Emile G. McAnany
Kenton T. Wilkinson
EDITORS

MASS MEDIA AND FREE TRADE

NAFTA and the Cultural Industries

UNIVERSITY OF TEXAS PRESS
AUSTIN

14

Mass Communication, Intellectual Property Rights, International Trade, and the Popular Music Industry

STEVE JONES

POPULAR MUSIC IS OFTEN overlooked as the site of cultural struggle. This is in part because it is visual media (film and television particularly) that garner the most attention, and in part because popular music is often considered an even less "serious" cultural form than other types of popular culture. And yet it is in the arena of popular music that cultural policy, intellectual property, and other important issues are most visible. Popular music at least relies more than other media on the exploitation of copyrights for revenue. I will concentrate my analysis on popular music in this chapter.

Popular music in America in the 1980s and 1990s has been characterized by an increased awareness of non-Western music among musicians, music industry executives, and music fans. "World music" is the moniker for recordings employing non-Western instruments and/or sounds, and it has become a recognized, institutionalized musical category through its use in publications from the industry standard *Billboard* to punk fanzines like *Maximum Rock 'n' Roll.*

Coincident with the birth of world music, the American music industry finds itself competing in a global, internationalized[1] popular music marketplace. Corporate acquisitions that place American record companies under foreign corporate control (for instance, Sony's purchase of Columbia's record and music-publishing interests and the fact that only one major label, Warner Brothers, is U.S.-owned) and stiff competition from foreign record labels whose acts dominate the charts

(like Virgin Records' releases by Janet Jackson and Paula Abdul) are forcing a rethinking of the means by which popular music is exploited as an investment with global dividends. The investment is essentially the same as it ever was, represented by the "song" or "album." And the music business has always been international, insofar as licensing agreements (to exploit sales of those investments) existed between record companies in different countries. Popular music, though, especially in regard to rock 'n' roll, is symbolic of America, and though labels may have corporate roots outside the United States, it is American music that these labels continue to make the most of, and from.

The dividends on these investments (songs and albums) now come from a variety of sources, including the exploitation of copyrights in emerging and new markets and the revision of trade agreements. Threats to these dividends come from legislative activities and international agreements that affect the ability to exploit copyright, just as they also come from new technology. Digital media and digital sampling open up new areas for exploitation, by way of sales of new media and royalty options for copyright holders, and make it difficult to enforce copyright by making copying quick, easy, private, and easily concealed.

It is against this backdrop that American record and music-publishing companies (often owned by the same parent company), whether or not they are ultimately owned by corporations outside the United States, are partaking in a flurry of legal activity that leads to a kind of cultural policy by default. That is, as cases involving the music business, trade, copyright, and immigration law are decided, precedents are set which affect the quantity and quality of popular music entering and leaving the United States. The cases, as should probably be expected, are argued largely on the basis of their perceived impact on profit/loss margins of parties involved, or their effects on employment and labor, but rarely (maybe never) in regard to their impact on cultural production and consumption, a point to which I will return. Moreover, as ownership is problematized it is rarely asked whether owners are creators, authors, employers, and so on. This is an issue with great consequences for the discussion of moral rights in intellectual property on an international scale and it has clear connections to free trade agreements.

Additionally, corporate policies that affect the production, distribution, and promotion of popular music may likewise be viewed as formations of cultural policy. However, as with the legal issues to be discussed, they too form a fragmented, often somnambulistic cultural

policy dictated by the economics of the music industry, an industry beset by challenges brought about both by its internationalization and by new media technologies. And, difficult as it is to unravel the interests represented in said legal issues, it is virtually impossible to penetrate to the levels necessary to determine and unravel corporate policies.

Thus far, legislation concerning intellectual property issues in international trade in the music industry has focused on three discrete, though related, fronts in the United States. As expected, one front is that of copyright law and another is that of trade law. A third, less-expected front is that of immigration law. I have examined these in greater detail elsewhere[2] and will only briefly go over them here to create a framework for further discussion.

Popular Music and U.S. Immigration Law

During the 1980s changes in U.S. Immigration and Naturalization Service (INS) laws made it more difficult for non-U.S. musicians to enter America and perform their music. The issue revolves primarily around H-1 work permits for entertainers. In the past, the INS required applicants for H-1 work permits to make their way through a forest of paperwork and to include documentation (in the form of press clippings, recordings, etc.) that proved the entertainer's "distinguished merit."

The wording in the INS law has changed, however, so that the term "distinguished merit" has been replaced by "preeminence." If distinguished merit was difficult to document (the INS provided no definition of it), at least it had a vagueness to it that allowed broad interpretation. The implication of preeminence is that a performer must be popular—for all intents and purposes, a star. Among groups that have been affected by enactment of the new law are the U.K.'s Blow Monkeys, Membranes, and New Model Army, Germany's Bochumer Ensemble, Poland's Stary Teatr, East European folk-jazz ensembles, reggae group Third World, and countless African performers (among them guitarist Chief Commander Ebenezer Obey). The difficulty faced by those wishing to book those groups in the United States is tremendous, since tours must be booked well before the INS bureaucracy grinds out a visa (or grinds to a halt).

