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INDIGENOUS MUSIC GOES DIGITAL: RECONCILING CULTURE AND THE LAW

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ABSTRACT

This study examined the contesting legal and cultural sensitivity binary surrounding the digitisation of indigenous music in South Africa. The Delphi technique was used to determine if there is any pattern or consensus around these issues. Questionnaires emailed to indigenous music collectors, indigenous music donors and various researchers in this field collected information on the intersection of intellectual property rights (IPR) and customary law in local digitisation initiatives. A review of relevant literature was also conducted to trace related trends in similar projects. The findings of the study show that, from a legal and cultural perspective, developing an ethical professional practice during the course of collecting and aggregating indigenous materials on the internet should involve managing a range of risks associated with breaches of both indigenous customary law and Western IPR. This risk should be managed through various sets of disclaimers, warnings, and other mechanisms for withdrawal of indigenous materials which stakeholders may contest. The study recommends that certain aspects of indigenous knowledge never enter the public domain (as prescribed by customary law) and remain protected as such in perpetuity.

Keywords: customary law; digitisation; indigenous music; information and communication technologies; intellectual property rights

INTRODUCTION

The growing digitisation of indigenous knowledge (IK) and history in South Africa has become an important tool to ensure the survival and sustainability of indigenous cultural heritage (Chisa 2012). Using modern information and communication technologies (ICTs), indigenous communities in the country are now able to digitise significant

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aspects of their cultures including languages, ceremonies, dances, songs, stories, symbols, artworks, tools and other traditional cultural expressions.

This study focused on the digitisation of indigenous music in the country, and the South African Music Archive Project (SAMAP) was used as a case study. Indigenous music is an important component of IK. It can be part of entertainment, ceremony, storytelling, celebration, mourning and telling of the events in indigenous peoples' lives both past and present. In this study, indigenous music will refer to music and lyrics, instrumental pieces and indigenous rhythms and songs created primarily by indigenous South Africans, or based on the "intellectual cultural property" of indigenous South Africans (Chisa 2012). Indigenous music is an important means of expressing indigenous heritage. Indigenous heritage is enshrined in indigenous cultural and intellectual rights. However, under the existing intellectual property regime, these rights are not always protected. This is why the use of indigenous cultural protocols such as customary law ought to be explored when digitising different aspects of IK (Chisa and Hoskins 2016).

The literature shows that although digitisation is ideal for sharing, exchanging, researching and preserving indigenous cultures, it also creates numerous opportunities for illicit access to and abuse of IK-related material (Burtis 2009; Chisa 2012). Thus, this study examined the legal, ethical and cultural mechanisms that are currently in place to ensure that South African indigenous musicians are recognised as the original creators and, therefore, rightful owners of their cultural heritage. It examined the extent to which these communities have the right to control access and disclosure of sensitive categories of their cultural heritage. The study considered the implications of accessing IK via electronic platforms and explored the benefits and barriers of this kind of access within the framework of the current intellectual property rights (IPR).

CONTEXT OF THE STUDY

In apartheid South Africa, the prominent arts were predominantly those of the politically and economically privileged white population. The music of the indigenous black South Africans was seen as primitive, devoid of artistic excellence and sometimes even subversive. It was, therefore, not championed in public discourse, either politically or academically. Since it was not perceived as a national asset, indigenous music could not be promoted, either through education or formal training (Chisa 2012).

It is against this background that the SAMAP initiative was conceived in order to respond to the absence of a coherent approach to promote indigenous music genres in post-apartheid South Africa. The project's objective was to network with different indigenous music collectors and donors in the country in order "to gather, preserve and make accessible through electronic services, South African indigenous music in digital form for research, teaching and learning" purposes (Chisa 2012, 2). In that sense, the project endeavoured to facilitate the engagement of academic research with other

systems of knowledge with a view to expanding research capacity in the field of IK in the country.

The project was implemented within the context of an interdisciplinary National Research Foundation (NRF) initiative on indigenous knowledge systems (IKSs). SAMAP created partnerships with the School of Music at the University of KwaZulu-Natal (UKZN) and other relevant heritage institutions such as Digital Innovation South Africa (DISA) to achieve this goal (Chisa 2012).

