

Happy Birthday in Wonderland



By Prof Owen Dean

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Warner/Chappel Music, a music publishing company in the United States, claims and exerts copyright in the ubiquitous song "Happy Birthday To You". It requires that royalty payments should be made to it each and every time this song is sung or used in public.

This is a startling proposition as most people probably assume that the song is in the public domain and is free for use by all. An American documentary filmmaker agrees and is objecting to having to pay royalties to include the song in a film. It has consequently commenced legal proceedings before the US court seeking a declaration that the song is out of copyright and in the public domain. These court proceedings are currently attracting attention worldwide, due to their somewhat bizarre nature.

According to the court documents, the song first saw the light of day in the late-1800s as Good Morning To You and its rights were assigned to Clayton Summy, who published it in 1893. No mention is made of the identity of the author of the song. The song was revised three years later. It is claimed that the copyright (if it existed at all) in both the initial version and the revised version expired in 1921 and 1924, respectively, under US copyright law.

By virtue of international copyright treaties and the South African Copyright Act, 1978, provided they can be said to be original, these songs of American origin would probably have been eligible for copyright in South Africa, but their term of protection would have been determined by South African law. The relevant term would have been the lifetime of the author plus 50 years after his death. While, as has been mentioned, the identity and lifetime of the author(s) are not known, it is probably safe to assume that such author(s) are long since deceased and that the further 50-year period expired a while ago. Mothers giving birthday parties for their children, and indeed the populace as a whole, in South Africa (irrespective of what the position in the US may be) can, thus, heave a collective sigh of relief that they will not be acting unlawfully and perhaps be subjected to criminal prosecution when Happy Birthday is sung to birthday boys/girls without having obtained prior authorisation and paid royalties for its use. Birthdays can thus be truly happy - or at least unblemished by any unpleasantness over well-meant renditions of the song.

The full wrath of the law

Alas, this happy situation may be about to change and celebrants of birthdays who do not obtain the necessary licence for singing Happy Birthday may, in future, bring the full wrath of the law down upon themselves through their unlawful conduct. Moreover, this situation could prevail in perpetuity.

You may well ask: How is this possible? What folly can bring this about? The law must truly be an ass! That may well be so,

but that description can better be visited on the legislature that would pass a law that creates this situation. Particularly when it has been warned time and time again that the legislation in question is ridiculous and entirely without merit, but has chosen to ignore all the expert advice that has been given to it.

The culprit is the much-vilified Intellectual Property Laws Amendment Bill that has occupied the time and attention of the lawmakers since at least 2008, i.e. for more than five years. It was passed by parliament last year, but fortunately in one of his more lucid moments the president declined to assent to it and sent it back to parliament on a technicality. It has once again been passed, unamended, by the House of Assembly and is currently before the Council of Provinces, where it is expected to be passed shortly. After another visit to the presidential desk, for application of the million-rand signature, it could become law by the end of the year. Unless, of course, the president has an epiphany and sees the light as to the worthlessness of the Bill and consigns it to the trash can where it rightfully belongs.

Shortcomings and nonsensical nature of the Bill

The Vine Oracle has written or sponsored numerous articles on the shortcomings and nonsensical nature of the Bill. It categorised the surreal outcomes of the Bill as the misadventures of the Mad Hatter in Wonderland in an article published under that title on this blog on 1 November, 2011.

One of the effects of the Bill is to protect so-called "traditional" songs and the like as newly contrived species of literary and/or musical works, being categories of works eligible for copyright under existing copyright law. These "traditional" works will, thus, be sub-categories of the classes of musical and literary works. The general principles of copyright will be applicable to the new sub-categories, but special terms and conditions contained in the amendment will also apply to them. These special provisions include that the communities from which they originate will be considered to have authored and to own the copyright (whether the actual author of the work is known or unknown), and that works in the nature of folklore will be protected even if they have been in existence since time immemorial. Moreover the copyright in these "traditional" works will last forever.

So, in Wonderland, a song that can be categorised as "traditional" (as contemplated in the Bill with its often incomprehensible definitions) will be protected by copyright even though it has been around for ever and is presently in the public domain, and looking ahead into the future, that protection will endure until kingdom come. If this does not cause a state of severe shock, consider the implications of a song like Happy Birthday qualifying as a "traditional" work. It will be lifted out of the public domain and made the subject of perpetual copyright owned by the community that originated it.

In terms of the manner in which "traditional works" and "community" are defined (the definitions are embarrassingly wide and imprecisely formulated), the song Happy Birthday arguably qualifies as a "traditional" song protected by the amendment. Ah, but wait a moment you say, the amendment only purports to deal with protection for South African traditional works and makes the protection of foreign works subject to reciprocity and the issuing of a Ministerial decree! Therefore, this proposition can't be correct. This may be what the legislature in its wisdom thinks, but like so many other aspects of the Bill, it has got it wrong.

Foreign works protected as if South African

The Copyright Act protects foreign musical and literary works as if they were South African works, and to the same extent. This is known as affording "national treatment" to foreign works. South Africa is obliged by international treaties of which it is a member, namely the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property (the TRIPS Agreement), to afford national treatment to the works of all other member countries.

Traditional literary and musical works are, as previously stated, sub-categories of "literary" and "musical" works. As our law protects foreign literary and musical works in terms of the principle of national treatment, it follows that all sub-categories of these classes are included in that protection. Our legislature will, thus, in its bounteous generosity, grant the full gamut of protection to foreign traditional songs and other works even though those countries do not reciprocate with protection of South African traditional songs and works, for the simple reason that they have not been sufficiently madcap to attempt the

impossible by seeking to protect traditional works under copyright law.

Warner/Chappel Music can be consoled with the thought that, in the likely event that the US court determines that Happy Birthday To You is in the public domain in the United States (this is true of the rest of the world), at least there is a small corner of the planet, at the southern tip of Africa, namely Wonderland, where, thanks to the efforts of the Mad Hatter, the song continues to enjoy copyright that will last forever. It will have to be content with extracting royalties for usage of the song from only South Africans, but this is better than nothing. It will certainly owe a vote of thanks to our legislature. But the South African populace should not feel the same way.

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