"Do we need Exit rules for Traditional Knowledge? Lessons from Solomon Linda, and the Mbube/'The Lion Sleeps Tonight' case"

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Abstract

Misappropriation of the traditional knowledge (TK) and traditional cultural expressions/folklore (TCEs) of indigenous and traditional communities has become an issue in the mainstream of intellectual property scholarship and policy. Many countries have put in legislation to address this issue. Much of this focuses on the idea that the means of protection should be addressed at actions by 'outsiders'. In this paper, I pose the question of whether, in focusing on actions by outsiders, policymakers and scholars have minimized or elided the crucial role played by 'insiders' in the process of misappropriation. In this paper, I take what is considered a prototypical story of fundamental injustice done to an individual artist and the traditional Zulu community from which he came, the story of the song Mbube/The Lion Sleeps Tonight and Solomon Linda and use it as a case study to identify some of the questions that should be raised as we begin to re-examine other cases to understand what the role of insiders has been in acts of misappropriation of TK and TCEs.

Keywords: Traditional Knowledge; Traditional Cultural Expressions; Race and Copyright;

1 Introduction

Misappropriation of the traditional knowledge (TK)[1] and traditional cultural expressions/folklore (TCEs) of indigenous and traditional communities has become a mainstream issue in intellectual property scholarship and policy-making. The rich scholarship has been accompanied by political recognition of such claims by many developing countries[2] and even in some developed countries.[3] This recognition has long been part of the program of work at the World Intellectual Property Organization (WIPO), represented in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which has been (very slowly) moving towards text-based negotiations on an instrument or instruments for the protection of traditional knowledge, genetic resources, and folklore (traditional cultural expressions).[4] In addition to the treaty texts being developed at WIPO, the mainstreaming of protection for TK and TCEs has resulted in a plethora of national and regional legislation. These represent many different approaches which draw on different underlying justifications for protection, but one thing that much of this legislation and treaty-making shares is the premise that the means of protection should be addressed at actions by 'outsiders'. In the common narrative of how misappropriation occurs, it is an outsider who enters a community, or encounters the TK or TCE, and then takes, without permission, and uses or even worse makes ownership or authorship claims over the TK or TCEs in the outside world. Such acts are seen as both moral and legal violations that the community is not able to reach because the outsider is understood as not subject to the authority, jurisdiction or political power of the community from which the TK or TCE was misappropriated. Legislation and treaties have focused on this as the core concern and have thus framed themselves as preventing outsiders from misappropriating.

In this article, I raise the question of whether the primary problem for much of what we think of as misappropriation is that insiders, members of the community, cross the boundary of the community and 1) make claims themselves, or 2) collaborate with outsiders to make claims, or 3) engage in relationships (commercial or otherwise) with outsiders that result in the outsider misappropriating the TK/TCEs. How should legislation address the Indian researcher who emigrates to the United States and applies for a patent on uses of turmeric for wound healing,

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[1] WIPO defines Traditional Knowledge (TK) as "a living body of knowledge passed on from generation to generation within a community . . . [that] often forms part of a people's cultural and spiritual identity." TRADITIONAL KNOWLEDGE, WORLD INTELL. PROP. ORG., http://www.wipo.int/tk/en/. Traditional Cultural Expressions (TCEs) tend to have more overlap with the subject matter of copyright and "may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions." TRADITIONAL CULTURAL EXPRESSIONS, WORLD INTELL. PROP. ORG., http://www.wipo.int/tk/en/folklore/

[2] Such recognition can exist either as a separate legislation or incorporated into a broader set of legislation. See e.g. Andean Community - Decision No. 486 Establishing the Common Industrial Property Regime (2000); India - Biological Diversity Act, 2002 No. 18;

[3] See e.g. Portugal - Decree-Law No. 118/2002 of 20 April; Switzerland - Federal Law of June 25, 1954 on Patents for Inventions (status as of January 1, 2012)

[4] Draft Provisions/Articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources. Available at: https://www.wipo.int/tk/en/igc/draft_provisions.html

drawing on traditional knowledge from India?[5] What of the Swazi musician who takes a song that she learned when she participated in the annual traditional Reed Dance, moves to the United Kingdom and records a hip hop album that incorporates and builds on the song?

Even if these insiders are not themselves making derivative works or making claims, how should we address the situation where they communicate such TK and/or TCEs to others who DO go on to make such uses and claims. Might there be some obligation placed on such insiders when they go out into the world and communicate their TK and TCEs to others?

If insider "exit" is a significant part of the problem, it would suggest that legislation and treaties should focus more extensively on addressing exit rules for insiders and controlling when and how insiders who cross the boundaries of the community should behave. This article takes as a case study a prototypical story of fundamental injustice done to an individual artist and the traditional Zulu community from which he came, the story of Solomon Linda and the misappropriation of his song "Mbube" into the pop song "The Lion Sleeps Tonight". I use the Solomon Linda case study to identify some of the questions that should be raised as we begin to re-examine other cases to understand what the role of insiders was in those acts of misappropriation.

2 Background and literature review

The lack of focus on exit rules is evident from a survey of the *sui generis* legislation compiled by WIPO.[6] Only a few of these address exit rules for insiders and even then, only by implication.[7]

The focus on outsiders as the primary misappropriators is also reflected in a significant portion of the scholarship.[8] Paul Kuruk premises his article "Bridging the Gap between

[5] U.S. Patent No. 5,401,504 (filed Dec. 28, 1993) (issued Mar. 28, 1995, later revoked) (granting original tumeric patent).

[6] 'Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions' (World Intellectual Property Organization 18 January 2021).

[7] 'Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore' (signed and adopted 9 August 2010, entry into force 11 May 2015). See also, the Biodiversity Act of Bhutan of 2003 (Article 37, Article 44) (https://wipolex.wipo.int/en/text/168016); the Chinese Regulations on Protection of Traditional Arts and Crafts, 1997 (Article 20(1) (https://wipolex.wipo.int/en/text/198447); the Kenyan Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Act No. 33 of 2016) (Article 10(3), Article 11, Article 18, Article 22) (https://wipolex.wipo.int/en/text/506164)

[8] See e.g. Olufunmilayo B Arewa, 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (2006) 10 Marquette Intellectual Property Law Review 155. at 170 – 179; Richard Awopetu, 'In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property' (2020) 69 Emory Law Journal 745.; Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' (1997) 11 Connecticut Law Review 1; Wanjiku Karanja, 'The Legitimacy of Indigenous Intellectual Property Rights' Claims' (2016) 1 Strathmore Law Review 165. at 173 – 174;

Traditional Knowledge and Intellectual Property Rights: Is Reciprocity an Answer"[9] on the need to address the cross-border misappropriation by actors in other countries and proposing reciprocity between source countries and use countries.[10] Kuruk[11] and Wassel[12], in their articles addressing the use of use customary law to protect against misappropriation focus their objection on the weaknesses of those systems in addressing incursions by outsiders. They argue that the internal sanctions imposed by customary law may be too weak, limited to the kind of non-economic, taboo and kinship oriented consequences which simply have much less force in modern societies and may be less effective even against insiders. They also note that the internal sanctions cannot reach to outsiders over whom the indigenous or traditional community has no jurisdiction. While the arguments about outsiders remain strong, the issue of effectiveness of customary law is re-framed if we consider a system that recognizes insiders as a major or primary vector of misappropriation. In such a system, the power of customary law, and jurisdiction of customary law, may actually be stronger. The scholarship, by not focusing on the role of insiders, may therefore have prematurely dismissed the strength and capacity of customary law as a means of addressing misappropriation.