Crucially, SAMAP also collaborated with various indigenous music collectors, indigenous music publishers and independent music labels whose materials had been identified for digitisation purposes. The aim was to "collect, protect, promote and produce South African … indigenous music that could previously not be heard within the mainstream record and broadcast industries" as the music was deemed "politically sensitive and subversive" during the apartheid era (Chisa 2012, 2). The SAMAP project, therefore, would digitise and restore the music from these "hidden years" as a resource for the future.

RESEARCH PROBLEM

The digitisation of IK items held in heritage institutions in South Africa is still a complicated legal and cultural minefield (Chisa and Hoskins 2015). There are numerous opinions regarding what the problems may be, where they manifest and what needs to be done to solve them. The literature shows increasing calls by indigenous peoples for legitimate rights to control and meaningfully utilise their own intellectual cultural property, including restricting other people's access to this knowledge that derives from unique cultural expressions, practices and contexts (Chisa 2012; Tobin 2013). So far, indigenous peoples have relied on existing IPR as a means to secure these ends.

However, there are many challenges that play out at the interface of IK and IPR in local digitisation endeavours. The most significant challenge being that the existing IPR have a unique Western derivation that ultimately informs their modes of classification, identification and operation. Moreover, IPR promote particular cultural interpretations of knowledge, ownership, authorship and property. These do not necessarily blend with indigenous peoples' understandings about the role and function of knowledge and knowledge practices (Chisa and Hoskins 2016).

Secondly, it is important to highlight that indigenous peoples' dependence on IPR raises issues that straddle both legal and non-legal aspects. In an indigenous world view, problems are not always legal or commercial in nature but can also assume cultural, historical, spiritual and moral dimensions. For example, the inappropriate use of sacred cultural artefacts, symbols or designs may not precipitate financial loss but can cause considerable offense to the relevant community (Britz and Lor 2003).

Yet, despite many efforts to protect various manifestations of IK, there is still no international consensus about how this protection can be secured, either within the

existing IPR regime or through some other legislative framework (Antons 2009). The present study attempted to contribute to the literature regarding the importance of the correct use of indigenous collections in the custody of heritage institutions such as SAMAP and the consequences of it being extrapolated to the digital context.

RESEARCH QUESTIONS

Therefore, the study sought to answer the following questions:

1. What were the policy objectives of the SAMAP initiative and how was indigenous music collected and digitised?
2. Who had access rights to the digitised music?
3. How did SAMAP navigate the legal and cultural challenges during the digitisation process?
4. Were indigenous moral and cultural rights respected especially in relation to ownership and attribution?
5. What recommendations based on the findings of the study can be made?

LITERATURE REVIEW

The review of literature is based on four main themes pertaining to the digitisation of indigenous music in South Africa. The themes are:

- an overview of the IKS;
- the philosophical and legal background to IK;
- customary law; and
- IPR.

Overview of the Indigenous Knowledge System

The IKS is a broad concept used mainly in the African context to denote that IK is connected to political, social, spiritual, cultural, legal, environmental and other institutions and, therefore, that this knowledge cannot be viewed as a separate entity, but rather as part of an interconnected system (Hammersmith 2008). Arising from this broad concept, the specific definition of IK is still contested although there is a general understanding of what it means. Some people define IK as the local knowledge that is unique to a given culture or society (Chisa and Hoskins 2016). Some have defined it simply as "local knowledge", while others have expressed it as "folk knowledge",

"information base for a society", "traditional wisdom" or, when it applies to the physical environment, as "traditional ecological knowledge" (Burtis 2009; Kawooya 2006; Tobin 2013).

Regardless of the definition, however, there is a general consensus that various communities, cultures and societies have indigenous knowledge systems. For the purpose of this study, IK is defined as the "knowledge acquired over generations by communities as they interact with their environment" (Warren 1993, 2). This definition deliberately leaves room that IK may not be as pure as some people believe. IK is the basis for local-level decision-making in agriculture, healthcare, food preparation, education, natural-resource management, and a host of other activities in indigenous communities. Indigenous music is an important component of IK. In an indigenous tradition, music expresses cultural belonging. It is also part of ceremony, storytelling, celebration, mourning and telling of events in indigenous peoples' lives (Chisa 2012). Indigenous music can embrace a range of music styles and forms including "pop, hip hop, country and western, disco, opera, rap, rhythm and blues, techno and others" (Janke 2005). Similarly, indigenous musicians use a variety of instruments such as guitars, drums, the piano and xylophones. In many instances, indigenous music has evolved as part of a collaborative process, created with non-indigenous people. For indigenous cultures, music and songs are central to identity, place and belonging. This means that indigenous music has an important place in the transmission and survival of indigenous cultures (Janke 2005).