A *Village Voice* article correctly placed the origins of the H-1 work permit in a "union-conscious legislature bent on protecting American

labor."[3] First drafted in 1952 to allow those with no intention of abandoning their own country to work temporarily in America, the H-1 permit was initially not difficult to obtain. But as the entertainment industry and its unions grew stronger, pressure on the INS to restrict H-1 permits mounted. The 1980s saw music industry pressure on several legislative fronts (the Recording Industry Association of America [RIAA] even moved its offices to Washington, D.C., to be closer to the source of its lobbying efforts). It is not surprising in light of such efforts by the industry that the INS has been subjected to industry pressure, especially when one considers the increase in record sales and radio play accompanying a concert tour. As Steven C. Bell, senior writer and editor of the *Immigration Law Review*, writes,

> the U.S. labor market is glutted with persons who seek careers in the various fields of the arts, most of whom are unemployed at any one time, and . . . no occupational field in the United States is more heavily unionized than the entertainment industry.[4]

Those accompanying an artist (roadies, sound mixers, etc.) are subject to the H-1 rules as well. A work permit category, H-2, exists that allows temporary entry to those who "perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country."[5] It is, of course, difficult to show that no one in the United States is capable of performing said service.

Since the musicians' union is exclusively consulted by the INS in these matters, ultimately it is the union that really runs the show, collapsing issues of artistic merit into ones of commercial control or, at the very least, equating issues of artistic merit with commercial success. Access to live performance before an American audience is determined by union executives whose experience of music (as performers and audience members) may bear no relation to the music of those seeking work permits. Moreover, these issues are further confused by quotas "limiting to 25,000 the number of annual visa applications from nonsuperstar musicians, athletes and dancers."[6] Making the limit more problematic is a revision requiring individual members of orchestras, dance troupes, ballet companies, and the like to file for visas. In the past, one visa admitted an entire ensemble. Whither artistic merit for application number 25,001?

The greatest fear among U.S. booking agencies and record companies is that the INS rules will provoke retaliation from other countries'

unions and immigration services. The manager of several non-U.S. rock and reggae acts said, "The INS is going to create a cultural trade war. It could cut domestic rock musicians' income in half by preventing them from traveling outside of America to earn money. The Dutch, the French, and the Canadians are already upset about this."[7]

In an era characterized by the continuation of Reaganite and Thatcherite trade policy, it is not surprising to find that trade unions in the U.K. and the United States have a reciprocal agreement. Union officials from each country keep track of performers to ensure that equal numbers are "exchanged."[8]

In many recent cases the only means for a foreign artist to come to the United States is under the guise of a tourist visa. But it would not be surprising to find that modern recording techniques such as multitracking are being used to bypass the INS—it would be difficult to deny entry to a tape recording or a sample of an African singer, or a French horn section, for instance, sent to the United States for additional recording, or for use during a performance.

The musicians' union is also seeking to address the issues technology has muddled for it. It is now circulating a new contract to recording studios that requires that those who program drum machines, computers, sequencers, or any form of electronic equipment that produces music (or, for that matter, anyone who starts any such piece of equipment) belong to the union. The long-standing joke that goes, "Sure, I'm a musician. I play the stereo," may not be so funny. And I can foresee the day that my friends from other countries will need work permits to use my CD player.

Immigration issues are particularly important to attend to, as they affect the circulation of music. Unlike distribution issues, which are most greatly affected by copyright and are concerned with the broadcasting, importation, and commodification of music, the live performance of music can be understood in terms of circulation of sound and musical ideas that creates an opportunity for a different form of exchange. It may nevertheless be commodified exchange (via the purchase of concert tickets, at least), but it is distinguished from distribution insofar as the exchange is not one of goods but, perhaps, is one of services. In that context immigration laws can greatly affect the music of those who provide such a service, especially insofar as there are many, many performers who will not have their music commodified and thereby mass-mediated.

• • Technology, Music, and Copyright

Authorship, uniqueness, reproducibility, and a host of other issues preoccupy the business and legal transactions in the music industry. Within that framework, copyright has traditionally been regarded as an author's protection against the copying and pirating of music. It has also been a means for record companies and music publishers, who usually own the copyrights to songs, to ensure income during periods of low sales, and to control the manufacture and distribution of recordings. Copyrights are bought, sold, and exploited via licensing fees and royalties. New technologies that enable a diffusion of authorship and ready reproduction are making traditional copyright protection obsolete.

The most recent and best-publicized controversy over copyright concerned home taping of records and compact discs when the recording industry sought a "tape tax" on blank audio media. Though beginning in the late 1970s, when the recording industry's sales slumped, copyright issues have taken on altogether new meanings with the development of digital recording and digital audio tape (DAT). The Electronics Industry Association's Consumer Electronics Group (EIA/CEG) was at the forefront of groups opposed to legislation sponsored by the RIAA in the United States Congress seeking a tax on blank tapes and audio recorders to make up for revenue allegedly lost due to home taping. The EIA/CEG has agreed, however, to jointly seek legislation with the RIAA "requiring the hardware companies to pay (record) labels a royalty on blank audiotape and digital recording equipment to compensate for sales lost to home taping"[9] in exchange for the RIAA dropping its request for such a tax on analog media.