There have been scholars and communities who have more strongly argued for an approach that valorizes, recognizes and enforces customary law. They have endorsed this both as a better to way to recognize how communities themselves organize their knowledge and as a means of addressing the sheer diversity of claims and practices of traditional and indigenous communities.[13] Few address the issue of exit rules for insiders. Gibson has addressed the broader tension between individual rights and group rights in the context of traditional knowledge although the article focuses on recognition of cultural and group rights of indigenous and traditional communities as such rather than whether and how individual members may exit the community.[14] Riley, in discussing the need for a bottom up development and recognition of tribal lawto protect Native American traditional knowledge points to the ways in which tribal codes can be relied upon to best address the balance between individual and collective ownership, including exit rules within their ambit. She specifically points to the situation where a tribal

[9] Paul Kuruk, 'Bridging the Gap between Traditional Knowledge and Intellectual Property Rights: Is Reciprocity an Answer?' (2004) 7 Journal of World Intellectual Property 429.
[10] ibid.
[11] Paul Kuruk, 'The Role of Customary Law under SUI Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge' (2007) 17 Indiana International & Comparative Law Review 67. at 102 – 105.; 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' (1999) 48 American University Law Review 769.
[12] Deborah Wassel, 'From Mbube to Wimoweh: African Folk Music in Dual Systems of Law' (2009) 20 Fordham Intell Prop Media & Ent LJ 289. at 312.
[13] See e.g. Johanna Gibson, 'Community and the Exhaustion of Culture: Creative Territories in Traditional Cultural Expressions' in *New Directions in Copyright Law* (New Directions in Copyright Law, Edward Elgar 2006) vol 3.; Angela R Riley, '"Straight Stealing": Towards an Indigenous System of Cultural Property Protection' (2005) 80 Washington Law Review 69.
[14] Johanna Gibson, 'The UDHR and the Group: Individual and Community Rights to Culture' (2008) 30 HAMLINE J PUB L & POL'y 285.

member turns a tribal song into an audio recording and that tribal law would be able to prevent such an action given that US federal IP law would provide no protection for the song.[15] She emphasizes that each tribe would determine the manner and means by which individuals would be allowed to lay claim to or exploit tribal TCEs. In a separate paper in which she proposed an Indian Copyright Act, Riley notes that a system of collective ownership would preclude any individual from being allowed to alienate any tribal cultural expression, again pointing in passing, to the ability to set exit rules in a broader *sui generis* system.[16]

The extent of role of insiders in misappropriation of TK and TCEs presents a factual question, but one that must be assessed with a specific analytical framework. A case study approach helps to establish what that analytical framework should be by identifying the sets of issues and questions that need to be addressed in such an examination. This next section re-visits the case of Mbube/The Lion Sleeps Tonight to see what lessons and questions can be learned from it as a basis for re-assessing other cases of misappropriation.[17]

3 Learning from Mbube/The Lion Sleeps Tonight

The Lion King, an animated film from the Disney Corporation contains a song called "The Lion Sleeps Tonight." That song, first popularized in the 1960s by the Tokens, was based on a 1950's Pete Seeger "composition" and sound recording called Wimoweh, which was his transposition and translation of a song called Mbube[18], from a record of South African popular music that had been sent by South Africa based Gallo records to its partner company in the US, Decca records.[19],[20] That song was first composed and recorded in Gallo Records' studio in 1939 by Solomon Linda, who died penniless in 1962, his family living in poverty, while millions were made on songs derived from his composition. An article by Rian Malan in Rolling Stone in 2000 resurrected the story of Linda.[21] In it, Malan, made clear that this was a story of misappropriation and injustice committed against a poor artist that deprived him and his family of their rightful compensation and credit. The story led Gallo records to retain the services of Owen Dean, an influential intellectual property lawyer in South Africa to represent the interests of the Linda

[15] Riley (n 13). at 24.
[16] Angela R Riley, 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' (2000) 18 Cardozo Arts and Entertainment Law Journal 175. at 217.
[17] I draw on similar case study methodologies see, for example in: Patricia Covarrubia and Lisa Albani, 'Cultural Expressions: The Intersection of Culture and Intellectual Creations - Fado as a Case Study' [2017] Intellectual Property Quarterly 29.
[18] "Mbube" as sung by Solomon Linda and the Evening Birds, https://www.youtube.com/watch?v=mrrQT4WkbNE
[19] Owen Dean, 'Awakening the Lion in the Jungle - The Story of the Lion Sleeps Tonight Case' (*Spoor&Fisher:Latest News*, 31 May 2019) <https://www.spoor.co.za/en/News/awakening-the-lion-in-the-jungle/> accessed 27 June 2019.
[20] Sam Cullman, 'Remastered: The Lion's Share' (Documentary, Netflix 2019). at 23.17. at 55
[21] Rian Malan, 'In the Jungle: Inside the Long, Hidden Genealogy of "The Lion Sleeps Tonight"' [2000] Rolling Stone.

family.[22] Disney was involved as a licensee in South Africa and was brought into the case because its other intellectual property was under threat of 'attachment'.[23] After initial legal maneuvering the case was settled in 2006.[24] In that settlement, Disney and TR/Folkways publicly acknowledged that "The Lion Sleeps Tonight" was derived from "Mbube".[25] Solomon Linda was recognized and listed as a composer of "The Lion Sleeps Tonight".[26]

However, there are varying strains of the origin of the song Mbube, from musicology and other sources that complicate this story in ways that may question the normative and legal claims that Linda could make on the song.

I do not challenge the narrative of injustice against Solomon Linda and his family.[27] The premise of a composer, unjustly deprived of the right to benefit from his music is a powerful tale within the confines of our understanding of how copyright works. I do however want to raise an issue that the settlement of this case allowed to be elided. Did Solomon Linda (along with Gallo records) himself have a right to the song in the first place? Was it truly an original piece or was it a copy or derivative of a traditional song that was sung in his home village in the rural areas? If so, copyright law at the time would have made the song unoriginal and Linda and Gallo records would not have been allowed to claim copyright over it. That they nevertheless did raises the specter that I am concerned with in this article: was the original act of recording the song an act of cultural piracy that misappropriated traditional knowledge?

Had the case gone further in South African courts, there was a clear defense that would have been available to Disney/Abilene records in the case. A classic response would be to challenge Linda's authorship of the song in the first place. If Disney could prove that Linda did NOT originate the song because what he did was in the public domain (in this case, a traditional song), then they would owe him and his family nothing. In fact, this is exactly what Disney did, and Dean acknowledges that this was a real threat to the success of any legal action to claim damages under copyright.[28]

Of course, Disney's success on such a claim would not truly address the harm that was a large part of the case made in support of Linda: the authenticity of the song's link to Zulu tradition and the misappropriation of a TCE. In fact, one way to prevent Disney from succeeding

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[22] Dean (n 19).
[23] ibid. See also Herman Blignaut, 'South Africa: Copyright - "The Lion Sleeps Tonight"' (2005) 16 Ent LR.
[24] Dean (n 19).
[25] ibid.
[26] ibid.
[27] See e.g. Sharon LaFraniere, In the Jungle, the Unjust Jungle, a Small Victory, N.Y. TIMES, 2 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; Madhavi Sunder, "Free. Fair. Share. Care." TEDxUCDavis - https://www.youtube.com/watch?v=CZmkF8xk_Lk&feature=share
[28] Dean (n 19). Dean elaborates on this is in a personal email as a significant concern of his during the litigation, to the extent that he had identified a musicologist who would have testified as to the source and originality of Mbube as belonging to Solomon Linda. (July 12, 2021 Email - on file with the author)

in its defense would be to make such a defense unavailable in the context of TCEs i.e. Disney could not claim that the song was in the public domain because it was protected by the rights of the traditional community, of which Linda was a part. However, for Linda to succeed in such a hypothetical scenario, he would have had to have been in compliance with the rules and traditions for someone in the community to take its knowledge and exploit it for their own individual benefit. Hence the question: was Solomon Linda a cultural pirate? Did he "exit" his community and use the work, in ways that complied with his obligations to that community? In order to answer that question, we have to first establish what the status of the song was when Linda and Gallo made their sound recording.

