

# Who is allowed to sing the ritual chant?

## Notes on the legal status of traditional music

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He wouldn't sing into the microphone. This is what the leader of an African-Brazilian group told me when I asked him for if I could document some of his traditional chants. This wasn't a very promising start to my ethnomusicological field research. However, nowadays it is not unusual for a traditional singer or musician to refuse to let his songs be recorded by foreigners. While it is often thought that traditional music is a treasure chest that can be opened by anybody seeking its creative yields, many traditional musicians try to guard their music against dissemination. Some demand protection for their music, and increasingly so, often with the assistance of non-governmental organisations or their national state agencies. At the *World Intellectual Property Organization (WIPO)* there is an ongoing debate about legal options for the protection of traditional music and «Traditional Cultural Expressions (TECs)» in general. In this paper I would like to explore some aspects of this discussion from an ethnomusicological and a legal point of view. My considerations will be developed around one single song, which I was finally allowed to record, and moreover, to document in different versions and performance settings.<sup>1</sup>

### **1. Kuenda: a traditional chant of a ritual**

As in many other southwestern regions of Brazil, the Catholic

festival for Our Lady of the Rosary is the most important celebration of the year in the rural district of Milho Verde (municipality of Serro, Minas Gerais). The population, living either in the central village or in one of the settlements scattered around it, elects an «African» king and queen. These monarchs are responsible for the organization of the festivities, especially for the meals served to all present persons. During the main festive day, the majesties parade through the village, being accompanied by a whole

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court, as well as by ritual groups. Their role is to guard the monarchs and, at the same time, to express the local religiousness through their chants, their dances and scenic interludes.

The members of one ritual group, called *Catopê*, intone the initial words «Lere kuenda» of one of their songs, just before noon when they are reaching the church consecrated to holy Mary. They are already marked by their exertion, having walked since early morning, the intense sun sapping their strength, but they stick to their task. Whilst the bells ring from the steeple, other ritual groups sing and the priest recites prayers. The members of the *Catopê* start playing the prescribed rhythmic pattern on their drums and bamboo rasps, sing their chant and thus pay respect to the secular monarchs of the district and to the celestial queen Mary.

Comparing recordings of this song made by myself and by others in the past, one finds different versions of a relatively stable melodic-rhythmic structure – I say ‘relatively’, because there are slight variations, as is usual for oral-aural traditions; ‘stable’ because the main melodic contour, in connection with the sung words, makes the versions recognizable as the same «musical work». It differs from other songs in the region, having a musical identity of its own. Since the song has no official name, we can call it just «Kuenda». This word has the same meaning for the members of the ritual group as it has in Central African languages, from where, with the enslaved people, many linguistic expressions were introduced to the region of Milho Verde. It says just «let’s go!», being, in the ritual context, the invitation to worship the Mother of God.

The word «Kuenda» is one of many non-Portuguese communicative expressions used in the ritual songs and mostly known only by some inhabitants of the district. The ritual group’s songs have, moreover, a content that surpasses their linguistic meaning, carrying the remembrance of passed performance experiences and the connotation with social values. Hence, the moment, when «Kuenda» is sung, is an emotional climax for all participants of the celebrations, as they gather in the church to pray the rosary to Mary in intercession. I was once told that «Kuenda» expresses «unity», meaning the unifying force of the song, fulfilling a social ideal of the district community, and at the same time, the religious experience of the bond to the Mother of God.

## **2. The exclusive right to perform a ritual chant**

Every African-descendant male inhabitant of the district can join the ritual group *Catopê*. The ones who have the most comprehensive knowledge of the song repertoire acquire positions as leaders and as soloists, singing every chant first. Younger members have to follow the directives of the elders and answer their singing by imitating words and melody. By this responsorial singing every performance is an act of transmission, both of the song repertoire and of the hierarchical, seniority-based organizational structure of the ritual group.

According to this principle, only the group’s main leader or his substitutes should intone ritual songs, such as «Kuenda», in public space. Like many rules in a traditional society, this is not verbalized explicitly, but can be deduced from different performances, particularly the ones outside the religious context. Thus, some inhabitants of the district have sung «Kuenda» on my request, but only inside their own four walls and mostly for the same number of ears. Further, a group of young people once sang «Kuenda» the night before the main celebration day in a parodying performance of their own local tradition; the elders have afterwards reproved this autonomous acting. Also, one time, at the local school during the official Brazilian «National Day of Folklore», when «Kuenda» was performed under the instruction of one mem-

ber of the *Catopê*, the ritual group's leader expressed his displeasure at not being informed and invited to attend.

«Kuenda» is not a «national» expression of the «folk», changing in its sound structure continually from performance to performance, as traditional music as a whole has often been defined. On the contrary, it is a song that has little changed in the course of its transmission, just being slightly adapted by the succeeding leaders of the ritual group.<sup>2</sup> In the case of «Kuenda», an institution, whose members change over the years and decades, comprehend themselves as bearers of a ritual tradition and as «owners» of their regularly performed «musical works». Over their ritual chants, this institution claims for an exclusive performance right, transferred inside the group to one person (the leader), who exercises it through intoning the songs.

