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## From Mbube to Wimoweh: African Folk Music in Dual Systems of Law

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### **Cover Page Footnote**

I would like to thank the incredible editors and staff of the IPLJ for their hard work, as well as Professor Tracy Higgins, without whose expertise this Note would not be possible. A special thanks to my parents and sister, whose endless love and support gave me the strength and drive to finish. Finally, I am grateful to Dan for everything—I couldn't have done any of this without you.

# From Mbube to Wimoweh: African Folk Music in Dual Systems of Law

Deborah Wassel\*

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\* J.D. Candidate, Fordham University School of Law, 2010; A.B., Dartmouth College, 2007. I would like to thank the incredible editors and staff of the IPLJ for their hard work, as well as Professor Tracy Higgins, without whose expertise this Note would not be possible. A special thanks to my parents and sister, whose endless love and support gave me the strength and drive to finish. Finally, I am grateful to Dan for everything—I couldn't have done any of this without you.

## INTRODUCTION

Solomon Linda was born in 1909 in South Africa, and grew up in Ladysmith, Zululand, a region located in South Africa.<sup>1</sup> He “never learned to read or write.”<sup>2</sup> He did, however, know how to sing in a high soprano voice,<sup>3</sup> and after a childhood of singing with friends,<sup>4</sup> he began singing to the local black workforce at various hostels and beer halls on the weekends.<sup>5</sup> Linda’s style, which later became known as *Mbube*, a soprano voice sung over four-part harmonies, became extremely popular and widely imitated.<sup>6</sup>

In 1939, Linda recorded his locally popular song titled *Mbube*, the Zulu word for “lion,” which was inspired by his childhood as a cattle herder in the untamed hinterlands.<sup>7</sup> The song was a huge hit.<sup>8</sup> *Mbube* sold approximately 100,000 copies, and Solomon Linda became a household name in South Africa.<sup>9</sup>

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<sup>1</sup> Independent Lens, *A Lion’s Trail*, <http://www.pbs.org/independentlens/lionstrail/trail.html> (last visited Sept. 18, 2009) [hereinafter *A Lion’s Trail*].

<sup>2</sup> Sharon LaFraniere, *In the Jungle, the Unjust Jungle, a Small Victory*, N.Y. TIMES, Mar. 22, 2006, at A1, available at <http://www.nytimes.com/2006/03/22/international/africa/22lion.html?r=1&scp=3&sq=solomon%20linda&st=cse>.

<sup>3</sup> *Id.*

<sup>4</sup> *A Lion’s Trail*, *supra* note 1.

<sup>5</sup> LaFraniere, *supra* note 2.

<sup>6</sup> *See id.*; *see also* *A Lion’s Trail*, *supra* note 1. *Mbube* later transitioned into another style of Zulu a capella singing known as *isicathamiya*, which is characterized by a harmonious blend of voices and embodied most famously today by Ladysmith Black Mambazo. *See* Wikipedia, *Isicathamiya*, <http://en.wikipedia.org/wiki/Isicathamiya> (last visited Sept. 20, 2009).

<sup>7</sup> *See* *A Lion’s Trail*, *supra* note 1; *see also* Rian Malan, *In the Jungle*, ROLLING STONE, May 25, 2000, at 54 (“It was a simple three-chord ditty with lyrics something along the lines of ‘Lion! Ha! You’re a lion!’ inspired by an incident in the Birds’ collective Zulu boyhood when they chased lions that were stalking their fathers’ cattle.”).

<sup>8</sup> *See* *A Lion’s Trail*, *supra* note 1. To hear a sample of the 1939 recording, along with dozens of cover versions of the song, see YouTube, MBUBE,

<http://www.youtube.com/user/FLORENCOM> (last visited Oct. 21, 2009).

<sup>9</sup> *See* Malan, *supra* note 7. Malan wrote:

In the jungle, the mighty jungle, the lion sleeps tonight. Griffith Motsieloa must have realized he’d captured something special, because that chunk of beeswax was shipped all the way to England and shipped back in the form of ten-inch 78-rpm records, which went on sale just as Hitler invaded Poland. Marketing was tricky, because there was hardly any black radio in 1939, but the song went out on “the re-diffusion,” a land line that pumped music, news and “native affairs” propaganda into black neighborhoods, and people began

Soon after, American folk singer Pete Seeger discovered the song and, after mispronouncing the main refrain, covered it with his band, The Weavers, calling it *Wimoweh*<sup>10</sup>—and all with negligible compensation to Linda.<sup>11</sup> There followed several different cover versions by different groups;<sup>12</sup> in 1961, American songwriter George Weiss took Linda's melody and added the lyrics, "In the jungle, the mighty jungle."<sup>13</sup>

Weiss was "[a] civilized chap with a Juilliard degree, [and] he didn't much like the primitive wailing," but he recognized the enormous potential in Linda's catchy refrain<sup>14</sup> and dismantled *Wimoweh* to create his masterpiece.<sup>15</sup> In Weiss's version, "[t]he chant remained unchanged, but the melody—Solomon Linda's miracle melody—moved to center stage, becoming the tune itself, to which the new words were sung: 'In the jungle, the mighty jungle.'"<sup>16</sup> This version was recorded by The Tokens and became a world-wide hit.<sup>17</sup>

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trickling into stores to ask for it. The trickle grew into a steady stream that just rolled on for years and years, necessitating so many re-pressings that the master disintegrated. By 1948, "Mbube" had sold in the region of 100,000 copies, and Solomon Linda was the undefeated and undefeatable champion of hostel singing competitions and a superstar in the world of Zulu migrants.

*Id.*

<sup>10</sup> See *id.* ("[H]e got out pen and paper and started transcribing the song, but he couldn't catch the words through all the hissing on the disc. The Zulus were chanting, 'Uyimbube, uyimbube,' but to Pete it sounded like awimboowee, or maybe awimoweh, so that's how he wrote it down.").

<sup>11</sup> See *A Lion's Trail*, *supra* note 1.

<sup>12</sup> See, e.g., Malan, *supra* note 7 ("'Wimoweh' lived on, bewitching jazz ace Jimmy Dorsey, who covered it in 1952, and the sultry Yma Sumac, whose cocktail-lounge version caused a minor stir a few years later. Toward the end of the decade, it was included on *Live From the Hungry I*, a monstrosly popular LP by the Kingston Trio that stayed on the charts for more than three years (178 weeks), peaking at Number Two. By now, almost everyone in America knew the basic refrain . . .").

<sup>13</sup> *A Lion's Trail*, *supra* note 1; Malan, *supra* note 7 ("George Weiss took 'Wimoweh' home with him and gave it a careful listen . . . [E]veryone agrees . . . that: 'The Lion Sleeps Tonight' was a reworking of 'Wimoweh,' which was a copy of 'Mbube.' Solomon Linda was buried under several layers of pop-rock stylings, but you could still see him beneath the new song's slick surface . . .").

<sup>14</sup> Malan, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *A Lion's Trail*, *supra* note 1; see also Malan, *supra* note 7. Malan wrote:

*Mbube* and its subsequent covers were so popular that approximately “[one hundred and fifty] artists eventually recorded the song.”<sup>18</sup> It was “translated into languages from Dutch to Japanese,” and was featured “in more than [thirteen] movies.”<sup>19</sup> Linda “should have been a rich man.”<sup>20</sup> Instead, he lived in a hut in the Soweto section of Johannesburg with no furniture, “sleeping on a dirt floor carpeted with cow dung.”<sup>21</sup> His payment? In 1952, upon signing over the rights to the company that produced his record, “Linda received ten shillings—about eighty-seven cents today.”<sup>22</sup> He “also got a job sweeping floors and serving tea in the company’s packing house.”<sup>23</sup> In 1962, the same year that The Tokens’ *The Lion Sleeps Tonight* became an international number one hit, a desperately impoverished Solomon Linda died from

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The song broke out regionally, hit the national charts in November and reached Number One in four giant strides.

Within a month, a cover by someone named Karl Denver reached Number One in England, too. By April 1962 it was topping the charts almost everywhere and heading for immortality. Miriam Makeba sang her version at JFK’s last birthday party, moments before Marilyn Monroe famously lisped, “Happy birthday, Mr. President.” Apollo astronauts listened to it on the launchpads at Cape Canaveral, Florida. It was covered by the Springfields, the Spinners, the Tremeloes and Glen Campbell. In 1972 it returned to the charts, at Number Three, in a version by Robert John. Brian Eno recorded it a few years later.

In 1982 it was back at Number One in the U.K., this time performed by Tight Fit. R.E.M. did it, as did the Nylons and They Might Be Giants. Manu Dibango did a twist version. Some Germans turned it into heavy metal. A sample cropped up on a rap epic titled “Mash Up da Nation.” Disney used the song in *The Lion King*, and then it got into the smash-hit theatrical production of the same title, currently playing to packed houses around the world. It’s on the original Broadway cast recording, on dozens of kiddie CDs with cuddly lions on their covers and on an infinite variety of nostalgia compilations. It’s more than sixty years old, and still it’s everywhere.

*Id.* To hear a clip from The Tokens’ *The Lion Sleeps Tonight*, see Wikipedia, *The Lion Sleeps Tonight*, [http://en.wikipedia.org/wiki/The\\_Lion\\_Sleeps\\_Tonight](http://en.wikipedia.org/wiki/The_Lion_Sleeps_Tonight) (last visited Oct. 21, 2009).

<sup>18</sup> LaFraniere, *supra* note 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

kidney disease at the age of fifty-three with less than twenty-five dollars to his name.<sup>24</sup>

Solomon Linda's story is just one example of Western exploitation of traditional African music. The issue of protecting traditional musical expressions in Africa encompasses much of the cultural debate in the international community.<sup>25</sup> Protecting traditional African songs under statutory-only copyright schemes has benefits, but more often than not, as exemplified in the case of Solomon Linda, a purely statutory scheme is desperately inadequate to protect the rights of traditional African songwriters and performers.<sup>26</sup> The Western and African traditions are incompatible at a very basic level, and a system that would mesh the two would be unfair and possibly destructive to traditional African communities.<sup>27</sup>

This Note explores the protections given to traditional African musicians and to the songs themselves under two very different schemes: customary law and Western statutory law. In Part I, the basic structure of both Western copyright and customary law systems is explained; this part also contains a cursory explanation of how customary law functions within Western courts set up under the colonial system. The statutory schemes available in different African countries, as well as several proposed international solutions, are also explored in Part I. Part II discusses the problems arising under customary law and statutory schemes, respectively, when copyright of traditional music is the issue at hand. Part III proposes a first-step solution to the problem of protecting traditional songs and the musicians who perform them by way of streamlining the court system and increasing judges' education.

