

**Does the Law of Copyright in the UK and  
Ireland Conflict with the Creative Practices  
of Irish Traditional Musicians?**

**A Study of the Impact of Law on a  
Traditional Music Network**

**By**

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# Declaration

I declare that the work presented in this thesis is the result of my own research, undertaken at the School of Law, Queen Mary, University of London.

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25<sup>th</sup> February 2011

# Abstract

The objective of this thesis is to investigate whether copyright law has the potential to affect the creative practices of Irish traditional musicians. By outlining the central tenets of copyright law, including both economic and moral rights, the thesis aims to identify the crucial issues that are relevant to the relationship between copyright and music. As described over the course of this thesis, Irish traditional music is typically created and performed in an environment within which free-sharing and musical borrowing are encouraged. By dissecting the crucial issues of conflict between copyright and Irish traditional music, the thesis attempts to discover whether any potential solutions can be found within the law to resolve these conflicts. In order to do this, empirical research is undertaken, so that the perspectives of a number of Irish traditional musicians can be assessed in relation to both the potential conflicts and the potential solutions.

This thesis aims to evaluate six things:

- The coherence of the notion of ‘originality’ under copyright in relation to the practices of Irish traditional music
- The suitability of the notion of ‘authorship’ of musical works under copyright in relation to the network of Irish traditional musicians
- The suitability of the notion of ‘joint authorship’ of musical works under copyright in relation to the collective forms of authorship present in the network of Irish traditional musicians
- The potential for the doctrine of infringement to interfere with the practices of Irish traditional musicians
- The applicability of moral rights in the context of Irish traditional music
- The suitability of the copyright licensing model in relation to the practices of the Irish traditional music network.

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# Abbreviations

AC – Law Reports, Appeal Cases  
All ER – All England Law Reports  
Burr – Burrow’s King’s Bench Reports  
Bus LR – Business Law Reports  
CA – Court of Appeal  
CA 1911 – Copyright Act 1911  
CA 1956 – Copyright Act 1956  
CA 1963 – Copyright Act 1963  
CBD – UN Convention on Biodiversity  
CBNS – Common Bench Reports, New Series  
CC – Creative Commons  
CCE - *Comhaltas Ceoltóirí Éireann*  
CD – Compact Disc  
CDPA – Copyright, Designs and Patents Act  
Ch/Ch D – Law Reports, Chancery Division  
Civ – Civil Division  
CRRA – Copyright and Related Rights Act  
CUNY – City University of New York  
ECJ – European Court of Justice  
ECDR – European Copyright and Designs Reports  
EIPR – European Intellectual Property Review  
EMLR – Entertainment and Media Law Reports  
ER – English Reports  
EU – European Union  
EWCA – England and Wales Court of Appeal  
EWHC – England and Wales High Court  
FCA – Federal Court of Australia  
FSR – Fleet Street Reports  
HMSO – Her Majesty’s Stationer’s Office  
IMRO – Irish Music Rights Organisation

IP – Intellectual Property  
IPO – Intellectual Property Office  
ICPPA – Industrial and Commercial Property (Protection) Act  
InfoSoc – Information Society Directive  
IPR – Intellectual Property Reports  
IR – Irish Reports  
ITM – Irish Traditional Music  
JP – Justice of the Peace Reports  
LJ PC – Law Journal Reports, Privy Council  
LP – Long playing record  
LR – Law Reports  
MacG CC – MacGillivray’s Copyright Cases  
MCPS – Mechanical Copyright Protection Society  
MCPSI - Mechanical Copyright Protection Society Ireland  
MP3 – MPEG-2 Audio Layer 3  
NGO – Non-governmental Organisation  
NZ – New Zealand  
RPC – Reports of Patent, Design and Trademark Cases  
SACEM – Société de Auteurs, Compositeurs et Éditeurs de Musique  
TCE – Traditional Cultural Expressions  
TK – Traditional Knowledge  
TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights  
UK – United Kingdom  
US/USA – United States/United States of America  
PPL – Public Performance Limited  
PRS – Performing Rights Society  
QB/QBD — Law Reports, Queen’s Bench Division  
RAAP – Recording Artists and Performers  
RIDA – Revue Internationale de Droit d’Auteur  
SCC – Supreme Court of Canada  
TLR – Times Law Reports  
UKHL – United Kingdom House of Lords  
WCT – WIPO Copyright Treaty  
WIPO – World Intellectual Property Organisation

WLR – Weekly Law Reports

WPPT – WIPO Performers and Phonograms Treaty



# Table of Legislation

## UK

Copyright Act 1842

Copyright Act 1911

Copyright Act 1956

Copyright and Related Rights Regulations 2003

Copyright, Designs and Patents Act 1988

Dramatic Copyright Act 1833

Dramatic and Musical Performers Protection Act 1925

Dramatic and Musical Performers Protection Act 1958

Duration of Copyright and Rights in Performance Regulations 1995

Human Rights Act 1998

Performances (Moral Rights) Regulations 2006

Performers' Protection Act 1963

Performers' Protection Act 1972

Statute of Anne 1710

## Ireland

Constitution of Ireland 1937

Copyright Act 1963

Copyright and Related Rights Act 2000

Copyright (Performers' Protection) Act 1968

European Communities (Term of Protection of Copyright) Regulations 1995

European Communities (Copyright and Related Rights) Regulations 2004

Industrial and Commercial Property (Protection) Act 1927

Public Dance Halls Act, 1935

## **EU**

Commission Proposal for amending Directive 2006/116/EC and extending the term of copyright protection for sound recordings

Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights

## **USA**

United States Copyright Act 1976

United States Copyright Term Extension Act of 1998

## **Germany**

German Act on Copyright and Neighbouring Rights 1965 (Urheberrechtsgesetz)

## **Israel**

Israeli Copyright Act 2007

## **International**

Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994)

Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised July 24, 1971 and amended 1979)

UN Convention on Biological Diversity 1992

UN Declaration on the Rights of Indigenous Peoples 2007

International Convention for the Protection of Performers, Producers of Phonograms and  
Broadcasting Organizations of 1961 (Rome Convention)

Universal Copyright Convention of 1952

WIPO Copyright Treaty of 1996

WIPO Performances and Phonograms Treaty of 1996

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- Ashdown v Telegraph Group Ltd* [2002] Ch 149
- Aston Barrett v Universal Island Rec. Ltd* [2006] EWHC 1009 (Ch)
- Austin v Columbia* [1917-1923] MacG CC 398
- Autospin (Oil Seals) v Beehive Spinning* [1995] RPC 683
- Bach v Longman* 98 ER [1777] 1274
- Baigent and Leigh v Random House* [2006] EWHC 719 (Ch)
- Bamgboye v Reed* [2004] EMLR (5) 61
- Bassey v Icon* [1995] EMLR 596
- Beckingham v Hodgens* [2003] FSR 238
- Beggars Banquet Records Ltd v Carlton Television Ltd* [1993] EMLR 349
- Beloff v Pressdram* [1973] 1 All ER 241
- Biotrading and Financing OY v Biohit Ltd* [1996] FSR 393
- Brighton v Jones* [2004] EWHC 1157
- British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1986] 2 WLR 400
- British Oxygen Co Ltd v Liquid Air* [1925] 1 Ch 383
- Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818
- CBS Records Australia Ltd v Gross* (1989) 15 IPR 385
- Coffey v Warner/Chappell Music* [2005] FSR (34) 747
- Confetti Records v Warner Music UK Limited* [2003] EMLR 35
- Corelli v Gray* [1913] TLR 570
- Cramp (GA) & Sons Ltd v Frank Smythson Ltd* [1944] AC 329
- Designers Guild Limited v Russell Williams (Textiles) Ltd* [2001] FSR 113
- Dick v Yates* (1881) 18 Ch D 76
- Donaldson v Beckett* (1774) 4 Burr 2408; 98 ER 257
- Duriron Company Inc v Hugh Jennings & Co Ltd* [1984] FSR 1
- Ex p Island Records* [1978] 3 All ER 824
- Express Newspapers v Liverpool Daily Post* [1985] 3 All ER 680

*Express Newspapers v News (UK) Ltd* [1990] FSR 359  
*Exxon Corporation v Exxon Insurance Consultants* [1982] RPC 69  
*Francis Day & Hunter v Bron* [1963] Ch 587  
*Francis Day & Hunter Ltd v Twentieth Century Fox Corporation Ltd* [1940] AC 112  
*Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9  
*Fisher v Brooker* [2008] EWCA Civ 287  
*Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764  
*Fylde Microsystems v Key Radio Systems Ltd* [1998] FSR 449  
*Godfrey v Lees* [1995] EMLR 307  
*Gramophone Company Ltd v Stephen Cawardine & Company* [1934] 1 Ch. 450  
*Hadley v Kemp* [1999] EMLR 589.  
*Hawkes and Sons (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593  
*Hollingrake v Truswell* [1894] Ch. 420  
*HRH the Prince of Wales v Associated Newspapers* [2007] 3 WLR 222  
*Hubbard v Vosper* [1972] 2 QB 84  
*Hyde Park Residence v Yelland* [2000] EMLR 363  
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*Interlego AG v Tyco Industries Inc* [1989] 1 AC 217  
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*LB (Plastics Ltd v Swish Products Ltd* [1979] RPC 551  
*Lerose Ltd v Hawick Jersey International* [1973] FSR 15 (Ch) 21  
*Lion Laboratories v Evans* [1985] QB 526  
*Lover v Davidson* (1856) 1 CBNS 182  
*Ludlow Music v Robbie Williams* [2001] FSR 271  
*MacCauley v A. Schroeder Music Publishing Co. Ltd* [1974] 1 WLR 1 308  
*MacMillan & Co Ltd v K & J Cooper & Co Ltd* [1923] 93 LJ PC 113  
*Merchandising Corporation of America Inc v Harpbond Inc* [1983] FSR 32  
*Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201  
*Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144

*Musical Performers' Protection Association Ltd v British International Pictures Ltd* 46 TLR [1938] 485

*Newspaper Licensing Agency v Marks & Spencer* [1999] EMLR 369

*Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239

*Newspaper Licensing Agency v Marks & Spencer* [2001] UKHL 38; [2003] 1 AC 551

*Norowzian v Arks Ltd (No 2)* [1999] FSR 79 and on appeal [2000] FSR 363

*Nova Games Ltd v Mazooma Productions Ltd* [2007] RPC 589

*O'Sullivan v Management Agency and Music Ltd* [1985] QB 428

*Panayiotou v Sony Music Entertainment* [1994] EMLR 229

*Pasterfield v Denham* [1999] FSR 168

*Peter Hayes v Phonogram Ltd* [2003] ECDR 110

*Pro Sieben Media v Carlton Television* [1999] FSR 610

*Ray v Classic FM plc* [1998] FSR 622

*Re Dickens* (1934) 1 Ch 267

*Redwood Music v Chappell* [1982] RPC 109

*Rees v Melville* [1911-16] MacG CC 168

*Robertson v Lewis* [1976] RPC 169

*Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] 1 WLR 3281

*Sean Toye v London Borough of Southwark* [2002] 166 JP 389

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*ABKCO Music, Inc. v Harrisongs Music, et al*, 508 F. Supp. 798 (1981); on appeal, 722 F. 2d. 988 (1983); again after remand, 841 F. 2d. 494, and again 944 F. 2d 971 (1991)
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*Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 FC Aust.

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# Introduction

## Hypothesis

It is questionable whether copyright law in the UK and Ireland properly takes account of the creative practices of Irish traditional musicians. In order to examine this hypothesis, this thesis evaluates six questions concerning originality, authorship, joint authorship, infringement, moral rights and licensing. The question of originality is particularly important regarding the creation of new traditional compositions and arrangements, which may be of questionable originality under copyright law. In relation to authorship, it is necessary to assess the role of the individual author in the context of Irish traditional music. With regard to joint authorship, it is necessary to discover whether there is a collective process of authorship present in Irish traditional music and if so, to further analyse whether this type of authorship is envisaged under copyright law. The issue of infringement in this context may be of importance regarding the way that tunes are passed around from musician to musician. In relation to moral rights, it is necessary to assess the meaning of the rights of attribution and integrity in the context of Irish traditional music. It is also necessary to discuss the formal copyright licensing model and to assess whether this model poses challenges to the creative practices of Irish traditional musicians.

In assessing the above possible conflicts, potential solutions in the form of fair dealing/fair use, public domain, traditional knowledge and alternative licensing are examined. Ultimately, this thesis proposes that the informal, flexible social rules of the Irish traditional music network effectively regulate the creative practices of musicians. While copyright law has the potential to affect the creative practices of musicians in a number of ways, at present it appears that the majority of musicians take a minimal approach to copyright. Nevertheless, it also appears that the majority of musicians are not in favour of abolishing copyright for traditional music. In this view, copyright does not overtly interfere with the creative practices of Irish traditional music. In fact, copyright often remains in the background. Thus, while a number of possible legal

solutions can be envisaged for providing solutions to potential conflicts between copyright and traditional music, it appears that the informal, flexible social rules of Irish traditional music are paramount in this regard.

## **Organisation of the Thesis**

### **Scope**

This thesis is both a study of law and a study of the creative practices of Irish traditional musicians. It examines the law of two jurisdictions - the UK and Ireland. In the UK, the Copyright, Designs and Patents Act, 1988<sup>1</sup> is the framework for copyright. In Ireland the structure is provided by the Copyright and Related Rights Act, 2000<sup>2</sup>.

### **Chapter Outlines**

The thesis is organised around five main chapters. Chapters 1 and 2 establish the legal background and the musicological context of the study. Chapters 3, 4 and 5 form the core of the thesis. In chapters 3-5, the key issues and questions of the thesis are explored.

The first chapter is mainly a legal analysis chapter. In particular, it focuses on the relationship between copyright and music. The main part of this chapter focuses on the current copyright law of the jurisdictions of the UK and Ireland with particular focus on the law as it applies to musical works.

The second chapter provides musicological context to the thesis by offering a musicological study of the origins of Irish traditional music, which is a form of ‘traditional’ music with its own distinctive characteristics.

The third chapter undertakes a critical analysis of creativity and authorship in the context of Irish traditional music. In this chapter the key issues of the thesis are articulated in

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<sup>1</sup> Hereafter referred to as CDPA; accessible at [http://www.opsi.gov.uk/acts/acts1988/UKpga\\_19880048\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm)

<sup>2</sup> Hereafter referred to as CRRA; accessible at <http://www.irishstatutebook.ie/2000/en/act/pub/0028/index.html>

reference to the relevant tenets of copyright law regarding originality, authorship, joint authorship, infringement, moral rights, and licensing.

The fourth chapter explores the potential solutions to the issues of conflict articulated in chapter three. Firstly, the potential use of a fair dealing/fair use solution is examined with reference to the law of the UK and Ireland and other jurisdictions where relevant. Secondly, the notion of 'public domain' is analysed and considered as a potential solution. Thirdly, the development of a sui generis 'traditional knowledge' solution is examined. Fourthly, the potential for the use of alternative licences such as 'Creative Commons' is explored.

In response to the issues of conflict articulated in chapter three, and the potential solutions discussed in chapter four, the fifth chapter analyses the results of a qualitative case study carried out between November 2009 and September 2010.

With respect to the results of the qualitative case study, the concluding chapter outlines the overall thesis findings and proposals.

## **Research Methodology**

### **Theoretical Data**

The theoretical framework of the study is based around an analysis of legal, musicological and socio-legal factors concerning the creative practices of Irish traditional musicians. The legal element of the research involves an analysis of relevant legislation and case law, as well as the relevant academic legal literature. The research also includes data from governmental reports, NGO reports and news items. Musicological literature is also examined, particularly in relation to Irish traditional music, blues music and jazz music. Socio-legal and socio-cultural literature is also examined where relevant, particularly with respect to the creative practices of traditional musicians.

## Empirical Data

As part of the research, a qualitative case study was carried out between November 2009 and September 2010. Over the course of this qualitative case study, two concurrent methods of data-gathering were undertaken. Once ethics approval for the study was obtained, the two methods were put into place. Firstly, an online survey was designed and launched using Bristol Online Surveys. Secondly, 10 research interviews were undertaken. These methods are outlined further below. The reason for the use of two methods was to try to access as much varied data as possible. Because of the use of two independent methods of data gathering, it is possible over the course of this thesis to compare the two streams of data. This broadens the accessibility of the study, and it arguably helps to ensure that the resulting conclusions of the thesis are based upon a representative sample of the Irish traditional music network. As noted above, over the course of the fifth chapter of the thesis, the results of the online questionnaire and the interviews are collated and compared.

### *Online Survey – March-April 2010*

The survey was launched in March 2010. It remained open until April 2010. The survey was completed by respondents anonymously. The anonymity of the respondents was important because it ensured that the respondents felt free to give their perspectives on the survey questions. Furthermore, the online nature of the survey meant that it was potentially accessible to practitioners all over the world. For this reason the survey was explicitly restricted to people who live or work within the UK or Ireland, since these are the jurisdictions relevant to the survey. The survey was left open for a two month period in order to allow time for as many responses as possible to be completed. The survey was advertised on ‘thesession.org’<sup>3</sup>, a site that has thousands of members, including a wide range of professional, semi-professional and amateur musicians<sup>4</sup>. In this way, the survey was potentially accessible to musicians within all of these categories. The survey

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<sup>3</sup> <http://www.thesession.org>

<sup>4</sup> For instance, professional touring musician John Gannon (and his fellow touring musicians) recently posted a discussion on the site in relation to their latest tour - <http://www.thesession.org/discussions/display/25590/comments#comment538124> – A professional traditional group known as ‘At the Racket also recently posted to the site - <http://www.thesession.org/discussions/display/19122/comments#comment399720>

received 34 responses. As detailed in chapter four, the survey draws on a varied range of respondent musicians of different ages and different levels of professionalism.

The online survey was designed to give musicians a chance to give their own perspective on the research questions. The survey was designed in a series of 17 short questions. The survey included a mixture of multiple choice questions and broad questions as appropriate to the issue at question. The survey questions were divided into two basic sections. Firstly, questions were asked in relation to copyright and the potential conflicts with traditional music (chapter 3 issues). Secondly, questions were asked in relation to the potential solutions (chapter 4 issues). In this regard, chapters 1 and 2 of the thesis provide the legal and musicological underpinnings of the specific thesis questions and solutions which are fully articulated over the course of chapters 3 and 4. The specific survey questions are outlined in Annex I. The survey answers are analysed in chapter 5 of the thesis.

#### *Interviews – November 2009-September 2010*

A total of 10 interviews were conducted during the period November 2009 -September 2010. The musicians who were interviewed during the period between November 2009 and September 2010 varied in terms of their lifestyles and their attitudes to the music. The interviews were divided equally between musicians who could be described as professional or semi-professional i.e. interviewees who derive all or a large proportion of their income from music, and musicians who could be classed as ‘non-professional’ i.e. interviewees who may be well regarded composers and/or performers within the network, but who do not derive a large proportion of their income from music. The presence of ‘non-professional’ musicians in the study is not unusual in this context. As is described in chapters two and three, many traditional musicians are not professional musicians. Nonetheless, all the interviewees were talented musicians who had been playing Irish traditional music for many years.

An initial round of interviews took place in the London area during November-December 2009. In this initial round, 4 Irish traditional musicians were interviewed. In order to undertake these initial interviews, preliminary contact was made with the interviewees and formal contact letters and information sheets were presented to the

interviewees for signatures of consent. These initial interviews were undertaken at this stage in order to discover the opinions of these 4 musicians in relation to the initial research questions and findings. Another reason for carrying out a small number of initial interviews at this stage was in order to ensure that the right questions would be asked in the online survey. Since the online survey questions could not be ‘rephrased’ once the survey was ‘opened’ online, it was important to make every effort to ensure that the survey respondents would be able to understand the survey questions clearly. The 4 initial interviews proved to be useful, both in relation to analysis of the responses, and in relation to fine-tuning the questions for the online survey. Following the launch of the online survey, a last round of 6 interviews was arranged. These interviews took place between June and September 2010. This set of interviews took place in Ireland, in Dublin and Galway, and in the UK, in London. In addition, 2 out of the 6 final interviews took place via email where a face-to-face meeting was not feasible due to scheduling conflicts.

The questions varied slightly for each participant, but most of the interviews followed a basic template (see Annex II). As with the survey, the musicians were asked questions in two basic sections. Firstly, questions were asked in relation to copyright and the potential conflicts with traditional music (chapter 3 issues). Secondly, questions were asked in relation to the potential solutions (chapter 4 issues). In this regard, chapters 1 and 2 of the thesis provide the legal and musicological underpinnings of the specific thesis questions and solutions which are fully articulated over the course of chapters 3 and 4. The interview responses are analysed in chapter 5 of the thesis.

## **Limitations**

It is important to note that this study does not attempt to address all issues relating to copyright and Irish traditional music. The study is limited to an examination of the creative practices of Irish traditional musicians within their social network, with particular emphasis on the creation of new compositions and arrangements of Irish traditional music. Furthermore, practitioners of Irish traditional music are dispersed around the globe, including such countries as the USA, Australia and Japan. However, due to the necessity of undertaking empirical research within the jurisdictions featured in

the study within a reasonable time frame, the study is expressly limited to the jurisdictions of the UK and Ireland up to and inclusive of 31<sup>st</sup> January 2011. The relevant empirical research was undertaken in these jurisdictions between November 2009 and September 2010.

In addition, given the diversity of views on the issue of copyright and traditional music, the qualitative study cannot claim to produce a definitive statement on the subject. Furthermore, the use of an online survey is not without potential difficulties. For instance, since the survey had to be completed online it is possible that a portion of musicians in the UK and Ireland i.e. those without regular internet access, would not have access to the survey. Nonetheless, as described in the second chapter there are a significant number of musicians who do have internet access and many of these musicians communicate regularly with each other via the internet. In addition, considering that participation in the survey was voluntary, it is arguable that only those Irish traditional musicians who have an interest in copyright would have been willing to complete such a survey. Any musicians who have no interest in copyright might have been unwilling to answer survey questions on the issue. However, two methods of data-gathering were used over the course of this study. Due to the simultaneous use of targeted interviews it was possible to contact and interview musicians who may not have had access or have been willing to answer the online survey. In this way, it was possible to compare and contrast the resulting data from both streams and to discuss whether the data from both streams is broadly comparable. In light of the dual process of data-gathering, it is submitted that the study adds valuable research to the scholarship in this area.



# Chapter 1: Exploring the Relationship between Music and Copyright

## Introduction

This chapter provides the legal framework for the examination of the relationship between copyright and Irish traditional music which occurs in the latter chapters of the thesis. This chapter focuses upon the aspects of copyright law that are of direct relevance to the thesis questions i.e. originality (1.1.3.), authorship (1.2.), joint authorship (1.3.), infringement (1.4.), moral rights (1.5.) and licensing (1.7). It is also necessary to discuss the relevant copyright ‘exceptions’ in this chapter (1.8.). Due to the fact that this thesis primarily focuses on copyright with regard to the musical work (1.1.1.), it is necessary to also outline the issues concerning sound recordings (1.1.2.) and performers’ rights (1.6.) in order to distinguish these rights from the copyright in the musical work.

This chapter analyses the current copyright law of the jurisdictions of the UK and Ireland. In the UK, the CDPA provides the framework for copyright. In Ireland the structure is provided by the CRRA. As outlined below, Irish copyright legislation has traditionally reflected the respective UK legislation. Today, this is mainly due to the ‘strong commercial relations’ between the two countries in the media and industrial sectors of the economy<sup>5</sup>. However, as noted below, the legal systems in Britain and Ireland also share common historical roots with regard to copyright law<sup>6</sup>. In line with this, the CRRA strongly reflects the influence of the CDPA. In light of the above and noting the further influence of international conventions and EU law, it is arguable that the copyright jurisdictions of the UK and Ireland are broadly comparable. For the purposes of this chapter, it is proposed to examine the principles of copyright in the knowledge that they generally apply to both jurisdictions in the same way. Where there is a relevant point of divergence between the two jurisdictions, this is clearly referenced.

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<sup>5</sup> R. Clark, S. Smyth and N. Hall, *Intellectual Property Law in Ireland* (Dublin: Bloomsbury Professional, 2010, 3<sup>rd</sup> ed.), 498 (hereafter referred to as Clark *et al.*).

<sup>6</sup> *Ibid.*, 216-218.

## 1.1. Exploring Subsistence of Copyright in Musical Works and Sound Recordings in the UK and Ireland

The concept of ‘the work’ is central to copyright protection. In relation to music, both ‘musical works’ and ‘sound recordings’ are works under the CDPA and CRRA. As noted above, this thesis primarily focuses on copyright in relation to the musical work. In order to bring clarity to the discussion of the musical work, over the course of this sub-section it is necessary to note the distinction between the copyright in the musical work and the copyright in the sound recording of that work. In this regard, the requirements of originality and fixation are outlined here primarily in relation to musical works, but also with respect to sound recordings. This sub-section analyses these issues with a view to applying these principles in later chapters with respect to the first thesis question, which discusses the notion of ‘originality’ in the context of Irish traditional music.

### 1.1.1. The Musical Work

Under copyright law, the ‘musical work’ is usually refers to the musical composition. As discussed below, since the crucial case of *Bach v Longman*<sup>7</sup> in 1777, the rights associated with the musical work have been expanded to include e.g. performing rights, adaptation rights etc. However, it is clear that the ‘musical work’ is difficult to define, as discussed further below<sup>8</sup>. Of particular importance to the first question of this thesis is the distinction under copyright between the copyright in the musical composition and the copyright in a subsequent ‘arrangement’ of that composition. This distinction is outlined below with a view to its application in the context of Irish traditional music in chapter 3.

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<sup>7</sup> *Bach v Longman* 98 ER [1777] 1274.

<sup>8</sup> A. Sterling, *World Copyright Law* (London: Sweet and Maxwell, 2008, 3<sup>rd</sup> ed.), 258 (hereafter referred to as Sterling).

### 1.1.1.1. *The Statute of Anne, 1710<sup>9</sup> and the case of Bach v Longman in 1777<sup>10</sup>*

It is not the intention of this chapter to explore the history of copyright in great detail. Expansive studies on this point have been undertaken elsewhere<sup>11</sup>. However, a number of relevant points can be noted regarding the beginning of the relationship between modern copyright law and music. For instance, while the first ‘letters patent’ had been issued to music publishers in England during the late 16<sup>th</sup> century<sup>12</sup>, it is interesting to note that music was ‘not thought to be protected under the Statute of Anne’ at the time of its enactment<sup>13</sup>. However, towards the latter half of the 1700s, Barron has remarked that there was a ‘shift in judicial understanding of the possible *objects* of property’<sup>14</sup>. Barron has argued that this was central to the development of copyright to encompass ‘other forms of expression such as music’<sup>1516</sup>. Eventually, in 1777, the decision in *Bach v Longman* established that musical compositions were in fact covered by the Statute of Anne<sup>17</sup>.

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<sup>9</sup> Statute of Anne, 1710; accessible at [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp)

<sup>10</sup> *Bach v Longman* 98 ER [1777] 1274.

<sup>11</sup> See for example M. Rose, *Authors and Owner - The Invention of Copyright* (Cambridge, Massachusetts: Harvard University Press, 1993). See also D. Ross, ‘Copyright and the Invention of Tradition,’ *Eighteenth-Century Studies* 26(1) (1992), 1. See also J. Feather, ‘The Book Trade in Politics: The Making of the Copyright Act of 1710,’ *Publishing History* 8 (1980), 19. See also C. Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006) (hereafter referred to as Seville). For further detail on these issues see generally J. Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988). See also J. Hughes, ‘The Philosophy of Intellectual Property,’ *Georgetown Law Journal* 77 (1988), 287 (hereafter referred to as Hughes) and W. Gordon, ‘A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,’ *Yale Law Journal* 102 (1993), 1533. Also of interest is B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999) and J. Waldron, ‘From Authors to Copiers,’ *Chicago-Kent Law Review* 68 (1988), 841.

<sup>12</sup> M. Carroll, ‘Whose Music is it Anyway? How We Came to View Musical Expression as a Form of Property,’ *University of Cincinnati Law Review* 72 (2004), 1405, 1463 (hereafter referred to as M. Carroll, ‘Whose Music is it Anyway?’).

<sup>13</sup> M. Kretschmer and F. Kawohl, ‘The History and Philosophy of Copyright’ in S. Frith and L. Marshall (eds.), *Music and Copyright* (Edinburgh: Edinburgh University Press, 2005, 2<sup>nd</sup> ed.), 21, 27 (hereafter referred to as Kretschmer and Kawohl). See also D. Hunter, ‘Musical Copyright in Britain to 1800,’ *Music and Letters* 67 (1986), 269, 274 (hereafter referred to as Hunter, ‘Musical Copyright’)

<sup>14</sup> A. Barron, ‘Copyright Law’s Musical Work,’ *Social and Legal Studies* 15 (2006), 101, 106 (hereafter referred to as Barron, ‘Musical Work’).

<sup>15</sup> *Ibid.*

<sup>16</sup> Carroll, ‘Whose Music is it Anyway’ *op. cit.*, 1463. Carroll noted that a close relationship between music and enforceable proprietary rights had not been firmly established in Europe until the late ‘Middle Ages’. See also J. Curtis, ‘Culture and the Digital Copyright Chimera: Assessing the International Regulatory System of the Music Industry in Relation to Cultural Diversity,’ *International Journal of Cultural Property* 13(2006), 59, 68. See also Kretschmer and Kawohl, *op. cit.*, 25.

<sup>17</sup> For a detailed assessment of the case see generally J. Small, ‘J.C. Bach Goes to Law,’ *The Musical Times* (1985), 526.

In line with this, Hunter has stated that three conditions necessitated the application of copyright protection to music in England during the 18<sup>th</sup> century<sup>18</sup>. Firstly, the existence of printing technology was vital. Secondly, the general acceptance of the concept of ‘intellectual property’ in some form at a governmental level was indispensable. Thirdly, due to a period of economic expansion and ‘the rise of the bourgeoisie’, a market in sheet music had begun to thrive. This also reflects the fact that it was not until the late 17<sup>th</sup> century that it became possible to make a profit from the ‘unauthorised publication of musical works’<sup>19</sup>. Furthermore, Deazley has argued that the economic rights of publishers were of paramount importance to the legislature when the Statute of Anne was enacted<sup>20</sup>. In this vein, Clark, Smyth and Hall have stated that the origin of statutory copyright reflects the ‘convoluted political struggle’ that occurred between the Crown and ‘publishing entrepreneurs’<sup>21</sup>. Arguably, the author or composer had only a sideline role in this ‘struggle’<sup>22</sup>. Nonetheless, it has been noted that the potential for enforcement of copyright for musical works began to have a tangible effect on the attitudes and practices of major classical composers during the 18<sup>th</sup> and 19<sup>th</sup> centuries<sup>23</sup>.

As noted above, *Bach v Longman* established that musical compositions were subject to copyright under the Statute of Anne. At the time this was of primary importance in relation to sheet music publishing. However, modern copyright in the ‘musical work’ typically includes the rights to control and authorise many other uses of the work such as a performance of the work. These rights are outlined below in sub-section 1.2. For present purposes, it can be noted that the first ‘performing right’ was created by the Dramatic Copyright Act 1833, which in 1842<sup>24</sup> was extended to include musical works<sup>25</sup>. As Arnold has noted, the 1833 Act, or ‘Bulwer Lytton’s Act’, was enacted due to the ‘recognition that certain classes of work were principally exploited through performance, and accordingly, rights in performances were required’<sup>26</sup>. Composers and rights-holders

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<sup>18</sup> D. Hunter, ‘Musical Copyright,’ *op. cit.*, 269.

<sup>19</sup> *Ibid.*, 270.

<sup>20</sup> R. Deazley, *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004), xix.

<sup>21</sup> Clark *et al.*, *op. cit.*, 213.

<sup>22</sup> *Ibid.*, referring generally to L. R. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968).

<sup>23</sup> F. Scherer, ‘The Emergence of Musical Copyright in Europe From 1709-1850,’ *Review of Economic Research on Copyright Issues* 5(2) (2008), 3, 11.

<sup>24</sup> Copyright Act, 1842 (5 & 6 Vict. c. 45).

<sup>25</sup> R. Arnold, *Performers’ Rights* (London: Sweet and Maxwell, 2008, 4<sup>th</sup> ed.), 16 (hereafter referred to as Arnold, *Performers Rights*)

<sup>26</sup> *Ibid.*, 16-17.

were the beneficiaries of these ‘performing’ rights. In addition, the development of music copyright over the past few centuries since *Bach v Longman* has been shaped by developments at the international level. It has frequently been the case that international conventions have provided the spur for the reform of national copyright legislation<sup>27</sup>. The next sub-section discusses these developments.

### *1.1.1.2 International Conventions*

There is no doubt that the Berne Convention of 1886 has proven to be the most important and far-reaching piece of international copyright legislation<sup>28</sup>. The Berne Convention has been adopted by much of the global community<sup>29</sup>, particularly since many of its standards also form part of the TRIPS<sup>30</sup> agreement. However, the Berne Convention only covers ‘literary and artistic works’<sup>31</sup>. As discussed further below, the later ‘Rome Convention’<sup>32</sup> was enacted to provide protection for other rights such as rights over sound recording and performers’ rights, as discussed further below.

For the purpose of this thesis it is necessary to note that the Berne Convention provides an international framework for copyright in relation to the musical work. Under the Berne Convention, the ‘musical composition with or without words’ and ‘dramatico-musical works’ are protected, but no further definition of ‘music’ or ‘musical composition’ is given<sup>33</sup>. It is interesting to note that there are surprisingly few definitions

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<sup>27</sup> L. Bently and B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2008, 3<sup>rd</sup> ed.), 5 (hereafter referred to as Bently and Sherman).

<sup>28</sup> Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised July 24, 1971 and amended 1979) hereafter referred to as Berne Convention; accessible at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

<sup>29</sup> Universal Copyright Convention (1952). This was enacted to provide international protection standards for countries that were unwilling to accept certain terms of the Berne Convention. Today the Universal Copyright Convention is less relevant due to the requirement that countries accede to the TRIPS agreement for WTO membership. Both the Geneva (1952) and the Paris (1971) texts are accessible at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=1814&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>30</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (1994) (hereafter referred to as TRIPS); accessible at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

<sup>31</sup> S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights- The Berne Convention and Beyond* (Oxford: Oxford University Press, 2006, 2<sup>nd</sup> ed.), 406-7 (hereafter referred to as Ricketson and Ginsburg). Ricketson and Ginsburg noted that the Berne Convention in fact covers a number of works which may not always be classed as ‘literary or artistic works’. Thus, the scope of this expression is wide.

<sup>32</sup> Rome Copyright Convention (1928) (hereafter referred to as Rome Convention); accessible at <http://www.efe.ca/pages/law/canada/rome.copyright.1928.html>

<sup>33</sup> Article 2(1) Berne Convention, *op. cit.*

of the ‘musical work’ in national and international copyright law. For instance, TRIPS adopted the terms of the Berne Convention and did not provide a further definition of the musical work<sup>34</sup>. The WIPO World Copyright Treaty of 1996<sup>35</sup> also did not give any further definition. Similarly, the relevant US legislation does not provide a definition<sup>36</sup>. It can be concluded that many legislative bodies, both national and international, appear to accept that the terms ‘music’ and ‘musical work’ are inherently difficult to define and/or that it is not necessary to define the terms strictly in order to provide protection to the work.

The broad notion of ‘musical work’ under copyright in the UK and Ireland is outlined below. For present purposes, it is necessary to note here that in the UK and Ireland, a ‘song’ comprises two separate ‘works’ in copyright law. In other words, there are separate copyrights in the music and the accompanying lyrics<sup>37</sup>. The lyric is a ‘literary work’ and the music is a ‘musical work’. However, this separation is not necessarily required by the Berne Convention<sup>38</sup>. Furthermore, as discussed below in 1.2, Handig has stated that following the *Infopaq*<sup>39</sup> case ‘it is arguable whether music and the words set for the music remain distinct works for copyright purposes’<sup>40</sup>.

In addition, the Berne Convention does not expressly state that there is a requirement of ‘originality’<sup>41</sup>. Nonetheless, Ricketson and Ginsburg have stated that there is ‘a clear

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<sup>34</sup> Similarly under TRIPS the articles 1-21 of the Berne Convention are adopted with no expansion of the definition of ‘musical work’; accessible at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1)

<sup>35</sup> WIPO Copyright Treaty (1996) (hereafter referred to as WCT). This exists in compliance with Article 20 of the ‘Berne Convention’ and it complies with the Berne definition of ‘literary and artistic works’. The WCT was enacted primarily to address the issues surrounding copyright and digital technology; accessible at [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P51\\_3806](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806).

<sup>36</sup> United States Copyright Act 1976 s 102(a)(2); accessible at <http://www.law.cornell.edu/copyright/copyright.act.chapt1a.html#17usc102>.

<sup>37</sup> CDPA s 3(1) states that a literary work ‘means any work, other than a dramatic or musical work, which is written, spoken or sung’. See *Ludlow Music v Robbie Williams* [2001] FSR 271. In this case, the singer Robbie Williams was found to have infringed the copyright in the lyrics to the song “I am the Way” by Loudon Wainwright, which itself was based on an earlier Woody Guthrie song. Ironically, Woody Guthrie himself famously declared that he didn’t mind if other people sang his songs – see R. Jones, ‘Technology and the Cultural Appropriation of Music,’ *International Review of Law, Computers and Technology* 23(1) (2009), 59, 63-64 (hereafter referred to as Jones).

<sup>38</sup> Sterling, *op. cit.*, 258-259.

<sup>39</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.

<sup>40</sup> C. Handig, ‘Infopaq International A/S v Danske Dagblades Forening (C-5/08): is the term "work" of the CDPA 1988 in line with the European Directives?’, *European Intellectual Property Review* 32(2) (2010), 53, 55 (hereafter referred to as Handig).

<sup>41</sup> Ricketson and Ginsburg, *op. cit.*, 402-3.

indication’ that the notion of intellectual creation is ‘implicit in the conception of a literary or artistic work’<sup>42</sup>. In line with this, it has been argued that it is implied within the terms of Berne that the creation will come from the individual creator, even if this level of originality is at a low threshold<sup>43</sup>. This notion of ‘originality’ in relation to the creation of a musical work is explored further below. When the Berne Convention was revised in 1908 it was decided that copyright should arise automatically i.e. that there should be no need for reservation<sup>44</sup>. It was also agreed that the minimum term should be 50 years after the life of the author<sup>45</sup>. As discussed further below, in 1911 these standards were passed into law in the UK.

### 1.1.1.3. UK

The Copyright Act of 1911<sup>46</sup> brought the Berne Convention standards into UK law. Furthermore, section 31 of the 1911 Act abolished common law copyright for unpublished works<sup>47</sup>. The Copyright Act of 1956<sup>48</sup> did not make substantial change to the provisions of the 1911 Act regarding musical works. However, it broadened the scope of copyright to include further rights in sound recordings, cinematographic works and broadcasts, as detailed below.

Neither the 1911 Act, nor the 1956 Act provided a definition of the ‘musical work’. In 1988 the CDPA repealed the 1956 Act. The CDPA provides a broad definition of the ‘musical work’, describing it as ‘a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’<sup>49</sup>. As noted below, what amounts to a piece of ‘music’ is undoubtedly difficult, and perhaps impossible, to

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<sup>42</sup> Article 2(5) Berne Convention, *op. cit.* See also Ricketson and Ginsburg, *op. cit.*, 402-3, noting that the preparatory documents for the Brussels Revision Conference appear to acknowledge that the expression ‘literary and artistic works’ encompassed a notion of ‘intellectual creation’.

<sup>43</sup> K. Garnett, G. Davies and G. Harbottle, *Copinger and Skone James on the Law of Copyright* (London: Sweet & Maxwell Ltd, 2010, 16<sup>th</sup> ed.), 138 (hereafter referred to as Garnett *et al.*).

<sup>44</sup> Article 4 Convention for the Protection of Literary and Artistic Works (1908) (hereafter referred to as Berlin Act); accessible at [http://en.wikisource.org/wiki/Convention\\_for\\_the\\_Protection\\_of\\_Literary\\_and\\_Artistic\\_Works\\_\(Berlin\\_Act,\\_1908\)](http://en.wikisource.org/wiki/Convention_for_the_Protection_of_Literary_and_Artistic_Works_(Berlin_Act,_1908))

<sup>45</sup> Article 7 Berlin Act, *op. cit.*

<sup>46</sup> Copyright Act, 1911 (hereafter referred to as CA 1911); accessible at [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga\\_19110046\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga_19110046_en_1)

<sup>47</sup> Arnold, *Performers’ Rights*, *op. cit.*, 16.

<sup>48</sup> Copyright Act, 1956 (hereafter referred to as CA 1956); accessible at [http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga\\_19560074\\_en.pdf](http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga_19560074_en.pdf)

<sup>49</sup> CDPA s 3(1).

define<sup>50</sup>. Regarding the definition of ‘music’ for the purposes of copyright law, it has been stated that a ‘reasonably liberal interpretation is called for’<sup>51</sup>. In line with this, Rahmatian has remarked that it is ‘wise’ that the legislature did not attempt to define ‘music’ when enacting the CDPA<sup>52</sup>. As detailed below, it is clear that the UK courts take a broad interpretation of what amounts to ‘music’ and what is encompassed by the ‘musical work’<sup>53</sup>.

#### 1.1.1.4. Ireland

Regarding copyright law in Ireland, the Copyright Act of 1842 extended the British copyright system to Ireland<sup>54</sup>. Furthermore, the 1911 Act applied in Ireland due to Ireland being within British jurisdiction at the time of its enactment. However this changed with the formation of the Irish Free State on the 6<sup>th</sup> December 1921. There was clearly some confusion at the time as to whether the 1911 Act had in fact ceased to be law in the Irish Free State due to the presence of the term ‘self-governing dominion’<sup>55</sup> in a provision of the 1911 Act<sup>56</sup>. The Irish Supreme Court in the case of *Performing Rights Society v Bray UDC*<sup>57</sup> initially stated that the 1911 Act did not apply in Ireland. Nonetheless, this decision was later overturned by the Privy Council<sup>58</sup>. In any event, the Industrial and Commercial Property (Protection) Act 1927<sup>59</sup> had already officially repealed the jurisdiction of the 1911 Act in Ireland while giving effect to the majority of its terms as part of the new legislation<sup>60</sup>. The Irish Free State was replaced with the State of Ireland, or Éire, in 1937, under a new constitution<sup>61</sup>. In 1963, a new Copyright Act<sup>62</sup>

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<sup>50</sup> C. L. Saw, ‘Protecting the sound of silence in 4’33’’ - A timely revisit of basic principles in Copyright Law,’ *European Intellectual Property Review* 27(12) (2005), 467, 469. Garnett *et al.*, *op. cit.*, 98, noting that it is unlikely that silence is of itself ‘capable of being a musical work’.

<sup>51</sup> H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (London: Butterworths, 2000, 3<sup>rd</sup> ed.), 79 (hereafter referred to as Laddie *et al.*).

<sup>52</sup> A. Rahmatian, ‘Music and Creativity as Perceived by Copyright Law,’ *Intellectual Property Quarterly* (2005), 267, 268 (hereafter referred to as Rahmatian, ‘Music and Creativity’).

<sup>53</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] 1 WLR 3281.

<sup>54</sup> Clark *et al.*, *op. cit.*, 216-217, noting that previous to this Ireland had been seen as a ‘haven’ for book piracy.

<sup>55</sup> CA 1911 s 25(1).

<sup>56</sup> Clark *et al.*, *op. cit.*, 495-496.

<sup>57</sup> *Performing Rights Society v UDC* [1928] IR 506.

<sup>58</sup> *Performing Rights Society v UDC* [1930] IR 509.

<sup>59</sup> Industrial and Commercial Property (Protection) Act, 1927; accessible at <http://www.irishstatutebook.ie/1927/en/act/pub/0016/index.html>

<sup>60</sup> Clark *et al.*, *op. cit.*, 495-496.

<sup>61</sup> Constitution of Ireland (1937); accessible at <http://www.constitution.ie/constitution-of-ireland/default.asp>



was enacted in Ireland. It repealed the ICPPA and modernised the law in line with the 1956 Act in the UK and in accordance with international obligations<sup>63</sup>. Thus, because the 1911 or 1956 Copyright Acts provided no definition of the ‘musical work’, a definition of the ‘musical work’ did not form part of the 1927 and 1956 Acts in Ireland. The 1963 Act was replaced with the enactment of the CRRA in 2000. As with the current law in the UK, ‘music’ is not defined within the terms of the CRRA. Nonetheless, it does provide a broad definition of the ‘musical work’<sup>64</sup>. The CRRA defines music as ‘a work consisting of music but does not include any words or action intended to be sung, spoken or performed with the music’<sup>65</sup>. This is a comparable definition to that of the CDPA.

#### *1.1.1.5. Exploring the Notion of ‘Musical Work’ under Copyright*

Laddie has remarked that an original musical work is usually ‘a combination of sounds appreciated by the ear for reasons other than linguistic content’<sup>66</sup>. The Court of Appeal decision in *Sawkins v Hyperion*<sup>67</sup> is the most recent, authoritative decision on the nature of the musical work under the CDPA. In *Sawkins*, the claimant successfully argued that he owned the copyright in performing editions that he had prepared of works by Michel-Richard Lalande. In this case, Mummery L.J. stated that ‘the essence of music is combining sounds for listening to’<sup>68</sup>. Mummery L.J. also remarked:

*“Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener’s emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it... There is no reason why, for example, a recording of a person’s spontaneous singing, whistling or humming or improvisations of sounds by a group of people with or without musical instruments should not be regarded as ‘music’ for copyright purposes.”*<sup>69</sup>

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<sup>62</sup> Copyright Act, 1963; accessible at <http://www.irishstatutebook.ie/1963/en/act/pub/0010/index.html>

<sup>63</sup> Clark *et al.*, *op. cit.*, 496-497.

<sup>64</sup> CRRA s 2(1). See also CRRA s 17(2)(a).

<sup>65</sup> CRRA s 2(1).

<sup>66</sup> Laddie *et al.*, *op. cit.*, 79.

<sup>67</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] 1 WLR 3281.

<sup>68</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at para. 53.

<sup>69</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at para. 53.

It is clear that this notion of music is not limited to harmony or melody. Mummery L.J. further stated that it would be incorrect to ‘single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators’<sup>70</sup>. Therefore, it is clear that the ‘musical work’ can encompass not only notes of music, but also other elements of musical practice and performance. As a result, the notion of ‘musical work’ articulated in *Sawkins* has been described as ‘broad and flexible’<sup>71</sup>.

Nonetheless, in *Coffey v Warner*<sup>72</sup>, it was held that a musical work cannot exist where it consists of mere ‘extractions’ from another work. Thus, to exist as a musical work in itself, a smaller work must be separable from a larger work. In addition, it has been noted that even though the human voice is an instrument, sung lyrics are not part of the musical work<sup>73</sup>. As previously stated, a song lyric is protected separately as a literary work. However, a song title will usually not be protected by copyright because it is ‘de minimis’<sup>74</sup>.

Regarding the theoretical background to the ‘musical work’, Barron has noted that copyright law had developed an embryonic legal ‘work-concept’ even before the 1777 case of *Bach v Longman*<sup>75</sup>. As noted above, it is arguable that the result in *Bach v Longman* came about once the courts began to apply this legal ‘work-concept’ to works of music. Consequently, it is arguable that the concept of ‘musical work’ under copyright is not entirely bound up with the aesthetic philosophy of 19<sup>th</sup> century Romanticism, as argued by Goehr<sup>76</sup>. On this point, Goehr described the musical work as envisaged under copyright as ‘a self-sufficiently formed unity, expressive in its synthesised form and content of a genius’s idea’<sup>77</sup>. However, this description of the musical work is somewhat at odds with the broad definition articulated in *Sawkins*. Bently has echoed this point by

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<sup>70</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565 at para. 55-56.

<sup>71</sup> L. Bently, ‘Authorship of Popular Music in UK Copyright Law,’ *Information, Communication and Society* 12(2) (2009), 179, 184 (hereafter referred to as Bently).

<sup>72</sup> *Coffey v Warner/Chappell Music* [2005] FSR (34) 747.

<sup>73</sup> *Peter Hayes v Phonogram Ltd* [2003] ECDR 110.

<sup>74</sup> *Francis Day & Hunter Ltd v Twentieth Century Fox Corporation Ltd* [1940] AC 112.

<sup>75</sup> Barron, ‘Musical Work,’ *op. cit.*, 122-124.

<sup>76</sup> L. Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music* (Oxford: Clarendon Press, 1992), 113.

<sup>77</sup> *Ibid.*, 242.

referring to the *Sawkins* decision, noting that ‘Mummery L.J.’s conception of the musical work seems miles away from the image of the completed, notated score awaiting conversion by musical automatons – performers – into sounds appreciated by reverent, sedentary, passive audiences’<sup>78</sup>. In fact, it would be more accurate to say that the legal concept of ‘musical work’ under copyright has influenced, and has been influenced by, a number of ‘aesthetic’ and ‘abstract’ notions of musical work present in ‘Romantic’ and ‘Classical’ musicological literature but it is not bound by them<sup>79</sup>. This is arguably a positive thing. For instance, it is possible to envisage cases, such as cases involving ‘avant-garde’ music<sup>80</sup>, where the provision of a strict definition of ‘musical work’ within copyright legislation might end up creating problems for judges, who may be unable to fit an avant-garde work within a formalist definition<sup>81</sup>. In this vein, it has been remarked that copyright law generally tries to avoid ‘the minefield area of subjective, aesthetic judgments’ with regard to the definition of ‘musical work’<sup>82</sup>.

The CRRA definition of ‘musical work’ is comparable to that of the CDPA. Therefore, it is logical to think that claims such as those in *Sawkins v Hyperion* and *Coffey v Warner* would probably be dealt with in the same way in Ireland as in the UK. Therefore, it is arguable that the notion of ‘musical work’ under copyright law in the UK and Ireland is broad and flexible (*Sawkins*), despite the caveat that for a smaller ‘work’ to exist it must be separable from a larger work (*Coffey*). Given the broad definition of ‘musical work’ under copyright law, if there are difficulties and injustices that arise from the application of copyright to music in the UK and Ireland, it is unlikely that these difficulties arise primarily due to the definition of ‘musical work’. However, as discussed further below, there is potential for difficulties to arise in relation to cases involving the distinction between two different musical works - the ‘composition’ and the ‘arrangement’.

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<sup>78</sup> Bently, *op. cit.*, 184.

<sup>79</sup> Barron, ‘Musical Work,’ *op. cit.*, 105-106 and 123-124.

<sup>80</sup> Ricketson and Ginsburg, *op. cit.*, 426.

<sup>81</sup> J. Pila, ‘Copyright and its Categories of Original Works,’ *Oxford Journal of Legal Studies* 30(2) (2010), 229, 236-242.

<sup>82</sup> Ricketson and Ginsburg, *op. cit.*, 426.

#### 1.1.1.6. *The Distinction between the Composition and the Arrangement under Copyright*

As previously noted, the distinction between the ‘composition’ and the ‘arrangement’ is of vital importance to the first question of the thesis, which is detailed in chapter 3. Under copyright law in the UK and Ireland, a separate copyright can exist in an ‘arrangement’ of a composition as long as the arrangement is sufficiently original<sup>83</sup> and the requisite originality comes from the arranger<sup>84</sup>. The owner of the original copyright in the composition is not the owner of the new arrangement copyright, which vests in the arranger<sup>85</sup>. Therefore, potentially copyright can recognise rights in multiple arrangements of the same composition. It must be stated that the effective use of this copyright in the new arrangement is subject to licensing requirements and it must be emphasised that the copyright in the new arrangement does not replace or nullify the copyright in the underlying work. An arranger of a copyright work must have obtained a licence from the owner of the underlying copyright work in order to release the new arrangement because the right to make ‘adaptations’ is one of the rights of the copyright owner<sup>86</sup>. The system of copyright licensing is discussed in detail in sub-section 1.7-8.

Interestingly, ‘musical arrangements’ were not initially protected as original works under the Berne Convention<sup>87</sup>. It appears that following the initial conference, the Berne Convention classed ‘arrangements’ as merely potentially ‘unauthorised indirect appropriations of works’ i.e. as examples of infringement<sup>88</sup>. However, following the Berlin Revision of the Berne Convention, arrangements were protected under Article 2(3) as original works, ‘without prejudice to the copyright in the original work’<sup>89</sup>. This debate over the terms of Berne is of interest because it clearly illustrates that a new arrangement of a copyright composition can simultaneously be an ‘original’ work in its own right and also an ‘infringing’ work with respect to the underlying copyright in the composition, unless it is properly licensed.

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<sup>83</sup> *Austin v Columbia* [1917-1923] MacG CC 398. See also *Robertson v Lewis* [1976] RPC 169. Further see *Lover v Davidson* (1856) 1 CBNS 182 which involved accompaniment to an old air and *Wood v Boosey* (1868) LR 3 QB 223 which involved an operatic pianoforte score.

<sup>84</sup> *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). However, a straightforward ‘cover’ of a work may lack sufficient originality. See comments of Lewison J. in section 6 of ‘Copyright Claims’ in *Aston Barrett v. Universal Island Rec. Ltd* [2006] EWHC 1009 (Ch).

<sup>85</sup> This would usually be the case unless an alternative has been agreed between the two parties.

<sup>86</sup> CDPA s 21. CRRA s 43.

<sup>87</sup> Ricketson and Ginsburg, *op. cit.*, 424-5.

<sup>88</sup> *Ibid.*, 435.

<sup>89</sup> Article 2(3) Berne Convention, *op. cit.* See also Ricketson and Ginsburg, *op. cit.*, 425.

Regarding musical works for which copyright protection has expired i.e. musical works in the public domain<sup>90</sup>, Laddie has remarked that it would appear from the decision in *Walter v Lane*<sup>91</sup> that a person who transcribes a folk song would be entitled to copyright in his ‘transcription’ though not copyright in the song itself<sup>92</sup>. As discussed below, this principle appears to be in line with the decision in *Sawkins*. In the same vein, an arranger can own copyright in an original arrangement of a folk song, though not the song itself, which remains in the public domain. In theory, the arrangement copyright includes the right to object to ‘sound-a-like’ records which mimic the particular copyright arrangement. However, such cases can be difficult to prove<sup>93</sup>, as noted below in subsection 1.4.

There have been a number of recent UK cases where a particular copyright arrangement has been the subject of a legal dispute. In both *Godfrey v Lees*<sup>94</sup> and *Beckingham v Hodgens*<sup>95</sup> the disputes centred on the authorship of the particular copyright arrangements. Nevertheless, it appears that when musical works are first composed and recorded, the distinction between the underlying work i.e. the composition and the recorded arrangement of that work is often blurred. It is further arguable that courts have sometimes found it difficult to clarify the distinction. For instance, in *Hadley v Kemp*<sup>96</sup>, a number of the band members of ‘Spandau Ballet’ took a case against their fellow band member Gary Kemp, arguing for a share in the copyright of a number of Spandau Ballet songs. Kemp was the principal songwriter of the group. He wrote the lyrics, chords and basic melody to the song ‘True’, which was one of the group’s biggest hits, and one of the works under dispute. One of the disputes over the song concerned its famous saxophone solo, which was played by Steve Norman, a band member. The solo lasted for 16 bars, approximately 9% of the song. Norman devised this solo around the chords that Kemp presented to him. The court ultimately held that the creation of the solo was not a ‘significant and original contribution’ to the work. This notion of ‘significant and

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<sup>90</sup> The ‘public domain’ is explored in greater detail in the fourth chapter.

<sup>91</sup> *Walter v Lane* [1900] AC 539.

<sup>92</sup> Laddie *et al.*, *op. cit.*, 81.

<sup>93</sup> *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 at 393. Laddie *et al.*, *op. cit.*, 80, noting that at trial it was found the defendant’s version was not close enough. Further, see *ZYX Music GmbH v King* [1997] 2 All ER 129.

<sup>94</sup> *Godfrey v Lees* [1995] EMLR 307 (Ch D).

<sup>95</sup> *Beckingham v Hodgens* [2002] EWHC 2143 (Ch); [2002] EMLR 45.

<sup>96</sup> *Hadley v Kemp* [1999] EMLR 589 (Ch D).

original' is discussed further below with regard to joint authorship in sub-section 1.3. For the purposes of this sub-section it is interesting to note that with regard to the actual 'musical work' at issue in *Hadley*, it is unclear as to whether the musical work, as composed and recorded in 'demo' form by Kemp, was the same 'work' as the eventual version of 'True', as recorded by the entire band, or whether the eventual band recording was an original 'arrangement' of Kemp's composition<sup>97</sup>. Furthermore, Park J. did not make such a distinction in his judgment, which may indicate that the other band members were 'claiming co-authorship of the works themselves'<sup>98</sup>. Arnold has argued that either outcome could have been possible, had it been fully considered by the court<sup>99</sup>. Arnold has further noted that 'in assessing claims to co-authorship of musical works, the vital first step is for the court correctly to identify the work the subject of the claim to copyright and to distinguish it from any antecedent work'<sup>100</sup>. The fact that the court failed to do so arguably makes the judgement problematic<sup>101</sup>.

Similarly, it has been stated that the recent case of *Fisher v Brooker*<sup>102</sup> left some questions 'unresolved' regarding the issue of musical arrangements<sup>103</sup>. In this case, the facts were similar in some respects to the *Hadley* case. In *Fisher*, authorship of the famous song 'A Whiter Shade of Pale' was disputed. This song became a huge hit in the 1960s, and it remains commercially valuable today, due in no small part to its popularity in the large market for 'ringtones'. Gary Brooker had always been credited with the copyright in the musical work because he wrote the chords and melody of the song. According to Brooker, this basic version ended up being recorded as a bare 'demo'. This version was presented to the other band members, who then performed on the final recorded and released work 'A Whiter Shade of Pale'. This song is perhaps most famous for its organ instrumental sections, which were created by band member Matthew Fisher

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<sup>97</sup> R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* (2010), 153, 159 (hereafter referred to as Arnold, 'Reflections').

<sup>98</sup> Bently, *op. cit.*, 191.

<sup>99</sup> R. Arnold, 'Are Performers Authors? *Hadley v Kemp*,' *European Intellectual Property Review* 21(9) (1999), 464, 467-468 (hereafter referred to as Arnold, 'Hadley').

<sup>100</sup> Arnold, 'Reflections,' *op. cit.*, 159.

<sup>101</sup> *Ibid.*, 159.

<sup>102</sup> *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9, on appeal to the Court of Appeal in *Fisher v Brooker* [2008] EWCA Civ 287 and on appeal to House of Lords in *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764.

<sup>103</sup> L. Abramson and T. Bamford, *The In-House Lawyer* (June, 2008), 42-43 (hereafter referred to as Abramson and Bamford); accessible at

<http://www.harbottle.com/hnl/upload/documents/Music%20Copyright.pdf>

during the performance and recording process. In this case, as with *Hadley*, the instrumental sections in question were created by a band member in response and counterpoint to a chord structure devised by the main songwriter of the group. Interestingly, both the initial song, as apparently initially presented to the band members in demo form by Brooker, and the organ solo devised by Fisher, were adapted to some extent from separate musical pieces originally composed by Bach i.e. works which reside in the public domain<sup>104</sup>.

Abramson and Bamford have asserted that since copyright in a song exists from the time it is reproduced in a material form, the original demo of 'A Whiter Shade of Pale' made by Brooker and Reid, without Fisher, was in fact the 'original work' in the case. The released version of the song, which featured Fisher's organ solo, should therefore be regarded as an 'arrangement' of the original 'work'. The commentators noted that the High Court judgment in *Fisher* did not appear to agree that the demo 'version' of 'A White Shade of Pale' was a 'work' for the purpose of copyright, and in fact, the court appeared to consider the earlier version as a draft or something akin to that<sup>105</sup>. This has been described as a 'wrong' interpretation of the law by Abramson and Bamford<sup>106</sup>. However, it must be noted that the original demo was missing, presumed lost, at the time of the litigation<sup>107</sup>. Therefore, Blackburne J. could not assess it in relation to the eventual released 'A Whiter Shade of Pale'. However, it is arguable that something akin to a musical work i.e. a song had been created by Brooker and Reid, the lyricist, prior to the involvement of Fisher. This 'pre-work' version of 'A Whiter Shade of Pale' is referred to constantly in the High Court judgment as 'the song', as opposed to 'the work' i.e. the eventual released version. It is odd that Blackburne J. appeared to be satisfied that this earlier version was a 'song'<sup>108</sup>, yet he did not accept that it was a 'work'. For instance, even if it had never been recorded in demo form, there was some evidence that a musical work in the form of a song had been created by Brooker and Reid. For example, Blackburne J. accepted that 'the song' had been played by Brooker to Fisher prior to the

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<sup>104</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 36

<sup>105</sup> Abramson and Bamford, *op. cit.*, 43. See also comments of Blackburne J. in *Fisher v Brooker* [2007] EMLR 9 at para. 52-55.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 22.

<sup>108</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 5.

initial ‘Procul Harem’ recording sessions<sup>109</sup>. Nonetheless, the courts have in the past recognised that a work can exist before fixation<sup>110</sup>. Therefore, in the Fisher case, it is not impossible that a work, in the form of ‘the song’, did exist prior to Fisher’s involvement, regardless of whether it was recorded in demo form. However, this work would not have attained copyright protection until it was fixed in a recording and it is unclear as to when exactly this first happened as a number of different recording sessions occurred during 1967 at which Fisher was present. Given this uncertainty, and in light of the lack of evidence of the prior work in the form of the original demo recording, the refusal to accept the existence of a prior musical work by Blackburne J. is not entirely surprising.

Nevertheless, if Blackburne J. had accepted that there was a prior musical work created by Brooker, then a different conclusion would probably have been reached regarding ‘the arrangement point’. For instance, it would be arguably correct to say that if there was an antecedent work, Fisher would be a joint author of the eventual recorded and arranged work known as ‘A Whiter Shade of Pale’ i.e. the version that includes the famous organ intro. In this vein, Arnold has stated that the judgment of Blackburne J. was correct in relation to the fact that ‘it will often be the case that a recorded piece of music created through performance is sufficiently original over any antecedent musical work to attract copyright’<sup>111</sup>. This is not to say that the antecedent work will no longer have copyright protection. In fact, both works will have copyright protection, though as noted above, the owner of the subsequent or ‘derivative’ work will usually have to pay a licence fee for the use of the underlying antecedent work. In this view, the eventual famous version of the song, which Fisher contributed to, would have required a licence in relation to the use of Brooker’s original musical work, as presented in the demo recording. In fact, a number of licensing complexities would have arisen had this conclusion been reached, which perhaps also influenced the decision of the court in finding that there was no antecedent ‘work’<sup>112</sup>. However, the Court of Appeal clarified this point, recognising that the dispute over ‘A Whiter Shade of Pale’ concerned an

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<sup>109</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 27-32.

<sup>110</sup> *Hadley v Kemp* [1999] EMLR 589.

<sup>111</sup> Arnold, ‘Reflections,’ *op. cit.*, 163.

<sup>112</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 52-58. See also A. Barron, ‘Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice,’ *Social and Legal Studies* 15 (2006), 25, 47, (hereafter referred to as Barron, ‘Harmony’). Barron noted that the fact that joint authors are generally held to be tenants-in-common, holding equal shares. Courts may be wary of multiplying the number of potential owners from whom licence must be obtained for various transactions.



‘arrangement’ of the antecedent work<sup>113</sup>. The Court of Appeal then dealt with the licensing considerations via the finding of various implied licences<sup>114</sup>.

## 1.1.2. Sound Recordings

With the development of sound recording equipment in the late 19<sup>th</sup> century, it became necessary to develop copyright law in order to take account of new technologies. This section outlines the relevant international and national legislation regarding sound recording rights. As previously noted, it is necessary to distinguish the rights outlined here from the rights covering the musical work, which are the main focus of this thesis.

