

**BEFORE THE U.S. DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE**

WIPO IGC NEGOTIATIONS ON GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE

Docket No: PTO-C-2023-0019

January 22, 2024

COMMENTS OF THE NATIONAL MUSIC COUNCIL OF THE UNITED STATES

The National Music Council of the United States (“NMC”) is pleased to respond to the request for written comments from the US Patent and Trademark Office (“PTO”) regarding the ongoing World Intellectual Property Organization (WIPO) Intergovernmental Committee (“IGC”) discussions on traditional cultural expressions. Specifically, our comments address questions 16-19 as published in the Federal Register at 88 Fed. Reg. 204 (October 24, 2023).

1. Statement of Interest

NMC is the Congressionally chartered umbrella organization of the U.S. music community, with membership groups ranging from organizations that represent creators and copyright owners to those whose advocacy efforts concern the viewpoints of music educators and music-related retailers. The organization is currently celebrating its 84th year as a forum for the open discussion of America’s national music priorities and challenges.

Founded in 1940 to act as a clearinghouse for the shared opinions of its members --and to work to strengthen the importance of music in American lives and global culture-- NMC’s membership today has grown to almost 50 of America’s largest and most effective national music organizations, encompassing every important form of professional, commercial and educational musical activity. Through the cooperative work of its member organizations, NMC promotes and supports music and music education as an integral part of the curricula in the schools of our nation, and in the lives of its citizens. The Council provides for the exchange of information and coordination of efforts among its member organizations and speaks with one voice for the music community whenever an authoritative expression of opinion is desirable. For more information on NMC, and for a complete listing of its membership, please visit the organization’s website at www.musiccouncil.org.

2. Introduction

The following comments are respectfully intended to set forth the *general* views of the member organizations of NMC regarding the preservation and furtherance of traditional knowledge, cultural expression and indigenous works of art and folklore across all disciplines and genres throughout the United States and the world. These comments are not intended in any sense to set forth the full range of opinions held by our member organizations regarding actions suggested by WIPO, or any other international body or treaty regime, seeking to address the complex issue of protecting traditional works. Members agree, however, that the expansion of intellectual property laws to cover the protection of ideas and expressions that currently reside in the public domain is an extremely volatile and nuanced subject that raises myriad issues related to speech freedoms.

Rather, by these comments NMC seeks to encourage further discussion of how local and national music education and artistic development programs, sponsored by governments (perhaps as mandated by formal treaty obligations) and conducted in partnership with indigenous communities, might be established and *geared specifically toward preservation and furtherance of indigenous musical culture and other art forms*. NMC believes such programs, if adequately funded and responsibly managed, would yield economic, cultural, and spiritual benefits not only to indigenous peoples, but also to the larger societies and nations in which they now live. And those results are and should be our goals, in careful coordination with the indigenous groups themselves, who should meaningfully and fully share in program design and leadership.

3. The Historic Need for Corrective Action

NMC's membership organizations are acutely aware of the critical contributions that indigenous music and other art forms have made --and continue to make-- toward the progress of global and national culture, creativity, and commerce. Our groups strongly believe that supporting the preservation and celebration of such indigenous works need to be a high priority for governments and societies throughout the world, an obligation made even more poignant by the long history of the ill-treatment of indigenous peoples and the frequent, willful obliteration and uncredited appropriation of their traditional arts and culture in pursuit of political and economic subjugation, or worse.

The United States itself is no stranger to such acts of indigenous cultural destruction, which have taken place in every state and territory of the nation over a period of centuries. We are fortunate, indeed, that through the passionate efforts of individuals, tribal groups, preservation organizations, and governments that at least a portion of traditional cultural works, knowledge and folklore have survived to influence the creation of new works by indigenous and other creators, and to propel future cultural advancement in all facets of the arts. In light of history, however, we know that we need to do much better.

As noted above, the important question we now face is how best to simultaneously serve the needs of indigenous peoples, whole societies, and the full universe of new creators, as we move forward into what we hope will be a far more fair, moral, and just world regarding the treatment of traditional art and culture.

4. Intellectual Property Law Exceptions and Exemptions Are Not the Answer

For the very reasons that the progress of culture and the process of creation --especially regarding the musical arts-- are based upon new generations being influenced by and building on the works of past generations, the complexity of devising solutions for the protection of traditional, indigenous works is formidable. Attempting to reformulate hundreds of years of legal philosophy concerning intellectual property protections, in an attempt to achieve an important but only tangentially related societal imperative that is almost certainly better suited to resolution through other means, could have drastic and far-reaching negative consequences.