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<sup>24</sup> *Id.*; A Lion's Trail, *supra* note 1.

<sup>25</sup> See generally Michael Blakeney, *Protecting Traditional Cultural Expressions: The International Dimension*, in 3 NEW DIRECTIONS IN COPYRIGHT LAW 3, 3 (Fiona Macmillan & Kathy Bowrey eds., 2006); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 773-74 (1999).

<sup>26</sup> See Kuruk, *supra* note 25, at 791-94.

<sup>27</sup> See *infra* notes 194-96 and accompanying text.

The solution would employ greater education for judges, an expansion of the customary law judicial system within the statute-created court system, and deference to the customary laws of particular jurisdictions. The only way to achieve equality between the customary law system and the statutory system is to recognize that customary law is in and of itself a legitimate system worthy of judicial enforcement, side-by-side with a statutory scheme.

## I. OVERVIEW OF COPYRIGHT PROTECTIONS: WESTERN VS. AFRICAN

### A. *Western Copyright (Statutory-Based Schemes)*

Before comparing Western copyrights with existing African customary law, it is necessary to lay out the basic foundations that are common to virtually all Western copyright schemes. It is important to keep in mind that this Note deals with the relationship between the oft-conflicting statutory and customary law systems in Africa; for this reason, African statutory law, which comes from the time of European colonization,<sup>28</sup> can be referred to as a “Western” scheme of law. In virtually every Western scheme, there is a set of doctrines that have a common thread: the requirements of fixation and originality, the idea that an author owns his own work, and the principle that an idea cannot be copyrighted.<sup>29</sup>

The fixation requirement, sometimes referred to as the tangible form requirement, ensures that the work can be perceived from the creation.<sup>30</sup> Most Western statutory schemes require that a work be fixed in a “definite medium of expression,” from which the work can be perceived or known.<sup>31</sup>

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<sup>28</sup> See *infra* note 98 and text accompanying note 100.

<sup>29</sup> E.g., 17 U.S.C. § 102(a) (2006) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

<sup>30</sup> See *id.*

<sup>31</sup> E.g., Ghana, Copyright Act of 2005, § 1(2)(b) (enacted May 17, 2005); Nigerian Copyright Act, (1999) Cap. 68, § 1(2)(b) (Nigeria).



This requirement is necessary to ensure that the copyright is given to a work that is more than fleeting.

The second requirement, which is notoriously difficult to parse, is the requirement of originality. Virtually all copyright statutes require originality.<sup>32</sup> The originality requirement forces the author to give some minimal degree of creativity (the degree to which creativity must be established can differ between countries).<sup>33</sup>

The third aspect of statutory copyright law that is common to most African countries is the way that ownership is determined. Under statutory schemes, ownership of any given copyright usually belongs to the author, co-author, or joint author of any of the included categories of works.<sup>34</sup> The statutory schemes do not allow group ownership, although most of these countries do allow for works made for hire, whereby the commissioning party would own the copyright.<sup>35</sup>

Finally, an aspect shared by most Western statutory schemes is that an idea cannot be copyrighted.<sup>36</sup> Rather, copyright applies only to those works whose expressions have been made tangible by an original, creative process.<sup>37</sup>

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<sup>32</sup> E.g., Ghana, Copyright Act of 2005, § 1(2)(a) (enacted May 17, 2005); Nigerian Copyright Act, (1999) Cap. 68, § 1(2)(a) (Nigeria).

<sup>33</sup> See Nigerian Copyright Act, (1999) Cap. 68, § 1(2)(a) (Nigeria) (noting that “sufficient effort” must be expended to ensure the work’s originality).

<sup>34</sup> E.g., Ghana, Copyright Act of 2005, § 1(1) (enacted May 17, 2005); Nigerian Copyright Act, (1999) Cap. 68, § 9(1) (Nigeria); South African Copyright Act 125 of 1992 s. 21(1)(a).

<sup>35</sup> E.g., Ghana, Copyright Act of 2005, § 7 (enacted May 17, 2005) (“In the absence of any contract to the contrary, the *economic right* of a work shall vest in an employer or a person who commissions the work where the employed or commissioned author has created the work in the course of the employment or commission.” (emphasis added)); Nigerian Copyright Act, (1999) Cap. 68, § 9(3) (Nigeria).

<sup>36</sup> E.g., Ghana, Copyright Act of 2005, § 2 (enacted May 17, 2005) (“Copyright shall not extend to ideas, concepts, procedures, methods or other things of a similar nature.”); Ghana, Copyright Law of 1985, § 3 (enacted Mar. 21, 1985).

<sup>37</sup> E.g., Nigerian Copyright Act, (1999) Cap. 68, § 1(2)(a) (Nigeria); South African Copyright Act 125 of 1992 s. 2(1). Ghana, South Africa and Nigeria have been provided as examples but are representative of the various statutory schemes existing in Africa. To avoid cluttering the footnotes with needless repetition, this Note will rely on those countries to provide statutory examples.

## B. Customary Law and African Culture

### 1. Background on Customary Law

Customary law can be a concept foreign to those trained in the Western tradition, and therefore, to understand the traditional concept of intellectual property within African traditions, it is necessary to provide an overview of the nature and role of musical composition as well as the relevant principles of customary law.

In much of sub-Saharan Africa, most people “belong to tribes and have roots in traditional communities, [regardless of] whether they live in villages or cities.”<sup>38</sup> These traditional roots influence much of their day-to-day lives, including particular rituals that may be performed.<sup>39</sup>

One of the ubiquitous forms of expression common to many African cultures is music.<sup>40</sup> Musical performance often involves “singing, humming, strumming strings, shaking rattles, beating drums, or ringing bells and gongs.”<sup>41</sup> The line between speech and music is indistinct in many performance cultures, and music is used for a variety of purposes, including both entertainment and conveying information.<sup>42</sup> Folksongs are often used in a social context to build and enforce socially acceptable character.<sup>43</sup>

Music also “serves as a means of recording history by preserving information about . . . past events.”<sup>44</sup> For example, “[i]n the Republic of Benin, there are special songs sung when a child cuts [his] first teeth;”<sup>45</sup> “among the Hausas of Nigeria, young people . . . [use songs] to help them court lovers or insult rivals,”<sup>46</sup>

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<sup>38</sup> Kuruk, *supra* note 25, at 841.

<sup>39</sup> *See id.* at 780.

<sup>40</sup> *See id.*; see also Bernard J. Hibbitts, “Coming to Our Senses”: Communication and Legal Expression in Performance Cultures, 41 EMORY L.J. 873, 893 (1992).

<sup>41</sup> Hibbitts, *supra* note 40, at 893 (citing IDISORE OKPEWHO, THE EPIC IN AFRICA 62–63 (1979)).

<sup>42</sup> *See id.*; Kuruk, *supra* note 25, at 780.

<sup>43</sup> *See* Kuruk, *supra* note 25, at 780 (citing JOHN ROSCOE, THE BAGANDA: AN ACCOUNT OF THEIR NATIVE CUSTOMS AND BELIEFS 460 (1965)).

<sup>44</sup> *Id.*

<sup>45</sup> Hibbitts, *supra* note 40, at 894 (quoting JOHN M. CHERNOFF, AFRICAN RHYTHM AND AFRICAN SENSIBILITY 34 (1979)).

<sup>46</sup> *Id.* (quoting CHERNOFF, *supra* note 45, at 34).

and “men working in a field may . . . appoint some of their number to work by making music instead of [farming];”<sup>47</sup> and “among the Hutus, men paddling a canoe will sing a different song depending on whether they are going with or against the current.”<sup>48</sup>

Although some practices, to be discussed later,<sup>49</sup> are quite different from the Western intellectual property tradition as exemplified in statutory schemes, African customary law does afford some degree of protection for intellectual property rights.<sup>50</sup> For example, only certain people are allowed to perform some musical rites, use certain instruments, or sing certain songs; very specific rules “govern who can . . . play certain musical instruments, and at what time and for what reasons they are played.”<sup>51</sup> In fact, “the absence of a modern intellectual property system” does not prevent an individual from seeking protection;<sup>52</sup> protection is not achieved with a formal system, but rather, through a universal understanding of social norms.<sup>53</sup> At the very basic level, intellectual property rights are protected by traditional

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<sup>47</sup> *Id.* (quoting CHERNOFF, *supra* note 45, at 34).

<sup>48</sup> *Id.* (quoting CHERNOFF, *supra* note 45, at 34); *see also* LEONARD W. DOOB, COMMUNICATION IN AFRICA: A SEARCH FOR BOUNDARIES 79 (1961). For a further discussion of the culture and specific examples of the practices of Nigerians, *see* SABURI OLADENI BIOBAKU, A WINDOW ON NIGERIA 19–29 (1994).

<sup>49</sup> *See infra* Part I.C.1.

<sup>50</sup> Johanna Gibson, *Community and the Exhaustion of Culture: Creative Territories in Traditional Cultural Expressions*, in 3 NEW DIRECTIONS IN COPYRIGHT LAW 15, 22 (Fiona Macmillan & Kathy Bowrey eds., 2007).

<sup>51</sup> Kuruk, *supra* note 25, at 784 (citing ROSCOE, *supra* note 43, at 189). Further discussing these rules, Kuruk wrote:

[T]he great national drums of the Lozi which are beaten only for war, or in national emergencies, are under the watchful eye of a special council of elders. Each Baganda king in Uganda has a select group of drummers who play special drums to ensure the permanency of his office. Among the Bahima of Uganda, only women keep harps, which they use at home. Among the Baganda, fifes are owned and played mainly by herd boys. In Nigeria, certain musical instruments are dedicated to particular cults.

*Id.*

<sup>52</sup> BANKOLE SODIPO, PIRACY AND COUNTERFEITING: GATT, TRIPS, AND DEVELOPING COUNTRIES 42, 47 (1997).

<sup>53</sup> *See* Kuruk, *supra* note 25, at 780–81.