### 1.1.2.1. International Conventions

Due to the fact that sound recordings were not included within the Berne definition of ‘literary and artistic works’, it was not feasible to include sound recording rights within its terms. In many continental European jurisdictions, rights concerning technological works were enacted under the law as distinct from the rights to the Berne ‘literary and artistic’ works<sup>115</sup>. These rights, which including sound recording rights, became generally known as ‘neighbouring rights’<sup>116</sup>. However, as discussed below, in the UK sound recordings were traditionally protected under the 1911 Act under the category of ‘musical works’ and as distinct works under the 1956 Act. Eventually, in 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (commonly known as the Rome Convention) was enacted<sup>117</sup>. As is clear from the full title of the convention, the rights in the Rome Convention protected the rights of performers, broadcasters and the owners of sound recordings. For the purpose of this thesis, it can be noted that the Rome Convention provided international protection for sound recordings and it primarily gave substantive rights to phonogram producers<sup>118</sup>. Furthermore, in 1996, the WIPO Performances and

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<sup>113</sup> *Fisher v Brooker* [2008] Bus LR 1123, Mummery L.J. at para. 34.

<sup>114</sup> *Fisher v Brooker* [2008] Bus LR 1123, Mummery L.J. at para. 101-102.

<sup>115</sup> H. MacQueen, C. Waelde, G. Laurie and A. Brown, *Contemporary Intellectual Property – Law and Policy* (Oxford: Oxford University Press, 2010, 2<sup>nd</sup> ed.), 40 (hereafter referred to as MacQueen *et al.*)

<sup>116</sup> Arnold, *Performers’ Rights*, *op. cit.*, 21.

<sup>117</sup> Rome Convention, *op. cit.*

<sup>118</sup> See in particular Articles 5, 7, 10 and 19 of Rome Convention, *op. cit.*

Phonograms Treaty<sup>119</sup> extended the rights available to phonogram producers with regard to the distribution, rental and making available of phonograms<sup>120</sup>.

#### 1.1.2.2. UK

In the UK, the Copyright Act of 1911 established copyright in sound recordings<sup>121</sup>. The 1911 Act enshrined in legislation the principle that copyright protection subsisted in recordings as ‘musical works’<sup>122</sup>. This protection was given to record/phonogram manufacturers from the date the initial recording was made<sup>123</sup>. However, it was not until the *Gramophone Company v Stephen Cawardine*<sup>124</sup> case that it was confirmed that section 19 of the 1911 Act not only gave protection to manufacturers regarding copying of the record/phonogram, but also granted the manufacturers rights over the ‘performance’ of a record/phonogram in public, such as a ‘performance’ in a tea-room. As noted above, in 1956 further progress was made in modernising copyright law. The Copyright Act of 1956 established that copyright subsisted in sound recordings from the date of first publication and that the first owner was the ‘maker’<sup>125</sup>. Sound recordings were no longer classed as ‘musical works’, but as ‘works’ in their own right. The 1956 Act further established new copyrights in relation to films and broadcasts amongst other new rights<sup>126</sup>. In 1988 the CDPA repealed the 1956 Act. This is discussed further below.

Sound recordings were first protected ‘as musical works’<sup>127</sup> under the 1911 Copyright Act. As held in *Gramophone Company*<sup>128</sup>, it is clear that a different type of skill and arrangement is required to make a sound recording than is necessary to create a ‘musical work’. The Copyright Act 1956 gave recordings protection ‘as sound recordings rather than as musical works’<sup>129</sup>. Under the CDPA, a sound recording is defined as ‘a recording

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<sup>119</sup> WIPO Performances and Phonograms Treaty (1996) (hereafter referred to as WPPT); accessible at <http://www.wipo.int/treaties/en/ip/wppt/>. See in particular articles 5-10 and 15.

<sup>120</sup> See in particular articles 11-14 of the WPPT.

<sup>121</sup> Arnold, *Performers’ Rights*, *op. cit.*, 16.

<sup>122</sup> CA 1911 s 19(1).

<sup>123</sup> CA 1911 s 19(1).

<sup>124</sup> *Gramophone Company Ltd v Stephen Cawardine & Company* [1934] 1 Ch. 450.

<sup>125</sup> CA 1956 s 12.

<sup>126</sup> Arnold, *Performers’ Rights*, *op. cit.*, 16.

<sup>127</sup> Bently and Sherman, *op. cit.*, 85, referring to the case of *Panayiotou v Sony Music Entertainment* [1994] EMLR 229, 348, where the history of recorded music is discussed in detail.

<sup>128</sup> *Gramophone Company Ltd v Stephen Cawardine & Company* [1934] 1 Ch. 450.

<sup>129</sup> Garnett *et al.*, *op. cit.*, 248, citing the Copyright Act 1956 Sch. 7 para. 11.

of sounds, from which the sounds may be reproduced’ or ‘a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced’<sup>130</sup>. At present, the copyright protection for sound recordings lasts for 50 years<sup>131</sup>. As Bainbridge has noted, the Act refers to recording of ‘sounds’, rather than music, therefore e.g. a recording of a politician giving a speech is covered under the Act. Further to this, Bently and Sherman have noted that this definition appears to encompass various forms of embodying recording, from the vinyl disc to the mp3, as well as any ‘digital instructions embodied in electronic form which produce sounds’<sup>132</sup>.

### *1.1.2.3. Ireland*

As stated above, the 1911 Act applied within Ireland, and the relevant provisions regarding sound recordings also formed part of the Industrial and Commercial Property (Protection) Act 1927. However, the enactment of the 1963 Copyright Act repealed the provisions of the 1927 Act. The new Act recognised copyright in sound recordings, broadcasts and films along the lines of the 1956 Act in the UK. As detailed below, sound recordings are now protected by the provisions of the CRRA in Ireland, which repealed the 1963 Act in 2000. In Ireland, the Copyright Act 1963 largely followed the template of the UK 1956 Copyright Act. Since 2000, sound recordings have been regulated by the CRRA<sup>133</sup>. As with UK law, copyright protection lasts for 50 years<sup>134</sup>. There has recently been an EU proposal to extend copyright protection in sound recordings from 50 to 95 years, but this proposal has not been put into law as yet<sup>135</sup>.

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<sup>130</sup> CDPA s 5B(1).

<sup>131</sup> CDPA s 13 and 13A.

<sup>132</sup> Bently and Sherman, *op. cit.*, 86, noting that ‘recorded sounds’ can include MIDI instructions which enable a synthesiser to generate sounds, as held in *Sean Toye v London Borough of Southwark* [2002] 166 JP 389.

<sup>133</sup> CRRA s 19.

<sup>134</sup> CRRA s 26.

<sup>135</sup> Commission Proposal for amending Directive 2006/116/EC and extending the term of copyright protection for sound recordings (hereafter referred to as Commission Proposal); accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT>

### 1.1.3. The Requirement of Originality

Waisman has noted that ‘originality’ is a central element of copyright law in two aspects<sup>136</sup>. Firstly, it draws a line between works that are protected and works that are not protected. Secondly, originality plays a role in the analysis of copyright infringement, due primarily to the fact that ‘the reproduction of a work that is not original cannot, by definition, be considered a violation of anyone’s rights’<sup>137</sup>. The first element of originality is dealt with here, and the second element is dealt with in the later sub-section on infringement. The issue of originality is highly significant to the first question of the thesis, which considers the originality of compositions and arrangements in the context of Irish traditional music.

#### 1.1.3.1. UK

Originality is required for a work to be protected under copyright law<sup>138</sup>. Indeed, Craig has noted that originality ‘is the central requirement of copyright protection’<sup>139</sup>. In this vein, Bainbridge has stated that the notion of ‘originality’ for the purposes of copyright law is ‘concerned with the manner in which the work was created’<sup>140</sup>. As discussed below, following the *Infopaq*<sup>141</sup> judgment of the ECJ, the originality standard has now been effectively harmonised in the EU, which of course has significance for copyright in the UK and Ireland. The traditional view of originality based on ‘skill, judgment and labour’ is firstly outlined here. Over the course of this sub-section this view is re-evaluated in light of the *Infopaq* standard of ‘intellectual creation’ with particular respect to musical works.

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<sup>136</sup> A. Waisman, ‘Revisiting Originality,’ *European Intellectual Property Review* 31(7) (2009), 370.

<sup>137</sup> *Ibid.*

<sup>138</sup> CDPA s 1(1)(a).

<sup>139</sup> C. Craig, ‘The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest,’ *University of Ottawa Law and Technology Journal* 2 (2005), 425, 427.

<sup>140</sup> D. Bainbridge, *Intellectual Property Law* (Harlow: Pearson, 2010, 8<sup>th</sup> ed.), 41 (hereafter referred to as Bainbridge).

<sup>141</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.

With respect to the traditional view, Peterson J. stated in *University of London Press v University Tutorial Press*<sup>142</sup>:

“The originality which is required relates to the expression of thought. But the Act does not require that the expression be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author”<sup>143</sup>.

With respect to Peterson J.’s remark on the notion of ‘expression of thought’, it is often stated that there is no copyright in an ‘idea’ and that copyright only exists for original expressions that are fixed in tangible form<sup>144</sup>. Nevertheless, this principle does not explicitly form part of the CDPA. The principle is alluded to in the CRRA<sup>145</sup>. It is expressly noted in the US Copyright Act<sup>146</sup> as well as in the EU Directive governing the protection of computer programs<sup>147</sup>. Furthermore, the principle was discussed in the case of *LB (Plastics) v Swish Products*<sup>148</sup> where it was noted that it is original skill in expression, rather than thought, that is protected by copyright<sup>149</sup>. Nonetheless, it has been argued that making reference to ‘a supposed principle that copyright is confined to expression’ does not actually assist in drawing the line between what should and what should not be protected under copyright<sup>150</sup>. In line with this, the idea/expression dichotomy is thought to have little bearing on questions of subsistence<sup>151</sup>.

In any event, it appears from Peterson J.’s remarks that the idea of ‘originality’ in copyright law is broadly defined. In line with this, it has been noted that it is not

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<sup>142</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

<sup>143</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-609. This was cited in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 by Reid J. at 277. This was also cited in *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74 by Barron J. at 90 along with *Interlego AG v Tyco Industries Inc* [1989] 1 AC 217 and *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60.

<sup>144</sup> This is often referred to as the idea/expression dichotomy. See Article 2 WCT, *op. cit.*

<sup>145</sup> CRRA s 17(3).

<sup>146</sup> United States Copyright Act of 1976 s 102(a).

<sup>147</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs; accessible at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ENnumdoc=31991L0250&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ENnumdoc=31991L0250&model=guichett)

<sup>148</sup> *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551 at 619 and 633.

<sup>149</sup> Garnett *et al.*, *op. cit.*, 140. See also *Baigent and Leigh v Random House* [2006] EWHC 719 (Ch), where it was held that ‘*The Da Vinci Code*’ did not infringe the earlier factual work of the complainants.

<sup>150</sup> Laddie *et al.*, *op. cit.*, 98.

<sup>151</sup> W. Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London, Sweet and Maxwell, 2010, 7<sup>th</sup> ed.), 448 (hereafter referred to as Cornish *et al.*). See also Laddie *et al.*, *op. cit.*, 97 and 103.

necessary that work be ‘unprecedented’<sup>152</sup>. Indeed one commentator has remarked that it is not even required that the work be ‘particularly meritorious’<sup>153</sup>. Therefore, the threshold for originality has traditionally not been high<sup>154</sup>. In *Ladbroke v William Hill*<sup>155</sup>, Lord Reid noted that ‘skill, judgment and labour’ on the part of the author are the necessary requirements for establishing originality<sup>156</sup>. This principle of copyright protection, as founded upon the skill and labour of the author in creating the work, was further reflected in the court’s decision in *Designers Guild v Russell Williams*<sup>157</sup>. However, not every case that features ‘skill and labour’ has resulted in a copyright work. From *Exxon v Exxon*<sup>158</sup> it is clear that even although skill and labour were exercised in the process of choosing to use the name ‘Exxon’, this was not sufficient to produce a ‘literary work’<sup>159</sup>.

Pre-1911, it was held in *Walter v Lane*<sup>160</sup> that even a verbatim copy of a speech by Lord Rosebery as transcribed by a reporter could be protected by copyright. However, *Walter v Lane* was not directly concerned with a notion of originality, but with the notion of authorship of books under the Copyright Act of 1842<sup>161</sup>. As Gravells has noted:

*“Most notably, and somewhat paradoxically, the case has come to be regarded as a legitimate starting point for judicial consideration of the notion of ‘originality’, which was, according to the majority of the House of Lords, neither an express nor an implied precondition of copyright protection under the then current 1842 Act.”*<sup>162</sup>

In recent times, the underlying reasoning of *Walter v Lane* has been cited as authority in relation to the traditional notion of originality under UK law, which is based upon skill,

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<sup>152</sup> Laddie *et al.*, *op. cit.*, 84.

<sup>153</sup> Bainbridge, *op. cit.*, 41.

<sup>154</sup> *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). See also *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>155</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

<sup>156</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 278.

<sup>157</sup> *Designers Guild Limited v Russell Williams (Textiles) Limited* [2001] FSR 113.

<sup>158</sup> *Exxon Corporation v Exxon Insurance Consultants* [1982] RPC 69.

<sup>159</sup> See generally J. Hughes, ‘Size Matters (or Should) in Copyright Law,’ *Fordham Law Review* 74(2) (2005), 575, arguing that regarding US copyright it is proper to deny copyright in single words because such ‘works’ are too small.

<sup>160</sup> *Walter v Lane* [1900] AC 539. See also *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>161</sup> Copyright Act 1842 s 2 and s 3 (5 amp 6 Vict. c. 45).

<sup>162</sup> N. Gravells, ‘Authorship and Originality: The Persistent Influence of *Walter v. Lane*,’ *Intellectual Property Quarterly* (2007), 267, 278 (hereafter referred to as Gravells).

labour and judgment. This endorsement occurred in cases such as *Express Newspapers v News*<sup>163</sup> and *Sawkins v Hyperion*<sup>164</sup>. However, Gravells has argued that the decisions in *Express Newspapers* and *Sawkins* do not ‘truly reflect the reasoning and decision in *Walter v Lane*... they are more consistent with the orthodox originality requirement’<sup>165</sup>.

For instance, in *Sawkins* Mummery L.J. endorsed *Walter v Lane* while noting that there was only a modest level of originality required in order for copyright in Dr. Sawkins’ performing editions of works by Lalande to be established<sup>166</sup>. Despite this endorsement in *Sawkins*, both Gravells<sup>167</sup> and Pila<sup>168</sup> have argued that *Walter v Lane* is actually of little use in relation to determining questions of originality under the CDPA. Gravells has further noted that the decision in *Walter v Lane* ought not to have been cited with approval in *Sawkins* due to the fact that Mummery L.J. went on to stress that a musical work must be considered apart from its fixation. As Gravells remarked:

*“Such reasoning is premised on the separation in the scheme of the 1988 Act of the musical work on the one hand and its fixation on the other hand; but, if that distinction were applied to the facts of Walter v Lane, the reporter’s record would be seen as the fixation of Lord Rosebery’s spoken literary work; and copyright would subsist in the spoken words themselves, not in the record of those words.”*<sup>169</sup>

In fact, both Gravells<sup>170</sup> and Pila<sup>171</sup> have argued that using *Walter v Lane* in cases such as *Sawkins* is unnecessary in any event, noting that the same result in *Sawkins* could have been achieved merely by reference to the skill, judgment and labour expounded by Dr. Sawkins i.e. the application of the traditional originality criteria under UK law.

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<sup>163</sup> *Express Newspapers v News (UK) Ltd* [1990] FSR 359.

<sup>164</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>165</sup> Gravells, *op. cit.*, 288-289.

<sup>166</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, Mummery L.J. at 3295.

<sup>167</sup> Gravells, *op. cit.*

<sup>168</sup> J. Pila, ‘An Intentional View of the Copyright Work,’ *Modern Law Review* 71 (2008), 535, 548 (hereafter referred to as Pila, ‘An Intentional View’).

<sup>169</sup> Gravells, *op. cit.*, 288.

<sup>170</sup> *Ibid.*, 288-289.

<sup>171</sup> Pila, ‘An Intentional View,’ *op. cit.*, 548.

In *Interlego v Tyco*<sup>172</sup>, the Privy Council stated that a copy of a work already in existence could not be an original work regardless of the skill, judgment and labour involved and therefore the particular technical specifications in question were not of the right kind to be considered as copyright works<sup>173</sup>. However, in the aftermath of *Sawkins*, it is questionable whether *Interlego* is still good law on this point. Pila has argued that the *Sawkins* decision was a correct interpretation of the law and that the *Interlego* decision was an incorrect interpretation of the law. In this view, the *Interlego* decision ‘misconceived’ the notion of copyright ‘work’ in relation to the drawings in question by failing to take into account the fact that ‘for copyright purposes production drawings do include their technical specifications’<sup>174</sup>. As previously noted, in relation to musical works, the broad understanding of the ‘musical work’ articulated in *Sawkins* is preferable to a narrowly defined ‘musical work’ for similar reasons. If the technical elements of music, such as performing indications, were excluded from the definition of the ‘work’, this could lead to an unfairly restrictive result.

At this point, it must be stated that the ECJ judgment in *Infopaq*<sup>175</sup> appears to point towards using the notion of ‘intellectual creation’ as a standard of originality for all copyright works within the EU. Previous to this case, this standard of ‘intellectual creation’ was mainly of relevance in the UK and Ireland as the originality standard for computer programs/databases<sup>176</sup>. Therefore, this standard of ‘intellectual creation’ is now of great importance. It appears that this presents a change to the standard of originality as it is applied in the national courts of the EU, including the courts of the UK and Ireland<sup>177</sup>. The *Ladbroke* requirements of ‘skill, judgment and labour’ have seemingly

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<sup>172</sup> *Interlego AG Industries Inc v Tyco* [1989] 1 AC 217, 263-264.

<sup>173</sup> *Interlego AG Industries Inc v Tyco* [1989] 1 AC 217, Lord Olivier at 262.

<sup>174</sup> Pila, ‘An Intentional View,’ *op. cit.*, 552. In coming to this conclusion Pila refers to *Solar Thomson v Barton* [1977] RPC 537 (CA) 558, *Lerose Ltd v Hawick Jersey International* [1973] FSR 15 (Ch) 21 and the New Zealand decision of *Wham-O Manufacturing v Lincoln* [1985] RPC 127 (NZ CA) 146.

<sup>175</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.

<sup>176</sup> See Article 1(3) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs; accessible at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ENnumdoc=31991L0250&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ENnumdoc=31991L0250&model=guichett) - See also Article 3(1) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; accessible at <http://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML> - It was also arguably the case that original photographs required this standard of ‘intellectual creation’ – see Bently and Sherman, *op. cit.*, 110-111.

<sup>177</sup> E. Derclaye, ‘Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law,’ *European Intellectual Property Review* 32(5) (2010), 247, 248 (hereafter known as Derclaye). See



been replaced with a requirement based on the notion of ‘intellectual creation’. Handig has argued that the harmonised *Infopaq* standard is probably higher than the previous UK standard under the CDPA<sup>178</sup>. In this regard, Derclaye has argued that this standard illustrates that ‘creativity is the criterion of originality’<sup>179</sup>. With respect to originality of musical works Derclaye remarked:

“The vast majority of musical and dramatic works will be creative, so for these, *Infopaq* does not change much”<sup>180</sup>.

Therefore, with respect to the originality of musical works the *Sawkins* case is arguably still highly relevant. The reason for this is that, as Derclaye has stated, it is arguable that most, if not all, musical works can be described as ‘creative’ to some extent. In fact, if one takes the ‘intentional view’ of Pila<sup>181</sup>, then if one intends to create a musical work and it accords with the broad *Sawkins* definition, then this arguably shows sufficient intellectual creativity to satisfy the *Infopaq* standard with respect to musical works. On this point, it is arguable that Dr. Sawkins did intend to create a musical work in the form of a performing edition that could be played by modern performers. In addition, the process of editing and filling in the gaps in the musical score was arguably a clear example of ‘intellectual creativity’. In this regard, Bainbridge has argued that had the court in *Sawkins* used a test based on the idea of ‘intellectual creation’, this would have made the originality/subsistence decision a more straightforward one in favour of Dr. Sawkins<sup>182</sup>.

In relation to originality of musical arrangements, Ricketson and Ginsburg have stated that ‘a work of arrangement may, in itself, require very high degree of musical skill’<sup>183</sup>. Nonetheless, as noted above, it is clear from the cases of *Redwood Music v Chappell*<sup>184</sup> and *Sawkins* that the same threshold of originality applies to both the act of musical

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also Handig, *op. cit.*, 56.

<sup>178</sup> Handig, *op. cit.*, 56.

<sup>179</sup> Derclaye, *op. cit.*, 248.

<sup>180</sup> *Ibid.*, 249.

<sup>181</sup> See generally Pila, ‘An Intentional View,’ *op. cit.*

<sup>182</sup> Bainbridge, *op. cit.*, 44. See also Rahmatian, ‘Sawkins,’ *op. cit.*, 588, noting that in the French version of the case (*Sawkins v Harmonia Mundi* 19<sup>th</sup> January 2005, Nanterre District Court (1 RIDA 391)) the court ‘regarded Sawkins’ editorial efforts as tantamount to an original creation’.

<sup>183</sup> Ricketson and Ginsburg, *op. cit.*, 424.

<sup>184</sup> *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD).

composition and the act of musical arrangement. It is interesting to note that Dr. Sawkins explicitly did not seek an arrangement copyright. He may have been seeking to establish that he did not want to own copyright in his ‘version’ or his ‘arrangement’ of the Lalande works, but only in relation to his scholarly research in the form of the performing editions<sup>185</sup>. Nonetheless, he arguably would have been entitled to an arrangement copyright if he had sought it, since he had arguably added sufficient originality to the public domain works. In line with this, Arnold has remarked that it is clear that very little is actually required on the part of the arranger ‘by way of changes to an antecedent musical work’ for the arrangement to be sufficiently ‘original, and thus capable of attracting a fresh copyright’<sup>186</sup>. However, although ‘originality’ is at a low threshold, it is unlikely that every performance of a copyright work will be ‘original’ enough to qualify as a new ‘arrangement’<sup>187</sup>. A straightforward cover version that directly mimics another version of the work may not be original enough for an ‘arrangement’ copyright to subsist. On the other hand, a jazz arrangement of a popular song will, in all likelihood, be original enough to be classed as a new copyright ‘arrangement’<sup>188</sup>. Therefore, it can be said that a low threshold of ‘originality’ is sufficient in relation to the question of whether an adaptation of a work results in a new copyright work i.e. a new, original ‘arrangement’ of the antecedent compositional work<sup>189</sup>. This standard would arguably satisfy the *Infopaq* ‘intellectual creation’ standard since the making of musical arrangements requires some degree of creativity.

### 1.1.3.2. Ireland

As with the UK, originality is required for a musical work to be protected under copyright law in Ireland<sup>190</sup>. The originality required for copyright to subsist in a sound recording is that it is not a copy of a previous sound recording or film<sup>191</sup>. In Ireland the leading case on ‘originality’ is *Gormley v EMI Records*<sup>192</sup>. In *Gormley*, Barron J. noted that the work ‘cannot be copied directly’ and that some ‘original thought’ is necessary as

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<sup>185</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, Mummery L.J. at para. 15.

<sup>186</sup> Arnold, ‘Reflections,’ *op. cit.*, 158.

<sup>187</sup> Abramson and Bamford, *op. cit.*

<sup>188</sup> Arnold, ‘Reflections,’ *op. cit.*, 157.

<sup>189</sup> *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). See also *Aston Barrett v Universal Island Records Ltd* [2006] EWHC 1009 (Ch), Lewison J. at para. 10 of the ‘Copyright Claims’ section.

<sup>190</sup> CRRA s 17(2)(a).

<sup>191</sup> CRRA s 17(6).

<sup>192</sup> *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74.

well as a ‘new approach’ if existing materials are used by the author to create the new work<sup>193</sup>. Barron J also emphasised that ‘creativity’ is important along with skill, judgment and labour. Kelleher and Murray have stated that the position in Ireland regarding originality is consistent with the relevant UK cases<sup>194</sup>. Furthermore, following *Infopaq*, the standard of ‘intellectual creation’ now applies in Ireland as the standard of originality. It is arguable that Barron J.’s emphasis on ‘creativity’ in *Gormley* is in line with the idea of ‘intellectual creation’ under *Infopaq*. Regarding arrangements under the CRRA, Clark, Smyth and Hall have remarked that “many ‘arrangement’ and ‘adaptation’ copyrights claimed may lack the necessary originality element to sustain a copyright”<sup>195</sup>. In light of the *Sawkins* decision and the *Infopaq* ruling, it is arguable that Clark, Smyth and Hall may not be correct in making this broad assessment. As previously noted, ‘arrangements’ will have copyright protection as long as they are the product of ‘intellectual creativity’. The threshold for originality of a musical arrangement is not high – it is the same as for original musical compositions<sup>196</sup>.

#### **1.1.4. The Requirement of Fixation**

As noted below, fixation is a basic requirement for copyright protection in the UK and Ireland.

##### *1.1.4.1. UK*

The musical work must be fixed in a tangible form for copyright to subsist; until a melody is recorded or written down, it will not have copyright protection<sup>197</sup>. Nonetheless, it has been held that a ‘musical work’ can exist before it is ‘fixed’<sup>198</sup>. As stated in *Sawkins v Hyperion*, it is necessary that music be ‘distinguished from the fact

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<sup>193</sup> *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74, 93.

<sup>194</sup> D. Kelleher and K. Murray, *Information Technology Law in Ireland* (Haywards Heath: Tottel Publishing, 2007, 2<sup>nd</sup> ed.), 6 (hereafter referred to as Kelleher and Murray).

<sup>195</sup> Clark *et al.*, *op. cit.*, 274.

<sup>196</sup> See generally Arnold, ‘Reflections,’ *op. cit.* See also A. Rahmatian, ‘The Concepts of “Musical Work” and “Originality” in UK Copyright Law - Sawkins v Hyperion as a Test Case,’ *International Review of Intellectual Property and Competition Law* 40(5) (2009), 560 (hereafter referred to as Rahmatian, ‘Sawkins’).

<sup>197</sup> CDPA s 3(2). CRRA s 18(1). Similarly see *Merchandising Corporation of America Inc v Harpbond Inc* [1983] FSR 32 where it was held that a ‘painting’ requires a surface and a human face does not suffice in this regard.

<sup>198</sup> *Hadley v Kemp* [1999] EMLR 589.

and the form of its fixation as a record of a musical composition... fixation in the written score or on a record is not itself the music in which copyright subsists'<sup>199</sup>.

#### *1.1.4.2. Ireland*

The CRRA in Ireland, unlike the CDPA in the UK, appears to require consent on the part of the author to the recording for fixation. This is not thought to be greatly problematic. Kelleher and Murray have noted that copyright would likely still subsist in the work and that authors would be able to control unauthorised first-recordings<sup>200</sup>. This is arguably important. For instance, it has been argued that in Australia, unlike the UK and Ireland, copyright legislation may not recognise that a work can exist before fixation. As a result, this could potentially prejudice the rights of performers in certain circumstances<sup>201</sup>.

## **1.2. Authorship and First Ownership of Copyright**

The purpose of this sub-section is to outline authorship under copyright and to outline the rights that the author/first owner holds over a musical work and/or a sound recording.

### **1.2.1. The Musical Work**

Authorship of the 'musical work' is discussed below in relation to the law in the UK and Ireland. The issues raised in this section are of particular relevance to the second question of this thesis, which considers the authorship of compositions and arrangements in the context of Irish traditional music.

#### *1.2.1.1. UK*

Copyright is a property right<sup>202</sup>. Usually the first owner of the copyright in the musical work is the author i.e. the composer<sup>203</sup>. The copyright in the musical composition lasts

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<sup>199</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, Mummery L.J. at para. 53.

<sup>200</sup> Kelleher and Murray, *op. cit.*, 8.

<sup>201</sup> E. Adeney, 'Unfixed works, Performers' protection and Beyond: Does the Australian Copyright Act always require material form?', *Intellectual Property Quarterly* (2009), 77.

<sup>202</sup> CDPA s 1(1).

for 70 years after the death of the author<sup>204</sup>. Copyright in the song lyric, a literary work, lasts for 70 years after the death of the lyricist<sup>205</sup>. As previously noted, Handig has stated that following the *Infopaq*<sup>206</sup> case ‘it is arguable whether music and the words set for the music remain distinct works for copyright purposes’<sup>207</sup>. The argument of Handig is that the ECJ focused upon a harmonised interpretation of the term ‘work’ i.e. one that is ‘autonomous and uniform’<sup>208</sup> throughout the EU. In cases involving a ‘production’ such as a ‘pop song’ or a ‘motion picture’, Handig argues that the *Infopaq* decision points towards utilizing a notion of the ‘production’ as a ‘single work’ rather than as ‘separate works’<sup>209</sup>. Handig remarked that the ECJ may have to make a definitive statement on this issue at some point. However, for present purposes it is arguable that the current division between musical and literary works remains effectively in place in the UK and Ireland. The EU legislative institutions have also taken an active role in the harmonisation of copyright laws across member states, particularly regarding term of copyright<sup>210</sup>. For instance, the 1995 Regulations<sup>211</sup> extended the copyright term from 50 to 70 years, giving effect to EU law, and the European Commission also made a recent proposal was made regarding the extension of the copyright in sound recordings<sup>212</sup>.

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<sup>203</sup> CDPA s 11(1).

<sup>204</sup> CDPA s 12 as amended by s 5 of Duration of Copyright and Rights in Performances Regulations 1995.

<sup>205</sup> CDPA s 12 as amended by s 5 of Duration of Copyright and Rights in Performances Regulations 1995.

<sup>206</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.

<sup>207</sup> Handig, *op cit.*, 55.

<sup>208</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259 at para. 27.

<sup>209</sup> Handig, *op cit.*, 55.

<sup>210</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereafter referred to as Infosoc); accessible at [http://europa.eu.int/comm/internal\\_market/en/intprop/docs/index.htm](http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm).

This was brought into force in the UK by the Copyright and Related Rights Regulations, 2003 and in Ireland with by the European Communities (Copyright and Related Rights) Regulations, 2004. Previous EU harmonisation measures included Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights; accessible at

[http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm).

This was brought into effect in the UK with the Duration of Copyright and Rights in Performance Regulations, 1995 and in Ireland with the European Communities (Term of Protection of Copyright) Regulations, 1995. There is also Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version); accessible at

[http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm)

This 2006 Directive consolidated the terms of Directive 93/98/EEC.

<sup>211</sup> Duration of Copyright and Rights in Performance Regulations, 1995.

<sup>212</sup> Commission Proposal, *op. cit.*

The copyright owner is entitled to prevent others from exercising ‘restricted acts’<sup>213</sup>. For instance, the copyright owner has the exclusive right to copy the work, distribute copies of the work, and rent or lend a work<sup>214</sup>. In line with this, the owner has the exclusive right to adapt the work<sup>215</sup> i.e. the rights to copy the musical work include rights concerning new arrangements of the work. The rights commonly known as the ‘mechanical rights’ generally refer to the rights to authorise the sound recording of a musical work e.g. for a film or TV soundtrack recording<sup>216</sup>. In addition, the copyright owner controls a number of other rights including rights concerning the performance of the work. These rights include the right to show or perform a work in public and to communicate a work to the public<sup>217</sup> by public broadcast<sup>218</sup>. In relation to authorship of music and ownership of music rights, there are difficulties inherent in dividing a single musical product or event ‘into a collection of different properties’<sup>219</sup>. For instance, in the case of one song on one compact disc, it has been noted that a division occurs between rights over the musical work, the literary work<sup>220</sup>, the sound recording and the performance(s). All of these different rights may be encompassed within one track on the disc, but will usually give rise to different authors and rights-holders. Disputes concerning these economic rights are discussed further below in relation to infringement (1.4) and licensing (1.7) and with regard to moral rights (1.5).

As the law stands, it is clear that in order to establish authorship of musical works under copyright law, the work must be the author’s ‘intellectual creation’. As previously stated, the traditional position relation to authorship was that ‘something more than labour alone’ was required in order to create an original work<sup>221</sup>. As previously noted, it is arguable that the standard of originality required for authorship of musical works articulated in *Sawkins* is compatible with the standard of ‘intellectual creation’

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<sup>213</sup> CDPA s 2(1) & s 16-27.

<sup>214</sup> CDPA s 17-18.

<sup>215</sup> CDPA s 21.

<sup>216</sup> M. Fisor, *Collective Mangement of Copyright and Related Rights* (Geneva: World Intellectual Property Organisation, 2002), 49.

<sup>217</sup> For a discussion of the meaning of public performance see *Bamgboye v Reed* [2004] EMLR (5) 61.

<sup>218</sup> CDPA s 19-20.

<sup>219</sup> Bently, *op. cit.*, 185.

<sup>220</sup> *Ibid.*, 186, referring to *Peter Hayes v Phonogram Ltd* [2003] ECDR 110 and noting that the separation of the musical and literary works could cause the rhythmic significance of the sung words to be unrecognised in relation to authorship of the musical work, something which may not serve the interests of justice in all cases.

<sup>221</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

elucidated in *Infopaq*. This is arguably true even in cases involving works based largely on existing public domain materials. In a related vein, it has been held in Israel that an expert in the field of Hebrew culture who helped to restore the ‘Dead Sea Scrolls’ owned copyright in the resulting work<sup>222</sup>. The expert had reassembled some fragments and filled in some gaps in the text using on his extensive knowledge. The argument in favour of awarding authorship to an expert such as Dr. Sawkins or Prof. Kimron is that there is nothing to prevent another scholar from doing precisely the same research as undertaken by such experts. However, copyright law prevents others from taking the ‘short cut’ i.e. copying the ‘Sawkins edition’ and the ‘Kimron edition’. It may be incorrect to say that Dr. Sawkins is the author of the Lalande pieces, or that Prof. Kimron is the author of the Dead Sea Scrolls. However, it is arguably correct to say that Dr. Sawkins is the author of the performing editions, and Prof. Kimron is the author of his edition of the Dead Sea Scrolls. In both cases, there is a solid argument that the editions, if not the underlying works, were the intellectual creations of the authors. Furthermore, there is little doubt that this kind of restorative work should be encouraged and rewarded<sup>223</sup>. However, it has been noted that alternative reward schemes for research, such as a grant system, might be preferable to the granting of copyright protection in such circumstances<sup>224</sup>. Nonetheless, it is difficult to articulate the terms of such a grant system. Any grant system may be dependent on the decision of a state body, or a non-governmental body, and as such, it is unclear whether the individual researcher would be best served by this method. One reason for not awarding copyright to Dr. Sawkins or Prof. Kimron might be the danger of public domain works being effectively brought back into copyright via their ‘reconstruction’<sup>225</sup>. Nonetheless, Rahmatian has remarked that the underlying work remains in the public domain, even if the new edition or arrangement is subject to copyright. This is in line with the *Sawkins* and *Kimron* judgments. Thus, this ‘danger’ may be overstated, because only the ‘original’ part of the new work will be protected as a work of authorship<sup>226</sup>.

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<sup>222</sup> *Elisha Kimron v Herschel Shanks* [1993] 7 EIPR D-157.

<sup>223</sup> Bainbridge, *op. cit.*, 46-47.

<sup>224</sup> Bently and Sherman, *op. cit.*, 37.

<sup>225</sup> Rahmatian, ‘Sawkins,’ *op. cit.*, 589-590.

<sup>226</sup> *Warwick Film Productions Ltd v Elsinger* [1969] 1 Ch 508.

### 1.2.1.2. Ireland

In relation to authorship and first ownership, the copyright law of Ireland is generally comparable with the law in the UK. Copyright legislation in Ireland grants property<sup>227</sup> rights to the author as first copyright owner<sup>228</sup>. Copyright in the musical work currently lasts for the same duration as in the UK i.e. 70 years after the death of the composer<sup>229</sup>. The same duration applies to the song lyric as a literary work<sup>230</sup>. As with the law in the UK, the copyright owner is entitled to prevent others from exercising the ‘restricted acts’<sup>231</sup>. The owner also controls other rights such as the ‘performance’ and ‘mechanical’ rights<sup>232</sup>. Furthermore, the owner has the exclusive right to adapt the work<sup>233</sup>.

## 1.2.2. Sound Recordings

Authorship and first ownership of sound recordings is briefly outlined below. Copyright in sound recordings is not of direct relevance to the thesis questions; therefore it is briefly dealt with here in order to clarify the distinction between the copyright in the sound recording and the copyright in the works encompassed by that recording.

### 1.2.2.1. UK

The person who makes the necessary arrangements in order to produce a sound recording is usually the author and first owner of copyright in the sound recording<sup>234</sup>. Hence, the first owner of the sound recording is typically the producer. In a case of dispute over ownership of the copyright in the sound recording, the factual context of the recording will be outlined before the court and the court will decide who the owner is<sup>235</sup>.

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<sup>227</sup> CRRA s 17.

<sup>228</sup> CRRA s 23(1).

<sup>229</sup> CRRA s 24.

<sup>230</sup> CRRA s 24.

<sup>231</sup> CRRA s 17 and s 37.

<sup>232</sup> CRRA s 38.

<sup>233</sup> CRRA s 43.

<sup>234</sup> CDPA s 9(2)(a).

<sup>235</sup> *Garnett et al., op. cit.*, 248-249. See also *A&M Records Ltd v Video Collection International Ltd* [1995] EMLR 25 and *Beggars Banquet Records Ltd v Carlton Television Ltd* [1993] EMLR 349. In a case concerning the ‘maker’ of a sound recording under the 1956 Act (the language in the 1988 Act is



As with the ‘musical work’, ownership of the sound recording includes rights to control the exploitation of the sound recording including its distribution, manufacture and performance. The duration of copyright in sound recordings is currently 50 years.

#### *1.2.2.2. Ireland*

The provisions under the CRRA are comparable with the UK legislation. The producer of the sound recording will usually be the author and first owner<sup>236</sup>. Ownership of the sound recording includes rights to control the exploitation of the sound recording. The duration of these rights is currently 50 years.

### **1.3. Joint Authorship**

The requirements of joint authorship in the UK and Ireland are assessed below, with reference to appropriate academic literature. The issues discussed in this sub-section are highly relevant to the third question of the thesis, which addresses the collective authorship of Irish traditional music in relation to the requirements of joint authorship under copyright.

#### **1.3.1. UK**

A work of ‘joint authorship’ requires collaboration between two or more authors<sup>237</sup>. The two authors jointly own the resulting work as tenants-in-common, unless otherwise specified<sup>238</sup>. The criteria under copyright legislation for the establishment of joint authorship can be described as follows. Firstly, it is required that the author’s contribution to the work must not be distinct from the contribution(s) of the other author(s)<sup>239</sup>. It is not necessary for each contribution to have the same weight in size or

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comparable to the 1956 Act on the issue so the authority is still relevant), it was required that the court discuss whether there was a difference between the owner of the first ‘tape’ of the recording and the person who arranged for the recording to be made – *Springsteen v Flute International Ltd* [1999] EMLR 180.

<sup>236</sup> CRRA s 21(a).

<sup>237</sup> CDPA s 10(1). CRRA s 22(1).

<sup>238</sup> CDPA s 11(1), 10(3). CRRA s TBC. See also *Stuart v Barrett* [1994] EMLR 448 and *Bamgboye v Reed* [2004] 5 EMLR 61, 74.

<sup>239</sup> CDPA s 10(1). CRRA s 22(1).

quality however<sup>240</sup>. Secondly, the contribution must form part of a ‘common design’ to produce the jointly authored ‘work’<sup>241</sup>. Thirdly, the contribution’s input must be ‘creative’ to some extent<sup>242</sup>. This final criterion is centred on the idea of a ‘significant and original’ contribution. As discussed below, it is the requirement of a ‘significant and original’ contribution that has often been of crucial importance in case disputes<sup>243</sup>.

### 1.3.2. Ireland

As with the UK law, a work of ‘joint authorship’ requires collaboration between two or more authors<sup>244</sup>. The contributions of each author must not be distinct from each other<sup>245</sup>. In Ireland, as stated above, the law is likely to be interpreted in the same manner as the law in the UK in this area<sup>246</sup>. Therefore, it is submitted that the following analysis of joint authorship is essentially applicable to both jurisdictions.

### 1.3.3. Exploring the Requirement of a ‘Significant and Original’ Contribution in relation to Musical Works

Numerous commentators have attempted to analyse the problems associated with assessing ‘contribution’ and ‘collaboration’ in cases of joint authorship of musical works<sup>247</sup>. For instance, Cornish, Llewelyn and Aplin have stated regarding performance of ‘pop songs’ that the dividing line between interpretation and contribution is ‘difficult to draw’<sup>248</sup>. Arguably, the main reason for this is that musical ‘performance’ can be

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<sup>240</sup> *Godfrey v Lees* [1995] EMLR 307 at 325. Furthermore, in *Brighton v Jones* [2004] EWHC 1157(Ch) the court noted that ‘writing’ is not necessarily required.

<sup>241</sup> *Godfrey v Lees* [1995] EMLR 307 at 325.

<sup>242</sup> *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818, 834-6. See also Barron, ‘Harmony,’ *op. cit.*, 27, noting that ‘skill and effort crystallised in the work’ form part of this ‘input’.

<sup>243</sup> D. Free, ‘Beckingham v. Hodgens: The Session Musician’s Claim to Music Copyright,’ *Entertainment Law* 1(3) (2002), 93, 94 (hereafter referred to as Free).

<sup>244</sup> CRRA s 22(1).

<sup>245</sup> CDPA s 10(1) states: ‘a “work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors’. CRRA s 22(1) follows this language exactly.

<sup>246</sup> Kelleher and Murray, *op. cit.*, 8.

<sup>247</sup> See generally L. Zemer, ‘Contribution and Collaboration in Joint Authorship: Too Many Misconceptions,’ *Journal of Intellectual Property Law and Practice* 1(4) (2006), 283 (hereafter referred to as Zemer, ‘Collaboration’). See also generally Barron, ‘Harmony,’ *op. cit.*

<sup>248</sup> Cornish *et al.*, *op. cit.*, 451-452.

described as ‘ethereal’ and ‘fleeting’. In fact, it may be impossible to define<sup>249</sup>. Obviously, few copyright complications arise over ‘joint’ authorship when a single individual composes, performs and records the work himself. However, when a composer performs and records a work collaboratively as part of a group, authorship tensions can arise. This is clear from the case of *Fisher v Brooker*<sup>250</sup>. These tensions are especially prone to occur when group members have not formally put in writing the terms of their relationship to each other<sup>251</sup>. One of the reasons for this lack of formality is the fact that musicians generally tend to concentrate on the creative aspects of music and they ‘typically only think about copyright when they have to’<sup>252</sup>.

Fundamental to joint authorship is the making of a ‘significant and original’ contribution to the work. Included within this requirement are issues concerning whether the purported joint author has made the ‘right kind’ of creation, which was crucial to the denial of joint authorship in relation to Norman’s saxophone solo in *Hadley*<sup>253</sup>. Although, in *Cala Homes v Alfred McAlpine*<sup>254</sup> Laddie J. had stated that the concepts of ‘detailed... data or emotions’ and ‘expertise’ should be valued when assessing claims of joint authorship<sup>255</sup> it appeared from the judgment in *Hadley* that the creation or improvisation of some parts of a song is not enough to establish joint authorship, where the melody, chords and rhythm are already part of the author’s composition<sup>256</sup>. One commentator has remarked that the standard of ‘significant and original’<sup>257</sup>, as applied by Park J. in relation to Norman’s ‘sax solo’, was so burdensome that ‘Charlie Parker would have been struggling to come up with a saxophone solo which would have entitled him to be considered a joint author alongside Kemp’<sup>258</sup>. However, this must now be considered in light of the *Fisher* case, where Blackburne J. stated:

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<sup>249</sup> *Ex p Island Records* [1978] 3 All ER 824, Lord Denning MR at 827. See also Clark *et al.*, *op. cit.*, 483.

<sup>250</sup> *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9 at para 36. The case went to the Court of Appeal – *Fisher v Brooker* [2008] EWCA Civ 287; [2008] Bus LR 1123. On further appeal to the House of Lords, it was held that Fisher could receive a share of future royalties, despite the fact that he had waited 40 years before taking the case. *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764.

<sup>251</sup> R. Schulenberg, *Legal Aspects of the Music Industry* (New York: Billboard Books, 2005), 3.

<sup>252</sup> Rahmatian, ‘Music and Creativity,’ *op. cit.*, 268.

<sup>253</sup> *Hadley v Kemp* [1999] EMLR 589, 644-650.

<sup>254</sup> *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818.

<sup>255</sup> *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 at 835.

<sup>256</sup> Arnold, ‘Hadley,’ *op. cit.*

<sup>257</sup> *Fylde Microsystems v Key Radio Systems Ltd* [1998] FSR 449.

<sup>258</sup> Free, *op. cit.*, 97. The use of a jazz musician as a comparison is ironic because as has been noted elsewhere, the contributions of jazz musicians have arguably been undervalued by copyright law. See Notes, ‘Jazz Has Got Copyright Law and That Ain’t Good,’ *Harvard Law Review* 118(6) (2005), 1940

“Reviewing the evidence as a whole, it is abundantly clear to me that Mr Fisher's instrumental introduction (i.e. the organ solo as heard in the first eight bars of the Work and as repeated) is **sufficiently different from what Mr Brooker had composed on the piano to qualify in law, and by a wide margin, as an original contribution to the Work.** The result in law is that Mr Fisher qualifies to be regarded as a joint author of the Work and, subject to the points to which I shall next turn, to share in the ownership of the musical copyright in it.”<sup>259</sup> (emphasis added by author)

Clearly, the court agreed that Fisher had made a ‘significant and original’ contribution to the work via the composition of the organ solo. Furthermore, the majority of recent cases appeared to have taken a less stringent approach towards the notion of ‘significant and original’ than is taken in *Hadley*. In this vein, Free has recently discussed joint authorship claims made by session musicians<sup>260</sup>. For instance, in *Beckingham v Hodgens*<sup>261</sup> the violin part of the arrangement of the song ‘Young at Heart’ was composed during the performance and recording process by the complainant session musician<sup>262</sup>. This was held to be both ‘memorable’ and a ‘significant and original’ contribution<sup>263</sup>. This decision is hard to reconcile with *Hadley*, where the saxophone solo was surely ‘memorable’<sup>264</sup> yet was not ‘significant and original’<sup>265</sup>. In line with this, Free has argued that the *Beckingham* decision effectively restored the notion, established by Blackburne J. in *Godfrey v Lees*<sup>266</sup>, that the qualifying threshold for a ‘significant and original’ contribution is not high. Richard Arnold has stated that the decisions in *Beckingham* and *Fisher* are based upon a more accurate understanding of the law in this area than *Hadley*<sup>267</sup>. In addition, it is apparent from the case of *Stuart v Barratt*<sup>268</sup> that collaboration to the work ‘through a process of jamming’ and improvisation can lead to a

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(hereafter known as ‘Jazz’).

<sup>259</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 42.

<sup>260</sup> Free, *op. cit.*, 93. Free noted the ‘continuing divergence between conventions in the music industry and the law in relation to music copyright’.

<sup>261</sup> *Beckingham v Hodgens* [2002] EWHC 2143 (Ch); [2002] EMLR 45.

<sup>262</sup> The complainant was Robert Beckingham, a session musician who is also known as ‘Bobby Valentino’.

<sup>263</sup> *Beckingham v Hodgens* [2002] EMLR 45 at para. 50. See also Zemer, ‘Collaboration,’ *op. cit.*, 287.

<sup>264</sup> *Hadley v Kemp* [1999] EMLR 589, at 644-650.

<sup>265</sup> R. Jones and E. Cameron, ‘Full Fat, Semi-Skimmed or No Milk Today: Creative Commons Licences and English Folk Music,’ *International Review of Law, Computers and Technology* 19(3) (2005), 1, 8 (hereafter referred to as Jones and Cameron).

<sup>266</sup> *Godfrey v Lees* [1995] EMLR 307 (Ch D) at 325-328. See also Free, *op. cit.*, 95.

<sup>267</sup> Arnold, ‘Reflections,’ *op. cit.*, 163.

<sup>268</sup> *Stuart v Barratt & Others* [1994] EMLR 448.

successful joint authorship case. In a similar vein, it is clear that a contribution to the percussion of a song or track could be ‘significant’ enough to give a partial share of authorship<sup>269</sup>. Furthermore, a recent claim made by a singer involving a wordless vocal featured in the song ‘The Great Gig in the Sky’ by Pink Floyd was settled out of court<sup>270</sup>. Interestingly, the fact that this case was settled out of court may indicate that it is not impossible that a contribution based on ‘vocal instrumentation’ could be a ‘significant and original’ contribution<sup>271</sup>.

In relation to the comments of Park J. in *Hadley*, it is important to assess the distinction between the role and rights of the ‘author’ of a work as opposed to the mere ‘performer’. As noted in *Beckingham*, via the performance process a performer is capable of making a ‘significant and original’ contribution to the work, thereafter becoming a joint author of e.g. the musical arrangement. In line with this, Arnold has remarked that it is crucial for the court to establish whether it is the original musical compositional work, or an original arrangement of that work, that has been jointly authored by the group<sup>272</sup>. Nonetheless, this point was not apparently considered by Park J. who instead engaged in a discussion of the ‘significant creative originality’ of the contribution as opposed to its ‘significant performing originality’<sup>273</sup>. According to Park J., any authorial contributions to a ‘work’ for the purpose of copyright law must ‘be to the creation of musical works, not to the performance or interpretation of them’<sup>274</sup>. As Barron has stated, a ‘rigid differentiation of authorship from performance’ can be identified from the decision in *Hadley*<sup>275</sup>. In addition, Park J. in *Hadley* clearly emphasised ‘a Romantic vision of the author/composer as an individual creative genius’ when discussing the song’s composer Gary Kemp<sup>276</sup>. The other musicians in the band were seen as merely interpreting the compositions of Gary Kemp, and hence, their performances were not recognised as authorial<sup>277</sup>.

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<sup>269</sup> *Bamgboye v Reed* [2004] EMLR (5) 61. See also partial share awarded to the drummer regarding one Spandau Ballet song in *Hadley v Kemp* [1999] EMLR 589.

<sup>270</sup> *Torry v Pink Floyd Music Ltd* [2005], which settled out of court in 2005 – as noted in Richard Arnold, *Performers’ Rights*, *op. cit.*, 292.

<sup>271</sup> This is in line with the comments of Richard Arnold, ‘Reflections,’ *op. cit.*, 164.

<sup>272</sup> Arnold, ‘Reflections,’ *op. cit.*, 159.

<sup>273</sup> *Ibid.*, 159-160. *Hadley v Kemp* [1999] EMLR 589 at 644.

<sup>274</sup> *Hadley v Kemp* [1999] EMLR 589 at 643.

<sup>275</sup> Barron, ‘Harmony,’ *op. cit.*, 28.

<sup>276</sup> *Ibid.*, 29. *Hadley v Kemp* [1999] EMLR 589 at 646. Kemp is even compared to Beethoven in this portion of the judgment.

<sup>277</sup> *Hadley v Kemp* [1999] EMLR 589 at 645-6.

The judgment of Park J. also ignored the fact that in music, composition often occurs via performance. Unless a musician can read and write musical notation, he or she will compose by playing her instrument i.e. via performance of the musical work in gestation. In this vein, the performance of a work by a group will often be original enough to qualify as an arrangement of the original composition. However, it will probably be required that some element of ‘creativity’ in the composition of independent musical parts occurred via this performance process. This view is sympathetic to the classic position of the musical soloist, who often composes variations on a theme spontaneously. Arguably, this was the position of ‘Bobby Valentino’ (the stage name of the complainant) in *Beckingham*, Matthew Fisher in *Fisher*, and arguably, Steve Norman in *Hadley*. Given the low threshold for originality, such contributions ought to be and are recognised as ‘significant and original’ under the law<sup>278</sup>.

Despite this argument, it has been remarked that the courts are wary of the potential legal implications of claims of joint authorship, particularly with regard to the potential for disturbing the ‘commercial expectations’ of rights-holders<sup>279</sup>. In this vein, Blackburne J. neatly summarised the oral arguments made in *Fisher* by Mr. Sutcliffe, who noted that there were practical difficulties associated with holding that the recorded work ‘A Whiter Shade of Pale’ was an arrangement of the underlying composition. Blackburne J. stated:

*“He submitted that an approach whereby each musician contributing to the arrangement, provided his contribution is significant (i.e. non-trivial) and original, can share in the copyright of the arrangement gives rise to practical problems. Thus, if a work exists in multiple versions, each entitling its authors to share in the publishing royalties arising from the exploitation of that version, the work will require multiple registrations with the collecting societies and sophisticated monitoring to ensure that royalties are paid to the correct parties. Second, he said, if the author of the original work is not one of the arrangers, steps will have to be taken to ensure that a share of the arranger’s copyright is paid to the owner of that original work. Third, he said, if all the*

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<sup>278</sup> Arnold, ‘Reflections,’ *op. cit.*, 163-164.

<sup>279</sup> Barron, ‘Harmony,’ *op. cit.*, 47. Barron noted that the fact that joint authors are generally held to be tenants-in-common in equal shares means that courts may be wary of multiplying the number of potential owners from whom licence must be obtained for various transactions.

*band members are in principle entitled to a publishing royalty, the result will inevitably be a drastic paring down of the share of royalties payable to the writer and publisher of the original work, especially if there is a multiplicity of versions.*"<sup>280</sup> (emphasis added by author)

Therefore, it appears that there may be conflicts between the most efficient ways of regulating commerce within the music industry and facilitating the existence of different copyright arrangements<sup>281</sup>. Nonetheless, despite these practical issues, the law is arguably quite clear. As was noted in *Redwood Chappell, Godfrey and Beckingham*, where an existing composition is in the process of being recorded by a band, it is perfectly possible for a contribution to be made during the performance process or the production/recording process that is significant and original enough to confer a share of joint authorship of the resulting arrangement. In line with this, Arnold has noted that as a result of *Fisher*, it is now established that a piece of music 'will often be a work of joint authorship between some or all of the musicians'<sup>282</sup>.

## **1.4. The Acts Restricted by Copyright and Infringement**

This section outlines the acts restricted by copyright and the doctrine of copyright infringement in the UK and Ireland. Particular reference is made to infringement cases involving musical works because this is highly relevant to the fourth question of the thesis, which examines infringement in the context of Irish traditional compositions and arrangements.

### **1.4.1. UK**

The CDPA gives the owner a number of exclusive rights over the work. A copyright owner has the right to control 'restricted acts' in relation to the work. These restricted

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<sup>280</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 50.

<sup>281</sup> Free, *op. cit.*, 93.

<sup>282</sup> Arnold, 'Reflections,' *op. cit.*, 163. See also Bently, *op. cit.*, 179.

acts include the right to copy, perform, broadcast or adapt the work<sup>283</sup>. For instance, in relation to the restricted acts, the CDPA states:

*“Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.”*<sup>284</sup>

Hence, a person will infringe copyright if, without licence, he or she exercises one of the restricted acts<sup>285</sup>. This infringement can be made in relation to a work ‘as a whole’, or to any ‘substantial part’ of it<sup>286</sup>. The doctrine of infringement is discussed further below.

## **1.4.2. Ireland**

In Ireland, the ‘restricted acts’ are covered by sections 37-42 of the CRRA. These are comparable to the ‘restricted acts’ in the CDPA, as outlined above<sup>287</sup>. As with the UK law, infringement occurs when without licence a person exercises one of the restricted acts<sup>288</sup>. The infringement can be in relation to a work ‘as a whole’ or any ‘substantial part’ of the musical work<sup>289</sup>. It is submitted that the discussion of the doctrine of infringement below is applicable to both jurisdictions.

## **1.4.3. Infringement under the CDPA and CRRA**

Primary infringement of a work can occur by copying<sup>290</sup>, by issue of copies to the public<sup>291</sup>, by performance i.e. the showing or playing of the work in public<sup>292</sup>, by broadcasting or including the work in a cable programme service<sup>293</sup>, or by making an adaptation of the work<sup>294</sup>. For example, in the case of copying, reproducing the work in

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<sup>283</sup> CDPA s 16-27. CRRA s 37-43.

<sup>284</sup> CDPA s 16(2).

<sup>285</sup> CDPA s 16(2). CRRA s 37(2).

<sup>286</sup> CDPA s 16(3). CRRA s 37(3).

<sup>287</sup> CRRA s 37-43.

<sup>288</sup> CRRA s 37(2).

<sup>289</sup> CRRA s 37(3).

<sup>290</sup> CDPA s 17. CRRA s 39

<sup>291</sup> CDPA s 18. CRRA s 41.

<sup>292</sup> CDPA s 19. CRRA s 40

<sup>293</sup> CDPA s 20. CRRA s 40.

<sup>294</sup> CRRA s 21. CRRA s 43.



material form qualifies as infringement<sup>295</sup>. Furthermore, to copy a sound recording<sup>296</sup> or to copy a substantial part of it<sup>297</sup> is an infringement whether done so directly or indirectly<sup>298</sup>. In the case of e.g. a musical work, performing the work in public could amount to an infringement<sup>299</sup>. Furthermore, infringement by adaptation includes making an arrangement or a transcription of the work<sup>300</sup>. According to the CDPA, an ‘infringing copy’ of a work exists ‘if its making constituted an infringement of the copyright in the work in question’<sup>301</sup>. To undertake any, or all, of the restricted acts noted above could result in a case of infringement.

In an infringement action, it is necessary for the complainant to show that the allegedly ‘infringing’ work is derived from his or her copyright work<sup>302</sup>. However, it does not have to be established that the infringing work is ‘derived directly from the original of the work’<sup>303</sup>. An inference of derivation can be drawn where it can be shown positively that the defendant had ‘familiarity’ with the copyright work<sup>304</sup>.

#### **1.4.4. The Meaning of ‘Substantial Part’**

Under the CDPA and CRRA, copyright protects against infringement in relation to an entire work, and also in relation to a ‘substantial part’ of a work. In relation to infringement cases, Laddie has stated that although the onus is on the claimant in an infringement action, a defendant should try to argue that to the extent that his allegedly infringing work is derived from the claimant’s work, the particular material taken was not originated by the claimant author and/or it is too generic to be a substantial part<sup>305</sup>. In *Ladbroke v William Hill*, Lord Reid stated that the issue of what amounts to a

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<sup>295</sup> CDPA s 17(2). CRRA s 39.

<sup>296</sup> CDPA s 16(1)(a) and 17(1). CRRA s 37.

<sup>297</sup> CDPA s16(3)(a). CRRA s 37(3).

<sup>298</sup> CDPA s16(3)(b). CRRA s 37(3).

<sup>299</sup> CDPA 19. CRRA 40(1)(b).

<sup>300</sup> CDPA 21(3)(b). CRRA 43(2)(b) states that infringement by adaptation ‘includes a translation, arrangement or other alteration or transcription of the work’.

<sup>301</sup> CDPA s 27(2). See CRRA s 44(2).

<sup>302</sup> CDPA s 27(4). CRRA s 44(4). See *Autospin (Oil Seals) v Beehive Spinning* [1995] RPC 683 where there was a failure to show a causal connection and *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, at para. 30.

<sup>303</sup> Bently and Sherman, *op. cit.*, 171-172.

<sup>304</sup> *Francis Day and Hunter v Bron* [1963] Ch 587. See also Bently and Sherman, *op. cit.*, 172.

<sup>305</sup> Laddie *et al.*, *op. cit.*, 84.

‘substantial part’ of a work depends on a qualitative test rather than a quantitative one<sup>306</sup>. Furthermore, in cases of musical infringement, the analysis of this test depends upon ‘how music is heard’ rather than ‘how it is recorded’<sup>307</sup>. In line with this, it can be said that the test in the UK and Ireland ultimately depends upon a qualitative assessment of whether a ‘substantial part’ of the original copyright work can be ‘heard’ in the context of the allegedly infringing work.

Nonetheless, there is arguably no ‘right’ or ‘wrong’ way to perceive music. For this reason, it can be difficult for courts to determine what amounts to a ‘substantial part’<sup>308</sup>. The role of expert testimony in these kinds of cases is also of questionable value largely due to the same problem of subjectivity<sup>309</sup>. In line with this, Bently has recently criticised the deference shown by judges towards ‘musicological’ experts in cases involving musical works<sup>310</sup>. This problem of subjectivity in relation to the perception of music is arguably also present in the US system. In contrast to the position in the UK and Ireland, the US courts look to whether to the ‘lay’ or ‘reasonable listener’ would agree that the two works in question are ‘substantially similar’<sup>311</sup>. Like the UK test, the US ‘lay’ or ‘reasonable’ listener test may be fatally flawed by the largely subjective nature of music appreciation<sup>312</sup>. Nevertheless, however difficult it might be in practice, it remains for the courts in the UK and Ireland to decide on the facts of the case whether a particular expression amounts to a ‘substantial part’ for the purposes of infringement.

Regarding the ‘qualitative’ nature of the test for ‘substantial part’, Spence and Endicott have remarked that a strict quantitative test would not be meaningful in all contexts of apparent infringement<sup>313</sup>. For example, a quantitative test would arguably not be

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<sup>306</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276. Cornish *et al.*, *op. cit.*, 481 at no. 24, have stated with regard to *Ludlow Music v Robbie Williams* [2001] FSR 271, that ‘in view of the very limited quantity actually taken, the emphasis upon quality may seem overstretched’. Furthermore, it is noted that in light of the Australian ‘Men at Work’ case (*Larrikin Music Publishing v EMI Songs Australia* [2010] FCA 29 FC Aust.), where the ‘quantity taken is large because the work itself is rather short then there is a greater likelihood that a qualitatively substantial part has been taken’.

<sup>307</sup> Kelleher and Murray, *op. cit.*, 11, referring to *Austin v Columbia* [1917-1923] MacG. CC 398.

<sup>308</sup> J. M. Keyes, ‘Musical Musings: The Case for Rethinking Music Copyright Protection,’ *Michigan Telecommunications and Technology Law Review* 10 (2004), 407, 433 (hereafter referred to as Keyes).

<sup>309</sup> Keyes, *op. cit.*, 435.

<sup>310</sup> Bently, *op. cit.*, 192.

<sup>311</sup> *Arnstein v. Porter* (1946) 154 F.2d 464 2d Cir. Under the Arnstein criteria it is also necessary to show that the alleged infringer had access to the copyright work.

<sup>312</sup> Keyes, *op. cit.*, 432.

<sup>313</sup> M. Spence and T. Endicott, ‘Vagueness in the Scope of Copyright,’ *Law Quarterly Review* 121

meaningful in a case where a small but memorable part of a song was copied. For example, in *Hawkes v Paramount*<sup>314</sup> a twenty second portion of a popular tune ‘Colonel Bogey’ was used in a newsreel. This was found to amount to a ‘substantial part’ of the work. As noted further below, it can be said that the relative value of the particular part is taken into account<sup>315</sup>. In a recent case, *Coffey v Warner*<sup>316</sup>, an infringement claim by a singer-songwriter was struck out regarding ‘vocal inflections’ in a single phrase. In *Coffey*, the vocal phrase was transferred from one of the complainant’s songs ‘into another co-written and sung by the pop-star Madonna’<sup>317</sup>. Blackburne J. emphasised that the test for a ‘substantial part’ was an objective one and that in this case the claim could not satisfy it<sup>318</sup>. Bainbridge has further stated that courts are unlikely to look favourably upon claims that engage in ‘cherry-picking’ or that try to ‘tailor’ parts of the work to make the claim more arguable<sup>319</sup>. Furthermore, it appears from the case of *NLA v Marks and Spencer*<sup>320</sup> that if a part is original enough to be protected in itself, then the unauthorised taking of it ought to be prohibited<sup>321</sup>. This is in line with the recent *Infopaq* judgment of the ECJ, where it was held that the unauthorised taking of eleven words could potentially amount to copyright infringement<sup>322</sup>. For this reason it is arguably unlikely that the *Infopaq* judgment advocates a different test to the current UK ‘qualitative’ test for ‘substantive part’. However, the importance of the *Infopaq* judgment was acknowledged recently in *Meltwater*<sup>323</sup>.