These issues obscure the larger concern record companies have about the pirating of recordings. It is, simply put, easier to tax audio media than it is to organize teams of law enforcement officials and attorneys to engage in anti-piracy efforts in various countries (though the latter is a practice the RIAA continues to pursue). Presumably, at some point in the chain of production, even pirates will pay a tax on the blank media they use! In any event, the recording industry's long-term goal is complete penetration of such anti-copying mechanisms as those the Serial Copying Management System (SCMS) built into DAT recorders inhibiting digital-to-digital copying. The RIAA is currently funding research to invent a system that will prevent analog-to-analog copying using digital recorders.

It is also necessary to consider the effects of digital sampling on

the use of copyright law. At present recordings using sampled sounds are evaluated by attorneys (and sometimes musicologists) at the record company and clearances secured from copyright holders for a (usually small) licensing fee. Such a system operates informally and does not turn over large sums of money (except in the rare instance of a hit song such as M. C. Hammer's "U Can't Touch This" or Vanilla Ice's "Ice Ice Baby"). Still, this matter has not been solved in any routine, consistent fashion. The trend is toward following guidelines established for compulsory license. If a recording has been publicly released it can be rerecorded, with a mandatory mechanical royalty to the copyright holder. Mechanicals can add up to a large sum, as shown in the case of pre- and post-reunification Germany. Since reunification, all of Germany is covered by Western copyright conventions. The German authors' rights society, GEMA, reported a $53 million increase in revenue (for a 1990 total of $478 million) in the first year after reunification.[10]

The more significant issue in terms of international trade in the music industry concerns the use of samples outside the United States in areas whose culture provides little or no conceptual framework for the ownership of sound. Issues of labor and income are at play, as are cultural issues. Reggae groups, for instance, use backing tracks dozens of times for different songs. These forms of "versioning" are widespread. How should copyright be established in these cases? Wallis and Malm[11] note that in many third world countries musicians record backing tracks that are used by producers for overdubbing singers and other instrumentalists. David Toop suggests that part of the reason for the use of backing tracks is economic: "Versions are obviously a convenient way of making records, as most of the ideas have already been worked out in the original."[12] U.S. record companies argue that since they've paid for the original, which is now being reused, some licensing set-up is in order.

As copyright laws become more alike from country to country, and as new markets are exploited to their fullest, copyright holders will seek new means of exploiting rights. Copyright has less to do with authors' protection and the establishment of an "authentic" original and more to do with profit. New media such as DAT, digital compact cassette (DCC), and mini disc (MD) not only allow increased income from sales of existing product in new formats (as the compact disc did), they also generate income from mechanical royalties and soon also from royalty income derived from hardware taxation.

Record companies have long recognized the importance of copyright

as a means of producing income, and the RIAA is very actively engaged in international lobbying to bring copyright legislation to as favorable a position as possible for copyright holders. In 1991 the RIAA was instrumental in passage of new legislation in Mexico that revised that country's copyright law and may earn record companies some $75 million a year.[13] And new legislation in Japan extends copyright protection in that country from thirty to fifty years, and prohibits rental of recordings for one year from their release. It is estimated that the new law may gain record companies up to $1 billion annually.[14] Copyright is clearly a high-stakes enterprise, and a source of income whose importance can rival that of record sales.

• • The Import Blockade

With the discussion of sound and copyright as a background, two cases regarding importation of sound recordings will now be considered. U.S. copyright holders have blocked the availability of many recordings issued by non-U.S. labels. The cases set a precedent for blocking importation of recordings (legally licensed for manufacture and distribution abroad) whose copyrights are held by American record companies.

In the first of the two cases, *Columbia Broadcasting System, Inc., v. Scorpio Music Distributors, Inc.*, that was decided on August 17, 1983, the court held that

> phonorecords manufactured abroad and imported by a third party intermediary without the consent of the copyright owner constituted unlawful importation of phonorecords under section 602 of the U.S. Copyright Act. . . . [Such] "importation" infringed the plaintiff's copyright in the phonorecords.[15]

The second case, *Harms Music v. Jem Importers*, that was decided on March 26, 1987, upheld the copyright of a music publisher against the importation of sound recordings containing the publisher's copyrighted songs. Out-of-court settlements between major labels and import distributors followed both cases.