The story of Linda in this article parallels the story that Arewa[29] tells in her article about blues musician Robert Johnson, both in the questions about the extent to which he individually benefited from being able to make copyright claims to blues compositions but also in the ways that he did so while operating in an ecosystem of production that allowed for extensive borrowing, in ways that record companies and other largely white artists used to appropriate blues into broader popular culture. Kevin Greene also provides some parallel insight in his examination and comparison of how the US Copyright system systematically excluded black women blues artists and the ways in which indigenous peoples and communities are excluded from the intellectual property system by placing their work into the public domain.[30]

This article also addresses similar issues to that of Manuel's exploration of the origins of the song "Guantanamera", where the issue of attribution is fundamental to both explorations.[31] Manuel studies the evolution of the song "Guantanamera" and the subsequent disputes about its authorship, and is especially enlightening about the moment of interface between the 'folk' origins of the song and the oral tradition of composition surrounding the song.[32] He reflects on how disputes about the song overlap and conflict with differing conceptions of intellectual property rights.[33] The research on the song and its origins challenges the standard story of who originally composed the song and highlights the questionable claims of the urban Jose Fernandez Diaz who may have laid claim to either an earlier composition or an earlier traditional/folk song.[34] The analysis in this paper borrows from the basic structure of Manuel's analysis by both digging into the story of the specific song, but also placing it in the broader tradition and context from which it sprang and concludes by examining the implications for how intellectual property frameworks should engage with such material. Manuel ends with a thought similar to my own; that excavations of stories such as Mbube and Guantanamera suggest that the pure idea of

[29] Olufunmilayo B Arewa, 'Blues Lives: Promise and Perils of Musical Copyright' (2010) 27 Cardozo Arts and Entertainment Law Journal 573.
[30] KJ Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (2008) 16 American University Journal of Gender, Social Policy & the Law 365.
[31] Peter Manuel, 'The Saga of a Song: Authorship and Ownership in the Case of "Guantanamera"' (2006) 27 Latin American Music Review 121.
[32] ibid. at 123.
[33] ibid. at 121.
[34] ibid. at 130.

Westerners taking culture from marginalized artists and communities is complicated by the role that insiders play.[35]

4 The origin myth

"The Lion Sleeps Tonight/Mbube" has been the subject of many articles, many primarily concerned with it as evidence of misappropriation and mistreatment of an author, from a traditionally underrepresented group.[36] Much of the discussion around the case, in order to make a strong case of misappropriation, emphasized both the original contribution made by Solomon Linda and the unique circumstances of the song's creation. Owen Dean, the lawyer for the family states in his account of the lawsuit and its settlement:

> In 1939 Linda found himself before a microphone in the Gallo studio, improvising falsetto vocal lines against a rolling, driving vocal chant. He called the song, "MBUBE" or "Lion" in Zulu. On the third take, Linda came up with a haunting skein of notes that went on to become the most famous melody ever to emerge from Africa.[37]

Dean emphasizes the unique original contribution made by Linda. Linda is seen to have created, out of whole cloth, the falsetto vocal line and he "came up' with the core melody. Dean, at least in introduction, describes Linda as:

> an uneducated Zulu tribesman and a gifted composer and performer of music. He migrated to Johannesburg and took up a job as the cleaner in a storeroom at Gallo Records, Johannesburg's first recording studio in the 1930s. By night, he performed at the local shebeens and gathering places together with a group called "The Evening Birds".[38]

Importantly, Dean emphasizes[39] the authenticity of Linda by making it clear that he is a Zulu tribesman, suggesting that at least some of his claim to justice comes from his status as a Zulu, who was less sophisticated and less educated than his interlocutors in the recording industry. What Dean also notes, and is important for us to keep in mind, is that he (Dean) was primarily retained by Gallo records[40] and so his story does not discuss whether Gallo records itself behaved in any manner that was unfair to Linda himself or to the Zulu community writ large. His brief did not extend to questioning whether Gallo had a right to record the music in the first place. As he notes, his mandate was limited to the following:

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[35] ibid. at 142.
[36] See Madhavi Sunder, 'IP³' (2006) 59 Stanford Law Review 257.;Madhavi Sunder, 'Copyright Law for the Participation Age' (2014) 40 Ohio Norther University Law Review 359. at 365-366.; Matome Ratiba, *"The sleeping lion needed protection" – lessons from the Mbube (Lion King) debacle*, 7 JICLT 1–10, (2012). at 2; Håvard Ovesen and Adam Haupt, 'Vindicating Capital: Heroes and Villains in A Lion's Trail' (2011) 61 Ilha Do Desterro 73. Wassel (n 12).; Karanja (n 8). at 183 – 185.; Greene (n 30). at 384.
[37] Dean (n 19).
[38] ibid.
[39] ibid.
[40] ibid.

> to find a way, and to do everything possible, to enable the children of Solomon Linda, the composer of a song called MBUBE, which later evolved into the international hit song THE LION SLEEPS TONIGHT, to derive some financial benefit from the considerable revenues generated by the popularity of THE LION SLEEPS TONIGHT. You should recommend any reasonable course of action which you can conceive and we are willing to finance it even if it means conducting litigation abroad.[41]

Why did Gallo take up this case on behalf of the family? It turns out that they initially planned to support the litigation, in partnership with Malan and the family after a concerted publicity campaign, but partway through the process, essentially when Disney was joined as a defendant, Gallo withdrew its financial support for the case, because its partnership with a South African film distributor linked to Disney was under threat.[42] What is clear is that, despite its attempt to vindicate its own claims, one of the original sinners of misappropriation from Linda was Gallo and its own practices during that time. The case would have revealed Gallo's own practices and its own culpability which has tended to be elided in the current popular culture telling of the story and in the story of the case itself.[43]

Within this origin myth, some broader facts are also evident. Solomon Linda was one of the first practitioners of a South African urban musical genre now known as *isicathamiya*, which had both a physical dance and musical thematic component. Primarily an urban phenomenon that started during World War I (WW1),[44] it was performed, almost exclusively, by men who had migrated to Johannesburg for work from the rural areas of Zululand, in present-day Kwazulu-Natal, South Africa.[45] Malan's story suggests that Linda and his young friends in the rural village were already performing at weddings and feasts and incorporating the style into their renditions of traditional Zulu songs.[46] Malan also emphasizes however, how much *composing* Linda did, drawing on his experiences of life in the new townships, writing original songs that became the basis for his own growing fame and that of his group, the Evening Birds.[47] Gunner also notes that Linda did a lot of composing subsequent to this of songs of his own that were not traditional songs and that focused on the urban experience in the township and the relation to the 'system' of segregation and capitalist exploitation in South Africa.[48]

