

Copyright in the Courts: The Return of the Lion

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By Owen Dean

*Hot on the heels of the settlement in "The Lion Sleeps" copyright case, this first hand account was written for WIPO Magazine by leading South African copyright expert, **Dr. Owen Dean** of Spoor and Fisher. Dr. Dean personally directed the litigation on behalf of the Linda family.*



Solomon Linda (left) and his band, the Evening Birds

In 1939, a Zulu migrant worker and entertainer who called himself Solomon Linda stood before a microphone in Johannesburg's first recording studio, improvising falsetto vocal lines against a rolling, driving vocal chant. He called the song *Mbube*, Zulu for lion. On the third take, Linda came up with a haunting skein of notes that went on to become the most famous melody ever to emerge from Africa. The English-speaking world knows it as the central theme from the song *The Lion Sleeps Tonight*. There are versions in French, Japanese, Spanish, Danish and many other languages. More than 150 different artists have recorded it and it features in at least 15 movies and musicals. It has earned by some estimates over \$15 million in composer royalties. Linda's role in the song's creation is undisputed, but he died a pauper, leaving his family too poor even to afford a headstone for his grave.

This is the story of the legal battle to claim back for Linda's children a share in the proceeds from their father's creation.

The song

In the early 1950s the recording of *Mbube* released by Gallo Records, already a good seller in South Africa, found its way to America and came to the attention of Pete Seeger, the folksinger. He liked what he heard and transcribed the music from the record to make his own song, which he called *Wimoweh* (a corruption of

the Zulu lyrics, *Uyimbube*, or "he is the lion"). *Wimoweh* was successful in the United States in the 1950s, and was later reworked into another version in the 1960s by song writers George Weiss, Hugo Peretti and Luigi Creatore, as *The Lion Sleeps Tonight*. In this form the song became a major hit and has remained popular for more than 40 years. Then in the mid-1990s it was incorporated into the Disney musical *The Lion King*. But neither the origins of the song, in *Mbube*, nor the role played by Solomon Linda was acknowledged, and the song was presented as being of American origin.

The rights

Solomon Linda had assigned his worldwide copyright in *Mbube* to the Gallo Record Company for a consideration of 10 shillings. He died in 1962, leaving a wife, Regina, and four children. In 1983 the American music publishing company, Folkways, which had gained control of *Wimoweh*, exacted for a consideration of one dollar an assignment of Regina's rights (as his legal heir) to the renewal term of *Wimoweh* under United States copyright law, and threw in at the same time her worldwide rights to the song, such as they may have been. Regina died in 1990. In 1992, with litigation raging in the United States regarding *Wimoweh* and *The Lion Sleeps Tonight*, the rights to which had been acquired by Abilene Music, Folkways exacted a further assignment of worldwide rights to *Mbube* from the Linda daughters for another dollar. No stone had been left unturned to ensure that the Linda family had no claim to the copyright in *Mbube*.

In the late 1990s, journalist Rian Malan wrote an article for *Rolling Stone* magazine exposing the machinations which had taken place and making the point that, while the derivatives of *Mbube* had made millions of dollars, the Linda daughters, one of whom had recently died from AIDS, were living in abject poverty in South Africa and deriving no material benefit from the fruits of their father's creative work. The article caused an outcry in South Africa. And it fostered a resolve to take legal steps to stake a claim on the part of the family to proceeds from the song, especially *The Lion Sleeps Tonight* version, and to gain due acknowledgment of Solomon Linda's role in creating the song, and of its South African origin.

The law

The action brought by Spoor and Fisher on the part of the family relied on a little known legal provision: Section 5(2) of the 1911 Imperial Copyright Act. This was a British statute, which was made law throughout the British Empire as it existed in 1911, including South Africa. According to this provision, where an author assigned his copyright during his lifetime, 25 years after his death the copyright reverted to the Executor of his estate, as an asset in that estate, *notwithstanding* any other assignments of copyright which might have taken place in the meantime.