African tribal members' deference to the customs and traditions of their respective groups.<sup>54</sup>

Individuals living within traditional tribes have historically enforced these rights in a variety of ways.<sup>55</sup> Two kinds of laws generally govern this area: royal decrees and taboos.<sup>56</sup> The king, who is regarded as a "sacred person[] representing the gods of the people of the earth," makes royal decrees,<sup>57</sup> which carry the force of secular law, albeit with a certain magical undertone.<sup>58</sup> The kings or chiefs have "moral and ritual authority based on a perceived mystical association with the tribes' ancestors."<sup>59</sup>

These "rights are recognized under social criteria depending upon the degree of the kinship, age, sex, title, or role of individuals in the society . . . ."<sup>60</sup> The norms are quite strictly enforced: it is inconceivable that anyone outside the socially acceptable group having these rights would engage in singing its songs.<sup>61</sup> This is particularly true of different age groups: "members of an age group would never sing the songs . . . of another age group."<sup>62</sup> These norms are enforced by sanctions based on common interests.<sup>63</sup> Sanctions, which are "often determined by the leaders of the constituent groups, can range from censure, to fines, to ostracism, or even expulsion from the group."<sup>64</sup>

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<sup>54</sup> *Id.* at 782–84.

<sup>55</sup> *See* SODIPO, *supra* note 52, at 42.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Kuruk, *supra* note 25, at 781.

<sup>59</sup> *Id.* at 781–82 (citing ELIZABETH COLSON & MAX GLUCKMAN, SEVEN TRIBES OF BRITISH CENTRAL AFRICA 169 (1968)).

<sup>60</sup> Kuruk, *supra* note 25, at 780–81.

<sup>61</sup> *See* SODIPO, *supra* note 52, at 44, 46.

<sup>62</sup> *Id.* at 44.

<sup>63</sup> Kuruk, *supra* note 25, at 785.

<sup>64</sup> *Id.* at 786. *See generally* SODIPO, *supra* note 52, at 43–44 ("The breach of a tradition could be punished by the head of the family, or clan, or by members of an age group. Erring members could be disciplined by the head of the larger family, who might order a fine of items like local gin, goats, etc., or a sacrifice. Pressure would be brought to bear on any offender who failed to pay his fine or who repeated the offen[s]e. His wife would plead with him to avoid the long-term repercussions (bad luck) which would ensue for his immediate family. The offender's wife would be coerced by members of her original larger family to press her husband to conform. Other members of the larger family might also coerce an offender into paying his fines, to avoid repercussions on their family.

Royal decrees and taboos are related forms; the royal decrees, made by a human king, often can be supported or carried out by magical or spiritual consequences, known as taboos.<sup>65</sup> Taboos are superstitious beliefs that “certain objects and persons are set aside as sacred or accursed.”<sup>66</sup> Because cultural norms are engendered with mystical connotations,<sup>67</sup> failure to observe these norms “brings the anger and curses of the gods against the offender or even against the whole community,”<sup>68</sup> and accordingly, a taboo will be placed on the offender or the whole community.<sup>69</sup> Taboos can result in severe penalties.<sup>70</sup>

Tribal intellectual property rights are absolutely binding; the sanction for violating these rights often takes the form of magical or spiritual punishments by tribal ancestors.<sup>71</sup> These sanctions derive their enforcement power from “the common ritual dependence of members of the lineage on their ancestors.”<sup>72</sup> If tribal rights are violated, it is believed that the gods will enforce these rights.<sup>73</sup> Therefore, even though a Western statutory scheme is not in place in a way that can be easily enforced by tribal members, traditional African tribes still afford some degree of protection of intellectual property rights.

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Further disobedience could lead to the family being ostracized by the larger family, or by the entire community. This was often the worst kind of punishment. The community would not buy from him or sell to him or members of his immediate family. If he was still obdurate (depending on the offen[s]e), he could either be banished from the community or he would leave of his own accord because he would not be able to bear the shame. Such exit usually must be for a distant community—neighbo[ring] communities would probably know that the newcomer was an offender from another community. He would then be seen either as bringing ill luck, or as a danger to the new community since he might be disobedient and cause an upset in the new community.”)

<sup>65</sup> See Kuruk, *supra* note 25, at 785–86.

<sup>66</sup> *Id.* at 849 n.112 (quoting MASON BEGHO, LAW AND CULTURE IN THE NIGERIAN AND ROMAN WORLD 99 (1971)).

<sup>67</sup> *Id.* at 785.

<sup>68</sup> *Id.* at 849 n.112 (quoting BEGHO, *supra* note 66, at 99).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 785–86.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 785.

<sup>73</sup> *Id.* at 785–86, 849 n.112.

## 2. Differences Between African and Western IP Ideology

Although customary norms provide a certain degree of IP protection, there are, of course, major differences between African and Western traditions, particularly with regard to the form, purpose, and ownership of the music itself.<sup>74</sup> For example, traditional African songs are often not fixed in tangible form, instead remaining ephemeral, fleeting, and in a constant state of change.<sup>75</sup> These songs are still protected under a system of social norms and magical beliefs.<sup>76</sup>

Another major difference is that the purpose of cultural property in African society is different than in Western music.<sup>77</sup> Aside from its value as entertainment:

Music serve[s] as a medium for recording history . . . play[s] a vital role in rituals and festivities . . . serve[s] as a medium for communing with dead ancestors and spirits; as a palliative in healing mental or physical illnesses by preparing the mind for healing acts; to provoke riots, or prepare for fights and battles; and as social commentary, to criticize or check abuse of government.<sup>78</sup>

At the heart of this difference is that the intent of the African creator departs from a Western ideal.<sup>79</sup> To Africans, the value of music cannot simply be commoditization—buying and selling in the marketplace.<sup>80</sup> As has previously been discussed, the intent of creating music may not be for the pure enjoyment of the music itself, but rather, to serve a specific societal purpose.<sup>81</sup>

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<sup>74</sup> See *infra* notes 75–87 and accompanying text.

<sup>75</sup> See Hibbitts, *supra* note 40, at 951.

<sup>76</sup> See *supra* Part I.B.1.

<sup>77</sup> See Hibbitts, *supra* note 40, at 893.

<sup>78</sup> SODIPO, *supra* note 52, at 38; see also BIOBAKU, *supra* note 48, at 22 (“The songs, ancient and modern, are rich in their use of language; they weave social events, long ago and of today, in their lyrics . . .”).

<sup>79</sup> See Hibbitts, *supra* note 40, at 894.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* (“In [N]orth African Siwan society, for instance, the air may be filled with the ritual wailing of bereaved relatives. This is not an immature ‘noise,’ an aural

Another major difference between customary law and Western IP schemes is that, under customary law, ownership of traditional practices, including music, “refers to the rights of all members of the community in subject-matter originally acquired by ancestors which cannot be transferred unilaterally by any member of the group.”<sup>82</sup> There is no real Western corollary to the group ownership that exists in African tribes; this idea that there is “an intermediary sphere of intellectual property rights between individual rights and the . . . public domain”<sup>83</sup> is simply foreign to the Western tradition.<sup>84</sup> Within traditional communities, however, it makes perfect sense:

[T]raditional communities inhere in the prior stability of ancestral tradition, and the responsibility to narrate tradition and therefore maintain the “self”-expression of community according to shared “values”. This tradition may not be personali[z]ed or “owned” as such, but must be expressed and maintained.

It is this responsibility to tradition that founds the legitimacy of community resources . . . .<sup>85</sup>

Responsibility to tradition makes property communal, or at the very least, “resistant to quantification;” this is achieved by social context where the tribe’s common belief in the pervasion of the

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nuisance, or an inconvenience. It is, instead, a useful manner of communicating a death over a wide geographic area.”).

<sup>82</sup> Kuruk, *supra* note 25, at 794; see Joost Smiers, *The Abolition of Copyrights: Better for Artists, Third World Countries and the Public Domain*, in COPYRIGHT IN THE CULTURAL INDUSTRIES 119, 128 (Ruth Towse ed., 2002) [hereinafter Smiers, *The Abolition of Copyrights*].

<sup>83</sup> Smiers, *The Abolition of Copyrights*, *supra* note 82, at 128.

<sup>84</sup> There are, of course, quasi-indigenous groups based in the Western tradition who may have a similar problem with the intellectual property rights of their ever-changing cultural property. See *generally id.* at 126–29. Additionally, there are groups around the world whose intellectual property differences mirror those of the African tribes. See *id.* at 126–28. However, the scope of this Note is limited to the issues surrounding the IP problems in African tribal music.

<sup>85</sup> Gibson, *supra* note 50, at 19.

sacred or the spiritual extends to all members of the community.<sup>86</sup> Cultural expression is considered a community resource; it is, at a very basic level, a rejection of the idea of the separation of community and its resources.<sup>87</sup>

This collective ownership derives from a different musical aesthetic. In traditional societies, “the responsibility for a narrative is never assumed by a person, but by a mediator, shaman or relater whose ‘performance’—the mastery of the narrative code—may possibly be admired but never his ‘genius.’”<sup>88</sup> Only in the modern Western tradition is an author accorded individual prestige rather than crediting the group as a whole.<sup>89</sup> This Western idea is best summed up in the words of James Fenimore Cooper: “All greatness of character is depend[e]nt on individuality. The man who has no other existence than that which he partakes in common with all around him, will never have any other than an existence of mediocrity.”<sup>90</sup>

However, in many parts of the world, music and other artistic creations belong to a process of changing and adapting, and thus belong to the commons.<sup>91</sup> In Africa, even the process of *creating* music is not done by a single individual, but rather, is shared by the community as a whole.<sup>92</sup> This is seen as a community-building and strengthening exercise which is vital to the very structure of the tribe itself.<sup>93</sup>

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<sup>86</sup> Peter Fitzpatrick & Richard Joyce, *Copying Right: Cultural Property and the Limits of (Occidental) Law*, in 4 NEW DIRECTIONS IN COPYRIGHT LAW 171, 175 (Fiona Macmillan ed., 2007).

<sup>87</sup> See Gibson, *supra* note 50, at 29–32.

<sup>88</sup> Smiers, *The Abolition of Copyrights*, *supra* note 82, at 124 (quoting K.M. NEWTON, TWENTIETH-CENTURY LITERARY THEORY: A READER 155 (1988)).

<sup>89</sup> See *id.* (citing NEWTON, *supra* note 88, at 155).

<sup>90</sup> JAMES FENIMORE COOPER, THE AMERICAN DEMOCRAT & OTHER POLITICAL WRITINGS 488 (Bradley J. Birzer & John Wilson eds., 2000).

<sup>91</sup> See Joost Smiers, *Creative Improper Property: Copyright and the Non-Western World*, in 1 NEW DIRECTIONS IN COPYRIGHT LAW 3, 13 (Fiona Macmillan ed., 2005) [hereinafter Smiers, *Creative Improper Property*].