Malan emphasizes Linda's fame, the idea that he was the "Elvis Presley" of the style and the township scene.[49] It therefore makes sense that he was found and brought into Gallo by a

[41] ibid.
[42] Malan (n 21). Dean (n 19).
[43] Ovesen and Haupt (n 36). at 85.
[44] Veit Erlmann, 'Migration and Performance: Zulu Migrant Workers' Isicathamiya Performance in South Africa, 1890-1950' (1990) 34 Ethnomusicology 199. at 207.
[45] ibid. at 199.
[46] Malan (n 21).
[47] ibid.
[48] Liz Gunner, 'Zulu Choral Music—Performing Identities in a New State' (2006) 37 Research in African Literatures 83. at 187 citing Erlmann at 171.
[49] Malan (n 21).

talent scout[50] rather than Linda simply being "discovered" working as a janitor. Malan also makes clear that there were several sessions of recording with Griffiths Motsieloa, the Gallo producer and talent scout, and that Mbube was recorded in the second session.[51] The process of recording is something heard from both Malan's[52] and Dean's accounts: there were two bad takes and then a third one in which Linda's genius came to the fore where he 'created' the unique elements of the song. Malan does not tell us whether the song was one that the Evening Birds had already been singing or whether it was created bespoke, in the studio. Dean believes it was created spontaneously in the studio.[53] Rob Allingham, Gallo Music's Archivist suggests that this moment of creation took place at the end of the second take[54] but he also reflects Dean and Malan's characterization of the extraordinary ability and creativity of Linda.

More importantly, Solon Linda and the Evening Birds were a strong vibrant pre-existing group performing and doing well in the musical environment of the Gold Reef in Johannesburg and the migrant hostel culture that existed there.[55] The group was a cohesive unit, led by Linda, consisting of his 'homeboys', men he had known from age mate groups in Msinga, the area of Zululand where they were born and went to school.[56] Again, this suggests less the process of surprise discovery of a 'diamond in the rough' and much more the harvesting of a mature, successful and well known group. Erlmann also notes that Linda was working as a packer at Gallo records when his group drew the attention of Griffith Motsieloa.[57]

Gallo Records is an interesting participant in the development of *isicathamiya* music and urban black South African music in general. Begun in 1926[58], Gallo was the premier record company in South Africa and dominated the local market in African music, compared to the foreign firms such as HMV and Columbia Records that catered to a local white audience. The origin myth emphasizes the role of the company in providing a means and a way to record the song and the supposed alchemy of the recording studio. This is made clear in the back and forth between Linda and the producer Motsieloa, who Malan notes is the one who brought in additional musicians after his assessment that the first two tries 'did not work', and the eureka moment when the third finally did. The story by Malan raises the question of how much of the key components of the song existed before Linda walked into that recording studio. Do we know what version of the song Linda and the Evening Birds, his band, were singing in the township? The next section examines in more detail what evidence exists for an original traditional song, and what it suggests was the true nature of Mbube as recorded by Linda and the Evening Birds.

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[50] ibid.
[51] ibid.
[52] ibid.
[53] Dean (n 19).
[54] Cullman (n 20). at 13.30.
[55] Erlmann (n 44). at 211.
[56] ibid. at 210.
[57] ibid. at 212.
[58] Lara Allen, 'Preserving a Nation's Heritage: The Gallo Music Archive and South African Popular Music' (2007) 54 Fontes Artis Musicae 263. at 266.

5 Is Mbube a traditional Zulu song, or is it based on a traditional Zulu song?

The question is in this section comes down to trying to understand whether such an original song existed, what contribution Linda made that differentiated it, and how this song related to the broader established genre of which it was a part. Was there such a traditional song? Do we have any evidence of what that original song sounded like and what the differences were between that song and Linda's Mbube?

5.1 The nature of Isicathamiya as a musical tradition

Some insight can be gained from musicological and other research into the roots and methods of what finally came to called *isicathamiya* music and its relationship to traditional Zulu music.[59] The genre was an urban phenomenon,[60] bred in the townships of Durban and Johannesburg, forced into the long nighttime sessions by segregation and white supremacist rule.[61] It was always contemporary in that it described and expressed the moment and the time, as it continues to do, to this day.[62] In Johannesburg in particular, you have a city that sucked in migrant workers from all over Southern Africa but insisted on segregating them by ethnicity in hostels near the mines.[63] This made for an environment of significant interaction during work while maintaining strong communal cultural ties. This provided a well-structured interaction for learning and interaction without dissolution of separate cultural performance styles. Simultaneously, the reliance by the white city center on black labor meant that the townships also quickly filled with more permanent residents, who were much more residentially mixed both ethnically and in terms of social class and provided a huge audience for the music being performed by African performers.[64] One component of the social structure was a well-educated (largely in Christian mission schools), significantly westernized elite who worked as educators, lawyers, clerks in government among other things and, who saw themselves as part of a common social unit, a vanguard of sorts.[65] This cohort was also evident in the regional areas from which they came (in Durban, or Cape Town) and so maintained their separate ethic identities, even as they cooperated on a class and race basis to interact with the white power structure in Johannesburg. This group were both producers and consumers of music and were not inclined to champion less 'westernized' forms of musical and performance traditions. Another significant category was migrant and industrial workers as well as domestic workers who did much of the unskilled labor in Johannesburg and presented a mass audience in the entertainment venues of the township, primarily the nominally illegal bars and restaurants (shebeens). As Coplan notes,

[59] Erlmann (n 44). Gunner (n 48).
[60] Gunner (n 48).at 84.
[61] Malan (n 21).
[62] Gunner (n 48). at 87.
[63] Veit Erlmann, *African Stars: Studies in Black South African Performance* (University of Chicago Press 1991). at 7 – 8.
[64] David Coplan, 'The African Musician and the Development of the Johannesburg Entertainment Industry,1900-1960' (1979) 5 Journal of Southern African Studies 135. at 135 – 136.
[65] ibid. at 136.

the groups were not truly separate audiences but tended to meet in community spaces such as churches and community halls for events such as music competitions.[66]

The nature of the audience and the producers meant that *isicathamiya* and other urban forms were always in tension with the link to tradition which was necessary for a claim to authenticity.[67] The constant pressure of migrant labor, the constant flow of men and women from the rural areas to the city, where they were not allowed to permanently settle, required by racial capitalism kept alive the link to traditional music that remains a part of the genre. Significant elements of the genre also had their roots in the early encounter with Black American spiritual and minstrel music, first in urban areas but even reaching rural areas through mission schools.[68] In the early years, the genre was synonymous with the name of Linda's song and was called 'imbube' so closely identified was it with its most well-known early practitioners.[69] Gunner also notes the highly communal, easy informal exchange, building off, appropriation, re-use and incorporation that developed in a tight knit community of performers and composers who clearly did not rely on any formal copyright mechanism for their performance and success.[70] Linda and the genre, despite becoming involved with Gallo records, developed in a community where the border between specific songs, and the ability to sometimes copy elements, or build on others work, copy/comment on another group's performance, draw on experiences from home were all part of the process of creation and listening, the process of participating in *isicathamiya*. It makes sense then that Linda would feel free to use or derive a song like Mbube from songs he grew up with or that were sung in the rural areas from which he and his peers migrated to the city.