### 3. A traditional chant as regional brand and its dissemination

Beside this exclusive right of performance, there are no other rights of use in cultures based on oral-aural transmission. Such rights became apparent when «Kuenda» unexpectedly was heard as theme music in a nation-wide transmitted telenovela. Women sang the song over a sound carpet, and, in an instrumental version, synthesized pan flutes and a marimba imitated the main melody. The song expressed musically the Africaness of colonial Brazilian society, where the telenovela was staged.<sup>3</sup>

The secretary of cultural affairs of the near town Diamantina had recorded «Kuenda» in Milho Verde. He made it known and put it at the disposal of the musical producer of the telenovela soundtrack. Before, the song had been performed in Diamantina by a university choir and was then played also by a local brass band. «Kuenda» advanced informally to an emblem for Diamantina's African-Brazilian cultural legacy and to a sounding brand for the town's cultural tourism offer.

With the dissemination through the telenovela, the song reached other regions of Brazil. For example, at the periphery of Belo Horizonte (the capital of the state Minas Gerais, situated approximately 250 kilometres from Milho Verde), I heard the song during the politically important anniversary celebration of Brazilian slave abolition, performed by a group of girls from a suburban African-Brazilian community.<sup>4</sup> «Kuenda» became part of their oral-aural tradition, but the song lost, in the process of media-aural transmission, the identity of the original cultural bearers. The song migrated geographically, in its aesthetic dimension and in its meaning. The song mutated from a religious expression of a rural men group, to a regional emblem of African-Brazilian history and to an urban political symbol.

### 4. A traditional culture system

In the district of Milho Verde, the leader and elder members of the ritual group disapproved of the external use of «Kuenda». However, the vehemence whereby they expressed their complaint is solely under-

<sup>2</sup> The versions of «Kuenda», I documented in recent times, are barely different in melody and words to a song version, the father-brother of the current leader of the *Catopê* sung for a recording in 1944 (Azevedo, Luiz Heitor Corrêa de / Silva Novo, Euclides: Recordings in Minas Gerais 1944, copies of original recordings of the *Escola de Música, Universidade Federal do Rio de Janeiro* in: *Folksongs of Brazil Collection*, Washington, DC: Archive of Folk Culture, American Folklife Center, *Library of Congress*, record no. 149 A b and 149 B a, reel copy no. AFS 7819 A b and AFS 7819 B a).

<sup>3</sup> The soundtrack to this telenovela was published as *Xica da Silva: trilha sonora original da Novela da Rede Manchete*, [compositions and arrangements by] Marcus Viana, Bloch Som e Imagem, s. a. [recorded 1996].

<sup>4</sup> Slave abolition celebration by the Arturos in Contagem, Minas Gerais, May 9, 2004.

standable, if we take into account the exclusive performance right as important element in the local culture system and its economic aspects.

First, in this culture system every member of the ritual group receives a recompense for performing at the annually celebrations for Our Lady of the Rosary. The reward is paid by fares, which include, beside the meals offered to everybody, at least two additional meals, served at the evening before and in the early morning of the main celebration day. This natural wage is part of the festivities' total expenses, administered by the monarchs and covered primarily by the population's labour collaborations and material gifts. Nobody can be forced to contribute, but refusal to support the festivities results in gaining a bad reputation. Sustaining the festivities is part of local customary conventions and, by including recompenses for singers, is an recognition of the *Catopê* as indispensable local cultural institution.

Secondly, the members and particularly the leaders of the ritual groups are responsible to supply for their special attire of the celebrations, for the production and maintenance of musical instruments and a variety of organizational arrangements. From the time-consuming investments, as well as from their special musical and ritual knowledge, the ritual groups and their leaders, deduce and receive their exclusive performance right. Since they guarantee the continuity of the local religious culture and sing every year the ritual songs, considered by the district's inhabitants to be fundamental for the celebration's succeeding, they demand as compensation a monopoly over their cultural expressions.

There are local violations of this exclusive performance right, such as the mentioned case of the school event or the young men's nightly singing. As main administrators of the ritual group's songs, the leaders have occasionally to advance against infringements and put themselves in the limelight, thereby displaying their knowledge of the African derived song texts.<sup>5</sup> However, such violations can be controlled in the restricted space of face-to-face-interactions and kept within limits. In general, the leaders are recognized by the district's inhabitants to know best, how to perform the ritual melodies properly, as well as what religious content and social force they inhere. Their exclusive right to perform the ritual songs is unquestioned.

By the use of «Kuenda» in the telenovela, the leaders became aware that their songs could be disconnected from the local ritual context and gain new meanings and values outside its original setting. There was no cogent cohesion between the songs' sound and the local culture, what was also suggestive of the fact that aesthetic expressions are, to a large extent, interchangeable. The infringement of the exclusive performance right from sources beyond the leader's control and the threat of the possibility of modern technological reproduction and media dissemination, were perceived to be of a major disturbance to the local culture system. The leader and some elder members of the ritual group feared that their ritual knowledge, their labour of transmission and their status weren't considered in Milho Verde anymore as indispensable.