These cases deal with what is commonly referred to as "parallel imports," and the result has been chilling as far as U.S. importers are concerned. Lawyers advised importers that

> the prudent United States purchaser of phonorecords from abroad would have determined, before entering into a purchase agreement, the nature and extent of any American copyright owner's rights to the phonorecords at issue. Since Scorpio Music, however, such a determination would be wise not only with respect to purchases from abroad but also purchases within the United States because of the possibility that the domestic purchaser would be found to be acting within the chain of importation and deemed a contributory infringer.[16]

Ostensibly, major labels and music publishers perceived a threat to their profit margin created by importation of recordings that had been manufactured more cheaply outside the United States. It is more likely, however, that they reasoned that U.S. consumers had a limited budget for their products, and that that budget was stretched too thinly when imports were available to consumers. Though unable to completely halt the importation of records into the United States, they damaged the importers sufficiently to convince most to cease import operations. Along the way they damaged the U.S. independent record label, as U.S. distributors (Caroline, Important, JEM, Rough Trade, Twin Cities) acted as importers but also generally stocked 50% independent label releases. U.S. independent labels have had a difficult enough time getting paid by distributors, and any financial difficulties placed on the distributors trickled down to the independent labels.

Importing records in the United States has never been an easy task to begin with. Import duties on records are relatively high, and unlike printed materials, records are not treated as perishable materials. It also takes some time for a shipment of records to clear customs. These factors, in a market in which timing may be all-important, create problems for the importer.

The implications are interesting for fans of hard-to-find American music that is released by European labels such as Charly, Ace, Demon, and Pathe-Marconi. In Europe there is a great appreciation for jazz and blues records that have long been deleted from the catalogs of U.S. record companies—but whose copyrights those companies still hold. Presumably, then, most Europeans will be able to buy records by American artists that are inaccessible to people in the United States.

Emphasizing the multinational nature of the record industry, Warner, Sony, and PolyGram have begun attempts to limit recordings exported by U.S. distributors out of America. A weaker dollar means that foreign wholesalers may purchase recordings from U.S. distributors and have them shipped overseas for less than it costs to purchase them from

the international arms of major labels. Such a practice weakens the profit and position of the non-U.S. branch of the label. It is clearly a policy among the major record labels to monitor and ensure that their business is functional and profitable on a multinational level.

Trading Music

Though the case of record imports has the clearest connections to NAFTA and GATT, intellectual property issues have the most long-term significance for international trade in popular music for two reasons. First, copyright exploitation has the greatest income-producing potential for the music industry; and second, popular music is used in many media, and as a result, music copyright creates a ripple effect in film, television, and multimedia productions that use music.

And yet there is a fundamental contradiction that the music industry faces—namely, in the definition of that which is copyrighted. On the one hand, it is recorded or, as U.S. copyright law has it, "fixed" sound that is copyrightable and thus it would seem that it is the material objects that contain music that are protected. On the other hand, however, it is the creative object that is of value and not the material object that contains it. This contradiction is embodied in copyright law itself, which states that ideas cannot be copyrighted, only their expression. To copyright a musical idea, then, one must record it, or "fix" it. And although the recording has intrinsic value (a recording of a Bob Dylan song can have value based on who recorded it, the quality of the performance, and so on), it is the musical content that is valuable and copyrighted (the law notwithstanding). There are two consequences. First, the creator of a song benefits more from copyright law than its performer does; and second, trade in its everyday sense of the exchange of commodities does not take place in the music industry. Although material objects (records, compact discs, cassettes) are indeed traded, what gives those commodities value is the abstracted object of copyright—namely, music.

In discussion of intellectual property issues in Chapter 17 of NAFTA, Article 1706 directly addresses sound recordings. It is clear from that discussion that NAFTA considers sound recordings as commodities, even though there is mention that "secondary uses" of sound recordings (such as for film or broadcasting) are understood as part of the agreement. There is little evidence that copyrights are themselves understood as commodities. In other words, exploitation of rights, it seems, occurs only when rights are "fixed" or "embedded" in material objects, such as compact discs or cassettes. The trading of rights, the use of rights for commercial purposes, and the relationship between performance rights and copyrights are not addressed in NAFTA (or, for that matter, sufficiently in GATT). Put another way, what NAFTA allows for is free trade in record albums but not necessarily in music. And regarding GATT, it would appear that record companies are quite the winners.[17]

Among the questions that thus need to be raised, the most important is: What room do these trade agreements leave for the definition of nonmaterial, but nevertheless copyrighted, information? It is easier to understand why NAFTA left such questions unanswered than it is to answer them. NAFTA is, ultimately, a conservative document that favors those with the wherewithal to mass-produce material objects within the legal limits available to them as copyright holders or licensees. There is no mention of income and labor related to authorship and creation. Indeed, there is no attempt to define the creation of intellectual property and rights associated with it. The goal of Article 1706 concerning sound recordings in particular is clearly to give producers of sound recordings protection against unauthorized (namely, unpaid) reproduction. Consequently, NAFTA continues the evolution of copyright as publisher's right and largely overlooks the author. The focus of discussion is the material object and not the creative subject, a dubious focal point, one that gives marketing preeminence and that disenfranchises creation.