It has been stated that while the idea/expression dichotomy has little bearing on questions of subsistence, it does perform ‘a necessary (if difficult) role in settling what amounts to substantial taking’ by a copier<sup>324</sup>. Nonetheless, it is arguable that the distinction between idea and expression is an ‘amorphous’ one<sup>325</sup>. This distinction has been described as a ‘fallacy’ and it is arguable that it ‘cannot withstand serious critical

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(October, 2005), 657, 663 (hereafter referred to as Spence and Endicott).

<sup>314</sup> *Hawkes and Sons (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593.

<sup>315</sup> Bainbridge, *op. cit.*, 146-147.

<sup>316</sup> *Coffey v Warner/Chappell Music* [2005] FSR (34) 747.

<sup>317</sup> Cornish *et al.*, *op. cit.*, 481.

<sup>318</sup> *Coffey v Warner/Chappell Music* [2005] FSR (34) 747 at para. 10.

<sup>319</sup> Bainbridge, *op. cit.*, 150.

<sup>320</sup> *Newspaper Licensing Agency v Marks & Spencer* [2001] UKHL 38; [2003] 1 AC 551.

<sup>321</sup> *Newspaper Licensing Agency v Marks & Spencer* [2001] UKHL 38, Hoffmann L.J. at para. 19.

<sup>322</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.

<sup>323</sup> *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch).

<sup>324</sup> Cornish *et al.*, *op. cit.*, 449-450.

<sup>325</sup> *Ibid.*, 9.

analysis<sup>326</sup>. On the other hand, it has been argued that the ‘vagueness’ of the idea/expression dichotomy may in fact be beneficial because it potentially allows the court to assess qualitatively in light of the particular circumstances of the case whether a ‘substantial part’ of the work has been infringed<sup>327</sup>. Regardless of whether they can be described as ‘ideas’ or ‘expressions’, it is the case that certain stylistic elements cannot be made subject to copyright. This can be seen in the case of literary works and dramatic works where, for example, a style or genre cannot be made subject to copyright<sup>328</sup>. However, it is clear that the details of a plot may be subject to copyright<sup>329</sup>. For this reason, Laddie has stated that since copying the details of a plot can amount to infringement, even if the details are expressed in different language, this effectively shows the weakness of the idea/expression dichotomy in this regard<sup>330</sup>. Furthermore, since some detailed ‘ideas’ are protectable, an important question remains regarding where the line between ‘general’ ideas and ‘detailed’ ideas should be drawn. In *Baigent v Random House*<sup>331</sup>, the court reiterated that mere ‘information, facts, ideas, theories and themes’ cannot be given copyright protection because to do so could have the effect of monopolising historical research<sup>332</sup>.

Regarding music, some chord progressions and musical phrases are thought to be too common to be protectable<sup>333</sup>. For instance, it is generally accepted that the ‘twelve-bar blues’ structure, which generally follows the standard I-II-V chord structure is not protectable<sup>334</sup>. Therefore, this particular chord structure could be described as the example of a general musical ‘idea’ which cannot be made subject to copyright. However, at least in purely musical terms, even a generic blues progression is an expression, not an abstract idea. Therefore, for the purposes of this thesis, rather than using the terms ‘idea’ and ‘expression’, the term ‘stylistic convention’ is used to describe

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<sup>326</sup> Laddie *et al.*, *op. cit.*, 97. See generally P. Masiyakurima, ‘The Futility of the Idea/Expression Dichotomy in UK Copyright Law,’ *International Review of Intellectual Property and Competition Law* 38(5) (2007), 548.

<sup>327</sup> Spence and Endicott, *op. cit.*, 663.

<sup>328</sup> *Norowzian v Arks Ltd (No 2)* [2000] FSR 363.

<sup>329</sup> *Corelli v Gray* [1913] TLR 570. See also *Rees v Melville* [1911-16] MacG CC 168.

<sup>330</sup> Laddie *et al.*, *op. cit.*, 98.

<sup>331</sup> *Baigent v Random House Group Ltd* [2007] FSR 579.

<sup>332</sup> *Baigent v Random House Group Ltd* [2007] FSR 579, Mummery L.J. at para. 156.

<sup>333</sup> S. Vaidhayanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001), 117 (hereafter referred to as Vaidhayanathan).

<sup>334</sup> *Ibid.*, 118.

an expression of music that is too generic to be protectable under copyright. A 'stylistic convention' cannot be held to be a 'substantial part' of a work; in other words, it cannot be said to be part of the author's protectable 'original' input to a work. As a result, no infringement action would succeed if a mere stylistic convention is taken from one work and used in another.

It must also be noted at this stage that it is possible to freely take elements from the public domain, including these generic stylistic conventions, but also whole works and substantial parts of works for which copyright protection has expired. However, if a new copyright arrangement is made of a public domain work, then a case of infringement could arise. For such a case to succeed, the court must be of the opinion that a work has been infringed through the 'taking' of the 'originality' from the copyright arrangement. In other words, an infringer must take a 'substantial part' of the copyright arrangement itself, rather than merely the public domain material<sup>335</sup>. For instance, in *Austin v Columbia*<sup>336</sup> new musical arrangements of old tunes for an opera were copied by the defendant. This was held to be an infringement, even though the relevant copied notes in the defendant's arrangement were not identical to the original copyright arrangement. Whereas, in the Australian case of *CBS Records v Gross*<sup>337</sup>, it was held that 'the copyright in a musical arrangement was not infringed where the defendants had not used the arranger's original contribution'<sup>338</sup>. Furthermore, in the case of *Robertson v Lewis*<sup>339</sup> a claim was taken regarding arrangements of traditional Scottish airs. The late Sir Hugh Robertson had been renowned as the leader of the Glasgow Orpheus Choir and had copyright over an arrangement of the air 'Westering Home'. When the same air, but not the words or accompaniment, was recorded by Vera Lynn, the Robertson estate took an ultimately unsuccessful copyright infringement case. The Robertson estate failed to show that the recorded Vera Lynn version was derived from the Robertson arrangement<sup>340</sup>. As Cornish has stated, this case shows that unless it is possible to show a clear case of copying the exact notes/accompaniment/words, in practice it may be difficult to enforce

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<sup>335</sup> *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 at 393.

<sup>336</sup> *Austin v Columbia* [1917-1923] MacG CC 398.

<sup>337</sup> *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 at 393.

<sup>338</sup> *Laddie et al., op. cit.*, 108.

<sup>339</sup> *Robertson v Lewis* [1976] RPC 169.

<sup>340</sup> *Robertson v Lewis* [1976] RPC 169.

rights in an arrangement of a traditional tune<sup>341</sup>. In addition, many traditional melodies have uncertain origin and assessing who owns the copyright is not straightforward. In a case involving the melody of the song ‘This Land Is Your Land’, the estate of Woody Guthrie eventually discovered that the late Woody Guthrie had not in fact composed the relevant melody himself, but had taken it from an old song recorded by the Carter Family<sup>342</sup>.

## 1.5 Moral Rights

The purpose of this sub-section is to discuss moral rights under the CDPA and CRRRA. It is noted that both authors and performers have moral rights. However, this element of performers’ rights is dealt with briefly below in 1.6 as it does not form a crucial part of the thesis question. The moral rights of composers and arrangers are relevant to the fifth question of the thesis, which examines moral rights of attribution and integrity in the context of Irish traditional music.

### 1.5.1. UK

Internationally, moral rights are protected under article *6bis* of the Berne Convention. However, moral rights are generally associated with civil law jurisdictions. In particular, moral rights are associated with the concept of ‘droit d’auteur’<sup>343</sup>. Under this view the personality of the author is central. For instance, the law in France has traditionally acknowledged the importance of both the economic and moral rights of the author<sup>344</sup>. This can be contrasted with the common law system of copyright, which is prevalent in the UK and Ireland. The common law tradition has tended to focus on the economic aspects of copyright<sup>345</sup>. In fact, Stamatoudi has noted that the UK legal system has

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<sup>341</sup> W. Cornish, ‘Conserving Culture and Copyright: a partial history,’ *Edinburgh Law Review* 13(1) (2009), 8, 18.

<sup>342</sup> *JibJab Media, Inc v. Ludlow Music, Inc* (2005) as referred to by Jones, *op. cit.*, 63-64. See also *JibJab Media Inc v. Ludlow Music Inc* (Complaint for Copyright Misuse and For Declaratory Relief of Non-Infringement of Copyright) US D. Ct. for Southern California (July 29th, 2004).

<sup>343</sup> E. Adeney, *The Moral Rights of Authors and Performers – An International and Comparative Analysis* (Oxford: Oxford University Press, 2006), 165-170 (hereafter referred to as Adeney, *The Moral Rights*).

<sup>344</sup> Clark *et al.*, *op. cit.*, 463-464.

<sup>345</sup> R. Bird and L. Ponte, ‘Protecting Moral Rights in the United States and United Kingdom: Challenges and Opportunities under the UK’s New Performances Regulations,’ *Boston University International Law Journal* 24 (2006), 213, 213-214.

traditionally not shown much enthusiasm towards moral rights<sup>346</sup>. Moral rights were only brought into UK law relatively recently, with the enactment of the CDPA in 1988.

Under the CDPA, an author has a number of moral rights, which are not assignable<sup>347</sup>. The two main moral rights are the right to be identified as the author of a work, which is generally known as the attribution or paternity right<sup>348</sup>, and the right of integrity<sup>349</sup>, which allows an author to object if his or her work is used in a derogatory or distorted ‘treatment’<sup>350</sup>. The author also has the right to object to false attribution<sup>351</sup>. The CDPA states that the attribution right must be asserted<sup>352</sup>, a provision which has provoked criticism<sup>353</sup>. The CDPA provides that moral rights can be waived by written consent<sup>354</sup>. This provision has been criticised for potentially undermining the effectiveness of moral rights, however it remains law at present<sup>355</sup>. Regarding attribution in cases involving musical works, it was found in *Sawkins v Hyperion* that because the liner notes to the ‘Sun King’ CD did not name Dr. Sawkins as an author, his right of attribution was breached<sup>356</sup>.

As yet, there is little case law on the integrity right in the UK<sup>357</sup>. *Morrison Leahy v Lightbond* is the leading case on musical ‘distortion’. However, it is clear from *Pasterfield v Denham*<sup>358</sup> and *Confetti Records v Warner Music*<sup>359</sup> that it is necessary to

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<sup>346</sup> I. Stamatoudi, ‘Moral Rights of Authors in England,’ *Intellectual Property Quarterly* (1997), 478, 478. See also generally B. Ong, ‘Why Moral Rights Matter: Recognising the Intrinsic Value of Integrity Rights,’ *Columbia Journal of Law and the Arts* 26 (2003), 297.

<sup>347</sup> CDPA s 94.

<sup>348</sup> CDPA s 77. This right must be asserted by the author – CDPA s 78.

<sup>349</sup> For analysis of the integrity right see Adeney, *The Moral Rights, op. cit.*, 405-415. See also generally J. Griffiths, ‘Not Such a “Timid Thing”’: The UK’s Integrity Right and Freedom of Expression’ in J. Griffiths and U. Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005), 211 (hereafter referred to as Griffiths, ‘Integrity Right’) which reassesses moral rights in the UK in light of a previous article – W. Cornish, ‘Moral Rights under the 1988 Act,’ *European Intellectual Property Review* 11(12) (1989), 449 (hereafter referred to as Cornish, ‘Moral Rights’).

<sup>350</sup> CDPA s 80(1)(a). *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144 is the leading case on this kind of musical distortion.

<sup>351</sup> CDPA s 84.

<sup>352</sup> CDPA s 77(1)

<sup>353</sup> Adeney, *The Moral Rights, op. cit.*, 398-400.

<sup>354</sup> CDPA s 87(2).

<sup>355</sup> T. Aplin and J. Davis, *Intellectual Property Law* (Oxford: Oxford University Press, 2009), 144.

<sup>356</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>357</sup> See *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144, *Tidy v Trustee of the Natural History Museum* [1996] EIPR-D 86; 39 IPR 501, *Pasterfield v Denham* [1999] FSR 168, and *Confetti Records v Warner Music UK Limited* [2003] EMLR 35.

<sup>358</sup> *Pasterfield v Denham* [1999] FSR 168.

show that the derogatory treatment would be prejudicial to the honour or reputation of the author. In the French cases of *Turner v Huston*<sup>360</sup> (explicitly referred to by the court in *Confetti Records*) and the *Godot*<sup>361</sup> case the French courts arguably demonstrated a stronger protection for the ‘integrity’ right. These cases concerned the colourisation of a black-and-white movie (*Huston*), and the presence of female actors performing in a play solely intended for male actors (*Godot*). In line with this, one commentator has described the integrity right under the CDPA as ‘timid’<sup>362</sup>. Nonetheless, it has been noted that the lack of a defence to infringement of the integrity right in the text of the CDPA could potentially make it a powerful legal tool<sup>363</sup>.

### 1.5.2. Ireland

With some reservations<sup>364</sup> it can be said that moral rights under Irish copyright law generally work in the same way as moral rights under UK law<sup>365</sup>. These rights include the right of identification<sup>366</sup> and a right concerning false attribution i.e. the right not to be identified with a work which the author has not in fact created<sup>367</sup>. Regarding the author’s ‘integrity’ right, the Irish legislation uses the phrase ‘distortion, mutilation or other modification of, or other derogatory action’ in relation to the prejudicial work<sup>368</sup>. The phrase in relation to ‘honour’ does not appear in the Irish legislation, an omission that has been criticised by Adeney<sup>369</sup>. Furthermore, unlike the CDPA, the CRRRA does provide a defence to infringement of the integrity right<sup>370</sup>. It has been noted that there is a distinct lack of case law with regard to moral rights in Ireland<sup>371</sup>.

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<sup>359</sup> *Confetti Records v Warner Music Inc* [2003] EMLR 35.

<sup>360</sup> *Turner Entertainment Company v Huston* Cour Cass 1 ch civ, 28 May 1991. See also CA Versailles, ch civ reunites, 19 December 1994 (1995) 164 RIDA 389.

<sup>361</sup> *Godot* TGI Paris (3<sup>rd</sup> Chamber), 15 October 1992, (1993) 155 RIDA 225.

<sup>362</sup> Cornish, ‘Moral Rights,’ *op. cit.*

<sup>363</sup> Griffiths, ‘Integrity Right,’ *op. cit.*, 221-225.

<sup>364</sup> For instance, Clark *et al.*, *op. cit.*, 469, have noted that under CRRRA s 107, the paternity right in this section arises automatically, whereas the CDPA requires this right to be asserted.

<sup>365</sup> CRRRA s 118.

<sup>366</sup> CRRRA s 107.

<sup>367</sup> CRRRA s 113.

<sup>368</sup> CRRRA s 109(1). Furthermore, the integrity right in Ireland potentially includes a ‘translation’ within the term ‘derogatory action’, something which is not covered within the CDPA. See further Clark *et al.*, *op. cit.*, 469.

<sup>369</sup> E. Adeney, ‘The Moral Right of Integrity: The Past and Future of Honour,’ *Intellectual Property Quarterly* (2005), 111, 111.

<sup>370</sup> CRRRA s 110.

<sup>371</sup> R. Clark and M. Ní Shúilleabháin, *Intellectual Property Law in Ireland* (Alpen aan den Rijn: Kluwer, 2010), 48.



## 1.6. Performers' Rights

Partially due to the rationale that copyright should reward authors, performers were traditionally given very few rights under copyright. This is no longer the case. During the past few decades performers' rights have been gradually expanded in international and national law. Performers' rights are not directly relevant to the thesis questions, so these rights are outlined here briefly in order to distinguish these authorial rights over performances from the authorial rights over compositions and arrangements.

### 1.6.1. International Conventions

The Rome Copyright Convention of 1928<sup>372</sup>, as well as later international negotiations, provided an international spur to create rights for performers<sup>373</sup>. As noted above, the Rome Convention was enacted in 1961<sup>374</sup>. Performers were granted rights requiring consent over the fixation of performances and the consequent duplication of such recordings<sup>375</sup>. However, performers were arguably left at a disadvantage under the terms of the Rome Convention in comparison with the rights afforded to phonogram producers and broadcasters<sup>376</sup>. For example, performers were given no rights over 'secondary uses' once consent had been given, and furthermore, no moral rights were afforded to performers<sup>377</sup>. Additionally, many states were slow to sign up to the Convention's provisions<sup>378</sup>. However, through the adoption of international agreements such as TRIPS, many states have now acceded to the provisions of the Rome Convention. In addition, the WPPT of 1996<sup>379</sup> extended the rights available to performers regarding control of fixation and distribution of performances, as well as rights concerning remuneration and moral rights.

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<sup>372</sup> Rome Convention, *op. cit.*

<sup>373</sup> Arnold, *Performers' Rights, op. cit.*, 20.

<sup>374</sup> Rome Convention, *op. cit.*

<sup>375</sup> See Articles 7 and 19 Rome Convention, *op. cit.*

<sup>376</sup> Arnold, *Performers' Rights, op. cit.*, 21-23.

<sup>377</sup> See articles 7, 19 and 6 Rome Convention, *op. cit.*

<sup>378</sup> Arnold, *Performers' Rights, op. cit.*, 23.

<sup>379</sup> See in particular articles 5-10 and 15 WPPT, *op. cit.*

## 1.6.2. UK

As stated above, much of the early rationale for copyright was defined by the rights of publishers and authors. Arguably, this affected musical and dramatic works in a different way to other literary and artistic works since performance is more central to these types of works. This was recognised by the 1833 Act, though performers did not benefit from the newly enacted ‘performing’ rights. It was not until the Dramatic and Musical Performers’ Protection Act of 1925 that the law sought to protect performers, and even then the legislation only created criminal, rather than civil, offences<sup>380</sup>. The Dramatic and Musical Performers’ Protection Act, 1958<sup>381</sup> did not provide for substantive additional protection for performers. Nevertheless, following the enactment of the Rome Convention<sup>382</sup> in 1961, the Performers’ Protection Acts of 1963 and 1972 expanded the range of criminal offences. After a series of attempted civil claims during the 1970s and 1980s<sup>383</sup>, it was finally decided by the Court of Appeal in *Rickless v United Artists Corp*<sup>384</sup> that performers did in fact have the right to take a civil action, though whether this was in fact a well-reasoned decision is debatable<sup>385</sup>. In any event, in 1988, the CDPA provided performers with the statutory right to take a civil action to prevent unauthorised use of performances.

Performers have property and non-property rights under the CDPA<sup>386</sup>. The CDPA confers these rights onto performers<sup>387</sup>. Furthermore, Arnold has noted that the composer and the performer are subject to similar provisions regarding subsistence, infringement, remedies, and to some extent, ownership<sup>388</sup>. For instance, the consent of the performer is required for the exploitation of performances or recordings of performances<sup>389</sup>. The

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<sup>380</sup> In *Musical Performers’ Protection Association Ltd v British International Pictures Ltd* [1938] 46 TLR 485, an attempt was made to take a civil case under the 1925 Act but the court found that the act was not intended to give a civil right of action (McCardie J. at 488).

<sup>381</sup> Dramatic and Musical Performers’ Protection Act, 1958; accessible at [http://www.opsi.gov.uk/acts/acts1958/pdf/ukpga\\_19580044\\_en.pdf](http://www.opsi.gov.uk/acts/acts1958/pdf/ukpga_19580044_en.pdf)

<sup>382</sup> Rome Convention, *op. cit.*

<sup>383</sup> For further detail see Arnold, *Performers’ Rights, op. cit.*, 26-35.

<sup>384</sup> *Rickless v United Artists Corp* [1988] QB 40.

<sup>385</sup> Arnold, *Performers’ Rights, op. cit.*, 35.

<sup>386</sup> See generally CDPA s 180-206.

<sup>387</sup> CDPA s 191(a).

<sup>388</sup> See Arnold, *Performers’ Rights, op. cit.*, 58-68, 129-152 and 93-98.

<sup>389</sup> CDPA s 180(1).

duration of these rights is 50 years after the end of the calendar year of performance<sup>390</sup>. Due to EU harmonisation measures, there has recently been an increase in rights covering performances<sup>391</sup>. Performers also have ‘moral rights’ including the right to be identified as performer<sup>392</sup> and the right to object to derogatory treatment of a performance<sup>393</sup>. Session musicians are commonly asked to sign a consent form which is usually authorised by the Musician’s Union or an equivalent union<sup>394</sup>. A session musician will generally only be given a one off performance fee rather than a royalty over the recording<sup>395</sup>. Nonetheless, as stated above, the CDPA<sup>396</sup> provides performers with the right to ‘equitable remuneration’ when sound recordings of their performances are broadcast e.g. on radio<sup>397</sup>.

Arnold has noted that while performers’ rights have been expanded over the last few decades, performers do not have equivalent rights to composers<sup>398</sup>. Under the CDPA, s 183(a) and (b) give a performer the right to prevent use of a recording of a performance made without consent. Parker has asserted that performers often suffer because they have a ‘lack of autonomy over the secondary use of legitimate sound recordings’<sup>399</sup>. Furthermore, although a large amount of music industry income is generated from the ‘exploitation of recordings of performances of musical compositions’, composers often earn more than performers<sup>400</sup>.

### 1.6.3. Ireland

The Performers Protection Act of 1968<sup>401</sup>, provided for a range of criminal offences regarding the unauthorised use of recordings of performances. Clark, Smyth and Hall

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<sup>390</sup> CDPA s 191.

<sup>391</sup> Performances (Moral Rights) Regulations, 2006; accessible at <http://www.opsi.gov.uk/si/si2006/20060018.htm>

<sup>392</sup> CDPA s 205C.

<sup>393</sup> CDPA s 205F.

<sup>394</sup> N. Parker, ‘A Raw Deal for Performers: Part 1 – Term of Copyright,’ *Entertainment Law Review* 17(6) (2006), 161, 163 (hereafter referred to as Parker).

<sup>395</sup> Parker, *op. cit.*

<sup>396</sup> This is the case following the 1996 and 2003 Regulations which amended the CDPA.

<sup>397</sup> CDPA s 182CA. A performer also holds an ‘equitable remuneration’ right for ‘rental’. CDPA s 191G.

<sup>398</sup> See Arnold, ‘Hadley,’ *op. cit.*, 464-469. See also generally Parker, *op. cit.*

<sup>399</sup> J. Barnard, ‘Performers Rights’ (October 2005); article accessible at [http://www.musiclawupdates.org/index\\_main.htm](http://www.musiclawupdates.org/index_main.htm).

<sup>400</sup> Parker, *op. cit.*, 161.

<sup>401</sup> Performers Protection Act, 1968; accessible at

have noted that it is possible that an Irish court could follow *Rickless* and allow a civil right of action for performers under the 1968 Act, but as yet such a case has not come up<sup>402</sup>. As detailed below, enacted since 2000, the CRRA provides a definition of ‘performance’ and it expands performers’ rights in Ireland in line with EU law and international conventions. As with the law in the UK, performers have property<sup>403</sup> and non-property rights<sup>404</sup> under copyright legislation in Ireland. The rights under the CRRA are generally comparable with the rights under the CDPA<sup>405</sup>. ‘Performance’ is defined in section 202<sup>406</sup>. As with the UK law, the duration of these rights is 50 years after the end of the calendar year of performance<sup>407</sup> and performers also have a number of ‘moral rights’ under the CRRA<sup>408</sup>. Performers are also entitled to ‘equitable remuneration’ when sound recordings of their performances are broadcast e.g. on radio<sup>409</sup>. This income is collected and distributed by the process described in 1.7.

## **1.7. Assignment and Licensing under the CDPA and CRRA**

It has been noted that copyright law ‘cannot be evaluated independently of economic behaviour’<sup>410</sup>. The primary way by which the music industry generates revenue is via assignment and licensing mechanisms. The assignment and licensing provisions of the CDPA and CRRA are briefly outlined here. Licensing forms the basis of the sixth question of this thesis, which examines licensing in the context of Irish traditional music.

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<http://www.irishstatutebook.ie/1968/en/act/pub/0019/index.html>

<sup>402</sup> Clark *et al.*, *op. cit.*, 483.

<sup>403</sup> CRRA s 202-299.

<sup>404</sup> CRRA s 309-319.

<sup>405</sup> CRRA s 203.

<sup>406</sup> CRRA s 202(1)

<sup>407</sup> CRRA s 291(a). CRRA s 291(b) also provides for 50 years after ‘where within that period a recording of the performance is lawfully made available to the public, that recording is first so lawfully made available to the public.’

<sup>408</sup> CRRA s 309.

<sup>409</sup> CRRA s 208.

<sup>410</sup> Kretschmer and Kawohl, *op. cit.*, 27

### 1.7.1. UK

The bundle of economic rights under copyright can be assigned by the author/copyright owner either in entirety or as individual parts<sup>411</sup>. This assignment must take place in writing and be signed by the assignor or on the assignor's behalf<sup>412</sup>. Copyright legislation allows an author to assign rights in any future works that he or she might create<sup>413</sup>. Once these works are created, they automatically transfer to from the author to the assignee under the agreement<sup>414</sup>. A copyright owner can also licence a copyright to a licensee<sup>415</sup>.

### 1.7.2. Ireland

Assignment and licensing of copyright under Irish copyright legislation is comparable to the copyright legislation of the UK<sup>416</sup>. As with the UK law, a licence from a copyright owner is not required in the case of exceptions such as 'fair dealing'<sup>417</sup>. It is interesting to note that some European jurisdictions, such as Germany, some aspects of copyright can never be fully assigned by authors, merely licensed<sup>418</sup>. As stated above, this is not the case in the UK or Ireland.

### 1.7.3. Copyright Licensing and the Music Industry

During the 20<sup>th</sup> century, the music industry expanded rapidly. Indeed, by the end of the 1990s, the global music industry was a huge part of the world economy<sup>419</sup>. In addition, there is little doubt that the commercialisation of music, and the consequent expansion of

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<sup>411</sup> CDPA s 90.

<sup>412</sup> CDPA s 90(3).

<sup>413</sup> CDPA s 91.

<sup>414</sup> CDPA s 91(1).

<sup>415</sup> CDPA s 90(4) and 92.

<sup>416</sup> CRRRA s 120-122.

<sup>417</sup> CRRRA s 49-106 provide for numerous exceptions for copying the work including for the purposes of education, private study, research, criticism and reporting current events.

<sup>418</sup> German Act on Copyright and Neighbouring Rights, 1965 (Urheberrechtsgesetz) s 29. See further A. Rahmatian, 'Non-assignability of authors' rights in Austria and Germany and its relation to the concept of creativity in civil law jurisdictions generally: a comparison with UK copyright law,' *Entertainment Law Review* 11(5) (2000), 95.

<sup>419</sup> The peak year of global recorded music sales was 1996, with a figure of approximately US \$39 billion in sales; accessible at <http://news.bbc.co.uk/1/hi/business/3622285.stm> - See further G. Lopes and K. Jopling (eds.), *The Recording Industry in Numbers* (London: IFPI, 2003).

the music industry over the course of the 20<sup>th</sup> century, could not have occurred without the enactment and enforcement of copyright law<sup>420</sup>. The music industry largely operates on the basis that the first owner of copyright in the musical work and/or the sound recording will assign or license the economic rights to a publisher, record company, and/or collecting society for the purpose of exploitation. With regard to licensing, the structure of the industry is analysed here. The rights of artists i.e. the composers, arrangers, performer etc. have already been discussed in this chapter. However, in order to give a proper overview of music licensing it is necessary to outline the position of the relevant business actors within the industry.

#### *1.7.3.1. The Business and Economic Actors within the Music Industry licensing system*

There are a number of important actors within the music industry, most notably publishers, record companies and collecting societies. It is important firstly to discuss the role of the music ‘publisher’. A ‘publisher’ is usually the company in which the copyright in a musical composition is vested by the composer. For instance, it has been stated that it is ‘rare for any publishing rights to be retained by the composer of a musical work’<sup>421</sup>. In return for this assignment, which typically takes place via a contract, the composer may receive an advance on future royalties and/or a fixed rate of royalty payment dependent upon successful publication of the work<sup>422</sup>. It is also noted here that the composer will not usually assign the performing rights to a publisher, but to a collecting society, as outlined below. The ‘business’ of a music publisher includes ‘pushing for records to be made, music to be performed live, the use of the music on television and films and in collecting and distributing income’<sup>423</sup>. As is the case with contracts between managers and artists, contracts between composers and publishers (and/or record companies) ‘may be unenforceable if they operate as an unreasonable restraint of trade’<sup>424</sup>. For example, in the case of *MacCauley v Schroeder Music*

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<sup>420</sup> For instance, the Monopolies and Mergers Commission noted in 1994 that copyright is vital for the music industry; see generally Monopolies and Mergers Commission, *The Supply of Recorded Music: A Report by the Monopolies and Mergers Commission on the Supply in the UK of Pre-recorded Compact Discs, Vinyl Discs and Tapes Containing Music* Cm 2599 (London: HMSO, 1994); accessible at [http://www.competition-commission.org.uk/rep\\_pub/reports/1994/356recordedmusic.htm#full](http://www.competition-commission.org.uk/rep_pub/reports/1994/356recordedmusic.htm#full)

<sup>421</sup> M. Flint, N. Fitzpatrick and C. Thomas, *User's Guide to Copyright* (Sussex: Tottel Publishing, 2006, 6<sup>th</sup> ed.), 352 (hereafter referred to as Flint *et al.*).

<sup>422</sup> Schulenberg, *op. cit.*, 561.

<sup>423</sup> Flint *et al.*, *op. cit.*, 353.

<sup>424</sup> *Ibid.*, 372.

*Publishing*<sup>425</sup> a publishing contract was found to be an unreasonable restraint of trade. This was due to the terms of the exclusive agreement which included the provision that the company was not required to do anything to promote the songs. As Harrison has noted, it is now standard in the industry in the UK that the length of term of this type of contract should be limited<sup>426</sup>. Furthermore, a contract should usually include a clause requiring the copyright to return to the composer if the company makes no effort to promote the compositions<sup>427</sup>.

It is also vital to assess the role of record companies in the music industry. The record companies are 'typically engaged in the creation or acquisition of rights in sound recordings, marketing and promoting those recordings, and commercialising those recordings'<sup>428</sup>. It has been noted that a record company must undertake three actions in order to undertake exploitation of sound recordings. Firstly, it must 'acquire rights in sound recordings'<sup>429</sup>. The 'author' and first owner of the sound recording is usually the producer<sup>430</sup>. Usually a record company will require producers to 'enter into agreements at an early stage assigning all present and future copyright in relation to the recording to the production company'<sup>431</sup>. Secondly, the record company must 'clear the underlying rights in the songs that are embodied in the sound recordings it controls for the forms of exploitation which it wishes to undertake'<sup>432</sup>. Thirdly, it must 'secure the consents it requires from the performers whose performances are embodied in the sound recording'<sup>433</sup>. The 'performing right' part of the 'record rights' will often be 'administered' by a collecting society as described below<sup>434</sup>. In relation to record companies, it has been noted that there is a clear imbalance in power between the

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<sup>425</sup> *MacCauley v A. Schroeder Music Publishing Co. Ltd* [1974] 1 WLR 1 308.

<sup>426</sup> A. Harrison, *Music: The Business – The Essential Guide to the Law and the Deals* (London: Virgin Books, 2008, 4<sup>th</sup> ed.), 101.

<sup>427</sup> *Ibid.* If the performer has not received separate advice, the issue of undue influence may well arise, therefore the guide notes that professional advice should always be sought when contracts are made. This was the case in *O'Sullivan v Management Agency and Music Ltd* [1985] QBD 428.

<sup>428</sup> *Garnett et al., op. cit.*, 1664.

<sup>429</sup> *Ibid.*, 1665.

<sup>430</sup> *Flint et al., op. cit.*, 368.

<sup>431</sup> *Ibid.*, 368, noting that a re-master of a previous sound recording probably would not be protected under CDPA s 5A(2) as it would be a copy of a previous sound recording.

<sup>432</sup> *Garnett et al., op. cit.*, 1665. It is noted that in the UK, this is usually done through the MCPS by clearing the 'rights to copy and issue copies to the public'.

<sup>433</sup> *Ibid.*, 1665. It is noted that this is usually done by use of a recording agreement or a consent agreement.

<sup>434</sup> *Flint et al., op. cit.*, 353.

musician and the record company when contractual agreements are made<sup>435</sup>. Due to the high level of risk and expense of promoting an artist's work, record companies frequently 'want options on four or five further albums'<sup>436</sup>. Nevertheless, it is also true that comparatively few artists developed and promoted by a record company actually make a profit for the company<sup>437</sup>. In light of this, the position of record companies is defensible to some extent.

Finally, the role of the 'collecting societies' is crucial to music licensing. There are a number of collecting societies operating within the UK and Ireland. These organisations collect and distribute copyright royalties on behalf of composers, performers and record companies. It is generally acknowledged that SACEM in France in 1851 was the first composers' collecting agency<sup>438</sup>. At present, the important music collecting societies in the UK are Phonographic Performance Limited (PPL), the Mechanical Copyright Protection Society (MCPS) and the Performing Rights Society (PRS). 'PRS for Music' is the umbrella organisation that represents the interests of both PRS and MCPS<sup>439</sup>. These organisations operate in the UK, but generally have equivalent organisations in other states operating under reciprocal agreements<sup>440</sup>. Phonographic Performance (Ireland) Limited, along with the RAAP (Recorded Artists and Performers), perform a similar function in Ireland to that of PPL in the UK. The Irish Music Rights Organisation (IMRO) in Ireland is the equivalent of PRS in the UK.

The rights to perform and communicate a work to the public are commonly referred to as 'performing rights'<sup>441</sup>. Typically, the members of the collecting society, such as composers and publishers, assign these performing rights to PRS or IMRO. In other words, these performing rights are vested in the society. This is usually achieved by

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<sup>435</sup> N. Lipton, *Music: The Law and Music Contracts* (Hertfordshire: CLT Professional Publishing Ltd, 2000), 1.

<sup>436</sup> Harrison, *op. cit.*, 64. This was one element at issue in *Panayiyou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229.

<sup>437</sup> Flint *et al.*, *op. cit.*, 351.

<sup>438</sup> R. Wallis, 'Copyright and Composers' in S. Frith and L. Marshall (eds.), *Music and Copyright* (Edinburgh: Edinburgh University Press, 2005, 2<sup>nd</sup> ed.), 103, 103.

<sup>439</sup> <http://www.prsformusic.com/Pages/default.aspx>

<sup>440</sup> Garnett *et al.*, *op. cit.*, 1656. It is noted that while 'public performance and national broadcast rights' would normally be licensed 'from the society in which the public performance or broadcast takes place, collecting societies (particularly within the EU) compete with each other to offer favourable terms to the major international record companies for reproduction rights' therefore a record company can choose to deal with only one EU society for all of its EU 'manufacturing licences'.

<sup>441</sup> *Ibid.*, 1655.



means of a membership contract, which a composer or publisher would enter into upon joining PRS<sup>442</sup>. The ‘repertoire’ of PRS includes almost all pieces of ‘published music in copyright’ as well as some unpublished works<sup>443</sup>. PRS then aims to license ‘others to exploit the performing rights’. PRS typically grants ‘blanket’ licences to broadcasters and ‘blanket’ or ‘one-off’ licences to premises and venues where music is performed through live performance, DJ or jukebox<sup>444</sup>. After the costs of administration are taken into account, the royalties are distributed to the member composers and publishers<sup>445</sup>. PRS members are also free to leave the society at any time in order to ‘self-administer their live performance rights’<sup>446</sup>. As stated above, since 1998, there has been an alliance between PRS and MCPS. This alliance is currently known as ‘PRS for Music’<sup>447</sup>. As noted above, IMRO operates in Ireland in the same way as PRS operates in the UK<sup>448</sup>.

MCPS has branches in both the UK and Ireland (MCPSI)<sup>449</sup>. It collects and distributes royalties to publishers and writers accruing from the use of recorded music through ‘mechanical rights’. MCPS typically acts as an agent on behalf of its members for the licensing of mechanical rights<sup>450</sup>. MCPS holds an ‘exclusive agency agreement’ with each member<sup>451</sup>. MCPS primarily issues licences regarding the ‘reproduction of music for physical products’<sup>452</sup>. In this regard, MCPS typically licenses music for commercial

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See PRS form; accessible at

[http://www.prsformusic.com/creators/wanttojoin/join\\_us/Pages/Writerapplicationform.aspx](http://www.prsformusic.com/creators/wanttojoin/join_us/Pages/Writerapplicationform.aspx)

<sup>443</sup><http://www.prsformusic.com/Pages/default.aspx> - See also Flint *et al.*, *op. cit.*, 359-360, noting that PRS works closely with its affiliates and similar overseas organisations ‘both in licensing those bodies to collect royalties in respect of the works administered by PRS when they are performed outside the UK, but which are owned by the foreign societies.’

<sup>444</sup> Garnett *et al.*, *op. cit.*, 1655.

<sup>445</sup> Flint *et al.*, *op. cit.*, 359. The guide states that this is usually divided upon the basis of ‘fractions of 12’ and where there is no publisher, the fee passes entirely to the composer, or if a song, shared between lyric writer and composer. For instance, if there is a publisher, the composer will typically received 6/12 and the publisher 6/12 (although this division could be altered under contract between the composer and publisher).

<sup>446</sup> *Ibid.*, 360-361.

<sup>447</sup> <http://www.prsformusic.com/aboutus/Pages/default.aspx>. See also Flint *et al.*, *op. cit.*, 360-361, noting that the ‘respective repertoires and memberships’ remain with each individual company for ‘licensing and distribution’.

<sup>448</sup> <http://www.imro.ie/content/what-we-do>

<sup>449</sup> <http://www.imro.ie/mcps/about-mcpsi>

<sup>450</sup> <http://www.prsformusic.com/creators/membership/MCPSroyalties/Pages/MCPS.aspx> See also Garnett *et al.*, *op. cit.*, 1655.

<sup>451</sup> Flint *et al.*, *op. cit.*, 362. See also

<http://www.prsformusic.com/creators/membership/MCPSroyalties/mcpsprinciples/Pages/MCPSdistributionprinciples.aspx>

<sup>452</sup> Garnett *et al.*, *op. cit.*, 1655.

sound recordings such as compact discs, downloads and vinyl records<sup>453</sup>. It has been noted that the greater proportion of MCPS revenue comes from licensing record companies<sup>454</sup>. The licences are usually either a ‘sales agreement’ based on shipments, which provides for quarterly accounts to MCPS, or a ‘manufacturing agreement’ also provided on an account basis and based on pressings<sup>455</sup>. For works in the ‘repertoire’ of MCPS, ‘the record company receives a licence except in the case of a first recording where the copyright owner has the option of granting specific prior consent’<sup>456</sup>. On behalf of its members, MCPS generally agrees blanket licensing agreements with radio, television and cable stations as well as additional blanket licences for online use of music<sup>457</sup>. Through co-operation and agreements with the record companies, MCPS is able to calculate royalties, issue invoices and perform audits ‘to ensure that its members receive the royalties due to them’<sup>458</sup>.

PPL licences the use of recorded music for its members<sup>459</sup>. Members generally assign the part of the sound recording copyright that is embodied within records to PPL<sup>460</sup>. PPL typically issues licences regarding the public performance and broadcast of sound recordings<sup>461</sup>. The licence fee is calculated on the basis of the premises size and the size of the likely audience<sup>462</sup>. PPL receives licence revenue and distributes it to each relevant member depending on the extent to which a specific sound recording has been exploited by the licensee<sup>463</sup>. PPL has also made agreement that 50% of the relevant income is paid to performers as ‘equitable remuneration’, and this portion of income is divided between ‘featured performers’ (65%) and ‘session musicians’ (35%)<sup>464</sup>. In addition to its UK operations, PPL has a branch operating in Ireland, known as PPI<sup>465</sup>. In addition, in Ireland RAAP administers the performers’ royalty for broadcast<sup>466</sup>.

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<sup>453</sup> *Ibid.*, 1655.

<sup>454</sup> Flint *et al.*, *op. cit.*, 362-363.

<sup>455</sup> *Ibid.*, 362.

<sup>456</sup> *Ibid.*, 362-363.

<sup>457</sup> *Ibid.*, 363.

<sup>458</sup> Flint *et al.*, *op. cit.*, 363.

<sup>459</sup> <http://www.ppluk.com/>

<sup>460</sup> Flint *et al.*, *op. cit.*, 370.

<sup>461</sup> Garnett *et al.*, *op. cit.*, 1663.

<sup>462</sup> Flint *et al.*, *op. cit.*, 371.

<sup>463</sup> Garnett *et al.*, *op. cit.*, 1663.

<sup>464</sup> Flint *et al.*, *op. cit.*, 371.

<sup>465</sup> <http://www.ppiltd.com/>

<sup>466</sup> <http://www.raap.ie/index.php?go=introduction-to-raap>

There has been much recent discussion about the future of the collecting societies within the wider economy<sup>467</sup>. It is beyond the remit of this thesis to address these issues in any great detail. Nonetheless, a number of issues in particular are worth noting. For instance, it is clear that the internet is having an effect on music licensing. Liebowitz and Watt have stated that musicians are ‘increasingly worried that the onslaught of technology is seriously interfering with their ability to charge end users for their creations’<sup>468</sup>. It has been widely acknowledged that it is much more difficult to enforce copyright licensing rules in the digital age<sup>469</sup>. In line with this, it has been stated that the collecting societies in some ways lack the capabilities to efficiently protect the rights of all relevant creators, although this is also related to the wider problem that concerns the imbalance of power that exists between the majority of artists and record companies<sup>470</sup>. For instance, Kretschmer has stated that collecting societies have traditionally tended to be inefficient, bureaucratic and lacking in transparency<sup>471</sup>.

In a similar vein, Cardi has stated that although the collecting societies are charged with the responsibility of collecting royalties for use of music, the societies are in fact ‘stifling the success of new music technologies’<sup>472</sup>. As a result, Cardi has posited that it is necessary to merge all of the regulatory functions of these bodies into one administrative body by way of legislation. While acknowledging that this would be a controversial measure, Cardi has argued that this drastic solution is necessary due to the fact that the ‘current state of music licensing imposes dramatically inefficient costs, especially when applied to the licensing of new technologies’ and that there is little evidence that these problems will be solved by the respective bodies themselves<sup>473</sup>. Nonetheless, Gyertyanfy has noted that there is a threat from the potential development of a ‘one-stop shop’ for online licensing. This threat concerns the concentration of power held by one large body.

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<sup>467</sup> See generally W. J. Cardi, ‘Uber-Middleman: Reshaping the Broken Landscape of Music Copyright,’ *Iowa Law Review* 92 (2007), 835 (hereafter referred to as Cardi), S. Liebowitz and R. Watt, ‘How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives,’ *Journal of Economic Surveys* 20(4) (2006), 513 (hereafter referred to as Liebowitz and Watt), P. Gyertyanfy, ‘Collective Management of Music Rights in Europe after the CIASC decision,’ *International Review of Intellectual Property and Competition Law* 41(1) (2010), 59 (hereafter referred to as Gyertyanfy).

<sup>468</sup> Liebowitz and Watt, *op. cit.*, 513.

<sup>469</sup> *Ibid.*, 514.

<sup>470</sup> B. Anderson, R. Kozul-Wright and Z. Kozul-Wright, ‘Rents, Rights N’ Rhythm: Conflict and Cooperation in the Music Industry,’ *Industry and Innovation* 14(5) (2007), 513, 537.

<sup>471</sup> M. Kretschmer, ‘The Failure of Property Rules in Collective Administration,’ *European Intellectual Property Review* 24(3) (2002), 126, 134 (hereafter referred to as Kretschmer).

<sup>472</sup> Cardi, *op. cit.*, 838.

<sup>473</sup> *Ibid.*, 889.

This potentially could work to the disadvantage of creators and rights-holders, who may find that they have even less bargaining power in this proposed new system<sup>474</sup>. However, Frabboni has stated that it is ‘possibly too soon to conclude that representation of smaller rights holders is in danger, considering the overall availability, intrinsic to digital solutions, of a larger shelf space, and the visibility that participants could obtain within the multi-territorial audience that online licensing platforms are able to reach’<sup>475</sup>. Thus, it is clear that while copyright licensing, and in particular the licensing of performing rights<sup>476</sup>, continues to play a major role in the music industry, the industry continues to face licensing challenges in the digital age. It is possible that the collecting system will change in the near future, possibly through the legislative action of the European Commission, but at present it remains in place<sup>477</sup>.

## 1.8. Exceptions and Limitations

The CDPA<sup>478</sup> and the CRRA<sup>479</sup> provide for a number of acts that may be exercised without licence and without infringing copyright. These are generally known as ‘permitted acts’. In this section, the exceptions and specific provisions that are directly relevant to the thesis questions are discussed in detail. These are the provisions regarding the defence of fair dealing, the provision regarding the recording of folksongs and the provision concerning anonymous or pseudonymous works. The other exceptions not discussed below include incidental uses<sup>480</sup>, library uses<sup>481</sup>, educational uses<sup>482</sup>, uses to allow access for people with disabilities<sup>483</sup>, public administration<sup>484</sup>, as well as specific

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<sup>474</sup> Gyertyanfy, *op. cit.*, 59.

<sup>475</sup> M. Frabboni, ‘Old Monopolies versus New Technologies,’ *Entertainment Law Review* 20(3) (2009), 76, 81.

<sup>476</sup> PRS for Music revenue continues to increase, boosted by licences for live festivals in particular – <http://www.prsformusic.com/creators/news/research/Pages/default.aspx>

<sup>477</sup> There has been some word from the European Commission that there is dissatisfaction at an EU level with the collecting regime due to competition issues. See post accessible at <http://www.iht.com/articles/2008/07/06/business/MUSIC07.php>

<sup>478</sup> CDPA s 28-76.

<sup>479</sup> CRRA s 49-106.

<sup>480</sup> CDPA s 31(1).

<sup>481</sup> CDPA s 37-44.

<sup>482</sup> CDPA s 32(1).

<sup>483</sup> CDPA s 74.

<sup>484</sup> CDPA s 45(1-2) and CDPA s 46(2); See also CA 1956 ss 6(4), 9(7), 13(6), 14(9), 14A(10).

exceptions in relation to artistic works<sup>485</sup>, computer programs<sup>486</sup>, databases<sup>487</sup>, temporary copies<sup>488</sup>, films<sup>489</sup>, sound recordings<sup>490</sup>, and broadcasts<sup>491</sup>.

### 1.8.1. The Defence of Fair Dealing

The relevant aspects of fair dealing are assessed over the course of this sub-section. The defence of fair dealing is further examined in chapter four with regard to potential solutions in relation to the thesis questions.

#### 1.8.1.1. UK

It has been noted that the concept of ‘fair dealing’ formed part of copyright law even before it was given legislative recognition<sup>492</sup>. The defence of fair dealing was not formally introduced into UK legislation until the Copyright Act of 1911. Today, the CDPA provisions which cover fair dealing are located in sections 29 and 30<sup>493</sup>. In the UK, fair dealing applies to the areas of ‘research and private study’<sup>494</sup>, criticism and review<sup>495</sup> and the reporting of current events<sup>496</sup>.

#### 1.8.1.2. Ireland

Fair dealing was first part of Irish law under the UK Copyright Act of 1911, which also applied to Ireland. The provisions in the CRRA are covered in sections 50 to 51<sup>497</sup>. In Ireland, as with the UK, fair dealing applies mainly to the areas of ‘research and private study’<sup>498</sup>, criticism and review<sup>499</sup> and the reporting of current events<sup>500</sup>. The analysis of

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<sup>485</sup> CDPA s 62 (double check citation).

<sup>486</sup> CDPA s 50A(3), s 50B(4), s 296A(1).

<sup>487</sup> CDPA s 50D.

<sup>488</sup> Recital 33 InfoSoc, *op. cit.*

<sup>489</sup> CDPA 66A.

<sup>490</sup> CDPA 67.

<sup>491</sup> CDPA s 68-75.

<sup>492</sup> See generally M. De Zwart, ‘A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age,’ *Intellectual Property Quarterly* (2007), 60.

<sup>493</sup> CDPA s 29 and 30.

<sup>494</sup> CDPA s 29(1) and (1C).

<sup>495</sup> CDPA s 30(1).

<sup>496</sup> CDPA s 30(2).

<sup>497</sup> CRRA s 50-51.

<sup>498</sup> CRRA s 50(1-5).

fair dealing below considers UK cases primarily since there is a great deal more case law. Reference is made to Irish cases where relevant.

### 1.8.2. Examining the Requirements of the Fair Dealing defence

In order for the defence to be made out, the alleged infringer must be able to firstly show that the dealing falls into one of the above ‘purpose’ categories. To some extent the UK courts have generally ‘construed the specific purposes liberally’<sup>501</sup>. Within the bounds of the enumerated specific purposes, it is often possible for an infringer to satisfy the first hurdle of establishing the purpose i.e. to show that the dealing falls within the above categories<sup>502</sup>. However, it must be emphasised that in contrast to the broad ‘fair use’ provision in US copyright law<sup>503</sup>, it is ‘notable’<sup>504</sup> that the fair dealing provisions under the CDPA and CRRA form an exhaustive list of defences to copyright infringement. In this sense, as noted in *Pro Sieben Media v Carlton*<sup>505</sup>, the exceptions cannot be widened beyond their specific remit e.g. ‘reporting current events’. As Bently and Sherman have commented, it is ‘irrelevant’ that the use might be ‘fair in general’, or be a ‘fair dealing’ for any other purpose than the specified legislative purposes<sup>506</sup>. Therefore, the fair dealing exceptions under UK and Irish copyright law do not appear to allow cases of transformative ‘dealing’ for the purpose of creating an original musical work. For example, a case involving a transformative but unauthorised use of a substantial part of a musical work would be unable to avail of the fair dealing defences under the CDPA and CRRA. In this vein, the Gowers Review<sup>507</sup> flagged up the importance of such ‘transformative’ dealings. However, as Bently and Sherman have stated, the enactment of a possible exemption for ‘transformative uses’, once it is compatible with the three-step test as outlined below, would probably have to be pursued at an EU level. It has

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<sup>499</sup> CRRA s 51(1)

<sup>500</sup> CRRA s 51(2)

<sup>501</sup> Bently and Sherman, *op. cit.*, 203, referring to *Newspaper Licensing Agency v Marks and Spencer* [2000] 4 All ER 239, 257 (Chadwick LJ) (CA), as well as *Pro Sieben Media v Carlton Television* [1999] FSR 610, 620 and *Ashdown v Telegraph Group Ltd* [2002] Ch 149, at para 64.

<sup>502</sup> *Ashdown v Telegraph Group Ltd* [2002] Ch 149 is an example where this was not possible however.

<sup>503</sup> United States Copyright Act 1976 s 107.

<sup>504</sup> Bently and Sherman, *op. cit.*, 202.

<sup>505</sup> *Pro Sieben Media v Carlton UK Television* [1997] EMLR 509.

<sup>506</sup> Bently and Sherman, *op. cit.*, 202.

<sup>507</sup> *Gowers Review of Intellectual Property* (London: HMSO, 2006) (hereafter referred to as Gowers Review); accessible at [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)

been noted that this does not appear to be on the cards at present<sup>508</sup>. In addition, the fair dealing defences do not necessarily apply to all forms of ‘work’. Indeed, the fact that in relation to research or private study the fair dealing defence currently does not extend to ‘non-textual media’ such as broadcasts and films has been criticised<sup>509</sup>.

Regarding the second hurdle i.e. interpreting the purpose of the dealing, the test used by a court is an objective test<sup>510</sup>. This is discussed further below in relation to the specific fair dealing defences. Furthermore, it must be noted that all permitted exceptions to copyright protection must satisfy the ‘three-step test’ as enumerated in Article 9(2) of the Berne Convention. Article 9(2) states that member states may allow permitted uses of literary and artistic works ‘in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’<sup>511</sup>. In the TRIPS agreement<sup>512</sup> and the WCT<sup>513</sup>, this is discussed in terms of ‘confining’ exceptions along the lines of the ‘three-step test’. In line with this, InfoSoc<sup>514</sup> takes a restrictive approach to exceptions. As a result of the three-step test, when assessing the fairness of the dealing it appears that impact on the market will be a relevant factor<sup>515</sup>.

#### *1.8.2.1. Evaluating the ‘Fairness’ of the Dealing*

The issue of establishing whether the dealing is ‘fair’ is ‘a question of degree and impression’<sup>516</sup>. The courts typically weigh up numerous factors in deciding this question. They will also consider issues of freedom of expression and the public interest in light of the Human Rights Act 1998<sup>517</sup>. The factors generally considered by the courts include

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<sup>508</sup> Bently and Sherman, *op. cit.*, 240.

<sup>509</sup> Garnett *et al.*, *op. cit.*, 559. See also IPO, *Taking Forward the Gowers Review of Intellectual Property* (London: IPO, 2008), 21-27 and 32; accessible at; <http://www.ipo.gov.uk/consult-copyrightrightexceptions.pdf>.

<sup>510</sup> Bently and Sherman, *op. cit.*, 203, referring to *Pro Sieben Media v Carlton Television* [1999] FSR 610, 620.

<sup>511</sup> Article 9(2) Berne Convention, *op. cit.*

<sup>512</sup> Article 13 TRIPS, *op. cit.*

<sup>513</sup> Article 10 WCT, *op. cit.*

<sup>514</sup> InfoSoc, *op. cit.*

<sup>515</sup> MacQueen *et al.*, *op. cit.*, 180.

<sup>516</sup> Bently and Sherman, *op. cit.*, 203, referring to *Hubbard v Vosper* [1972] 2 QB 84.

<sup>517</sup> *Ashdown v Telegraph Group Ltd* [2002] Ch 149, Phillips L.J. at para. 71. See also generally J. Griffiths, ‘Copyright Law after Ashdown – Time to Deal Fairly with the Public,’ *Intellectual Property Quarterly* (2002), 240.

whether the work is unpublished<sup>518</sup>, the means by which the work was procured<sup>519</sup>, the amount of the work taken<sup>520</sup>, the particular use made of the work<sup>521</sup>, the intention or motive of the dealing<sup>522</sup>, the potential consequences of the dealing at a market level<sup>523</sup> and whether the purpose could have been achieved by another method of expression<sup>524</sup>.

#### 1.8.2.2. *The Requirement of 'Sufficient Acknowledgement'*

'Sufficient acknowledgement' is a requirement in a case of fair dealing of a work for the purpose of criticism or review<sup>525</sup> or for the reporting of current events<sup>526</sup>. However, regarding fair dealing for the purpose of private study or non-commercial research, sufficient acknowledgement is not always required. It is required in relation to research where to give sufficient acknowledgement would not be impossible due to 'reasons of practicality or otherwise'<sup>527</sup>. In relation to acknowledgement, it is necessary to acknowledge the work and the author of the work<sup>528</sup>. This can be achieved in relation to the work through identification of its title or a description of it<sup>529</sup> and this can be achieved in relation to the author<sup>530</sup> through provision of a name, photograph etc.

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<sup>518</sup> See CDPA s 30(1), (1A) and the case of *Hyde Park Residence v Yelland* [2000] EMLR 363, Aldous L.J. at para. 34, stating that it would be difficult to imagine 'fair dealing' of an unpublished work. See also *HRH the Prince of Wales v Associated Newspapers* [2007] 3 WLR 222, Blackburne J. at para. 174. As noted by Bently and Sherman, *op. cit.*, 204, this attitude stands in contrast with the Canadian decision of *CCH Canadian v Law Society of Upper Canada* [2004] SCC 13.

<sup>519</sup> *Beloff v Pressdram* [1973] 1 All ER 241 – it is less likely that a work that is obtained via an illegal or illegitimate channel will be classed as a 'fair dealing'. See also *The Controller of Her Majesty's Stationery Office, Ordnance Survey v Green Amps Ltd* [2007] EWHC 2755 (Ch) (paragraph 54).

<sup>520</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>521</sup> *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239, 257 comments of Chadwick LJ (CA) stating that commercially advantageous dealing will not qualify as a fair dealing unless there is an overriding public interest.

<sup>522</sup> The test is whether 'a fair minded and honest person' would have 'dealt with the work' in the particular manner – *Hyde Park Residence v Yelland* [2000] EMLR 363, 379. See also *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239, Gibson L.J. (CA) at 250. As noted by Bently and Sherman, *op. cit.*, 205, if the motive of the infringer is 'altruistic or noble', this may help the infringer's case.

<sup>523</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>524</sup> *Newspaper Licensing Agency v Marks & Spencer* [1999] EMLR 369, 382-3. See also *Hyde Park Residence v Yelland* [2000] EMLR 363, 379.

<sup>525</sup> CDPA s 30(1). CRR s 51(1).

<sup>526</sup> CDPA s 30(2) – however, the exception does not cover photographs. See also CDPA s 30(3). CRR s 51(2).

<sup>527</sup> CDPA s 29(1).

<sup>528</sup> CDPA s 178.

<sup>529</sup> *Pro Sieben Media v Carlton Television* [1999] FSR 610, 616.

<sup>530</sup> *Pro Sieben Media v Carlton Television* [1999] FSR 610, 625. The owner does not have to be identified, only the author – *Express Newspapers v Liverpool Daily Post* [1985] 3 All ER 680.



### 1.8.2.3. Research or Private Study

This defence applies to literary, dramatic, musical and artistic works and typographical arrangements<sup>531</sup>. The defence does not extend to broadcasts, sound recordings and films<sup>532</sup>. In addition, it is limited in relation to computer programs<sup>533</sup>. To make out this defence, a potential infringer must show that the dealing was for the purpose of non-commercial research or private study<sup>534</sup>. Further to this, as discussed above, the defendant must show that the dealing itself was ‘fair’. As noted above, sufficient acknowledgement may be required.

### 1.8.2.4. Criticism or Review

To successfully argue this defence<sup>535</sup>, it is required that a potential infringer show that the use of the work is for the purpose of criticism or review<sup>536</sup>, that the work had been made available to the public previously<sup>537</sup>, that the dealing itself is ‘fair’<sup>538</sup> and that sufficient acknowledgement is given, as discussed above. At present, there is no explicit defence for a ‘parody’ of a work, something that was criticised in the Gowers Review<sup>539</sup>.

### 1.8.2.5. Reporting of Current Events

To avail of this defence<sup>540</sup>, an infringer must show firstly, that the dealing had the purpose of reporting current events<sup>541</sup>, and secondly, that the use of the work was

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<sup>531</sup> CDPA s 29(2). CRRRA s 50.

<sup>532</sup> CDPA s 29. CRRRA s 50 does include sound recordings and films however.

<sup>533</sup> CDPA s 29(4)-4(A), as well as CDPA s 50B and 50BA. CRRRA s 50(5).

<sup>534</sup> CDPA s 29(1). See *The Controller of Her Majesty’s Stationery Office, Ordnance Survey v Green Amps Ltd* [2007] EWHC 2755 (Ch), at para. 23, regarding the purpose and potential commercial value of the work. Merely collecting data is not ‘research’, as noted in the Irish case *Longman Group v Carrington* (1990) 20 IPR 264. See also CRRRA s 50(4).

<sup>535</sup> CDPA s 30. CRRRA s 51(1).

<sup>536</sup> *Beloff v Pressdram* [1973] 1 All ER 241. This is usually construed liberally - as discussed in *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239, 257. See also *Pro Sieben Media v Carlton Television* [1999] FSR 610, 620.

<sup>537</sup> CDPA s 30(1A). See also *HRH Prince of Wales v Associated Newspapers* [2007] 3 WLR 222, Blackburne J. at para. 176.

<sup>538</sup> The criticism itself does not have to be ‘fair’ – only the dealing, as noted in *Pro Sieben Media v Carlton Television* [1999] FSR 610, 619.

<sup>539</sup> IPO, *op. cit.*, 31-36.

<sup>540</sup> CDPA s 30(2). CRRRA s 51(2).

<sup>541</sup> This is generally given a liberal interpretation - *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239, 382. See also *Ashdown v Telegraph Group Ltd* [2002] Ch 149, 172 and *Hyde Park*

‘fair’<sup>542</sup>. Thirdly, the infringer must show that sufficient acknowledgement was given to the author/work, as noted above. This defence has been acknowledged as an important part of achieving an appropriate balance between authors’ rights and freedom of speech, something that is clearly in the public interest<sup>543</sup>. For instance, it is necessary that disclosure ‘in the public interest’ be assessed by the court<sup>544</sup>.

### **1.8.3. Specific Provisions for Sound Recordings of Folk/Traditional Songs in the UK and Ireland**

Additionally, there are specific provisions for ‘recordings of folksongs’ under the copyright law of the UK<sup>545</sup> and Ireland<sup>546</sup>. In the UK these provisions provide for protection for an archive sound recording of a folk song as long as it is ‘unpublished and of unknown authorship at the time the recording is made’<sup>547</sup>. Furthermore, the recording must not infringe any other copyright<sup>548</sup> or performer’s prohibition<sup>549</sup>. The Irish provision provides comparable protection for a sound recording of a folk song as long as it is an ‘anonymous work’<sup>550</sup>. It has been stated that this protection is ‘limited’; if the music on the recording were reproduced by another person e.g. in a live performance, it would not infringe this copyright in the sound recording<sup>551</sup>.

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*Residence v Yelland* [1999] RPC 665, 661. See also Irish case of *De Garis v Neville Jeffries Pidler Pty.* [1990] 18 IPR 292.

<sup>542</sup> The court may examine whether it is reasonable to deal with the work to report the events – *Associated Newspapers Group v News Group Newspapers* [1986] RPC 515, 519. See also *Hyde Park Residence v Yelland* [2000] EMLR 363, 393.

<sup>543</sup> *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239, Gibson L.J. (CA) at 249. See also Irish case of *National Irish Bank v Radio Teilifis Eireann* [1998] 2 IR 465.

<sup>544</sup> See *Lion Laboratories v Evans* [1985] QB 526, *Hyde Park Residence v Yelland* [2000] EMLR 363 and *Ashdown v Telegraph Group Ltd* [2002] Ch 149.

<sup>545</sup> CDPA s 61.

<sup>546</sup> CRRA s 245.

<sup>547</sup> CDPA s 61 (2)(a).

<sup>548</sup> CDPA s 61 (2)(b). CRRA s 245 (1)(a).

<sup>549</sup> CDPA s 61 (2)(c). CRRA s 245 (1)(b).

<sup>550</sup> CRRA s 245(1).

<sup>551</sup> *Laddie et al., op. cit.*, 81.

#### 1.8.4. Specific Provisions regarding Anonymous or Pseudonymous Works in the UK and Ireland

The CDPA s 57(1) and the CRRA s 88(1) cover the position of works that are often described as ‘orphan’ works i.e. works whose authorship is unknown or unverifiable. If it is not possible by way of reasonable inquiry to identify the author and it is reasonable to assume that copyright in the work has expired, then copyright will not be infringed by making use of the work<sup>552</sup>. Unlike the CRRA, in relation to expiry of copyright, the CDPA makes reference to the belief that enough time has passed since the author died for the copyright to have expired<sup>553</sup>. In the case of a work of joint authorship, both the CDPA and the CRRA state that ‘the identity of the author shall be construed as a reference to its being possible to ascertain the identity of any of the authors’<sup>554</sup>. Furthermore, unlike the CRRA, in relation to expiry of copyright the CDPA explicitly states that all authors must have died<sup>555</sup>. Nonetheless, it is arguable that under copyright law, both of these conditions are implicit within the notion of copyright expiration and therefore, the law is probably the same in both jurisdictions.

### 1.9. Conclusion

Overall the above chapter seeks to emphasise the following points, which are highly relevant to the later chapters 3-5 of the thesis.

- There is a broad and flexible definition of ‘musical work’ under the CDPA, as defined in *Sawkins*. It is strongly arguable that this is the standard under the CRRA as well. Both new original compositions and new original arrangements of underlying compositions are protected as musical works under the CDPA and CRRA, as noted in *Fisher*.
- The originality criterion is now the standard of ‘intellectual creation’ in light of *Infopaq*. However, since most, if not all, musical works will be the product of intellectual creativity it is arguable that the originality standard applied in *Sawkins* is still

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<sup>552</sup> CDPA s 57(1). CRRA s 88(1).