Since IK is mostly stored in people's minds and passed on through generations orally rather than in written form, it is vulnerable to rapid change (Sithole 2006). Development processes like rural to urban migration and changes to population structures as a result of famine, epidemics, displacement or war may all contribute to the loss of IK. Even in remote areas, the powers that push global content (such as formal education, electronic media and advertising) are stronger than those pushing local content (Greyling 2007). Seen from that perspective, IK faces a bleak future unless it is properly documented and regulated (Nyumba 2006). One step towards achieving this goal is through the conversion of indigenous analogue material to digital form using modern ICTs, a process commonly known as "digitisation".

Digitisation has become prevalent in heritage institutions in South Africa (Burtis 2009). From a Library and Information Science (LIS) perspective, digitisation often increases the demand for access to the original item, as awareness of what is held in a collection increases. However, while digitisation may present opportunities to increase access to indigenous items, these items also present challenges regarding their circulation with regard to IPR. Moreover, digitisation often raises expectations of benefits but without an effective regulatory framework these expectations have the potential to put indigenous collections at risk (Britz and Lor 2003; Chisa and Hoskins 2016).

Philosophical and Legal Background to IK

It should be borne in mind that IK is primarily created for cultural and community reasons, and not for commercial gain. However, in some situations, third parties may wish to commercialise certain aspects of this knowledge for economic reasons. This tendency, of course, brings the cultural importance of IK into conflict with alien commercial and legal realities. In most cases IK, at least in its basic form, has been in existence for many years. It is generally created with the intention of existing in perpetuity, or as part of the culture of the society in which it was created. This can be contrasted with the generally limited term of IPR which are supposed to "protect" IK in the global economy market (Antons 2009).

The concept of "protection" has given rise to considerable confusion and differences of opinion. While IPR regard "protection" as preventing unauthorised people from copying protected intellectual property, in an indigenous context what is sought after is to "protect" the integrity, continued existence and development of IK (Chisa 2012). This implies safeguarding the cultural and spiritual context of that knowledge within the community. This is a key consideration relative to IPR. IPR protect not just "property" but also "private property". This concept clashes fundamentally with the nature of IK, which is considered to be a community heritage that cannot be owned by one person and that certainly cannot be bought or sold. In contrast, IPR are based on the principle of the private ownership of intellectual property (Antons 2009).

Another contentious issue is that IK is generally classified as perpetually falling in the "public domain". However, this is disputed by indigenous communities who reason that IK belongs to them and not to society at large. This means that if IPR continue to be used as an instrument of "protection" for IK, that part of IK protected by the IPR will be alienated from its communal ownership and will eventually become private property. In other words, when the term of such IPR lapses, that part of IK so removed will subsequently fall into the public domain. It will then become free from any restrictions, allowing anyone to copy and use it in any other way instead of remaining part of the heritage of the community in which it originated (Antons 2009).

Customary Law

To make any effort at understanding customary law, we must begin with looking at what custom itself is all about. Custom has a plurality of definitions, though in common parlance it can be understood as uniformity of conduct of a people under similar circumstances. It is a practice that by its common adoption has come to have a force of law (Tobin 2013). Thus, a custom is a usage by virtue of which a class of persons belonging to a defined section in a locality is entitled to exercise specific rights against certain other persons or property in the same locality (Tobin 2013).

According to Barclay (2005, 116), customary law is the "body of rules, values and traditions accepted in indigenous societies as establishing standards and procedures

to be followed and upheld" to govern and safeguard the IKS. Indigenous customary law transforms over time to account for the changes in the needs of the peoples it seeks to govern. It derives its legitimacy from social acceptance by the members of the community it governs and is based on norms that may be understood only by the members of that community (Tobin 2013).