<sup>92</sup> Smiers, *The Abolition of Copyrights*, *supra* note 82, at 128 (“[I]n African performing arts the audiences often have a creative role too, as they chant, clap and perform dance-dialogues with the musicians.”).

<sup>93</sup> See *African Activists Take the Stage at New York Performance Summit*, N.Y. AMSTERDAM NEWS, Oct. 27, 2005, at 20.



It is important to note, however, that the members of the community (or subgroup within the community) who create traditional music do not have particular enforceable rights vis-à-vis outsiders.<sup>94</sup> For example, a Western intruder who wrongfully appropriated tribal music would be unaffected by the royal decrees or taboos, and thus, would have no incentive to follow those societal traditions. While there are socially enforceable rules governing the rights of members of the tribe against each other (insiders against insiders), there are no enforceable customary laws that protect members of the tribe against nonmember appropriation of tribal music (insiders against outsiders).<sup>95</sup> These outsiders can, and often do, appropriate traditional music without fear of retribution.<sup>96</sup>

### 3. Customary Law in the Courts

In order to understand the root of the issue this Note seeks to explore, it is necessary to briefly describe how the customary law system functions within the Western-style court system in most African countries.<sup>97</sup>

Most African countries did not recognize customary law as a legitimate legal system until very recently.<sup>98</sup> Before that, countries

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<sup>94</sup> See Gibson, *supra* note 50, at 32.

<sup>95</sup> This is because, quite simply, a Western-thinking individual would not believe in the taboos and royal decrees that bind traditional African peoples. An atheist does not fear the wrath of God because he does not believe in a higher power, but a religious person would have that deity-based fear in his heart. Such is the case with Westerners and African tribes. See Kuruk, *supra* note 25, at 786–87.

<sup>96</sup> See *infra* Part II.A.

<sup>97</sup> There are customary law courts that deal specifically and only with customary law, but for the purposes of this section, only Western-style courts will be discussed, as they would be the courts hearing copyright cases with Westerners. The legal authority of these courts was solidified in the case of *Mdumane v. Mtshakule*, 1948 N.A.C 28 (C&O) (Bizana) (S. Afr.). D.S. Koyana, *Traditional Courts in the 21<sup>st</sup> Century* 2 (Leitner Center for Int'l Law & Justice). Furthermore, “[t]raditional courts are not courts of record as such. All proceedings are conducted orally in the language most widely spoken in the area of jurisdiction of the court.” *Id.* at 7.

<sup>98</sup> See, e.g., T.W. BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 34 (2004) (“Until the advent of a new constitution in 1993, customary law had never been fully recognized as a basic component of the South African legal system. Instead, Roman-Dutch law was treated as the common law of the land.”). In 1988, South Africa promulgated the Law of Evidence Amendment Act, which “made customary law applicable in any court in the

like South Africa stated that the courts “could apply customary law, except in so far as it was ‘not repugnant to the general principles of humanity observed throughout the civilized world.’”<sup>99</sup> In the early twentieth century, many traditional courts, which applied customary law, were subordinate to commissioners’ courts, which applied Western colonial law; this meant that Westerners could hear appeals from customary law disputes.<sup>100</sup>

Today, African courts may apply either Western law or customary law, depending upon the facts of the case before the court.<sup>101</sup>

### C. Statutory Protections: African and International

Many African states have adopted national intellectual property schemes that attempt to accommodate traditional African conceptions of intellectual property in addition to Western statutory schemes.<sup>102</sup> Additionally, there are several international approaches which have been developed to accommodate internationally differing conceptions of intellectual property.<sup>103</sup> This section reviews such schemes.<sup>104</sup>

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country.” *Id.* at 42. This obligation to apply customary law where necessary is qualified by three restrictions: “that customary law is ‘applicable,’ that it is compatible with the Constitution and that it has not been superseded by ‘any legislation that specifically deals with customary law.’” *Id.* at 43.

<sup>99</sup> *Id.* at 38.

<sup>100</sup> *See id.* at 40.

<sup>101</sup> *Id.* at 49–51.

<sup>102</sup> *See infra* Part I.C.2.

<sup>103</sup> *See infra* Part I.C.2.

<sup>104</sup> It is important to keep in mind that when speaking of African tradition from a Western perspective, it is inherently a view of primal fixity—the idea of the primitive who must be protected from the invasiveness of the Western world. *See* Fitzpatrick & Joyce, *supra* note 86, at 175. Essentially, when we speak about primal fixity, it is the idea that the African tribe member has always performed his custom in the manner in which the Westerner presently observes. *See id.* However, this is likely not the case because African traditions are so fluid and constantly change over time. *See id.* at 174. Therefore, the view of African traditions must necessarily be a paternalistic one if viewed from the Western perspective. *See id.* at 174–75. Primal fixity is a concept which controls much of how Westerners view copyright protections; it is inherently rooted in Western individualism and centers around the idea that once something is created, it exists forever and does not change—hence the aforementioned view of African culture as fixed in a certain, ever-present and always repeated tradition. *See id.* The concept of a changing, living, and breathing African musical culture cannot fit into a view of primal

The Western tradition dictates that every artist who has created or performed something must take care to protect his work from wrongful misappropriation and must take care that the work will demonstrably receive copyright status after the creation or performance.<sup>105</sup> Indeed, in multilateral agreements like TRIPs<sup>106</sup> (Agreement on Trade-Related Aspects of Intellectual Property Rights, from the World Trade Organization), “poor and developing countries have been pushed” to introduce a system of intellectual property that would offer individuals copyright protection in cultural works.<sup>107</sup>

### 1. International Schemes

Cultural identity is protected in Article 27 of the International Covenant on Civil and Political Rights.<sup>108</sup> Additionally, the

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fixity, and therefore, it must be subordinate to the Western view. *See generally* IP JUSTICE, IP JUSTICE POLICY PAPER FOR THE WIPO DEVELOPMENT AGENDA (2005), [http://ipjustice.org/WIPO/WIPO\\_DA\\_IP\\_Justice\\_Policy\\_Paper.shtml](http://ipjustice.org/WIPO/WIPO_DA_IP_Justice_Policy_Paper.shtml) (“IP systems need to take into account different levels of national development to ensure that the underlying policies that IP seeks to promote are ultimately met. Both developed and developing countries support this proposition, but some developed countries try to impose a particular view of intellectual property on all, while disregarding history in which today’s ‘rich’ countries became wealthy to a certain extent by refusing to recognize intellectual property and by granting wider exceptions and limitations to copyright.”).

<sup>105</sup> *See* Gibson, *supra* note 50, at 21.

<sup>106</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 40, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197, 1213 (1994) [hereinafter TRIPs Agreement].

<sup>107</sup> *See* Smiers, *Creative Improper Property*, *supra* note 91, at 5. For example, the TRIPs Agreement speaks directly to individual ownership; however, it leaves out any mention of group ownership. *See* TRIPs Agreement, *supra* note 104, at art. 16. This is a concept being foisted upon poor and developing countries that may not have as sophisticated an IP system as Western countries. *See* Smiers, *Creative Improper Property*, *supra* note 91, at 5. This causes the developing countries to try to conform their wealth of intellectual property to a Western system that may not be the best fit. *Id.*; *see* TRIPs Agreement, *supra* note 104, at art. 13 (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”).

<sup>108</sup> International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* Yvonne Mokgoro, *The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?*, 52 SMU L. REV. 1549, 1550 (1999) (“[P]ersons belonging to . . . minorities shall not be denied the right, in community with other members of their

Universal Copyright Convention (“UCC”), held in 1952 by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), “provided that the existence of a copyright notice was sufficient of subsistence of copyright in member states.”<sup>109</sup>

The UCC protection, however, pre-supposed that there was copyright protection in the first country in order to transfer that right across international borders.<sup>110</sup> Quite obviously, if the country of origin does not give copyright protection to the author originally, then there will be no copyright protections to transfer to a new country.<sup>111</sup> The UCC was an attempt to broaden the international protections of copyright, but kept mainly to a statutory scheme because “copyright notice” does not exist in customary law in the traditional sense.<sup>112</sup>

In 1985, UNESCO and the World Intellectual Property Organization (“WIPO”) adopted a resolution based on the *Model Provisions for National Law on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*,<sup>113</sup> promulgated by the Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore (convened in 1980).<sup>114</sup> The Model Provisions use the terms “expressions” or “productions” instead of “works” as a distinction between its protection of folk songs and ordinary copyright laws.<sup>115</sup> The Provisions protect “characteristic

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group, to enjoy their own culture, to profess and practi[c]e their own religion, or to use their own language.” (quoting ICCPR, *supra*, at art. 27)). Mokgoro notes that “South Africa is a signatory to this Covenant.” Mokgoro, *supra*, at 1561 n.7.

<sup>109</sup> SODIPO, *supra* note 52, at 22.

<sup>110</sup> *See id.* at 22–23.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* at 21–22. Copyright notice is a Western tradition; in African tribes, because of the group ownership dynamic, there is no need to notify anyone of the existence of an individual right. When something is created, it belongs to the whole group, albeit restricted to the appropriate age, rank, class, etc. *See supra* Part I.B.

<sup>113</sup> Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO & UNESCO (1985), <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> [hereinafter Model Provisions].

<sup>114</sup> Blakeney, *supra* note 25, at 5.

<sup>115</sup> Kuruk, *supra* note 25, at 815 (citing Farhana Yamin & Darrell Addison Posey, *Indigenous Peoples, Biotechnology and Intellectual Property Rights*, 2 REV. EUR.

elements of the traditional artistic heritage developed and maintained by a community.”<sup>116</sup> Protection exists whether the art “is expressed verbally, musically, by action, or in tangible form.”<sup>117</sup>

The Model Provisions were another attempt to broaden copyright protections by defining a new class of community artistic works subsumed under the heading of folklore. There are two problems with the Model Provisions, however. First, they “avoid the concept of ownership.”<sup>118</sup> The Model Provisions offer protection only to those “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of (name of the country) or by individuals reflecting the traditional artistic expectations of such a community,”<sup>119</sup> a concept which offers no concrete idea of who might actually be the owner of any work. Second, the Model Provisions’ useful features are legally and practically insignificant because they have not been adopted by any country.<sup>120</sup>

In 2001, UNESCO adopted the Universal Declaration on Cultural Diversity,<sup>121</sup> which states that “culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>122</sup> The Declaration puts a particular emphasis on the diversity of creative

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COMMUNITY & INT’L ENVTL. L. 141, 145 (1993)); *see* Model Provisions, *supra* note 113, § 2.