<sup>553</sup> CDPA s 57(1)(b)(ii).

<sup>554</sup> CDPA s 57(3)(a).

<sup>555</sup> CDPA s 57(3)(b).

highly relevant to the determination of the originality of musical works under both the CDPA and CRRA. Furthermore, this originality criterion is the same standard for new compositions as it is for new musical arrangements.

- Joint authorship requires that the joint authors possess a common design and also that the contributions of the joint authors are not distinct from each other. As seen in *Fisher*, the test for assessing joint authorship of a musical work is based around the idea of a 'significant and original' contribution – a criterion that is assessed in light of the circumstances of the case.
- Regarding infringement of musical works, the test for 'substantial part' is a qualitative test. This test is undertaken in light of all circumstances of the case, but it is clear that even a very small extract could be sufficient to amount to a 'substantial part' under the law in the UK and Ireland, particularly in light of the *Infopaq* judgment.
- Regarding moral rights, the rights of attribution and integrity are potentially of importance to composers and arrangers of musical works.
- Regarding licensing, it is clear that the collecting societies play a vital role in the music industry. A composer or arranger must register compositions or arrangements with a society in order to take advantage of the collective licensing system.

# Chapter 2 - Exploring Irish Traditional Music

## Introduction

The purpose of this chapter is to explore the musicological context of Irish traditional music. This exploration is necessary in order to establish the context of the six thesis questions, which are examined in chapter three. The main focus of this study is Irish traditional instrumental music, but as noted over the course of this chapter, certain singing and song-styles are relevant due to their connection with the instrumental tradition.

The first sub-section (2.1) outlines the historical background, collection and scholarship, and the origin and age of Irish traditional music (ITM). The second sub-section (2.2) outlines the musical structures of ITM, the influence of the *sean nós* singing style, and the influence of the traditional instruments. This sub-section also assesses the three areas of ITM that make it distinctive as a form of music by focusing on its musical characteristics, its range of styles and the emphasis placed on melodic and rhythmic variation and ornamentation. The final sub-section of the chapter (2.3) discusses the commercialisation of the music and the means of transmission of traditional music in the modern world.

### 2.1. The History of ITM

The purpose of this sub-section is to give historical and musicological background to the scholarship concerning ITM. In line with this, this sub-section explores the definition of ‘traditional’ music in this context, discusses the historical collection of the music and maps out the music’s hybrid origins.

### 2.1.1. Musicological Background – What is ‘Traditional’ Music?

Due to the fact that this thesis focuses on a form of ‘traditional’ music, it is necessary to identify what the inherent characteristics of this particular genre of music are. ‘Traditional’ music is generally thought of as ‘old’ or ‘ancient’. It is often seen as ‘pre-modern’<sup>556</sup>. The terms ‘folk’ and ‘traditional’ music are sometimes used interchangeably, though it has been argued that the term ‘traditional music’ is preferable<sup>557</sup>. Porter has stated that though the terms ‘traditional song’ and ‘traditional music’ are imprecise ‘at least they imply a process,’ which the terms ‘folk song’ and ‘folk music’ do not necessarily imply<sup>558</sup>. Another commentator has noted that there is a sense of ‘heritage’, meaning that something is to be ‘passed on from one age to the next’ in the common use of the term ‘Irish traditional music’ in Ireland<sup>559</sup>. As such, it has been described as ‘music from Ireland that is traditional in any way i.e. origin, idiom or in the transmission or performance style’<sup>560</sup>. For the purposes of this thesis the term ‘traditional music’ will be used as much as possible, but it may be necessary to use the term ‘folk’ music in some circumstances e.g. where related academic literature explicitly uses the term.

ITM can be quite accurately described as a form of ‘traditional’ music<sup>561</sup>. As described below, it has developed in Ireland over the last 300 years, from both ‘native’ and ‘outside’ influences. ITM has also been described as ‘Celtic’. However, Porter has criticised the general use of this term to describe ITM:

*“Invoking the term ‘Celtic’, of course, has always been questionable because the concept is riddled with linguistic, cultural and ideological implications.”*<sup>562</sup>

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<sup>556</sup> L. O’Laoire, ‘Fieldwork in common places: An ethnographer’s experiences in Tory Island,’ *Ethnomusicology Forum* 12(1) (2003), 113 (hereafter referred to as O’Laoire, ‘Fieldwork’).

<sup>557</sup> J. Porter, *Traditional Music of Britain and Ireland* (New York: Garland, 1989), x (hereafter referred to as Porter, ‘Traditional Music’). Porter noted that ‘folk’ contains ‘overtones of romanticism and condescension.

<sup>558</sup> *Ibid.*, xi.

<sup>559</sup> B. Breathnach, *Folk Music and Dances of Ireland* (Dublin: Mercier Press, 1993) (hereafter referred to as Breathnach).

<sup>560</sup> J. Waldron, ‘Learning, Teaching, and Transmission in the Lives of Two Irish Musicians: An Ethnographic Case Study,’ *International Journal of Community Music* (2006), 1, 3 (hereafter referred to as Waldron).

<sup>561</sup> Breathnach, *op. cit.*, 88.

<sup>562</sup> J. Porter, ‘Locating Celtic Music (And Song),’ *Western Folklore* 57 (1998), 205 (hereafter referred to as Porter, ‘Locating Celtic Music’).

As outlined below, Gaelic *sean nós* songs can justifiably claim to be ‘Celtic’, in the sense that they have song lyrics in the Celtic language, Irish/*An Gaeilge*. However, it would be inaccurate to say that other forms of ITM are ‘Celtic’. As outlined below, the dance music of Ireland, especially reels and hornpipes, has more in common with the lowland Scots and northern English types of dance music than the traditional music of other Celtic nations e.g. Breton music<sup>563</sup>. Furthermore, Valley has been critical of the label ‘Celtic’ music, especially in its use as part of the brand ‘world music’ and the group ‘Afro-Celt Soundsystem’<sup>564</sup>. It is perhaps better to view the term ‘Celtic music’ in the same way as the label ‘World music’; it is a general marketing brand, rather than an accurate description of the music itself or its origins.

### 2.1.2. The Collection of ITM

It has been said that the beginning of the ‘scholarly debate’ with regard to ‘ITM’ began with the first major collection of the tunes themselves<sup>565</sup>. It is clear that there was some ‘antiquarian’ interest in traditional music within Ireland and Britain during the 17<sup>th</sup> century<sup>566</sup>. Although traditional music is not dependent on the written form, the presence of collections has helped to keep the tradition alive since the 17<sup>th</sup> century. O’Laoire has concluded that ‘the scholarly debate concerning traditional music in Ireland’ was ‘initiated’ by the collection of Edward Bunting<sup>567</sup>. In addition, one of the great collectors of the nineteenth century was George Petrie<sup>568</sup>. Another well known collector was P. W. Joyce. As Porter has remarked, Bunting, Petrie and Joyce form a significant ‘triumvirate of collectors devoted to preserving ITM’<sup>569</sup>.

In some ways the collection of ITM only became vitally important as the traditional ways of life in rural Ireland began to be eroded due to the effects of the Irish famine in the 19<sup>th</sup> Century and the subsequent mass emigration<sup>570</sup>. The most important collector of

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<sup>563</sup> *Ibid.*, 211.

<sup>564</sup> F. Valley, ‘The Apollos of Shamrockery: Traditional Musics in the Modern Age’ in M. Stokes and P. V. Bohlman (eds.), *Celtic Modern* (Lanham: Scarecrow Press, 2003), 201, 208 (hereafter referred to as Valley, ‘Apollos’).

<sup>565</sup> O’Laoire, ‘Fieldwork,’ *op. cit.*, 115.

<sup>566</sup> Porter, ‘Traditional Music,’ *op. cit.*, xiii.

<sup>567</sup> O’Laoire, ‘Fieldwork,’ *op. cit.*, 115.

<sup>568</sup> Porter, ‘Traditional Music,’ *op. cit.*, xxiii.

<sup>569</sup> *Ibid.*

<sup>570</sup> O’Laoire, ‘Fieldwork,’ *op. cit.*

ITM of the late 19<sup>th</sup> and early 20<sup>th</sup> century was Francis O'Neill. Interestingly, O'Neill collected the music in the United States of America<sup>571</sup>, largely from the Irish immigrant community there. O'Neill, a traditional musician himself, is said to be the most famous collector of ITM. Ultimately, Vallely has even attributed the music's survival to a mixture of 'romantic politicisation' and the significance of the O'Neill collection<sup>572</sup>.

### 2.1.3. The Origins and Age of the Body of ITM

The possible origins of ITM are much debated. McCarthy has noted that in the past Ireland has often been written about in terms of a false dualism which places classical music, colonialism and Anglo-Irish society on one side, and traditional music and 'Gaelicism' on the other<sup>573</sup>. This dichotomy does not take into account the many different sources that went into the creation of a body of ITM which included a mixture of indigenous and foreign music<sup>574</sup>. In line with this, Vallely has stated that ITM contains a balance of 'indigenous base material', influences from classical music, 'Baroque structures', and material borrowed from the Scottish, English, and French traditions<sup>575</sup>. The music also subsumed the form of 'indigenous classical music of the onetime court harpers who had become redundant due to Gaelic dispossession prior to the eighteenth century'<sup>576</sup>.

Breathnach observed that most of the body of ITM i.e. the numerous 'airs' and 'tunes', would probably have been composed over the last three or four centuries, with the majority of tunes dating from the late 18<sup>th</sup> and early 19<sup>th</sup> century<sup>577</sup>. However, he noted that it is certainly possible that there are earlier musical elements<sup>578</sup> present in the body of tradition, 'sustained like particles of matter in a stream' but that further study and scholarship would be necessary to properly assess this<sup>579</sup>. Breathnach has further stated

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<sup>571</sup> Porter, 'Traditional Music,' *op. cit.*, xii.

<sup>572</sup> Vallely, 'Apollos,' *op. cit.*, 202.

<sup>573</sup> See generally M. McCarthy, *Passing It On - The Transmission of Music in Irish Culture* (Cork: Cork University Press, 1999).

<sup>574</sup> Vallely, 'Apollos,' *op. cit.*

<sup>575</sup> Vallely, 'Apollos,' *op. cit.*, 202.

<sup>576</sup> *Ibid.*, 204.

<sup>577</sup> Breathnach, *op. cit.*

<sup>578</sup> *Ibid.*, 18. Breathnach noted that there are a small number of airs that can be dated to earlier times. He noted the example of the air 'Cailín ó Chois tSiúre mé'.

<sup>579</sup> *Ibid.*



that due to the lack of the written form until the collections of Bunting et al. it is difficult to gauge with any accuracy the age of many traditional tunes<sup>580</sup>. He referred to the example of Bunting's collection of 'ancient' music and stated:

*"Bunting's description of airs, 'Very Ancient, Author and Date Unknown', sheds no light on the age of our music; and in the absence of a dated tunes, it is not possible to examine a body of music and assign types with certainty to particular periods."*<sup>581</sup>

For this reason, even if some tunes, airs and songs are pre-17th century in origin, 'labelling them as such is largely conjecture'<sup>582</sup>. Meanwhile, many tunes and songs have undoubtedly been lost over the past three centuries. For this reason Breathnach emphasises that it is generally the later examples of ITM, rather than earlier ones, that are most commonly played today. He remarked:

*"...the tradition is still living, the national store maintains itself, later additions offsetting losses of older material..."*<sup>583</sup>

This notion of the music as a 'living tradition' is crucial to this thesis. ITM is not set in stone; it is in a constant state of redefinition. As discussed in chapter three, the creation of new compositions and arrangements plays a role in maintaining this 'living tradition'. Furthermore, Irish instrumental music has historically been dependent on a traditional process of person-to-person transmission, rather than a written, documented form such as Western classical music. The way the music is transmitted, and to some extent 'authored' in this way, is detailed further in the third chapter in relation to the six thesis questions.

## **2.2. The Structure, Content and Characteristics of ITM**

This sub-section assesses the structure and content of ITM as well as outlining its defining characteristics. This discussion of the structure of the music is highly relevant to

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<sup>580</sup> *Ibid.*, 16.

<sup>581</sup> *Ibid.*

<sup>582</sup> *Ibid.*

<sup>583</sup> *Ibid.*

the analysis of the thesis questions in chapter three. In particular it is relevant to the application of originality, authorship, joint authorship and infringement in the context of ITM.

### 2.2.1. The Musical Structures of ITM

Regardless of its origins, the musical structures of ITM were established by the mid-18<sup>th</sup> century, and ‘have remained remarkably constant since that time’<sup>584</sup>. In addition, it can be said that the vast majority of Irish traditional tunes ‘share a similar structure’ from a musicological perspective<sup>585</sup>. For instance it has been observed:

*“Each consists of at least two strains or parts of eight bars... In the vast majority of tunes each part is made up of two phrases. The common pattern is a single phrase repeated with some slight modification, with the phrases falling naturally into half-phrases of two bars each.”*

There are some exceptions, but it is generally commonplace today that when playing a tune, each part of the tune is repeated<sup>586</sup>. The first part is sometimes known as the ‘tune’ and the second is known as ‘the turn’<sup>587</sup>. Breathnach has stated that the vibrant rural culture of the 18<sup>th</sup> and 19<sup>th</sup> centuries has directly led to modern Ireland inheriting ‘an immensely rich legacy of dance music’<sup>588</sup>. It is estimated that this includes at least six thousand ‘individual pieces’ of music<sup>589</sup>. Irish traditional instrumental tunes, such as reels, jigs, hornpipes and polkas, can serve both a dance music function and a ‘solo art’ function.

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<sup>584</sup> L. McCullough, ‘Style,’ *Ethnomusicology* 21(1) (Jan., 1977), 85.

<sup>585</sup> Breathnach, *op. cit.*, 56.

<sup>586</sup> *Ibid.*, 56.

<sup>587</sup> *Ibid.*, 57.

<sup>588</sup> *Ibid.*, 56.

<sup>589</sup> *Ibid.*

### 2.2.1.1. Reels

The reel is the most common type of dance-tune in played today in ITM<sup>590</sup>. It is thought that this form of dance music ‘evolved’ in the mid-1700s<sup>591</sup>. Reels are usually transcribed with a 4/4 time signature, and they are generally played with a steady, even beat<sup>592</sup>. A reel usually has at least two parts, and each part is usually eight bars<sup>593</sup>. Each part is commonly played twice in sequence, although there are some reels where each part is played only once<sup>594</sup>. Breathnach has stated that there is a ‘strong case’ for linking Irish reels with Scotland because there is a scarcity of reels in early Irish collections, compared with Scottish reel ‘music sheets’<sup>595</sup>. Thus, it has been stated that many of the reels played as part of ‘ITM’ were originally Scottish<sup>596</sup>. For instance, the reel recorded by emigrant musician Michael Coleman, as ‘Bonnie Kate’, was in fact ‘composed by Daniel Dow, a fiddler from Perthshire’<sup>597</sup>. Similarly, ‘The Boyne Hunt’, which has been recorded by numerous musicians including the famous accordion player, Joe Cooley<sup>598</sup>, was ‘composed by Miss Stirling of Ardoch and published for the first time in 1780’<sup>599</sup>. There are numerous other examples of the adoption of Scottish tunes into the Irish tradition<sup>600</sup>. Via the oral/aural process of transmission, these tunes, which are Scottish in origin, have ‘flourished’ in their Irish settings and they are now markedly different from their original versions<sup>601</sup>. Over time, it can be said that ‘foreign’ tunes that enter the body of ITM tend to acquire an ‘Irish’ character, from a melodic point of view. This musical ‘character’ is assessed further in sub-section 2.3.

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<sup>590</sup> *Ibid.*, 59.

<sup>591</sup> *Ibid.*, 60.

<sup>592</sup> *Ibid.*, 88.

<sup>593</sup> *Ibid.*, 60.

<sup>594</sup> *Ibid.*, 56.

<sup>595</sup> *Ibid.*, 60.

<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*

<sup>598</sup> The tune can be found on the Joe Cooley, *Cooley* and other recordings listed at <http://www.thesession.org/recordings/display/211>

<sup>599</sup> *Ibid.*, 61.

<sup>600</sup> C. Mac Aoidh, *Between the Jigs and the Reels* (Leitrim: Drumlin Publications, 1994), 19 (hereafter referred to as Mac Aoidh, *Between the Jigs*), noting: “Other favourite reels which have been borrowed from Scotland are Rakish Paddy (there known as Cabar Féigh or The Deer’s Horn), John Frank (Colonel McBain), Greig’s Pipes, Lucy Campbell, The Ranting Widow (Hopetown House), and The Flogging Reel.”

<sup>601</sup> Breathnach, *op. cit.*, 61.

### 2.2.1.2. *Jigs*

The jig is ‘the oldest form of dance music’ in the Irish tradition<sup>602</sup>. Jigs are the second most-common type of dance tune in ITM, and they come in various forms including double jigs, treble jigs, ‘slip’ jigs, and single or ‘hop’ jigs. Jigs usually have eight bars and a 6/8 time signature, although ‘slip’ jigs are in 9/8 and there are even some jigs in 12/8 time<sup>603</sup>. Most of the jigs in the Irish tradition are ‘Irish’ in origin and the greater portion would ‘appear to have been composed by the pipers and fiddlers of the eighteenth and nineteenth centuries’<sup>604</sup>. Despite this, the actual term ‘jig’ is thought to be Italian in origin<sup>605</sup>.

### 2.2.1.3. *Hornpipes*

This form of dance music is English in origin, and in its present form can be dated to around 1760<sup>606</sup>. Breathnach notes that this form of music was danced on stages ‘between the acts and scenes of plays’<sup>607</sup>. Hornpipes are similar to reels in that they are usually said to have a 4/4 time signature, but differ from reels in the emphasis of certain notes and they are usually played ‘in a more deliberate manner’<sup>608</sup>. As one musicologist has noted, the structure of a hornpipe, and the fact that it is often played at a slower pace than reels, means they can often become vehicles for individual musical expression<sup>609</sup>.

### 2.2.1.4. *Polkas*

The ‘polka’ is indelibly associated with the southern counties of Ireland, especially Kerry<sup>610</sup>. Polkas have a 2/4 time signature and are typically played at a steady and often fast pace, which is ideal for dancing.

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<sup>602</sup> *Ibid.*, 57.

<sup>603</sup> Breathnach, *op. cit.*, 59.

<sup>604</sup> *Ibid.*, 59.

<sup>605</sup> *Ibid.*, 57.

<sup>606</sup> *Ibid.*, 61.

<sup>607</sup> *Ibid.*

<sup>608</sup> *Ibid.*

<sup>609</sup> R. Hall, *Irish Music in Camden 1945-1970* (Ph. D thesis, University of Sussex, 1994; accessible at the Cecil Sharp House Library)

<sup>610</sup> See comments at <http://www.thesession.org/tunes/display/1410>

#### 2.2.1.5. 'Slow Airs'

Usually a 'slow air' or '*fonn mall*' is based on a *sean nós* song, but is played instrumentally by a solo musician<sup>611</sup>. The melody of a 'slow air' is often quite old, and this type of tune can often be a vehicle for intense, individual expression. Many beginner musicians avoid these tunes for precisely this reason; they are hard to play well.

#### 2.2.1.6. Carolan Pieces

Within the body of ITM, there are about two hundred pieces of music 'attributed' to the blind Irish harpist Turlough Carolan<sup>612</sup>. Carolan composed pieces of music for 'patrons' such as the Dillon family of Lough Glynn, Co. Galway and the O'Conors of Belangare, Co. Roscommon<sup>613</sup>. Though Carolan is seen as an 'essentially Irish harpist-composer', he was influenced by Irish and non-Irish music, such as the Italian music of the time<sup>614</sup>. Much of the Carolan repertoire was transcribed in various 18<sup>th</sup> and 19<sup>th</sup> century collections after his death<sup>615</sup>. Carolan is one of the very few individual composers of this period who is remembered, possibly because his compositions are of a recognisably different character to in comparison to works of other composers.

#### 2.2.1.7. Other types of Dance Music

There are also forms of dance music that are less popular generally, such as strathspeys, flings and mazurkas, all of which remain quite popular in the Northern counties of Ireland such as Donegal, and while many of these tunes do have a certain 'Irish' quality, they remain strongly influenced by Scottish music<sup>616</sup>. Another class of dance tune, the 'set dance' is often played to a hornpipe rhythm<sup>617</sup>.

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<sup>611</sup> T. O'Canainn, *Traditional Music of Ireland* (London: Routledge and Kegan Paul, 1978) (hereafter referred to as O'Canainn).

<sup>612</sup> J. Rimmer, 'Patronage, Style and Structure in the Music Attached to Turlough Carolan,' *Early Music* 15(2) (May, 1987), 164, 164 (hereafter referred to as J. Rimmer).

<sup>613</sup> J. Rimmer, *op. cit.*, 165-167.

<sup>614</sup> *Ibid.*, 171.

<sup>615</sup> *Ibid.*, 164.

<sup>616</sup> Mac Aoidh, *Between the Jigs, op. cit.*, 20.

<sup>617</sup> Breathnach, *op. cit.*, 62

### 2.2.2. The Influence of Sean nós singing on Instrumental ITM

The traditional *sean nós* songs, which are mostly in the Irish language, are of importance because they are linked very closely to the instrumental tradition, which is the main focus of the thesis. *Sean nós* has been referred to as a ‘complex and magnificent art’<sup>618</sup>. O’Canainn has stated:

*“It is the author’s belief that no aspect of Irish music can be fully understood without a deep appreciation of sean-nós (old style) singing. It is the key that opens every lock. Without a sound knowledge of the sean nós and a feeling for it a performer has no hope of knowing what is authentic and what is not in playing and decorating an air. In the same way, a listener who is not steeped in the sean-nós tradition will be unable fully to assess even an instrumental traditional performance of an air because the style of playing is so much affected by the implications of the language.”*<sup>619</sup>

In light of this statement, the content of the *sean nós* styles and songs is outlined here. The ‘*sean nós*’ style of singing is very much associated with the *Gaeltacht* or Irish-speaking areas in Ireland, which includes parts of Donegal, Galway, Mayo, Cork and Kerry. This style of singing is usually unaccompanied, which allows the singer to add his own unique ornamentation to a piece. O’Canainn emphasises *sean nós* as a ‘solo art’<sup>620</sup>. Thus much of the ‘art’ of the *sean nós* would be lost. A *sean nós* song can sometimes also be played instrumentally as a slow air (*fonn mall*) or if it has a steady rhythm as a jig (*port*) and as such are an important part of the tradition itself<sup>621</sup>. These tunes/songs were often sung in the past as *port-a-bhéal* or literally ‘tunes of the mouth’ for dancing when there were no available instruments. As a result the lyrics are often amusing and sometimes quite nonsensical. An example of a *sean nós* song of this type is ‘*Cailleach an Airgid*’<sup>622</sup>. A similar tradition of ‘mouth music’ still exists in the *Gàidhlig* (Scots-Gaelic) speaking areas of Scotland and Nova Scotia where it is known as *puirt à beul*<sup>623</sup>.

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<sup>618</sup> G. Ó hAllmhuráin, *A Pocket History of Irish Traditional Music* (Dublin: O’Brien Press, 1999), 9 (hereafter referred to as Ó hAllmhuráin, ‘History’).

<sup>619</sup> O’Canainn, *op. cit.*, 49.

<sup>620</sup> *Ibid.*, 72.

<sup>621</sup> *Ibid.*

<sup>622</sup> This song has been recorded by Joe Heaney.

<sup>623</sup> See generally H. Sparing, “‘Music is Language and Language is Music’ – Language Attitudes and Musical Choices in Cape Breton, Nova Scotia,” *Ethnologies* 25(2) (2003), 145.

Even if a tune is not also a *sean nós* song, it may be ‘lilted’. ‘Lilting’ refers to the practice of a singer making rhythmic sounds with his voice to the tune, similar to ‘scat’ in jazz music<sup>624</sup>.

### 2.2.3. The Influence of ‘Traditional’ Instruments on the Music

The first instrument of all music is the voice and due to the influence of the *sean nós* style, as outlined above, the human voice has had influence over the instrumental tradition. Furthermore, since the 1950s and 1960s, guitars, tenor banjos, mandolins and even the Greek bouzouki have become very popular<sup>625</sup>. However, the main older traditional instruments that feature in the playing of this music are the harp, ‘union’ or ‘*uilleann*’<sup>626</sup> pipes (a type of bag pipes played by exertion using the elbow<sup>627</sup>), fiddle, flute, and whistle as well as the ‘free reed’ instruments. At times, the music itself has been changed to shape particular instruments. For instance, a fiddler who learns a tune from a piper may alter the tune slightly so that it better fits his or her instrument by<sup>628</sup>. In this way, tunes that were once suited to a particular instrument e.g. the pipes, the harp etc. can be re-interpreted to suit another e.g. the fiddle. As one commentator has stated, much of the use of variation, ornamentation and decoration by flute and whistle players ‘derives’ from piping styles<sup>629</sup>. In light of the above, it can be said that the structures of ITM were shaped by the coming together of numerous internal and external musical influences. In addition, the structures have been further influenced by the existence of Irish traditional songs, voices and instruments.

### 2.2.4. The Defining Characteristics of ITM

This sub-section outlines what are arguably the three defining characteristics that make ITM unique and distinctive from a musicological perspective. This sub-section discusses the musical coherency and character of the music, the distinctive regional and individual

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<sup>624</sup> G. C. Ward and K. Burns, *Jazz – A History of America’s Music* (New York: Knopf, 2000), 131 (hereafter referred to as Ward and Burns).

<sup>625</sup> See generally M. Maher, ‘An Irishwoman’s Diary,’ *The Irish Times* (2002) accessible at; <http://www.mickmoloney.com/articles/maher.html>

<sup>626</sup> ‘Elbow’ in the Irish language.

<sup>627</sup> Breathnach, *op. cit.*, 75.

<sup>628</sup> Mac Aoidh, *Between the Jigs*, *op. cit.*, 37.

<sup>629</sup> Breathnach, *op. cit.*, 93.

styles, and the importance of melodic and rhythmic variation and ornamentation. This analysis is necessary in order to assess works of ITM in relation to the thesis questions.

#### *2.2.4.1. Music with a Coherent 'Irish' Character and Tunes with Shared Melodic Parts*

The above sections established that ITM can be described as a form of music that has a number of different historical and musicological origins. What helps to give the music an 'Irish' character is the fact that many tunes share similar melodic motifs. Farrell has noted the prevalence of a B-minor 'motif', or melodic figure, in many tunes. As noted in the third chapter of this thesis, these characteristics are highly relevant to questions of originality and infringement. For instance, Farrell has noted that there are many tunes that share similar, if not identical, melodic parts<sup>630</sup>. A number of the older, piping tunes, which are 'still popular today', have 'branched off' into variants<sup>631</sup>. These variants share melodic parts. For example, Mac Aoidh noted that 'The Tullaghan Lassies Reel' is also known in two variants as 'Lough Isle Castle' and '*Seán Sa Cheo*'<sup>632</sup>, both of which derive from a reel known as 'Sleepy Maggie', which was published in 1734 in Scotland<sup>633</sup>. The well known reel 'Toss the Feathers' has at least four distinct versions and each version contains subtle differences. However, each version is still musically recognisable as 'Toss the Feathers'<sup>634</sup>. Therefore, it can be said that the presence of similar melodic 'motifs', as well as 'identical' tune parts, gives a unique 'character' and continuity to ITM.

#### *2.2.4.2. Regional and Individual Styles in ITM*

The regional and individual styles of ITM are examined here because these styles are relevant to the first question of the thesis, which examines the originality of arrangements of tunes which are arranged in a particular style. Gearóid Ó hAllmhuráin has remarked:

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<sup>630</sup> M. Farrell, 'Who Owns the Tunes? An Examination of Composition Ownership in Irish Traditional Music,' (CUNY, July 1, 2003) (hereafter referred to as Farrell); accessible at <http://musicandcopyright.beyondthecommons.com/farrell.html>

<sup>631</sup> Mac Aoidh, *Between the Jigs, op. cit.*, 42.

<sup>632</sup> This translates as 'Sean in the fog'

<sup>633</sup> Mac Aoidh, *Between the Jigs, op. cit.*, 42.

<sup>634</sup> Journalist and *uilleann* piper Peter Browne refers to the different, distinct versions of 'Toss the Feathers' in his liner notes to Matt Molloy, *Matt Molloy* (Mulligan, 1977) .



*“A fiddler may be described as having a Sligo, Clare or Donegal style. While these simple county divisions are valid to a degree, research among some older communities in the West of Ireland has revealed a more precise topography of musical dialects. Many of these are based on older clachán-type communities (rural clusters of extended kin and neighbours) which have remained intact since the post-famine era and are distinguished by specific dance rhythms, repertoires and other features”*<sup>635</sup>.

The styles are regional and they do not necessarily recognise county borders. An example of this can be seen particularly in the case of County Clare, where there are said to be two distinct styles, ‘East Clare style’ and ‘West Clare style’. The eastern style is generally said to be more sparsely ornamented and lonesome sounding, whereas the western style is more ornamented<sup>636</sup>. However, as stated above, even county borders are misleading, because the styles of the bordering villages of East Galway and East Clare share many of the same characteristics and have more in common musically to each other than the ‘East Clare style’ does to the ‘West Clare style’<sup>637</sup>. Moreover, the Donegal style is strongly related to Scottish music, but it has its own distinct character<sup>638</sup>. Furthermore, Wilkinson has observed:

*“No style exists in complete isolation: it is in a constant state of re-definition... Styles are not just ‘there’; they are summoned into being through the words and actions of musicians and others.”*<sup>639</sup>

Further to this, many recent performers have attempted to mould their own individual styles, which may lean on one or more regional styles. The well-known fiddler Martin Hayes has stated that he feels that individual styles are the only way for ITM to continue to evolve into modern times<sup>640</sup>.

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<sup>635</sup> Ó hAllmhuráin, ‘History,’ *op. cit.*, 7.

<sup>636</sup> B. Taffe, ‘Regional Fiddle Styles in Ireland,’ (October, 2006) (hereafter referred to as Taffe); accessible at <http://www.fiddlelessons.com/oct06/Taaffe.pdf>

<sup>637</sup> Taffe, *op. cit.*

<sup>638</sup> Mac Aoidh, *Between the Jigs*, *op. cit.*, 20.

<sup>639</sup> D. Wilkinson, ‘Play Me a Lonesome Reel’ (M.A. thesis, University of Limerick, 1992; accessible at the University of Limerick), 5.

<sup>640</sup> See generally ‘A Lilt All His Own’ - Interview with Martin Hayes *Fiddler Magazine* (Spring 1994); accessible at [http://www.ceolas.org/artists/Martin\\_Hayes/interview/html](http://www.ceolas.org/artists/Martin_Hayes/interview/html)

### 2.2.4.3. Variation and Ornamentation

The ability to add melodic variation and ornamentation to a tune is vital in ITM. In this respect, Waldron has made the point that musical practices and processes of ITM are ‘somewhat analogous to jazz’<sup>641</sup>. Ornamentation, such as the use of a ‘crann’, ‘roll’, or ‘triplet’, plays a ‘prominent’ part in a musician’s individual performance of a tune<sup>642</sup>. Musicians will usually add ‘ornaments’ to basic melodies in the form of ‘embellishment’<sup>643</sup>, ‘variation’<sup>644</sup> and ‘rhythm’<sup>645</sup> although each instrument’s own ‘demands’ will also determine what type of ornamentation can be added<sup>646</sup>. For example, it can be said that pipers generally use ‘embellishment’ in their playing, ‘because this suits their instrument’, just as concertina players generally use ‘rhythmical or metrical variations’ which better suit the practicalities of the concertina<sup>647</sup>.

In a related vein, O’Canainn stressed the importance of ornamentation in the *sean nós* singing tradition:

*“The singer is inclined to lengthen important notes in the song and these are generally associated with important words. What one might call musical sense often takes precedence over the sense of the text, particularly when the singer is a very musical performer.”*<sup>648</sup>

Famous *sean nós* singers of recent times include Joe Heaney and Darach O’Cathain, both of whom were recorded extensively<sup>649</sup>. An Irish traditional musician or *sean nós* singer can discover new expressive possibilities within well known traditional tunes or songs by using the techniques of variation and ornamentation.

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<sup>641</sup> Waldron, *op. cit.*, 4.

<sup>642</sup> *Ibid.*

<sup>643</sup> Breathnach, *op. cit.*, 95, noting: “By embellishment is meant (a) the use of one or more grace notes, and (b) the filling in of intervals.”

<sup>644</sup> *Ibid.*, 98, noting: “Variation, the second class of ornamentation, consists in changing or varying groups of notes in the course of the tune.”

<sup>645</sup> *Ibid.*, 99, noting that an example of a rhythmical alteration would include holding one long note where two shorter notes are usually played.

<sup>646</sup> *Ibid.*, 94.

<sup>647</sup> *Ibid.*

<sup>648</sup> O’Canainn, *op. cit.*, 73.

<sup>649</sup> Examples include Joe Heaney, *Ó Mo Dhucháis* (Gael Linn, 1976) and Darach O’Cathain, *Darach O’Cathain* (Gael Linn, 1975).

## 2.3. Exploring ITM in the Modern World

As noted above, ITM is a ‘living tradition’. In other words, ITM is constantly re-defined by its practitioners. Inevitably these changes may affect the traditional character of the music. This sub-section outlines some of the changes that have occurred in recent times in relation to the way that Irish musicians learn the music and issues surrounding the ‘commercialisation’ of the music. The issues outlined in this sub-section are relevant to the six questions of the thesis, and particularly the sixth question concerning licensing.

### 2.3.1. The Commercialisation of ITM

In some ways, the beginnings of commercialisation of ITM in Ireland can be traced to the 1930s. The government, under pressure from the Catholic clergy, who believed the house-dances were encouraging ‘indecent’ dancing, enacted the Public Dance Halls Act of 1935<sup>650</sup>. The Act’s provisions meant that all public dancing required a licence<sup>651</sup>. The licensed ‘dance halls’ were often parish halls owned by the Church. The clergy would often charge people for entry to dances<sup>652</sup>. The Act was enforced quite rigidly in some parishes, and the loss of the country house-dance meant that an outlet of creative expression in Irish music was lost. Some commentators lament the competitive and commercial concerns that arose from the more professional environment of the licensed dance-hall and the popularity of the the *céilí* bands, which had a hybrid traditional-modern sound that typically included drums and the saxophone alongside more ‘traditional’ instruments<sup>653</sup>.

As noted above, many recordings were made of Irish musicians such as Michael Coleman and James Morrison in the USA during the late 19<sup>th</sup> and early 20<sup>th</sup> century. These commercial recordings eventually found their way back to Ireland where they proved influential amongst native musicians. However, the post-1929 depression led to a

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<sup>650</sup> Public Dance Halls Act, 1935

<sup>651</sup> G. Ó hAllmhuráin, ‘Dancing on the Hobs of Hell,’ *New Hibernia Review* 9(4) (2005), 11 (hereafter referred to as Ó hAllmhuráin, ‘Dancing’).

<sup>652</sup> *Ibid.*, 16.

<sup>653</sup> *Ibid.*, 18.

decline in these recordings. However, post WWII, the 1960s ‘folk revival’ led to a boom in commercial recordings<sup>654</sup>. Groups such as ‘The Clancy Brothers’ and ‘The Dubliners’ generally played ‘rocked up’ versions of traditional songs and these groups even had some success on the pop charts in the USA and the UK.

It has been well documented that ITM only became truly commercialised as part of the ‘world music’ brand during the 1990s. As the music became more commercially ‘viable’ and ‘sustainable’, some musicians became more professionally minded. In line with this, it has been remarked that although ITM itself can be traced to provinces and regions and dialects in Ireland, today the music commands a ‘vast transnational audience’<sup>655</sup>. The most successful professional musicians of ITM tend to release recordings either on their own labels, or with the assistance of major distributors. Professional musicians from the UK and Ireland generally also undertake concert tours, stopping off at folk and traditional festivals around the world in countries as far apart as Australia, Japan and the USA. One commentator has remarked that what has traditionally been a ‘communal folk art’ could now become a ‘privatised market commodity’<sup>656</sup>. In this vein, the next chapter elucidates the potential conflicts between ITM and copyright in relation to the six thesis questions.

### **2.3.2. Modern Forms of Transmission via Recordings, ‘Sessions’, Online Facilities**

The availability of recordings has had a profound influence on traditional ‘styles’. For instance, the *uilleann* piper Patsy Touhey was an early immigrant musician, who adapted his style of playing to suit his American ‘vaudeville’ audience. Touhey’s style is said to be the first ‘Irish-American style’<sup>657</sup>. Similarly, the first notable recordings of Irish fiddle music in America, such as the recordings of Michael Coleman proved to be hugely influential on musicians at home<sup>658</sup>. In fact, the recordings of Michael Coleman in

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<sup>654</sup> B. Whelan, ‘Globalising Irish Music’ – Lecture accessible at [http://www.ucd.ie/scholarcast/transcripts/Globalising\\_Irish\\_Music.pdf](http://www.ucd.ie/scholarcast/transcripts/Globalising_Irish_Music.pdf).

<sup>655</sup> Ó hAllmhuráin, ‘History,’ *op. cit.*, 5.

<sup>656</sup> *Ibid.*, 153.

<sup>657</sup> S. K. S. Smith, ‘Irish Traditional Music in a Modern World,’ *New Hibernia Review* 5(2) (2001), 111, 117 (hereafter referred to as S. Smith).

<sup>658</sup> Mac Aoidh, *Between the Jigs*, *op. cit.*, 19.

particular remain influential to this day. Looking at the changing and differing styles of accordion playing shows a detailed example of the effect of recordings on traditional styles in the twentieth century. The first button accordions that were used for ITM were single-row melodeons, made popular by recordings of players such as John Kimmel in the 1920s<sup>659</sup>. Smith has analysed the effect that the popularity of recordings of the chromatic B/C style accordion player, Paddy O'Brien had on establishing the 'new style' of playing Irish tunes on button accordion in the 1950s, which led to the older 'melodeon' style of C#/D becoming almost obsolete<sup>660</sup>. Later in the 1970s, recordings of C#/D accordion player Jackie Daly became popular, and this led to an increase in popularity again for the 'old style' and today both styles are quite popular<sup>661</sup>. It is arguable that sociality in the system of ITM has the potential to change the music stylistically. In fact, the availability of recordings and broadcast technology has also affected many other styles of music<sup>662</sup>. This is particularly evident in the USA due to the existence of broadcast radio from the early part of the 20<sup>th</sup> century onwards. Traditional blues, folk and country music generally became more standardised with the availability of recording<sup>663</sup>. One effect of the availability of recordings is the altering of the process of learning the music. Today many musicians learn the music directly from recordings, rather than through a 'person to person' process<sup>664</sup>.

In relation to the 'person-to-person' transmission of music, it is important to examine the 'session'. The 'session' is a social gathering based around the informal playing and learning of ITM. The 'session' can be described as a 'musical context that occurs most generally in pubs, but also occasionally in private houses, with three or more musicians'<sup>665</sup>. A member of the listening audience might volunteer or may even be called upon to play a tune or to sing a song. The 'session' has even been described as 'inherently egalitarian' since it typically involves the sharing of tunes and folk

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<sup>659</sup> G. Smith, 'Modern-Style Irish Accordion Playing: History, Biography and Class,' *Ethnomusicology* 41(1) (1997), 436.

<sup>660</sup> *Ibid.*, 437.

<sup>661</sup> *Ibid.*, 451.

<sup>662</sup> J. Toynbee, 'Copyright, The Work and Phonographic Orality in Music,' *Social and Legal Studies* 15 (2006), 77, 77-79 (hereafter referred to as Jason Toynbee, 'Music')

<sup>663</sup> *Ibid.*

<sup>664</sup> *Ibid.*, 78.

<sup>665</sup> A. R. Kaul, 'The Limits of Commodification in Traditional Irish Sessions,' *Journal of the Royal Anthropological Institute* 13(3) (2007), 703, 704 (hereafter referred to as Kaul).

information about the tunes etc<sup>666</sup>. It is a relatively recent phenomenon. Pub sessions began in emigrant cities such as London in the early to mid 20<sup>th</sup> century, when playing music in public houses became a workable alternative to kitchen, house and hall dances<sup>667</sup>. Before the 1960s ‘revival’, the ability to play ITM was not highly valued. There was little ‘economic’ value in the playing of ITM at this time. It was not until post-WWII, and particularly from the early 1960s onwards that pub sessions became a ‘common occurrence through Ireland itself’<sup>668</sup>. Kaul has noted that this led to ‘musical tourism’, and within this framework the ‘session’ became a part of the ‘experience’ of visiting Ireland for many tourists<sup>669</sup>.

On observing Irish traditional musicians as well as ‘Delta Blues’ musicians in his hometown of Boston, Smith noticed that both groups of musicians shared similar traits. Smith noted that there was a strong sense of ‘artistry’ amongst the groups and within each set of musicians, but also a commitment to ‘mutual social respect’ and ‘a sense of a place for all within the community’<sup>670</sup>. Some sessions are specifically aimed at encouraging inexperienced players and at these sessions tunes will generally be played a slower pace. Sheet music or notes may be allowed at these types of sessions, but may be out of place in other sessions. It is necessary for learners to listen for ‘patterns’ in the music. In this regard, the session provides an opportunity for the real ‘contextual musical education’<sup>671</sup>. One of the subjects of Waldron’s research, an experienced musician, stated that ‘written’ music and ‘played’ music are not the same in Irish musical contexts<sup>672</sup>. Waldron concluded that Irish musicians value their ‘connections’ with each other and in this context the sharing of tunes and variations is crucial<sup>673</sup>. On the other hand, it has been said that the session can often be a ‘loud, smoky, drink-filled experience’<sup>674</sup>. Breathnach has argued that the popularity of the group session has meant that the ‘solo’ art function of traditional music has been devalued<sup>675</sup>. Nonetheless, there is little doubt

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<sup>666</sup> *Ibid.*

<sup>667</sup> *Ibid.*, 705.

<sup>668</sup> *Ibid.*

<sup>669</sup> *Ibid.*, 705-6. This is most apparent from the 1960s onwards. Kaul’s study focused on Doolin, Co. Clare, which hosts many sessions, especially during the summer months when tourism is at its peak.

<sup>670</sup> C. Smith, ‘Reclaiming the Commons, One Tune at a Time,’ *New Hibernia Review* 10(4) (2006), 14 (hereafter referred to as C. Smith).

<sup>671</sup> Waldron, *op. cit.*, 9

<sup>672</sup> *Ibid.*

<sup>673</sup> *Ibid.*, 16.

<sup>674</sup> S. Smith, *op. cit.*, 121.

<sup>675</sup> B. Breathnach, ‘The traditional music scene in Ireland’ in T. P. Coogan (ed.), *Ireland and the Arts*

that the ‘session’ provides an important social and transmission function in the context of ITM.

The cultural nationalist organisation CCE was founded in the early 1950s with the aim of promoting and teaching ITM at home and abroad<sup>676</sup>. CCE is a major organiser of sessions and Irish music classes and it also provides some online audio and video facilities via its website<sup>677</sup>. It also organises summer schools and workshops where well known musicians teach students tunes over a number of hours or days. CCE quickly became influential in identifying what is ‘proper’ in the performance of traditional music<sup>678</sup>. However, this has been somewhat controversial since there is arguably no ‘correct’ or ‘incorrect’ style of ITM. For instance, Mac Aoidh has criticised what he calls a form of ‘cultural imperialism’ promulgated by CCE, something which ‘was not entirely appreciative of stylistic diversity and was, in some cases, hostile to certain styles of playing’<sup>679</sup>.

Furthermore, in addition to the availability of pub sessions, as outlined above, there are also a growing number of ‘online community’ facilities such as ‘TradTune’<sup>680</sup>, ‘Fiddler’s Companion’<sup>681</sup>, ‘IRTRAD’<sup>682</sup> and ‘thesession.org’<sup>683</sup>. The website known as ‘thesession.org’ is currently one of the most widely used of these internet sites with over 38,000 members and over 6,000 active contributors to the site<sup>684</sup>. The website allows musicians to trade Irish tunes and variations. It also provides a discussion forum and a facility for advertising sessions in locations in countries including the UK, Ireland, USA and Japan. Smith has referred to the folklorist Nicholas Carolan who described these new transmission facilities as forming a ‘secondary aurality’<sup>685</sup>. Secondary or not, new

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(London: Namara Press, 1983), 170.

<sup>676</sup> A full history of CCE can be accessed at [www.comhaltas.ie](http://www.comhaltas.ie)

<sup>677</sup> <http://comhaltas.ie/music/>

<sup>678</sup> Vallely, ‘Apollos,’ *op. cit.*, 204

<sup>679</sup> C. Mac Aoidh, ‘Donegal: A Voice in the Wilderness, or the Voice of Reason?’ in T. Smith and M. Ó Súilleabháin (eds.), *Blas: The Local Accent in Irish Traditional Music* (Dublin: Colour Books, 1997), 67, 71.

<sup>680</sup> <http://tradtune.com/>

<sup>681</sup> <http://www.ibiblio.org/fiddlers/>

<sup>682</sup> <https://listserv.heanet.ie/cgi-bin/wa?A0=IRTRAD-L>

<sup>683</sup> [www.thesession.org](http://www.thesession.org)

<sup>684</sup> <http://www.thesession.org/discussions/display/14741/comments#comment304007> – The available figures come from comments by the website moderator ‘Jeremy’ as of August 2007.

<sup>685</sup> S. Smith, *op. cit.*, 124, referring to a lecture by N. Carolan.

technology would appear to be playing an ever increasing role in ensuring that the music continues and thrives in the 21<sup>st</sup> century.



# **Chapter 3 – Exploring Potential Conflicts between Copyright and the Creative Practices of Irish Traditional Musicians**

## **Introduction**

The first chapter analysed the relationship between copyright and musical works, with particular focus on the areas that are directly relevant to the thesis questions i.e. originality, authorship, joint authorship, infringement, moral rights and licensing. The second chapter established the musicological context of the thesis. In light of the above, this chapter undertakes a critical analysis of the relationship between copyright and Irish traditional music by directly applying the copyright issues from chapter one to the musicological context established in chapter two. In doing so, this chapter examines the six thesis questions in order to discover whether there are potential conflicts between copyright law and the creative practices of Irish traditional musicians. The chapter is divided into sub-sections, which each sub-section centred on a particular thesis question i.e. originality (3.1), authorship (3.2), joint authorship (3.3), infringement (3.4), moral rights (3.5), and licensing (3.6).

## **3.1. Exploring the Idea of Originality in Relation to ITM**

This sub-section examines the first thesis question. As explored in the first chapter, there is a concept of originality based on ‘intellectual creation’ that is currently the standard under copyright law in the UK and Ireland. The central element of this question concerns whether there is a different notion of ‘originality’ at play within the culture of ITM. Therefore, it is necessary to examine the coherence of ‘originality’ requirement under copyright in the context of ITM. In this regard, the Irish traditional ‘tunes’ described in

the second chapter, such as jigs, reels, hornpipes etc., can be divided into what can be termed as ‘older tunes’ i.e. tunes which typically have no known author and have existed for an unspecified period, and ‘newer tunes’ i.e. tunes which often have a known author/composer and which can sometimes be traced to a specific date of composition. In addition, there are also ‘new arrangements’ of both the ‘older tunes’ and the ‘newer tunes’. In relation to the first thesis question, the creation of new compositions and arrangements is of crucial importance.

### **3.1.1. ‘Originality’ and ‘Stylistic Conventions’ in ITM**

It was noted in the second chapter that many traditional tunes include similar or identical basic melodic ‘motifs’. Arguably, these motifs are akin to the ‘stylistic conventions’ discussed in the first chapter. It is necessary to question whether these ‘motifs’ are capable of being sufficiently ‘original’, and therefore, subject to copyright as ‘original’ works.

#### *3.1.1.1 Subsistence of Copyright and Stylistic Conventions*

It was noted in chapter one that the idea/expression dichotomy is of dubious value in relation to music. For instance, it has been argued that that music ‘collapses’ the idea/expression dichotomy<sup>686</sup>. One reason for this is that there are a limited number of musical notes e.g. twelve notes in a standard major scale. Furthermore, it is generally accepted that certain expressions cannot be made subject to copyright, in the same way that in literature certain genre conventions and basic plots cannot be made subject to copyright. On this point, regarding literary works, Stern has noted that authors themselves have often disagreed over the issue of ‘originality’<sup>687</sup>. Stern stated that some authors tend to argue in favour of their own individual ‘genius’, while other authors freely acknowledge that writing depends upon processes of ‘adaptation and revision’, as well as the existence of stylistic conventions, which are essential for the creation of great

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<sup>686</sup> Vaidhayanathan, *op. cit.*, 117. See also R. Rosen, *Music and Copyright* (New York: Oxford University Press, 2008), 1 (hereafter referred to as Rosen).

<sup>687</sup> S. Stern, ‘Copyright, Originality and the Public Domain in Eighteenth-Century England’ in R. McGinnis (ed.), *Originality and Intellectual Property in the French and English Enlightenment* (New York: Routledge, 2009), 69, 71.

literature. In relation to music, many similar issues remain contested<sup>688</sup>. Therefore, as noted in 1.1, the term ‘stylistic conventions’ is used to describe expressions of music that are not capable of being made subject to copyright.

For instance, it can be said that musical ‘style’ has not been ‘monopolised’ by intellectual property law. In this vein, Toynbee has suggested that the ‘blues’ music of the USA would have been greatly inhibited had strict copyright law been enforced over certain ‘licks’<sup>689</sup>. Moreover, it is arguable that if certain ‘stylistic conventions’ had been made subject to copyright, this would potentially have had a negative effect on the development of a great deal of modern music, much of which is ‘written in a traditional style’, and particularly influenced by ‘traditional’ and ‘blues’ conventions<sup>690</sup>.

Nevertheless, as noted in 1.1, small, identifiable musical riffs are protectable<sup>691</sup>. Indeed, even a short melody is generally protectable under copyright<sup>692</sup>. Furthermore, Laddie has remarked that an original tune can be produced from an existing melody by ‘altering a very few notes’<sup>693</sup>. This is due to the fact that popular melodies in general have quite a simple structure and even a small variation can amount to a sufficient degree of novelty for a new tune to be created<sup>694</sup>. However, this is subject to the condition that it does not contain a ‘substantial part’ of another tune, as outlined in 1.4 in relation to infringement.

### 3.1.1.2. Originality and Musical Conventions

In assessing the notion of ‘creativity’ within Irish music, Farrell discussed two main concepts. These concepts are ‘recombining’ and ‘conjoining’. The notion of ‘conjoining’ is discussed in 3.4 below in relation to infringement. However, the concept of ‘recombining’ is arguably central to the notion of ‘originality’ in the context of ITM and this concept is examined here. This concept refers to the process whereby tunes are ‘built

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<sup>688</sup> S. Vaidhayanathan, *op. cit.*, 118.

<sup>689</sup> Toynbee, ‘Music,’ *op. cit.*, 95.

<sup>690</sup> Jones and Cameron, *op. cit.*, 2.

<sup>691</sup> Vaidhayanathan, *op. cit.*, 118, making reference to the Rolling Stones famous ‘Start Me Up’ riff, which soundtracks Microsoft ‘Windows’ operating system.

<sup>692</sup> S. Berry and S. Borella, ‘Case Comment – Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd: laugh, Kookaburra, laugh,’ *Entertainment Law Review* 21(5) (2010), 194, 195 (hereafter referred to as Berry and Borella).

<sup>693</sup> Laddie *et al.*, *op. cit.*, 82.

<sup>694</sup> *Ibid.*

from the same basic motif' i.e. 'stylistic conventions' such as motifs, themes, 'melodic gestures' are found in many tunes. As discussed in the 2.2, the presence of these stylistic conventions gives a unique 'character' and continuity to ITM. It has been noted that this phenomenon is also present in blues music, where 'a composer might employ a familiar riff within a new composition as a signal that the new song is part of one specific tradition'<sup>695</sup>. In the Irish context, Farrell noted in particular the example of common musical figure, the 'B-minor descending triad'. This triad often begins/ends the melody in many traditional tunes. In this vein, Farrell has stated that any composer who deliberately avoids using these central 'motifs' in their compositions would run the risk of the resulting composition not sounding 'in tune' within the traditional melodic character of the music<sup>696</sup>. In other words, if a composition sounds too 'original' and too far removed from the familiar 'sound' of ITM, it may not 'fit' within the tradition. Quite simply, if it does not 'sound' right, it may not be 'acceptable' for musical reasons<sup>697</sup>. For instance, Knowlton has described the fact that one of the fiddler Liz Carroll's tunes is of 'Irish traditional' character, therefore it has been 'accepted' into the tradition i.e. it is played by numerous traditional musicians. However, another of her compositions, which is of a less 'Irish traditional' character, is not frequently performed<sup>698</sup>. The process by which tunes are 'accepted' in this way is detailed in sub-section 3.6 below.

For the purposes of the first question of the thesis on originality in the context of ITM, it is necessary to discover whether a musical stylistic convention such as a traditional 'B-minor descending triad' can be made subject to copyright. Farrell has argued that many of the relevant motifs may be small enough to escape copyright disputes<sup>699</sup>. In other cases, the convention may lack sufficient originality. If a stylistic convention, in the form of a melodic motif, is used in a number of public domain tunes then it is probably not possible to grant copyright protection to it in the same way that copyright cannot protect a common and generic blues chord progression. Therefore, it is arguable that if a new composition contains such a 'traditional' motif, the composition is subject to copyright

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<sup>695</sup> Vaidyanathan, *op. cit.*, 118

<sup>696</sup> Farrell, *op. cit.*

<sup>697</sup> Social acceptance of tunes is outlined in 3.6 below. At sessions it is common for musicians to play 'sets' of tunes and thus it is important for the tunes to 'fit' together well.

<sup>698</sup> B. Knowlton, *Community Authorship: An Exploration of the Copyright Bargain in Traditional Irish Music* (M.A. Thesis, University of Limerick, 2008; copy on file with author, hereafter referred to as Knowlton), 19.

<sup>699</sup> Farrell, *op. cit.*

only to the extent that the composition is original i.e. in relation the ‘combination of sounds’ that the composer has created. In this regard, it is unlikely that the ‘B-minor descending triad’, or other such stylistic conventions, can be protected by copyright.

### **3.1.2. Exploring the ‘Originality’ of Irish Traditional Compositions and Arrangements**

This sub-section analyses whether Irish traditional musicians are capable of creating original compositions and arrangements in accordance with the originality requirement under copyright law.

#### *3.1.2.1 Originality and Composition*

‘Originality’ is crucial to the perception of composition of music. As noted in the 1.1, it is arguable that during the 18th and 19th centuries, the rise of this idea coincided with, and was influenced by, the continuing ascent of the twin concepts of ‘Romantic authorship’ and the existence of ‘the work’<sup>700</sup>. Furthermore, regarding originality of performance, it has been argued that the European art music of pre-1800 necessitated a far more sympathetic relationship between ‘composers’ and ‘performers’ than generally exists today. This is primarily because the ‘composed’ musical scores were often left ‘incomplete’. As such, the musical scores typically required a certain amount of improvisation by the performers<sup>701</sup>. In fact, one commentator has described this ‘continuity’ between performer and composer by stating clearly that in pre-1800 Europe, ‘performance subsumed composition’<sup>702</sup>. It was not until the 19th century that the concept of original, autonomous authorship became dominant in the context of European ‘art’ music<sup>703</sup>. It is arguable that the rapidly expanding market for ‘sheet music’ was a determining factor in the rise of ‘the work’, as composers sought to protect their rights under copyright<sup>704</sup>. Thus, the notion of the ‘composer’ as the sole ‘author’ of a piece of

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<sup>700</sup> Barron, ‘Music,’ *op. cit.*, 122-124. See also Toynbee, ‘Music,’ *op. cit.*, 80.

<sup>701</sup> Goehr, *op. cit.*, 188-9.

<sup>702</sup> Toynbee, ‘Music,’ *op. cit.*, 80.

<sup>703</sup> *Ibid.*, 81. See generally J. Goodman, ‘Stealing our Heritage? Women’s Folksongs, Copyright Law and the Public Domain in Algeria,’ *Africa Today* 49 (2002), 84 and P. Manuel, ‘The Saga of a Song: Authorship and the Case of “Guantanamera”’ *Latin American Music Review* 27(2) (2006), 121.

<sup>704</sup> *Ibid.*, 82. See also C. Ehrlich, *Harmonious Alliance: A History of the Performing Right Society* (Oxford: Clarendon Press, 1989), 5.

music naturally led to a ‘loss of status’ for the ‘performer’ who was now seen as a mere ‘executant’<sup>705</sup>. It therefore seems logical to observe that in conjunction with the idea of the ‘composer as author’, ‘the work’ was held to be an ‘expression of the composer’s soul’<sup>706</sup>. In other words, a piece of composed music was seen as the work of the ‘composer’, who was now truly an ‘author’.

During the 19th and 20th centuries the distinction between ‘composers’ and ‘performers’ became broader and more crucial in the realm of western ‘art’ music, as well as in most forms of ‘pop’ music. As noted in chapter one, cases such as *Sawkins* and *Fisher* illustrate the difficulties that can arise from the application of these distinctions in the contexts of classical and pop music. It is clear that even in these areas, maintaining the distinction between composer and performer is not always a straightforward task. Furthermore, the distinction between ‘composer’ and ‘performer’ arguably remains blurred in traditional blues music, jazz music and ITM<sup>707</sup>.

For instance, it has been noted that the notions of ‘originality’ and ‘authorship’ within the blues tradition are difficult to define<sup>708</sup>. Nonetheless, it is clear that a notion of ‘originality’ is still vital within this tradition<sup>709</sup>. However, it is arguably a different type of ‘originality’ than the standard under copyright law. For example, it is accepted that within the blues tradition ‘originality’ is generally expressed through performance<sup>710</sup>. The structure of the music stays relatively rigid, yet within the boundaries of e.g. ‘twelve-bar blues’, a vast array of performers are able to express themselves in an original way. This blues culture has been classed as an ‘oral culture’ and thus, it is said to be ‘strongly determined by the need to reproduce knowledge’ as opposed to an overriding focus on originality of ‘the work’<sup>711</sup>. As a result, these types of traditional music have been described as ‘iterative-variative in structure, rather than differentiated

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<sup>705</sup> *Ibid.*, 81. See also C. Small, ‘Performance as Ritual: Sketch for an Enquiry into the True Nature of a Symphony Concert’ in A. White (ed.), *Lost in Music: Culture, Style and the Musical Event* (London: Routledge and Kegan Paul, 1987), 6.

<sup>706</sup> *Ibid.*, 81.

<sup>707</sup> *Ibid.*, 84.

<sup>708</sup> O. Arewa, ‘Blues Lives: Promise and Perils of Music Copyright,’ *Cardozo Arts and Entertainment Law Journal* 27 (2009-10), 573, 596-597 (hereafter referred to as Arewa, ‘Promise’).

<sup>709</sup> *Ibid.*, 587.

<sup>710</sup> Vaidhayanathan, *op. cit.*, 123.

<sup>711</sup> Toynbee, ‘Music,’ *op. cit.*, 78.

as in the case of musical works<sup>712</sup>. A similar point can be made with regard to jazz music, where the performer is of paramount importance. The same composition can be played in innumerable different ways, depending on the skill of the performer<sup>713</sup>. It is therefore arguable that ‘originality’ must be seen as embedded within certain contexts, and the same idea of originality may not be applicable in all contexts<sup>714</sup>. It is therefore necessary to discover whether Irish traditional musicians are capable of creating original composition and arrangements in line with the originality standard under copyright.

### *3.1.2.2. Assessing the Originality of Compositions and Arrangements in the Context of Irish Music*

The first part of this sub-section discusses whether Irish traditional musicians are capable of creating original compositions for the purposes of copyright law. In the first chapter it was noted that following *Infopaq* the requirement of ‘intellectual creation’ is the relevant standard of originality. As noted in 1.1, this requires a low level of creativity on the part of the composer. Furthermore, in relation to originality of ‘musical works’, the ruling in *Sawkins* is arguably still highly relevant. In light of 2.2, it is clear that a piece of traditional music, such as a jig, reel or hornpipe, is potentially a ‘musical work’ capable of being protected under copyright in line with the broad definition of ‘musical work’ in *Sawkins*.

As noted in the second chapter, ITM is a ‘living tradition’. In line with this, it is notable that there are several ‘new’ compositions present within this ‘living tradition’. Many of these have been written by living composers such as Paddy Fahy and Finbarr Dwyer. These tunes are commonly performed at sessions and have been recorded by other Irish traditional musicians<sup>715</sup>. While these new compositions are ‘traditional-sounding’ enough to be accepted as part of the ‘living tradition’, they often also bear the distinct hallmarks of the composer’s intellect. As discussed further below, Ed Reavy was perhaps the most celebrated composer of ITM during the 20<sup>th</sup> century. It has been noted that many of his compositions fit within the traditional ‘Irish’ sound, while retaining an individual

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<sup>712</sup> *Ibid.*

<sup>713</sup> Ward and Burns, *op. cit.*, 162.

<sup>714</sup> Arewa, ‘Promise,’ *op. cit.*, 615.

<sup>715</sup> Farrell, *op. cit.*

character<sup>716</sup>. It is strongly arguable that these new compositions are ‘creative’, at least to the extent that they satisfy the *Infopaq* criterion of intellectual creativity. Thus, from the analysis undertaken in 1.1, and in light of the discussion of musical conventions above, it can be concluded that Irish traditional composers are capable of creating original compositions for the purposes of copyright. Furthermore, ‘public domain’ works can be used by composers as the basis for new compositions. As stated above, to the extent that any new composition contains a familiar motif or a substantial melodic part from a public domain composition, the new composition is protected under copyright to the extent that it is original.

The second part of this issue is the question of whether Irish traditional musicians are capable of creating ‘original’ arrangements for the purpose of copyright law. Arguably, this is a more complex question. For instance, it has been noted by PRS for Music that copyright in relation to arrangements of folk/traditional music is a ‘grey’ area<sup>717</sup>. As noted in chapter one, there is comparatively little case law involving copyright of traditional songs or tunes that have been adapted and ‘arranged’<sup>718</sup>. Nonetheless, when a new arrangement of a work is made, provided that the arrangement satisfies the originality standard of ‘intellectual creation’, the new arrangement will have copyright protection. This may be the case even where there is a relatively low level of creativity because the same originality standard applies to the creation of arrangements as it does to the creation of compositions, as noted in *Redwood Chappell* and *Sawkins*. In light of this, it is necessary to discover whether arrangements of ITM typically satisfy this requirement. In light of the above discussion, there are two particular factors to assess in relation to arrangements of ITM. Firstly, there is the issue of ‘style’ in arrangement and performance. Secondly, there is the issue of variation and improvisation in arrangement and performance. These issues are outlined here.

Firstly, it was noted in chapter two that many Irish traditional musicians generally play in one or more of the various regional or individual styles. Playing within a regional style requires certain elements of the arrangement of a tune to be in line with other

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<sup>716</sup> M. Moloney, ‘Introduction’ in *The Collected Compositions of Ed Reavy* (Leitrim: Green Grass Music, 1996) (hereafter referred to as Moloney, ‘Introduction’); accessible at <http://www.reavy.us/compositions.htm>

<sup>717</sup> [http://www.prsformusic.com/creators/wanttojoin/how\\_it\\_works/arrangements/Pages/arrangements.aspx](http://www.prsformusic.com/creators/wanttojoin/how_it_works/arrangements/Pages/arrangements.aspx)

<sup>718</sup> Jones, *op. cit.*, 65.



arrangements in that style. For instance, there is an old jig known as ‘The Carraroe’. This tune has been recorded by numerous artists from the region of East Clare/East Galway in the style of the region<sup>719</sup>. Due to the similarities inherent in this style, it might be questionable whether a fiddler playing this jig within the East Clare/East Galway style of ITM would be adding sufficient ‘originality’ for the conferral of an ‘arrangement’ copyright. This could be of particular importance in the case of an arrangement of a tune that resides in the public domain, because a musician would not be entitled to claim it as a copyright composition, only as a copyright arrangement.