Indigenous communities possess institutional structures and mechanisms to implement and enforce their laws. Thus, indigenous customary law is so entwined with the way of life of indigenous peoples, and is such an integral part of their culture that it deserves respect as an integral element of the culture. Customary law governs the way in which IK can be used in indigenous communities (Tobin 2013). Crucially, it determines who in the community is authorised to permit the use of IK and its reproduction (Chirayath, Sage, and Woolcock 2005; Tobin 2013).

Barclay (2005, 116) explains that "customary law focuses on community ownership and involvement" rather than on personal rights. Under customary law in South Africa, for example, the right to use a clan's symbols and stories resides in the traditional owners, who are considered custodians of these cultural expressions. Therefore, the traditional owners collectively determine whether and how the clan's images and symbols can be used (Sithole 2006). Unfortunately, indigenous customary law is often viewed as inferior to other dominant legal traditions, and has not been accorded the legitimacy that it deserves. Yet, indigenous customary law is still law although it might not conform to Western notions of what constitutes law (Tobin 2013). Moreover, indigenous customary law has always governed the use of IK satisfactorily, and is flexible enough to protect the diverse cultural expressions of indigenous communities in South Africa (Tobin 2013).

Customary Law and Indigenous Music

When recording indigenous musical works, it is important to observe customary law. Observing customary law means finding out who can speak for that music, so that the right people are asked for permission to use the music (Anu interview). For instance, if another musician wanted to use a rhythm or phrase from music belonging to a particular Zulu family or clan in South Africa, it is essential to locate the correct family group from the particular community owning that song. Anu (interview) advises that "if you can't find the correct … group or family to ask permission, that's a good reason not to use the music". Anu (interview) explains that in order to obtain "prior informed consent", it is necessary to

- provide adequate information to the custodians,
- ask the right people,
- consult fully, and
- be prepared that consent may be withheld.

Therefore, the right of "prior informed consent" requires that the custodians be given full information about the proposed use or uses of their cultural material. For example, the way in which a song will be used is an important detail that must be presented to the custodians (Anu interview). If the producer hopes for commercial release of the song, he/she should make this clear to the owners of the cultural material. Moreover, if a number of different uses are proposed, customary law requires that each use be discussed exhaustively. Consent should be sought again if new uses are considered, such as downloads from an Internet site or use of a song as a telephone ringtone (Indigenous Arts Reference Group 1998).

Intellectual Property Rights

Field (2006) refers to IPR as the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Thus, IPR are the means via which creators are protected, by conferring time-limited rights to control the use of their creations (WIPO 2001). IPR give statutory expression to the legal and economic rights of creators and to the obligations of the public in return for access to these creations. On that basis, the creator is able – through the right to prevent others from exploiting his/her invention – to derive material benefits from the invention as a reward for intellectual effort and as compensation for research expenses which the inventor would not be able to reap if unbridled copying of the invention was allowed (WIPO 2001).

Since intellectual property shares many of the characteristics of real and personal property, associated rights permit intellectual property to be treated as an asset that can be bought, sold, licensed or even given away at no cost (Association for Progressive Communications 2007). Existing IPR, which are based on Western intellectual property ideals, are so well established today that most of the world has accepted them without question. For instance, the 149 member nations of the World Trade Organization (WTO), including South Africa, have agreed to ensure that their national laws conform to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement (Field 2006). The TRIPS Agreement makes inadequate protection of patented, trademarked and copyrighted products an unfair trade practice that could invoke serious retaliation under Section 301 of its Trade Act of 1974 (Association for Progressive Communications 2007).

According to Grout et al. (2000), intellectual property laws and regulations centre on the following categories: copyright, patents, and trademarks. Copyright is the form of IPR specifically pertaining to the music industry. In general, copyright protects literary, artistic, musical and dramatic works which are in a permanent and tangible form (Chisa 2012). Copyright protects the written expression of words and music, and in the case of recordings, the recorded form of the sounds. Copyright does not protect ideas. It can only protect music when it is reduced to material form. Music may be reduced to material form in a number of ways. According to Janke (2005), a separate copyright exists in each of the following forms: the written version of the music, the

written version of the lyrics, the recording of the song, and the published edition of the song, for example, sheet music.

Janke (2005) explains that performers have a different set of rights with only limited copyright ownership in certain circumstances. Complications can arise for indigenous cultural custodians where indigenous music, dance, designs and stories are passed on orally. This cultural material is not in material form and is therefore not automatically protected under the conventional intellectual property laws. It is important to consider making special arrangements for copyright ownership when oral cultural material is recorded because generally, the maker of the recording is the copyright owner in the recording. This can be altered by agreement (Janke 2005).