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<sup>5</sup> The African lexical items used in songs have partly the value of secret knowledge. On the issue of secret songs cf. Ammann, Raymond: „The Archive of the Vanuatu Cultural Center: the preservation and maintenance of Melanesian music“, *Music archiving in the world: papers presented at the conference on the occasion of the 100<sup>th</sup> anniversary of the Berlin Phonogramm-Archiv*, ed. Gebriele Berlin and Artur Simon, Berlin: VWB, 2002, 371-378.

## 5. Valorisation of intangible cultural heritage

In the described culture system, disturbances of its stability can be corrected by a recognition of traditional music and a consolidation of cultural demand. In Milho Verde, the interest of cultural tourists and ethnomusicologists has influenced the district's inhabitants and contributed to the confirmation of the ritual groups' leaders as important bearers of knowledge. Promoting such interest in oral-aurally transmitted cultures is the goal of projects for the safeguarding and promotion of intangible culture heritage by the *Unesco* and by national institutions.<sup>6</sup> In Switzerland, for example, the *Conseil International des Organisations de Festivals de Folklore et d'Arts Traditionnels* has, under the patronage of the *Swiss Federal Culture Agency*, created the «Directory of Intangible Cultural Heritage». In its scope it follows a Japanese model from the 1950s and doesn't aim directly at the protection of intangible heritage itself but targets its valorisation through the identification of culture bearers (like traditional musicians) and culture specialists (like ethnomusicologists).<sup>7</sup>

In Brazil, there was as early as 1936 a proposal for considering intangible cultural heritage in the national safeguarding program for the historical and artistic heritage. Music, dance and legends were regarded to be tightly attached to the material heritage.<sup>8</sup> However, the suggestion was not carried out until the 1980s. In the Brazilian constitution of 1988, the legislator committed the government to the valorisation of the «immaterial» culture. Further, it called to «protect the manifestations of the indigenous and African-Brazilian folk cultures, as well as of other groups that participate in the socio-cultural development of the nation».<sup>9</sup> In 2000, the Brazilian Ministry of Culture launched a national repertoire of intangible cultural heritage. The criteria to be included in this repertoire are formulated openly, whereas the extent of the advantages conferred to a registered item are straiten to the right to bear the title of «Cultural heritage of Brazil», to be documented, valorised and promoted by the Ministry of Culture.<sup>10</sup>

<sup>6</sup> Cf. *Convention for the safeguarding of the intangible cultural heritage* (Unesco document MISC/2003/CLT/CH/14), Paris: Unesco, 2003, [unesdoc.unesco.org/images/0013/001325/132540e.pdf](https://unesdoc.unesco.org/images/0013/001325/132540e.pdf) (accessed January 14, 2006). The convention defines «intangible cultural heritage» as «practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage»; it is manifested in domains such as «oral traditions», «performing arts», «social practices, rituals and festive events», «knowledge and practices concerning nature and the universe», «traditional craftsmanship» (art. 2). For a critical account of the convention see Kurin, Richard: «Safeguarding intangible cultural heritage in the 2003 *Unesco* Convention: a critical appraisal», *Museum international* (Oxford) 2004, 56.1-2:66-77.

<sup>7</sup> The Swiss repertoire is an internet project, accessible on [www.culturaldiversity.cioff.ch](http://www.culturaldiversity.cioff.ch). For the history on the safeguarding of intangible cultural heritage in Japan see Tomoaki Fujii: «Protection of those who make available and of those who collect expressions of folklore», *Unesco-Wipo World Forum on the Protection of Folklore Thailand 1997* (Unesco publication CLT/ CIC/98/1; Wipo publication 758), Geneva: Wipo, 1998, p. 131-142.

<sup>8</sup> In Switzerland, too, the safeguarding of the intangible cultural heritage was early seen as closely attached to the protection of material culture, although this conjunction was neither legally prescribed nor defining state-operated actions. The *Swiss Heritage Society*, for example, pursued in its goals at the beginning of the 20<sup>th</sup> century not only the preservation of monuments and buildings but also the safeguarding of folk songs. In the course of time the society focused on architectural heritage, outsourcing the safeguarding of immaterial culture. Cf. Bundi, Madlaina: *100 Jahre Schweizer Heimatschutz: Chronik*, Zürich: Schweizer Heimatschutz, 2004 ([www.heimatschutz.ch/media/pdf/Chronik\\_SHS.pdf](http://www.heimatschutz.ch/media/pdf/Chronik_SHS.pdf), accessed January 26, 2006).