Some more details can be found from Veit Erlmann's masterful work and research into *isicathamiya*. Erlmann makes it very clear that the urban practices of early precursors of *isicathamiya* fed into traditional music in the rural areas and vice versa.[71] That rural music, while working within tradition, adopted and adapted those earlier urban forms into traditional songs. Sithole states that these rural areas were also sites of original composition by luminaries such as Reuben. T. Caluza, a composer and a performer, self-consciously developing an elite Africa interpretation of traditional Zulu music which he brought to Johannesburg as a performer. The rural mode of production was a place of composition, complicating the story of a static, rural source of music which was simply taken into the urban arena but instead presenting a co-creation space also likely drawing on traditional music.

Sithole also points to Ngoma and traditional Zulu praise poetry to re-emphasize the role of the choir leader in generating extemporaneous verbal patter at the beginning of performances,

[66] ibid. at 137.
[67] Gunner (n 48). at 85.
[68] ibid.at 86. See also Erlmann (n 44). at 203.
[69] Gunner (n 48). at 87.
[70] ibid. at 88.
[71] Erlmann (n 44).at 205.

accompanied by significant improvisation during the performance.[72] This reflects the tradition in which Linda also performed as leader of the Evening Birds, and illuminates the 'creative' moment in the studio which the origin myths of Mbube seem to emphasize over and over again. That mechanism of creation wasn't unique to Linda but was part of a tradition of choir leaders engaging in improvisation. Thus perhaps both stories can be true: Linda provided something uniquely creative in the studio (as he would during any performance) but that the 'work', the song Mbube, had its roots, if not its entire existence, in a precursor piece of music, whether that was composed, written by some other rural composer or created and performed traditionally.

There is an interplay between the primarily urban modes which immediately preceded early *isicathamiya* (styles as *mnyuziki* and, "*isikhunzi*", "*isikhwele jo*", then "*cothoza mfana*"[73]), and *Ngoma* music which used primarily rural idioms and references (including traditional wedding songs *(izingoma zomtshado*).[74] Ngoma was both an immediate pre-cursor and a beneficiary of these urban forms and the evidence suggests that, at a minimum, there was a shared musical style, especially the use of four part harmony, differentiated by the presentation and associated dance.[75] *Isicathamiya* adopted not only elements of dance from Ngoma but also compositional style and subject matter.[76] The fact that some have argued that Mbube is likely based on a traditional wedding song[77], seems to reflect the idea that Linda and his cohort would perform at weddings and that such a song was likely to have been heard or performed by them in this rural environment, reflecting the already rural/urban hybridized style from which *isicathamiya* draws. The names of *isicathamiya* groups, the manner in which they were organized in teams also reflected structures of youth group socialization from the rural areas, again evidence of significant continuity between the rural and the urban.[78] More importantly, it suggests that there may have been a flow of songs *per se* that were performed in the different styles but that were recognizable, and perhaps even essentially the same, to the men who migrated back and forth between the city and the rural areas. To put it more strongly, as Erlmann argues:

> "rural and urban performance practices were part of the same culture that had begun to permeate the whole society. Rural practices not only depended for their survival, evolution and functionality on the feedback from the cities, in certain areas and during specific historical periods they were even inseparably enmeshed with urban culture."[79]

[72] Elkin Thamsanqa Sithole, 'Ngoma Music among the Zulu' in John Blacking and J Keali'inohomoku (eds), *The Performing Arts: Music and Dance* (Mouton 1979). at 280.
[73] See Cullman (n 20). at 14.20. Also, Sithole (n 72). at 279.
[74] Erlmann (n 44). at 206.
[75] ibid.
[76] ibid.
[77] Ratiba (n 36). At 2.
[78] Joseph Shabalala and Veit Erlmann, 'A Conversation with Joseph Shabalala of Ladysmith Black Mambazo. Aspects of African Performers' Life Stories' (1989) 31 The World of Music 31. at 41.
[79] Erlmann (n 44). at 200.

The 'traditional' nature of this music, in the popular culture of the understanding of the term, is also challenged by the fact that much of this music reflected westernization and was a truly hybrid, syncretic form. The evidence is that, at least as far as *isicathamiya* was concerned, there was likely no purely traditional rural from which he drew but an ongoing creative hybridization and exchange community. As Erlmann, so succinctly concludes:

> "What seems to emerge from the prehistory of *isicathamiya*, is the fact that it can by no means simply be construed as a case of transformation of a "traditional" rural performance tradition through rural urban migration. Not only had the changed social relations in the countryside long produced cultural formations that contained strong admixtures or urban cultural practices, but the agents of these transformations were often within the same generation."[80]

The very first instances of *isicathamiya* that Erlmann finds, the Crocodiles and the Durban Evening Birds, performed both rural and urban forms from *ingoma zomtshado* to *isikhunzi*, showing that there was indeed a flow of songs per se, not just of styles.[81] This increases the chances that the song that Linda recorded was indeed a pre-existing one that at best was adapted to *isicathamiya* performance and recorded at Gallo. Erlmann points to a broad community of performers and composers up and down Zulu class structure who performed all the styles of extant music in differing emphases and proportion.[82]

The early *isicathamiya* performers were therefore quite catholic in their performances and musical choices performing music from rural and urban areas.[83] The competition structure in which they all performed also meant that group would perform the same or similar 'sets' on competition nights providing their own interpretations of songs that others were performing.[84]

5.2 Evidence for Mbube as a pre-existing song

Understanding the milieu in which *isicathamiya* developed and in which Solomon Linda himself was participating, what evidence is there of an original song?

There is a tantalizing gap here in the narrative of Mbube that either reflects a simple factual evidentiary gap, or perhaps more accurately represents the confusion around the complex hybridity and flow of music between the rural and urban areas, as well as the formal and informal composition practices between well-educated and poorer working class Zulus. In his argument, Ratiba[85] cites to Gunner[86], who cites from Erlmann for the fact that Mbube WAS

[80] ibid. at 207.
[81] ibid. at 209.
[82] ibid.
[83] ibid.
[84] ibid. at 214.
[85] Ratiba (n 36). at 2.
[86] Gunner (n 48). at 86-87.

indeed a wedding song that was sung by young girls in weddings in Msinga where Linda grew up. Erlmann himself states this to be true basing his statement on interviews with at least one of the original members of the Evening Birds.[87] He states this almost in passing, less concerned with the originality of the song and more with Linda's originality in innovating the genre.

Dean is convinced, based on his own discussions with the family and with an early consultation with a traditional Zulu musicologist (the name and record of whom has been misplaced) that it was not a traditional song but one that at the least Linda created in the studio.[88] Malan's article focuses intensely on the creative moment in the studio, but does not point to the source of that narrative fact.[89]

Almost all citations for the fact that Mbube was a traditional wedding song cite to Erlmann's *African Stars*.[90] Specifically, Erlmann notes that it refers to a specific incident from Linda's youth in which he and several herd boys killed a lion.[91] Several key notes come from Erlmann's finding. The first is that Mbube was similar to many other *isicathamiya* songs in that it was 'based on' traditional songs.[92] The phrase 'based on' covers a multitude of sins, and can range from a pure 'cover' of the song, to a new arrangement or interpretation which if sufficiently different would count as a derivative work. What it likely is NOT is a wholly original piece of work within a genre or style deserving of copyright independently. On this, although not making a legal statement, Erlmann is quite clear:

> "While neither the words of 'Mbube' nor its anchorage in a wedding song were particularly original, in the view of Evening Birds member Gilbert Madondo, it was Linda's performance style in conjunction with a number of other innovations that revolutionized migrant workers' choral performance."[93]

Thus, based on his interview with at least one extant member of the Evening Birds, Mbube was NOT an original work, it was at a minimum derived from a wedding song composed and sung by girls at weddings in Msinga. As noted, this doesn't preclude Mbube itself from being an original song, just that its original composition took place in Msinga and was not to be credited, in a traditional copyright manner, to Linda but to some unknown composer or set of composers. Especially noting how the rural areas were venues for creativity and not simply static transmitters of traditional music, this seems more than plausible. It also does not preclude the participation of Linda in the process of creation of the song given that the story is that the song was created in response to an event in which he was one of the main protagonists i.e. the killing of the lion.