Nonetheless, it is true that there may be slight differences between the actual arrangements played and recorded by the two musicians, even if both of them play generally within the East Clare/East Galway style. However, these differences may be slight, and furthermore, the differences in arrangement may be indiscernible to anyone not possessing a keen ear for the particular style of ITM. Expert evidence could be adduced on this point, but it still may be difficult to articulate the distinctions to the court. However, the continuation of these styles is dependent upon musicians playing tunes in a particular stylistic manner, and therefore, within a limited idea of ‘originality’.

Secondly, within the culture of ITM, ‘original’ arrangements and performances often feature melodic variation and ornamentation. Therefore, it is necessary to discover whether the use of melodic variation in arranging a traditional tune satisfies the originality criterion of intellectual creativity. The following has been noted by IMRO:

*“In the case of ITM, no copyright issues arise when the music performed is part of a body of work that has been passed down from the time that would clearly indicate that any responsible copyright term has expired, and usually the origins of the music are anonymous<sup>720</sup>. **Variation and ornamentation tend to be the distinguishing features of the contemporary performance of this music.** Such embellishments, however, do not create a new copyright arrangement because they exist only in the performance and not, as previously indicated, in any tangible form, such as writing or a recording. In such situations, it is presumed that artistic considerations only arise if the embellishments referred to are repeated by a third party. **However, should recordings be made of such***

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<sup>719</sup> See recordings listed at; <http://www.thesession.org/tunes/display/771>

<sup>720</sup> As stated in the second chapter, many living composers and arrangers are in fact well known.

*performances a right is recognised in those versions of the performance.*<sup>721</sup> (emphasis added by author)

As detailed in the first chapter in relation to *Sawkins* and *Infopaq*, it is strongly arguable that such arrangements are protected by copyright. In other words, it is arguable that the use of melodic variation and ornamentation is an example of ‘intellectual creativity’<sup>722</sup>. As a result of this assessment, it can be said that in the context of ITM it is possible that several different, original arrangements of the same underlying tune can exist simultaneously. Each arrangement will only be protected to the extent that it is original.

## **3.2. Individual Authorship in the Context of ITM**

As previously stated, there are two primary methods of original authorship in ITM, composition and arrangement. This sub-section examines the second question of the thesis, which examines the coherency of the notion of authorship under copyright in the context of authorship of Irish traditional compositions and arrangements.

### **3.2.1. Exploring the Differentiation between the Rights of Composers, Arrangers and Performers under Copyright**

For the purpose of this sub-section, it is important to note that it is arguable that the line between the ‘composition’ and the ‘arrangement’ of that composition is frequently blurred<sup>723</sup>. Furthermore, an arrangement will often not be as commercially valuable as an original composition. The main reason for this is that the making of an ‘arrangement’ requires a licence fee to be paid for the use of the underlying copyright composition, unless it is a public domain composition<sup>724</sup>. These licensing issues are detailed further below in 3.6. For the purpose of this sub-section it must be stated that the making of arrangements remains central to many types of music, including blues and jazz, where it is common for old ‘standard’ pieces to be taken as the basis for the creation of new

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<sup>721</sup> <http://www.imro.ie/content/traditional-music>

<sup>722</sup> See also Derclaye, *op. cit.*, Arnold, ‘Reflections,’ *op. cit.* and Rahmatian, ‘Sawkins,’ *op. cit.*

<sup>723</sup> See difference between opinions of High Court and Court of Appeal on this issue in *Fisher v Brooker* [2007] EMLR 9 and *Fisher v Brooker* [2008] EWCA Civ 287. See also Arnold, ‘Reflections,’ *op. cit.*

<sup>724</sup> ‘Jazz,’ *op. cit.* This is the case even if the musician drastically alters the original work, as is common in jazz music.

arrangements<sup>725</sup>. Furthermore, in blues and jazz music it is arguable that ‘performance’ plays a large part in the ‘authorship’ of arrangements<sup>726</sup>. In other words, a jazz or blues musician’s ability as a performer will affect his or her ability to create a new arrangement of a work. Therefore, like the distinction between the ‘composition’ and the ‘arrangement’, there is a sometimes controversial differentiation between the rights of the composer, arranger and performer<sup>727</sup>.

As described in the first chapter, it is apparent that even within the spheres of classical and pop music, the roles of the composer, arranger and performer can often blur, as the recent cases of *Sawkins*<sup>728</sup> and *Fisher*<sup>729</sup> demonstrate. Nonetheless, it is often important that courts are able to distinguish between the composer and the arranger. Further to this, it was noted in the first chapter that performers have rights concerning their performances, but these rights are not authorial rights over the musical composition or arrangement. Performers’ rights are rights in the specific performances themselves, whereas this sub-section has a specific focus on the second question of the thesis, which concerns the authorship of compositions and arrangements. Hence, for the purpose of this sub-section, it is necessary to examine the nature of performance as it relates to the creation of compositions and arrangements, not as it relates to performers’ rights.

### **3.2.2. Defining the Distinction Between the ‘Composer’ and ‘Performer-arranger’**

Composers are viewed as important within the ITM network and their role is increasingly given a great deal of praise and award<sup>730</sup>. Nevertheless, the performer remains the most important role in the context of ITM, and most of the well known professional musicians are performers rather than composers. As discussed further below, due to the nature of ITM, the ‘performer’ is nearly always also an ‘arranger.’ Therefore, as noted over the course of this section, the distinct roles of composer,

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<sup>725</sup> *Ibid.*

<sup>726</sup> Toynbee, ‘Music,’ *op. cit.*, 78.

<sup>727</sup> Bently, *op. cit.*, 185.

<sup>728</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>729</sup> *Fisher v Brooker* [2007] EMLR 9.

<sup>730</sup> See discussion of the TG4 Irish Traditional Music Awards - <http://www.ramblinghouse.org/2010/02/tg4-honour-ex-chieftain-sean-potts/>

arranger and performer, as assigned by copyright law, arguably make less sense in the context of the blurred boundaries of ITM. This sub section argues that it is arguable that authors of compositions and arrangements of ITM can be divided into two categories – ‘composers’ and ‘performer-arrangers’. As detailed below, the reason for the use of the category ‘performer-arranger’ is the fact that a musician’s ability as a performer will directly shape his or her ability to create an original ‘arrangement’.

### 3.2.2.1. *The Composer*

Although there is a strong sense of community amongst Irish traditional musicians, the initial compositional acts of individuals are vitally important to the continuance of the ‘living tradition’<sup>731</sup>. As Breathnach noted, ‘traditional’ tunes are ‘in the first instance the work of some one person’<sup>732</sup>. Nonetheless, while a certain few individual composers, and in particular the composer and harpist Turlough O’Carolan, are eulogised as authors within the context of ITM, it has generally not been the case that the composer is of great standing or that he or she is even remembered<sup>733</sup>. In the context of ITM, previous generations of composers, whose works are now in the public domain, fade into the background as new composers and arrangers become ‘authors’ of the music. Recent exceptions to this phenomenon include the Irish-born, US-based musician Ed Reavy, who remains one of the best known composers of ITM in the 20<sup>th</sup> century, and other modern composers such as Paddy Fahy, Finbarr Dwyer and Michael Gorman, all of whom have composed numerous popular tunes.

New tunes are composed continuously, but not all of them will be accepted into the ‘living tradition’. In fact, many of these ‘new tunes’ will be forgotten in the years to come despite the fact the composer might have recorded them<sup>734</sup>. Moreover, it has been noted that while ‘composition has flourished’ in the modern era, it is also true that ‘criticism and pedagogy of modern tune-making can hardly be said to exist’<sup>735</sup>. Nonetheless, appreciation for new, ‘acceptable’ compositions continues to grow and

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<sup>731</sup> Breathnach, *op. cit.*

<sup>732</sup> *Ibid.*

<sup>733</sup> *Ibid.*

<sup>734</sup> F. Valley, *The Companion to Irish Traditional Music* (Cork: Cork University Press), 88 (hereafter known as Valley, ‘Companion’).

<sup>735</sup> *Ibid.*

once a new composition is ‘accepted’ by other traditional musicians, it becomes part of the fabric of the tradition. This notion of ‘acceptance’ of new tunes within the context of ITM is detailed in 3.6.

In recent times, an award has been established for traditional composers<sup>736</sup>. However, the prestige of this award is arguably not as high as the award for ‘traditional musician’ of the year, which is frequently awarded to a performer such as Martin Hayes (2008) or Charlie Harris (2009), neither of whom is a noted composer of tunes. Therefore, within the system of ITM, it arguably does not make sense for copyright law to privilege composers. As noted further below, it is arguable that composers are generally at an inferior level of social status to musicians in the category of performer-arrangers, as detailed below.

#### *3.2.2.2. The Performer-arranger*

In the context of ITM, there are some notable musicians, such as Donal Lunny, who could be classed as ‘arrangers’<sup>737</sup>. In this role, an arranger such as Lunny primarily comes up with arrangements for other artists, often as part of the recording process. Furthermore, there are some musicians who could be classed as ‘performers’ i.e. musicians who perform tunes without any variation at all (mostly beginners). Nonetheless, it is arguable that many Irish traditional musicians could best be categorised as ‘performer-arrangers’. This is due to the fact that a well known performer will often arrange a tune in his or her own style, or a regional style. For instance, a prominent musician such as Martin Hayes<sup>738</sup>, who has an individual style, will arrange tunes in his own performance style and then perform the tunes/arrangements at sessions and concerts. He may also record the arrangements on an album. Therefore, Martin Hayes is both an arranger and a performer; he is a ‘performer-arranger’<sup>739</sup>. It is arguable that the category of ‘performer-arranger’ is best suited to the majority of artists within ITM, including well known musicians such as Noel Hill, Kevin Burke, Mick O’Connor

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<sup>736</sup> See discussion of the TG4 Irish Traditional Music Awards - <http://www.ramblinghouse.org/2010/02/tg4-honour-ex-chieftain-sean-potts/>

<sup>737</sup> Though, in addition to Donal Lunny’s role as a professional arranger, he is also a noted traditional performer-arranger and composer.

<sup>738</sup> [www.martinhayes.com](http://www.martinhayes.com)

<sup>739</sup> Once recorded, the original arrangement is usually claimed as copyright. Martin Hayes would therefore be the first owner of the arrangement copyright and sound recording, dependent on his recording contract.

and Martin Hayes<sup>740</sup>. As previously stated, this category refers to the creation of an ‘arrangement’ of a work through the individual performer-arranger’s addition of variation and ornamentation when recording a tune.

In line with this, it can be said that musicians in the hybrid category of ‘performer-arranger’ tend to be far more celebrated than their composer peers. In other words, musicians tend to place more value on arrangement and performance than on composition in the context of ITM. It must also be stated that there are a relatively small category of musicians such as Michael Gorman, Tommy Peoples and Finbarr Dwyer, who are well known performer-arrangers, as well as being well known composers. On the other hand, Ed Reavy and Paddy Fahy, possibly the two most prominent traditional composers of the late 20<sup>th</sup> century, are far better known for their compositions than their performances. For instance, Paddy Fahy has never made a commercial recording and he rarely performs outside of his locality. Many musicians know his compositions only through the performances of other musicians, such as Martin Byrnes, Martin Hayes and Kevin Burke.

### **3.2.3. Putting Forward the Idea of ‘Relational Authorship’ in the Context of ITM**

Cohen has recently provided a ‘social theory of creativity’ which provides a useful guiding theory for analysing authorship in the context of ITM<sup>741</sup>. There are three principle claims in Cohen’s theory<sup>742</sup>. Firstly, Cohen stated that the existence of artistic cultures is an ‘intrinsic’ good. Secondly, Cohen noted that such artistic cultures are often not merely ‘a set of products’ but a ‘relational’ network of actors, practices and resources. Thirdly, Cohen argued that any ‘discredited fallacies’ regarding rights or authorship should be abandoned. In particular, Cohen noted the value of the sometimes controversial practice of ‘musical borrowing’, which is defined and discussed further below in relation to infringement. The idea of a ‘relational’ network is examined here.

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<sup>740</sup> [http://www.irishfiddle.com/frankie\\_gavin\\_interview.html](http://www.irishfiddle.com/frankie_gavin_interview.html); <http://www.noelhill.com/>; <http://www.paragonclub.co.uk/micko/connor.html>; <http://www.kevinburke.com/>

<sup>741</sup> J. Cohen, ‘Copyright, Commodification and Culture: Locating the Public Domain’ in L. Guibault and P. B. Hugenholtz, *The Future of the Public Domain* (Alphen aan den Rijn: Kluwer, 2006), 121, 137-138. (hereafter referred to as Cohen, ‘Commodification’).

<sup>742</sup> *Ibid.*, 138.

In light of this idea, and taking influence from the work of Craig<sup>743</sup>, Shi and Fitzgerald have recently put forward the argument that a ‘relational’ theory of authorship under copyright is necessary in order to take account of new forms of social creativity, such as internet-based creativity<sup>744</sup>. The ‘relational’ idea is based upon a re-positioning of the author/composer ‘within, and constituted by’ a community or network of actors and texts<sup>745</sup>. It must be noted that this does not mean that the individual author does not have a unique role to play within this network of actors<sup>746</sup>. As stated above, the initial acts of individual composers of ITM are important. In line with this, it has been noted that the idea of the primacy of the individual author is generally in line with liberal philosophy<sup>747</sup>. However, other commentators, such as Knowlton, Shi and Fitzgerald, look towards communitarian philosophy for the idea that an author is situated within a cultural context<sup>748</sup>. Gibson’s discussion of network-based creativity is also in line with the idea of ‘relational’ authorship<sup>749</sup>. In light of these arguments, it is arguable that creativity and authorship ‘to some extent must be linked back to the social existence within which the author is situated’<sup>750</sup>.

This is not to say that the liberal perspective on individual rights of the author has no relevance. It merely suggests that the roles of individual composers and performer-arrangers should be discussed within the ‘relational’ context of ITM. The idea of a ‘network’ in the Irish traditional context is preferable to that of a distinct community. Although there is considerable overlap between these terms, the idea of a network<sup>751</sup> is appealing in this context because it envisages a number of individuals working within

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<sup>743</sup> C. Craig, ‘Reconstructing the Author Self: Some Feminist Lessons for Copyright Law,’ *American University Journal of Gender, Social Policy and the Law* 15(2) (2007), 207, 207-211 (hereafter referred to as Craig, ‘Reconstructing’).

<sup>744</sup> S. Shi and B. Fitzgerald, ‘A Relational Theory of Authorship,’ 1-2 of paper accessed via SSRN; at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1285947](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285947) (hereafter referred to as Shi and Fitzgerald). This paper is also published as S. Shi and B. Fitzgerald, ‘A Relational Theory of Authorship’ in M. Perry and B. Fitzgerald (eds.) *Knowledge Policy for the 21<sup>st</sup> Century* (Toronto: Irwin Law, 2009). See also Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedoms* (New Haven: Yale University Press, 2006) (hereafter referred to as Benkler).

<sup>745</sup> Craig, ‘Reconstructing,’ *op. cit.*, 261.

<sup>746</sup> J. Cohen, ‘Creativity and Culture in Copyright Theory,’ *University of California Davis Law Review* 40 (2007), 1151, 1178-9.

<sup>747</sup> Shi and Fitzgerald, *op. cit.*, 1.

<sup>748</sup> Knowlton, *op. cit.*, 12. Shi and Fitzgerald, *op. cit.*, 1.

<sup>749</sup> J. Gibson, *Creating Selves* (Aldershot: Ashgate, 2007), 25-31.

<sup>750</sup> Shi and Fitzgerald, *op. cit.*, 1

<sup>751</sup> For a good outline of network-based creativity and peer-production see Benkler, *op. cit.*, 3-7.

this network, whereas the idea of ‘community’ can sometimes obscure the individual contributors. For the purposes of this chapter, the ‘relational’ network can be said to encompass the reciprocal relationship between Irish traditional musicians. The ‘texts’ include the musical materials described over the course of the second chapter i.e. instrumental ITM in the form of jigs, reels, hornpipes etc.

Given the diverse nature of the creative processes that occur within the ITM network, it is arguable that the ‘network’ itself appears to defy strict definition. For the purpose of this thesis a broad definition is outlined as follows - the traditional music network in the UK and Ireland can arguably be best described as being akin to a loose collective of dispersed individual musicians, with each musician forming a kind of reciprocal relationship with the other members of the collective. This element of reciprocity is crucial to the collective transmission/authorship process.

Once it is accepted that there is a ‘relational’ network in the context of ITM, it is necessary to assess how creativity works within this network. In this regard, it is possible to draw parallels with other creative ‘networks’ within which intellectual property plays only a minimal role in the regulation of creative practices. In this regard, it may be important to evaluate the importance of informal social norms<sup>752</sup>. For instance, Loshin has recently discussed the notions of authorship, ownership and creativity within the magicians’ community. It is arguable that there are certain parallels between the magician community and the ITM network<sup>753</sup>. Once a magician has been accepted into the community, he or she gains access to the stock of magic tricks and illusions that have been built up over hundreds of years. As Loshin has noted, performance style is crucial<sup>754</sup>. Similarly, a traditional musician may start off by imitating the performances of others but in time, he or she can improve and become a well respected performer in his or her own right. Furthermore, it is not the amount of tricks that a magician knows that enables him or her to attain high status within the community. Great magicians tend to be the great performers who may only know a limited amount of tricks, but who can

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<sup>752</sup> See M. Schultz, ‘Copynorms: Copyright Law and Social Norms’ in P. K. Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age 1* (Westport, Connecticut: Praeger, 2007), 201, 201-204.

<sup>753</sup> J. Yoshin, ‘Secrets Revealed: Protecting Magicians Intellectual Property without Law’ in C. A. Corcos (ed.), *Law and Magic: A Collection of Essays* (Durham, North Carolina: Carolina Academic Press, 2010), 123, 123-129.

<sup>754</sup> *Ibid.*



entertain an audience<sup>755</sup>. Similarly, a great musician will not necessarily be the one who knows the most tunes, but the one who plays the tunes that he or she does know in the most pleasing way. As discussed above, this usually involves a musician ‘arranging’ a tune in a particular style, which may also include elements of improvisation and variation.

Furthermore, in relation to ‘stand-up comedy’, it has been argued that until recent times, the transmission and performance of jokes by comedians were ‘governed by an open access regime’<sup>756</sup>. Within this network, the texts of jokes were passed around freely, and great emphasis and value was placed on performance. In other words, a talented performer could tell a familiar joke in a new way. This context is comparable with the magicians’ community as outlined above. As described further below, this context is also somewhat comparable with the Irish traditional network. However, it has also been noted by Oliar and Sprigman, that over the past few decades, in response to social and economic pressures, comedians have developed a more complex set of ‘non-legal norms, institutions and practices that maintain a non-trivial set of incentives to create’<sup>757</sup>. This new system placed a higher level of protection on an individual comedian’s narrative joke-texts. Therefore, it appears that such ‘relational’ networks are capable of redefining the systems of social norms in response to new social and economic pressures. Furthermore, these redefined norms can lead to tighter regulation of texts and materials when performance is no longer the sole marker of e.g. a comedian’s status.

As discussed below, it is arguable that an individual-based conception of ‘the author as composer’ is not the norm in the context of ITM<sup>758</sup>. In fact it can be accurately described as a kind of ‘relational’ network that places a high value on collaborative authorship<sup>759</sup>. In this context, it may be necessary to question the validity of the more individual-based conception of authorship which currently prevails under copyright law<sup>760</sup>.

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<sup>755</sup> *Ibid.*, 125-132.

<sup>756</sup> D. Oliar and C. Sprigman, ‘There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy,’ *Virginia Law Review* 94(8) (2008), 1789, 1865-1866.

<sup>757</sup> *Ibid.*

<sup>758</sup> Knowlton, *op. cit.*, 2.

<sup>759</sup> Craig, ‘Reconstructing,’ *op. cit.*

<sup>760</sup> M. Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”,’ *Eighteenth-Century Studies* 17 (1984), 425.

### 3.2.4. Copyright and Individual Composers in the Context of ITM

With regard to the ‘relational’ network, Mac Aoidh has referred the necessity for Irish traditional musicians to compose new tunes:

*“As was the case everywhere else in Ireland, Donegal musicians continued to add to the overall repertoire by composing new tunes.”*<sup>761</sup>

Once these new ‘original’ compositions are recorded, they are technically subject to copyright since copyright arises automatically upon fixation. Thus, the first important issue that arises in relation to the second question of the thesis concerns the attitude that composers take towards their compositions in relation to authorship and ownership. In particular, it is important to question whether composers seek to enforce their copyrights against their fellow musicians within the ‘relational’ network of ITM.

In addition, Zemer has stated that it is the ability to take ‘what is already known’ and then add some ‘subjective contribution’ which gives value to the creative process of authorship<sup>762</sup>. For this reason, copyright seeks to protect the individuals who have this ability e.g. composers. This would appear logical, given one of the most commonly cited justifications for copyright law is that it is necessary to promote innovation and creativity<sup>763</sup>. This leads to the second issue concerning whether copyright is a motivational factor that encourages composers of ITM to create. If it can be shown that composers of ITM pay little attention to copyright law, this may indicate that copyright does not provide either a spur for innovation or a reward for creativity in this context.

Further to this, one of the potential problems with the current individualistic conception of copyright is the control which authors and copyright owners have in relation to their creations, which arguably does not take sufficient account of community or relational networks of creativity<sup>764</sup>. Furthermore, in ITM, it is acknowledged that performer-arrangers play a more important and celebrated role within this network than composers.

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<sup>761</sup> Mac Aoidh, *Between the Jigs*, *op. cit.*, 27

<sup>762</sup> L. Zemer, *The Idea of Authorship in Copyright* (Aldershot: Ashgate, 2007), 77 (hereafter referred to as Zemer, ‘Authorship’).

<sup>763</sup> Jones and Cameron, *op. cit.*

<sup>764</sup> Shi and Fitzgerald, *op. cit.*, 12-14.

Therefore, the third issue of this question relates to whether composers should cede some rights to performer-arrangers in the context of ITM. These issues are considered in light of the empirical research in the fifth chapter.

### **3.2.5. Copyright and Individual ‘Performer-arrangers’ the Context of ITM**

At this point, it is necessary to discuss the way that Irish traditional musicians create new arrangements from existing tunes. A performer-arranger may achieve this by copying other versions of the tune to some extent and by then adding an original contribution, such as a ‘variation’ on the melody, in order to create a new arrangement of the tune. Furthermore, in ITM, ‘performer-arrangers’ often arrange tunes in a regional or individual style, as stated in 3.1. In this vein, Mac Aoidh has noted that musicians often take older tunes and radically reconfigure them, thus creating new ‘arrangements’. This is explained by the following quote, which refers to musicians in the Irish county of Donegal:

*“Furthermore, they were and continue to be very active in reworking into their own style tunes which originated in Scotland. This is typified by the store of Highlands and Germans played in Donegal which originated as either Scots strathspeys or reels.”*<sup>765</sup>

Further to this, there are some examples of tunes that are well known as ‘arrangements’ created by individual ‘performer-arrangers’ such as ‘Joe Cooley’s Reel’<sup>766</sup> or ‘Dermot Grogan’s Jig’<sup>767</sup>. Tunes like these are usually seen as the arrangement of the particular musician e.g. Joe Cooley, because the musician has added something particularly expressive to the tune. However, it is often the case that an individual’s arrangement will be more subtle, and the person’s name will not be recognised in the title of the tune. Thus, there are many subsequent arrangements of ‘Joe Cooley’s Reel’, and the vast majority of these arrangements keep the ‘Joe Cooley’ name attached to the tune rather than adding the name of the most recent arranger<sup>768</sup>.

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<sup>765</sup> Mac Aoidh, *Between the Jigs*, op. cit., 27.

<sup>766</sup> See <http://www.thesession.org/tunes/display/1>

<sup>767</sup> See <http://www.thesession.org/tunes/display/1880>

<sup>768</sup> See <http://www.thesession.org/tunes/display/1>

During the process of arranging a tune, the addition of melodic variation and ornamentation is important. Waldron has observed that ‘a player may never play a given tune twice in the same way and two players will rarely play a tune identically’<sup>769</sup>. A musician’s ‘individual’ creativity is therefore very important<sup>770</sup>. The process by which a musician learns how to add this melodic and rhythmic variation is based on the aural/oral tradition process, by which a musician will learn from other musicians ‘by ear’. On this point, Mac Aoidh has referred to a conversation that he had with the late Dublin-based fiddler Tommie Potts concerning ‘the nature and attraction of Irish music’<sup>771</sup>. Arguably, to the uninitiated listener it may ‘all sound the same’, but for Potts the beauty of the music was that there was always something new and beautiful to discover within it<sup>772</sup>. Potts felt there was a cyclic approach to the music. Mac Aoidh noted:

*“It started with the player hearing and becoming interested in a tune. The next step in the sequence was to learn it. Thereafter the fiddler would work hard on perfecting a setting of the tune. At this point, the piece was very stable for the musician and could possibly become stale and even boring through a routine approach. Here is where the magic lay for Tommie. When the player was being lulled into disinterest with a tune he or she would, at some unexpected time, hear the same piece played by another player who, by simply altering a note or two, completely transfixed the complexion of the tune and the fiddler’s delight with it. This process was an on-going one, Tommie maintained, and he delighted in cautioning that whenever you think you know a tune and may become complacent with it, you risk being struck by this pleasurable, unending phenomenon. He described it as “the hidden note”. It was there all the time waiting to be discovered and when all around was like a tedious drone it struck the ear and the imagination like a pearl of thunder.”*<sup>773</sup> (emphasis added by author)

Arguably, it follows from this statement that it is vital to the ‘attractiveness’ of this type of music, that musicians are able to learn from each other and are able to take notes and musical phrases from different arrangements and variants of the same tune. For instance,

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<sup>769</sup> Waldron, *op. cit.*, 4.

<sup>770</sup> *Ibid.*

<sup>771</sup> Mac Aoidh, *Between the Jigs, op. cit.*, 17.

<sup>772</sup> *Ibid.*

<sup>773</sup> *Ibid.*

it may be important for a musician to be able to ‘copy’ elements of another musician’s arrangement in order to transpose these ‘hidden notes’ into their own playing. If it were possible for one musician to prevent another musician from doing this, it could remove this element of ‘magic’ that Potts appreciated. Therefore, the fourth issue of this sub-section concerns the attitude that performer-arrangers take towards their arrangements in relation to authorship and ownership. In particular, within the Irish network of musicians, given the importance of and taking ‘hidden notes’ from different arrangements of the same tune, is it just that copyright grants potentially restrictive authorial rights to individual performer-arrangers?

This leads to the fifth issue of this sub-section concerning whether copyright is a motivational factor that encourages performer-arrangers of ITM to create. If it can be shown that performer-arrangers of ITM pay little attention to copyright law, this may indicate that copyright does not provide either a spur for innovation or a reward for creativity in this context. This is analysed in relation to the empirical research in the fifth chapter.

### **3.3. Collective Authorship in the Irish Traditional Context and Joint Authorship under Copyright Law**

It was argued above that the ‘individual creative person’ has often been viewed as the paradigm under copyright law<sup>774</sup>. However, this is a contestable idea of creativity which is arguably based on a conception of the isolated, individual author. For instance, Cohen has recently argued that ‘creativity’ is a ‘social phenomenon manifested through creative practice’<sup>775</sup>. In line with this, if the author is not entirely the individual ‘creative genius’, working in isolation from his or her ‘external world’, then as Zemer has stated it may be crucial to investigate the ‘contribution of collective sources’ to the authorship process when examining copyright law<sup>776</sup>. This sub-section analyses the third question of the thesis, concerning the suitability of the notion of ‘joint authorship’ of musical works

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<sup>774</sup> Shi and Fitzgerald, *op. cit.*, 1-2.

<sup>775</sup> Cohen, ‘Commodification,’ *op. cit.*, 166.

<sup>776</sup> Zemer, ‘Authorship,’ *op. cit.*, 76-77.

under copyright in relation to the form of ‘collective’ authorship present in the network of Irish traditional musicians.

### **3.3.1. Joint Authorship under Copyright in the Context of ITM**

Zemer has suggested that collaborative creativity occurs within a very different creative process than occurs in the process of independent creation by one individual. It is arguable therefore that the requirements for joint authorship should reflect this ‘in light of the shared responsibility collaborators hold for the resulted... expression’<sup>777</sup>. The requirements for establishing joint authorship under copyright were stated in the first chapter (1.3). It was noted in the first chapter that ‘joint authorship’ of musical works requires that the potential joint author makes a ‘significant and original’ contribution to the work. Joint authorship also requires a ‘common design’. In light of *Fisher v Brooker* and *Beckingham v Hodgens* it is clear that a contribution made during the recording process can lead to joint authorship of a composition or arrangement. Therefore, to some extent copyright law does take account of the collaborative nature of music creation.

In light of the above, the first issue that this sub-section raises is whether the creative practices of Irish traditional musicians are amenable to the requirements of joint authorship in relation to compositions and arrangements. On the face of it, there is no reason why Irish traditional musicians are not capable of creating works of ‘joint authorship’. However, as detailed below, it is arguable that the requirements of joint authorship, and particularly the requirement of a ‘common design’, make the application of joint authorship under copyright difficult in the context of the collaborative authorship process that typically occurs within the network of Irish traditional musicians.

In the context of ITM, a great deal of creativity necessarily takes account of ‘collective sources’. Through the aural/oral process, music is transmitted throughout the network, from musician to musician, generation to generation. Moreover, the body of traditional music was largely created during the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> centuries through this oral/aural process. This transmission and authorship process forms part of the notion of ‘relational authorship’, as outlined above. The oral/aural transmission process depends upon music

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<sup>777</sup> Zemer, ‘Collaboration,’ *op. cit.*, 291.

being shared freely from person to person and from region to region at house dances or sessions, with the shared tunes taking on new characteristics along the way<sup>778</sup>. One scholar described this aural transmission process as ‘a system of inheritance: the basic pattern is carried... with modifications added by each successive generation’<sup>779</sup>. Breathnach further emphasised that when it came to ‘phrasing’ in ITM, it is ‘only by ear’ that the two crucial elements of ‘accent’ and ‘length’ can be properly learned by a musician<sup>780</sup>. Therefore, even today it is paramount that a musician has the opportunity to hear ‘genuine material performed in a traditional manner’<sup>781</sup>. Nevertheless, as noted in the second chapter, musicians today also make use of recordings and online facilities when sharing tunes and tune variations.

It must be emphasised that this is a process not only of transmission, but also of authorship. As tunes are transmitted, they are changed. For example, tunes often branch off into variants and some become new, distinct tunes. This can happen in a number of ways. As noted above, it has been recognised that few musicians play exactly the same version of a tune as each other<sup>782</sup>. Musicians often also add variation to the melody during the ‘rounds’ of a tune, and eventually, through the ‘process’ of aural transmission, a tune can take on a more permanent change so that it exists and is known in several comparable versions<sup>783</sup>. In line with this, there are also many reels that have crossed from the Scottish tradition into Irish music, and many of these tunes can now be found in numerous ‘Irish’ variants<sup>784</sup>. Furthermore, O’Canainn remarked that it is important to recognise the effect of past ‘errors’ that occurred during the aural transmission process. In some cases, these ‘errors’ led musicians accidentally discovering new tune variants<sup>785</sup>. O’Canainn explained that ‘mistake, compounded in subsequent transmission, could eventually result in a whole new tune-family’<sup>786</sup>. As a result of this aural/oral tradition

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<sup>778</sup> G. Ó hAllmhuráin, ‘Dancing,’ *op. cit.*, 9.

<sup>779</sup> S. Smith, *op. cit.*, 118-119.

<sup>780</sup> Breathnach, *op. cit.*, 90.

<sup>781</sup> *Ibid.* See also S. Smith, *op. cit.*, 118.

<sup>782</sup> O’Canainn, *op. cit.*, 3

<sup>783</sup> For instance, as noted in the second chapter, the well known reel ‘Toss the Feathers’ has at least four distinct versions; each version contains subtle differences, yet each is still recognisable as ‘Toss the Feathers’.

<sup>784</sup> ‘Drowsy Maggie’ and ‘Sean sa ceo’; see comments accessible at <http://www.thesession.org/tunes/display/177>

<sup>785</sup> O’Canainn, *op. cit.*

<sup>786</sup> *Ibid.*

process, certain different tunes have been noted to have very similar, almost identical parts<sup>787</sup>.

Thus, the traditional process is a continual, collective process which arguably forms part of the notion of relational authorship outlined above. Notions of intellectual property do not easily fit this type of collective, continual process. In particular, it is arguable that the notion of joint authorship under copyright law does not take account of these kinds of ‘external’ sources<sup>788</sup>. In light of the above discussion, the collective transmission process within ITM can be viewed more clearly as a continual process of collaboration between individuals based on incremental and sometimes random acts of revision and featuring a high degree of sociality, rather as a number of acts undertaken by ‘joint authors’ in pursuit of a common design<sup>789</sup>. For the purposes of joint authorship, even where there is a ‘significant and original contribution’ on the part of a musician, it would still be necessary to identify the other purported ‘joint authors’, which may not be possible considering the fact that the process is continual. As previously noted, the lack of a ‘common design’ would also potentially rule out joint authorship in many cases. Therefore, it is possible that two or more joint authors could create a jointly authored Irish traditional composition or arrangement. However, this type of behaviour does not appear to be the norm with respect to the traditional process of transmission.

### **3.3.2. Is Collective Authorship Possible under Copyright?**

The above analysis sets the scene for the second issue of this sub-section. Arguably, copyright does not provide a mechanism under ‘joint authorship’ for facilitating the kind of network-based ‘relational authorship’. However, it is technically possible for such a continual, collective process of creation to occur in line with copyright law, even though there is no distinct category of ‘collective authorship’ under copyright. It would be possible for a network of individual or joint authors to collaborate under copyright. This view would first require an original composition or arrangement i.e. a ‘work’ which is created by an individual author or a number of joint authors. Within this view,

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<sup>787</sup> Farrell, *op. cit.*

<sup>788</sup> Zemer, ‘Authorship,’ *op. cit.*, 77. See also J. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Massachusetts: Harvard University Press, 1996), 114.

<sup>789</sup> J. Toynbee, ‘Beyond Romance and Repression: Social Authorship in a Capitalist Age’ *Open Democracy* (28 November 2002); accessible at [http://www.opendemocracy.net/media-copyrightlaw/article\\_44.jsp](http://www.opendemocracy.net/media-copyrightlaw/article_44.jsp)



subsequent individual authors, or subsequent joint authors, might add variations to the tune i.e. the ‘work’. In turn, this may create a new arrangement or a number of new arrangements.

However, under copyright each use along the chain would typically require a licence from the copyright holder or it would potentially risk being an infringement of the underlying work. This possibility is assessed in the next sub-section 3.4. Since each use may require a licence, it is necessary to discover whether the impact of copyright licensing has the potential to negatively affect the collective process of transmission i.e. the process of ‘relational authorship’. This is assessed below in 3.6. Furthermore, if copyright does not at present provide a model of collective authorship, the question arises as to whether copyright ought to provide such a model. This question is analysed over the course of the fourth chapter with respect to potential solutions and in the fifth chapter with respect to the empirical research.

### **3.4. Infringement and ‘Musical Borrowing’ in the Irish Traditional Context**

This sub-section discusses the fourth question of this thesis concerning the potential for the doctrine of copyright infringement to interfere with the creative practices of Irish traditional musicians. In particular this sub-section looks at the notion of ‘musical borrowing’ and how this notion can be applied in the context of ITM.

#### **3.4.1. Overview of ‘Musical Borrowing’<sup>790</sup>**

As noted in chapter one, copyright infringement in the UK and Ireland envisages the unauthorised or unlicensed taking of a ‘substantial part’ of a copyright work. As outlined

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<sup>790</sup> This phrase is commonly used to denote the taking and transformative use of musical materials. Although the term ‘borrowing’ is used, it is not always the case that materials are ‘returned’ to the place where they were found. In fact, this term appears to denote the use of materials, even where copyright protection applies, in contexts where such use is justified. As such the term is useful and it is used in this thesis to convey this idea of ‘justifiable use’. For uses of the term see Cohen, ‘Commodification,’ *op. cit.*, 143 and Arewa, ‘Bach,’ *op. cit.*, 547.

in chapter one<sup>791</sup>, if a ‘substantial part’ of a musical work is used by another musician without licence, this potentially results in an infringement. While the use of a work is legal where a licence is obtained, this may often be impractical due to financial considerations<sup>792</sup>. In this regard, it is arguably necessary to acknowledge the benefits of copying and ‘musical borrowing’ in certain creative contexts<sup>793</sup>. As this section argues, within the context of ITM it is not seen as ‘unoriginal’ that several Irish traditional tunes share ‘substantial parts’.

Regarding authorship of music, it is widely acknowledged that ‘musical borrowing’ is an ancient practice that pervades many if not all forms of music<sup>794</sup>. For instance, with regard to European classical, operatic and ‘art’ music, it is notable that up until the 19<sup>th</sup> century, many composers felt able to ‘borrow’ and re-arrange material from their own, and each other’s, previous works<sup>795</sup>. In Italy and Germany during the early 18th century musical borrowing was seen as ‘benign’<sup>796</sup>. For instance, it was not illegal, nor was it seen as ‘unoriginal’ or ‘wrong’ for composers to borrow melodies from other composers. Furthermore, the practice was widespread amongst composers at the time<sup>797</sup>. It was not illegal at the time, and therefore it was not seen as unoriginal. However, it has also been noted that during the 19th century, ‘plagiarism’ ceased to be tolerated by composers of ‘written’ music<sup>798</sup>.

In light of this, it is arguable that the concepts of ‘originality’ and ‘infringement’ are not static. These concepts have had different meanings throughout the history of musical practice. In more recent times, Cohen has observed that traditional blues music and jazz

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<sup>791</sup> CDP s 16(3). CRR s 37(3).

<sup>792</sup> M. Rimmer, ‘The Grey Album: Copyright Law and Digital Sampling,’ *Media International Australia* 114 (2005), 40, 51.

<sup>793</sup> Cohen, ‘Commodification,’ *op. cit.*, 143 and Arewa, ‘Bach,’ *op. cit.*, 547.

<sup>794</sup> Charles Seeger acknowledged that folk songs were created ‘entirely’ through a process of ‘plagiarism’. P. Seeger, *The Incomplete Folksinger* (Lincoln: University of Nebraska, 1992), 450. Similarly the great classical composers including Mozart, Beethoven, Bach, Handel, Brahms are all known to have borrowed from other composers, as noted by Keyes *op. cit.*, 426, referring to A. Shafter, *Musical Copyright* (Chicago: Callaghan and Company, 1932), 187. See also Jones and Cameron, *op. cit.*, 260, noting that much of what we term ‘pop’ music today has its roots and structures in traditional music, primarily folk and blues music.

<sup>795</sup> Toynebee, ‘Music,’ *op. cit.*, 80, Goehr, *op. cit.*, 181-2.

<sup>796</sup> Rosen, *op. cit.*, 5.

<sup>797</sup> *Ibid.*, 5.

<sup>798</sup> Toynebee, ‘Music,’ *op. cit.*, 81. Goehr, *op. cit.*, 220-1.

music typically involve a ‘ceaseless process of innovative borrowing’<sup>799</sup>. Borrowed songs and melodies were also emblematic of the folk revival of the 1960s in the UK, Ireland and the USA<sup>800</sup>. In addition, much of what we term ‘pop music’ today is influenced by forms of traditional music and it is, in many ways, rich with ‘musical borrowings’ from the past<sup>801</sup>. Regarding music in the USA, it is not only blues and jazz that are potentially restricted by copyright law, but also ‘hip-hop’<sup>802</sup>. In recent years, the ‘sampling’ culture of hip-hop music has been criticised for being unoriginal and it has even been described as ‘theft’<sup>803</sup>. Unlike other forms of borrowing, sampling involves direct use of a copyright sound recording. For this reason some commentators seek to differentiate this type of ‘borrowing’ from other examples of musical borrowing<sup>804</sup>. Nonetheless, there have also been copyright disputes over the use of a small portion of the underlying ‘musical work’ in a ‘Hip Hop’ song, such as the dispute between the Beastie Boys and James Newton<sup>805</sup>. Furthermore, some authors have argued that ‘Hip-Hop’ musical practices have been negatively affected by copyright licensing requirements<sup>806</sup>.

Taking the specific example of blues music, Toynbee has noted that in the early to mid 20<sup>th</sup> century, blues melodies were frequently re-arranged and re-used by musicians working within the blues tradition<sup>807</sup>. It is possible that this blues culture of ‘same tune, new words and voicings’ could lead to complications with respect to copyright law<sup>808</sup>. For example, Vaidhayanathan has noted that it was common for Muddy Waters and other blues singers to take an old blues song in whole or in part and then to add their own stylistic originality to the song. The resulting blues song would probably be best

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<sup>799</sup> Cohen, ‘Commodification,’ *op. cit.*, 143.

<sup>800</sup> Jones and Cameron, *op. cit.*

<sup>801</sup> Toynbee, ‘Music,’ *op. cit.* See also Jones and Cameron, *op. cit.*

<sup>802</sup> See generally O. Arewa, ‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context,’ *North Carolina Law Review* 84 (2) (2006), 547 (hereafter referred to as Arewa, ‘Bach’).

<sup>803</sup> *Grand Upright Music, Ltd v Warner Bros. Records Inc.*, 780 F.Supp. 182 (1991)

<sup>804</sup> See generally T. L. Reilly, ‘Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court’s Attempt to Afford “Sound” Copyright Protection to Sound Recordings,’ *Columbia Journal of Law and the Arts* 31 (2008), 355.

<sup>805</sup> *Newton v Diamond* 388 F 3d 1189 9<sup>th</sup> Cir. (2003)

<sup>806</sup> O. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess and Unfair Use*, *Rutgers Law Journal* 37 (2006), 277 (hereafter referred to as Arewa, ‘Copyright’). See also Toynbee, ‘Music,’ *op. cit.*, 87.

<sup>807</sup> Toynbee, ‘Music,’ *op. cit.*, 95. See also M. J. Madison, ‘Intellectual Property and Americana, or Why IP Gets the Blues,’ *Fordham Intellectual Property, Media and Entertainment Law Journal* 18 (2007-2008), 677.

<sup>808</sup> *Ibid.*, 87.

described as a new arrangement, and it would only be protected under copyright to the extent that it is original, as noted above. This type of authorship resulted in songs such as ‘Walking Blues’<sup>809</sup>. The song had been previously recorded in 1937 by Robert Johnson, while Muddy Waters learned it from a recording of Son House. In each version, it is recognisably the same song, but each recording reflects the unique performance and arrangement style of each musician.

This type of authorship is clearly fundamental to the notions of ‘tradition, inspiration and improvisation’<sup>810</sup> within blues music. The relevant underlying work may well have been in the public domain, and if so it may well have been possible to avoid legal difficulties regarding the use of the underlying work. There would only be a possible action if it was alleged that a particular copyright arrangement of the public domain work was infringed. Given the fact that Muddy Waters learned it from Son House’s version, it is interesting to consider whether it is possible that a ‘substantial part’ of Son House’s arrangement could have been copied by Muddy Waters and incorporated into his own arrangement. In such a case, a judge would have to consider whether the originality of Son House’s arrangement had been copied. In any case, no infringement was alleged. As Toynbee has noted, it was largely unheard of for blues musicians of this era to litigate regarding the taking of a ‘substantial part’ of one of their works. Due to the fact that the copyright law of the early 20<sup>th</sup> century was not strictly enforced in relation to blues music, musicians were able to continue utilizing this process<sup>811</sup>.

However, in the case of a blues composition which is not in the public domain, an infringement action is arguably more likely. The discussion of blues ‘style and presentation’<sup>812</sup>, as referred to above, is relevant to the dispute which occurred in the 1980s involving blues composer and musician Willie Dixon and the British pop group ‘Led Zeppelin’. Dixon alleged that Led Zeppelin’s composition ‘Whole Lotta Love’ infringed his earlier work ‘You Need Love’, which had been recorded in the early 1960s. It is arguable that from a musical point of view, there is not a great difference between the situation where Robert Johnson, Son House and Muddy Waters all play different

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<sup>809</sup> Vaidhayanathan, *op. cit.*, 122.

<sup>810</sup> *Ibid.*, 121.

<sup>811</sup> Toynbee, ‘Music,’ *op. cit.*, 87.

<sup>812</sup> Vaidhayanathan, *op. cit.*, 117.

versions of the same blues song, and the case of Led Zeppelin playing a blues song that took elements from Willie Dixon's blues composition. Furthermore, it is arguable that there is nothing less 'original', from a musical perspective, in what early blues musicians did in the early-to-mid 1900s and what Led Zeppelin did in the late 1960s. The only difference is that in one case a 'public domain' composition was used, and no licence was apparently required, whereas in the other case, Willie Dixon's copyright composition was used, and therefore a licence was required. In light of the Dixon case and other cases involving blues 'compositions'<sup>813</sup>, it is possible that an increased level of awareness of copyright law within the music industry has altered the acceptability of 'musical borrowing', even with respect to a form of music that is 'traditional' in origin.

It can be said that in spite of the history of musical borrowing in various musical cultures<sup>814</sup>, the courts have in recent times 'displayed very little sympathy for plagiarists'<sup>815</sup>. Some of the world's most famous pop musicians have faced legal difficulties over infringement, even where the copying involved occurred 'as a result of the subconscious mind'<sup>816</sup>. For example, in the case of *Bright Tunes v George Harrison*<sup>817</sup>, the melodies and chord structures of two songs were examined. It was found, under US copyright law, that there was 'substantial similarity' between the song 'My Sweet Lord' and the earlier work 'He's So Fine'. Arguably, a similar outcome would be possible under the doctrine of infringement in the UK and in Ireland, under the test of the 'substantial part' as it stands today. Recently the guitarist and composer Joe Satriani settled<sup>818</sup> a dispute in the US against the British group 'Coldplay'. Satriani had alleged that the Coldplay song 'Viva La Vida' infringed his earlier work<sup>819</sup>. The songwriter Yusuf Islam (formerly known as Cat Stevens) has also argued that 'Viva La Vida' infringed his earlier work, which also pre-dates Joe Satriani's composition<sup>820</sup>. In a case involving the musician John Fogerty, an allegation of copyright infringement in the USA was nullified where the defendant showed that the alleged similarity between the

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<sup>813</sup> O. Arewa, 'Promise,' *op. cit.*

<sup>814</sup> Rosen, *op. cit.*, 1-5.

<sup>815</sup> Bainbridge, *op. cit.*, 39.

<sup>816</sup> *Bright Tunes Music Corp. v Harrisongs Music, Ltd et al.*, 420 F. Supp 177 (1976); *ABKCO Music, Inc. v. Harrisongs Music, et al.*, 508 F. Supp. 798 (1981); on appeal, 722 F. 2d. 988 (1983); again after remand, 841 F. 2d. 494, and again 944 F. 2d 971 (1991).

<sup>817</sup> *Bright Tunes Music Corp. v Harrisongs Music, Ltd, supra* note 817.

<sup>818</sup> <http://news.bbc.co.uk/1/hi/entertainment/8258217.stm>

<sup>819</sup> <http://www.guardian.co.uk/music/2009/apr/08/coldplay-deny-satriani-plagiarism-claims>

<sup>820</sup> <http://www.guardian.co.uk/music/2009/may/05/coldplay-yusuf-islam>

two separate works was a result of a stylistic, musical similarity inherent in the composer's body of work<sup>821</sup>.

With respect to the above cases, it is arguable that it is not always a straightforward task to define musical 'originality' in relation to copyright infringement. As one commentator has noted, there are a limited number of notes in a musical scale<sup>822</sup>. Therefore, in relation to infringement, the following question is prescient:

*"At what point between general chord patterns and specific strings of notes does repetition constitute infringement of a protectable expression?"*<sup>823</sup>

As assessed below, in the context of ITM this question has particular significance due to the traditional practice of 'conjoining'.

### **3.4.2. Conjoining – An Example of Copyright 'Infringement' in ITM?**

As noted in 3.1, Farrell has posited an analysis of 'creativity' in relation to composition of Irish tunes, including the two concepts of 'recombining' and 'conjoining'<sup>824</sup>. It was noted that the musical character of ITM to some extent depends upon the existence of common melodic 'motifs', patterns and stylistic conventions (recombination). Moreover, for the purpose of this sub-section, it is important to discuss the existence of 'shared' or 'borrowed' parts (conjoining). As detailed here, this notion of 'conjoining' would potentially appear to be at odds with the doctrine of copyright infringement.

For Farrell, the notion of 'conjoining' explains the fact that several different tunes have sections that are melodically similar to sections of other tunes. For instance, if a jig has an 'A' part and a 'B' part, it may be the case that another tune has the same 'A' part, but a different 'B' part. For example, Farrell noted strong similarities between two distinct tunes 'The Lark in the Morning' and '*An Buachaillín Bui*'<sup>825</sup>. Ultimately, Farrell

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<sup>821</sup> *Fogerty v Fantasy, Inc.*, 510 U.S. 517 (1994).

<sup>822</sup> Vaidhayanathan, *op. cit.*, 117.

<sup>823</sup> *Ibid.*, 118.

<sup>824</sup> Farrell, *op. cit.*

<sup>825</sup> *Ibid.* 'The fair little boy' is the exact translation.

discovered four tunes that she believed were strongly linked<sup>826</sup>. There are many more, perhaps countless examples of this phenomenon<sup>827</sup>, to the extent that it is reasonably safe to say that ‘conjoining’ has traditionally played a vital role in relation to creative practices of Irish traditional musicians. In line with this, it has been said that it is important to maintain ‘a healthy measure of freedom for “second takers” to build upon an expressive tradition’<sup>828</sup>. However, if one of the above tunes was subject to copyright, it is not impossible that an infringement action could be taken by the copyright holder regarding the use of a ‘substantial part’ of the tune. In other words, if Irish traditional musicians are prevented by copyright from freely taking ‘substantial parts’ from tunes, regardless of their copyright status, this could prevent ‘conjoining’.

It must be reiterated that the use of a ‘substantial part’ of a work that is in the public domain would not be infringement. Nonetheless, regarding the taking of a ‘substantial part’ of a new composition or a new arrangement, an infringement action may be feasible. In this vein, the application of the doctrine of copyright infringement in the context of ITM is potentially problematic. Therefore, it is necessary to discover whether Irish traditional composers and ‘performer-arrangers’ envisage taking infringement actions regarding the use of their compositions and arrangements. In particular, it is necessary to discover whether composers and arrangers seek to enforce their copyrights against their fellow musicians. This is analysed in relation to the empirical research in the fifth chapter.

### **3.5. Moral Rights – Attribution and Integrity in the Context of ITM**

As noted in chapter one, the author of the musical work possesses moral rights concerning the work. In relation to the fifth question of the thesis, it is necessary to assess the position of moral rights in the context of ITM. For instance, the right of attribution, and the right against false attribution, are highly relevant in this context, as

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<sup>826</sup> *Ibid.*

<sup>827</sup> See discussions at [www.thesession.org/tunes/display/177](http://www.thesession.org/tunes/display/177) and [www.thesession.org/tunes/display/27](http://www.thesession.org/tunes/display/27)

<sup>828</sup> Vaidyanathan, *op. cit.*, 118

outlined below. In addition, the potential significance of the right to integrity is also discussed in this sub-section.

### **3.5.1. Attribution in the Context of ITM**

The following two sub-sections discuss the issue of attribution of tunes in the context of ITM. Firstly, in relation to attribution, the titles of tunes sometimes provide attribution to composers or ‘performer-arrangers’. Secondly, there is a highly informal form of attribution that occurs when a tune is transmitted from one person to another, or when a tune is taken from a source such as a recording or a tune book. Both of these types of attribution are discussed here in relation to the moral right of attribution under copyright.

#### *3.5.1.1. Attribution of Composers and Performer-arrangers*

Firstly, composers are often attributed by the titles of tunes in ITM. For example, this can be seen with ‘Mick O’Connor’s Reel’<sup>829</sup> or ‘Paddy Fahey’s Jig’<sup>830</sup>. There are also many examples of well known tunes such as ‘The Hunter’s House’, which has a relatively anonymous name, yet has been published as one of the many compositions of Ed Reavy<sup>831</sup>. The most common way of giving attribution is to list the composer’s name in the liner notes of the recording. For example, Martin Hayes has recorded several of the compositions of Paddy Fahy, giving him attribution in the liner notes of the recording. This type of crediting of composers in the LP or CD liner notes can be of crucial importance in relation to moral rights. For example, it was found in *Sawkins v Hyperion* that because the liner notes to the ‘Sun King’ CD did not name Dr. Sawkins as an author, his right of attribution was breached<sup>832</sup>.

Performer-arrangers are sometimes given attribution when it is clear that they have added something to a tune, such as a melodic variation<sup>833</sup>. For example, the popular reel commonly known as ‘Cooley’s Reel’ is attributed to the famed accordion player from

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<sup>829</sup> See <http://thesession.org/tunes/display/1593>

<sup>830</sup> See <http://thesession.org/tunes/display/849>

<sup>831</sup> A list of Ed Reavy compositions is accessible at <http://www.reavy.us/compositions.htm>

<sup>832</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

<sup>833</sup> See example of ‘Dermot Grogan’s Jig’ – an arrangement of ‘Luaitheadán’s Jig’; comments accessible at <http://www.thesession.org/tunes/display/1880>



Galway, Joe Cooley, who died in the early 1970s. However, as noted above, while the tune is attributed to him, it is not thought to be an entirely original composition – it is Joe Cooley’s arrangement of an older reel known as ‘The Tulla Reel’<sup>834</sup>. This kind of attribution and identification is quite commonplace where a musician has made a well-regarded new arrangement of a tune. For this reason, at times it can be difficult to distinguish the recent compositions from the older tunes merely by looking at the common name of the tune. For example, the tune known by some musicians as ‘Dermot Grogan’s Jig’ was not composed by the musician Dermot Grogan, but his arrangement is sometimes given attribution due to the melodic variation he added to the tune. The tune can be traced to the fiddler Junior Crehan, who called it ‘Luathreadán’s Jig’<sup>835</sup>. In a similar vein, in relation to blues music Vaidhayathan has observed that it was possible for Muddy Waters to assert authorship of the song ‘Walking Blues’<sup>836</sup> while also describing the fact that he had learned it from another blues musician, Son House, and admitting he was familiar with an earlier Robert Johnson version of the song. Therefore, it is not always possible to give accurate attribution to composers and performer-arrangers of pieces of traditional music just by looking at the common name of the tune. Giving the correct attribution information can often be a difficult task.

Furthermore, while every piece of music starts out as a composition in one form or another, there is a great deal of myth and folklore surrounding certain tunes. This is especially true of older tunes. The history of the composition or creation of these tunes is laced with mystery. On this point, Mac Aoidh relates the folkloric tale tradition of ‘fiddle enchantment’, in which the story usually tells of a human fiddle player who through a fortunate encounter with a mysterious stranger or ‘fairy’ character, becomes a famous and well regarded player<sup>837</sup>. Upon the final moment of death of this player, this ‘enchanted’ fiddle is often said to suddenly shatter or break into smithereens, so that no other player may inherit it<sup>838</sup>. Similarly, the folklorist Seamus Ennis referred to a story of the origin of the great piping jig ‘The Gold Ring’ or ‘*An Fainne Ór*’. Ennis recounted the story of how the tune supposedly came from a fairy, who gave it to a young man in

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<sup>834</sup> See comments and tune history at <http://www.thesession.org/tunes/display/1>

<sup>835</sup> The origin story of the tune can be found (alongside a performance of the jig) on the family-produced recording Junior Crehan, *The Last House in Ballymakea*; listed at <http://www.thesession.org/recordings/display/2099>

<sup>836</sup> Vaidhayathan, *op. cit.*, 122.

<sup>837</sup> Mac Aoidh, *Between the Jigs*, *op. cit.*, 57

<sup>838</sup> *Ibid.*

gratitude of the young man returning a gold ring that the fairy had lost during a fairy dance in the woods<sup>839</sup>. Regardless of the truth of these tales, it does illustrate that there is a difficulty in tracing the exact origin of older tunes<sup>840</sup>. Thus, it can be said that correctly identifying a composition or arrangement and giving the proper attribution to the author(s) is not a straight forward exercise in the context of ITM<sup>841</sup>. For the purposes of this thesis, it is necessary to discover the attitude that composers and arrangers take towards attribution of their compositions and arrangements within the network of Irish traditional musicians. Given the complexity associated with correctly identifying the origins of tune, it is also necessary to discover whether any composers or arrangers have been falsely attributed as authors of tunes.

### 3.5.1.2. Attribution and Transmission

There is another layer of attribution present within the ITM network. When performing, musicians will generally state where they first heard or learned a tune, and from whom<sup>842</sup>. O'Shea has noted:

*“Irish musicians make similar claims in their tune introductions at concerts and on sleeve-notes to recordings. If a musician cannot claim musical pedigree via a parent, they may claim other kinds of filiation (through relatives, teachers, living in a musical district) or affiliation (the influence of high-status musicians either personally or, as a last resort, via recordings)”*<sup>843</sup>.

This type of attribution is strongly related to the communal nature of creativity in the context of ITM. It is for this reason that musicians are often careful to attribute where, and from whom, they first learned a tune. This is done out of ‘respect’ and appreciation for this interdependence<sup>844</sup>. Farrell has stated that by performing this ritual, musicians

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<sup>839</sup> The story can be found on the recording Seamus Ennis, *Ceol, Sceálta Agus Amhráin* (Gael Linn, 2006).

<sup>840</sup> Valley, ‘Companion,’ *op. cit.*, 81.

<sup>841</sup> *Ibid.*

<sup>842</sup> Farrell, *op. cit.*

<sup>843</sup> H. O'Shea, ‘Getting to the Heart of the Music: Idealizing Musical Community and Irish Traditional Music Sessions,’ *Journal of the Society for Musicology in Ireland* 2 (2006-7), 1, 17. O'Shea's uses Edward Said's distinction between ‘filiation’ and ‘affiliation’ in E. Said, *Culture and Imperialism* (London: Chatto & Windus, 1983), 174-175.

<sup>844</sup> Farrell, *op. cit.*

are ‘giving credit to those who owned the tune before them’<sup>845</sup>. Farrell noted that in giving attribution, there is recognition that some form of ‘ownership’ of the tune is being passed from one musician to another<sup>846</sup>. This is arguably related to the notion of ‘relational’ authorship outlined above. Attribution appears to be a key signifier of this relational authorship system. In line with this, Smith has remarked:

*“More than just the Music is transmitted in this fashion. Often, the people who have played the tune- or, in some cases, who have composed the melody- are recalled in the making and remaking of the music. A traditional performer can be relied upon to add a personal stamp to the performance of the tune, but the musician from whom the tune was learned will also be recalled and named when the music is played in public. A portion of the social fabric that bound the tune as it was played in the past is thus transmitted as well in the traditional process.”*<sup>847</sup>

Additionally, attribution is sometimes given to the tune collections or to recordings where the collection or the recording was the source of the tune. In this vein, some of Michael Coleman’s arrangements/settings of tunes, such as the one described by Mac Aoidh, have become ‘standard’ in ITM<sup>848</sup>, and Coleman’s recordings are sometimes listed as a ‘source’ of tunes in CD liner notes<sup>849</sup>. Thus, this type of attribution appears to remain somewhat important in the context of ITM. However, it may be a more informal kind of attribution than that envisaged under copyright. It is necessary therefore to discover the attitude of Irish traditional musicians towards this informal ‘transmission’ attribution, which does not necessarily denote ‘authorship’ of a tune, but instead denotes the provenance of a tune.

### **3.5.2 The Integrity Right and ITM**

The integrity right is potentially relevant here. The reason for this is that in most cases a composer’s work or a performer-arranger’s work will be altered by other traditional

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<sup>845</sup> *Ibid.*

<sup>846</sup> *Ibid.*

<sup>847</sup> S. Smith, *op. cit.*, 112.

<sup>848</sup> Farrell, *op. cit.*

<sup>849</sup> An example is the tune ‘Tarbolton’ – a tune which is usually attributed to a famous Michael Coleman recording, as noted at <http://www.thesession.org/tunes/display/560>

musicians through the traditional processes of performance and transmission described in 3.2 and 3.3. For instance, melodic variation may be added to a composition so that certain melodic qualities of the composition are drawn out over others. Furthermore, through the traditional process, ‘error and ‘mis-hearing’ can occur. Indeed, via the transmission process, a composition may in fact take on a new rhythmic characteristic, or even a new melodic part. For example, a tune usually played in jig-time (3/4) might be played in reel-time (4/4), giving the tune a new character. Via the transmission process, the individual acts of composers appear to fade into the background within the context of ITM. The composition merely becomes part of the fabric of the tradition. Furthermore, only when a tune is in a constant state of flux can it be said that it is truly part of the living ‘tradition’. For this reason, if a composer was interested in protecting the ‘integrity’ of his tune, or his ‘honour’ or reputation, this could change the ‘acceptability’ of his tune as part of the ‘living tradition’

In addition, a composition, or part of a composition, may form the basis for a further act of composition or arrangement by another musician, so that the original composition becomes less recognisable. Despite this, the name of the composer may still be attached to the tune. This may occur even if the characteristics of the tune have changed considerably over time. In this regard, the integrity right potentially comes into play.

As yet, there is little case law on the integrity right in the UK and there is no case law on the issue in Ireland<sup>850</sup>. As noted above, *Morrison Leahy v Lightbond*<sup>851</sup> is the leading case on musical ‘distortion’. The *Morrison Leahy* case concerned the use of samples of George Michael works in new recordings. The complainant argued that this was derogatory and the court appeared willing to consider that taking part of a work and putting it in a different context could be derogatory. However, it is clear from *Pasterfield v Denham*<sup>852</sup> and *Confetti Records v Warner Music*<sup>853</sup> that it is necessary to show that the derogatory treatment would be prejudicial to the honour or reputation of the author. This condition may be difficult to apply in the context of the network of Irish traditional musicians. Theoretically, if a composer is identified with a composition that is of a lower

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<sup>850</sup> See cases, *supra* note 357.

<sup>851</sup> *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144.

<sup>852</sup> *Pasterfield v Denham* [1999] FSR 168.

<sup>853</sup> *Confetti Records v Warner Music Inc* [2003] EMLR 35.

standard than the tunes in his usual repertoire, the composer might argue that this is a breach of his or her integrity right - if it is held to be sufficiently prejudicial. The possibility of a breach of the ‘integrity’ right within the network is analysed with respect to the empirical research in the fifth chapter.

Furthermore, it might be the case that the integrity of a composer’s tune is impinged by use by a person outside of the network. For instance, if part of a composition or arrangement were to be taken up and used in a different context e.g. a hip-hop context as in *Morrison Leahy*, an author may feel that the integrity of his or her work has been called into question. Nonetheless, as the *Confetti Records* case shows, it can be difficult to establish ‘prejudice’ in this regard. Therefore, unless prejudice to the author’s reputation can be demonstrated it is unlikely that a composer of ITM would succeed in such a case before the UK or Irish courts. This issue of ‘integrity’ in the context of use outside the network is also examined in the fifth chapter.

It is interesting to note that unlike the right to attribution, there is little secondary evidence showing that composers of ITM are particularly concerned about the ‘integrity’ of their tunes<sup>854</sup>. Therefore, as a primary issue of the fifth question of the thesis, it is necessary to discover to what extent ‘integrity’ matters to composers and performer-arrangers of ITM. These issues will be examined in view of the empirical research in the fifth chapter.

### **3.6. Licensing in the Context of ITM**

This sub-section discusses the sixth question of the thesis, which asks whether copyright licensing has the potential to alter the social and creative practices of Irish traditional musicians. Before examining the issues of licensing, it is necessary to give an overview of the way tunes are ‘accepted’ into the tradition. As discussed further below, the ‘free’ sharing of tunes remains important within the culture of ITM.