<sup>9</sup> *Constituição da República Federativa do Brasil*, October 5, 1988, art. 216 and art. 215 § 1. All Brazilian legal texts, to which I refer, are accessible at the Brazilian senate's internet page ([www.senado.gov.br/sf/legislacao](http://www.senado.gov.br/sf/legislacao)). A conspectus of all culturally relevant Brazilian regulations can be found on the internet page of the Ministry of Culture ([www.cultura.gov.br/legislacao](http://www.cultura.gov.br/legislacao)).

<sup>10</sup> The criteria to be included in this «Registro de Bens Culturais de Natureza Imaterial» are the «historical continuity of the cultural good and its national relevance for the memory, identity and the development of Brazilian society» (executive decree no. 003551, August 4, 2000, art. 1 § 2, cf. for the rights art. 6 and 8). For the genesis of

Safeguarding conventions recognise the importance of cultural heritages, make them known through branding (*Unesco's* «Masterpieces of the Oral and Intangible Heritage of Humanity») and sometimes induce special state programs providing financial support to cultural bearers. They may also increase the value assigned to traditional musical expressions in general, even to the ones not registered in a national repertoire, as it is the case of the ritual chants of Milho Verde. One may even ascribe a valorising impact to the use of the song «Kuenda» in the telenovela; such a positive effect can't be precluded in so far as on the compact disc the song is not declared to be a creation of the arranger (as it already happened with traditional music in the process of its commercialization), but name and origin of the ritual group is given.

Nevertheless, some members of the ritual group have perceived the external use of «Kuenda» as «theft» of their traditional intangible cultural «property». As safeguarding conventions are «soft laws», not giving an effective protection to traditional music, the bearers of «Kuenda» have to rely on other legal instruments to claim for a protection of their «property». Would formal Brazilian laws of effective protection sustain the sentence of the singers of «Kuenda», adjudicated from the traditional exclusive performance right?

## 6. Traditional music, copyright and related rights<sup>11</sup>

### a. Performers' rights

The leader of the ritual group *Catopê* reported to me that he sang «Kuenda» during an interview. Before he had explicitly requested the interviewer not to record the song. He learned afterwards that a film camera was turned. It had had fixed the sound that later served the creation of the telenovela's song version.

This fact can hardly be proven in order to claim the right of musicians, to prevent a fixation of their performances, as assured by the Brazilian Law (*BrCA* art. 90[i]) and by international treaties.<sup>12</sup> Moreover, appealing to this right of performers would not admit the very demand of the ritual group, i. e. to dispose exclusively over their traditional heritage. For it makes no difference, if «Kuenda» was fixed on a recording medium or in the mind of the interviewer, because the interest was not the reproduction of the performance but the use of the «musical work».

### b. Authors' rights

«Kuenda» fulfils the prerequisites for copyright protection as «musical work» (*BrCA*, art. 7 and 8). The ritual group could subsequently have prevented the use, arrangement and the shifting of meaning of «Kuenda» for the telenovela, claiming «moral rights» as «author» (*BrCA*, art. 24). However, the song has no known «author» in the sense of copyright legislation; in addition, the song's origin goes back much further in time than the legally granted term for protection, i. e. seventy years after the supposed author's

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the Brazilian repertoire see Falcão, Joaquim: «Patrimônio imaterial: um sistema sustentável de proteção», *Patrimônio imaterial* (Tempo brasileiro 147), ed. Cecília Londres, Rio de Janeiro: Folha Carioca, 2001, p. 163-180.

<sup>11</sup> I am consulting the Brazilian legislation concerning copyright and related rights (Law no. 009610, February 19, 1998, abbreviated as *BrCA*); cf. Pontes Neto, Hildebrando: «As expressões do folclore e os direitos autorais» (*Wipo* document OMPI/CRTK/SLZ/02/1), *Seminário da OMPI sobre a preservação, promoção e proteção do folclore e dos conhecimentos tradicionais, São Luis do Maranhão, Brasil, March 11-13, 2002*.

<sup>12</sup> World Trade Organization (WTO): *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, 1994, art. 14(i); *Wipo Performances and Phonograms Treaty (WPPT)*, 1996, art. 6(ii). Both international agreements are accessible on [www.wipo.int/clea](http://www.wipo.int/clea). Concerning the *BrCA*, it has to be noted that it became effective only two years after «Kuenda»'s «theft»; however, Brazil's previous copyright act already granted the performers' right to hinder the recording of an interpretation (Brazilian law no. 005988, December 14, 1973, art. 95).

death (*BrCA* 41). In the oral histories of the elder inhabitants of Milho Verde, as well as in the discourses of younger bearers of the musical tradition, the identity of the first creator of «Kuenda» is determined only in so far, as he occupied the function of a ritual group's leader and was an ancestor in Africa or Brazil. «Kuenda», people of Milho Verde say, is «very old» and has always been sung in the village. In line with this view is an information given in the booklet of the telenovela's compact disc; there, the creation of «Kuenda» is dated in the 18<sup>th</sup> century.<sup>13</sup> In short, the local value of this song is, according to its great age, very high; the copyright protection, however, is for the same reason not given. «Kuenda» is part of the «public domain».