Moral Rights and Indigenous Music

Moral rights are separate from the economic rights of intellectual property owners and may give indigenous musicians avenues to challenge inappropriate treatment of their musical works. According to the Australia Council for the Arts (2002), moral rights laws provide the following rights to authors and performers of indigenous musical works:

- The right to be attributed as author: The author of a work has the right to be identified as the author where his/her work is reproduced in material form, published, performed, adapted, or communicated to the public.
- The right not to have work falsely attributed to another musician: Indigenous musicians can take action against parties who falsely attribute others as creators of their works.
- The right of integrity: Performers can object to treatment of their performance that demeans their reputations.

The potential for moral rights to increase the copyright protection of indigenous musicians has not been fully explored. One important point about moral rights is that they are individuals' rights. There is still no legal recognition of communal ownership of indigenous cultural material. However, individuals who have created a song can bring legal action if they are not properly attributed for their work, if someone else is named as the creator, or if their work is treated in an inappropriate manner. In general, moral rights last for the period of copyright. In other words, the moral rights will exist for as long as the copyright exists. In many countries for example, the moral rights in the lyrics of a song will last for the author's life plus 70 years (Australia Council for the Arts 2002).

METHODOLOGY

The study used the SAMAP initiative as a case study to gather detailed information. The population was selected purposively because of its expertise and ability to answer

research questions. The Delphi technique was used to determine if there were any patterns or consensus around the issues raised by the research questions. The Delphi method is an exercise in group communication among a panel of geographically dispersed experts (Hsu and Sandford 2007). The technique allows these experts to carefully analyse a complex problem or task. The basic premise of the Delphi technique is that experts have the best idea of what the future may hold. Thus, unlike a typical user survey, the validity of a Delphi study does not depend on the number of participants polled but rather on the expertise of the panel who participate (Hanafin and Brooks 2005).

Numerous questionnaires consisting of a number of items relating to the research problem were circulated to a preselected group of experts. Statements regarding the topic were generated, based on the literature and the initial opinions of experts in the field. The questionnaires were designed to elicit individual responses to the questions posed and to enable the experts to refine their views as the group's work progressed. The process was repeated three times in order to gradually produce consensus among the group (Hanafin and Brooks 2005).

The experts identified were IPR experts, IK researchers and digital archivists. Initially, 12 potential panellists were identified. Four declined to participate owing to personal reasons and eight agreed to take part. However, four panellists did not return their first round of questionnaires, despite follow-ups, and in the end only four of the anticipated eight panellists completed all the questionnaires.

The small panel size may raise questions regarding the validity of this study. However, in a Delphi study conducted by Akins, Tolson and Cole (2005, 116–117), the researchers point out that there is "no clear … agreement as to what constitutes a sufficient number of Delphi survey participants to ensure stability of results". Akins, Tolson and Cole (2005, 118) explain that "sample size in Delphi studies has been researcher and situation specific, and … convenience samples have been chosen dependent on the availability of experts and resources." Akins, Tolson and Cole (2005, 115–118) conclude by noting that reliability in a Delphi study may be obtained with a panel of a relatively small number of Delphi experts and that "a small expert panel from a limited field of study may be used with confidence".

While it was anticipated that at least eight panel members would participate in this study, data collected from the four remaining panel members were rich and varied and consensus was reached on the majority of issues. The collected data were then analysed by open coding. In order to identify major themes, the labelling and categorising of phenomena were done as indicated by data.

SUMMARY AND FINDINGS

The Delphi panel's value judgements regarding the SAMAP digitisation initiative revealed key themes arising from the research questions. This is in addition to the many critical issues highlighted in the literature review, pertaining to the conflicting

intersection between the law and indigenous cultural sensitivities in relation to the digitisation of indigenous music. The key themes in question are as follows:

- policy objectives of the SAMAP initiative and how indigenous songs were digitised;
- access to the digitised songs;
- intersection of the law and culturally sensitive or sacred aspects of IK; and
- the moral rights of indigenous communities.

What follows is a discussion of each of the above issues as they pertain to the Delphi panel's comments.