Copyright and Trade

I have addressed critical issues of copyright elsewhere[18] and do not wish to engage those here, except to say that although copyright may have use as an author's protection against unauthorized copying, copyright was initially enabled and engaged as a means of determining who had the right to publish. It was publishers who first used copyright law provisions to circumscribe the marketplace. Similarly, authors' organizations are defensive in nature and "are proud to be champions of the rights and economic interests of their members."[19] Particularly in the music industry, authors' organizations are closely linked to industry organizations and their interests, most commonly by way of Broadcast Music, Inc. (BMI) or the American Society of Composers and Publishers (ASCAP). Given that BMI and ASCAP are also *publishers'* associations, one finds little distinction between the interests of authors and those of publishers. Consequently, whether in the service of authors or publishers, copyright law must first and foremost be understood as law

created to regulate trade and protect property, and as such it is antithetical to free trade. Copyright is a monopoly right ostensibly given to encourage creativity. The monopoly is generally justified by the desire to give economic benefits to the creator, but is often counterbalanced by "fair use," the clause in copyright law which permits free use of copyrighted materials for a variety of purposes (such as criticism), provided such use does not take away from the market value of the copyrighted work.

The issue of authorship therefore must be addressed. Article 1706 of NAFTA clearly gives "the producer of a sound recording the right to authorize or prohibit" a variety of the uses to which a recording is put. Lacking is any mention of a performer, creator, author—or even copyright holder. The NAFTA wording regarding the types of traded commodities understood as "music" (that is, compact discs, records, tapes, etc.) gives the clear impression that record companies—the ones that produce (manufacture) recordings—are the ones with "rights." In many, many instances it is undoubtedly the case that a record company's agreement with an artist gives the record company copyright in the artist's music (and this is particularly true in cases where the work-for-hire clause in copyright law gives the employer rights in employees' works). In other instances, however, the record company may indeed own the recording, but others (artists, publishers, investors) may control a variety of rights, further complicating matters owing to the variety of royalty mechanisms (mechanical, performance, and the like) generating income to rights holders. Though NAFTA and GATT make provision for trade, they do little, if anything, to address exploitation of copyright by way of such royalties. Granted, this may be a daunting task as it means that labor, broadcasting, and cultural issues and policies need to be addressed.

A significant symbol of these concerns is GATT and NAFTA's basis in economic rights. Moral rights have not been a segment of U.S. copyright law, but have been an important element of the Berne Convention and other countries' intellectual property legislation. Moral rights are inalienable and in a sense *not* commodifiable. They are, however, part of contract law, and thus play a substantive role in the negotiation of intellectual property issues. Technology in particular has made moral rights problematic as it has lessened the ability to protect those rights by making copying easier. On an international level, the United States' ability to refrain from recognizing moral rights causes great difficulty in relation to its dealings in intellectual property with those countries that do recognize such rights. In some countries, for instance, translating

song lyrics from one language to another qualifies as a creative act and the translator is recognized as an author. To a degree, adherence to NAFTA and GATT may represent a significant weakening (if not dissolution) of moral rights. An exclusion of moral rights from these agreements represents the clearest indication that both represent a further industrialization of culture and are industry-driven. They also represent further support for the definition of "ownership" as being vested in producers and manufacturers, an outcome of such industrialization.

In the recording industry (whether U.S.-based or multinational), part of the reason for the emphasis on producers that is found in trade agreements is the focus on piracy and the profits it seems to siphon off and concomitant lobbying efforts by producers. To that end, NAFTA seems geared toward establishing boundaries within which legitimate recordings can be freely traded and piracy vigorously stamped out. The industry has defined several types of piracy (indeed, the RIAA considers parallel imports pirate recordings). To combat them, copyright law has most often been invoked. Consequently, for the recording industry, NAFTA establishes the bounds (national and transnational) within which copyright can be used as a means of legitimately selling recordings. In terms of the transnational component, it creates a definition of those who will be able to move recordings across borders; in terms of the national component, it creates an environment within which nonnational recordings will be given "national treatment." In both cases the interest is, as the RIAA's president Jason Berman has stated, to "[press] for the exclusive right of record companies to authorize or prohibit the reproduction and rental of their works for a period of at least 50 years."[20]

Of course, the interest is not only to protect rights but to exploit them. As Neal Turkewitz, the RIAA's vice-president, pointed out in regard to trade negotiations with China, record piracy losses there represent $16 million in lost revenue, but if China were to open its markets, yearly sales could be near a half billion dollars.[21]

Such interest also explains the recording industry's concentration on Mexico rather than Canada in the NAFTA negotiations. Canada has already been infiltrated by U.S.-based record labels and seems to have less market potential. Indeed, there is not a Canadian national distribution network operated by a Canadian record label—an indication that non-Canadian labels have a significant hold on the system. Canada also participates actively and directly with BMI and ASCAP. Mexico, however, represents both an untapped market and a site of piracy, and con-

sequently NAFTA would appear to the RIAA as the stone that will kill both birds (protection and exploitation).