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<sup>854</sup> None of the major commentators including Breathnach, *op. cit.*, O’Canainn, *op. cit.*, and more recently, Knowlton, *op. cit.*, refer to this issue.

### 3.6.1. Social Norms of ‘Acceptance’ of Tunes in the Context of ITM

Farrell has referred to a comment by the renowned collector of ITM, Francis O’Neill, who stated that the tunes were akin to the ‘common possession of the peasantry’<sup>855</sup>. This idea seems to point towards an idea of ownership which is based on norms, but not necessarily based on copyright law. The notion of ‘acceptance’, outlined here, is a crucial part of this ‘norm-based’ system. As noted above, it is clear that for a tune to be accepted as part of the ‘tradition’, the ITM network of musicians must accept it and recognise it as such. In order for this ‘acceptance’ to be granted, it appears that a composer of a new tune must distribute the tune amongst the members of the network. In practice, there are many ways in which a new composition might be distributed. If the musician is well known, he or she might record the composition on a commercial recording which may then spread knowledge of the tune amongst musicians. For some composers, such as Paddy Fahy, who has never recorded commercially, the fame of a composition might be spread through its direct transmission from him to the musicians living and playing in his locality, and eventually the tune may become widely known through recordings by other musicians e.g. Martin Byrnes, Martin Hayes, Liz and Yvonne Kane<sup>856</sup>. The composition might also be distributed via person-to-person transmission at ‘sessions’. Over time, if the composition is taken up and played by musicians, this means that it has effectively been ‘accepted’ as part of the body of traditional music. A similar distribution and acceptance process can also occur in relation to arrangements of tunes, such as ‘Joe Cooley’s Reel’.

To illustrate this process of acceptance, the example of Ed Reavy’s composition ‘The Hunter’s House’ is used. As noted previously, Ed Reavy is perhaps the most celebrated composer of Irish traditional tunes of the twentieth century. Today many of his compositions are part of the established body of traditional music. The folklorist and musician Mick Moloney has stated:

*“No composer of traditional dance tunes in the history of Irish music has ever had his music adopted and played as widely as Ed. He devoted much of his life to the creation of*

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<sup>855</sup> Farrell, *op. cit.*

<sup>856</sup> Examples are listed at <http://www.thesession.org/tunes/display/150>

*a vast body of compelling, finely crafted tunes leaving an indelible imprint on the beautiful old tradition that was always his first love.*"<sup>857</sup>

Moloney has also explored the issue of how exactly Ed Reavy's compositions 'achieved widespread recognition' amongst traditional musicians in North America and Europe during his own lifetime<sup>858</sup>. Firstly, Moloney noted the increase in travel and communication between Reavy's adopted home in America and his native home of Ireland. This meant that other musicians who had learned his compositions from him, such as the fiddler Louis Quinn, could spread Reavy's tunes through meeting and playing with other musicians in Ireland, as well as through the performance of his tunes on Irish radio. Quinn also passed around taped recordings of Reavy's tunes, 'which he copied for many prominent musicians'<sup>859</sup>. The way that Reavy's tunes spread through personal meetings, as well as official<sup>860</sup> and unofficial recordings, shows both the importance of the 'person-to-person' transmission process, as well as the kind of 'phonographic orality' envisaged by Toynbee<sup>861</sup>. Not only was Reavy not aggrieved at the passing around of his compositions in these ways, he was 'extremely pleased to see his tunes being played so widely'<sup>862</sup>. In more recent times, published collections of his tunes have been issued<sup>863</sup>. Possibly the most famous of his tunes is the reel entitled 'The Hunter's House'. This tune is now an established part of the body of traditional music, and it has been recorded many times<sup>864</sup>. The success of Reavy as a composer also shows the impact that individual composer can have within the network of ITM.

However, a newly composed tune will not necessarily be 'accepted' into the body of traditional music. For instance, a new composition might not be acceptable for the reason that it does not possess a suitable musical character i.e. it sounds slightly out of place

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<sup>857</sup> Moloney, 'Introduction,' *op. cit.*

<sup>858</sup> *Ibid.*

<sup>859</sup> *Ibid.*

<sup>860</sup> See recordings listed at <http://www.thesession.org/tunes/display/302>

<sup>861</sup> Toynbee, 'Music,' *op. cit.*, 78, referring to the process by which musicians learn by listening to recordings.

<sup>862</sup> Moloney, 'Introduction,' *op. cit.*

<sup>863</sup> *The Collected Compositions of Ed Reavy* (Leitrim: Green Grass Music, 1996); accessible at

<http://www.reavy.us/compositions.htm>

<sup>864</sup> See recordings listed at <http://www.thesession.org/tunes/display472>

when played in a sequence with older tunes. If a tune is not accepted, then it will rarely be heard in ‘sessions’ or on other recordings<sup>865</sup>. One commentator has noted:

*“Communities of traditional musicians tend to vote collectively with their fingers. In a largely unspoken process of selection, a minority of tunes possessed of that special combination of playability and aesthetic interest gradually fold themselves into the traditional repertoire, while the vast majority of new compositions languish in printed collections, on commercial CDs, or in the repertoires of isolated practitioners.”*<sup>866</sup>

For instance, with regard to transmission of tunes at ‘sessions’, it has been said that while many newer, accepted tunes are ‘treated in the same way’ at sessions as the older, established tunes, it is clear that musicians sometimes feel anxious about performing their own compositions for fear that the new tunes will not be ‘accepted’<sup>867</sup>. As Moloney has observed, the ‘success’ of a composer of ITM depends upon the extent a composition is accepted by his or her fellow musicians. In line with this, Knowlton has stated that ‘the community as a whole is involved in the negotiation of new cultural inclusions’. These new inclusions consist of compositions and arrangements<sup>868</sup>.

In relation to the acceptance of arrangements, Jones and Cameron have referred to Sharp’s study of ‘folk’ music traditions, as elucidated by Bearman<sup>869</sup>. This system uses the term ‘continuity’ in order to refer to the fact that the same tunes are found in different regions of a country, often in different ‘variations’. Regarding the process of ‘acceptance’, it was noted that ‘variants of the song will be judged by the community and accepted and passed on, and if not favoured, discarded’<sup>870</sup>. Since the network is heavily involved in this process, for the purposes of this thesis, it is necessary to discover whether Irish traditional musicians are in favour of the individual-based rights of copyright law, whether they seek a system of ‘collective’ rights instead, or whether in fact they favour the use of an informal norm-based system. This will be analysed in the fifth chapter.

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<sup>865</sup> Vallely, ‘Companion,’ *op. cit.*, 88.

<sup>866</sup> *Ibid.*

<sup>867</sup> Waldron, *op. cit.*, 13.

<sup>868</sup> Knowlton, *op. cit.*, 5.

<sup>869</sup> Jones and Cameron, *op. cit.*, 2, referring generally to C. J. Bearman, ‘Who were the folk? The demography of Cecil Sharp’s Somerset folk singers,’ *Historical Journal* 43(3) (2000), 751.

<sup>870</sup> *Ibid.*



### 3.6.2. Exploring the Copyright Licensing Model in Relation to ITM

As noted in the first chapter, within the music industry most uses of copyright works are paid for via collective licensing mechanisms. The income is distributed by the collecting societies amongst their member composers and performers. However, many older Irish traditional tunes are in the public domain. The use of these musical works does not require a licence. Nonetheless, as discussed above, many newer compositions within the body of ITM are subject to copyright. In addition, the use of a copyright ‘arrangement’ of a public domain work may require a licence fee. It is therefore necessary to discuss the copyright licensing system in the context of ITM. It is particularly important to discuss whether composers and arrangers are actively engaging with this system of licensing within the traditional network of musicians.

#### 3.6.2.1. New Compositions and Licensing in ITM

As noted above, there are several ‘new’ compositions, such as works by living composers such as Paddy Fahy and Finbarr Dwyer, which have been accepted as part of the tradition<sup>871</sup>. Many of these tunes are widely played in sessions and have been recorded on LPs and CDs by other performers<sup>872</sup>. It has been observed that due to the particular practices of ITM many composers traditionally did not rely on copyright to claim royalties for the use of their compositions in this way<sup>873</sup>. One of the primary reasons for this is the fact that in traditional music, the amount of money that would potentially arise from copyright royalties would usually be miniscule in comparison with even a moderately successful pop song. As discussed above, the goal of a composer would not necessarily be financial gain, but to have his or her new composition ‘accepted’ as part of the tradition<sup>874</sup>. Nonetheless, like any composer, a composer of ITM is free to register with a collecting society i.e. PRS and MCPS in the UK and IMRO and

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<sup>871</sup> Farrell, *op. cit.*

<sup>872</sup> For example the recording Angelina Carberry, *An Tradisiún Beo* (2005) contains both Paddy Fahy and Finbarr Dwyer compositions; noted in comments at <http://www.thesession.org/recordings/display/1873>

<sup>873</sup> Ó hAllmhuráin, ‘History,’ *op. cit.*, 153, noting that until recently, few composers gave consideration to copyright issues.

<sup>874</sup> McCann, ‘Commons,’ *op. cit.*, 72, noting that in the 1990s when IMRO started to enforce performance licensing on pub sessions, copyright considerations that had previously not affected ‘sessions’, now had to be taken into account.

MCPSI in Ireland. A composer must register with these societies, or risk losing out on royalties.

Farrell has stated that that if a new generation of musicians is actively composing new tunes, and then seeking to utilize the formal licensing process, this could actually affect the ‘acceptability’ of these compositions within the tradition<sup>875</sup>. If a composer chooses to register his or her compositions with PRS/MCPS/IMRO, it is arguable that the composer is effectively formalising the relationship between the copyright work and the network of musicians. This formalisation could potentially affect the nature of the relational process of authorship and transmission within the network.

For instance, it is plausible that the copyright status of a tune might have affect its possible acceptance as part of the body of traditional music. This is a vital point. If a copyright licence is required for certain uses of a new traditional composition, the form of acceptance in ITM outlined above could become more formal, complex, bureaucratic and costly. Certain uses of a tune, such as the making of a new arrangement of the tune on a recording that was made commercially available, would potentially require a MCPS licence. If musicians within the network were required to pay for the use of these tunes, it might discourage them from recording the tunes – something which might ultimately affect the distribution and acceptability of the tune within the network. On the other hand, the use of such tunes at pub sessions would probably be covered by the venue’s blanket PRS or IMRO licence.

It is possible that new compositions, which have always played a dynamic role in keeping the ‘living tradition’ alive, may be less ‘acceptable’ if e.g. an MCPS licence is required for use the tune on a recording. Therefore, it is important to discover whether Irish traditional composers generally register compositions with a collecting society. In particular, it is necessary to discover the attitude that composers take towards the use of their compositions by their peers within the network. These issues are discussed further with reference to the empirical research as part of the fifth chapter.

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<sup>875</sup> Farrell, *op. cit.*

It is also possible that Irish traditional musicians might object in principle to the copyright licensing model, if it is thought to be at odds with the social norms of ‘relational authorship’. Musicians may fear that by utilizing the formal copyright system they risk altering the informal nature of the relational network from a system that values communal creativity to a more individual-based system. This issue is also discussed in the fifth chapter with respect to the empirical research.

### 3.6.2.2. *New Arrangements and Licensing in ITM*

As noted above, a performer-arranger can claim copyright in a new, original arrangement of a musical work. Interestingly, this practice occurred in the US the early 20<sup>th</sup> century when folk and early country artists like the Carter Family used to copyright songs in this way, by re-arranging them slightly and claiming authorship. This was not an uncontroversial practice at the time. In fact, it led to a falling out between the two most important folklorists in the US at the time, Charles Seeger and John Lomax. John Lomax frequently claimed copyright in relation to traditional songs, but Charles Seeger, father of the well known musicians Pete Seeger and Mike Seeger, believed strongly that copyright should never be applied in relation to traditional songs<sup>876</sup>.

In the UK and Ireland, a performer-arranger must register his or her arrangements with a collecting society e.g. PRS, IMRO, MCPS etc., or risk losing out on royalties. In the case of an arrangement of a public domain work, no licence fee is necessary for the use of the underlying public domain work in the arrangement. However, if an arrangement is made of a copyright work e.g. a new composition, a licence is usually required for use of the underlying work in the new arrangement. The issues surrounding the licensing of new compositions in the context of ITM are discussed above in 3.6.2.1. For the purposes of this sub-section, it is necessary to focus primarily on ‘arrangements’ of public domain works. It has been argued that while perfectly within the bounds of intellectual property law, the practice of claiming copyright in arrangements of public domain tunes has the potential to undermine ‘the integrity of the traditional storehouse’<sup>877</sup>. Speaking in 1998, Ó hAllmhuráin stated:

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<sup>876</sup> D. Dunaway, *How Can I Keep From Singing? The Ballad of Pete Seeger* (New York: Random House, 2008), 248-249.

<sup>877</sup> Ó hAllmhuráin, ‘History,’ *op. cit.*, 153.

*“In 1990, ethnomusicologist Hugh Shields likened this practice to the ‘private enclosure of common land. Eight years afterwards, the legal status of the traditional performer still remains precarious, not least because his music predates the profit dynamics of the music industry, and continues to be defined within a collective oral environment.”*<sup>878</sup>

For instance, it was noted in 3.4 above that the musician Tommy Potts felt it was crucial that musicians were able to take influence, phrases and ‘hidden notes’ from each other’s arrangements. This is a procedure whereby a musician first learns a tune, and then by hearing it played by other musicians, is able to uncover ‘the hidden note’, as Potts put it, or melodic variation, that allows the musician to discover a new way of playing the tune. As noted above, the sharing of variations and arrangements appears to be informal<sup>879</sup>, but it certainly hinges upon some notion of interdependence within the network, whereby individuals can learn and be influenced by each other, without accusations of copying or ‘stealing’. The ‘free’ sharing of arrangements of tunes appears to be important.

As noted above in 3.1, original arrangements of ITM are potentially subject to copyright. There may be potential for licensing issues to arise in relation to arrangements in the Irish traditional context. In order to illustrate this, a typical example is offered. In the following scenario, the example of Noel Hill’s arrangement of ‘Joe Cooley’s Reel’ is examined. The tune known as ‘Joe Cooley’s Reel’ is Joe Cooley’s musical setting of an old reel, known as ‘The Tulla Reel’. Hence, for copyright purposes, it could be described as Joe Cooley’s arrangement of a public domain work<sup>880</sup>. Noel Hill has recorded an arrangement of ‘Joe Cooley’s Reel’<sup>881</sup>, featuring melodic and rhythmic variations based on his distinctive West Clare concertina style. If the arrangement ‘Joe Cooley’s Reel’ had been registered with MCPS, this could have raised complex issues. Under typical copyright licensing practices, it is possible that Noel Hill would have had to pay a MCPS licence fee for the use of this tune in his own new arrangement, which featured on his recording. Noel Hill’s arrangement of ‘Joe Cooley’s Reel’ might well be original enough

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<sup>878</sup> *Ibid.*

<sup>879</sup> A. McCann, ‘All that is Given is Not Lost,’ *Ethnomusicology* 45(1) (2001), 89, 89 noting that ‘grass-roots Irish traditional music transmission rests upon an as yet unarticulated system of gift or sharing’.

<sup>880</sup> This reel has been frequently recorded by other artists and nearly always attributed to Joe Cooley, as noted in comments at <http://www.thesession.org/tunes/display/1>

<sup>881</sup> See the recording Noel Hill and Tony Linnane, *Noel Hill and Tony Linnane* (Tara, 1978). Joe Cooley’s Reel is track 12; noted at <http://www.thesession.org/recordings/display/27>

to be an original copyright arrangement in its own right. If another musician arranged Noel Hill's version of Joe Cooley's reel on recording, this may require a licence with respect to both the Noel Hill arrangement and the Joe Cooley arrangement. With each new arrangement, added complexities arise. While these complexities might be allayed somewhat by the musician obtaining a blanket MCPS licence covering both arrangements, the entry of formal licensing considerations into the system of ITM may bring related difficulties. Due to the particular circumstances of ITM, a musician might be unaware of who arranged other versions of the tune. From the perspective of copyright, this could potentially lead to later infringement claims. It is also possible that with respect to new arrangements of new compositions, the musician may be aware of a particular musician's arrangement of the tune, but he or she may not be aware who the composer is.

Overall, it appears that the licensing of arrangements may have the potential to restrict the free sharing and transmission of different versions of tunes. Certainly, the above licensing scenario would appear to be at odds with the system of relation authorship described in 3.2 above. Given the complexities at issue, it is possible that musicians may avoid registering arrangements with collecting societies. On the other hand, some professional Irish traditional musicians may choose to do so. These issues are further considered in relation to the empirical research in the fifth chapter.

## **3.7. Summary and Conclusions**

The primary questions of this thesis were outlined and explored over the course of this chapter. These issues are briefly summarised here with a view to exploring these issues in the fourth chapter in relation to each of the potential solutions and in the fifth chapter with regard to the empirical research.

### **3.7.1. Originality**

The first part of this sub-section questioned whether Irish traditional musicians are capable of creating original compositions for the purposes of copyright law. The second part of this issue concerned the question of whether Irish traditional musicians are

capable of creating ‘original’ arrangements for the purpose of copyright law. As discussed in 3.1, both of these questions can be answered in the affirmative.

### **3.7.2. Individual Authorship**

The first question raised in this area concerns the attitude that composers take towards their compositions in relation to authorship and ownership. It was noted that it is important to discover whether composers seek to enforce their copyrights against their fellow musicians within the ‘relational’ network of ITM. The second question queries whether copyright is a motivational factor that encourages composers of ITM to create. The third question concerns the issue of whether composers should cede some rights to performer-arrangers in the context of ITM. In line with this, the fourth and fifth questions seek to discover the attitude that arrangers take towards their arrangements in relation to authorship and ownership.

### **3.7.3. Joint Authorship**

The first issue that this sub-section raises relates to whether Irish traditional musicians are capable of jointly authoring compositions and arrangements in line with the requirements of copyright law. This question can be answered in the affirmative. However, the traditional process of transmission and relational authorship does not fit the criteria of ‘joint authorship’. Copyright does not appear to envisage this type of collective authorship process – although it could be facilitated via licensing, as noted in 3.6.

### **3.7.4. Infringement**

It is arguable that a strict enforcement of copyright by individual composers and arrangers could restrict the traditional transmission process, as detailed in 3.2. Therefore, it is necessary to discover whether Irish traditional composers and performer-arrangers envisage taking infringement actions concerning the use of their compositions and arrangements. In particular, it is necessary to discover whether composers and arrangers seek to enforce their copyrights against their fellow musicians.

### **3.7.5. Moral Rights**

It is necessary to discover the attitude that composers and arrangers take towards attribution of their compositions and arrangements within the network of Irish traditional musicians. Given the complexity associated with correctly identifying the origins of tune, it is also necessary to discover whether any composers or arrangers have been falsely attributed as authors of tunes. It is necessary to discover whether integrity matters to composers. For instance, it would be important to establish whether composers see the above changes as potentially ‘derogatory’. To the extent that the changes could be perceived as being derogatory to the composer, it would be important to discover whether composers would be willing to take action in order to prevent the changes.

### **3.7.6. Licensing**

In this context, it is particularly important to discuss whether composers and arrangers formally license tunes within the traditional network of musicians. In this regard, it is important to discover whether Irish traditional composers and arrangers generally register their works with a collecting society.

# **Chapter 4 – Exploring Potential Solutions to the Conflicts between Copyright and Irish Traditional Music**

## **Introduction**

As previously stated, this thesis focuses on six questions concerning originality, authorship, joint authorship, infringement, moral rights and licensing. The previous chapter explored these questions in relation to the potential conflicts that may arise between the law of copyright and the creative practices of Irish traditional musicians. In light of this, it is necessary to consider what can be done to deal with the issues raised in the third chapter.

The first possibility that arises in this regard is the potential for reforming copyright in order to take account of the issues raised in the third chapter. In relation to reform, two major possibilities emerge. Firstly, it might be useful to consider reforming copyright legislation in the UK and Ireland either to expand the system of ‘fair dealing’ exceptions, or to enact a broad ‘fair use’ exception. Section 4.1 discusses the potential for expanding ‘fair dealing’ or ‘fair use’ within the scope of copyright limitations in the UK and Ireland. Secondly, in relation to copyright reform it might be useful to consider whether enlarging the ‘public domain’ could provide a solution. Section 4.2 outlines the notion of the ‘public domain’ in detail and discusses the possibility of enacting reforms.

The second possibility that arises in this regard concerns the potential for enacting a solution which does not aim to reform copyright in the general sense, but which can be tailored specifically to the circumstances raised in the third chapter. In relation to this, two major possibilities emerge. Firstly, the possibility of enacting a sui generis ‘traditional knowledge’ system is considered. Section 4.3 discusses the development of the doctrine of ‘traditional knowledge’ with particular focus on the relevance of ‘traditional cultural expressions’ in the context of Irish traditional music. Reference is



made to academic studies, as well as to WIPO materials. Secondly, in relation to a ‘tailored’ solution it is necessary to consider the possibility of utilizing a system of ‘alternative licensing’. If copyright licensing has the potential to be unduly restrictive in relation to Irish traditional music, it is arguable that utilizing alternative licences, such as ‘open source’ and ‘Creative Commons’ licences, could prove to be useful. Section 4.4 discusses the area of ‘alternative licensing’ in detail.

## **4.1. ‘Fair Dealing’ and ‘Fair Use’ – Exploring the Possibility of ‘Transformative’ or ‘Creative Use’**

The idea of ‘fair dealing’ is an attractive one. For instance, D’Agostino has noted the relevance of ‘the ethics of fair dealing’ to recent movements such as the ‘open source’ software movement and the ‘Creative Commons’ initiative<sup>882</sup>. These movements have attempted to limit the scope of copyright to some extent and they are discussed in detail in sub-section 4.4. This sub-section examines whether reform of fair dealing, or the enactment of a broadly defined fair use provision, could help to provide a solution to the conflicts between Irish traditional music and copyright. By definition, fair dealing and fair use concern situations involving ‘exceptions’ i.e. the ‘permitted’ acts as opposed to the ‘restricted acts’ discussed in the first chapter. In practice, this potential solution provides a defence to an infringement action. In a case involving fair dealing, or fair use, a defendant typically argues that he or she has not infringed the work because in the circumstances the use of the work ought to fall within the scope of a ‘permitted’ use. In this regard, the issues raised in the third chapter in relation to infringement and licensing are most relevant here. Furthermore, in cases involving fair dealing, or fair use, acknowledgement of authorship is often a requirement, therefore issues of moral rights are also of relevance here.

Due to the fact that this potential solution is predicated upon the taking of infringement actions, in the context of Irish traditional music it would potentially be most useful where a composer or performer-arranger (or other copyright holder) has taken action

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<sup>882</sup> G. D’Agostino, ‘Healing Fair Dealing? A Comparative Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use,’ *McGill Law Review* 53(2) (2008), 309, 311 (hereafter referred to as D’Agostino).

against a musician who has made a ‘transformative’ or ‘creative’ use of the copyright work. In particular, the idea of a broad fair use exception is attractive in an Irish traditional context because it is potentially far-reaching, yet it can also be tailored to each case depending on the relevant circumstances. The positives and negatives of these potential solutions are assessed below in relation to fair dealing (4.1.1. and 4.1.2.) and fair use (4.1.3. and 4.1.4.).

#### **4.1.1. How Fair Dealing Might offer Solutions – the Case for Allowing ‘Transformative’ or ‘Creative’ Dealing**

As discussed in the first chapter, in contrast to the broad ‘fair use’ provision under US copyright law<sup>883</sup>, it is ‘notable’<sup>884</sup> that the current fair dealing provisions in the UK are narrowly enumerated defences to copyright infringement, as stated in *Pro Sieben Media v Carlton*<sup>885</sup>. It has been noted that the current UK fair dealing provisions are inflexible<sup>886</sup>. The fair dealing provisions under copyright law in Ireland are similarly rigidly defined. Unlike the position of the Canadian courts, which have recently taken an activist<sup>887</sup> approach to the expansion of fair dealing, the courts in the UK and Ireland have not taken such an approach towards fair dealing.

For the purpose of this sub-section, it is crucial to note that the current fair dealing exceptions under UK and Irish copyright law do not appear to make allowance for ‘transformative’ or ‘creative’ dealing. Under the current law, it is ‘irrelevant’ that the use might be ‘fair in general’, or be a ‘fair dealing’ for any other purpose than the specified legislative purposes<sup>888</sup>. In fact, ‘fair dealing’ is arguably of quite limited use in relation to musical works under the current law. It is not possible to fit a ‘transformative’ or ‘creative’ use of a musical work, such as use in a new arrangement of the work on a small-scale CD release, within the idea of ‘criticism or review’.

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<sup>883</sup> United States Copyright Act 1976 s 107.

<sup>884</sup> Bently and Sherman, *op. cit.*, 202.

<sup>885</sup> *Pro Sieben Media v Carlton UK Television* [1997] EMLR 509 (comments of Laddie J.).

<sup>886</sup> Garnett *et al.*, *op. cit.*, 556. See also IPO, *op. cit.*, 21-27 and 32.

<sup>887</sup> Canadian law now includes an idea of a ‘user right’ as part of fair dealing – see *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339. See also D’Agostino, *op. cit.*, 309, noting that this decision effectively elevated the narrow exceptions to the level of a general principle, despite the fact that a ‘user right’ is not reflected in the legislation.

<sup>888</sup> Bently and Sherman, *op. cit.*, 202.

At present, any transformative, but unauthorised, use of a substantial part of a musical work may result in infringement. Allowing for ‘transformative’ or ‘creative’ dealing would require an extension to the list of permitted purposes under the CDPA and CRRA. In addition, once the purposes were expanded, any prospective ‘fair dealing’ would have to be assessed by the courts in relation to the ‘fairness’ criteria under the law in the UK and Ireland, as well under the relevant EU and international laws, with particular focus on the ‘three-step test’.

In 2006, the Gowers Review<sup>889</sup> was published. It has been noted that Gowers ‘boldly recommended’ the enactment of an exception for ‘creative, transformative or derivative works’ within the framework of the ‘three-step test’<sup>890</sup>. MacQueen, Waelde, Laurie and Brown have noted that the reasoning behind this recommendation was to ‘legitimise clearly the reworking of existing material for a new purpose or to give it a new meaning’<sup>891</sup>. In this regard, Gowers referred to successful examples of transformative dealings of previous works by artists including Beethoven, Mozart, Bartok and Ives<sup>892</sup>. This ‘transformative’ recommendation was not taken up by the subsequent UK IPO consultation document<sup>893</sup>, although it may be revived under the review of fair dealing/use being undertaken by the current government<sup>894</sup>.

If such an exception were brought under the CDPA and CRRA, it would be necessary to establish what factors the courts might assess. The court would firstly have to be able to fit the ‘dealing’ within the purpose of ‘transformative dealing’. An assessment of the meaning of ‘transformative’ would be crucial in this regard. Since there are no cases in the UK and Ireland, the case law from the US on ‘fair use’ and Germany on ‘free use’ may provide some guidance. In relation to US law, Leval<sup>895</sup> has argued that creativity ought to be central to the idea of ‘transformative’ use. Within this analysis, one creator builds upon the work of another. The idea of ‘transformative’ use as being founded upon

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<sup>889</sup> Gowers Review, *op. cit.*

<sup>890</sup> MacQueen *et al.*, *op. cit.*, 259.

<sup>891</sup> *Ibid.*

<sup>892</sup> Gowers Review, *op. cit.*, 67 – referring to Arewa, ‘Bach,’ *op. cit.*, 630.

<sup>893</sup> IPO, *op. cit.*, 22-37 and 32-33. See also MacQueen *et al.*, *op. cit.*, 261.

<sup>894</sup> Current review is headed by Prof. Ian Hargreaves; summary accessible at

<http://www.ipso.gov.uk/preview.htm>

<sup>895</sup> See generally P. Laval, ‘Towards a Fair Use Standard,’ *Harvard Law Review* 103 (1990), 1105.

encouraging ‘creativity’ can be seen in certain cases in the US<sup>896</sup>. However, there is also a line of cases which stresses the idea that a ‘transformative’ use is one which utilizes the work in order to perform a new function<sup>897</sup>. Furthermore, even in the cases that focus on creativity, it is often the case that the ‘transformative’ use is creative in a different sense than the original work e.g. parody (*Campbell*) or collage effect (*Graham*). On this point Arewa has recently noted:

“... even if doctrines intended to enable future uses, such as fair use, are taken into account, such property rules have thus far not facilitated a clear delineation between the scope of acceptable and unacceptable uses of existing material, particularly in contexts of living music traditions.”<sup>898</sup>

Nonetheless, if ‘creativity’ is truly at the root of ‘transformative’ use, then it would seem unfair if creative uses of compositions were not acceptable in the context of Irish traditional music.

In relation to Germany, the idea of ‘freie Benutzung’<sup>899</sup> is of note. For the purposes of this chapter, this is translated as ‘free use’. Referring to Ulmer, Geller stated that under this doctrine if the materials are taken from a copyright work and used in another work, there will be no infringement if the materials taken are sufficiently subsumed within the new work<sup>900</sup>. This idea of ‘free use’ does involve a certain amount of creative transformation and artistic considerations can be taken into account by the court<sup>901</sup>. Furthermore, the purpose of the ‘free use’ provision is to encourage cultural progress<sup>902</sup>.

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<sup>896</sup> See e.g. *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994) and *Bill Graham Archives v Dorling Kindersly Ltd*, 488 F. 3d. 605 2d. Cir. (2006).

<sup>897</sup> See e.g. *Kelly v Arriba Soft* 280 F. 3d. 934 9th Cir. (2002) and *Perfect 10, Inc v Amazon.com, Inc* 487 F. 3d. 701 9th Cir. (2007).

<sup>898</sup> Arewa, ‘Promise,’ *op. cit.*, 616.

<sup>899</sup> German Act on Copyright and Neighbouring Rights, 1965 (Urheberrechtsgesetz) s 24 – (1) “An independent work created by fair use of a work of another person may be disseminated or exploited without the consent of the author of the work used.” (2) “Subsection 1 shall not apply to the use of a musical work by which a melody is discernibly taken from the work and used as the basis for a new work.” (Translation by A. Klett, M. Sonntag and S. Wilske, *Intellectual Property Law in Germany* (Munich: Verlag C.H. Beck, 2008), 277.

<sup>900</sup> P. Geller, ‘A German Approach to Fair Use: Test Cases for TRIPS Criteria for Copyright Limitations,’ *Journal of the Copyright Society of the USA* 57 (2010), 553, 556 at no. 13 (hereafter referred to as Geller), referring to Eugen Ulmer, *Urheber-Und Verlagsrecht* (Berlin: Springer-Verlag, 1980, 3<sup>rd</sup> ed.).

<sup>901</sup> Geller, *op. cit.*, 556-557. Ulmer, *op. cit.*, 276. However, under s 24(2), ‘free use’ is of restrictive application in relation to the use of ‘discernable’ melodies in later works.

<sup>902</sup> *Kraftwerk v Moses Pelham* Decision of the German Federal Supreme Court no. I ZR 112/06

Neither of the above two ideas provides a perfect fit for cases involving Irish traditional music. However, the principle at the base of both ‘fair use’ and ‘free use’ i.e. the encouragement of creativity and cultural progress, does fit with the practices of Irish traditional musicians. It is strongly arguable that each new arrangement of a tune does give the underlying material a ‘new meaning’ within the context of Irish traditional music, and as such it is the kind of activity that ought to be permitted. In this regard, for a ‘transformative’ dealing exception to be workable in the context of Irish traditional music, the meaning of ‘transformative’ would have to accommodate ‘creative’ use of works in this context. It also may be important to note that relation to the other specific purposes the UK courts have often been willing to take a broad view<sup>903</sup>. In light of this, it might be possible to interpret ‘transformative’ more broadly, so to encompass ‘creative’ dealings. Any worries that taking a broad interpretation of ‘transformative’ might prejudice the rights of the author could be allayed via the ‘fairness’ assessment and via application of the ‘three-step test’.

In relation to fairness, it was noted in the first chapter that the question of whether the dealing is fair is ‘a question of degree and impression’<sup>904</sup>. In the absence of any transformative fair dealing cases in the UK, it is somewhat difficult to take guidance from previous cases. Nonetheless, in making this analysis, the factors generally considered by the courts include whether the work is unpublished<sup>905</sup>, the means by which the work was procured<sup>906</sup>, the amount of the work taken<sup>907</sup>, the particular use made of the work<sup>908</sup>, the intention or motive of the dealing<sup>909</sup>, the potential consequences of the dealing at a market level<sup>910</sup> and whether the purpose could have been achieved by another method of expression<sup>911</sup>. These factors could also be applied by courts when

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(November, 2008) – translation of judgment found in N. Conley and T. Braegelmann, ‘Metall Auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany,’ *Journal of the Copyright Society of the USA* 56 (2009), 1017, 1034.

<sup>903</sup> See cases, *supra* note 501.

<sup>904</sup> *Ibid.*, 203, referring to *Hubbard v Vosper* [1972] 2 QB 84.

<sup>905</sup> CDPA s 30(1), (1A) and cases noted, *supra* note 518.

<sup>906</sup> See cases, *supra* note 519.

<sup>907</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>908</sup> *Newspaper Licensing Agency v Marks & Spencer* [2000] 4 All ER 239, 257, *supra* note 521.

<sup>909</sup> See cases, *supra* note 522.

<sup>910</sup> *Hubbard v Vosper* [1972] 2 QB 84.

<sup>911</sup> *Newspaper Licensing Agency v Marks & Spencer* [1999] EMLR 369, 382-3. See also *Hyde Park Residence v Yelland* [2000] EMLR 363, 379.

assessing the fairness of a ‘transformative’ dealing in the context of Irish traditional music. It is also arguable that the relevant social or cultural practices involved in context of the use should be assessed in this regard<sup>912</sup>. As Gowers noted:

*“The crucial point should be whether transformative use compromises the commercial interests of the original creator or offends the artistic integrity of the original creator”*<sup>913</sup>

Given the fact that sufficient acknowledgement is a requirement in relation to fair dealing in most cases under the current law, it is likely that it would be a requirement in relation to a case of ‘transformative dealing’. This would satisfy the moral right of attribution. As Gowers noted, the integrity right could be assessed as well. These moral rights issues are explored in the Irish traditional context in 4.1.2.3 below.

Any exception for transformative dealing would have to satisfy the ‘three-step test’. Article 9(2) of the Berne Convention states that member states may allow permitted uses of literary and artistic works ‘in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’<sup>914</sup>.

Analysis of the ‘three-step test’ by various national courts has not been uniform<sup>915</sup>. However, there are persuasive arguments for taking a more liberal interpretation of the test<sup>916</sup>. The consequences of the test in the Irish traditional context are discussed in 4.1.2.

Furthermore, it might be useful to consider whether such an exception might be narrowed specifically in relation to dealings involving works of traditional music. As

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<sup>912</sup> M. J. Madison, ‘A Pattern-Oriented Approach to Fair Use,’ *William and Mary Law Review* 45 (2004), 1525, noting that in cases such as *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994) and *A & M Records, Inc v Napster, Inc* 239 F. 3d. 1004 9th Cir. (2001), the social practices involved in the uses did play a role in the court’s analysis.

<sup>913</sup> Gowers Review, *op. cit.*, 68.

<sup>914</sup> Article 9(2) Berne Convention, *op. cit.*

<sup>915</sup> J. Griffiths, ‘The “Three-Step Test” in European Copyright Law – Problems and Solutions,’ *Intellectual Property Quarterly* (2009), 428.

<sup>916</sup> C. Geiger, J. Griffiths and R. Hilty, ‘Towards a Balanced Interpretation of the “Three-Step Test” in Copyright Law,’ *European Intellectual Property Review* 30 (2008), 489. See also D. Gervais ‘Towards a New Core International Copyright Norm: the Reverse Three-Step Test,’ *Marquette Intellectual Property Law Review* 9 (2005), 1, 32 and M. Senftleben, ‘Fair Use in the Netherlands – A Renaissance?’, *Tijdschrift voor Auteurs, Media en Informatierecht AMI* 33(1) (2009), 1, 7.

noted in the 1.8.3, there is some precedent for a specific ‘folk music’ provision within copyright law, due to the fact that a specific provision currently exists in relation to sound recordings of ‘folk songs’ in the UK and Ireland. However, if the law attempted to make a narrow exception in the case of ‘traditional’ musical works, this could potentially lead to problems. There is no universally accepted definition of ‘traditional’ music. Any attempt to give a legislative definition could lead to cases of injustice. For instance, should ‘traditional’ music only apply to older tunes that reside in the public domain, or should it also apply to new arrangements and new compositions? In this case, it might be preferable that the definition of traditional music be left open, to be decided on a case-by-case basis. However, this might lead to a certain amount of uncertainty. Overall, due to these definitional problems it might not be suitable to legislate only with regard to works of ‘traditional music’. A broader ‘exception, potentially covering all musical works, would be preferable. Within this broader exception, the ‘fairness’ of the dealing could be judged in light of the particular context of Irish traditional music, as discussed in 4.1.2 below.

#### **4.1.2. Assessing ‘Transformative’ or ‘Creative’ Dealing in the UK and Ireland in relation to Irish Traditional Music**

The idea of a ‘transformative’ or ‘creative’ dealing is analysed here with regard to the specific questions of infringement, licensing and moral rights, as outlined in the third chapter. Potentially, a ‘transformative’ or ‘creative’ dealing exception might apply to many different categories of works, but it is assessed here in relation to musical works as this is the primary focus of the thesis.

##### *4.1.2.1. Infringement*

As discussed in 3.4, a strict enforcement of copyright by individual composers and arrangers could restrict the traditional creative transmission process. An expanded idea of fair dealing could allow the Irish traditional authorship and transmission process to continue without the threat of infringement actions. For instance, if a musician is accused of infringement by a composer of a work, it ought to be possible to claim that the ‘transformative’ or ‘creative’ dealing should be classed as ‘fair’. It was noted in the third

chapter that in order for tunes to be ‘acceptable’ within the network of musicians the tunes must ‘fit’ within the body of existing tunes. This means that it is sometimes necessary for a composer or arranger to use a ‘substantial part’ from another tune in order to create a new original composition or arrangement. In such a case, it is unlikely that the ‘transformative’ or ‘creative’ purpose of the dealing could have been achieved by another method of expression. The ‘living tradition’ has historically thrived due to this kind of ‘musical borrowing’. As noted above, the court might also examine the particular cultural circumstances present within the Irish traditional network and decide that the dealing was fair. This would also need to be assessed in light of the possible commercial implications of the dealing, as discussed below in relation to licensing.

#### *4.1.2.2. Licensing*

As noted in 3.6, in the context of Irish traditional music, there is a system of ‘free’ sharing of tunes within the network. In this context, the fairness of the dealing might be assessed in relation to means by which the work was procured. The good faith of the musician could also be assessed in relation to knowledge about whether the work is published or not because within the traditional network, the musician might not be able to establish this fact. It would also be important to consider the potential consequences of the dealing at a ‘market’ level. As a result of the ‘three-step test’, as applied in InfoSoc, when assessing the fairness of the dealing, it appears that ‘impact’ on the market will be a relevant factor<sup>917</sup>. In this regard, a ‘transformative’ or ‘creative’ dealing undertaken for a largely commercial purpose would probably not satisfy the ‘three-step test’. In that case a licence may be a more appropriate means of facilitating the use of the underlying work. However, if it is a largely non-commercial ‘transformative’ or ‘creative’ dealing which has a minimal impact on the ‘market’ for the underlying work, this fact might weigh in favour of the court finding that it is a ‘fair’ dealing.

#### *4.1.2.3. Moral Rights*

Regarding the moral right of attribution, this can arguably be accommodated via the ‘acknowledgement’ requirement of fair dealing. However, within the informal system of

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<sup>917</sup> MacQueen *et al.*, *op. cit.*, 180.



Irish traditional music it is common that compositions and arrangement are passed around from person to person, often with the incorrect title and origin information. In light of this, it is arguable that the court should take into account the good faith of the musician who has made the transformative dealing in case where correct attribution has not been given. Since acknowledgement is a requirement of fair dealing, as soon as the musician becomes aware of the provenance of the tune, he or she could be required to give sufficient acknowledgement from that point onwards. As noted in the Gowers Review, the integrity right may also need to be considered in relation to the notion of ‘transformative’ or ‘creative’ dealing. If the author’s work is ‘transformed’ by the dealing in a manner that could be seen as ‘derogatory’, this might negatively affect the court’s judgment regarding the ‘fairness’ of the dealing. However, it might also be possible to view this requirement cautiously. Unless the court was careful to assess whether in the specific context the use of the work could actually be seen detrimental to the author’s integrity right, this right might end up being a barrier to the effectiveness of the ‘transformative’ or ‘creative’ dealing in this context.

Overall, it would appear from the above discussion that if a ‘transformative’ or ‘creative’ dealing exception were facilitated under the CDPA and CRRA, it could prove useful in a case involving the creative practices of Irish traditional musicians. However, it may be preferable that a broad ‘fair use’ exception is enacted rather than a narrow exception due to the perceived greater flexibility of the ‘fair use’ model. This possibility is assessed below.

#### **4.1.3. Exploring the Possibility of Incorporating a ‘Fair Use’ Standard in the UK and Ireland**

The issue of whether narrow ‘fair dealing’ exceptions are preferable to ‘fair use’ exceptions, is a hotly debated one<sup>918</sup>. As noted above, narrow fair dealing provisions are often criticised due to a perceived inflexibility. In line with this, there would appear to be advantages to the enactment of a broadly defined ‘fair use’ provision, most notably

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<sup>918</sup> R. Burrell, ‘Reining in Copyright Law: Is Fair Use the Answer?’, *Intellectual Property Quarterly* (2001), 361, 361 (hereafter referred to as Burrell).

increased flexibility. For instance, in the US, the court has freedom to assess ‘fair use’ in relation to a much wider range of uses of works than is possible in the UK and Ireland.

Under US law, there are four standard factors that must be taken into account in a case of apparent ‘fair dealing’. The four factors are the purpose of the defendant’s use, the nature of the copyright work, the substantiality of the taking and the potential harm to the market or value of the work<sup>919</sup>. Furthermore, Samuelson has noted that while the broad ‘fair use’ provision in the US is ‘often decried’ due to its apparent unpredictability, it is arguable that when the various exceptions are divided into relevant categories of exception, stable jurisprudential patterns appear<sup>920</sup>. For instance, it has been argued that the US courts typically make a distinction between commercial and non-commercial uses, with the courts looking less favourably on commercially viable uses of a work<sup>921</sup>. Nonetheless, Beebe has argued that the designation of ‘commercial’ or ‘non-commercial’ has relatively minor significance in the assessment of fairness<sup>922</sup>.

In the US, ‘fair use’ cases involving music are not uncommon<sup>923</sup>. For instance, in *Campbell v Acuff- Rose Music*<sup>924</sup>, the US Supreme Court made a finding of fair use in relation to a parody of the song ‘Pretty Woman’, judging that the parody would not impact on the market for the original song. A finding of ‘fair dealing’ in such a case would not be possible under the current regulations in the UK and Ireland.

Nevertheless, while some commentators have lamented the narrow ‘fair dealing’ approach, others have stated that there is little practical difference between the two standards. One commentator has argued that the current narrow approach of the British courts, based on ‘fair dealing’, may not change even if a broad ‘fair use’ provision is adopted<sup>925</sup>. For some authors, the US approach is potentially more ‘fair’<sup>926</sup>. However,

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<sup>919</sup> United States Copyright Act 1976 s 107 - <http://www.copyright.gov/title17/92chap1.html#107>

<sup>920</sup> P. Samuelson, ‘Unbundling Fair Uses,’ *Fordham Law Review* 77 (2009), 2537, 2539-3546 (hereafter referred to as Samuelson).

<sup>921</sup> *American Geophysical Union v Texaco Inc.*, 60 F. 3d. 913 2d. Cir. (1994) at 922.

<sup>922</sup> B. Beebe, ‘An Empirical Study of US Copyright Fair Use Opinions 1978-2005,’ *University of Pennsylvania Law Review* 156(3) (2008), 549, 556 (hereafter referred to as Beebe).

<sup>923</sup> See discussion of ‘fair use’ of Phil Spector’s music; accessible at <http://www.nytimes.com/2010/06/27/movies/27specter.html?fta=y>.

<sup>924</sup> *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994).

<sup>925</sup> Burrell, *op. cit.*, 368.

<sup>926</sup> See generally D. Nimmer, ‘“Fairest of Them All” and other Fairy Tales of Fair Use,’ *Law and Contemporary Problems* 66 (2003), 263.

Nimmer has stated that the four factors that are applied by the US courts in cases of ‘fair use’ are actually ‘malleable enough to be crafted to fit’ either a restrictive or broad interpretive approach<sup>927</sup>. In other words, a change to the broad standard would need to be accompanied by a change in judicial attitudes in order for a more liberal interpretation of ‘fair use’ to take hold in the UK. However, there is a core difference between fair dealing and fair use – under fair use there is an absence of restricted purposes. This arguably helps to give the court a greater ability to adjust to circumstances.

Interestingly, there is some recent precedent for switching from a narrow provision to a broadly articulated one. Israeli law had historically utilized a narrowly defined ‘fair dealing’ clause in line with the UK Copyright Act of 1911. However, Israel recently adopted a broad, open-ended standard of fair use in line with the US position<sup>928</sup>. As Afori has noted, the fair use doctrine is arguably of paramount importance for ensuring a balanced copyright law, and thus, the Israeli Parliament approved the adoption of a broader standard<sup>929</sup>. Recently, a case taken under the new broad fair use standard produced a controversial decision regarding liability of broadcast on the internet of sporting events<sup>930</sup>. Uganda has also moved from ‘fair dealing’ to a broader ‘fair use’ provision in recent times<sup>931</sup>. Thus, it is potentially useful to assess how the application of a broad ‘fair use’ standard might work in relation to an Irish traditional musical work.

#### **4.1.4. Assessing Fair Use in the Context of Irish Traditional Music**

In a fair use case involving an Irish traditional composition or arrangement, the four factors would need to be assessed as follows.

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<sup>927</sup> *Ibid.*, 287, citing the decisions in *Sony Corp of America v Universal City Studios, Inc* 104 S. Ct. 774 (1984), *Harper & Row, Publishers, Inc v Nation Enterprises* 105 S. Ct. 2218 (1985) and *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994).

<sup>928</sup> Israeli Copyright Act 2007 s.19.

<sup>929</sup> O. F. Afori, ‘Legislative Comment - An open standard ‘fair use’ doctrine: A welcome Israeli initiative,’ *European Intellectual Property Review* 30(3) (2008), 85, 85-86.

<sup>930</sup> *The Football Association Premier League v Ploni* (2009) Case 1636/08 Motion 11646/08 (District Court of Tel Aviv)

<sup>931</sup> African Copyright and Access to Knowledge, *Country Report on Uganda*; accessible at [www.aca2k.org/attachments/154\\_Uganda\\_Country\\_Report.pdf](http://www.aca2k.org/attachments/154_Uganda_Country_Report.pdf)

Regarding the first factor, the purpose of the use would probably fall within Samuelson's 'transformative' category of uses<sup>932</sup>. Within this category, it would not be a parody like *Campbell*, but it might fall into a line of cases regarding transformative artistic uses such as *Blanch v Koons*<sup>933</sup>. For instance, in an Irish traditional context, it is arguable that each new arrangement of a traditional tune in some way comments upon previous versions of the tune. An assessment of this might involve an examination of the originality of the use with regard to the subsequent work of authorship that is created. As was the case in *Blanch*, such a 'transformative' use may be looked upon favourably by the court, though expert evidence may have to be adduced on this point. As noted above, the cultural practices present in the Irish traditional music network could be taken into account in this regard.

Furthermore, when discussing 'transformative use' the definition of 'non-commercial' may need to be assessed in light of all circumstances of the case. As noted in the third chapter in relation to licensing, in the context of Irish traditional music there is a need for tunes to be 'accepted' by musicians within the traditional network. With respect to the rights of composers, the use by a subsequent arranger would probably not interfere with the core licensing market<sup>934</sup>. On this point, evidence of the cultural practices of Irish traditional music with respect to the 'free' sharing of tunes, as described in 3.6 above, could be adduced as indicative of fairness. In line with the opinion of D'Agostino, it might be useful for organisations such as PRS or IMRO to produce 'fair use guidelines' with respect to traditional music<sup>935</sup>.

Regarding the second factor, the nature of the work would obviously be musical. However, 'nature' covers more than this – this factor also considers whether the work is published or unpublished, though the fact that the work is unpublished may not necessarily prevent a fair use finding<sup>936</sup>. Furthermore, it has been noted that the courts are generally more willing to allow fair use of factual, rather than creative, works<sup>937</sup>. This would have to be taken into account in relation to 'fair use' of a composition or

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<sup>932</sup> Samuelson, *op. cit.*, 2548-2555.

<sup>933</sup> *Blanch v Koons* 467 F. 3d. 244 2d. Cir. (2006)

<sup>934</sup> There have been cases where interference with a core licensing market has nullified a potential fair use – *Los Angeles News Service v Reuters Television International Ltd* 149 F.3d 987 9<sup>th</sup> Cir. (1998)

<sup>935</sup> D'Agostino, *op. cit.*, 361.

<sup>936</sup> *Harper & Row, Publishers, Inc. v Nation Enterprises* 105 S.Ct. 2218. 85 L.Ed.2d. 588 (1985) at 554.

<sup>937</sup> *Campbell v Acuff-Rose* 114 S.Ct. 1164 (1994).

arrangement, since the work would be ‘creative’. Nonetheless, Beebe has noted that a reasonable amount of the fair use findings involve ‘creative’ works<sup>938</sup>. Furthermore, in an ITM context it is possible that the work may not be published – it may have been passed around the network informally, as noted in 3.6 above.

Regarding the third factor, the substantiality of the taking would have to be assessed in light of each case. As previously stated in the third chapter in relation to infringement in an Irish traditional context, it sometimes occurs that the entire tune is re-arranged by a subsequent performer-arranger in order to create a new arrangement. In other cases, only a small amount or one melodic ‘part’ of a tune might be used in the creation of a ‘new’ composition. In line with the fourth factor i.e. potential harm to the market, it has been noted that the ‘amount taken should only be judged excessive if it harmed the market for the work’<sup>939</sup>. This is said to be in line with the decision in *Suntrust Bank v Houghton Mifflin Co.*<sup>940</sup> which noted that the taking does not necessarily have to be minimal. Therefore, it is not impossible that even the re-arranging of an entire work could be an acceptable ‘fair use’, provided that it did not harm the market of the work.

Overall, it is conceivable that the US fair use test would be potentially useful when applied in the context of a case that involves the creative practices of Irish traditional musicians.

#### **4.1.5. Summary of the Potential Solutions provided by Fair Dealing and Fair Use**

From the above analysis, it appears that either the enactment of a specific ‘transformative’ fair dealing or the provision of a broad fair use exception could prove useful at mitigating some of the potential conflicts between the creative practices of Irish traditional musicians and copyright. In the event of the enactment of an amendment to allow either a narrow or broad exception for transformative dealings/uses, the provision of guidelines outlining fair dealing/use ‘best practices’ in the area of Irish traditional music would be useful. In particular, this would help to raise awareness within the Irish

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<sup>938</sup> Beebe, *op. cit.*, 661.

<sup>939</sup> Samuelson, *op. cit.*, 2552.

<sup>940</sup> *Suntrust Bank v Houghton Mifflin Co.* 268 F. 3d. Cir. 1257 11<sup>th</sup> Cir. (2001) at 1273.

traditional music network regarding copyright and fair dealing issues. This has already occurred in other creative industries in other jurisdictions<sup>941</sup>. For instance, in Canada ‘fair dealing’ guidelines have already been provided in relation to the area of documentary film-making<sup>942</sup>. The availability of these guidelines arguably brings some clarity to the area.

Overall, it is arguable that the ‘fair use’ model does have substantive advantages over the ‘fair dealing’ model, particularly with regard to flexibility and adapting to particular cultural circumstances, therefore the broader standard is to be slightly favoured over the narrower model. However, there are two major drawbacks that apply equally to both solutions.

Firstly, both solutions are defence-based. For this reason, both solutions are reliant on the possibility of infringement actions occurring in order for the courts to establish the boundaries of the exception. It appears that infringement actions taken by Irish traditional musicians have rarely occurred<sup>943</sup>. In this regard, it must also be reiterated that both ‘fair dealing’ and ‘fair use’ are reliant upon interpretation by the courts. The courts in the UK and Ireland have traditionally been quite conservative in applying statutory exemptions to copyright. The ECJ has also recently argued in favour of interpreting the existing ‘Infosoc’ defences narrowly<sup>944</sup>. As Burrell has remarked, merely bringing a new exception into the law may not necessarily change the traditional attitude of the courts<sup>945</sup>.

Secondly, it must be noted that while stating that an exception for parody should be introduced, the Gowers Review<sup>946</sup> rejected the possibility of passing domestic legislation in the UK, and by analogy, Ireland, in order to facilitate ‘transformative’ dealing/use,

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<sup>941</sup> D’Agostino, *op. cit.*, 361.

<sup>942</sup> Association of Independent Video and Filmmakers (ANF) et al., *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (18 November 2005) at 1-2; accessible at [http://centerforsocialmedia.org/files/pdf/fair\\_use\\_final.pdf](http://centerforsocialmedia.org/files/pdf/fair_use_final.pdf) - See also generally G. D’Agostino, *op. cit.*, 361 and C. Craig, ‘The Changing Face of Fair Dealing in Canadian Copyright Law’ in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), 437.

<sup>943</sup> Ó hAllmhuráin, ‘History,’ *op. cit.*, 153. The lack of monetary incentive for such actions is probably a factor.

<sup>944</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259.

<sup>945</sup> Burrell, *op. cit.* 368.

<sup>946</sup> Gowers Review, *op. cit.*, 68.

noting that this exception would not be in line with the ‘InfoSoc’ directive<sup>947</sup>. Therefore, it is reasonable to conclude that legislation is unlikely to be introduced by the UK and Irish governments either with respect to narrow or broad ‘transformative’ exceptions. It has been noted that any possible exemption allowing ‘transformative uses’ would probably have to be pursued at an EU level<sup>948</sup>. It has been argued that such an innovation is conceivable<sup>949</sup>. However, Bently and Sherman have stated that such a change in EU policy does not seem to be on the cards at present<sup>950</sup>. As stated above, any such exception would have to be compatible with the ‘three-step test’. In this regard, it is arguable that the German exception for ‘free use’ might provide some guidance in relation to enacting broader exceptions that allow for elements of ‘transformative use’ without falling foul of the ‘three-step test’<sup>951</sup>.

## 4.2. The Public Domain

An understanding of the concept of ‘public domain’ is important when discussing the relationship between Irish traditional music and copyright. As described in the third chapter, this is mainly due to the fact that many stylistic conventions and a substantial amount of ‘older’ tunes reside in the public domain. Since public domain materials can be used freely, an expansion of the public domain could facilitate the kind of ‘free’ sharing of tunes that is prevalent within the Irish traditional network, as detailed below.

### 4.2.1. How the Public Domain might offer Solutions

A work generally falls into one of two categories; it is either in copyright, or it is in the public domain. For instance, a musical work falls out of copyright once the term of subsistence has expired<sup>952</sup>. Once this has occurred, the musical work is said to be in the public domain. In addition to works that have fallen out of copyright, Benabou and Dusollier have stated that the ‘public domain’ also includes the ‘ideas and non-original

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<sup>947</sup> Article 5 Infosoc, *op. cit.*

<sup>948</sup> Bently and Sherman, *op. cit.*, 240.

<sup>949</sup> J. Griffiths, ‘Unsticking the Centre-Piece – the Liberation of European Copyright Law?’, *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), 87, 87 (hereafter referred to as Griffiths, ‘Centre-Piece’).

<sup>950</sup> Bently and Sherman, *op. cit.*, 240.

<sup>951</sup> Griffiths, ‘Centre-Piece,’ *op. cit.*, 89. See also IPO, *op. cit.*, 31-36.

<sup>952</sup> Commission Proposal, *op. cit.*

works<sup>953</sup> that are not protectable under copyright. This category of ‘ideas and non-original works’ might include musical conventions and patterns, works that are effectively excluded from protection (including Crown Copyright etc.), the numerous ‘exceptions to the exclusive rights’ of the author, as well as ‘freedom of use not covered by the exclusive rights’<sup>954</sup>. MacQueen, Waelde, Laurie and Brown have made a similar point, noting that uses that traditionally fall outside of the ‘restricted acts’, such as a private performance of a musical work, would also come under the ‘public domain’<sup>955</sup>. In line with this, it has been noted that many countries have no ‘positive definition’ of ‘public domain’ and thus, it is difficult to draw its boundaries with accuracy<sup>956</sup>. This lack of a clear definition potentially makes the public domain ‘vulnerable’, according to Benabou and Dusollier<sup>957</sup>.

Despite this lack of definition, from the analysis in chapter three it can be said that the public domain encompasses stylistic conventions and musical works for which copyright has expired. Furthermore, due to the fact that creators usually build upon previous works, it is arguable that the public domain should be constructed as widely as possible. With respect to the above, it can be said that copyright is defined against the public domain<sup>958</sup> just as the individual is often defined against the wider public or community<sup>959</sup>. In light of this, it is necessary to discuss the apparent conflicts between assessing the rights of individual authors and rights holders<sup>960</sup> and viewing the musical works as a kind of ‘community resource’<sup>961</sup> available to all.

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<sup>953</sup> V-L. Benabou and S. Dusollier, ‘Draw Me a Public Domain’ in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar, 2007), 161, 173 (hereafter referred to as Benabou and Dusollier).

<sup>954</sup> *Ibid.*

<sup>955</sup> MacQueen *et al.*, *op. cit.*, 171.

<sup>956</sup> Benabou and Dusollier, *op. cit.*, 163.

<sup>957</sup> *Ibid.*

<sup>958</sup> P. Johnson, ‘Dedicating’ Copyright to the Public Domain,’ *Modern Law Review* 71(4) (2008), 587, 587 (hereafter referred to as Johnson, *op. cit.*). See generally A. Chander and M. Sunder, ‘The Romance of The Public Domain,’ *California Law Review* 92 (2004), 1331 (hereafter referred to as Chander and Sunder).

<sup>959</sup> R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, North Carolina: Duke University Publishing, 1998), 129.

<sup>960</sup> Laddie *et al.*, *op. cit.*, 36-42, discussing the monopoly rights granted to individuals under intellectual property law.

<sup>961</sup> See generally J. Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Aldershot: Ashgate Publishing, 2005) (hereafter referred to as Gibson, *Community Resources*). For a perspective critical of the idea of ‘rights’ to public domain materials, see generally J. Cahir, ‘The public domain: right or liberty?’ in C. Waelde and H. MacQueen (eds.), *Intellectual Property – The Many Faces of the Public Domain* (Cheltenham: Edward Elgar, 2007), 35.



In this context, it is necessary to discuss the six questions of the thesis in order to explore the possibility of resolving the potential conflicts between copyright and the creative practices of Irish traditional musicians via the expansion of the public domain. For instance, with regard to originality it was noted in the third chapter that the musical stylistic conventions of Irish traditional music reside in the public domain. These stylistic conventions can be used freely by composers and arrangers in the creation of new works. Furthermore, in relation to authorship and joint authorship of new arrangements of public domain works, it was noted in 1.1 and 1.2 that the argument that this practice threatens to take material out of the public domain is somewhat overstated, despite the outcomes in *Sawkins* and *Kimron*. The reason for this is that an author only has copyright protection in relation to the originality that he or she has added to the work, not any underlying public domain material.

Nonetheless, in relation to this ‘originality’, an author has the right to restrict the use of the work, or a substantial part of it. In this regard, an author e.g. a composer or arranger can potentially restrict the creative practices of another musician. Unless a composer or arranger obtains a licence, the underlying copyright work cannot be used legally. Indeed, as noted in the third chapter, the formal licensing system appears to conflict with the ‘free’ sharing of tunes and the process of ‘relational’ authorship and transmission prevalent in the Irish traditional network. With respect to the above discussion, and for the reasons given below, this sub-section examines two main methods of expanding the public domain - shortening the duration of copyright and allowing and encouraging donation to the public domain.

Firstly, in relation to infringement and licensing in particular, it is necessary to analyse whether the duration of copyright is at an optimal level. The issue of duration of copyright is of vital importance to the maintenance of the public domain, particularly regarding works which are close to falling into the public domain. As discussed below, if a work is in the public domain it does not require a licence for use. In other words, the tune can be shared freely and it can also be used to create subsequent works. However, because the duration of copyright lasts for the life of the author plus seventy years, then it can potentially take a very long time before all uses of the work are actually ‘free’ from a legal perspective. In this regard, it is necessary to discuss whether the term of copyright should be shortened so that works fall into the public domain at an earlier date.

It is also important to assess whether such a solution is practical or feasible. It is also necessary to discuss the effect that the shortening of the duration of copyright protection might have on the moral rights of attribution and integrity of the composer or arranger.

Secondly, it is necessary to evaluate whether it is possible for an author to ‘donate’ a work to the public domain. The possibility of ‘donating’ a work would appear to be in line with the idea of the autonomy of the author, and it may be a useful solution, particularly if shortening the duration of copyright is not practical. In the context of Irish traditional music, allowing donation to the public domain would appear to be in line with the ‘relational’ authorship and transmission process described in the third chapter. Indeed, it is also necessary to discover whether in certain circumstances it might be possible for the law to envisage ‘implied donation’ of a musical work, or whether this conflicts with the rights of the author. Furthermore, in relation to moral rights, it is important to discuss whether the rights to attribution and integrity, which under UK law are capable of being waived, should in fact be waived in relation to ‘donation’ of works to the public domain. An analysis of these areas is undertaken in 4.2.3 below

#### **4.2.2. The Origins of the Concept of ‘Public Domain’**

The ‘public domain’ is a concept that is often defined in opposition to copyright. In line with this, Johnson has stated that the notion of a public domain ‘has existed as long as copyright itself’<sup>962</sup>. Furthermore, it is arguable that before the advent of copyright, or its various precursors, there was no notion of ‘public domain’, as the term is understood today. Deazley has argued that the public domain effectively existed in the period pre-copyright, when works could be used freely<sup>963</sup>. However, it is arguable that it would not be accurate to describe this as the ‘public domain’ in the way the term is understood today. The reason for this is that there was no comparative ‘private domain’. Therefore, the position of ‘works’ during this period would arguably have been markedly different

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<sup>962</sup> Johnson, *op. cit.*, 587. For an early discussion on the importance of the Public Domain, Johnson refers to D. Lange, ‘Recognising the Public Domain,’ *Law and Contemporary Problems* 44 (1981), 147. See also J. Litman, ‘The Public Domain,’ *Emory Law Journal* 39 (1990), 965 (hereafter referred to as Litman, ‘Public’). See also J. Boyle, *The Public Domain – Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008) (hereafter referred to as Boyle, *The Public Domain*); accessible at <http://www.thepublicdomain.org>

<sup>963</sup> R. Deazley, *Rethinking Copyright* (Cheltenham: Edward Elgar, 2006), 108-109.

from the interaction between works ‘in copyright’ and works in the ‘public domain’ today.

Cohen has noted that the term ‘public domain’ in the USA did not exist until the late 19<sup>th</sup> century<sup>964</sup>. Furthermore, some scholars trace the ‘public domain’ to a concept originally found in French law, and this would appear to be the reason for its inclusion in the Berne Convention<sup>965</sup>. Nonetheless, Cohen has stated that an examination of 19<sup>th</sup> century US copyright case law shows that to some extent the notion of ‘public domain’ arose concurrently in Europe and the USA around that time<sup>966</sup>. Furthermore, it is arguable that the realisation of the ‘public domain’ was a necessary innovation following the enactment of copyright law. The notion provided a counterpoint to the ‘modern’ and rapidly expanding notion of intellectual property. In other words, in establishing what could be made subject to copyright, it was also necessary to establish what could not be made subject to copyright. Therefore, ‘copyright’ and ‘public domain’ can be said to form a dichotomy, similar to the one comprising ‘modernity’ and ‘tradition’<sup>967</sup>. In this view, the category ‘tradition’ was often applied to elements of culture that were considered ‘pre-modern’. For instance, as noted in chapter one, copyright law requires authorship. On the other hand, many ‘folk’ or ‘traditional’ tunes were considered to be ‘public domain’ works.