<sup>116</sup> Kuruk, *supra* note 25, at 815 (quoting Model Provisions, *supra* note 113, § 2).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See* Model Provisions, *supra* note 113, § 2.

<sup>120</sup> Kuruk, *supra* note 25, at 817 (citing Darrell Addison Posey, *International Agreements and Intellectual Property Right Protection for Indigenous Peoples*, in 3–4 IPR: A CURRENT SURVEY IN INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK 223, 231 (Tom Greaves ed., 1994)).

<sup>121</sup> UNESCO Universal Declaration on Cultural Diversity, UNESCO Doc. 31C/Res 25, Annex 1 (Nov. 2, 2001), *available at* <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf> [hereinafter UNESCO Declaration].

<sup>122</sup> *Id.* at pmb1.

works, and urges that the rights of artists should be respected,<sup>123</sup> it also states that cultural goods and services have “vectors of identity, values, and meaning” and must not be treated as mere commodities or consumer goods.<sup>124</sup>

The Declaration goes on to state that “cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level,”<sup>125</sup> but it does not lay out any specific guidelines for how each state should define its cultural policy,<sup>126</sup> instead leaving it to the individual country to implement its own policies through whatever “means it considers fit.”<sup>127</sup> These guidelines serve to promote cultural diversity and to encourage states to be more inclusive in their own statutory schemes, rather than promoting one type of scheme over another.<sup>128</sup> The Declaration is an attempt to garner acceptance for cultural intellectual property forms and to afford them the same protection given to traditional Western forms of culture.<sup>129</sup>

## 2. National Schemes

A brief discussion of individual African countries’ schemes for copyright protection reveals an effort by African states to accommodate both traditional conceptions of property in music and Western intellectual property protection.<sup>130</sup> For example, in South Africa, the Bill of Rights “recogni[z]es that people belonging to a cultural . . . community may not be denied the right to enjoy their culture . . . .”<sup>131</sup> The South African Bill of Rights

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<sup>123</sup> *Id.* at art. 9 (“While ensuring the free circulation of ideas and works, cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.”).

<sup>124</sup> *Id.* at art. 8.

<sup>125</sup> *Id.* at art. 9.

<sup>126</sup> *See id.* at art. 12.

<sup>127</sup> *Id.* at art. 9.

<sup>128</sup> *See id.* at Action Plan §§ 16, 18, 19.

<sup>129</sup> *See* UNESCO Declaration, *supra* note 121.

<sup>130</sup> *See infra* notes 131–52 and accompanying text.

<sup>131</sup> Mokgoro, *supra* note 108, at 1556 (citing S. AFR. CONST. 1996 §§ 30–31).

aims to “forge a common value system for a national consensus,” presumably to blur the line between customary law and statutory law.<sup>132</sup> But the South African Constitution itself recognizes the “status and role of traditional leadership”<sup>133</sup> and states that the courts are obligated to apply customary law when applicable.<sup>134</sup> This creates a pluralist system of law, where the law applied in any given case may be either customary or statutory.<sup>135</sup>

In Nigeria, the Copyright Act protects expressions of folklore.<sup>136</sup> Additionally, the Act protects music and performances.<sup>137</sup> The Act offers protection against unauthorized “reproduction . . . communication to the public by performance . . . [or] adaptations” where the expressions are “made . . . for commercial purposes or outside their traditional or customary context.”<sup>138</sup> Nigeria has a very inclusive scheme for protection of traditional music because it attempts to circumvent the problems with tangible form and ownership requirements to which many other countries rigidly adhere.<sup>139</sup> Thus, Nigerian copyright protection eschews many of the traditional qualities a work must have before protection is allowed.<sup>140</sup>

In contrast, Ghana’s scheme makes little effort to get around the tangible form and originality requirements that are so problematic in traditional tribal culture.<sup>141</sup> In Ghana’s Copyright Act, which has a much less flexible framework, “the work must be original, in writing, or otherwise reduced to material form” to

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<sup>132</sup> *Id.* at 1557.

<sup>133</sup> S. AFR. CONST. 1996 § 211(1).

<sup>134</sup> *Id.* § 211(3).

<sup>135</sup> *See id.* § 211.

<sup>136</sup> Copyright Act, (1990) Cap. 68, § 28(5) (Nigeria) (“[F]olklore means a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means including—(b) folk songs and instrumental folk music . . .”).

<sup>137</sup> *Id.* § 23.

<sup>138</sup> *Id.* § 28(1)(a)–(c).

<sup>139</sup> *See id.* § 28.

<sup>140</sup> For a discussion of these qualities, see *supra* Part I.A.

<sup>141</sup> *See infra* notes 142–45 and accompanying text.

garner copyright protection.<sup>142</sup> Ghanaian law also requires that the work is created by a citizen or resident of Ghana, if first published in Ghana,<sup>143</sup> “or if first published outside Ghana, [is] published in Ghana within thirty days of its publication outside Ghana.”<sup>144</sup> As for folklore protection, the copyrights of authors of folklore vest “in the [government] as if the [government] were the creator of the works.”<sup>145</sup>

In most African countries, folklore is seen as part of the national heritage. In Cameroon, “work based on . . . ideas borrowed from traditional cultural heritage of the country is protected under copyright law.”<sup>146</sup> Additionally, “Congolese copyright law protects folklore without a time limitation . . . [and] a [special] society known as the ‘Body of Authors’ is responsible for collecting royalties, representing the interests of authors, and overseeing the use of folklore,”<sup>147</sup> as well as giving permission for any performance or reproduction.<sup>148</sup>

Mali has a similar system, in which “folklore is also considered part of the country’s heritage,” and anyone wishing to use a folk song for profit must contact the Minister of Arts and Culture.<sup>149</sup> Besides for-profit uses of folklore, all “works whose authors are unknown, including the songs, legends, dances, and other

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<sup>142</sup> Ghana, Copyright Act of 2005, § 1(2)(a)–(b) (enacted May 17, 2005); *see also* Kuruk, *supra* note 25, at 788.

<sup>143</sup> Ghana, Copyright Act of 2005, § 1(2)(c)(i) (enacted May 17, 2005); *see also* Kuruk, *supra* note 25, at 788.

<sup>144</sup> Ghana, Copyright Act of 2005, § 1(2)(c)(ii) (enacted May 17, 2005); *see also* Kuruk, *supra* note 25, at 788.

<sup>145</sup> *See* Ghana, Copyright Law, (5)(2) (enacted Mar. 21, 1985) *amended by* Ghana, Copyright Act of 2005, § (4)(2) (enacted May 17, 2005).

<sup>146</sup> Kuruk, *supra* note 25, at 802 (citing Law No. 82-18 to Regulate Copyright (Cameroon) art. 6(c) (1982), *reprinted in* 19 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 201, 360, 360–61 (1983)); *id.* at 802 n.242.

<sup>147</sup> *Id.* at 800 (citing Law on Copyright and Neighboring Rights (Congo) arts. 16, 68–69 (1982), *reprinted in* 19 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 201, 201–02, 244 (1983)).

<sup>148</sup> *Id.* (citing Law on Copyright and Neighboring Rights (Congo) art. 18 (1982), *reprinted in* 19 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 201, 202 (1983)).

<sup>149</sup> *Id.* at 801 (quoting Ordinance Concerning Literary and Artistic Property (Mali) art. 8 (July 1, 1977), *reprinted in* 16 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 125, 180, 182 (1980)).



manifestations of the common cultural heritage”<sup>150</sup> are placed in the public domain and may include folklore; potential users must pay a fee.<sup>151</sup> Similarly, “[i]n the Central African Republic, the Central African Copyright Office must authorize the commercial [usage] of folklore.”<sup>152</sup>

By placing works in the public domain but leaving control with the government, these countries create a central authority from which people can gain permission to use copyrighted material. This allows for greater access due to the ease with which all parties can garner information about ownership and potential use, and also, greater protection for the tribes who might not otherwise be afforded the respect of having their permission sought.

## II. INADEQUATE EITHER WAY: ISSUES IN PURE SCHEMES OF LAW

### A. *Problems: Copyright Protections Arising Under Customary Law*

A number of difficulties arise if a system of exclusively customary law is used. Firstly, and perhaps most obviously, extending intellectual property protections outside the tribe is practically impossible, given that many of the sanctions imposed under customary law for infringement make sense and are a deterrent only to members of a particular tribe.<sup>153</sup>

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<sup>150</sup> *Id.* (quoting Ordinance Concerning Literary and Artistic Property (Mali) art. 8 (July 1, 1977), *reprinted in* 16 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 125, 180, 182 (1980)).

<sup>151</sup> *Id.* at 801–02 (citing Ordinance Concerning Literary and Artistic Property (Mali) art. 8 (July 1, 1977), *reprinted in* 16 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 125, 180, 182 (1980)). The statute authorizes the Ministers of Arts and Culture and of Finance to charge fees for use of works deemed to be in the public domain. *Id.* Works belonging “to the common cultural heritage,” or public domain, include works by unknown authors, owners who waived copyright protection, foreign authors not residing in Mali, deceased authors without heirs, and authors whose term of protection has expired. *Id.*

<sup>152</sup> *Id.* at 802 (citing Ordinance No. 85-002 on Copyright (Central African Republic) arts. 9, 46 (Jan. 5, 1985), *reprinted in* 21 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 158, 160 (1985)).

<sup>153</sup> *Id.* at 786–87 (citing SODIPO, *supra* note 52, at 42).

If sanctions are enforced by magical or religious beliefs, they obviously only have power over those who subscribe to those particular beliefs.<sup>154</sup> If those sanctions are enforced by social norms, then quite clearly only the members of that social group would have the power to enforce those norms; similarly, only members of that social group have incentive to avoid sanctions like ostracism.<sup>155</sup> To members of a particular tribe, these protections are internally sufficient because they are reinforced by the very social fabric of their tribe.<sup>156</sup> These protections are not sufficient to protect against the outside world, however, because outsiders have no reason to follow these social norms.

Take, for example, the problem of Solomon Linda, whose traditional work was appropriated by more than one outsider.<sup>157</sup> Linda's work may have been internally protected within his own tribe in the Hinterlands, but once outsiders like Pete Seeger and George Weiss found his music, they were able to appropriate it without fear of retribution by angry tribal spirits.