### c. *Sui generis* rights

The legal conception of «public domain», however, includes exemptions. «Traditional knowledge» has received legal treatment of its own, due to its special context of use and its distinctive characteristics in relation to other intellectual properties. The Brazilian copyright legislation, with reference to *sui generis* provisions to be enacted, excludes «ethnic and traditional knowledge» from «public domain» (*BrCA* art. 45, paragraph 2). This has been established in a provisional regulation for the access and use of a community's «traditional knowledge» related to «non-human genetic resources» and «biodiversity».<sup>14</sup> A song like «Kuenda» isn't part of such a specified «traditional knowledge».

The notion «traditional knowledge», as appearing in the copyright act, may be construed in different ways. In relation to the knowledge of Brazilian indigenous populations, the term has been understood extensively. With reference to the special constitutional protection of indigenous populations, their musical expressions have been considered to be protected from every non-authorized use by non-members outside the indigenous community.<sup>15</sup> In the case of «Kuenda», whose bearers are not members of an indigenous community, there is no entitlement for protection.

To sum up, the Brazilian legislation gives at this moment no effective protection for traditional songs like «Kuenda». Whilst in local public spaces the use of «Kuenda» is restricted by customary law, the copyright act places such a song everywhere outside its local tradition in the «public domain», makes it appropriable for anybody and causes disturbances in stability of the local culture system.

<sup>13</sup> As there is no historical proof for such an old age of the song, a historian with a positivist credo may see in this information a misguidance of music consumers. Here the consumer protection would be applicable, regulated in the Brazilian legislation in a law of its own. According to it the consumer has the right to be correctly and extensively informed about goods and services, and he is protected from misleading advertising (Brazilian law no. 008078, September 11, 1990, relevant are particularly art. 6[iv], art. 31, art 37 §1 and 3). However, this law may be first of all applicable, if the booklet information of the telenovela's compact disc would have tout the arrangement of «Kuenda» as original recording of traditional music. This is not the case. The booklet states clearly that the song is an «arrangement und adaptation» and names further the traditional bearers (recognizes thus implicitly the right of attribution). It doesn't advertise with a pretended «authenticity» or «traditionality» to increase sales.

<sup>14</sup> Provisional regulation no. 002186-16, August 23, 2001 (in force in January 2006).

<sup>15</sup> Oliveira, Jô Cardoso de: *Algumas informações sobre direito autoral e direito de imagem dos índios*, Brasília, December 13, 2002, internet article of the *Associação Brasileira de Antropologia* ([www.abant.org.br/informacoes/documentos/documentos\\_004.shtml](http://www.abant.org.br/informacoes/documentos/documentos_004.shtml), accessed January 15, 2006); cf. *Brazilian Constitution* art. 231 and 232. However, the currently valid law regarding indigenous population, placing the «not integrated Indians» under tutelage of the Brazilian state, contains no explicit protection of their musical expressions. It just gives the «assurance of respect toward the cultural heritage of the indigenous communities» and their «artistic values» (Law no. 006001, December 19, 1973, art. 47). In a 1991 formulated draft for a law revision, the indigenous populations are adjudged explicitly collective, exclusive and timely unlimited rights over

## 7. The *Wipo* discussions on the protection of traditional music

*Sui generis* options to protect traditional music have already been discussed since the 1960s at the international level at conferences organized by *Unesco* and the *World Intellectual Property Organization (Wipo)*.<sup>16</sup> A protection of traditional music partly already exists by the *Berne Convention*, whereby a signatory country can exercise, through a competent national agency, the rights concerning unpublished and anonymous «works», if the author's nationality is presumed to be of that country.<sup>17</sup> The readopted discussion on the protection of traditional music issued from repeated claims about the insufficiency of this optional national protection in our regionally diverse and increasingly globalised world, as well as in connection to the protection demands for traditional knowledge in the economically relevant domain of genetic resources and traditional medicine. Therefore the *Wipo* member states constituted 2000 the «Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore».<sup>18</sup>

Concerning the «traditional cultural expressions (TCEs)» or alternatively «expressions of folklore (EoF)» that include traditional music,<sup>19</sup> the current discussion at the *Wipo* is founded on the principle that the expectations of the TCEs' bearers have primarily to be considered. The peculiarities of TCEs and the bearers' customary laws of use should guide the establishment of an international regulation. For an example of such a TCE we can look at Milho Verde with its ritual groups. The singers of «Kuenda» maintain that oral-aural traditions imply continual investments and acts of recreation, in order that they themselves should receive the right to decide on whatever use of their songs. This would be redeemed by a «prior informed consent», a concept that has been discussed at the *Wipo* as core principle for a *sui generis* protection of traditional knowledge and TCEs. Thereby, every person, wishing access to a TCE, has first to apply for permission to its bearers; and, in the case of commercial use of this TCE, he is obliged to inform them previously about the consequences and negotiate the sharing of benefits.