Smiers has stated that there is growing recognition that ‘the public domain of creativity and knowledge is paying a high price for the cultural privatisation that is underway’<sup>968</sup>. As a result, some authors have argued that there is a need to find greater harmony between copyright and the public domain as well as between individual property rights

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<sup>964</sup> Cohen, ‘Commodification,’ *op. cit.*, 125.

<sup>965</sup> Litman, ‘Public,’ *op. cit.*, 975. See also J. Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain,’ *Law and Contemporary Problems* 66 (2003), 33, 58.

<sup>966</sup> Cohen, ‘Commodification,’ *op. cit.*, 126, referring especially to *Singer Manufacturing Co. v June Manufacturing Co.*, 163 US 169, 203 (1896), a case which she stated is the crucial turning point for the adoption of ‘public domain’ over the more narrow, competing term ‘public property’. See generally Seville, *op. cit.*

<sup>967</sup> M. Dommann, ‘Lost in Tradition? Reconsidering the History of Folklore and its Legal Protection since 1800’ in C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008), 3, 4 (hereafter referred to as Dommann). In addition, Hobsbawm has discussed the nation-building process of the 19th century and its reliance on the ‘invention’ of tradition itself – See generally E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

<sup>968</sup> J. Smiers, ‘Creative Improper Property’ in F. MacMillan (ed.), *New Directions in Copyright Law* 1 (Cheltenham: Edward Elgar, 2005), 3, 22 (hereafter referred to as Smiers).

and the public interest<sup>969</sup>. On the other hand, other commentators argue in favour of strong copyright protection based on labour principles<sup>970</sup>. Furthermore, Litman has argued that within this system, it is necessary to ‘guard against protecting authors at the expense of the enterprise of authorship’<sup>971</sup>. This debate has been described by one critic as a ‘culture war’, the spoils of which include control over the ‘means of production of creative content in our society’<sup>972</sup>. As a result of recent debate, there has been much discussion of the positive aspects of an expanded public domain. For instance, Boyle has argued that a large, freely accessible public domain is vital for creativity<sup>973</sup>. Following Hardin<sup>974</sup>, it is often argued that the public domain is a type of ‘commons’ since works are apparently ‘free’ for all to use<sup>975</sup>.

Nonetheless, Landes and Posner have argued that the public domain does not represent a ‘fixed supply of works from which any enlargement of copyright subtracts’<sup>976</sup>. In this vein, Cohen has emphasised that what we refer to as the ‘commons’ or ‘public domain’ is not in fact ‘a separate place, but a distributed property of social space’<sup>977</sup>. Hence, ‘reification’ of the public domain will not necessarily provide a solution. As a result, it has been argued that a reformulation of what we mean by ‘public domain’ is required<sup>978</sup>. Cohen has argued in favour of exploring the particular circumstances of creativity in different societies to discover what exactly is required in terms of authors’ rights and the public or community interest, rather than advocating a universal system based on one notion over another. This exploration is undertaken in sub-section 4.2.3 below and it is continued in the fifth chapter with respect to the empirical research.

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<sup>969</sup> See generally Boyle, *The Public Domain*, *op. cit.*

<sup>970</sup> Hughes, *op. cit.*, 287-290.

<sup>971</sup> Litman, ‘Public,’ *op. cit.*, 969.

<sup>972</sup> D. Hunter, ‘Culture War,’ *Texas Law Review* 83 (2005), 1105 (hereafter referred to as Hunter, ‘Culture War’). This debate is not limited to cultural expressions such as music - it also extends to the realm of patent law regarding medicines, computer software etc.

<sup>973</sup> See generally Boyle, *The Public Domain*, *op. cit.*

<sup>974</sup> See generally G. Hardin, ‘The Tragedy of the Commons,’ *Science* 162 (1962), 1242, noting the problem of ‘over-grazing’ of the commons.

<sup>975</sup> However, some recent Nobel-prize winning research has argued against the principle of Hardin’s ‘Tragedy of the Commons’ thesis; accessible at

[http://nobelprize.org/nobel\\_prizes/economics/laureates/2009/press.html](http://nobelprize.org/nobel_prizes/economics/laureates/2009/press.html). See also E. Ostrom, *Governing the Commons* (New York: New York University Press, 1990).

<sup>976</sup> W. Landes and R. Posner, ‘Indefinitely Renewable Copyright,’ *University of Chicago Law Review* 70 (2003), 471, 474.

<sup>977</sup> Cohen, ‘Commodification,’ *op. cit.*, 124.

<sup>978</sup> Cohen, ‘Commodification,’ *op. cit.*, 166.

### **4.2.3. Exploring the Specific Issues of Conflict in the Context of Irish Traditional Music**

As noted above, there are a number of ‘public domain’-related issues of relevance to the six questions of the thesis. These issues are detailed below.

#### *4.2.3.1. Originality*

As noted above, with regard to originality the musical stylistic conventions of Irish traditional music reside in the public domain. The conventions or motifs can be used by any musician when composing or arranging a new work. Similarly, tunes for which copyright has expired are in the public domain and can be shared and used freely. Furthermore, any ‘composition’ or ‘arrangement’ of ITM which is insufficiently original will not be a copyright work. Instead it will remain in the public domain. However, since the originality threshold is at a low level, once melodic or rhythmic variation is added to a tune, this is probably enough for the subsequent version of the tune to qualify as an original arrangement. As discussed in the third chapter, only the originality of the composition or arrangement is protected by copyright – any other underlying materials remain in the public domain. Therefore, any expansion of the public domain would have to focus on bringing this ‘original’ material within the public domain either by shortening the duration of copyright, or allowing authors to donate the composition or arrangement to the public domain. These options are discussed further below.

#### *4.2.3.2. Authorship and Joint Authorship*

Regarding authorship and joint authorship of new compositions and new arrangements of public domain works, was noted above that these practices do not actually threaten to take material out of the public domain. Only the originality of the work of the author(s) is protected. In relation to the possibility of either shortening the duration of copyright or allowing authors to donate works to the public domain, both of these potential solutions would have a drastic effect on the rights of the author. In this regard, it must be noted that there are public policy questions raised by the granting of monopolistic property rights over cultural works e.g. a piece of music. On one hand, this conflicts with the

public interest in making that work freely accessible for performance and adaptation<sup>979</sup>. On the other hand, copyright is often justified by the need to reward individual creators and ensure that creators retain a certain amount of control over their work<sup>980</sup>. This central dichotomy is part of a long-standing debate that continues to polarize musicians, lawyers and commentators today<sup>981</sup>.

Regarding the first solution, it is necessary to analyse whether the duration of copyright is at an optimal level in the Irish traditional context, since once the duration has expired works fall into the public domain. As noted above, the concepts of copyright and public domain are often defined in opposition. Scholars that come from a ‘public domain’ perspective tend to favor a short term of copyright, and they generally oppose legislative attempts to extend the term of copyright such as the recent EU Commission proposal on sound recordings<sup>982</sup>, or the United States Copyright Term Extension Act of 1998 in the US<sup>983</sup>. In contrast, Chander and Sunder have argued that the benefits of the public domain should not be overstated. Chander and Sunder have noted that ‘knowledge, wealth, power, access, and ability’ mean that a widely constructed ‘public domain’ would not in fact be equally accessible to all<sup>984</sup>. Arguing against the position of Chander and Sunder, Skillman and Ledford have argued that rather than creating new rights, it would be more beneficial to traditional communities to firstly increase the public domain, and secondly, work towards an interpretation of the TRIPS agreement which is more equitable<sup>985</sup>. In other words, it is argued that there is a fundamental need to reduce the ‘rigidity’ of intellectual property laws<sup>986</sup>. Nonetheless, there is little doubt that the main method of ‘enlarging’ the public domain would be to reduce the term of copyright protection, so that works fall into the public domain at an earlier date. This would enable

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<sup>979</sup> See generally Boyle, *The Public Domain*, *op. cit.* See also J. Sanders, *Adaptation and Appropriation* (London: Routledge, 2006).

<sup>980</sup> Bentley and Sherman, *op. cit.*, 4-5. See generally Kretschmer and Kawohl, *op. cit.*

<sup>981</sup> See generally Hunter, ‘Culture War,’ *op. cit.* Contrast the different positions of Chander and Sunder, *op. cit.* and D. Skillman and C. Ledford, ‘Limiting the Commons with Uncommon Property – A Critique of Chander & Sunder’s “The Romance of the Public Domain”’, *Oregon Review of International Law* 8 (2006), 337 (hereafter referred to as Skillman and Ledford). See also Boyle, *The Public Domain*, *op. cit.*

<sup>982</sup> See generally Opinion, ‘Creativity Stifled? A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings,’ *European Intellectual Property Review* 30(9) (2008), 341 and list of signatories.

<sup>983</sup> See *Eldred v Ashcroft* 1123 S. Ct. 769 (2003) and in particular the ‘Amicus Curiae’ brief and list of signatories; accessible at <http://cyber.law.harvard.edu/openlaw/eldredvascroft/supct/amici/ip-lawprofs.pdf>

<sup>984</sup> Chander and Sunder, *op. cit.*, 1332.

<sup>985</sup> Skillman and Ledford, *op. cit.*, 341-343.

<sup>986</sup> *Ibid.*, 343.

more ‘free’ access to the works although it could also be argued that it would reduce the incentive for investment in cultural works<sup>987</sup>.

In relation to ITM, it was argued in the third chapter that within the system of ‘relational’ authorship and transmission it is important that works are ‘freely’ available for use by subsequent performer-arrangers. At present, the duration of copyright is arguably too long in the context of ITM, because tunes may not be fully ‘accepted’ until they can be used freely, as discussed above. However, any change to the term would need to be radical in order to have any significant effect in this regard. Furthermore, it is hard to quantify an appropriate term in the context of ITM. The reason for this is that from the analysis undertaken in the third chapter it would appear that upon distribution new compositions and arrangements are taken up almost immediately by other musicians in order for the process of ‘acceptance’ to occur. Once accepted, these tunes become part of the ‘living tradition’ i.e. the tunes are used as the basis for subsequent arrangements. In other words, the duration of copyright would have to be reduced to a negligible term in order to have any effect. Given the international nature of copyright under the Berne Convention, such a reduction would have to be enacted by treaty agreement. Even if the political will for such a reduction existed, it would still be extremely controversial. In light of this, an adequate shortening of duration of copyright of musical works is unlikely to be feasible. Furthermore, even in the case where only the duration of works of ITM was reduced to a negligible, this might prejudice the rights of individual composers and arrangers of ITM who do wish to enforce their copyrights, particularly if their works are used by commercial entities. For these reasons, the shortening of duration of copyright is not a feasible solution to the issues.

The second potential way of resolving this issue would be to encourage authors to ‘donate’ works to the public domain. Bainbridge has stated that it ‘is conceivable, though unlikely, that a work might be created by a person unknown’<sup>988</sup>. In such a case, it might be possible that the author has in some way ‘donated’ or ‘dedicated’ his or her work to the public domain. Furthermore, it is arguable on the basis of individual autonomy, that should a composer and copyright owner wish to dedicate a work to the public domain, he

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<sup>987</sup> Hughes, *op. cit.*, 344.

<sup>988</sup> Bainbridge, *op. cit.*, 74. Furthermore, Bainbridge has noted that where it is reasonable to assume the author is dead, there is probably no infringement.

or she should be allowed to do so. In this vein, composers could donate their tunes to the public domain, making the tunes freely accessible. Performer-arrangers, who arrange tunes in either a regional or individual style, could donate these to the public domain as well. On the other hand, in practical terms it would arguably be enough for an author to simply not enforce his rights. The only difficulty with the ‘non-enforcement’ option is that there is nothing to stop the author from changing his mind and enforcing his rights at a later date. This could affect later composers and arrangers that have made use of the work.

Indeed, it has been noted that as a result of the subsistence requirements under the CDPA, it may be impossible in the UK for copyright owners to ‘cause their copyright to cease to exist by dedicating it to the public’<sup>989</sup>. This would be the case even in the situation of an author attempting to give up his or her rights over a work for altruistic purposes. In other words, ‘works of authorship are protected by copyright upon fixation... regardless of whether the author desires protection or not’<sup>990</sup>. The CDPA does not appear to envisage making such a ‘dedication’ or ‘donation’ of rights to the public domain; the only way of divesting rights is via assignment or licensing. Therefore, it is thought that such a dedication would merely create a licence which could be withdrawn at any stage<sup>991</sup>. If this licence is withdrawn at a later date, it could mean that not only new users would be prevented from using the work but such a withdrawal could terminate rights that existing users have<sup>992</sup>. Due to the fact that at a practical level, the same provisions for subsistence apply in Ireland under the CRRA, this situation is probably mirrored in Irish copyright law. This appears to be at odds with the idea of authors having freedom of choice regarding their works and it arguably entrenches property rights in works to an unnecessary degree. This in turn has the potential to damage the public interest in a wide public domain. Therefore, there may be a substantial practical barrier to donation to the ‘public domain’ in the UK and Ireland when an author wishes to abandon his rights to a new work.

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<sup>989</sup> Johnson, *op. cit.*, 609.

<sup>990</sup> G. Rosloff, ‘Some Rights Reserved: Finding the Space between All Rights Reserved and the Public Domain,’ *Columbia Journal of Law and the Arts* 33 (2009), 37, 37-39 (hereafter referred to as Rosloff).

<sup>991</sup> Johnson, *op. cit.*, 609.

<sup>992</sup> *Ibid.*



At a practical level, it is possible to envisage assignment or licensing providing some solutions to this issue. For instance, if an author assigned or licensed e.g. his or her economic rights to a representative body under the condition that the body will not enforce the rights, this might provide some form of clarity. However, this solution is not really a ‘public domain’ solution, and it is best discussed in 4.4 below in relation to alternative licensing. Interestingly, as noted further below in 4.4, in the US there has been attempt at facilitating a licence that effectively allows an author to waive all his or her rights to a work<sup>993</sup>. However, this would probably not be valid outside the US jurisdiction<sup>994</sup>. Furthermore, Loren has stated that the current system of copyright, which provides for automatic protection upon fixation, does not take account of the author’s actual motivation for creating the work<sup>995</sup>. As a result, an author may possess more rights than he or she desires. Nevertheless, it may not be practically possible for the author to divest himself of these rights completely as noted above. In relation to US law, one commentator has argued that in order to maximise the potential for authors to donate to the public domain, it is necessary to bring in a new system of formalities<sup>996</sup>. Such a system would probably have to provide that certain rights arise automatically upon fixation in order to comply with international law<sup>997</sup>. However, a new system of registration could provide authors with the ‘tools to affirmatively disclaim some or all of their rights to a work’<sup>998</sup>. At present, such an innovation does not appear likely in the UK or Ireland, or at EU level. Furthermore, as noted above, both the ‘duration’ and ‘donation’ solutions would probably require a legislative alteration to the CDPA and CRRA.

#### 4.2.3.3. *Infringement and Licensing*

In relation to infringement and licensing, the duration of copyright protection is of great importance. Musical materials in the public domain are free to use for adaptation without the requirement of payment of any licence fee or royalty. Therefore, in theory at least,

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<sup>993</sup> <http://creativecommons.org/choose/zero>. There is also a licence for enumerating certain works that are already in the public domain - <http://creativecommons.org/choose/publicdomain-2>

<sup>994</sup> <http://creativecommons.org/choose/zero>

<sup>995</sup> L. P. Loren, ‘The Pope’s Copyright? Aligning Incentives with Reality by using Creative Motivation to Shape Copyright Protection,’ *Louisiana Law Review* 69 (2008), 1, 17 (hereafter referred to as Loren).

<sup>996</sup> Rosloff, *op. cit.*, 70-75.

<sup>997</sup> *Ibid.*

<sup>998</sup> *Ibid.*, 75.

public domain works are freely accessible and effectively ‘free’ to use. As noted above, the ability to use works freely is important to the system of ‘relational authorship’ present in Irish traditional music.

Despite the practical difficulties discussed above, it is worth considering the consequences of ‘duration’ and ‘donation’ in an Irish traditional context with regard to infringement and licensing. If it was possible for either the duration of protection of the work to be shortened drastically, or for an author to donate the work to the public domain, it would be free to use, without licence, within the ‘relational’ network. In addition, the potential for infringement cases regarding these tunes would cease. As noted in the third chapter, such infringement cases would potentially disrupt the creative practices of Irish traditional musicians. This potential for disruption would no longer exist in the case of a tune that is in the public domain.

Arguably, this would come at the expense of protecting the compositions/arrangements of musicians under copyright. The possibility of receiving licensing royalties would be negated. Although these royalties would probably be quite small in the vast majority of Irish traditional cases, this concern may have some bearing for professional and semi-professional Irish traditional musicians. Shortening the duration of copyright or allowing donation of a copyright work to the public domain would effectively mean that authors would lose their rights to control their works. Within a public domain context, there is nothing to prevent someone else, perhaps a commercial actor, from e.g. claiming a new arrangement of a composition<sup>999</sup>. No licence would be payable to the composer in this instance and no infringement case would be actionable. This possibility may negate some of the positive aspects of this solution with respect to the rights of composers and performer-arrangers. For this reason, some musicians may be reluctant to donate their compositions and arrangements and they may argue strongly against a radical shortening of duration. The principal reason for reluctance would probably be the fear of exploitation of the work by others, which could occur once the work was in the public domain. Nonetheless, there may still be an argument that reform should occur in this area in order to allow musicians the choice regarding donating a work to the public

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<sup>999</sup> O. Arewa, ‘Copyright,’ *op. cit.*, noting that Gershwin took public domain blues songs and re-arranged them into new works.

domain. The attitude that composers and performer-arrangers take towards these options is discussed in relation to the empirical research in the fifth chapter.

#### 4.2.3.4. *Moral Rights*

Finally, in relation to moral rights, it is important to discuss whether the rights to attribution and integrity, which under UK law are capable of being waived, should in fact be waived in relation to ‘donation’ of works to the public domain. If a work was donated to the public domain, it is feasible that moral rights could be abandoned in relation to this work, though this would not necessarily be the case in some civil law jurisdictions<sup>1000</sup>. Similarly, a proposal to drastically shorten the duration of copyright protection might have the effect of weakening or removing the moral rights of the author. Alternatively, a proposal might only provide for a drastically shortened term of economic rights. Even if this occurred, it is possible that the social rules of ITM would ensure respect for composers and performer-arrangers in relation to attribution at least. Arguably, the question of which rights an author wishes to retain, if any, are better resolved via alternative licensing mechanisms, as outlined below. Furthermore, the attitude that composers and performer-arrangers take towards these options is assessed in the fifth chapter in light of the empirical research.

#### **4.2.4 Summary**

As stated above, the idea of the public domain presents a number of useful possibilities in an Irish traditional context. In particular, original compositions and arrangements that are in the public domain can be used ‘freely’ within the Irish traditional network. This would help to facilitate the ‘relational’ authorship and transmission process discussed in the third chapter. However, there are both legal and practical difficulties with this solution. Firstly, providing for a shortened duration or providing the possibility of ‘donation’ to the public domain would probably require a change to copyright legislation. Under the current law such a donation would probably only amount to a licence, which could be revocable. Furthermore, there is no indication that legislation is being contemplated in the UK or Ireland, or internationally, on these issues. Therefore, it

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<sup>1000</sup> Farchy, *op. cit.*, 257.

is concluded that the possibility of ‘expansion’ of the public domain provides some potential solutions to the above problems, but the enactment of these solutions appears to be impractical at present.

### **4.3. Traditional Knowledge**

This section has a general focus on exploring the debate around ‘traditional knowledge’ (TK) and the area of ‘traditional cultural expressions’ (TCEs) in particular, since this is the term that would potentially cover Irish traditional music.

#### **4.3.1. How TK could provide a solution to the conflicts between Copyright and Irish Traditional Music**

The issues at the heart of the TK debate are much contested. There are potential conflicts between the terms of IP and TK, and between the competing notions of individual-based rights and community-based rights<sup>1001</sup>. It is therefore necessary to analyse the concepts of TK and TCEs in detail. It is important to reiterate that there is a distinction between the wider term ‘Traditional Knowledge’ (TK), which generally applies a broad set of knowledge, including medical and biological knowledge and the term ‘Traditional Cultural Expressions’ (TCEs), which applies to artistic and cultural works. This distinction is detailed below. There is a WIPO Inter-Governmental Committee on TK, but it has yet to agree on the terms of a specific treaty on the issue. Nonetheless, TK is defined in relation to Article 8(j) of the Convention on Biological Diversity (CBD) as follows:

*“Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals,*

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<sup>1001</sup> G. Teubner and A. Fischer-Lescano, ‘Cannibalizing Epistemes: will modern law protect traditional cultural expressions?’ in C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008), 17, 18-21 (hereafter referred to as Teubner and Fischer-Lescano).

*community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.*”<sup>1002</sup>

Within the wider framework of TK, it is important to define TCEs, as these are potentially relevant to the thesis. The WIPO IGC has issued provisional objectives regarding ‘TCEs’<sup>1003</sup>. However, at present there is no accepted international definition of TCEs. For the purposes of this chapter, the WIPO working definition of TCEs will be used<sup>1004</sup>. The working definition is as follows:

*“Traditional cultural expressions’/‘expressions of folklore’ means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:*

*– verbal expressions, such as folk tales, folk poetry and riddles, signs, words, symbols and indications;*

*– musical expressions, such as folk songs and instrumental music;* (emphasis added by author)

*– expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and,*

*– tangible expressions, such as: productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; crafts; musical instruments; architectural forms.”*

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<sup>1002</sup> UN Convention on Biodiversity, (1992); accessible at <http://www.cbd.int/traditional/intro.shtml>

<sup>1003</sup> The relevant WIPO definitions are found at;

[http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html)

<sup>1004</sup> See WIPO document at [http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf)

Furthermore, the WIPO IGC has remarked:

*“In general, it may be said that TCEs/folklore (i) are handed down from one generation to another, either orally or by imitation, (ii) reflect a community’s cultural and social identity, (iii) consist of characteristic elements of a community’s heritage, (iv) are made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so, (v) are often not created for commercial purposes, but as vehicles for religious and cultural expression, and (vi) are constantly evolving, developing and being recreated within the community.”*<sup>1005</sup>

It has been stated that traditional cultural expressions (TCE) are ‘essential’ to indigenous communities<sup>1006</sup>. As noted above, music, art and dance are generally described as ‘traditional cultural expressions’<sup>1007</sup>. On the face of the above statements, it is arguable that the TCEs terminology potentially encompasses Irish traditional music. Since the terms TK and TCEs are generally applied to cultural works that are ‘traditional’ in nature, works of Irish traditional music should arguably be compatible with this model. In this regard, it is well established that copyright traditionally has found it difficult to deal with traditional cultural expressions, due largely to the requirements of originality, fixation and individual or joint authorship<sup>1008</sup>. Thus, there are clear theoretical similarities between TK conflicts and the conflicts between copyright and Irish traditional music expressed in the third chapter.

Firstly, regarding the potential problems of ‘originality’ under copyright, there may be some potential for TK/TCEs to provide a solution. Under TK, it is feasible that traditional cultural expressions that are not ‘original’ enough to be protected under copyright, can be protected under TK rules. Secondly, under a TK/TCE-based solution, it is possible that the collective authorship/transmission process could continue

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<sup>1005</sup> *Ibid.*

<sup>1006</sup> C. B. Graber and M. Burri-Nenova, ‘Preface’ in C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008), xi (hereafter referred to as Graber and Burri-Nenova).

<sup>1007</sup> The most recent objectives and principles are outlined at; [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=55137](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=55137)

<sup>1008</sup> D. Wassel, ‘From Mbube to Wimoweh: African Folk Music in Dual Systems of Law,’ *Fordham Intellectual Property, Media and Entertainment Law Journal* 20 (2010), 289, 294-296.

successfully, since TK definitions appear to envisage community-based authorship. Thirdly, regarding moral rights, it is possible to imagine the moral rights in Irish traditional music being accommodated under a TK/TCE-solution to some extent. Fourthly, cases of infringement could be accommodated under a TK-system. Fifthly, in relation to licensing, it is possible that a new formal, sui generis system of licensing could be accommodated within a TK/TCE solution.

### 4.3.2. The Origins and Rationale of ‘Traditional Knowledge’

The term ‘traditional knowledge’ is a relatively recent one, but the term refers to an area of culture that has been under academic discussion for well over a century<sup>1009</sup>. Previous attempts to define this area resulted in the concepts of ‘folklore’<sup>1010</sup> and ‘cultural heritage’<sup>1011</sup>. It is arguable that the issue of TK can be framed around a central conflict - the cultural expressions of indigenous and traditional communities are threatened by the inability to reconcile ‘the interests of a modern society with their traditional customs and laws’<sup>1012</sup>. Jabbour has described four main concerns that are fundamental to this debate. These are concerns in relation to maintaining the authenticity of TK in a globalised world, concerns regarding expropriation and misappropriation of TK by outside forces, concerns regarding compensation for appropriation of TK, and concerns over the general cultural welfare of indigenous societies<sup>1013</sup>.

In addition, a possible solution to this conflict i.e. that TK should be regulated by indigenous or traditional customary law ‘appears to be in conflict with the primacy and universality of internationally recognised human rights standards’<sup>1014</sup>. Hence, the issues raised concerning TK/TCE are very much framed by issues of ‘universal versus particular’. Furthermore, along with other the relevant political issues such as ‘post-colonisation’ and ‘cultural imperialism’, TK/TCE are often linked with notions of

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<sup>1009</sup> Domann, *op. cit.*, 3-4.

<sup>1010</sup> M. Blakeney, ‘The Protection of Traditional Knowledge under Intellectual Property Law,’ *European Intellectual Property Review* 22(6) (2000), 251, 251, noting the unsatisfactory nature of this term.

<sup>1011</sup> See e.g. *UNESCO Convention for the Safeguard of Intangible Cultural Heritage* 2003; accessible at

<sup>1012</sup> Graber and Burri-Nenova, *op. cit.*, xi.

<sup>1013</sup> A. Jabbour, ‘Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore,’ *Copyright Bulletin* XVII (1) (1983), 10, 11-12.

<sup>1014</sup> Graber and Burri-Nenova, *op. cit.*, xi.

‘sustainable development’ and ‘cultural diversity’<sup>1015</sup>. This suggests that there are a multitude of potential problems and solutions as well as various different rationales.

TK is usually discussed in relation to ‘indigenous peoples’,<sup>1016</sup> such as the Aboriginal people of Australia<sup>1017</sup>. In this vein, the concept of intellectual property is often criticised as being ‘Eurocentric’<sup>1018</sup>. However, it is to be noted that in some cases, members of indigenous communities have sought to rely upon intellectual property laws in order to take action when aspects of their traditional crafts or cultural expressions are infringed<sup>1019</sup>. Nonetheless, it has been generally accepted that the concepts of intellectual property are not easily applied to cases of informal communal authorship and ownership<sup>1020</sup>. Moreover, it has been stated that an IP-based approach alone is insufficient to deal with issues of TK<sup>1021</sup>. Further to this, Smiers has stated that the current IP laws are contested both in developed and in developing countries<sup>1022</sup>. Thus, there may be some symmetry between the kinds of concerns that of Irish traditional musicians in the UK and Ireland and the concerns that indigenous communities have regarding use of TK. In light of these concerns, it has been noted that a general reformulation of copyright in the international sphere would be useful. However, this is ultimately an ‘unrealistic’ aim, due in large part to the fact that there is no political will on the part of many countries to e.g. roll back the TRIPS standards<sup>1023</sup>. Furthermore, as Arewa has noted, there is some potential within TRIPS for local communities to use their knowledge to the economic benefit of the communities themselves<sup>1024</sup>.

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<sup>1015</sup> *Ibid.*

<sup>1016</sup> There is no universally accepted definition of ‘indigenous peoples’ – it is not defined within the UN Declaration on the Rights of Indigenous Peoples (2007); accessible at <http://www.un.org/esa/socdev/unpfi/en/drip.html>. It is thought that an all-encompassing definition would be impossible to ascertain due to the diversity of ‘indigenous’ peoples around the world – a number of working definitions are accessible at [http://www.nciv.net/Millennium/Definitions/some\\_indigenous\\_peoples\\_english.htm](http://www.nciv.net/Millennium/Definitions/some_indigenous_peoples_english.htm)

<sup>1017</sup> Blakeney, *op. cit.*, 258.

<sup>1018</sup> *Ibid.*, 252.

<sup>1019</sup> *Milpururru v Indofurn Pty Ltd* (1995) 91-116 CCH Australian Intellectual Property Cases 39, 051, and *Bulun Bulun v R & T Textiles Pty Ltd* (1995) 91-116 CCH Australian Intellectual Property Cases 39, 077.

<sup>1020</sup> Blakeney, *op. cit.*, 256-257.

<sup>1021</sup> P. Kuruk, ‘Bridging the Gap between Traditional Knowledge and Intellectual Property Rights – Is Reciprocity an Answer?’, *The Journal of World Intellectual Property* 7(3) (2004), 429 (hereafter referred to as Kuruk). See also Smiers, *op. cit.*, 17.

<sup>1022</sup> Smiers, *op. cit.*, 23.

<sup>1023</sup> *Ibid.*, 22.

<sup>1024</sup> O. Arewa, ‘TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks,’ *Marquette Intellectual Property Review* 10 (2006), 156, 180.



One of the particular ironies identified by Teubner and Fischer-Lescano is the fact that TK is caught between expansion of IP through international measures such as TRIPS and measures enacted to protect cultural heritage and biodiversity i.e. TRIPS vs. CBD<sup>1025</sup>. Due in part to the inherent conflicts identified above, advocates of TK sometimes argue in favour of measures which are akin to ‘sustainable development’ measures. For instance, Burri-Nenova has stated that the debate over TK/ICH requires a re-definition of the relationship between trade and culture<sup>1026</sup>. As Sunder has noted, the ‘poor’ must be recognised as ‘both receivers and producers of knowledge’ and as such mere access to knowledge is not enough<sup>1027</sup>. In some cases this would mean a certain amount of privatisation would be required, so that the TK can be exploited by particular traditional communities as a kind of ‘community resource’<sup>1028</sup> but not by multinational corporations. Skillman and Ledford also noted that the provisions of TRIPs, could be interpreted to achieve a greater level of distributive justice.

In this regard, Cottier and Panizzon have discussed IP-based schemes as providing just ‘reward’ for the important part played by ‘indigenous knowledge’ in the global marketplace and furthermore, such measures could encourage further entry to the global market by traditional communities<sup>1029</sup>. This is arguably a form of ‘modernisation’<sup>1030</sup>. Furthermore, a solution that helps TK communities to develop and modernise could lead to the communities altering their traditional practices. Fitzpatrick and Joyce have remarked that because TK uses an intellectual property framework, it necessarily threatens the nature of the cultural practices involved<sup>1031</sup>. Similarly, MacMillan has stated that it would be ‘naive’ to advocate that the best way to ensure that TK practices can continue would be to privatise these practices through intellectual property<sup>1032</sup>.

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<sup>1025</sup> Teubner and Fischer-Lescano, *op. cit.*, 18-21.

<sup>1026</sup> M. Burri-Nenova, ‘Trade versus Culture in the Digital Environment: A Conflict in Need of a New Definition,’ *Journal of International Economic Law* 12 (2009), 1, 1-2.

<sup>1027</sup> M. Sunder, ‘The Invention of Traditional Knowledge,’ *Law and Contemporary Problems* 70 (2007), 97, 124 (hereafter referred to as Sunder).

<sup>1028</sup> See generally Gibson, *Community Resources, op. cit.*

<sup>1029</sup> T. Cottier and M. Panizzon, ‘Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection,’ *Journal of International Economic Law* 7 (2004), 371, 380.

<sup>1030</sup> Teubner and Fischer-Lescano, *op. cit.*, 18-21.

<sup>1031</sup> P. Fitzpatrick and R. Joyce, ‘Copying Right: Cultural Property and the Limits of (Occidental) Law’ in F. MacMillan (ed.), *New Directions in Copyright* 4 (Cheltenham: Edward Elgar, 2007), 177.

<sup>1032</sup> F. MacMillan, ‘Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of a Relationship’ in C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008), 77, 93-94 (hereafter referred to as MacMillan, ‘Human Rights’).

Additionally, MacMillan has argued that intellectual property is ‘clearly implicated in the constriction and possible destruction of some cultural rights’<sup>1033</sup>. Under a TK-based solution, the critical argument that the knowledge or expressions could become ‘locked up’, and thus, less accessible, is potentially valid. Certainly, with regard to TK, as Kuruk has noted, ‘it may not be prudent to focus exclusively on IPRs’<sup>1034</sup>. In light of this, the social norms of the ‘community’ might be of relevance. Furthermore, as noted below, in relation to Irish traditional music there is a crucial concern in relation to defining the parameters of the ‘community’ or ‘network’ itself.

#### **4.3.4. Exploring the TK/TCEs Debate in relation to Irish Traditional Music**

The specific issues raised in the third chapter are discussed below with respect to TK.

##### *4.3.4.1. Originality*

Advocates arguing in favour of a TK-based solution are often concerned about the ‘misappropriation’ of traditional knowledge, including cultural expressions, by forces outside the community such as multi-national corporations<sup>1035</sup>. For TK advocates, one of the key stumbling blocks to protecting TCEs using conventional IP law, is the fact that TCEs often lack the ‘originality’ required for copyright protection to arise. In other words, due to the ‘originality’ requirement, TCEs are often regarded as being ‘public domain’, which means that the particular TK community cannot protect the use of TCEs using copyright.

Under the provisional WIPO policy, once TCEs are protected, regardless of their originality, the TK community would be able to restrict use of the TCEs. Hence, within a TK community the cultural materials would be used by members in accordance with the usual rules of the community. However, in the case of a person from outside the community, unless he or she received ‘prior, informed consent’ from the community, the

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<sup>1033</sup> *Ibid.*, 94.

<sup>1034</sup> Kuruk, *op. cit.*, 446.

<sup>1035</sup> See generally S. Munzer and K. Raustalia, ‘The Uneasy Case for Intellectual Property Rights in Traditional Knowledge,’ *Cardozo Arts & Entertainment Law Journal* 27 (2009), 37.

outsider would not be allowed to make use of the TCEs. Furthermore, WIPO envisages a policy of ‘benefit sharing’ regarding any income generated by use of the TCEs. This income would be administered and shared by community representatives, for the benefit of the community as a whole.

Regarding ITM, there are some parallels with TK communities, particular regarding misappropriation and the use of IP laws to block access. For instance, TK/TCEs are sometimes discussed in terms of a different idea of creativity and ‘originality’ i.e. one based on continuous development by the community. This may suit Irish traditional music to some extent. The way that TCEs are potentially protected by TK rules, even in the absence of ‘originality’ and/or an ‘author’, is potentially applicable to older tunes in Irish traditional music. However, the ‘originality’ present in ITM also takes account of particular forms of individual, original authorship which may be difficult to accommodate within TK/TCE. The lack of a consensus on the definitions of TK/TCEs adds to the uncertainty in this area.

However, there are two crucial points to make. Firstly, many older Irish traditional tunes are in the public domain. As noted below in relation to licensing, it may be the case that Irish traditional musicians are more in favour of these tunes remaining in the public domain rather than these tunes being brought under TK rules and thereafter being administered by some sort of representative body. This will be discussed in relation to the empirical research in chapter five. Secondly, as noted above, the new compositions and arrangements in Irish traditional music probably are sufficiently original to satisfy the requirements of copyright. Therefore, these compositions and arrangements are protected by copyright. In fact, it may be the case that Irish traditional musicians are in favour of less property rights in relation to ITM, rather than additional sui generis rights. This possibility will be discussed further in the fifth chapter.

#### 4.3.4.2. *Authorship and Joint Authorship – The Possibility of Collective Authorship Rights?*

TK envisages the fact that communities have the ability to not only produce knowledge, but to benefit, both economically and culturally, from this production<sup>1036</sup>. In noting this, Sunder has noted that it may be necessary to depart from a more individualist view of intellectual property<sup>1037</sup>. This would certainly be in line with the processes of Irish traditional music.

Regarding the authorship rights of individuals, TK tends to promote the collective rights of the community. The solutions provided by TK/TCE usually require the community to ‘steward’ the TCEs on behalf of the entire community, in line with the customs of the community. As noted above, this may negate individual authorship to some extent. Regarding collective authorship, under a TK/TCE-based solution, it is possible that the collective authorship/transmission process could continue successfully. TK/TCE definitions (as they stand) could potentially take account of the continuous creativity in the Irish traditional music network.

Although the collective forms of creation and transmission are important within ITM, there is little doubt that individual authorship has a role to play as well. Considering the difficulties in defining both what ‘TCEs’ are, and more importantly, defining who can create them, it is not easy to establish how exactly TK could provide a solution in the context of ITM. It may be the case that the informal social rules of ITM take account of collective authorship, as well as individual authorship. Defining ITM under strict TK rules could cause more negative effects than positive effects because TK appears to necessitate utilizing a formal intellectual property framework. In other words, as noted above, the use of TK could lead to more restrictive rules on the use of traditional tunes, as opposed to the current, relatively open system. It appears that there is a delicate balance in ITM between collective and individual authorship. It is not clear how a TK-solution could allow for both of these forms of creativity, particularly in light of the fact that the network of musicians is not located in one ‘community’ but is a ‘network’ that includes many dispersed individuals around the world.

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<sup>1036</sup> Chander and Sunder, *op. cit.*, 1338.

<sup>1037</sup> Sunder, *op. cit.*, 123.

#### *5.2.4.3. Infringement*

Regarding ‘infringement’ within a TK/TCE-based scenario, the potential for providing a solution appears to be mixed. It is more difficult to see how infringement issues could arise between Irish traditional musicians, once the ‘community’ is given the charge of regulating the TCEs. However, it is envisaged under a TK-based solution, that i.e. the community/network representatives could take action when someone outside the community/network tries to use a substantial part of a TCE. Once again this brings serious definitional problems regarding ‘what are TCEs’ e.g. would the TCEs only apply to public domain works, or also to new compositions? Furthermore, as noted above, there are problems regarding defining who exactly should be the representatives of the ‘community’ and defining how the rights of individuals can work within a TK system.

#### *4.2.4.4. Moral Rights*

Regarding moral rights, it is possible to imagine the moral rights in ITM being accommodated under a TK/TCE-solution to some extent. Attribution can be noted for each use of a TCE. However, given the fluidity between individual, joint and network-based authorship in ITM, in many cases, the application of TCE rules of attribution might be highly impractical, and perhaps even impossible in some cases. Furthermore, TK rules tend to privilege the rights of the collective over the rights of the individual, which could have negative consequences for an individual’s moral rights. For instance, it is unlikely that a collective right of integrity would be able to accommodate a number of individual rights of integrity. Furthermore, like other aspects of TK, moral rights difficulties could arise regarding the definition of community. In other words, without a clear definition of the ‘community’ in the Irish context, it is impossible to articulate whether TCE moral rights also apply to those ‘outside’ the community.

#### *4.3.4.5. Licensing*

The solutions provided by TK/TCE usually require the community to steward the TCEs. This role can potentially include the ability to license the works to outsiders if this is in line with the customs of the community. However, as noted above, there are difficulties with the potential enforcement of TK/TCEs, which are linked with the difficulties of

defining who exactly should represent the community. In this regard, while a TK solution may have relevance to tribal groups and ‘indigenous peoples’, it is very difficult to see how TK can work in the context of ITM. The principal reason for this is related to the definition of the community. While ITM itself shares many of the same characteristics of TCEs, the relevant ‘community’ in ITM is not a centred, geographically located community. As noted above, the ‘community’ in Irish traditional music is really a diffuse network of musicians that exists not only in Ireland, but in large and increasing numbers in the UK, USA, Australia, Canada and other countries. Hence, there is a major problem regarding defining the ‘community’. Furthermore, it is unlikely there would be any consensus over who should administer the benefits of a TK policy. Previous attempts by umbrella organisations such as CCÉ to undertake a similar role have proven controversial<sup>1038</sup>.

Nonetheless, under TK, the licensing and prior-informed consent provisions are potentially relevant to composers who release their tunes into the social network. Therefore, TK attempts to deal with the problems of misappropriation of TCEs. In relation to licensing, a new formal, sui generis system could be accommodated within a TK/TCE solution. Within this solution, a licensing system would be operated by the representatives of the community/network. This could include licensing to third parties for the benefit of the community (benefit sharing). However, as noted above, this potentially could give a minority of community representatives a large and disproportionate amount of power.

### **4.3.5 Summary**

On the face of it, ITM appears to possess many of the characteristics that would make it amenable to TK-based solution. Irish traditional musical works would appear to fit within the working definition of TCEs. However, as noted above there are reasons for doubting the potential effectiveness of TK in the Irish traditional context. For one thing, the TK model is usually applied with regard to indigenous communities within

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<sup>1038</sup> A. McCann, *Beyond the Commons: The Expansion of the Irish Music Rights Organisation, The Elimination of Uncertainty, and the Politics of Enclosure* (Ph. D thesis, University of Limerick, 2002), 2 (hereafter referred to as McCann, ‘Commons’); accessible at <http://www.beyondthecommons.com>

developing countries. There are some aspects of this model which seem to jar with a modern setting such as the UK and Ireland.

Perhaps the major stumbling block regarding the possibility of utilizing TK licensing is the fact that there are major difficulties in identifying the ‘community’. In addition it is difficult to define the community representatives who would be charged with ‘protecting’ the TCEs for the benefit of the community. Arguably, the concept of TK is therefore not readily applicable to the multi-faceted boundaries of Irish traditional music. Additionally, there are also huge difficulties in defining TK and TCEs. WIPO has not come up with a fully satisfactory definition of these concepts as yet, and it currently uses a ‘working’ definition. Furthermore, there is a tendency for TK to reject the idea of individual ownership, which arguably would not entirely suit Irish traditional music. The ideas of individual authorship and moral rights have some credence in Irish traditional circles. At present TK cannot provide a clear solution to the conflicts between copyright and Irish traditional music. Arguably, there are simply too many problems with both the theoretical definitions, as well as the practical implications, of TK for it to be useful. Furthermore, the beneficial aspects that can be achieved under a TK-solution could arguably be achieved with a similar degree of efficiency, in an Irish traditional context, through the expansion of the ‘public domain’. In addition, the use of ‘alternative licences’ might be more suitable than the use of TK in the context of Irish traditional music, as discussed in 4.4.

## **4.4. Alternative Licensing**

As noted below, in recent years, alternative licences have proven to be increasingly popular for licensing software and cultural works. These licences are potentially useful in an Irish traditional context, as discussed below.

### **4.4.1. How Alternative Licensing Could Provide a Solution**

With regard to ITM, the use of an alternative licensing system is potentially useful in a number of ways. Alternative licences are potentially useful with respect to individual and joint authorship, infringement, moral rights and of licensing.

Firstly, in relation to individual and authorship, the idea of utilizing an alternative licensing system is potentially attractive in an Irish traditional context because the use of an alternative licence gives the composer or arranger the choice and control over the terms of the licence. As stated above, it has been noted that some authors may not wish to avail of all of the rights associated with copyright<sup>1039</sup>. Secondly, it could be feasible via the use of CC licences to facilitate the traditional collective process of authorship. Thirdly, a number of issues regarding infringement can be accommodated within the licence terms. Fourthly, it is arguable that moral rights, and particularly attribution, can be accommodated within this system. Fifthly, and most obviously, the use of an alternative licensing system provides an alternative to the copyright licensing system, which is arguably not suited to the practices of Irish traditional music. As such, this potential solution appears to provide a number of useful options for dealing with the potential conflicts between ITM and copyright.

#### **4.4.2. Alternative Licensing Systems – A Modern Solution to Conflicts between Copyright Law and Creativity?**

As noted below, alternative licensing systems aim to provide a modern solution to the conflicts between copyright and creativity.

##### *4.4.2.1. Copyright ‘Under Fire’*

It was noted in section 4.3 that critical scholarship on intellectual property, which initially focused on the maintenance and expansion of the public domain, in some ways led to the philosophical development of ‘traditional knowledge’. However, it has been stated that concern over the effects of intellectual property is not limited to indigenous or traditional knowledge<sup>1040</sup>. With regard to modern, developed nations such as the USA, Canada and many European countries, challenges to conventional intellectual property have also arisen, particularly with regard to copyright in ‘the information age’. In fact, it

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<sup>1039</sup> Rosloff, *op. cit.*, 68.

<sup>1040</sup> Hunter, ‘Culture War,’ *op. cit.*



can be said that the potential conflicts between ‘property’ and ‘culture’ are no less pronounced in ‘modern’ societies<sup>1041</sup>.

In this vein, Goss has stated that copyright is ‘under fire’<sup>1042</sup>. In fact, Goss is not the only legal scholar to use militaristic terms to describe the current debate over copyright. It has even been described as ‘culture war’ by one commentator<sup>1043</sup>. Zimmerman has stated that it is possible that attempts to vigorously apply copyright to the digital world may ‘exact too high a price’ on privacy, ‘internet use rights’, as well as fair dealing or fair use considerations<sup>1044</sup>. Furthermore, it is arguable that within the political and economic sphere, there is little consensus on how broad copyright protection should be. Some commentators have argued in favour of retaining the wide range of rights available to authors by relying on labour principles or economic incentive arguments<sup>1045</sup>. Other commentators have argued that there is no economic justification for e.g. the derivative right<sup>1046</sup>. In this vein, it has been argued the scope of these rights should be narrowed<sup>1047</sup>. Zimmerman has argued that any alternative system of compensation for authors must endeavour to serve the purposes of copyright while not restricting the workings of the online environment<sup>1048</sup>. It is beyond the remit of this thesis to examine these issues in great detail. However, with regard to the central questions of this thesis, it is vital to examine the relevant alternative licensing systems, and in particular, the ‘Creative Commons’ (CC) brand of licence.

#### 4.4.4.2. What are Alternative Licensing Systems?

Alternative licensing systems work alongside, rather than replace, copyright. As Kelty has stated, alternative licensing systems ‘rely on the existence of intellectual property to create and maintain the “commons”... even as they occupy a position of challenge or

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<sup>1041</sup> *Ibid.*

<sup>1042</sup> A. Goss, ‘Codifying a Commons: Copyright, Copyleft and the Creative Commons Project,’ *Chicago-Kent Law Review* 82 (2) (2007), 963, 963 (hereafter referred to as Goss).

<sup>1043</sup> Hunter, ‘Culture War,’ *op. cit.*

<sup>1044</sup> D. Zimmerman, ‘Authorship without Ownership: Reconsidering Incentives in a Digital Age.’ *DePaul Law Review* 52 (2003), 1121, 1168 (hereafter referred to as Zimmerman).

<sup>1045</sup> Hughes, *op. cit.*, 287-290 and 344.

<sup>1046</sup> D. Bambauer, ‘Faulty Math: The Economics of Legalising the Grey Album,’ *University of Alabama Law Review* 59 (2007), 345.

<sup>1047</sup> N. Voegtli, ‘Rethinking Derivative Rights,’ *Brooklyn Law Review* 63 (1997), 1213.

<sup>1048</sup> Zimmerman, *op. cit.*, 1168.

resistance to the dominant forms of intellectual property'<sup>1049</sup>. Hence, alternative licensing systems do not attempt to break away completely from intellectual property, but instead they attempt to bend IP so that it can be tailored to suit individual creators. For instance, the 'copyleft' software licence, the GNU General Public Licence<sup>1050</sup>, allowed the creators of computer software in the 1990s to release the software with an 'open-source' code. Alternative licences, such as the 'open-source' software licences, have proven very successful within specific fields. For instance, the Unix/Linux operating system operates with an open-source code. This means that it can be continually upgraded and improved by independent programmers worldwide, without any need for licence fees. The success of Unix/Linux in its various forms, such as the most popular current brand, 'Ubuntu'<sup>1051</sup>, has meant a multinational corporation such as Microsoft, which sells the patented and 'closed source' 'Windows' operating system, has been forced to take notice<sup>1052</sup>.

Following on from the success of the open-source software licence, the CC licence was created in order to provide an alternative licence for a wide range of creative works including music, film and literature. CC is a non-profit organisation. It is based in the USA and it is founded upon the principle of using licences to enable creators to claim 'some rights reserved', rather than 'all rights reserved'<sup>1053</sup>. CC is the most widely known and widely used type of alternative licence for artistic works<sup>1054</sup>.

#### *4.4.2.3. Can Alternative Licences work in conjunction with the Public Domain and/or Traditional Knowledge?*

Further to this, it is interesting that there is still a relatively distinct gap between the academic scholarship on IP and TK, and the scholarship concerned with IP and the forms of culture prevalent in 'modern' societies, such as computer software communities and the CC initiative. Arguably, some TK provisions are in line with the way alternative licences work, as Gibson has noted<sup>1055</sup>. One thing is apparent; the two potential solutions

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<sup>1049</sup> C. Kelty, 'Punt to Culture,' *Anthropological Quarterly* 77(3) (2004), 547.

<sup>1050</sup> <http://www.gnu.org/philosophy/free-sw.html>

<sup>1051</sup> More information is accessible at; <http://www.ubuntu.com/>

<sup>1052</sup> See [www.microsoft.com/opensource](http://www.microsoft.com/opensource)

<sup>1053</sup> See [www.creativecommons.org](http://www.creativecommons.org)

<sup>1054</sup> There are others such as the Artistic Licence 2.0 - see <http://www.opensource.org/licenses/artistic-license-2.0.php>). The 'CC' licence is the most high profile however.

<sup>1055</sup> J. Gibson, 'Open Access, Open Source and Free Software: Is There a Copy Left?' in F. MacMillan

are not entirely mutually exclusive. Recently some commentators have noted that the problems faced by members of traditional or indigenous communities and the problems faced by members of online game and software programming communities are similar in the sense that both types of group make objections to intellectual property law<sup>1056</sup>. These objections are usually founded upon the basis that intellectual property law fails to adequately allow processes of cultural innovation within a certain environment, such as software development or traditional music creativity. For instance, the open source software movement started out with the belief that ‘closed code’ software is unduly restrictive and that it put too much power in the hands of corporate entities. A similar criticism can be made of intellectual property in relation to appropriation of traditional knowledge. The common criticism emanating from both types of group is that IP does not provide an adequate solution to a particular set of cultural circumstances.

As noted in 4.3, there are inevitable regime-collisions that occur in this area. Arguably, these collisions do not necessarily have to result in a violent smash, but instead have the potential to produce a ‘soft landing’. It is possible that alternative licences could be tailored to suit particular communities, such as the hybrid schemes envisaged by MacMillan. This convergence between a ‘modern’ type of community and a ‘traditional’ type of community is interesting and arguably it is to be welcomed. While this potential convergence has yet to be fully embraced by WIPO and some TK commentators, there is potential for it to provide solutions in some, but not all circumstances. Furthermore, Burri-Nenova has stated that not only do alternative licences have the potential to aid the TK communities, but there is some evidence that this is already taking place in Brazil<sup>1057</sup>. Interestingly, Dommann has stated that in some ways, the attempt of TK, to make ‘authorless’ and ‘timeless’ cultural expressions protectable as part of IP, means that ‘tradition is modernised now’<sup>1058</sup>. This may be true to some extent, since some TK measures aim at formalising the relationship between TK/TCE and IP, whereas traditionally IP law was largely ignored by TK communities. In the same vein,

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(ed.), *New Directions in Copyright 4* (Cheltenham: Edward Elgar, 2007), 127, 133-134.

<sup>1056</sup> See generally Fitzpatrick and Joyce, *op. cit.* See also K. Bowery, ‘Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices,’ *Macquarie Law Journal* 6 (2006), 65, 89-95.

<sup>1057</sup> M. Burri-Nenova, ‘The Long Tail of the Rainbow Serpent: New Technologies and the Protection and Promotion of Traditional Cultural Expressions’ in C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008), 205, 230-232.

<sup>1058</sup> Dommann, *op. cit.*, 16.

alternative licences such as open source and the CC licences described below also formalise the relationship between creative works and IP law. As noted above, the use of alternative licences has advantages over the use of TK rules in the more ‘modern’ environment of Irish traditional music.

#### **4.4.3. Creative Commons Licences – Terms, Definitions and Discussion**

‘Creative Commons’ licences are discussed in detail below. It is also necessary to discuss the potential effect of these licences on the traditional copyright licensing system with regard to music.

##### *4.4.3.1. Creative Commons Licence Terms*

Under a CC licence, copyright in the work typically remains with the author, but the author can choose one of the CC licences in order to regulate further uses of the work by others. As Farchy has stated, under a CC licence, ‘the authorisation granted is not absolute’<sup>1059</sup>. In addition, the existence of a licence ‘does not shelter users from legal pursuit in the instance of copyright violation when a work is used outside the provisions of the contract’<sup>1060</sup>.

CC licences are provided in three forms – firstly in legal language, secondly in clear, readable language and thirdly, as ‘machine-readable’ content. There are a number of core aspects of a CC licence. These are the terms covering attribution, non-commercial reproduction and derivative use. In addition, the licences entrench the idea of ‘share-alike’<sup>1061</sup>. This ‘share-alike’ idea envisages that derivative works can be created using the licensed work, as long as these derivative works are themselves licensed under the same CC terms. The terms of the licence are for the author to choose. For instance, it is possible for an author to retain only the attribution right, and to allow even commercial

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<sup>1059</sup> J. Farchy, ‘Are Free Licences Suitable for Cultural Works?’, *European Intellectual Property Review* 31(5) (2009), 255, 257 (hereafter referred to as Farchy).

<sup>1060</sup> *Ibid.*, 257.

<sup>1061</sup> <http://creativecommons.org/about/licenses>. See also Rosloff, *op. cit.*, 67.

uses of the work<sup>1062</sup>. In contrast, it is possible to restrict all rights except non-commercial distribution.

It is interesting to note that the CC organisation defines ‘commercial use’ as use that is exercised ‘in any manner that is primarily intended for, or directed toward, commercial advantage or private monetary compensation’<sup>1063</sup>. As Rosloff has said, these licences have the ‘laudable’ goal of facilitating the free use of works for non-commercial purposes, while allowing authors to retain economic rights<sup>1064</sup>. Nonetheless, it is arguable that the boundary between ‘commercial’ and ‘non-commercial’ may not always be clear<sup>1065</sup>.

As noted above, the work is protected by the underlying copyright law, but it is licensed contractually. Goss has remarked that since CC licences depend on contract law for enforcement, this presents challenges for courts<sup>1066</sup>. Thus far, a number of courts, including those in the US and the Netherlands, have accepted such alternate licences as being valid<sup>1067</sup>. Indeed, as Maracke has pointed out, CC has become a global project. This has necessitated the development of ‘local’ versions of CC licences in order to ensure compatibility with domestic law<sup>1068</sup>. In particular, Maracke has noted that creating local licences in states like France, where there is strong protection for the ‘inalienable’ moral right of integrity, will prove to be a challenge for lawyers<sup>1069</sup>. Furthermore, Farchy has noted that the terms of collective licensing vary from territory to territory. For instance, in France, authors generally do not ‘fragment’ their body of work for ‘independent management of the parts’<sup>1070</sup>. This effectively reduces the flexibility that an author has regarding licensing. For instance, even if the author wishes to release one work under a CC licence, he or she may be ‘thwarted by his or her status

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<sup>1062</sup> <http://creativecommons.org/about/licenses/meet-the-licenses>

<sup>1063</sup> <http://creativecommons.org/licenses/by-nc/3.0/legalcode> - section 4.b.

<sup>1064</sup> Rosloff, *op. cit.*, 69.

<sup>1065</sup> *Ibid.*, noting that the Copyright Office could provide guidance notes regarding ‘non-commercial’ uses.

<sup>1066</sup> Goss, *op. cit.*, 964.

<sup>1067</sup> See e.g. US case of *Jacobsen v Katser* 535 F. 3d 1373 Fd. Cir. (2008) and the Dutch case of *Curry v Audax* Case no. 334492 / KG 06-176 SR (March, 2006).

<sup>1068</sup> C. Maracke, ‘Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges,’ *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 1(1) (2010), 4, 6-7.

<sup>1069</sup> *Ibid.*, 7. See also C. Rigamonti, ‘Deconstructing Moral Rights,’ *Harvard International Law Journal* 47(2) (2006), 353.

<sup>1070</sup> Farchy, *op. cit.*, 257.

as a member of a collecting society'<sup>1071</sup>. In line with this, in one Spanish case it was noted that the existence of a CC licence could have ramifications for collective licensing<sup>1072</sup>.

It must be stated that the CC strategy is unlikely to contribute many creative works to the 'public domain', because the majority of CC licensed works still require attribution and/or prevent commercial uses of the work<sup>1073</sup>. Hence, the CC licence is most beneficial to creators who want to distribute their works, but do not want all of the rights associated with copyright. Indeed, some commentators have pointed out that CC could encourage a system of 'free access' to cultural works, or, as Dusollier has referred to it, a 'gift culture', that would ultimately be more favourable to users than creators<sup>1074</sup>. In other words, some commentators are worried that the success of CC could de-value cultural works. In contrast, Goss has noted that Elkin-Koren is more concerned that CC will lead to greater 'commodification' of culture by enabling small-scale creators, many of whom largely ignored IP in the past, to claim some rights over their works<sup>1075</sup>. It is undoubtedly still early days in the CC project. In addition, it is clear that the debate over the success of CC is still ongoing. Some commentators argue that the goals of CC are not sufficiently defined. As a result it is difficult to gauge how successful the project has really been. Nonetheless, the CC initiative has certainly proven to be an interesting experiment.

#### 4.4.3.2. *The Possible Effects of Creative Commons Licences on the Music Industry*

While it might be possible to envisage 'authorship without ownership', Zimmerman has stated that an author will always require an editor to some degree, as well as a certain amount of promotion to help them find an audience<sup>1076</sup>. Gibson has noted that the costs of creating and distributing works have been reduced drastically with the advent of

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<sup>1071</sup> *Ibid.*, 257.

<sup>1072</sup> *Sociedad General de Autores y Editores ("SGAE") v Ricardo Andrés Utrera Fernández* (February, 2006); accessible at [http://www.internautas.org/archivos/sentencia\\_metropoli.pdf](http://www.internautas.org/archivos/sentencia_metropoli.pdf) - A summary of the case is accessible at <http://creativecommons.org/weblog/entry/5830>

<sup>1073</sup> N. Elkin-Koren, 'Exploring Creative Commons: A Sceptical View of a Worthy Pursuit' in in L. Guibault and P. B. Hugenholtz, *The Future of the Public Domain* (Alphen aan den Rijn: Kluwer, 2006), 325, 337-339 (hereafter referred to as Elkin-Koren).

<sup>1074</sup> S. Dusollier, 'The Master's Tools v. The Master's House: Creative Commons v. Copyright,' *Columbia Journal of Law and Arts* 29 (2006), 271.

<sup>1075</sup> Goss, *op. cit.*, 995. See also Elkin-Koren, *op. cit.*, 334-339.

<sup>1076</sup> Zimmerman, *op. cit.*, 1169.

‘digital architecture’<sup>1077</sup>. However, the costs of promoting a new artist or author remain high. As a result, it has been said that publishing houses are increasingly focusing their energies on marketing strategies, particularly for already established artists<sup>1078</sup>. Some of the greatest successes in terms of online market impact have been projects undertaken by established artists such as Prince<sup>1079</sup>, Radiohead<sup>1080</sup> and Nine Inch Nails<sup>1081</sup>. All of these artists had previously benefited from the traditional industry promotion process i.e. each artist previously had the support of a large record company. Nonetheless, some online experiments such as ‘Wikipedia’<sup>1082</sup> have proven to be largely successful at encouraging the provision of ‘free’ knowledge<sup>1083</sup>. In line with this, CC could prove to be the most suitable system for authors who are undertaking collaborative creativity. This is particularly relevant to authors working under a system of regulative social norms, or for non-professionals who wish to make their work known, or to professionals who seek to establish a network of users in order to sell certain other products and services<sup>1084</sup>.

Furthermore, Carroll has noted that the role of traditional ‘intermediaries’ like publishing houses and record companies must now be compared to the role of new ‘intermediaries’ such as internet service providers, search engines and online ‘blogging’ communities. In this analysis, CC licences ‘act as a disintermediating force because they enable end-to-end transactions’ in works that are subject to copyright<sup>1085</sup>. Older intermediaries are not necessarily required for this process to succeed. The newer intermediaries, such as ISPs, merely supply the digital architecture that allows this process to occur<sup>1086</sup>. Carroll also identified new commercial companies that accommodate CC licences into their business model, such as ‘Magnatune’,<sup>1087</sup> as examples of new intermediaries<sup>1088</sup>. Carroll went on to state that CC licences also ‘act as a reintermediating force by enabling new

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<sup>1077</sup> J. Gibson, ‘Once and Future Copyright,’ *Notre Dame Law Review* 81 (2005), 167, 212-17.

<sup>1078</sup> K-N Peifer, ‘The Return of the Commons – Copyright History as a Helpful Source?’, *International Review of Intellectual Property and Competition Law* 39(6) (2008), 679, 679.

<sup>1079</sup> See <http://www.webbyawards.com/press/press-release.php?id=118>

<sup>1080</sup> See [http://news.cnet.com/8301-10784\\_3-9812275-7.html](http://news.cnet.com/8301-10784_3-9812275-7.html)

<sup>1081</sup> See [http://news.cnet.com/8301-10784\\_3-9894376-7.html](http://news.cnet.com/8301-10784_3-9894376-7.html)

<sup>1082</sup> See [www.wikipedia.org](http://www.wikipedia.org)

<sup>1083</sup> While not all the knowledge within Wikipedia is referenced, the organisation continues to improve its system and recently James Boyle has noted that it remains a success considering the cost of any ‘closed’ encyclopaedia.

<sup>1084</sup> Farchy, *op. cit.*, 261-63.

<sup>1085</sup> M. Carroll, ‘Creative Commons and the New Intermediaries,’ *Michigan State Law Review* 1 (2006), 45-65, 47 (hereafter referred to as Carroll, ‘Creative Commons’).

<sup>1086</sup> *Ibid.*, 45.

<sup>1087</sup> <http://magnatune.com/>

<sup>1088</sup> Carroll, ‘Creative Commons,’ *op. cit.*, 52-53.

services to be performed, and new online communities to form'<sup>1089</sup>. In this vein, Carroll noted that in a situation where one party wishes to negotiate with another party in relation to receiving a commercial licence for a work that has been designated for non-commercial uses under a CC licence, it is possible that older intermediaries such as the collecting societies, or a new emergent intermediary, may play a role as 'broker' of the negotiations<sup>1090</sup>. However, it is arguable that this situation would in some ways be a backward step, since it may return authors to a system of individual-based licensing. From an economic perspective, this is generally said to be 'inefficient'. However, Carroll may have a point. It may occur in the future that an author issues his or her works for non-commercial use under a CC licence, while joining a collecting society in order to efficiently regulate 'commercial' uses of the work. For the purposes of clarity, this potential solution may be necessary because once a musician has signed a membership agreement with e.g. PRS or IMRO, the musician cannot not freely license uses of the work that have been assigned to the collecting society. To do so would be a violation of the membership agreement. In the future a hybrid solution, such as the one envisaged by Carroll, may be feasible in this regard. If this possibility comes to fruition, it may also prove to be useful in an Irish traditional music context, as noted below.

#### **4.4.4. Creative Commons Licences and Irish traditional music**

CC licences are discussed below in relation to the issues raised in the third chapter regarding ITM.