As mentioned before, complicating these matters is the difficulty of addressing a variety of issues concerning labor, broadcasting, and culture. The former two are, in some sense, already part of the NAFTA and GATT discourse. Culture, however, though it may be embedded in the "cultural products" exemption granted Canada in NAFTA, gives the recording industry more trouble. As Les Bider, chairman and CEO of Warner/Chappell Music, put it, "We're educating [people] about the concept of paying for music."[22] Whether others share a decidedly Western belief that music must be bought is beside the point.

• • Protection, Exploitation, Enforcement

Each of the three issues discussed previously (immigration, copyright, parallel imports) and addressed by the U.S. recording industry (primarily via the RIAA) makes it clear that the industry is fundamentally protectionist. Given that the RIAA has been able to use legal means to enable protectionism, its current strategy seems to be one of establishing similar legal structures in other areas of the world it wishes to exploit. Consequently, as Gabriel Richerand points out, in terms of trade-related aspects of intellectual property (TRIPS), GATT seeks

> to do three things: (a) to ensure that contracting parties to GATT (or at least those who sign the new agreement, which must be a touchstone for international trading respectability) meet the substantive standards of the international copyright (and patent and trade mark) conventions, so establishing and reinforcing the requirements of the conventions as international standards; (b) [to] requir[e] contracting parties to provide effective administrative and judicial enforcement procedures under their legal systems; and (c) [to] provid[e] an international dispute-settlement procedure, backed by the availability of trading sanctions, when contracting parties fail to meet these obligations.[23]

Of course, such an effort has been under way in terms of intellectual property since organization of the Berne Convention. GATT gives teeth to the drive to not only establish intellectual property ownership but enforce rights on a global scale. However, as Richerand points out, the concept of an "open market" renders protection difficult. It has been the practice in the recording industry to grant individual exclusive licenses within specific territories. For instance, a U.S. record company may license a recording to a French record label for European release and distribution, and to a Japanese label for Asian release and distribution. Or, as Richerand puts it,

> it has normally been accepted that the [intellectual property] conventions require each of their contracting parties to grant separate exclusive rights within their separate territories, with the automatic consequence that copies licensed for other territories can be excluded. Indeed, it would be impractical to exercise the local exclusive reproduction or publishing right if imports from other territories could not be excluded.[24]

Until now, I have focused on music and rights associated therein. However, any discussion of the exploitation of rights via licensing is incomplete without a consideration of income from auxiliary sources, such as mass merchandising. The recording industry derives significant income from the sale of T-shirts, books, posters, and such. Estimates vary, but in the United States, T-shirt sales at concerts are said to gross over a half billion dollars a year. *Musician* magazine reported that New Kids on the Block "sold $30 million in merchandise at their shows" in 1990.[25] The U.K. industry is in a similar position, even at the level of the independent record label. Cow Records, for instance, reported that at one Inspiral Carpets performance in Manchester the label earned £25,000 solely from T-shirt sales.[26] As one reporter for the U.K. magazine *The Face* put it, "At times it seems—and bands will admit this—that T-shirts are as important if not more important than records themselves."[27]

The industry thus has as much interest in protecting merchandising rights as it does in protecting any rights associated directly with recordings, particularly as tie-ins to films, books, and the like are perceived as mutually beneficial—one promotes the other. Cross-marketing tie-ins of recorded products also highlight the fact that the recording industry (by now quite well integrated with media industries generally) gains less and less from the outright sales of recordings and more and more from what I would characterize as "trans-mediation"—that is, the placement of artist, music, merchandise, and so forth across a wide variety of media.

Consequently, NAFTA and GATT can be interpreted as guidelines structuring two elements of the global popular-music market. First, they are intended to establish a (near-) uniform legislative arena within which rights holders can enforce their rights; and second, they are

intended to remove restrictions on the flow of commodities across borders. However, having overlooked (most likely deliberately) the commodification of music via copyright, neither agreement restricts or circumscribes the rights that the recording industry has generally enjoyed vis à vis copyright. Such restrictions could have come about had either agreement made clear the relationships between rights, labor, and control, for any such clarification would establish some force other than producers (manufacturers or publishers) as integral to the creation and performance of music (recorded or otherwise).

• • Conclusion

Both NAFTA and GATT need to be viewed as documents that are preliminary to a comprehensive agreement on trade-related aspects of intellectual property rights (TRIPS). As Swiss observers have noted,

> GATT is concerned with tangible goods, while the subject-matter of the [intellectual property] conventions is intangible rights that can extend over both products and processes. GATT is concerned with the "dynamic" flow of goods, while the intellectual property conventions only deal with the "static" question of the protection of [intellectual property rights], rather than [with] their use or exercise.[28]

What, then, might be a next step in negotiations and clarification of these agreements? One likely direction is the establishment of an international performing rights organization. As one legal scholar noted in a discussion of the *Columbia Broadcasting System vs. ASCAP* case, the necessity for a performing rights organization is driven by "the difficulty of individual negotiation and the near impossibility of individual policing and enforcement."[29] Both NAFTA and GATT, as mentioned previously, represent a first step toward establishing a uniform legal structure for policing and enforcement. Negotiation will follow once that structure is in place, but a police force (or collection force) will still be necessary. After all, it is the performance of music that is valuable to the copyright holder, not just its sale. Cultural "content" policy, like Canada's "CanCon" and Australia's "music quotas," recognizes this, but there is a difficulty in determining not only where to draw the line when defining national origin, but also sufficient minimums—and sustaining the bureaucracy to do so.