Many ethnomusicologists apply the principle of free «prior informed consent». I myself have obtained the permission for sound and film recordings by the singers of «Kuenda» after a long period of confidence

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their intangible heritage (Law draft no. 002057/1991 art. 20 and 21, [www.funai.gov.br/pptal/novoestatuto.htm](http://www.funai.gov.br/pptal/novoestatuto.htm), accessed January 15, 2006).

<sup>16</sup> Since intellectual property regulations have become, by the TRIPS, part of international trade agreements, the protection of traditional music has sporadically been discussed at the *World Trade Organization (WTO)* and the *United Nations Conference on Trade and Development (Unctad)*.

<sup>17</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 1886 and as amended up to 1979, art. 15(4). This option for protection of traditional music is little used.

<sup>18</sup> A succinct resume of the debates, pre-existing legislations and options for protection is given in the *Consolidated analysis of the legal protection of traditional cultural expressions/expressions of folklore* (Background paper 1), Geneva: Wipo, 2003 ([www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf)); cf. *Intellectual property needs and expectations of traditional knowledge holders: Wipo report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva: Wipo, April 2001, <http://www.wipo.int/tk/en/tk/ffm/report>, further: *For a legal protection of folklore?* (Copyright bulletin 32.4), Paris: Unesco, 1998. The currently most actual resume (January 2006) is given by *The protection of traditional cultural expressions / expressions of folklore: revised objectives and principles*, April 8, 2005 (Wipo document WIPO/GRTKF/IC/8/4 on [www.wipo.int/meetings/en/archive.jsp](http://www.wipo.int/meetings/en/archive.jsp)). For a discussion from an ethnomusicological point of view see Sandler, Felicia: *Music of the village in the global marketplace: self-expression, inspiration, appropriation, or exploitation?*, PhD University of Michigan, 2001.

<sup>19</sup> For a description of these terms see *Traditional knowledge – operational terms and definitions*, May 20, 2002 (Wipo document WIPO/GRTKF/IC/3/9); further the mentioned survey on *The protection of traditional cultural expressions / expressions of folklore*, April 8, 2005 (Wipo document WIPO/GRTKF/IC/8/4), annex II, paragraphs 26 to 28.

building. I will put copies of my recordings solely at the disposal of the leaders of the ritual group and make them otherwise accessible only in excerpts, in form of musical transcriptions and in the academic realm. If there will be an international *sui generis* agreement for the protection of TCEs, the «prior informed consent» will become committing for everybody. Furthermore, by such a *sui generis* agreement, the two principal prerequisites, which many traditional musical expressions don't meet for protection by copyright law, will be abrogated: a musical expression has not to be a musical «work», resulting from the creative act of an individual «author». To be protected neither a TCE has to be invariable over time, nor an individual author identifiable and isolated from the group of the tradition bearers. «Kuenda», for example, could be protected effectively, although it already has been transformed slightly in the past and may change in future.<sup>20</sup> As TCEs feature a continuous re-creation by changing individuals, the period of protection can't be marked by a beginning and an end. TCEs, which are currently part of the «public domain» and a freely usable resources for creative adaptations, would receive an extensive protection exceeding the one of copyrighted «works».

## 8. Formulation the core principle to protect traditional music

To make a protection system for TCEs enforceable and to avoid conflicts with existing intellectual property regulations, the substantive working out of the «prior informed consent» is of enormous importance. This I would like to illustrate with a European musical example:

- It is necessary to outline clearly the criteria a TCE must meet for its protection. Equally it has to be defined, who is recognized to be a legal personality entitled to hold rights. We can refer to the traditional festival of former craftsmen guilds in the Swiss town Zurich, called «Sechseläuten» and taking place annually in its actual form since the 19th century. These «guilds» are formed today by individuals working in the service sector and maintaining a re-invented local tradition. Could these «guilds» collectively apply for the protection of their «Sechseläuten» march, which probably originates from Eastern Europe, but has become a fundamental sounding marker of the festival's identity?<sup>21</sup>
- To give full respect to traditional musicians and to ensure the protection of TCEs from misuses, it is necessary to create autonomous institutions with the possibility to sanction infringements of rights. Where and how is a dispute settled, if the Zurich «Sechseläuten guilds» would gain redress against a unauthorized and distorting use of their march at the carnival in the rivalling Swiss town Basle (since parodying, excepted under the doctrine of fair use from copyright protection and occurring not seldom inside traditional societies, may be illicit regarding TCEs, due to its potential offensive character)?
- Also regionally shared TCEs have to be considered. The «Sechseläuten» march is also performed since the 19<sup>th</sup> century under the name of «fools' march» at carnivals in south-western parts of Germany and was played 2001 in Moscow at a political event of the controversial poli-

<sup>20</sup> «Kuenda» remained relatively stable over time in its melody and words. However, the instrumental accompaniment of the song changed. In the past the *Catopê* used tambourines with metal jingles, today they play mainly bamboo rasps.