Centuries of jurisprudence have led the United States to conclude, starting with Article I Section 8 of the US Constitution, that legal protections particularly under copyright law should be limited in time and apply only to human expression of ideas, not to ideas themselves. The purpose of such limitations is to balance respect for both the rights of individual creators to be motivated and rewarded through compensation, and the benefits to society of a robust marketplace of ideas that draws energy from works that after a time reside in the public domain and thereby facilitate even greater open discourse and creativity.

NMC believes that it would serve no good purpose to deviate from the current local and international regimes of copyright statutes and treaties that seek to establish an equitable balance between the strong protection of creators' rights and the recognized free speech benefits of a nearly inviolate public domain. Our organizations, in fact, are concerned that creation of new exceptions and exemptions that disturb this delicate balance, such as attempts to place ancient, traditional public domain works *of any source* under copyright protection, could prove to have unintended and enormously damaging consequences. The most slippery of those potential slopes would be a backlash against the narrowing of the public domain that re-energizes a movement to expand the "fair use" doctrine around the world, to the point that an exception swallows the rule of copyright protection altogether.

Moreover, the practical hurdles alone of enforcing legislation that places traditional, public domain works under new legal protections after centuries or millennia in the public domain would likely create so much marketplace confusion, rule flouting, "me-too"-ism, and litigation that such laws would likely have the opposite effect as intended. Those unintended consequences might easily include the unfortunate heaping of more frustration and harm on indigenous cultures and peoples, rather than enhancing public respect for such art, music and Native folk traditions.

There are better ways to accomplish the goals of preserving and perpetuating indigenous culture and art while at the same time benefitting indigenous peoples and entire societies. *Those solutions start with serious economic investment by governments in indigenous cultural and arts education programs and indigenous creator and artist development projects, in full partnership and consultation with indigenous communities themselves.*

5. Government Investment in Education Models that Serve Indigenous Communities

A full analysis of what such educational programs might look like is beyond the scope of these brief comments, but by raising the issue we hope to facilitate and fast-track the fuller consideration by USPTO and other national and global agencies of the concept. By example, the general goal of attempting to reverse through *educational programs* (rather than intellectual property laws) the effects of cultural deprivations visited upon indigenous peoples has been embraced by the Biden Administration in the United States since early in its assumption of leadership.

Building on the prior but less-than-effective efforts of past US administrations led by both major American political parties, the U.S. federal government announced via Executive Order on October 11, 2021, a new “Initiative on Advancing Educational Equity, Excellence and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities.” In pertinent part, the Order acknowledges the past horrors committed against indigenous peoples in the U.S., including attempts to forcibly eradicate beliefs, customs, and traditions of Native Peoples, and states that it is now the policy of the United States:

...to advance equity, excellence, and justice in our Nation’s education system and to further Tribal self-governance, including by supporting activities that expand educational opportunities and improve educational outcomes for all Native American students. [This] Administration will help expand opportunities for Native American students to learn their *Native languages, histories, and cultural practices*; promote indigenous learning through the use of traditional ecological knowledge; and enhance access to complete and competitive educations that prepare Native American students for college, careers, and productive and satisfying lives. This includes supporting educational opportunities for students attending [traditional Native American colleges and universities], given the unique advantages those institutions provide.¹ (emphasis added)

While it is true that indigenous peoples all over the world have many times before heard platitudes and announcements by governments of ambitious plans for educational reparations, only to be disappointed by callous bureaucratic inaction, underfunding, and sometimes dishonest participant behavior, such past failures in plan execution do not indicate that the underlying goals and principles of such programs are incorrect.

By bringing the experiences and full participation of indigenous peoples into the scoping and running of such programs, as well as choosing the best privately and publicly developed models for music, arts and cultural education, we move closer to the goal of using education and charitable investment (both public and private) as the proper and most effective ways to address the goals of protection and furtherance of indigenous culture as living, breathing elements in our

¹ For full text, see: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/11/executive-order-on-the-white-house-initiative-on-advancing-educational-equity-excellence-and-economic-opportunity-for-native-americans-and-strengthening-tribal-colleges-and-universities/>

national lives. This, we believe, is a far better approach than attempting to torture intellectual property laws into forms that run counter to longstanding jurisprudential wisdom regarding the careful balancing of intellectual property and free speech rights.

6. Conclusion

The member organizations of NMC respectfully urge the U.S. Government to stress the need for national and global consideration of robust, indigenous arts education and cultural preservation programs --properly staffed and adequately funded-- that are geared specifically toward serving the present and future cultural and economic needs of indigenous communities. Moreover, those communities should be full partners with governments and non-profit organizations in the development, implementation and leadership of such programs, the goals of which must be to preserve and further the advancement of their own artistic and cultural traditions *for the benefit of both their own peoples and of society as a whole.*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles J. Sanders". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Charles J. Sanders, Esq.
Board Chair

cc: Dr. James Weaver, NMC President
Dr. David H. Sanders
The NMC Board of Directors