It is instructive to note that the measure of success used by the recording industry when it releases figures to the public is unit sales of recordings, and that this is the measure used during discussions of the impact of international trade agreements on the industry. At best, statistical measures are used to determine the direction of a particular market, medium, or genre. Of course, it is difficult to imagine what other measures exist. Yet, Jocelyne Guilbault notes:

> statistics alone do not suffice here. As Wallis and Malm explained in their study of four small countries, few "hard facts" could be obtained by gathering statistics on cultural practices . . . It could be argued that an evaluation of . . . groups' or singers' popularity based on measurements of record sales, for example, can be misleading as it reifies what it is trying to prove. The categories on which the measurements are based are devised by the record promoters themselves to confirm the success of their own products and to achieve a specific goal, that is, to boost sales.[30]

Of course there are matters other than sales to be considered, matters having to do with culture, identity, consumption, and creation. Guilbault does a marvelous job attending to those matters in her study of zouk. How, though, will such issues be brought forward in an economistically driven neoconservative document such as NAFTA? It is clear that the audience is largely not conceptualized in these agreements, and if it is at all, it only serves to whet the appetites of industry by dint of its size and potential. Another way to view these agreements, then, is as geographer Edward Soja might—that is, as

> a continuous process of societal restructuring that is periodically accelerated to produce a significant recomposition of space-time-being in their concrete forms, a change in the nature and experience of modernity that arises primarily from the historical and geographical dynamics of modes of production.[31]

Soja points out that "capitalist development is geographically uneven," while "[at] the same time, there is also a persistent tendency toward increasing homogenization and reducing these geographical differences."[32] This is precisely the situation vis à vis the popular music industry. On the one hand, there need to exist untapped markets for consumption, reservoirs of labor for production, and cultural homogeneity for both consumption and production of the popular music product generated by the global popular music industry.

Some of the impetus for free trade agreements doubtlessly comes from the "information superhighway," the National Information Infrastructure in the United States (and elsewhere), which in actuality establishes the opportunity to upload and download cultural products (media content). That this can be done at great distances clearly problematizes the ability to maintain exclusion, national treatment, and a host of other issues that FTAs address. As Roger de la Garde has said, "free trade does not mean deregulation but regulation of another kind,"[33] and economies will find ways in which to regulate (and thereby institutionalize exploitation of) electronic media from cassettes[34] to digital samplers to computers. And yet, as Horace Newcomb has stated, "culture cannot be protected by treaty or agreement."[35] There is a kind of "will to market" that is operative not only in cultural industries but in culture itself that permeates our production and consumption of popular music in particular, but of culture generally. Kenichi Ohmae has observed this from the perspective of business:

> There are, for example, 600 million consumers in . . . Japan, the United States, the nations of the European Community . . . with strikingly similar needs and preferences. Gucci bags, Sony Walkmans, and McDonald's hamburger stands are seen on the streets of Tokyo, London, Paris, and New York.[36]

I can thus think of only one way in which the music industry understands the term "world music," and I assure you that it has nothing to do with music that is non-Western and everything to do with marketing particular music(s) to the world.

NOTES

1. I use the term "internationalized" to mean the inclusion of non-Western sounds and music in Western popular music, the growing popularity of non-Western music among fans of popular music, and the growth of the music business into an industry dominated by transnational corporate interests. It is not intended to mean the exportation to (and hence exploitation in) third world and other countries of Western popular music. The term "popular music" is taken to include forms such as pop, rock, rock 'n' roll, and so forth.

2. See Steve Jones, "Who Fought The Law? American Responses to Popular Music, Cultural Production and the International Popular Music Industry," in *Rock and Popular Music: Politics, Policies and Institutions*, ed. Tony Bennett, Larry Grossberg, Graeme Turner, and Simon Frith (London: Routledge, 1993).

3. L. Berman, "Foreigners Need Not Apply," *Village Voice*, December 30, 1986, p. 34.

4. S. C. Bell, "Special Procedures for the Entry of Alien Entertainers," in *1985 Entertainment, Publishing and the Arts Handbook*, ed. Alexander Lindey, p. 421 (New York: Clark Boardman Company, 1985).

5. All references to the U.S. Immigration Reform Act are from Section 101(a)(15)(H)(ii), the *United States Immigration Reform and Control Act of 1986* and subsequent congressional revisions.

6. Bill Holland, "Tighter Visa Rules Bad News for Biz," *Billboard*, June 8, 1991, p. 1.

7. P. Verna, "Fed Quota Law on Visas May Limit Overseas Acts," *Billboard*, June 15, 1991, p. 77.

8. H. D. Deutsch, *Employer's Complete Guide to Immigration* (Paramus, N.J.: Prentice-Hall Information Services, 1987), 213–214.