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[87] Erlmann (n 63). at 167.
[88] Owen Dean, July 12, 2021 Email - on file with the author.
[89] Malan (n 21).
[90] Erlmann (n 63).
[91] Erlmann (n 44). at 212.
[92] ibid.
[93] ibid.

This should NOT detract from Linda's role as an innovative and genre creating musician. Linda was the first to truly concretize the style and genre of *isicathamiya* or *imbube* music. However, the song Mbube may suffer however from being one of the first true exemplars of a genre or style, a conflict that makes it difficult to distinguish an early original piece of work from subsequent adoption of that genre or style. We see this conflict most recently in the Marvin Gaye litigation over 'Blurred Lines" and whether what was taken from Marvin Gaye's original song was the genre style, or the specifics of the particular piece of music.[94] It is also clear that Linda himself was a composer, which was the practice of the leaders of almost all the *isicathamiya* groups, just perhaps not this particular song.

We return at the end here to the core factual question: was Linda's composition original in the copyright sense and thus deserving of copyright protection? Was it a derivative work in the copyright protection, in which case, did he violate the copyright in an underlying work which itself was original? Or did he create a work that was derivative of a traditional song over which there was no copyright, in which case he did not violate copyright norms, but he may have violated the norms of the traditional community from which came? Finally, did he simply perform a traditional song and record it, in which case, he would have violated copyright norms and was not deserving of copyright protection and did he also violate the norms of the community from which he came? The answer appears to be: No, it was likely not original in the copyright sense and was not deserving of copyright protection on that basis; at best it was a derivative work for which perhaps some of the additional elements, such as the falsetto added in the studio, might receive protection; he likely recorded a 'traditional' song but one which he was performing within the rules of the community in which he was practicing. The question of whether the act of recording was within the rule of the community from which he came, and especially if that recoding acted to preclude others from performing or recording that song is discussed next.

5.3 Did Linda comply with the norms of the community from which he came?

The discussion on the sources of *isicathamiya* makes it clear that while rooted in Zulu tradition, *isicathamiya* and Mbube in particular likely did not come from some static rural tradition. They arose in a vibrant, hybridizing rural/urban culture within which there was no controlling Zulu state or Zulu tradition in which urban modes of composition and performance were separate from those of the westernized forms. There were composers, such as RT Caluza, who wrote original works and had them published under copyright, but there were also those who composed within informal mechanisms and did not publish and the latter worked within a tradition of free performance and borrowing. Linda was clearly one of the latter.

[94] See e.g. Toni Lester, 'Blurred Lines-Where Copyright Ends and Cultural Appropriation Begins-The Case of Robin Thicke versus Bridgeport Music and the Estate of Marvin Gaye' (2013) 36 Hastings Comm & Ent LJ 217.; Suzanne Kessler and others, 'Bringing Blurred Lines into Focus' [2016] Belmont Law Review 103.

"Folk" or "indigenous" or "ethnic" music is plagued by the insider "exit" problem. The translators of the music tend to be people who are part of the community who then make it available outside the community. In tracing the chain of misappropriation in Linda's case, I want to argue that, while the clearest and easiest place to point to is the moment that Gallo sends the music to the US and it is transcribed and recorded by Pete Seeger who then lays at least some partial claim to the composition, the most effective place to go is when Linda steps outside his community to record the song with Gallo records. In doing this, I think we can set the boundary by looking at this as a move outside the creative community in terms of WHO Linda collaborates with i.e. in the context of South Africa, a white owned commercial actor with no ownership, participation, or pre-existing duties to the community from which he came. This was an act that by the very virtue of recording the song, established and precluded others from commercializing the song in this *specific* way, in violation of the pre-existing pattern of creation and consumption in which Linda had previously participated. If he had followed the rules of his community, others should have been able to both perform, as they had been, the song Mbube, AND record their own versions. The recording with Gallo precludes others in his community from engaging in that specific form of exploitation of the song.

This framework however, would NOT have precluded Linda from registering and publishing the song as a composition, provided it was original. The creative community of which he was a part had already been engaging in that kind of activity and composers such as RT Caluza and his kind were active contributors to the development of *isicathamiya* and related musical forms. Thus we don't need to argue about the 'traditionality' and originality of Linda's Mbube here, but we look to the manner in which he violated the creative norms of his community by going outside the community and engaging in a form of commercialization that excludes the same or similar norms of consumption of the work. To emphasize, the violation of duty here then would be twofold – both ***with whom*** he collaborated with and ***the manner*** in which he did so. First, he collaborated with Gallo without ensuring that Gallo took on similar obligations and duties as he had to his community. Second, he engaged in a form of commercialization that had NOT been engaged within by his creative community and in doing so violated his own obligations to ensure that his own creative work was subject to the same rules of access, sharing and exchange that he had used to create his own work.

One problem with the above analysis is that the timing of the recordings, including that of Mbube, was part of a broader attempt by record companies to move into the new black urban market and had begun scouting and recruiting groups and singers to record. Recording may actually have been part of the norms of the community. While Gallo was the largest such actor in the pre-WWII era, other companies such as Columbia and HMV records were also active.[95] The recording industry in South Africa had been active as far back as 1908 with sales of ragtime and coon songs. From 1928, South African artists were sent to London by Gallo to record, until a full

[95] Erlmann (n 44). at 209.

recording studio was set up in 1932.[96] Much of this music was recordings of English folk standards, hymns, traditional African folk songs (undefined as originally composed by any specific person),[97] setting a pattern of recording African oriented music outside of a rights framework for the underlying musical compositions. The record companies retained the sound recording (or phonogram) rights, but no particular performer or composer actually benefited, and there was no-one whose permission was needed to engage in recordings. This was aided by the fact that the vast majority of the songs recorded were by miners and other migrant workers[98] who had no tradition or practice of claiming composition rights and/or publishing music which would be the basis for claiming rights. As Allingham points out, this was consistent with the practice of the industry which did not concern itself with composition rights, even where a local African composer might actually have been identified.[99]

There are few if any composer credits on many of the early recordings, which presents an industry practice, but can also be thought of as a practice of the underlying performance community in which, while credit for the original composition can be found, neither the act of performance, or the act of recording prevented others in the community from engaging in performance or even recording of the same song. This is true even in the practice of the more well-educated elite such as RT Caluza. In fact, Caluza recorded some of his own original compositions with his Double Quartet in 1930 for HMV along with songs credited to folk or other composers.[100] There is no evidence that Caluza sought to prevent others from recording his songs. Allingham points out that much of what passed for a music publishing industry was primarily driven by composers themselves, set up as a means of selling their own sheet music, but not as part of a broader musical publishing industry that connected with the recording industry.[101] At least in the early days of a formalizing music industry, such publishing did not entail preventing others from recording music. In fact, with the structure of copyright in South Africa and the broader British Commonwealth, a system called Copyright Control was in effect in which a simple declaration of a promise to pay royalties to a composer, to be identified at some point in the future if at all, was enough.[102] This allowed multiple recordings of a song where copyright of the underlying song was unknown, or in which the composer never asserted composition or publishing rights. Even where a composer was known, the practice of recording companies such as EMI, was to simply state "Copyright Control" and never register a publishing copyright for the composer. This means that mechanical royalties rarely if ever actually had to be paid out to a local composer.[103]

[96] Coplan (n 64). at 143.
[97] ibid.
[98] ibid. at 144.
[99] Rob Allingham, 'From "Noma Kumnyama" to "Pata Pata": A History' (2009) 8 African Music 117. at 119.
[100] Coplan (n 64).
[101] Allingham (n 99). at 119.
[102] ibid. at 119.
[103] ibid. at 121.