A second problem arises with the concept of communal ownership of music in African tribes, and this situation is exceedingly common in traditional African tribes.<sup>158</sup> It is unclear exactly which rights this system confers on individuals outside the tribe; neither does this system clarify who within the tribe could have the power to give rights to individuals outside the group.<sup>159</sup>

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<sup>154</sup> For a discussion of these beliefs, see *supra* Part I.B.1.

<sup>155</sup> See Kuruk, *supra* note 25, at 785–86. Customary law does not always encompass problems associated with folklore:

Within the groups, there is pressure to recognize and respect the rights and privileges associated with folklore in the common interests of members of the community. Inherent in this system, however, is a defect that may limit the usefulness of customary law in tackling the problems of unauthorized uses. Since many of the individuals engaged in the unauthorized use of folklore are foreigners, they may not have the incentive to respect the norms in the interest of the general community.

*Id.* at 786.

<sup>156</sup> See *id.* at 785–86.

<sup>157</sup> For history and details on this topic, see *supra* Introduction.

<sup>158</sup> For a discussion of communal ownership, see *supra* Part I.B.1.

<sup>159</sup> See Smiers, *The Abolition of Copyrights*, *supra* note 82, at 126–27 (“[Artists in Third World countries] may be highly respected for what they have created. However,

While chiefs or other members of the group may have authority to perform the music, it is not clear who would serve as the authority to grant permission for *other* types of use.<sup>160</sup> This is a growing problem due to a movement toward individualism within the tribes themselves.<sup>161</sup> Communal ownership creates problems, of course, when trying to enforce these intellectual property rights *outside* of the particular tribe.<sup>162</sup>

In some tribes, traditional “notions of collective ownership have been contaminated by concepts of private ownership and of production for profit”<sup>163</sup> as tribal members realized there was money to be made in cultural industries.<sup>164</sup> This movement is widespread and affects many countries;<sup>165</sup> local artists take a melody which originated from the collective tradition and use it with the purpose of commercializing and commodifying that music.<sup>166</sup> These artists claim ownership, which enables exclusion of others in rights to those cultural resources.<sup>167</sup> It is in this transformation from communal to individual that the concept of copyright gets introduced because when an individual owns a

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there is no concept in many cultures of an individual exploiting a creation or invention monopolistically for many decades.”).

<sup>160</sup> See Kuruk, *supra* note 25, at 783–87.

<sup>161</sup> See *id.* at 787.

<sup>162</sup> See SODIPO, *supra* note 52, at 49 (“Property in intangibles in pre-literate societies was usually vested in the community as a whole, or the section of the community concerned. This raises the question of the non-recognition of communal property in intellectual property by the common and civil law. Communal ownership [sic] of real property is recogni[z]ed in Nigeria. Unless attention is given by the international community to the recognition of communal intellectual property ownership by the modern system, similar rights in preliterate societies will be prejudiced.”).

<sup>163</sup> Kuruk, *supra* note 25, at 787.

<sup>164</sup> *Id.*; cf. Samuel K. B. Asante, *Interests in Land in the Customary Law of Ghana—A New Appraisal*, 74 YALE L.J. 848, 857 (1965) (discussing evolving concepts of ownership in response to social and economic changes).

<sup>165</sup> Smiers, *Creative Improper Property*, *supra* note 91, at 14 (“Meanwhile, it happens more and more in non-Western societies that local artists privately appropriate an artistic idea . . . and start to use it for their own commercial interests . . . . What has been described here in a nutshell covers huge social transformations taking place all over the world.”).

<sup>166</sup> *Id.* Solomon Linda may be taken as an example of this notion. In his case, he took a traditional song and popularized it outside of his own tribal group, obviously with the intent to distribute copies and to make some sort of profit. See *supra* Introduction.

<sup>167</sup> Smiers, *Creative Improper Property*, *supra* note 91, at 14.

copyright, he is necessarily owning the right to exclude others from using the subject of the copyright.<sup>168</sup>

However, it is not entirely clear from whom these individuals should be seeking permission to use traditional music. The customary law system is effective in protecting against unfair use in the traditional tribal context due to its social enforceability; however, the customary system breaks down when individuals within the tribe appropriate the music for their own commercial use in society outside the tribe.<sup>169</sup>

Another problem posed by this scenario is how to tell insiders from outsiders. That is, how to discern who is considered a tribal member and who is a non-tribal member for the purposes of protecting traditional musical cultural property. Does an insider (i.e., a tribal member) automatically become an outsider when he appropriates a traditional song and attempts to use it outside the traditional context? Should that insider be considered as an outsider or should he be treated differently than an actual Western “outsider?” Automatically considering a tribal member to be an “outsider” once he misappropriates a work is not necessarily an undesirable occurrence for purposes of cultural exchange because it simplifies the classification of individuals seeking to use tribal music, but customary law as it stands does not have any protections against it.<sup>170</sup>

Additionally, no customary rules exist with regard to non-tribe members taking traditional tribal music and using it in a commercial setting.<sup>171</sup> That is, the customary law does not provide

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<sup>168</sup> *Id.*

<sup>169</sup> This is, perhaps, due to the fact that the idea of individual gain from the group’s property is relatively new. *See Smiers, The Abolition of Copyrights, supra* note 82, at 126–27 (“The individual appropriation of creations and inventions is a concept alien to many cultures . . . there is no concept in many cultures of an individual exploiting a creation or invention monopolistically for many decades.”).

<sup>170</sup> This is necessarily true; customary law applies only to those members of the group who follow their laws; there are no laws pertaining specifically to non-tribal members, or members who break with tradition with no regard for the tribal customs, perhaps because the tribes never contemplated that scenario. *See Kuruk, supra* note 25, at 786–87.

<sup>171</sup> As has been discussed previously in this Note, Solomon Linda’s case is a good example of this; Pete Seeger and George Weiss, among numerous others, appropriated Linda’s music and used it to create world-wide hits. For further discussion, see *supra* Introduction.

for rules in a situation like Solomon Linda's, where a Westerner appropriates traditional African music. While there may be statutory schemes in some countries that protect against this, no *customary* scheme has this characteristic, probably because the customary law system never contemplated this now increasingly common scenario.<sup>172</sup> This insider-versus-outsider problem poses a significant threat to the safety and integrity of cultural property.<sup>173</sup>

Perhaps the most difficult problem that exists in a purely customary scheme, however, is that of how non-traditional courts should apply customary law. A cursory definition of customary law is helpful, taken from a Ghanaian example:

Customary law, as comprised in the laws of Ghana, consists of rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application.<sup>174</sup>

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<sup>172</sup> See Smiers, *Creative Improper Property*, *supra* note 91, at 14 (“[I]t happens more and more in non-Western societies that local artists privately appropriate an artistic idea, a melody or a cultural development origination from the collective tradition, and start to use it for their own commercial interests. They pretend it is theirs, which starts the process of excluding others of those cultural resources. In this transformation the concept of copyright gets introduced rather quickly.”).

<sup>173</sup> For a cursory example, see *supra* Introduction for a discussion on Solomon Linda and the perils of producing a popular, traditional song.

<sup>174</sup> Gordon R. Woodman, *Some Realism About Customary Law—The West African Experience*, 1969 WIS. L. REV. 128, 129 (quoting Interpretation Act (1960), Acts of Ghana C.A. 4, § 18(1)(b)); see E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 18, 28 (1954) (“A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possession the socially recognized privilege of so acting.” (emphasis omitted)). *But see* Francis Snyder, *Customary Law and the Economy*, 28 J. AFR. L. 34, 35 (1984) (“It was the product of European capital and the colonial state, but was subsequently reified as the concept of ‘tradition.’ In this form the precolonial referent was explicitly integrated into the ideologies of scholarship and politics. It formed an essential part of the conventional contrast between the ‘traditional’ and the ‘modern,’ embodying both evolutionary and political presuppositions. Produced in the particular historical circumstances, the notion of customary law was an ideology of colonial domination.”).

Customary law in most countries takes the form of rules that the average person within the culture would regard as binding.<sup>175</sup> What makes customary law binding is that it is “habitually obeyed by those subject to it [because] if not fortified by established usage it is not law.”<sup>176</sup> While established usage may help the courts to determine which law to apply, customary law remains uncodified in virtually every country where it is in use.<sup>177</sup>

While codifying customary law would certainly make its application a simpler process for Western courts, some scholars have argued that “once custom has been codified or settled by judicial decision, its binding force depends on the statute or the doctrine of precedent” and it therefore loses the force and flexibility of customary law, instead becoming a Western creation.<sup>178</sup> Others, however, have argued that customary law does not exist *until* a court has acted.<sup>179</sup> Nonetheless, regardless of which definition of customary law ultimately prevails, it is true that a certain degree of error regarding customary law is inevitable due to judges’ unfamiliarity with customary law,<sup>180</sup> and this error is compounded by the ambiguity in customary law.<sup>181</sup>

After gaining a basic understanding of what customary law means, it is necessary to apply the law. But this is much more difficult than it appears. The reason that it is particularly difficult

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<sup>175</sup> Woodman, *supra* note 174, at 151. *But see* BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 67 (Greenwood Press Publishers 1984) (1926) (claiming that the law of primitive societies is distinguishable from their customs).

<sup>176</sup> Antony Allott, *The Judicial Ascertainment of Customary Law*, in ESSAYS IN AFRICAN LAW 72, 89 (1960).

<sup>177</sup> While there are countries that respect cultural property, there are none that have actually gone so far as to codify the customary law. *See, e.g.*, Ghana, Copyright Act of 2005 (enacted May 17, 2005); Nigerian Copyright Act, (1999) Cap. 68, § 1(2)(b) (Nigeria).

<sup>178</sup> Allott, *supra* note 176, at 89.

<sup>179</sup> *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 82 (1909); JOHN SALMOND, JURISPRUDENCE 41–43 (Glanville Williams ed., 11th ed. 1957).

<sup>180</sup> *See* Woodman, *supra* note 174, at 141.

<sup>181</sup> Bennett, *supra* note 98, at 44 (“According to common-law doctrine, rules that are considered law may be presented to the courts by way of argument on the basis of authoritative texts. Issues of fact, on the other hand, must be proved by leading evidence. The ambiguous nature of customary law accounts, in part, for the strikingly different approaches to proof and ascertainment in the two main sections of the South African courts.”).

to discuss which law to apply in the area of copyright is that there is no hard and fast customary law in the area, as is the case in customary law marriage, intestate succession, and wills.<sup>182</sup> Statutes in countries that recognize customary law require the courts to apply the customary law of the people subject to their jurisdiction, where customary law would be appropriate.<sup>183</sup> For example, in Ghana, “Any question as to the existence or content of a rule of customary law is a question of law for the court.”<sup>184</sup> However, determining which customary law to apply is not as easy a task as it might seem.