Project Policy Objectives and Acquisition of Indigenous Material

The reasons for implementing a digitisation project are varied as indicated earlier in this study. Specifically, the objectives of the SAMAP initiative have also been provided in the study. Ideally, each digitisation project should have a policy framework that can identify and discuss key issues involved in the conceptualisation, planning and implementation of the project, with recommendations for "best practice" to be followed at each stage of the process. Context of the project in question and the implication on users also need consideration (Chisa 2012). It is very important for the project to be clear about its objectives, as the purpose will ultimately determine the process and the costs (Chisa 2012).

In line with the above, SAMAP posted online policy standards and protocols relating to acquisition, access, dissemination and preservation of its holdings. During the course of this study, these protocols were readily available on SAMAP's website. For example, SAMAP's data-use agreements clearly warned that its database collections were of a non-commercial nature (SAMAP 2011 as cited in Chisa 2012).

However, some Delphi panellists were concerned by the lack of lucidity in SAMAP's core policy objectives because they did not seem to accommodate indigenous interests and concerns. For example, the project's stated objective was to "facilitate the engagement of academic research with other systems of knowledge with a view to expanding research capacity in the field of indigenous knowledge in South Africa" (SAMAP 2011 as cited in Chisa 2012). In this regard, SAMAP acknowledged that the initiative was essentially an online database intended for an international audience. The core aim was clearly to digitise and restore music from the country's "hidden years" as a resource for academic research (SAMAP 2011 as cited in Chisa 2012). This implies that SAMAP's primary goal was not to cater for indigenous concerns regarding their intellectual property. This is evidenced by the fact that its database application included no functionality to restrict access to "sensitive" material.

There was consensus among panel members that policy formulations regarding the digitisation of indigenous material are currently confronted by vexing challenges

(Chisa 2012). This is in light of the dichotomy between the indigenous and Western world views and as a result of the competing expectations of indigenous communities on the one hand, and the digitising institution on the other. These complexities may also include the challenges posed by the need to accommodate different access conditions for indigenous records which contain sensitive material (Andrzejewski 2010; Cameron 2007).

Access to the Digitised Material

Panel members in this study observed that heritage institutions in South Africa do not seem to pay the required attention to the resurgence of self-determination by indigenous peoples, particularly their quest for access to and custodial rights for their heritage resources. For example, one panel member who was closely associated with the planning and implementation of the SAMAP initiative, noted that the music arising from the SAMAP digitisation initiative had not been made accessible to indigenous communities. According to this panel member, SAMAP's music remained "hidden ... to many ordinary South Africans" especially those living in rural areas (Chisa 2012, 170).

Relevant general literature has been growing in the digitisation field, as have national and international activities focusing on the digitisation of high demand indigenous collections for enhanced access and preservation (Mulrenin 2002). The literature, especially in the LIS profession, generally delineates a clear nexus between the socio-economic disadvantages experienced by indigenous communities and their ability to access information using modern ICTs (Chisa and Hoskins 2015; DiMaggio and Hargittai 2001). These social disadvantages, directly linked to marginalisation and characterised by poverty and powerlessness, are reflected in measures of education, employment and income (DiMaggio and Hargittai 2001). Significantly, these social disadvantages also inform the "digital divide" phenomenon. This means that although technology has increased the availability of more information to more people, at the same time it has made access to this information more difficult for marginalised communities (Chisa and Hoskins 2015).

Legal and Cultural Sensitivities

The panellists in this study noted the lack of accommodation within the law for considerations of cultural integrity and preservation issues that are relevant to the indigenous world view. This concern is consistent with most of the literature in this field (Fetterman 2006). The position of IK within intellectual property law has been documented in this study. Generally, the argument is that IK does not necessarily fit the forms of classification and identification required to determine intellectual property subject matter (Chisa 2012). Thus, there is still uncertainty across many heritage institutions when dealing with culturally sensitive issues. A big problem area is how to

balance public access and the use of indigenous materials in the context of IPR, with responsiveness to the cultural needs and concerns which indigenous people express about materials relating to them (Barclay 2005).

Unfortunately, as the Delphi panel unanimously noted, contested ownership and access issues relating to the material form of indigenous recordings can and do arise. Yet, presently, the law remains the only arbiter when the changing needs of a people, in relation to their cultural material, are dealt with practically. Because the law is reluctant to openly deal with issues of "culture", researchers, especially in the field of LIS, must serve as interpreters between the requirements of the law and the changing nature of the cultural material that they collect and study (Chisa 2012).