One practice that Erlmann points to is that many groups recorded "folk songs" that were popular and well known[104], without necessarily claiming copyright over the underlying songs. Other groups were not prevented from recording their own or the traditional version of the song. This is different from the case of Mbube whose claim rests on the claim of originality that Linda makes and therefore would have been a basis for Gallo to prevent other performances and recordings of Mbube in South Africa.

We know that many groups recorded songs on their own albums that other groups had already recorded, including, confusingly, an album by another group also called the Evening Birds that covered some of the same repertoire with a singer who sounded very similar to Linda himself.[105] For the most part, these recordings were not seen as a primary means of earning a living by many of these performers but perhaps as ways of expanding their audience for live work.[106] In fact, many performing groups became leery of recording their music as the shebeens[107] and other live venues where they performed became increasingly able to buy gramophones and preferred to sometimes play recorded music than pay or make room for live music.[108]

This complicates our understanding of what was common in the community but does not negate the basic underlying premise that the community understood that there was a specific kind of sharing and right to use underlying songs, even if it was for recording because the act of recording did not exclude them from being able to perform and adapt the song. In the context of Mbube, because the underlying work consists of both an exclusive claim to the composition AND the sound recording, there is an exclusionary effect. At least for the informal composers in the *isicathamiya* field there appeared to be no practice of registering and claiming copyright in their compositions[109], even while there existed a system of acknowledging authorship and that this did not necessarily prevent other groups from directly singing or performing works derivative of other compositions.

The evidence suggests, albeit as a somewhat closer call, that Linda, in recording Mbube, did not comply with the duties he owed to his community, at least as far as the community of practice is concerned. There was no legal obligation to do so, nor was there a specific legal prohibition from within the practice of the extremely weak and ineffective Zulu state of that time. While there may be some as yet unfound evidence from anthropological work, there is no evidence that there was a 'traditional' prohibition in Zulu custom preventing him from engaging

[104] Erlmann (n 44).
[105] ibid. at 214.
[106] Coplan (n 64). at 144-145.
[107] Shebeens are a combination of private home, small communal gathering space, illegal tavern and performance spaces in which much of social life in the townships took place outside of the formally endorsed and white controlled and sanctioned halls. David Coplan, 'The Urbanisation of African Music: Some Theoretical Observations' (1982) 2 Popular Music 112. at 115.
[108] Coplan (n 64). at 144.
[109] Allingham (n 99). at 120, noting the example of Alson Mkhize, another prolific Mbube group leader.

in the kind of privatization he did. This does not mean that he had no duty, but that it was not codified. Where a system of protection for traditional knowledge existed, as it does in present day South Africa, then we can imagine a much stronger duty being placed on Linda. Based on the analysis above, what lessons should we take forward from the story of Solomon Linda for addressing traditional knowledge? The next section looks at that piece of the puzzle.

6 Lessons to be learned from the story of Mbube

6.1 The need for protection of TK and TCEs based on sovereign-like control over persons and works

If Linda simply performed, with some small variations, a traditional Zulu song, then neither he nor Gallo records should ever have received copyright on it. The problem, however, is that under traditional copyright norms, the traditional Zulu song would also NOT have received copyright protection. It would have had no original author, although perhaps some argument could be made for the girls in his home village. It would have not been fixed in any medium (as was the case under US copyright law) and likely not copyrightable under British copyright law[110] at the time. The traditional song would have been considered a part of the public domain which was free for all to use, but would not have benefited Linda or Gallo records as a composition or sound recording. In that sense, Linda and Gallo can be considered to have misappropriated and privatized a piece of the public domain without having added anything new, a violation of copyright norms.

If Linda can be considered to have created a derivative work, one that is based on a prior work but has significant original components added by someone else to make it a new work, then he may have had a right to copyright under traditional copyright norms. That would mean that Linda's Mbube would have protection for those elements of the song that he added that were ostensibly original to him i.e. the falsetto vocals and melody. Making a derivative of something that is in the public domain is the *sine qua non* of the copyright justification. However, this approach of giving due credit to Linda still relegates the prior Zulu song to something that was publicly available to use and rewards Linda for privatizing an element of his traditional culture for his own benefit without sharing that back to his community. Even the falsetto that Linda added in the song was likely not just a spontaneous innovation in the studio but was part of an existing tradition in which such falsetto ad-libbing was part of both traditional Zulu vocals (e.g. in regimental singing), as well as township practice.[111] This means that Linda was probably engaging in a creative act of cross-fertilization between existing genres, but was also engaging in the kind of improvisation that was already common in competitions happening around them in the township.

[110] British (Imperial) Copyright Act of 1911
[111] Erlmann (n 44). at 214.

Is there a way to reconcile the two visions of the implications of Mbube here: one that looks at the song and states that Linda did not do anything original and that the song was taken from a traditional community or one that states that Linda did something original but still engaged with a kind of misappropriation?

One approach is to work on the presumption that not just rights flow with creativity and work but that duties do so as well. Copyright traditionally does not recognize that such duties exist, except perhaps in contractual arrangements made around joint works, collectives and other such enterprises. I and others argue for a separate and distinct form of protection for traditional knowledge and traditional cultural expressions precisely because the attempt to stretch copyright to accommodate these concerns weakens and makes copyright less effective as a tool for commercialization of specific kinds of work.[112] A separate form of protection makes the boundary definition issue easier i.e. by focusing on the cultural/creative communities that have moral, ethical and historical claims to a separate mode and form of creation, expression and consumption of cultural goods and services. Of course, we can discuss a continuum but it means that indigenous and traditional polities with independent claims to political and cultural sovereignty have the strongest claims to being such a cultural/community with its own norms, rules and duties. Only on that basis would we be able to establish that duties and obligations need to be attached to BOTH the work and the person from the community when they exit/work outside the community. Linda's story suggests that absent such control, we are left with constructing communities of practice that have primarily moral claims, such as the township isicathamiya community in which Linda lived or communities of creation around the Slender Man internet mythos, stand-up comedy, and the fashion industry among others.[113]

The story of Linda confirms the centrality of ensuring that systems for the protection of traditional knowledge and TCEs exist, not just in the indigenous and tribal communities but in the metropolitan states which contain the communities. The issue is then how the law of the metropolitan state should interact with the law of the community.