This "reversionary copyright" provision was tailor-made for the facts of the *Mbube* case, save that both Regina and the daughters had already assigned their claim to copyright in *Mbube* to Folkways. It was reasoned, however, that the reversionary copyright had been vested in the Executor since 1987 (i.e. 25 years after Solomon Linda's death) and did not become the property of either Regina or her daughters unless and until such time as it was transferred to them by the Executor. As such a transfer had never happened, the assignments made by Regina and the daughters in favor of Folkways accordingly had no force or effect.

The litigation

The estate of the late Solomon Linda was reopened and an Executor, Stephanus Griesel, appointed in 2004. Litigation was begun in the name of the Executor in his representative capacity. Since the Executor could only claim rights to *Mbube* in countries which were formerly members of the British Empire, it was decided to bring the litigation before the South African court. This in turn meant that the case could not be brought directly against Abilene Music, as the South African court can only exert jurisdiction over a defendant who has a place of business or other assets in South Africa, against which an eventual judgment could be enforced. Since Abilene Music had no known assets in South Africa, Spoor and Fisher opted to sue the most prominent and high profile *licensee* of the song against which it was possible to secure jurisdiction before a South African court, i.e. Walt Disney Enterprises Inc. This could be done by "attaching" some 200 registered trade marks owned by Walt Disney Enterprises in South Africa, in

effect holding the Disney trademarks hostage to provide security for the enforcement of payment of a debt.

The application to attach Disney's registered trademarks, as well as the copyright in the movie *The Lion King*, was granted by the High Court of South Africa. Spoor and Fisher then instituted an action against Disney and certain other licensees or sub-licensees of Abilene, claiming that the defendants had infringed the Executor's copyright in *Mbube* by reproducing and publicly performing a substantial part of it in the guise of *The Lion Sleeps Tonight* without his authority.

Walt Disney Enterprises reacted immediately by bringing an urgent application before the South African court to set aside the attachment on the grounds that the Executor had no case against it. The court refused the application, in which all the legal issues were set out, thus in effect endorsing the Executor's cause of action.

The settlement

The action was set down for trial commencing on February 21, 2006. Shortly before the trial date a settlement was reached between the parties to the litigation, as well as with Abilene Music, the true defendant behind the litigation, which had granted an indemnity to Disney when it had licensed the use of *The Lion Sleeps Tonight*. The settlement, which operates worldwide and in settlement of all claims, encompasses the following:

- The Linda heirs will receive payment for past uses of *The Lion Sleeps Tonight* and an entitlement to future royalties from its worldwide use.
- *The Lion Sleeps Tonight*
- is acknowledged as derived from *Mbube*.
- Solomon Linda is acknowledged as a co-composer of *The Lion Sleeps Tonight* and will be designated as such in the future.
- A trust will be formed to administer the heirs' copyright in *Mbube* and to receive on their behalf the payments due out of the use of *The Lion Sleeps Tonight*.

The legal implications

The settlement and the judgement of the court in the application to set aside the attachment of Disney's trademarks, demonstrated that the reversionary interest under the Imperial Copyright Act is enforceable under current South African copyright law, despite the fact that the Imperial Copyright Act itself was repealed in 1965. The case has thus set a precedent for heirs of authors who are not benefiting from the copyrighted works of their forbears, to obtain remuneration arising from the exploitation of such works. This applies not only to heirs in South Africa, but in any countries of the former British Empire in which the Imperial Copyright Act of 1911 (i.e.) was made law.

A happy ending

The remuneration which the Linda daughters will receive should ensure that they will be able to sustain themselves economically into the future. The settlement implicitly acknowledges that *The Lion Sleeps Tonight* is of South African origin and rooted in South African culture. From a South African perspective the saga has a happy ending and there is some pride in having successfully championed the cause of the small creator among entertainment industry giants. The record will, however, read: Griesel NO v Walt Disney Enterprises Inc and others: case withdrawn.

For more information see: <http://www.spoor.co.za>