<sup>21</sup> Cf. the record of the «Sechseläuten» march on *Musikalischer Streifzug durch das Zürcher Sechseläuten*, ed. R. Kalt and Zunft zur Waag, Dübendorf: Trio Eugster 1998.

tician Zhirinovskiy. How would transnationally competing claims for rights of a TCE be dealt with?<sup>22</sup>

This example merely indicates some questions and, compared to the tradition of Milho Verde, shows the differences between various TCEs, leading to complications in creating a transnationally adequate template for protection.

## 9. Varying interests and social inequality

In a questionnaire directed at the beginning of the present debates to the *Wipo*'s member states, more than the half of the 64 replies welcomed an international agreement for the protection of TCEs. However, less than half of the replying states provided or planned a legal protection for TCEs on national level. Moreover, the *Wipo* questionnaire revealed just a few practical experiences with existing national regulations. Switzerland pronounced against an international agreement. The state agency in charge pointed precisely to this lack of experience and stated that Swiss bearers of TCEs are satisfied with existing intellectual property rights.<sup>23</sup>

The position of Switzerland and the demand of the African-Brazilian ritual group are in an opposition that is understandable only, if we move our attention to the dimension of social inequality. The inhabitants of Switzerland have a long-time effective system of intellectual property and can benefit from a high level of education and public information, in order that almost everyone has access to juridical institutions; the members of the ritual group in Milho Verde live far away from such institutions, geographically inhabiting a remote rural district, socio-economically having a very low income and regarding education with no or a low grade of alphabetization – impeding them, for example, to access and read legal texts as they are discussed in connection with their TCEs at the *Wipo*.

With the decreasing cultural isolation of Milho Verde's population – by interactions with tourists and by television introduced at the end of the 1980s – external socio-economic standards became more and more the measuring for their living conditions. The processes of cultural integration, which we all are exposed to and not only the inhabitants of Milho Verde, cause changes of values and put forth the consciousness for social inequalities and legal disadvantages. Often, traditional societies experience and comprehend the integration into the «global village» as negative. This was the case in the little village of Milho Verde regarding its TCEs.

Processes of integration, however, produce also new chances for a development. In Milho Verde there are some indications that the «theft» of «Kuenda» is processed positively and may ultimately lead to a strengthening of local culture. After «Kuenda» reached popularity with the transmission of the telenovela version, the ritual group performed the song often outside its religious context. The leader of the *Catopê* sang «Kuenda» even in a concert setting in a town – probably to show, who really owns this song. This marked clearly a new handling of the tradition. The local music of Milho Verde is adapting to new kinds of use, although maintaining its traditional practice. The songs of the ritual group can be, in addition to its religious local meaning, an economically exploitable performance good. Recently, Milho Verde's ritual

<sup>22</sup> Cf. *Practical means of giving effect to the international dimension of the Committee's work*, April 4, 2005 (*Wipo* document WIPO/GRTKF/IC/8/6), section V.

<sup>23</sup> *Final report on national experiences with the legal protection of expressions of folklore*, March 25, 2002 (*Wipo* document WIPO/GRTKF/IC/3/10), paragraphs 141 und 149; *Questionnaire on national experiences with the legal protection of expressions of folklore: response of Switzerland*, 2001, [www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/switzerland.pdf](http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/switzerland.pdf).

groups acquired funds for their TCEs in a program launched by the Brazilian government. The actual Brazilian government has affirmed its commitment with cultural diversity and intangible cultural heritages, emending the constitution to ensure financial contributions to cultural projects in general and creating supportive actions to safeguard TCEs and incentive the transmission of traditional music.<sup>24</sup>

Recent achievements by the ritual groups of Milho Verde may too hasty draw an optimistic picture for future developments. Thus the question remains: Shall we support an international agreement for the effective protection of musical TCEs?

## 10. A protection system for traditional music?

National and international safeguarding programs aim to foster traditional music by means of valorisation efforts. But if we acknowledge the recognition of cultural diversity, as it have been affirmed recently in a convention at the *Unesco*,<sup>25</sup> then we have to own up also the demands forwarded by the various bearers of traditional music. Beneath them there is the demand of the singers of «Kuenda». They require that their traditional musical expressions should not be freely accessible and exhaustible resources for commercial products of the creative industries. Traditional music should receive an effective protection to guarantee their bearers the exclusive right to decide on their TCEs' uses and receive rewards of commercially disseminated products derived from their cultural heritage. From the point of view of musicians in traditional societies, it is not fair, not to recognize legally their work of oral-aural recreation and preservation – and this just because many traditional musical expressions don't fit in a copyright conception that bearers of traditions wouldn't have conceived like that, nor are able to read as they are frequently non-literate resp. illiterate.