9. Bill Holland and S. Nunziata, "Duping Royalty Pact Signals New Era," *Billboard*, July 20, 1991, p. 1.

10. W. Spahr, "Mechanical-License Income Boosts GEMA to Record Year," *Billboard*, June 8, 1991, p. 2.

11. Roger Wallis and Krister Malm, *Big Sounds From Small Peoples* (New York: Pendragon Press, 1984).

12. David Toop, *Rap Attack* (Boston: South End Press, 1984), 111.

13. Bill Holland, "New Mexican Law Recognizes U.S. Copyrights," *Billboard*, July 20, 1991, p. 8.

14. J. Clark-Meads and Bill Holland, "Japan Boosts Copyright Protection," *Billboard*, May 11, 1991, p. 1.

15. O. J. Sloane and R. Thorne, "International Aspects of United States Copyright Law: The Music Business," in *1986 Entertainment, Publishing and the Arts Handbook*, ed. Alexander Lindey, p. 69 (New York: Clark Boardman Company, 1986).

16. Ibid., 73.

17. Thomas Cottier, "The Prospects for Intellectual Property in GATT," *Common Market Law Review*, 28(1991): 402.

18. Steve Jones, "Critical Legal Studies and Popular Music Studies," *Stanford Humanities Review*, 3(Autumn, 1993): 77–90.

19. William Klein II, "Authors and Creators: Up by Their Own Bootstraps," *Communications and the Law*, (September 1992): 49.

20. Jason Berman, "International Copyright Battle Persists," *Billboard*, December 21, 1991, p. 12.

21. Bill Holland, "China Hears U.S. Plea: Protect Copyrights," *Billboard*, January 25, 1992, p. 6.

22. Sal Manna, "For Les Bider, Success is Measured by More Than the Bottom Line," *BMI MusicWorld* (Summer 1993): 22.

23. Gabriel Richerand, "GATT, Intellectual Property Rights and the Developing Countries," *Copyright Bulletin*, 25, no. 3 (1991): 13.

24. Ibid., 14.

25. Thom Duffy, "The Rag Trade," *Musician*, January 1992, p. 42.

26. Amy Raphael, "Material Gains," *The Face*, June 1991, p. 50.

27. Ibid., 54.

28. Rajan Dhanjee and Laurence Boisson de Chazournes, "Trade Related Aspects of Intellectual Property Rights (TRIPS): Objectives, Approaches & Basic Principles of the GATT and of Intellectual Property Conventions," *Journal of World Trade*, 24, no. 5 (September 1990), p. 7.

29. Simon H. Rifkind, "Music Copyrights and Antitrust: A Turbulent Courtship," *Cardozo Arts and Entertainment Law Journal*, 4(1): 4.

30. Jocelyne Guilbault, *Zouk: World Music in the West Indies* (Chicago: University of Chicago Press, 1993), 177–178.

31. Edward Soja, *Postmodern Geographies* (London: Verso, 1989), 27.

32. Ibid., 107.

33. Roger de la Garde, remarks at the international conference, Media, Culture and Free Trade: NAFTA's Impact on Cultural Industries in Canada, Mexico and the United States, Austin, Texas, March 3–5, 1994.

34. Cassettes are a particularly interesting medium. Portable, easy to copy, easy to mail, the cassette has, in a sense, made the postal service a distribution system for music in much the same way that it is a distributor for magazines and newspapers.

35. Horace Newcomb, remarks at the international conference, Media, Culture and Free Trade: NAFTA's Impact on Cultural Industries in Canada, Mexico and the United States, Austin, Texas, March 3–5, 1994.

36. Kenichi Ohmae, *Triad Power* (New York: Free Press, 1985), 23.

15

Copyright, Contract, the Cultural Industries, and NAFTA

KEITH ACHESON AND CHRISTOPHER J. MAULE

Introduction

The cultural industries[1] significantly affect the quality of our lives. On average, we spend an increasing amount of the day reading the newspaper, tuning in to the radio while commuting to work, purposefully searching for information on a data base, browsing on an electronic bulletin board, listening to recorded music, and watching television or seeing a film in the evening.

The Electronic Mall

Shopping is another activity that absorbs much of our time and is equally symbolic of the North American lifestyle. There are interesting parallels between developments in retailing and in the cultural industries. In the past twenty-five years shopping malls have grown to dominate North American retailing. In many cities the malls are urban parks in which locals and tourists gather. By locating stores conveniently and judiciously controlling the mix of local stores and a growing number of chain stores, a mall reduces the search and travel costs of the shopper.

What malls have done in consolidating shopping opportunities, cable television has done for viewing. Viewers browse among a mix of local stations and an expanding set of cable networks. As shopping malls have steadily got larger and extended their menu to include professional services, more eating opportunities, and a burgeoning set of entertain-