Moral Rights of Indigenous Artists

Delphi panel members in this study were unable to provide convincing answers as to how moral rights can be applied to indigenous cultural productions, especially where copyright protection does not apply. This is not surprising especially because there is a lack of clarity in the literature on this matter as well. However, by developing reliable guidelines, digitisation initiatives such as SAMAP could allow far greater access to the digitised music for a wider range of audiences who would also be secure in the knowledge that access occurs under well-informed parameters which respect moral rights, both legal and cultural (Chisa 2012). Britz and Lor (2003) observe that people who deal with artistic works have a moral obligation to ensure that

- the artist is attributed,
- the work is not falsely attributed to someone else, and
- the work is not dealt with in a way that is prejudicial to the artist's honour or reputation.

According to Britz and Lor (2003), an artist is entitled to legal recourse if any of the above "moral rights" is infringed. In line with the above, panellists in this study discussed the importance of attribution and of maintaining the integrity of indigenous songs in a digitisation project such as SAMAP (Sunder 2006).

The panellists agreed that the accuracy of the reproduction is of great importance, as inaccurate reproduction of a song can cause deep offence to those familiar with the work (Australia Council for the Arts 2002). This means that the introduction of the moral rights of attribution and integrity may further the interests of indigenous communities in South Africa. As Guivarra (2000) observes, moral rights include the inalienable personal rights of the creator of a work to claim authorship of the work or song (right of attribution), and to object to any distortion, mutilation or other modification of the work that would be prejudicial to the creator's honour or reputation (right of integrity).

CONCLUSION AND RECOMMENDATIONS

This study set out to examine the dichotomous legal and sensitivity issues relating to the digitisation of indigenous music in South Africa. The SAMAP initiative was used as a case study.

The study found that, from a legal and cultural perspective, developing an ethical professional practice at the interface of indigenous culture and Western intellectual property law in the virtual environment should involve managing a range of risks associated with breaches of both indigenous customary law and Western IPR, including moral rights. Heritage institutions should consider this risk management along a continuum, ranging from total avoidance of any contest between IPR and indigenous customary law (by withholding IK from digitisation) to an acceptance of the risk of breaching both legal and cultural principles. This risk should be managed through various sets of disclaimers, warnings, and other mechanisms for the withdrawal of materials which interested parties contest.

Therefore, it is recommended that the indigenous communities in South Africa have collective ownership of their knowledge, which could be expressed as a form of "collective copyright". In developing a "collective copyright"' system, a "collective royalty" system could also be considered. Another possibility is for royalty payments for the use of IK to go to established indigenous communities' collection agencies, and/or an established national indigenous arts fund or scholarship.

It is recommended that certain aspects of IK do not enter the public domain (as deemed under customary law) and remain protected as such into perpetuity. This could be expressed as a form of "indigenous private domain". In cases of conflict between legal systems over IK, customary law should prevail over the Western intellectual property law.

It is recommended that the enforcement of infringements of IK regulations incorporate the concept of "cultural harm" and that damages reflect the degree of the harm caused. Reimbursement payments for profits made from unauthorised use of IK could also be considered. These payments could be made to the same established funds suggested above.

The study recommends that heritage institutions such as SAMAP gain verbal permission from custodians of indigenous materials, where written permission is problematic. Where permission has been granted, it should be acknowledged on the institution's website. Moreover, where rights holders or cultural custodians cannot be found, the institution should acknowledge copyright or cultural interests on the web page and should request people with information to come forward.

It is recommended that heritage institutions invite indigenous people to view digitised exhibitions and to respond to any concerns raised. The study strongly recommends that the institution also employ an indigenous liaison person to encourage interaction between the institution and indigenous communities.

Finally, the study recommends intensive and regular training of IPR personnel and practitioners to keep abreast of current developments in contemporary IPR. It also recommends a proper review and amendment of intellectual property laws in South Africa to reflect contemporary issues in IPR especially with regard to indigenous cultural rights.

These strategies can be used by heritage institutions in the country as a basis for determining legal and culturally sensitive judgements, and for maintaining good relationships with indigenous communities.

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