Western judges have a particularly difficult role because they must straddle the line between applying customary law as it is traditionally recognized and applying the customary law as they might interpret it from a necessarily Western perspective.<sup>185</sup> This is because “the law works well only in systems where judges are familiar with their sources.”<sup>186</sup> “[H]owever, customary law derives from the practices of particular communities; these practices differ considerably from place to place, and they change constantly over time.”<sup>187</sup> Because the court is not part of that customary community, it “cannot possibly know the law.”<sup>188</sup>

Even when these judges apply customary law as tradition requires, there still remains a choice of law regarding different groups’ traditions as applied to other, similar groups. For example, South Africa has many different systems of customary law.<sup>189</sup> The Law of Evidence Amendment Act provides:

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<sup>182</sup> See *infra* note 237.

<sup>183</sup> Woodman, *supra* note 174, at 128.

<sup>184</sup> *Id.* at 139 (quoting Ghana, Courts Act of 1960, § 67 (current version at Courts Decree of 1966, § 65)).

<sup>185</sup> *Id.* at 143 (“The position of a judge in such a case will be similar to that of the lawyer. If he ignores the law reports, and looks only, for example, to the body of rules which the Accra people recognize as obligatory, he will be making a revolutionary break with the well established practices of his profession.”).

<sup>186</sup> Bennett, *supra* note 98, at 44.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *id.* at 69 (“Implicit in this complex provision is a hierarchy of choice of law rules . . . . [I]f the parties have not agreed on applicable law, the court must apply the law of the place where defendant resides . . . . This rule may cause more problems than it solves.”).

In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.<sup>190</sup>

This system creates difficulties arising in a number of situations; for example, if the defendant is a resident of one area and is employed in another, or if the place of residence is not within a “tribal area.”<sup>191</sup>

Courts sometimes hold that if a custom was established for one ethnic group, it raises a presumption that that custom also exists for another group.<sup>192</sup> For example, “Nigerian courts have sometimes held themselves bound by Ghanaian decisions on customary law, although there is no significant ethnic group common to both countries.”<sup>193</sup> This is quite obviously an area brimming with confusion for judges who must apply customary law.

### *B. Problems: Under Statutory Schemes*

While statutory schemes attempt to offer copyright protection to traditional African music, a host of issues arise. African conceptions of cultural heritage differ from their Western counterparts at the most basic level; the Western conception is focused on artistic, literary and performing works as creations in and of themselves, whereas in Africa, music is within the realm of cultural heritage.<sup>194</sup> It is “inherently difficult to protect folk[

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<sup>190</sup> *Id.* (quoting Law of Evidence Amendment Act 45 of 1988 s. 1(3)).

<sup>191</sup> *Id.* at 69–70.

<sup>192</sup> See Woodman, *supra* note 174, at 139.

<sup>193</sup> *Id.* (citing Awodiya v. Apoesho, [1959] N.W.L.R. 221 (Nigeria)).

<sup>194</sup> Blakeney, *supra* note 25, at 6–7.



music] under modern intellectual property laws which tend to be prompted by concerns irrelevant to folk[ music]”<sup>195</sup> because Western statutory copyright protection simply may not apply to traditional music “where the material is deemed [intangible,] unoriginal and in the public domain.”<sup>196</sup>

First, the tangible form requirement presents a problem; most statutory schemes require music to be in some tangible form to be protected—either written down or recorded.<sup>197</sup> However, much of traditional tribal music cannot be written down, as it is ever-changing and ephemeral.<sup>198</sup> In one instant, the music is heard, and in the next instant, it vanishes, which creates a fundamental problem for protection within statutory schemes.<sup>199</sup> Simply put, folk songs which would probably qualify under a modern copyright system may fail the test of fixation because there is no recording of such works.<sup>200</sup> It would be impractical to require that folk songs be reduced to a tangible form because African tribal culture is always changing; thus there is nothing “palpably present

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<sup>195</sup> Kuruk, *supra* note 25, at 776. Efforts at protecting these rights within Western intellectual property frameworks “largely presume the objective to be . . . [defense] against misappropriation . . . rather than reali[z]ing positive rights in traditional knowledge development and management according to the customary law of the community.” Gibson, *supra* note 50, at 17. Additionally:

[T]he system does not recogni[z]e and affirm such rights as rights even if it calls them “rights.” It cannot do so without an unraveling of its own miasmic and fragile identity, which would ensue from accepting the insistent assertion of right by indigenous peoples. Instead, and as part of its self-sustaining, its own delimited foundation is projected onto indigenous peoples and it is their law and their rights that are found to be spatially and temporally contained.

Fitzpatrick & Joyce, *supra* note 86, at 178.

<sup>196</sup> Gibson, *supra* note 50, at 18; see also Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 22 (1997); B.A. Botkin, *Definitions of Folklore*, in 1 FUNK AND WAGNALLS STANDARD DICTIONARY OF FOLKLORE, MYTHOLOGY AND LEGEND 398, 399 (Maria Leach ed., 1949) (discussing purely oral cultures in which folklore is passed through generations without ever being fixed or frozen in a particular form).

<sup>197</sup> See, e.g., Ghana, Copyright Act of 2005, § 1(2)(b) (enacted May 17, 2005); Nigerian Copyright Act, (1999) Cap. 68, § 1(2)(b) (Nigeria).

<sup>198</sup> See Hibbitts, *supra* note 40, at 951.

<sup>199</sup> *Id.*

<sup>200</sup> SODIPO, *supra* note 52, at 39.

to protect.”<sup>201</sup> Traditional Western protection by copyright is incompatible with how creativity works in most African societies.<sup>202</sup>

A second problem arises due to most statutory copyright schemes’ requirement that a work be “original” in order to qualify for protection.<sup>203</sup> A work can only be considered original if it is the product of the independent efforts of the author.<sup>204</sup> This makes the protection of traditional folk songs all the more difficult because originality is almost impossible to establish.<sup>205</sup>

On a more abstract level, originality within folk music is difficult to establish because the performer uses many different sources of language, sounds, and rhythms that are part of the common heritage.<sup>206</sup> In fact, “‘the same theme may know as many variations as there are performers.’ The base is shared knowledge, which refers less to a repertoire of existing ‘texts’ but more to a whole of social signs.”<sup>207</sup>

The idea that music must be original to be copyrightable does not fit with the African tradition;<sup>208</sup> the idea that the author creates

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<sup>201</sup> Fitzpatrick & Joyce, *supra* note 86, at 174 (citing S. Kirsch, *Lost Worlds: Environmental Disaster, “Culture Loss,” and the Law*, in 42/2 CURRENT ANTHROPOLOGY 167 (2001)).

<sup>202</sup> Smiers, *Creative Improper Property*, *supra* note 91, at 8 (“Copyright normally requires works to be fixed, but such a freezing of cultures is not how creativity works in most societies in all corners of the planet.” (citing G. Dutfield, *Traditional Knowledge and Folklore*, in INTELLECTUAL PROPERTY LAW: ARTICLES ON CULTURAL EXPRESSIONS AND INDIGENOUS KNOWLEDGE 78 (W. Grosheide & J. Brinkhof eds., 2002))). In fact, there is a very real fear “often expressed about the extending of intellectual property rights to traditional knowledge, a fear that this extension will uproot traditional and intangible resources, reducing them to some determinate form and thus facilitate their exploitation and corruption.” Fitzpatrick & Joyce, *supra* note 86, at 174.

<sup>203</sup> Kuruk, *supra* note 25, at 796 (citing Ghana, Copyright Law of 1985, § 2(2)(a) (enacted Mar. 21, 1985), *reprinted in* 21 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 423, 424 (1985) (legislating that a work is not eligible for copyright unless it is original in character)).

<sup>204</sup> Ghana, Copyright Law of 1985, § 2 (enacted Mar. 21, 1985).

<sup>205</sup> Kuruk, *supra* note 25, at 796.

<sup>206</sup> See Smiers, *The Abolition of Copyrights*, *supra* note 82, at 125.

<sup>207</sup> Smiers, *Creative Improper Property*, *supra* note 91, at 6 (quoting B. DAOUDI AND H. MILIANI, *L’AVENTURE DU RAI. MUSIQUE ET SOCIETE* (Paris: Editions du Seuil: 1996)). This can be similar to the idea of jazz improvisation, which, similarly, fails the fixation test discussed earlier. See *supra* Part I.

<sup>208</sup> See Smiers, *The Abolition of Copyrights*, *supra* note 82, at 128.

something out of nothing is a Western idea.<sup>209</sup> What is closer to reality is the concept that “[n]ot one person ever creates out of nothing.”<sup>210</sup> Each singer, musician, or performer uses cultural heritage and adds something to it.<sup>211</sup> Trying to force an originality requirement on traditional African society is inherently unfair because “individuals and communities have rights to maintain their own cultural uniqueness”<sup>212</sup> and keep their traditional music safe from would-be copyright infringers.

The third problem with statutory copyright protection is the idea that traditional folk songs are not owned by a particular individual, but rather, by the group as a whole.<sup>213</sup> It is almost impossible to recognize the author in the Western sense,<sup>214</sup> which makes it difficult to apply modern intellectual property protections.<sup>215</sup>

Even when there is an individual creator, there is no sharp divide between the creator of the music and the performer, or the dancer who dances to that music, or the audience who listens to it;

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<sup>209</sup> See *id.* at 126.

<sup>210</sup> Smiers, *Creative Improper Property*, *supra* note 91, at 16.

<sup>211</sup> *Id.*

<sup>212</sup> Mokgoro, *supra* note 108, at 1557. See generally BIOBAKU, *supra* note 48, at 19 (describing how traditions and songs are often intermingled between peoples).

<sup>213</sup> For a discussion of these communal ownership rights, see *supra* Part I.B.1. See also Smiers, *The Abolition of Copyrights*, *supra* note 82, at 126–27 (“The individual appropriation of creations and inventions is a concept alien to many cultures . . . . [T]here is no concept in many cultures of an individual exploiting a creation or invention monopolistically for many decades.”).