6.2 Insiders play a crucial role in misappropriation of TCEs

Linda's story also confirms the centrality of the insider to this kind of misappropriation. However, it also shows that there is real complexity in the fact that he was both a victim and a violator. Linda's moral claim to Mbube would be strengthened by a recognition that, yes, he did

[112] See e.g. Kuruk, 'Bridging the Gap between Traditional Knowledge and Intellectual Property Rights: Is Reciprocity an Answer?' (n 9)., Riley (n 13). and Karanja (n 8).

[113] See Cathay Smith, 'Beware the Slender Man: Intellectual Property and Internet Folklore' (2018) 70 Florida Law Review 601.; Elizabeth Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40 Florida State University Law Review 441.; Elizabeth Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34 Columbia Journal of Law & the Arts 317.; Michael J Madison and others, 'Constructing Commons in the Cultural Environment' (2010) 95 Cornell Law Review 657.; Dotan Oliar and Christopher Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94 Virginia Law Review 1787.; Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia Law Review 1687. See also Arewa (n 29).

add something to the traditional song, but that in doing so, he owed something to the traditional community from which he derived his work. This is the premise on which arguments for protection of traditional knowledge rely: that there is no single public domain, and that traditional communities have moral and legal claims to knowledge and cultural expressions that they generate.[114] The sense of injustice of seeing the song succeed without benefit to the community is what drives many arguments for providing protection of traditional knowledge and traditional cultural expressions.[115] However, actors from within the community, like Linda, who exit the community and privatize for their own benefit knowledge and cultural expressions they learned because they were a part of or members of the community present a problem for protection of traditional knowledge and traditional cultural expressions.[116] It allows actors like Gallo, who are outsiders, to find just one member of the traditional community, and as long as that member is willing to participate in the act of misappropriation, to claim that the person had every right to use the music and is not violating any moral or ethical obligations. This suggests that identifying the insider/outsider who is the vector for the misappropriation is crucial to any system of protection of TK and TCEs. However, the story of Linda also suggests that, both in terms of a specific song and more generally for a community, identifying the insider over whom to exert power and control may prove to be complex. For example, who is the insider in our tale? Perhaps it is not Linda but instead Griffiths Motsieloa the talent scout/producer who worked with Gallo. Griffiths was not himself Zulu but of Sotho origin, thus an outsider, but he was also part of the black urban class engaging in the slippery boundary between ethnicity and class, making him an insider. Coplan notes the role that Motsieloa specifically played a role as a gatekeeper for the recording companies by deciding what type of music was deserving of being recorded as a true representative of the culture.[117] His status as someone outside the traditional community, the ethnically Zulu tradition in which Mbube lived meant that he was an outsider coming in to take, as a person over whom the traditional community had no legal, moral or cultural claim.[118] In is his role as the person who brought Linda and the Evening Birds into Gallo, he clearly played the role of cultural 'miner', scraping the cultural resources from the township performance milieu for exploitation in the recording market using flat fee payments and the lack of composition rights to bifurcate the market. The experience here points to greater complexity of the mode of misappropriation that, while it still requires an insider to facilitate it (Linda) may involve several modes of insiderhood and outsiderhood. The question of race is unavoidable here, as 'blackness' in the South African context is one of the modes of community which Gallo relied on in its use of scouts and producers such as Motsieloa, to open the door and bring in black performers from

[114] See Kuruk, 'The Role of Customary Law under SUI Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge' (n 11). at 117.
[115] *Id*.
[116] As Ratiba acknowledges, it is the participant actor, the 'cross-over' artist who enables commodification and distribution of the TK and TCEs. See Ratiba (n 36). at 2.
[117] Coplan (n 64). at 143.
[118] Coplan points to several claims made by performers that Motsieloa imposed unfair terms on them or exploited them unfairly, although he also notes the difficult position Motsieloa was in as an employee carrying out the dictates of his capitalist boss. ibid. at 150-51.

whom to extract value for themselves. That blackness has its roots in a common community, but not a sovereign unit, such as the traditional Zulu with a common cultural set and pattern from which to draw norms.

We should also note that, as an insider, Linda and his role in the development of *isicathamiya* may represent the most typical way in which insiders interact with the outside world: on a continuous basis, moving back and forth feeding what they learn in the outside back into their community and taking from the community and feeding that into their work and participation in the wider world. This means that rules need to not just address one-time exits but the process and terms on which such continuous exchanges take place while maintaining the integrity of the community and its TK/TCEs, and the rights and integrity of the member of the community.

7 Conclusion

What framework does the Mbube/The Lion Sleeps tonight suggest for further work?

First, we will need to identify the insiders involved in the misappropriation, if any. The story of Linda cautions against using a simple binary and suggests that we should be willing to define individuals and institutions as sometimes embodying both simultaneously. The other is that we will need to live with some complexity around the definitions of the community where a person or institution can belong to more than one community and have rights and duties to those that overlap.

Second, we will need to identify the type of exit involved. Are we seeing a one-time permanent exit, such as can happen with a person migrating and giving up citizenship/membership and pledging loyalty to another sovereign/community? Is it one where a person is leaving temporarily to engage or live in another sovereign/community for some period of time without giving up their citizenship/membership? Is it one where the community member has multiple citizenships/memberships in different sovereigns/communities and has multiple duties and obligations and moves relatively continuously between those states/communities?

Third, to what extent, in the particular case, was the form of exit in line with the rules and forms dictated by the norms of the sovereign/community of origin (of the person and/or the TK/TCE). If the person or TK/TCE was covered by an existing sui generis legislation for protection of TK/TCE, was their exit in line with those rules? We should take the lesson from Solomon Linda's case that the community member may be both a victim of misappropriation themselves by being denied the benefits of protection and benefit by the outside system with which they interact, even as they fail to properly comply with the rules of their own community regarding the nature and forms of allowable exit and exchange with the outside.

The next step should be for scholars to revisit our narratives and understanding of the misappropriations of TK and TCEs that drove the adoption of national and regional systems of TK and TCE protection. We must assess the extent to which those narratives may be better characterized as problems of insiders exiting inappropriately than outsiders coming in independently and taking knowledge. The story of Solomon Linda and Mbube is a complex one. He was clearly a victim of injustice and the danger of research like that conducted in this paper is that it may appear to disregard or minimize the harm and pain suffered by actors such as Linda. However, the power of the story may also have blinded many interlocutors to the aspects of the case in which Linda and Gallo Records did not necessarily fully and equitably generate, and distribute the song. Boundary crossing insiders like Linda, present a vector by which culture from inside communities is shared with outsiders.

What this suggests for the appropriate legislation remains to be seen, but I would argue that where we understand insiders to be the problem, systems of recognition of customary law are likely to be better at addressing the problem than top down sui generis systems that do not recognize the balance between community rights and individual rights that each community must establish for itself. Further research will need to consider the legal theories under which the duties of the insider may travel with the work and place a burden on the outsider. In considering the further development of proposals for recognition of customary law, we will also need to survey those states and regions that have already attempted such an approach and evaluate their ability to address the types of exit identified in this article. Kuruk's survey from 2007[119] will need to be updated and expanded, focusing on evaluating the extent to which insiders are covered by the customary law in this area of TK/TCEs.

[119] Kuruk, 'The Role of Customary Law under SUI Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge' (n 11). In that survey, Kuruk identifies both regional and national approaches to recognition of customary law for traditional cultural expressions such as the Model Law for the Protection of Traditional Knowledge and Expressions of Culture from the Secretariat of the Pacific Community, Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, which did not preclude nor require the application of customary law.