As a friend of the singers of «Kuenda» I support their claims for the recognition of their cultural labour and for economic improvement. As an ethnomusicologist, however, I am not sure, if this can and should be achieved by protecting their songs. First, a protection of songs like «Kuenda» and TCEs in general is cost-intensive regarding management of rights. A system of effective protection involves expenses to administer rights, to arbitrate on conflicts concerning rights for transregionally shared traditional musical expressions and to enforce sanctions in case of infringements. This expenditures probably surpass the total economic rewards from the commercialization of traditional music. If the costs for the protection system are to be paid by the musicians themselves, then the intended positive effect probably is reversed.<sup>26</sup> Secondly, one fundamental creative output of traditional music is already protected by an internationally established legislation. It is the imitation and variation of existing musical expressions for a creative preservation, being fundamental for whatever musical practice. This labour of reproduction is protected by the

<sup>24</sup> The mentioned art. 215 and art. 216 of the *Brazilian Constitution* have been extended by the constitutional emendation no. 48, August 10, 2005, respectively no. 42, December 19, 2003. The ritual groups of Milho Verde were considered in the program of the Brazilian Ministry of Culture called «Fomento às Expressões das Culturas Populares» (cf. [http://www.cultura.gov.br/programas\\_e\\_acoes/identidade\\_e\\_diversidade\\_cultural](http://www.cultura.gov.br/programas_e_acoes/identidade_e_diversidade_cultural), accessed February 3, 2006).

<sup>25</sup> *Convention on the protection and promotion of the diversity of cultural expressions*, Paris: Unesco, October 20, 2005 ([portal.unesco.org/culture/en/file\\_download.php/31f1743d940cdb41a4359bc0129c11c3Conv2005\\_official\\_ENG.pdf](http://portal.unesco.org/culture/en/file_download.php/31f1743d940cdb41a4359bc0129c11c3Conv2005_official_ENG.pdf), accessed January 9, 2006).

<sup>26</sup> See John Collins' critical account on the protection of traditional music in Ghana: «The 'folkloric copyright tax' problem in Ghana», *Intellectual Property Rights and Communication* (Media development 2003/1), ed. World

legislation of performers' rights, where musicians of «expressions of folklore» now are explicitly named as rights holders.<sup>27</sup>

Nevertheless, we should take the concerns of traditional musicians seriously and contemplate on three points to meet their demands. The first one refers to actions put already in practice, the second one is a pragmatic measure to reconcile varying interests, the third an unrealistic consideration.

1. *Valorisation of intangible cultural heritage*: We can recognize traditional cultural expressions according to the *Unesco* conventions of the intangible cultural heritage and cultural diversity. Establishing programs in the same line with *Unesco*'s efforts for valorisation and supporting musicians allows for flexible actions, respecting the peculiarities of different cultural traditions. Such programs should raise the general consciousness about the problematic issues of musical appropriation and advance the respect towards customary laws of performance. A positive effect of the valorisation concept will depend on the actions, the single national governments will take. The actual Brazilian government, for example, has launched several cultural programs, considering the intangible cultural heritage. Switzerland, on the other side, had abstained in the voting at the *Unesco*'s General Assembly to approve the *Convention for the safeguarding of the intangible cultural heritage*, but is now preparing a documentation to ratify the convention.
2. *Performers' rights*: Instead of creating a new regulation, the existing performers' rights could be improved regarding its enforcement. Therefore collective management organizations, acting on behalf of performers, must provide special funds for musicians of traditional societies. This funds allow an active information of bearers of musical traditional expressions – and especially non-literates resp. illiterates ones – and, in the case of infringements of rights, the support for access to justice. A special effort to assist musicians of traditional societies partly reconciles their demands with the refusal of an effective protection of TCEs.
3. The claims of musicians in traditional society must be understood as a substantial constituent of the general public interest to be considered along with other interests in intellectual property regulations; we should comprehend traditional musical expressions with their specific characteristics as empirical reality that questions the justification and adequacy of existing legislation.<sup>28</sup> Music related copyright legislation, for example, should be re-evaluated according to music conceptions in traditional society. The performance-centred characteristics of traditional musical expressions and its low significance of the concept of the individual creation could lead to consider the period of copyright protection for an «author's» «musical works», which has achieved, in some countries, a problematic extent of up to seventy years (after its author's death).

This last point is outside any consideration, if we evaluate the political and economic forces realistically. However, shortening the period of protection would increase the number of musical expressions in the «public domain», and bearers of traditions would perceive the assignment of their music to this «public domain» as less unjust, if other music was also freely accessible and legally usable for creative transformations.

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Association for Christian Communication, [wacc.dev.visionwt.com/wacc/content/pdf/630](http://wacc.dev.visionwt.com/wacc/content/pdf/630), accessed February 3, 2006; cf. the articles by Paul Kuruk and A. O. Amegatcher in *Copyright bulletin* 36.2, Paris:Unesco, 2002.

<sup>27</sup> BrCA art. 5(xiii), cf. *Brazilian Constitution* art. 5(xxviii a); *Wipo Performances and Phonograms Treaty (WPPT)*, 1996.

<sup>28</sup> Cf. Pahud, Eric: *Die Sozialbindung des Urheberrechts*, Bern: Stämpfli, 2000.