<sup>214</sup> Smiers, *The Abolition of Copyrights*, *supra* note 82, at 127; see also Mamie Harmon, *Definition of Folklore*, in FUNK AND WAGNALLS STANDARD DICTIONARY OF FOLKLORE, MYTHOLOGY AND LEGEND, 398, 399–400 (Maria Leach ed., 1949) (stating that folklore is defined by the ways in which it is transmitted, such that the work of an individual can become folklore as it is acquired as the symbol of a group and passed through generations); Kuruk, *supra* note 25, at 796 (“For example, there may be a problem identifying an individual who could claim authorship given the passage of folklore through generations of people in the community. It is obvious that while an individual may have indeed created a particular work of folklore, it would eventually have been acquired and used by the society at large and gradually, with the passage of time, have lost its individualistic traits.”); Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, 9 INTELL. PROP. J. 293, 307–08 (1995) (explaining that Aboriginal folklore derives from complex relationships between generations of people and their land).

<sup>215</sup> Kuruk, *supra* note 25, at 795.

in African society, *all* of these individuals have ownership over the music, whereas Western society usually gives ownership solely to the author.<sup>216</sup> In the Western tradition, there is a certain preoccupation with expression as the means by which to gain recognition; this is critical to the “natural justice and economic justifications for intellectual property protection.”<sup>217</sup> This Western perspective is necessarily at odds with communal experiences of cultural music because the Western tradition names the author as the individual with rights to exclude others,<sup>218</sup> but African tribal members all have access to and permission to use the music.<sup>219</sup>

A fourth problem arises when copyright protection is to be extended over national boundaries. As demonstrated by the enactment of the Berne Convention, the best way to ensure adequate protection in all countries may be to extend protection of national laws to foreign copyright holders and hope that other countries would reciprocate the gesture.<sup>220</sup> However, the protection schemes tend to disproportionately favor the developed countries whose intellectual property laws are already in existence, and the underdeveloped countries have to scramble to follow suit.<sup>221</sup>

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<sup>216</sup> See Smiers, *The Abolition of Copyrights*, *supra* note 82, at 126–28 and accompanying text (“Even when copyrights are applied in many non-Western cultures, it soon becomes clear that the ideology sustaining the system is not fit for the complexity of the creative process. In the Western world there exists a sharp division between . . . the composer and the performer. This is not the case in African music, which . . . is usually associated with specific dances.”).

<sup>217</sup> Gibson, *supra* note 50, at 21.

<sup>218</sup> *Id.*; see also Fitzpatrick & Joyce, *supra* note 86, at 171 (“Prevalent modes of protecting traditional knowledge and culture seek to determine the content of ‘traditional’ rights and the identity of their holders. However . . . such determination is impossible.”).

<sup>219</sup> See Smiers, *The Abolition of Copyrights*, *supra* note 82, at 126–28.

<sup>220</sup> SODIPO, *supra* note 52, at 20–21.

<sup>221</sup> Smiers, *The Abolition of Copyrights*, *supra* note 82, at 129–30 (“The author’s concept stands as a gate through which one must pass in order to acquire intellectual property rights. At the moment, this is a gate that tends disproportionately to favo[r] the developed countries’ contributions to world science and culture.”) (quoting JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 124–28 (1991)). For a discussion of the issues that can arise in situations where there is a conflict of law between two different areas, see *supra* Part I.B.3.

### III. RESOLUTION: A NEW DIRECTION FOR CUSTOMARY LAW COPYRIGHTS

Quite simply, “intellectual property” is not the correct regime to be implemented if the goal is to offer adequate protections to traditional tribal music.<sup>222</sup> What is necessary is a new concept based on traditional African ideas and social norms. A system that naturally flows and works with the traditional customary law would be much more constructive than “trying to make the forms of protection fit within a framework which was never designed for them and where the existing users and developers of copyright notions resist strenuously any such development.”<sup>223</sup>

Forcing Western intellectual property forms onto traditional African customs can only challenge the form of custom itself,<sup>224</sup> which would serve only to erase an important part of African culture. In truth, the only reason that copyright is seen as an appropriate frame of reference to the protection of indigenous music is because there is sufficient superficial similarity between music of the Western tradition and African tribal music.<sup>225</sup> However, that superficial similarity—that both are auditory music—is a ludicrous reason to force a different, Western-style creative intent on a completely different form of African art.

While some would suggest that the “essence of our communication as human beings” should be liberated from control by corporate holders and allowed to return to the public domain,<sup>226</sup> that line of thinking is dangerous; it leaves African culture open to easy abuse and misappropriation.<sup>227</sup> It would be much more appropriate to view “[t]he object of protection . . . not necessarily [as] the resource as an end in itself but the ability of the

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<sup>222</sup> *Id.* at 129.

<sup>223</sup> *Id.* (quoting *Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society*, COM (1996) 568 final (Nov. 20, 1996)).

<sup>224</sup> Fitzpatrick & Joyce, *supra* note 86, at 186.

<sup>225</sup> *Id.* at 185.

<sup>226</sup> Smiers, *The Abolition of Copyrights*, *supra* note 82, at 132.

<sup>227</sup> Much of traditional African music is unprotected even within its own region from the greedy eyes of potential misappropriators, which makes the notion of freeing the “essence of our communication as human beings” simply unworkable in a practical sense.

community to continue to function and observe internal differentiation and communal integrity through its management and deployment of resources.”<sup>228</sup> Western society needs to approach copyright protection from the viewpoint of respect for cultural diversity, rather than from the “perspective of the value of traditional knowledge as commodities in trade.”<sup>229</sup>

African countries that already recognize the protection of folk music should “be urged to adopt an . . . arrangement to regulate the use of folklore outside of the region.”<sup>230</sup> While this is a good idea, creating a government agency to handle the integration of customary law recognition<sup>231</sup> only serves to feed into the bureaucracy and create more red tape for traditional Africans to gain the protection they need and would not be an effective system to implement.

The best way to approach this problem is not to force a Western-style scheme of protection on a customary law system that does not share the same values in copyright protection, but rather, to streamline the court system so that more cases where customary law is appropriate to use may be heard. Streamlining the cases would require a more formal docketing system, whereby applicants to the court would have specific dates and times.<sup>232</sup>

To be most effective, the system must have local branches, or perhaps simply individuals in each region, who might be in charge of keeping track of the cases in that area. That way, the applicants would have less difficulty in traveling to the court for an additional day to file their papers; they would only have to be in the courtroom for the day of their hearing. These changes would make the court much more accessible to a greater number of traditional people.

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<sup>228</sup> Gibson, *supra* note 50, at 16; *see also id.* at 27 (“A community model for the protection and management of traditional knowledge will be ineffectual if indeed that model continues the historical archiving of community, the nostalgia of ‘tradition,’ and the morali[z]ing of the protection and safeguarding of the traditional community as a global ‘public good.’”).

<sup>229</sup> *Id.* at 17.

<sup>230</sup> Kuruk, *supra* note 25, at 841.

<sup>231</sup> *See id.* at 841–44.

<sup>232</sup> Customary law courts are often conducted on a first-come, first-served basis, with no written record and few formalities. *See Koyana, supra* note 97, at 4.

Additionally, and perhaps most importantly, African statutory judges *must* receive a more comprehensive training in the customary law of their jurisdiction. This is because the judges who know the most about the law are able to adjudicate disputes most fairly.<sup>233</sup> Once Western court judges are given a deeper understanding of the customary law systems, they would be better able to adjudicate the customary law disputes with the same degree of precision they approach the Western disputes.<sup>234</sup> While this plan would certainly be difficult to administer, and would create much work for the judges, the ease or difficulty of application should never govern the solution.

In order to facilitate this new system, the traditional people of a certain area should be directed to a specific court, so that the judges in each particular court have the least possible amount of new information to absorb. Local courts would have to be established. This would serve two purposes. Firstly, it would allow the people of that region to have a court sitting in their jurisdiction, hearing the issues occurring in that community, and would allow them to settle disputes without having to travel too far. Secondly, it would make judges' jobs much easier in that they would have to learn fewer different customary law systems. The fewer systems the judges have to learn, the more intimately familiar they will be able to become with the systems they do know, which would lead to fairer and more even-handed adjudication of customary law disputes.

Each country must play a vital role in this re-education of the judiciary; there must be standards of knowledge for customary law, just as there are standards for statutory and common law. The customary law that would be applied in a certain situation must have the same force as a statute that might be applied in a similar, non-traditional setting; the closest scheme to this suggested one is

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<sup>233</sup> *Id.*

<sup>234</sup> It is important to keep in mind the dualist system existing in many African countries. There are two separate court systems: one which is run as a Western system (what most readers will be familiar with) and one which is a customary law court system, presided over by traditional African judges practicing customary law. *Id.*

that of Nigeria.<sup>235</sup> South Africa's Constitution also sets a good example for the recognition of the legitimacy of customary law concurrent with statutory law<sup>236</sup> because the South African Constitution has provisions for customary law and its implementation.<sup>237</sup> Only in this way would customary law be on equal footing with statutory law in the protections that they afford to traditional people.

The insider/outsider problem certainly needs addressing if a customary law system is to be enforceable. It is unclear as to whether this problem would be best solved by statutory additions to customary practices or through individualized judicial determinations. The fair use of insiders and protection against misappropriation of music by outsiders are issues that the legislatures and judicial systems of various African countries must explore further.

#### CONCLUSION

Through a discussion of the various schemes of customary and statutory law, this Note has highlighted the need for a shift in thinking. What I propose is not a violent shift, or an unalterable one, but rather a solution that works with the natural flow of two different, yet co-existent cultures. Perhaps if these intercultural protections had been in place at the time of Solomon Linda's rise to fame, he would not have died in abject poverty, without the recognition or payment he so deserved.

Through recognition of the differences between customary and statutory law, it is possible to engender respect for both schemes. Only through respect and mutual enforcement can these two systems coexist harmoniously.

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<sup>235</sup> This is because Nigerian copyright protection eschews many of the traditional qualities a work must have before protection is allowed. Nigeria has a very inclusive scheme for protection of traditional music because it attempts to circumvent the problems with tangible form and ownership requirements to which many other countries rigidly adhere. *See supra* note 139 and accompanying text.

<sup>236</sup> *See* Mokgoro, *supra* note 108, at 1557; *see also* S. AFR. CONST. 1996 § 211(1)–(3).

<sup>237</sup> The customary law provisions are generally about customary law marriage and intestate succession; there is virtually no coverage of intellectual property issues. *See* Koyana, *supra* note 97, at 27.