##### *4.4.4.1. Originality*

As noted above, a composer or performer-arranger of Irish traditional works is only entitled to protection to the extent that the works are original. Once the author has created an original work, he or she is free to license this work as he or she sees fit. For the purposes of originality, all that is necessary to say here is that an author would only have the right to license original copyright works. In this way, the CC solution is reliant on the standard requirements of copyright.

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<sup>1089</sup> *Ibid.*, 47.

<sup>1090</sup> *Ibid.*, 48-49.



#### *4.4.4.2. Individual and Joint Authorship*

Regarding individual and joint authorship, it is important to reiterate that an alternative licence would give a choice of terms to the author(s) i.e. the composer(s) or performer-arranger(s). For instance, if a composer wants his tune to be freely used by other musicians, he or she is free to stipulate this in the terms of the licence. Similarly, the same composer has the freedom to explicitly retain certain rights, such as rights over commercial uses. The composer can also stipulate that he or she wishes to be attributed for each use of the work. In this way, the use of an alternative licence system has the potential to formalise the way Irish traditional musicians share tunes.

Therefore, the use of such a licence would allow the composer or performer-arranger to explicitly provide the terms by which later authors can use or change the works. This may be of crucial importance in the context of Irish traditional music. However, it may also have the effect of entrenching the primacy of individual property rights, and thus, formalising the system of ‘free’ sharing that occurs within the network of Irish traditional musicians. Whereas previously many musicians may have effectively ignored copyright, the use of an alternative licence presupposes both knowledge and use of intellectual property. Furthermore, in practice, a licence, such as a CC licence, typically involves the use of a term that allows ‘free, non-commercial use’<sup>1091</sup>. Since many Irish traditional musicians do in fact release recordings on LP, CD or mp3, these ‘uses’ may fall into the ‘commercial use’ bracket. Although, the average Irish traditional CD sells only a tiny fraction of what a commercially available ‘pop’ album sells, the traditional recording would arguably still be ‘commercially available’. As a result, recording an arrangement of a CC-licensed work may breach this term. These issues are discussed further in relation to the empirical research in the fifth chapter.

Regarding collective authorship, it is arguable that the use of alternative licences could prove to be useful. Under an alternative licence-based solution, the collective authorship process could continue successfully, as long as each musician does not violate the licence terms. For instance, the use of these licences could take account of the

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<sup>1091</sup> The most popular CC licence is issued for ‘non-commercial use’ with the author retaining attribution rights – see <http://creativecommons.org/weblog/entry/4216>.

continuous creativity in the Irish traditional music network by allowing each musician along the line to add creativity and then pass it on. An analogy could be drawn with the way software programmers use open-source software licensing<sup>1092</sup>. However, as noted above, this would require each person in the chain to comply with the licence terms. This may not be feasible within the Irish traditional music network since there are a large number of musicians who have little knowledge of alternative licences.

#### 4.4.4.3. *Infringement*

The strength of alternative licence systems, such as CC, is that these systems allow each artist to compose a new tune, or add creativity to an existing tune in the form of a new copyright arrangement, and then license this openly to other musicians. As noted below regarding authorship and infringement, this would arguably clarify the law regarding the subsequent use of compositions. In relation to infringement, the alternative licence system may provide some solutions. Contained within an alternative licensing scenario, infringement could become a matter of breach of licence terms i.e. breach of contract. This may not solve all problems, however, as the rights of third party users, or the rights upon revocation of licence, could vary in practice. Litigation regarding alternative licences is still in its infancy. Thus, at present it is arguable that the use of an alternative licence could lead to uncertainty. Therefore, while these licences may have a positive impact, it is impossible to say with any certainty whether these licences may complicate matters of ‘infringement’. In chapter five the social rules of Irish traditional music are discussed in detail. It is arguable that these informal rules provide a more suitable solution than the formal licensing solution offered by CC.

#### 4.4.4.4. *Moral Rights*

Regarding moral rights, the alternative licence system makes clear provisions for the protection of the moral right of attribution. Attribution is one of the cornerstones of the CC licences, so there is plenty of scope for this moral right to be accommodated. Even in the absence of financial rewards, it is arguable that authors generally seek attribution.

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<sup>1092</sup> See generally Jones and Cameron, *op. cit.*

It is clear that ‘attribution matters’ to authors<sup>1093</sup>. The success of the attribution CC licences shows that attribution is vitally important to the majority of authors, even where they do not want all the rights associated with copyright. For instance, Tushnet has stated that within American society there is a general acceptance of the requirement of attribution<sup>1094</sup>. This is reflected in the fact that the requirement of attribution is a basic term of the standard licences available under CC. This further gives weight to the argument that recognition is a key incentive for encouraging creativity<sup>1095</sup>, even in the absence of a monetary incentive. Furthermore, the terms by which the ‘integrity’ of the work could be altered could be expressed in the licence i.e. an author can describe which uses of the work are permitted. The CC licences are therefore potentially useful in the context of Irish traditional music. However, as noted above, it is necessary in chapter five to discuss whether these licences threaten to formalise an informal, traditional system of sharing music in an Irish traditional context.

#### 4.4.4.5. Licensing

It has been stated that ‘American jurists like James Madison have known for centuries’ that a ‘leaky’ copyright system works best<sup>1096</sup>. As noted above, it is arguable that CC licences effectively ‘fill in the gaps’ left by the copyright system. This in turn may lead to the entrenching of individual property rights in an area where previously individuals generally ignored copyright. For instance, in cases where there is no financial incentive to enforce the rights, which is often the case with respect to Irish traditional music, this could be described as the ‘leaky’ copyright system working well. However, if alternative licences are utilized by composers and performer-arrangers, it may end up being more restrictive as these potential leaks would be ‘filled in’. In other words, the informal, non-enforcement of copyright, which under Irish traditional music may be governed by social rules, may become a formal, enforceable system of alternative licensing.

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<sup>1093</sup> C. Fisk, ‘Credit Where it’s Due: The Law and Norms of Attribution,’ *Georgetown Law Review* 95 (2006), 49, 56-60 (hereafter referred to as Fisk).

<sup>1094</sup> R. Tushnet, ‘Naming Rights: Attribution and Law,’ *Utah Law Review* 2007(3) (2007), 789, 791.

<sup>1095</sup> Fisk, *op. cit.*, 56-60.

<sup>1096</sup> Vaidhyathan, *op. cit.*, 184, referring to the opinion of James Madison.

In addition, many authors appear to not favour allowing the appropriation and commercial exploitation of their works<sup>1097</sup>. For instance, with regard to CC licences, while many authors allow non-commercial uses of their works, authors tend to retain rights over commercial uses. This may reflect a fear regarding exploitation of the work by others. This fear also appears to be prevalent within the magician and comedian networks<sup>1098</sup>. Ultimately, the great ‘open-source’ licensing success stories have been examples of communally created software. Arguably, the type of ‘peer production’ envisaged by Benkler<sup>1099</sup> is more easily envisaged with regard to software than to cultural works<sup>1100</sup>. It may also be significant that software is a recorded product, and therefore it is susceptible to ‘wrapping up’ in licence terms, whereas music is essentially intangible and perhaps less susceptible to a pure licensing solution.

However, as noted in 3.2 above, ITM is a network-based system of creativity. Therefore, it is arguable that CC licences have a greater potential for success in this area, in comparison with more individual-centric forms of cultural creativity. Arguably, the ‘free’ software movement thrived because it was based upon a kind of community ethos, whereby individuals identified with each other on a reciprocal basis. As Farchy noted, the presence of social norms has been crucial to the success of community-based creativity within the ‘free’ software movement<sup>1101</sup>. Westkamp has stated that it is possible to observe that open-source networks are ‘built upon an ethos of sharing’<sup>1102</sup>. Nonetheless, finding ways to regulate this ethos within the law is not a straightforward matter<sup>1103</sup>. Furthermore, a similar range of social norms may be applicable in the context of ITM. This is evaluated over the course of the fifth chapter. Nevertheless, the ‘tech-savvy’ community of software developers is arguably much more homogenous than the Irish traditional network. In the ITM community, it is possible that knowledge of ‘free’ licences such as CC not as prevalent. This possibility is assessed in the fifth chapter in relation to the empirical research.

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<sup>1097</sup> J. Litman, ‘Lawful Personal Use,’ *Texas Law Review* 85 (2007), 1871, 1912-14.

<sup>1098</sup> See Loshin, *op. cit.*, 125-34 and Oliar and Sprigman, *op. cit.*, 1865-1866.

<sup>1099</sup> Benkler, *op. cit.*, 59-91.

<sup>1100</sup> Farchy, *op. cit.*, 259.

<sup>1101</sup> *Ibid.*, 261.

<sup>1102</sup> G. Westkamp, ‘The Limits of Open Source: Lawful User Rights, Exhaustion and Co-Existence with Copyright Law,’ *Intellectual Property Quarterly* (2008), 14, 57.

<sup>1103</sup> *Ibid.*

As Elkin-Koren has stated, unlike the ‘open source’ software movement the CC alliance of creators and users does not have a ‘unifying principle’<sup>1104</sup>. For instance, the open source community has relatively limited goals and it appeals to a relatively limited amount of creators and users – people who have a relatively high level of IT knowledge. CC on the other hand appeals to a variety of different creators and users, covering a diverse range of art forms. Furthermore, it provides a wide range of possible CC licences based on a ‘pick-and-choose’ basis. Therefore, the ‘Creative Commons movement’ appears to be far more heterogeneous than the relatively homogenous ‘open source’ software movement. Thus, the apparent ‘certainty’ provided by CC licences may be called into question<sup>1105</sup>.

One further potential disadvantage to the CC system of licensing is the problem of increased complexity<sup>1106</sup>. The number of different licences that are potentially available may make it difficult for users to comprehend which uses are acceptable and legal. This problem may be compounded due to the fact that CC licences have the potential to increase transaction costs<sup>1107</sup>. However, as noted above, CC has attempted to create a database of works/licences to make this task easier for users. Nonetheless, the organisation has stated that may still be an element of doubt regarding licence terms that may require a potential user to contact the copyright holder directly<sup>1108</sup>. This may be burdensome for users. Thus, the CC licence is a ‘worthy’ attempt at creating a universal alternative licence for creative works. Nonetheless, it is not without its own difficulties. It is arguable that it does not in itself provide a solution to the problem of discovering whether such a work is licensed and available. However, Carroll has countered this suggestion by arguing that efforts are underway to facilitate the online search for works that use CC licences<sup>1109</sup>. He has remarked that Yahoo<sup>1110</sup> and Google<sup>1111</sup> have already

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<sup>1104</sup> Elkin-Koren, *op. cit.*, 326.

<sup>1105</sup> *Ibid.*

<sup>1106</sup> Rosloff, *op. cit.*, 342. See also J. Liu, ‘Regulatory Copyright,’ *North Carolina Law Review* 83(1) (2004), 87, 87-94.

<sup>1107</sup> Farchy, *op. cit.*, 257.

<sup>1108</sup> <http://search.creativecommons.org/>

<sup>1109</sup> Carroll, ‘Creative Commons,’ *op. cit.*, 455.

<sup>1110</sup> See Yahoo! Search for Creative Commons; accessible at <http://search.yahoo.com/cc>

<sup>1111</sup> See Google Advanced Search; accessible at [http://google.com/advanced\\_search](http://google.com/advanced_search) - A relevant search can be made under ‘usage rights’.

provided a specific CC search as part of their search engines. In addition, CC provides its own search engine, as well as links to the other CC search engines<sup>1112</sup>.

Therefore, while CC has the potential to make the use and adaptation of creative works both legal and formal, it also has the potential to undermine access to culture. It largely depends on the way creators use the licences. Thus far, many artists are using the CC licences in a ‘savvy’ manner<sup>1113</sup>. This has undoubtedly increased the diversity of markets for culture. The use of ‘open source’ and CC works has perhaps led to a situation where there is a wider range of works and products available, on a broad cost-spectrum. Hence, while the picture of an emerging ‘gift culture’ might not be strictly accurate, it is true that certain types of creative works may become available at both a low-end price as well as a high-end price<sup>1114</sup>. Further to this, Farchy has argued that licences such as CC, may end up making artists more ‘vulnerable’ in the sense that the commercial value of their works may be reduced if the works have been issued under a CC licence<sup>1115</sup>. This criticism has been made of ‘free’ licences, due to the fact that these licences are perceived to be ‘weakening’ the institution of copyright<sup>1116</sup>. However, as noted above, it is also arguable that CC licences entrench property rights, filling in the gaps of the ‘leaky’ system. Nonetheless, in the arts field, the CC licence has proven increasingly popular. Successful bands such as Nine-Inch-Nails<sup>1117</sup> and Radiohead<sup>1118</sup> have made material available under a ‘non-commercial use’ CC license, enabling re-mixers and video-makers to re-interpret their tracks/videos without the need for a licence.

#### 4.4.5. Summary

The use of alternative licences could prove to be useful in the context of ITM. Arguably, these licences can take account of the diversity of views in ITM because each composer/arranger would be able to make the choice of terms to use. Alternative licences

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<sup>1112</sup> See <http://search.creativecommons.org>

<sup>1113</sup> Goss, *op. cit.*, 995-6.

<sup>1114</sup> See for instance the Radiohead ‘In Rainbows’ example (noted at [http://news.cnet.com/8301-10784\\_3-9812275-7.html](http://news.cnet.com/8301-10784_3-9812275-7.html)) where the basic album was available for next to nothing, but the deluxe box-set, which included many extra tracks, was much more expensive.

<sup>1115</sup> Farchy, *op. cit.*, 258.

<sup>1116</sup> *Ibid.*, 259.

<sup>1117</sup> See <http://creativecommons.org/weblog/entry/8095>

<sup>1118</sup> See <http://creativecommons.org/tag/radiohead>

also potentially provide a solution to the problem of overprotection with respect to Irish traditional compositions and arrangements. Therefore, these licences can be used to facilitate the ‘relational’ authorship and transmission process. As noted above, with the use of an alternative licence, each musician in a chain could openly license a work for use by other musicians. This could potentially allow the unique forms of creativity present in ITM to continue. However, while the use of alternative licences may lead to more certainty regarding licence terms, it also might ‘fill in the gaps’ of the ‘leaky’ copyright system. If it is the case that historically Irish traditional musicians paid little attention to copyright, and effectively allowed their works to be shared freely, then encouraging the use of a new formal system of licensing may have unforeseen negative effects. In this sense, it may reduce the flexibility of ‘free sharing’ within the network. Furthermore, alternative licences may be of limited practical use if there is a general lack of knowledge of the licences within the network of musicians. On the other hand, if a way can be found to ‘engage the public in a discussion on the values that should be expressed in the intellectual property system’ a discussion of alternative licences, and CC in particular, could form part of this engagement<sup>1119</sup>. The potential of alternative licences as a solution is discussed with respect to the empirical research in the fifth chapter.

## 4.5. Conclusion

Over the course of this chapter, four different potential solutions have been examined. In light of the above, the following points can be made.

Firstly, it is possible that an expanded fair dealing exception, framed around the idea of ‘transformative’ or ‘creative’ dealing, might be provide a partial solution with respect to infringement and licensing issues, while also taking moral rights into account. However, as noted above it is preferable that a broad ‘fair use’ type exception be enacted since this remains the most flexible model and the one which is arguably best placed to deal with different cases that could arise in the Irish traditional context. While the enactment of such a provision might prove controversial in light of the ‘three-step test’ and the

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<sup>1119</sup> C. Waelde, ‘The priorities, the values, the public,’ in C. Waelde and H. MacQueen (eds.), *Intellectual Property – The Many Faces of the Public Domain* (Cheltenham: Edward Elgar, 2007), 226, 244-245.

comments of the ECJ in *Infopaq*, it remains a possibility that reform could take place. However, such reform is dependent upon political will.

Secondly, it is possible that expanding the ‘public domain’ could provide solutions in relation to reducing the term of copyright via legislation and also by but this option is not feasible without redrafting the terms of international copyright law including TRIPS and aspects of the Berne Convention. As such, this option is arguably an impractical one.

Thirdly, on the surface the TK model appears to be applicable in an Irish traditional context, but when considered at a deeper level it is strongly arguable that the model is ill-suited to the Irish traditional context. There are serious difficulties with regard to defining the idea of ‘community’ or ‘network’ in the Irish traditional context, and there are also problems with deciding who should be the ‘representatives’ of the network. As such, this solution is not really workable in this context.

Fourthly, the use of alternative licences does provide some potential solutions. Alternative licences give the composer or performer-arranger the flexibility to license works under a variety of terms e.g. for any non-commercial use, with or without attribution. However, this solutions is dependent upon knowledge of these systems within the Irish traditional network, something that cannot be assumed. Furthermore, such a licensing solution may effectively formalise what has historically been an informal system of ‘free sharing’ within a network.

In light of the above, the fifth chapter analyses the results of the empirical research in order to assess the conflicts discussed in the third chapter, and the potential solutions examined in the fourth chapter.



# Chapter 5 – Evaluating the Empirical Research Findings

## Introduction

The specific issues of potential conflict between copyright and Irish traditional music were outlined over the course of the third chapter. Over the course of the fourth chapter, the various potential solutions were analysed in detail. It was found that no one solution appeared to provide a complete solution. In addition, all of the solutions rely on intellectual property law in some way or another. For the purposes of this thesis, it was decided that the best way to gauge the attitudes of Irish traditional musicians was to undertake original empirical research.

This chapter analyses the results of a qualitative case study carried out between November 2009 and September 2010. As noted above, this qualitative case study used two concurrent methods of data-gathering. As well as a number of targeted face-to-face interviews and emailed interviews, an online survey was undertaken. The reason for the use of two methods was to try to access a broad range of data. This was thought to be best achieved by using two methods rather than one single method of data-gathering.

As previously stated, this thesis began with the aim evaluating six things:

- The coherence of the notion of ‘originality’ under copyright in relation to the practices of Irish traditional music
- The suitability of the notion of ‘authorship’ of musical works under copyright in relation to the network of Irish traditional musicians
- The suitability of the notion of ‘joint authorship’ of musical works under copyright in relation to the collective forms of authorship present in the network of Irish traditional musicians

- The potential for the doctrine of infringement to interfere with the practices of Irish traditional musicians
- The applicability of moral rights to the practices of Irish traditional musicians
- The suitability of the copyright licensing model to the practices of the Irish traditional music network.

Over the course of this chapter, each of these potential ‘conflict’ areas, and the various solutions, are analysed in relation to the empirical research findings.

## **5.1. Overview of the Empirical Research**

As previously noted, there were two separate streams of data gathering used in this study. This sub-section outlines the ‘make-up’ of the respondents in both streams.

### **5.1.1. Survey**

The online survey, it was completed anonymously by 34 participants from a wide range of ages - 18-30 (7 respondents, 20.5%), 31-45 (8 respondents 23.5%), 46-60 (13 respondents, 38.4%), 60+ (6 respondents, 17.6%). Interestingly, the respondents were spread out fairly evenly across all the age groups, with the greatest proportion (approx 38.4%) coming in the category of 46-60. In addition, 25 respondents (73.5%) currently live in the UK and 9 respondents (26.5%) currently live in Ireland. This result is unsurprising given the large number of traditional musicians living within the UK, and in the further context of the overall population in the UK which is far greater than the population of Ireland.

In line with the categories of ‘composer’ and ‘performer-arranger’ presented in this thesis, the respondents were asked to describe themselves as musicians. Respondents had the option of picking both available options.

- 33 (approx 97%) described themselves as ‘performer-arrangers’ i.e. ‘you generally arrange tunes in your own style, or a regional style, and perform them on your instrument, adding variations, improvisation etc.’
- 6 (approx 17.6%) described themselves as ‘composers’ i.e. ‘you have composed a tune that other Irish traditional musicians have played’

Respondents were given the opportunity of giving more detail here regarding their own descriptions and to comment on the above categories. The responses were as follows:

- *“I have also recorded CDs (and appeared on them), publications and created original YouTube uploads, all with my own copyright material.”*
- *“I have composed tunes, I would have no problem with others using these freely without charge. i have had the benefit of the work of many past anonymous composers. this for me is part of the tradition.”*
- *“I play tunes which are passed on (some of them newly composed)... I don't arrange them!!”*
- *“Neither, at my level I just play other people's tunes.”*
- *“Only two tunes that I have heard played by other people”* (regarding being described as a ‘composer’)

Thus, it can be seen that only 1 respondent (approx 3%) was a ‘composer’, but not a ‘performer-arranger’, while 5 out of 33 ‘performer-arrangers’ also described themselves as a ‘composer’. This fits with the general perception in ITM that the majority of musicians are ‘performer-arrangers’ rather than ‘composers’, though it is clear that a minority class themselves in both categories.

### **5.1.2. The Interview Participants**

A broad range of interview participants were consulted. Half of the interview participants were semi-professional musicians, or had previously spent time working as a full time professional musician, while the other half included part-time and skilled amateur musicians who play music mostly at pub sessions. 6 of the interview participants were composers as well as being performer-arrangers, whereas the 4 other

interview participants were solely performer-arrangers. For the purposes of anonymity, names or identifying characteristics are not used in the assessment of the results below. The exception to this is Dr. Reg Hall, who expressly requested that his name be attributed to any relevant quotes or paraphrases used.

Over the course of the sub-sections 5.2-10, the data from the survey respondents and the interview participants is assessed. and over the course of 5.3-10, the specific issues relevant to chapters 4 and 5 are dealt with. The data from both streams is dealt with as is relevant to each issue.

## **5.2. Assessing the General Attitude of Survey Respondents and Interview Participants to Copyright Law**

Before the specific detailed issues were discussed in the survey and interviews, it was necessary to establish some basis issues in relation to the attitude of the respondents and participants towards copyright in the context of ITM. The following results arose from the preliminary questions of the survey and interviews.

### **5.2.1. Assessing the General Understanding of Copyright Law**

The assessment of the general understanding of copyright is undertaken below in relation to both streams of data.

#### *5.2.1.1. Survey Respondents*

The survey respondents were asked a multiple choice question regarding their knowledge of copyright law. The results were as follows:

- 11 respondents stated 'I have little or no knowledge of copyright law in this area' (approx 32.3%)

- 19 respondents stated ‘I have some understanding of copyright law in this area’ (approx 55.9%)
- 4 respondents stated ‘I have a strong understanding of copyright law in this area’ (approx 11.8%)

Thus, it can be concluded that few musicians were confident enough to say that they had a strong understanding of copyright. This may be evidence for the assertion that some Irish traditional musicians tend to pay scant attention to the provisions of copyright law. Nonetheless, 23 respondents (approx 67.7%) stated that they were aware that copyright arises automatically upon fixation, whereas 11 respondents (approx 32.3%) were not aware of this. Therefore, a two-thirds majority of the respondents were aware of this basic principle. Since this is arguably a relatively high rate of understanding, it is possible to conclude that basic awareness of copyright is strong within the network of musicians. However, it is also possible that those who have no interest or knowledge of copyright would simply not go out of their way to complete a survey on the subject. For this reason, it is important not to overstate this claim. Certainly, it can be said that there are musicians who are interested in copyright issues, and these musicians tend to have at least a basic knowledge of copyright.

#### *5.2.1.2. Interview Respondents*

Among the interview participants, understanding of copyright was decidedly mixed. All the participants had at least a basic comprehension of the important issues, particularly in relation to composition and composers’ rights. The musicians who had released commercial recordings or were involved in the professional side of recording tended to be much more aware of their rights in relation to arrangements as well. Their responses are discussed below in relation to specific issues in 5.3-9. Other musicians who were in the ‘non-professional’ category tended to know less and have less interest in copyright. Nonetheless, even within this group musicians were generally aware that copyright did exist. Furthermore, all of the interview participants felt that to some degree it brought potential complications in the Irish traditional context. For example, one participant stated:

*“It hasn’t affected me personally. I know people that... who are concerned about this – copyright - because they may be more involved than I am, or have created more, and I just wonder about it. I think once you start invoking the law and your rights then you’ve also got a whole set of other duties as well. It’s an ugly area – it can be.”*

Generally, even the interview participants who knew little about copyright were wary of applying the full implications of copyright in a traditional context. Nonetheless, even amongst the skilled amateur musicians, no participant was completely unaware or completely against the idea of copyright. As detailed below in 5.3-5.10, most interviewees tended to take a nuanced view of copyright.

## **5.2.2. The General Attitudes towards the Effect of Copyright in the Context of Irish Traditional Music**

Having first established the basic level of understanding of copyright, the survey and the interviews next sought to gauge the general attitude to the effect of copyright in relation to traditional music. The responses are outlined below.

### *5.2.2.1 Survey*

The respondents were given a multiple choice question on the current effect of copyright law on Irish traditional music:

- 3 stated ‘Positive’ (approx 8.8%)
- 11 stated ‘Negative’ (approx 32.3%)
- 17 stated ‘It has little or no effect’ (approx 50%)
- 3 stated ‘Other’ and gave an explanation in the comment box (approx 8.8%). All of the respondents who ticked the ‘other’ box stated that they ‘did not know’.

Furthermore, the survey respondents were asked to give a reason for this answer:

- *“As a primarily aural tradition, it isn't always possible to trace the composer of a particular tune, never mind how old they are and whether the mandatory 75 years has*

*past. ITM is also a community thing, so tunes are shared. I am simply flattered when people play tunes that I've written, but I'd be a bit cross if someone made profit from my work without any acknowledgement of my ownership."*

*- "As a very occasional performer in small venues if copyright law is 'over egged' and persued with absolute intent to extract payment it would finish off small folk clubs and dances/ceilidhs. If on the other hand I was making my living from music I would expect to 'pay my dues' - like tax it goes with the territory."*

*- "As I said above, the boundaries between composition, arrangement and variation are very fluid in this music."*

*- "court cases on the matter seem to be few"*

*- "Discourags open source style sharing of tunes."*

*- "Don't know enough about the subject to form a VALID opinion"*

*- "Have been cases of people trying to claim copyright for trad tunes with no known composer."*

*- "I am not aware of it as an issue although American scumbags occasionally try to make it so."*

*- "I believe copyright law is a mess and many large commercial organisations (record companies) are attempting to clamp down on this to preserve their own ways of doing business rather than addressing the growth of international, digital media exchange. For example, seeking to restrict access to YouTube because of some copyright violations - regardless of also killing the real creativity that's on there (but for which the big companies don't get any income!)"*

*- "i don't know anything about the coyright law"*

*- "I don't really know but I haven't heard of any real negative effects yet. But then again I am just a musician - and have never made a recording."*

*- "I don't that the current law restricts the activities of traditional musicians but can help muisicians make a living so on the whole is positive."*

*- "I have repeatedly heard where the copyright folk have tried to collect money for sessions in a pub. This is idiotic. I remember one instance where the publican was actually considering not allowing live sessions because they'd put the fear in him. Worse, the folks at the centre of Performing Rights in the UK seem to be pretty damned ignorant on this stance, and that ignorance is dangerous, harmful to live music and the health of these social activities, public music, sessions and dances. Unions too, in their scrabbling for money, they too can cause damage and have a negative effect on such things."*

- *"I write negative only because I have yet to encounter a positive effect. For example, the added stress to publicans and musicians playing in live sessions, the recent shambolic debate between Tony MacMahon and Alec Finn on the radio, the seeling of rights to traditional music by Comhaltas to imro in Ireland. Its directly linked to commercialism. I often wonder what the likes of John Doherty would think of this: <http://www.youtube.com/watch?v=TiehZZ2tXKg&feature=Playlist&p=5DA19B02B5F89051&index=0&playnext=1>"*
- *"In Ireland, despite the recent lamentable efforts of CCE, it is generally neutral veering to positive. Less certain about the UK situation."*
- *"In sessions no one is worried about copyright and any musicians of worth in public performance play their own versions/arrangements."*
- *"It creates an atmosphere of trepidation and doubt."*
- *"It does not have a significant impact on non-recording, amateur musicians."*
- *"It has not impinged on my musical life in any way."*
- *"It is fundamentally opposed to the tradition of freely exchanging musical ideas which is the basis of so much of Irish music."*
- *"It is largely ignored in performance, and most composers give recording permission freely."*
- *"It isn't really enforced, to my knowledge"*
- *"It isn't, as far as I know, very rigidly enforced, and some bands will get round the restrictions by simply not naming tunes in a set which have known composers, And in any case collection of ryalyies ahs been , historically, haphazard."*
- *"Most people don't even consider it."*
- *"nobody cares, including the writers of tunes. We're talking peanuts anyway"*
- *"Not aware of any current effect (although I do recall the case of Lunasa/Donald Shaw and 'The Wedding Reel' and believe it was not resolved through the courts). A PRS rep came to a session I was at once and asked for the names & composers of the tunes we were playing. It exposed how little some of us really knew!"*
- *"People generally ignore the issue"*
- *"prevents people sharing new tunes as much, especially those that are written in books (not O'Neills, but more recent) that other people can't access"*
- *"put an Irishman on a spit and you'll find another to turn it"*
- *"the passing on of the music is ill served by overly legalistic interpretations of "ownership"."*



- *“The volume of sales for most "amateur" recordings makes it not worth making an issue of. Bigger sellers/crossover are aware and comply with copyright”*
- *“This music has been hijacked for commercial purposes, like so many other things, and our music is more important than simply as a commodity”*
- *“traditional music is informal. We could get by without cd's etc”*
- *“Why?”*

Therefore, in the survey a slim majority of musicians stated that copyright is having little or no practical effect with regard to ITM. Furthermore, from the above statements, it is clear that many respondents feel that copyright is generally ignored or simply not enforced at all in relation to ITM. Some respondents echoed these remarks by pointing out that there is relatively little money at stake in the context of ITM. However, there was a broad minority of views that thought otherwise, and some interesting points made on the issue. In relation to the musicians who stated that it was having a ‘negative’ effect, it is possible to observe a fear of copyright that might actually outweigh the potential effect that copyright actually currently has in relation to ITM. In addition, with respect to copyright enforcement and licensing it is possible to observe a sense of general antipathy towards organisations such as the PRS, IMRO, MCPS and CCE. In this regard, very few musicians stated that copyright is having a positive effect on ITM. This may indicate that copyright does not provide an incentive for creativity in ITM. In fact, it appears that copyright plays only a minimal role. Nonetheless, the incentive or reward arguments cannot be entirely ruled out due to the fact that a couple of respondents did refer to the need to ‘make a living’ via copyright etc. In other words, even if many musicians ignore copyright entirely, there are a minority of musicians that do choose to avail of it to some extent.

#### *5.2.2.2. Interviews*

Regarding the interviews, similar conclusions to the above can be reached. The majority of the interviewees did not consider copyright to be currently having a large effect, positive or negative, with respect to ITM. To the extent that it had any negative effect, the interview participants were of the general opinion that the social rules of ITM ought to be paramount. There was a general sense that the network of musicians tended to regulate itself. One musician described it as ‘open-source’, perhaps confirming the

analogy drawn in chapter four with respect to the network of open source software designers. Another participant noted that individual rights did not take account of the importance of the social network:

*“The whole is much more important than any individual.”*

Furthermore, a preliminary point that can be gleaned from both streams of data is the fact that there is a great diversity of views on the subject of copyright amongst musicians. As discussed further below, this may give credence to the view that there can be no one solution to the potential issues of conflict between the practices of musicians and the law of copyright. Musicians appear to be not entirely pro-copyright, but neither are they entirely anti-copyright. However, there are some views from respondents arguing that copyright ought to play a more limited role in the regulation of ITM. In this context, for many musicians, it appears that it is felt that copyright should remain firmly in the background, though it should not be abandoned entirely. Specific issues of copyright in this context are analysed in detail below in relation to the six thesis question areas in sub-sections 5.3-10.

## **5.3. Originality and Irish Traditional Music**

A number of originality-related questions formed part of the survey and these issues were also discussed in the interviews. With respect to the survey, the responses to the question on authorship of composition and arrangements were highly relevant to originality. These questions and responses are given below in full as part of 5.4 regarding authorship. In this sub-section, quotes from these responses are used in relation to originality. With respect to the interviews, the relevant responses are given below.

### **5.3.1. Survey**

A number of the responses to the survey questions regarding composition and arrangement, as detailed in 5.4 below, also had direct relevance in relation to originality. For instance, it was stated:

*“Much of so-called composition is built on phrases that existed before the new mix of a 'composition'.”*

In line with this, the following two remarks are also on point:

*“The composer is drawing on a tradition without which he would not be able to compose.”*

*“Yes. Its true that the tradition is evolving, but it was never and should never be about money. You cannot compose a traditional tune without conforming to the articulations that make the tune sound traditional (i.e. sound right). These articulations have been laid since the 17th century, what gives us the right to demand money for them now?”*

Regarding arrangement, it was noted by one respondent that copyright should only protect the exact arrangement i.e. its ‘originality’:

*“...copyright should surely only apply to an exact arrangement. If another musician uses the same tune differently arranged copyright should not apply, unless it is a recently composed tune where the composer wants to exercise their copyright rights”*

However, it is difficult to draw the line between arrangements that are ‘exact’ and non-exact. Furthermore, the standard of originality is low. One respondent in particular appeared to recognise this by stating:

*“Just change a note and its your own arrangement.”*

In light of the above remarks, it is arguable that the conclusions drawn in 3.2 above are correct. Composers and performer-arrangers appear to be drawing upon established stylistic conventions in composing and arranging new tunes, but in many cases they also appear to be adding sufficient originality for the subsequent tunes to be classed as copyright works.

### 5.3.2. Interviews

Regarding originality and composition, one participant composer noted that before composing a tune he felt a sense of trepidation regarding whether he could create an original-sounding tune in the context of Irish traditional music:

*“How am I going to do something that’s original rather than something I’ve heard, or that’s in the back of my mind... You tend to think ‘oh this is just something I’ve heard’.”*

Eventually the composer was satisfied that he had something to build upon:

*“Something must have come into my mind... Just a phrase... and I just thought ‘I can work on that...’”*

Following the composition, the composer tested the ‘originality’ of the tune by playing it for other musicians without telling them its origins:

*“And then you think ‘oh well this won’t be original’. So you ask some people and you don’t tell them ‘what do you think of this tune I’ve just composed?’ because they go ‘oh, well that sounds like...’ – you just wait for their reaction. Don’t tell them it’s anything - that it’s just a tune that’s going through your head. And then if they say ‘well that’s nice – I have never heard that before’ then you think ‘well I’m up to something here...’ So... that’s it. And it’s a nice thing to I might have a tune that somebody might play. It’s a thrill.”*

Regarding originality, another interview participant noted that the performer-arranger was of primary importance for ITM. The participant noted that fans of Irish ITM would rarely, if ever, buy a CD to just hear a particular composition. The primary reason for buying a CD was to hear the playing style of a particular musician. Thus, as stated in the third chapter, the originality of arrangement-performance is valued highly in ITM.

Regarding arrangements of tunes, another participant stated:

*“You’ve got the original way of playing the tune. And then somebody might do something... put their own stamp on it. They may change it a bit, but they generally don’t change it completely so that it’s completely and utterly unrecognisable from the original, but if they do their own little bits, that’s good too... Generally it’s good, it’s nice to have, because... other people then learning the tune could say ‘I’d like to learn that way of playing it, and the original way as well’.”*

Another participant stated that adding something new and original to a tune is something that is highly valued in the context of ITM. Referring to a particularly original arrangement, the musician commented:

*“He put in a different key and he played it quite differently and it was beautiful and it was lovely and it was something new that he had created there.”*

It must be noted that none of the interview participants referred to the standard of originality under copyright as being an important consideration in this context. This may show that the idea of ‘originality’ in the context of ITM is a particular concept. However, although there may be a particular, and somewhat distinct, concept of originality at play in this context, there may be substantial overlap with the copyright conception of originality. In this regard, the originality present in this context may satisfy the low originality standard of copyright. This is in line with the argument made in 3.1 that Irish traditional composers and performer-arrangers are capable of creating original compositions and arrangements for the purpose of copyright.

## **5.4. Authorship and Irish Traditional Music**

As noted in 3.2, authorship in Irish traditional music encompasses both individual acts of composition and arrangement. Both of these forms of authorship are discussed below.

### 5.4.1. Survey

The survey responses in this area are assessed below in relation to general attitudes of respondents towards older tunes and newer tuners, and with specific attention paid to new compositions and arrangements.

#### *5.4.1.1. Examining Attitudes towards Older Tunes, New Compositions and New Arrangements*

Regarding 'authorship' of composition and arrangements, survey respondents were asked to describe the kind of tunes they play. This was a multiple choice question, but respondents had freedom to pick more than one option. The results were as follows:

- 32 respondents stated that they generally play 'Older tunes i.e. tunes that have no identifiable composer' (approx 94.1%)
- 29 respondents stated that they generally play 'Newer tunes i.e. tunes that have been composed more recently by identifiable composers' (approx 85.3%)
- 21 respondents stated that they generally play 'Newer arrangements of tunes i.e. older tunes that have become associated with certain musicians due to their arrangement of the tune' (approx 61.8%)
- 7 respondents stated that they generally play tunes in the category of 'other', a category which they then went on to explain in a comment box (approx 20.6%)

Regarding the category of 'other', the respondents were required to explain their responses:

- *"A bit of a mixture, I generally learn and play what's played at the sessions I go to."*
- *"All of above"*
- *"I am not always aware that a tune I am playing is the work of a modern composer or musician."*
- *"I will often arrange 'sets' of tunes and the way they are played i.e. varying speed, key, and emphasis e.g. turning a jig into a reel or vice versa"*
- *"If I like it I play it. I wouldn't classify them as old/new/arranged"*

- *“Including tunes from other traditions than those recognized as being under the heading Irish...”*
- *“Tunes such as Carolan's tune collections which are out of copyright (although my understanding is the publication I get them from is effectively a copyright).”*

The vast majority (approx 94.1%) of respondents play older tunes, though a high percentage (approx 85.1%) play newer tunes. A lesser, but substantial amount (approx 61.8%) stated that they play new arrangements of older tunes. Clearly, there is a high degree of similarity between the levels of playing older tunes and newer compositions. This shows the significance of new compositions to the ‘living tradition’. There was a slightly lower representation of arrangements, but nonetheless it is clear that almost two-thirds of the respondents agreed that the provision of new arrangements contributes significantly to the ‘living tradition’.

#### *5.4.1.2. Authorship of Compositions*

Survey respondents were also asked about whether they think that the composer’s permission should be sought before recording the composition. Respondents only had the choice of one option:

- 16 stated ‘Generally, the musician should ask permission from the composer’ (approx 47%)
- 4 stated ‘It depends on what the composer wants’ (approx 11.8%)
- 10 stated ‘Tunes tend to be shared freely and informally, therefore asking permission is not necessary’ (approx 29.4%)
- 0 stated ‘I do not consider this to be an important issue’
- 4 stated ‘Other’ and gave an explanation in the comment box (approx 11.8%)

Regarding the category of ‘other’, the respondents were required to explain their responses:

- *“If it's being recorded as music for sale written or otherwise”*
- *“If they are known it would be courteous, however, I don't believe it is essential. Contemporary composers have themselves benefited from many past composers. It is*

*arrogant for them to expect to have their cake and eat it. Given the small nature of the Irish music scene the royalties are small, in general those who receive the greatest benefit are the collectors and their associates such as Comhaltas.”*

- *“MCPS License for 1000 or less copies removes need for permission, although we always do seek composer approval.”*
- *“Only if he heard or read the original version.”*

Interestingly, almost half of the respondents 9 (approx 47%) felt that the composer should be asked permission for use. In addition, a further 11.8% stated that it depends on what composer wants. Interestingly, this leaves open the option that the composer may not necessarily want to enforce his or her copyright in this way. Nonetheless, almost two-thirds of the respondents felt strongly that the composer should have this right, while 29.4% believed that it was not necessary to seek permission in the context of ITM.

A follow on question was asked of survey respondents regarding whether they think that there should be an exception for ITM with regard to the composer’s right to prevent use of his or her composition i.e. whether the author’s permission should not be required. The question was asked in the following way:

*“Under copyright law, permission and licence would usually have to be granted in order for a composer's tune to be recorded by another musician. Do you think that there should be an exception to this for Irish traditional music?”*

This question was mandatory therefore all 34 respondents gave an answer. 11 respondents merely said ‘no’ and 6 respondents merely said ‘yes’. The other respondents’ responses were as follows:

- *“Copyright is not appropriate in trad!!”*
- *“Depends what the composer wants, and also if they are still alive, or their compositions have become part of the general Irish repertoire.”*
- *“I think composer should be asked by the recording musician for permission to play his/her tune. He/she may be delighted that a recording artist wishes to record it. If unable to contact composer - then I think the Copyright Law is a good thing.”*



- *“Might I suggest that you cannot have a composer for Irish traditional music; if it is traditional there is no composer; it might be IN THE STYLE OF traditional music.”*
- *“No - if a profit is made or intended using someone else's property, the composer should have the right to claim their cut.”*
- *“No, however given recent moves to change the rules governing copyright this could result in written and recorded music could be shackled by cost and litigation.”*
- *“No. I think that the composer is entitled to the mechanical royalty that is collected through the licence.”*
- *“no. I would not be aware of a situation yet where permission was refused -- one would hear anecdotes about such stuff-- but then again there are so many good tunes out there and I have yet to hear a newly composed (recent) tune that would be a MUST HAVE on a recording. If permission was refused it would reflect more on the ego of the composer and there's always another tune to put in instead.”*
- *“Possibly.”*
- *“Provisions if not exceptions, yes, that knowledge of a composer in a traditional setting is not always obvious or easily chased up. Most of our tunes are small packages, and the best fit nicely into the tradition, rather than being obviously composed. Much of so-called composition is built on phrases that existed before the new mix of a 'composition'. I do not think there should be heavy penalties attached to an infringement of this. The possible demands should be no more than is fair ~ credit being given ~ and if there was income possible, however small, that being offered, but not penalties, except for costs if such are accrued in pursuit of fair representation of the composer's rights.”*
- *“This is an involved question but I don't see that we need to make a special case here. The law protects composers as it does in other genres. If the artist knows for sure that the composer desires no contact regarding his work then licence applications can be easily fudged to sidestep the issue.”*
- *“Wasn't aware this was the case, thought it only applied to America. But yes.”*
- *“Why should composers of Irish traditional music tunes be treated differently to any other composers?”*
- *“Yes, as described above - they are benefiting from the tradition far more than they are contributing.”*
- *“Yes, unless stated otherwise by the composer...”*
- *“Yes. It's true that the tradition is evolving, but it was never and should never be about money. You cannot compose a traditional tune without conforming to the*

*articulations that make the tune sound traditional (i.e. sound right). These articulations have been laid since the 17th century, what gives us the right to demand money for them now?”*

- *“Yes. The composer is drawing on a tradition without which he would not be able to compose.”*

Overall, two strong points can be said to emerge from the above responses. Firstly, the respondents were clearly of the opinion that composers ‘benefit from the tradition’. In this regard, composition is seen as involving the elements of ‘conjoining’ and ‘re-combination’ discussed in 3.1, 3.2 and 3.4 above. Secondly, the respondents generally did not seem to think that Irish traditional composers should be treated any differently under copyright than any other type of composer. Most respondents appeared to state strongly that the composer should have this right. Nonetheless, it is possible to observe tension arising between these two points of view – between the debt individual composers are said to owe to the ‘tradition’ and the individual rights that composers obtain upon fixation of the work.

#### *5.4.1.3. Authorship of Arrangements*

In relation to arrangements, the same question was asked regarding permission from the performer-arranger. The responses were as follows:

- 5 stated ‘Generally, the musician should ask permission from previous performer-arrangers’ (approx 14.7%)
  - 6 stated ‘It depends on what previous performer-arrangers want’ (approx 17.6%)
  - 16 stated ‘Different versions of tunes are generally shared freely and informally, therefore asking permission is not necessary’ (approx 47%)
  - 3 stated ‘I do not consider this to be an important issue (approx 8.8%)
  - 4 stated ‘Other’ and gave an explanation in the comment box, as discussed below (approx 11.8%)
- 
- *“An acknowledgement should surely be given.”*
  - *“NO! Balderdash...”*
  - *“NO. NO. NO.”*

- *“Some recognition would be appropriate and if arrangement was substantially reproduced, then payment of royalties.”*

It is clear from the above that a strong majority (47%) did not favour a requirement that permission ought to be sought from arrangers. A follow on question was asked of survey respondents regarding whether they think that there should be an exception for ITM with to the arranger’s right to prevent use of his or her composition. This question was mandatory. 10 respondents merely said ‘no’ and 8 merely said ‘yes’. The other responses were as follows:

- *“All traditional music should be excepted, not just Irish.”*
- *“copyright should surely only apply to an exact arrangement. If another musician uses the same tune differently arranged copyright should not apply, unless it is a recently composed tune where the composer wants to exercise their copyright rights.”*
- *“I would refer you to my previous answer regarding recordings etc.”*
- *“It would be interesting to know who is going to be monitoring all this.”*
- *“Just change a note and its your own arrangement. I would rarely play a tune the same way twice.”*
- *“No - again, the work has been done by someone else and it is only polite and in keeping with ITM etiquette to acknowledge this.”*
- *“No as long as the original creative input was rewarded”*
- *“No. I think this type of whole sale copying of one player's variation or arrangement is relatively uncommon in ITM.”*
- *“No. See answer to 9a.”*
- *“Should it be different to other music?”*
- *“The idea that traditional arrangements - more properly settings - should be the subject of copyright is ludicrous”*
- *“This is problematic, as the boundary between arranging, playing a variation, and just having it come out that way that time is totally fluid. Determining whether one is playing someone elses arrangement is artificial.”*
- *“Yes, and all traditional music. It's not big band jazz arrangements, and if we're not talking about compositions or songs with lyrics, it's idiotic to copyright where someone puts a roll or a chord. Worse, we should consider where they first picked that up, since 'tradition' is about something passed down through the ages and generations. Who first*

*put that roll in that bar of "The Kesh Jig"? And chords, give me a break. Chords like naturally, and if they don't they jar. There might be some consideration if we were talking about a written score for a dozen instruments and arranged as if for a concert band or small orchestra. That's not 'tradition' in the sense we're talking about here, is it? I don't think so."*

- *"Yes. (and not only for ITM. I don't think an arranger should have any rights to tunes he didn't write)"*

- *"Yes. (there may be a problem with this survey i just wrote out a long answer to this already)You cannot compose a traditional tune without conforming to the articulations that make the tune sound traditional (i.e. sound right). These articulations have been developed since the 17th century, they belong to our ancestors as much as the belong to us. What gives us the right to demand money for it now?"*

- *"yes. however minute the change the new arrangement is just that-new. Slavish imitation of previous arrangement of a trad tune should however acknowledge the debt owed of existing recording or performance. MCPS lawyers earn enough as it is I suspect."*

It is arguably clear from the above responses that there is less recognition that performer-arrangers should have strong rights over their arrangements than there is in relation to composers. With respect to authorship of arrangements, the following conclusions can be drawn. As discussed further below in relation to licensing, the network of musicians generally appears to self-regulate. Hence, the responses seem to acknowledge that copyright in arrangements appears to be rarely enforced against fellow Irish traditional musicians. Arguably, there is a belief observable in many of the above comments that the enforcement of arrangement copyrights could do more harm than good to the way music is created and performed within the network of musicians. Musicians seemed to fear that the enforcement of strong rights could push the music away from a traditional character towards a more individualistic one.

#### **5.4.2. Interviews**

All of the interview participants recognised the fact that composers should have some rights over their compositions. For example, Dr. Reg Hall stated that composers should

have their rights under copyright and that it would be morally wrong for a commercial performer to take someone else's composition and claim it as their own. Another participant commented:

*“All the safeguards should be in place legally you know, but how we regard that amongst ourselves within the tradition – we can do that informally. So I think... give the protection as the default position and we'll see how we handle it.”*

Regarding the recognition of authorship of arrangements by individual performer-arrangers, one participant noted that he thought recognition of authorship in this way was positive. He stated:

*“I don't want to bring it up in case we end up fighting over it, as while there is no money to be made, I think it is an insult to the fantastic musicians who have made the old tunes their own (virtually re-composing them) for them to be unable to at least feel that they had official recognition for their art.”*

Another participant stated that performer-arrangers are very much recognised as authors in the context of ITM. In fact, even when a performer-arranger is not present, or has died, another musician may perform his or her particular arrangement out of respect. The participant stated:

*“We say... ‘let's play someone else's version of it ’ and we know what we are doing and we do it out of sort of love and respect for the tune and the people who used to play it in order to keep it alive”*

Interestingly, none of the composers or performer-arrangers interviewed stated that they were motivated by commercial expectations or incentives when composing or arranging traditional tunes. This may be due to fact that ‘traditional music’ forms a relatively small market within the music industry. It appears that in the context of ITM, to have the composition or arrangement accepted and played by other musicians is the main recognition of authorship.

## 5.5. Collective Authorship in Irish Traditional Music and Joint Authorship under Copyright

In the context of ITM, examples of ‘joint authorship’ are rare. Exceptions include the works jointly composed by the brothers Finbarr and John Dwyer, who claim they are unsure which brother composed which parts of their jointly authored compositions<sup>1120</sup>. Similarly, groups such as ‘Planxty’ and ‘De Danann’ have often made use of collective arrangement credits for their group arrangements of public domain works<sup>1121</sup>. However, these are rare examples within the network of musicians, and as noted in the third chapter, the collective process of authorship via transmission is not envisaged by copyright. In rare cases it might be possible for a performer-arranger to show a ‘significant and original contribution’ e.g. in the case of ‘Dermot Grogan’s Jig’ or ‘Joe Cooley’s Reel’, but generally, the notion of ‘relational’ authorship, does not really fit with the current conception of joint authorship. As noted above in 3.3, the lack of a ‘common design’ would mean that joint authorship is impossible in the vast majority of cases. The relevant responses are assessed below.

### 5.5.1. Survey

It is clear from the above discussion of individual authorship of composition and arrangements in 5.4 that there is a presumption in favour of recognising the rights of individual composers. This also exists to a much lesser extent individual with regard to the rights of individual performer-arrangers, but this does not necessarily denigrate the ‘relational’ process of collective authorship. As previously stated, the individual and the collective forms of authorship in ITM are invariably linked within the system of ‘relational authorship’. This view gives credence to the argument of 3.3 above that creativity in the context of ITM is closer to that of a network-based system of individual creators to that of a distinct community working together to produce set results. As

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<sup>1120</sup> The brothers were jointly awarded a ‘Composer of the Year’ award in 2010; <http://www.irishtimes.com/newspaper/features/2010/0205/1224263802056.html>

<sup>1121</sup> See e.g. Planxty, *Live 2004* (Sony, 2004) liner notes and De Danann, *De Danann* (Polydor, 1976) liner notes.

discussed further in 5.9, this has consequences for the possible applicability of the TK model in the Irish traditional context.

However, as seen in 5.3 and 5.4 above it is clear that the ‘free sharing’ of tunes within the network contributes to creativity. In particular, in order for the ‘relational’ authorship and transmission process to occur different arrangements and variations of tunes must be shared freely. For instance, as noted in 5.4, the largest group of respondents (approx 47%) stated ‘Different versions of tunes are generally shared freely and informally, therefore asking permission is not necessary’. As one respondent noted in relation to arrangers -

*“... as described above - they are benefiting from the tradition far more than they are contributing.”*

As noted in 5.4.1.2, there is a tension between the debt that individuals are said to owe to the general ‘tradition’ and the rights that individual authors gain upon authorship. However, the survey respondents seemed wary of removing the individual rights of authors. In this regard, seeking to resolve this tension through the imposition of the TK idea of community or group rights may not be feasible in this context.

### **5.5.2. Interviews**

As noted in the third chapter, it is difficult to acknowledge contributors to the ‘relational authorship’ process as ‘joint authors’ since a ‘significant and original’ contribution would often be unascertainable. Dr. Reg Hall noted that tunes are commonly passed around in modified form and people often don’t know all of the creative contributors in the chain of composers and arrangers. He remarked:

*“One of the problems is that in an oral tradition, things get very confused.”*

Referring to informal sharing amongst musicians, another participant stated:

*“I’ve composed tunes and I’ve shared them with people and of course I don’t mind what happens to them.”*

In this vein, Dr. Reg Hall went on to state:

*“The reality is that I would be thrilled to bits to think that somebody had taken my tune and improved it or put their own stamp on it.”*

One participant stated that tunes are passed around freely regardless of their origin. Regarding older tunes and arrangements of older tunes, another participant stated:

*“The tunes have been passed on to us, we pass it on to them and so we all use it freely.”*

For this reason, it is not always possible to take proper account of the rights of the individual or joint authors involved within the network. The participant went on to state:

*“Nobody is stripping the author of his rights... it’s just circumstance.”*

In relation to infringement and licensing, there appears to be little passion for making an amendment to copyright in order to facilitate the role of the ‘collective’ in the relational authorship process, or to take rights away from individual authors. However, all the musicians interviewed acknowledged some debt to the wider network of musicians. As explored further below in 5.6 and 5.8, the informal social rules of ITM may in fact be paramount in relation to resolving tension in this area.

## **5.6. Infringement in the Context of Irish Traditional Music**

Within the network of Irish traditional musicians, two different sets of tunes, tunes that are in copyright, and those in the public domain, are played frequently. Both sets of tunes are ‘available’ to all, as Farrell has stated<sup>1122</sup>. In addition, for a composer of ITM to be truly successful, his or her composition must first be accepted and played by traditional musicians. However, it is further arguable that for his or her composition to

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<sup>1122</sup> Farrell, *op. cit.*



be truly accepted, later musicians must be able to treat it in the same way as works in the public domain i.e. to use and borrow all or part of it for later arrangements and compositions. As stated in the third chapter, if musicians are prevented from taking ‘substantial parts’ from tunes, regardless of the copyright status of the works involved, this could fundamentally change the process of collective or ‘relational’ authorship. As noted below, some Irish traditional musicians have not sought to enforce their composition or arrangement copyrights in this way for this reason.

### 5.6.1. Survey

On this issue, the survey respondents were asked a multiple choice question regarding whether a composer should have the right to restrict uses of the composition, including use of a part of it in the creation of a new tune (musical borrowing). The results were as follows:

- 9 stated ‘Yes, the composer should have this right’ (approx 26.5%)
- 8 stated ‘No, the composer should not have this right’ (approx 23.5%)
- 9 stated ‘The sharing and creation of tunes should not be restricted in this way’ (approx 26.5%)
- 7 stated ‘It depends on what the composer wants’ (approx 20.5%)
- 1 stated ‘I do not consider this to be an important issue’ (approx 3.4%)

Furthermore, the respondents were invited, but not required, to give further opinions on this issue:

- *“He can object, but not prevent.”*
- *“let the composer know beforehand what your intentions are”*
- *“New ITM tunes are largely based on a source that covers all possible variations. Any new tune will be in some way itself taken from an older one. New tunes outwith the tradition are easily identifiable (Tam Linn/Catharsis) and should be subject to copyright. Which category such a new tune falls into is extremely difficult to identify though.”*
- *“No, but, he is still entitled to the appropriate share of royalties, the same as a modern musician whose work is sampled.”*

- *“These tunes are constructed of simple phrases, this right would stifle the continued evolution of the tradition. Composers like Junior Crehan who can manufacture wonderful tunes in part from existing phrases would end up being prosecuted for something that trad players have done for generations.”*
- *“They should have the right, but they'd be right precious twat to use it”*
- *“this is problematic as many 'new' tunes seem to contain bits of old ones and bars of music are shared by many tunes new and old.”*

The respondents were evenly divided on this question as the above results show. This confirms the diverse range of views on this subject. For example, of the participants who gave an additional statement on the subject, each comment picks up on a slightly different issue, as seen in the comments listed above. Nonetheless, a relatively high proportion of the participants, amounting to a total of 47%, were in favour of allowing the composer to have this right or that it ought to depend upon what the composer wants. Perhaps the most striking comment was that a composer ought to have this right, but the right ought not to be enforced against other musicians.

In relation to the responses outlined in 5.4 above, one response was highly relevant to the question of infringement and it bears repeating here:

*“... tunes are small packages, and the best fit nicely into the tradition, rather than being obviously composed. Much of so-called composition is built on phrases that existed before the new mix of a 'composition'. I do not think there should be heavy penalties attached to an infringement of this. The possible demands should be no more than is fair ~ credit being given ~ and if there was income possible, however small, that being offered, but not penalties, except for costs if such are accrued in pursuit of fair representation of the composer's rights.”*

This response does not rule out the possibility of infringement, but it looks to limit the possible penalties in the particular context of ITM.

## 5.6.2. Interviews

Regarding the interview participants, it appears that the consensus was that composers are entitled to copyright protection. However, most interview participants appeared to doubt whether composers were ever likely to try to enforce this against their fellow musicians. Dr. Reg Hall was of the opinion that most ‘new’ compositions were based on, or were substantially similar to, older tunes, many of which are in the public domain. Other participants simply noted that there was a lack of incentive for taking a case due to the small amounts of money involved. For instance, regarding the use of a part of a copyright composition in the composition of another tune by another musician, one participant stated:

*“As long as it was credited and logged, it would be fine. If not, it would be infringement. Of course, natural error would be a possibility.”*

From this comment, it is clear that the participant seeks to be credited as the composer whenever his tunes are used by others. This is discussed further below in relation to the moral right of attribution. Nonetheless, even where his composition copyright was infringed, the same participant stated that he would not pursue legal redress. He stated that the reason for this reluctance is that in the context of Irish traditional music there is little money at stake. In line with this, regarding the copying of his arrangements by other musicians, which he said had happened many times, the same participant stated:

*“Would I take them to court for copyright infringement? No, not personally, as this is exactly how we all learned. One might say, “ah, but what if they make money out of it?” Same answer!”*

In this regard, the respondent appeared to be wary of infringement affecting the creation of new compositions. As with the survey, there was a general reluctance on the part of interviewees to entertain the possibility of taking infringement actions against their fellow musicians. As discussed further below in relation to licensing, the social rules of ITM appear to be crucial in regulation this form of authorship. At present it appears that

traditional musicians rarely, if ever, sue each other for infringement. There appears to be little motivation or monetary incentive to sue a fellow musician. As is the case with the other possible solutions, what remains crucial is not the law itself. In many cases the law rarely plays a direct role in musicians' lives. What is crucial is adherence to the social norms – the rules that effectively regulate ITM. Nonetheless, there was also reluctance on the part of interviewees to take rights away from individual composers or arrangers. As with the survey, it appears that most musicians want authors to have the right to take an infringement action, but that authors should not do so in the context of the network of musicians. However, if the work is taken up by a purely commercial performer then the context is different - an author may well decide to take action in such circumstances, something which was noted by Dr. Reg Hall.

## **5.7. Moral Rights – Attribution and Integrity in the Context of ITM**

The attribution and integrity rights are discussed below in the context of the empirical research.

### **5.7.1. Attribution of Compositions**

It appears that attribution is important to composers of Irish traditional music. Furthermore, this right is respected by the majority of respondents. This sometimes includes the titles of tunes. For instance, in addition to the informal passing around of Ed Reavy's tunes, published collections of his tunes have been issued. This helped to publicise his tunes further, and the collections also gave each composition's correct title. Cases of 'false attribution' can also occur. For instance, in a recent recording by Mick Mulcahy, Mick O'Connor was mistakenly falsely attributed as the composer of a reel. The reel in question was actually composed by another musician, Mick O'Brien<sup>1123</sup>. When this happens it appears to be a relatively minor issue and it may be corrected at a later date.

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<sup>1123</sup> See comments at <http://www.thesession.org/recordings/display/3406>

### 5.7.1.1. Survey

Survey respondents were asked about the attribution rights of a composer. Respondents only had the choice of one option:

- 21 stated ‘Where possible the composer should be named’ (approx 61.8%)
- 4 stated ‘It depends on what the composer wants’ (approx 11.8%)
- 5 stated ‘Tunes are generally shared freely, and giving the name of the composer is not important’ (approx 14.7%).
- 1 stated ‘I do not consider this to be an important issue’ (approx 3.4%)
- 3 stated ‘Other’ (approx 8.8%)

Furthermore, these 3 respondents gave the following explanations in the comment box

- *“composer credited on recordings, not on performance”*
- *“If it is possible the composer should be acknowledged for recordings, if not possible this is not crucial. For performances this should not be required, although in my experience performers like to share what they know about a tune.”*
- *“It is of interest, but not relevant to the tune.”*

It is observable from these responses that a large portion of the respondents (approx 61.8%) favour attribution of the composer and a further 11.8% would give the composer this option.

### 5.7.2.2. Interviews

As noted in the third chapter, giving the correct attribution information to composers is not a straightforward task. Dr. Reg Hall spoke about one tune that was recorded on a record he was involved with. The tune is known commonly as ‘Mudabawn Chapel’ but it was recorded under a different name. Dr. Reg Hall was contacted by a member of the Reavy family who asked for a correction when the record was reissued. This is not the only example he was aware of. Dr. Reg Hall observed:

*“I can tell you all sorts of examples of people I know who composed tunes that are attributed to other people...”*

Another participant noted:

*“Sometimes people get mixed up – they may not know that certain tunes were composed by certain people. The names get changed by mistake sometimes – people don’t know what the name of a tune is. They might make a recording and put the wrong name down... Sometimes genuine mistakes get made... I think it is good though if we can find out a little bit about the tunes and then say ‘that’s the name of that tune’ and ‘that was composed by... such and such’. It’s good to have that history. And it’s nice for the people to get a bit of recognition.”*

In this vein, another participant gave an example of an arrangement made of a recent contribution. In this case the performer-arranger gave ‘attribution’ to the composer. The participant noted:

*“He put in a different key and he played it quite differently and it was beautiful and it was lovely and it was something new that he had created there, but he still credited (the author) and said it was an arrangement of his tune.”*

## **5.7.2. Attribution of Arrangements**

### *5.7.2.1. Survey*

Survey respondents were given a set of multiple-choice option regarding whether performer-arrangers should be given attribution. The responses were as follows:

- 8 stated ‘Where possible previous performer-arrangers should be named’ (approx 23.5%)
- 3 stated ‘It depends on what previous performer-arrangers want’ (approx 8.8%)
- 16 stated ‘Tunes are generally shared freely, and giving the name of previous performer-arrangers is not important’ (approx 47%)

- 2 stated 'I do not consider this to be an important issue' (approx 6%)
- 5 stated 'Other' and gave an explanation in the comment box (approx 14.7%)

It is arguable that from the above data, attribution of previous performer-arrangers is not seen as important as attribution of composers in the context of ITM. This may be because arrangements are often made of well established tunes and there are often multiple arrangements of the same tune. Giving the correct attribution data for each arrangement would arguably result in too many complications. In line with this, the 5 people who ticked the 'other' box gave the following explanations:

- *"I think this is a grey area, depending on the level of formality and profit involved."*
- *"Named for legal reasons? No. Named out of respect for the musician and his composition? Yes."*
- *"NO! This is a sensitive issue, as a number of 'jerks' have made small changes, or added chords, which are 'open choice' to any specific melody anyway ~ and then claim copyright on something like "Miss McLeod's" reel. It's ridiculous, it's silly. No matter how hard anyone might try, we can't exactly copy anyone's take on a given traditional melody. There are too many variable, including the make of one's instrument, and it's condition and parts, like the strings you favour on your violin, or the bow you use. It is daft to copyright 'arrangements' for a given jig, reel, hornpipe, waltz or other tune..."*
- *"Performance/arrangement gives no rights to traditional tunes. Just change a note and its a different arrangement."*
- *"Should only need to be acknowledged if another performer uses their particular arrangement."*

From the above results, there is less of a clear majority view regarding whether performer-arrangers should also be given attribution. On this issue, the musicians tended to take a more flexible view i.e. performer-arrangers should sometimes be named, but definitely not in every case. As noted above, this undoubtedly makes sense, given the sheer amount of performer-arrangers that would have to be named if this was the case. As noted above, there was generally also a trend in favour of asking the composer for permission to record a composition. Again, this trend did not follow for performer-arrangers. This does make sense due to the sheer amount of people that might have contributed to a particular arrangement of a tune. Hence, for arrangements of older tunes

i.e. public domain works, previous musicians may be named, particularly if the tune was directly learned from their playing. However, generally this is not thought by musicians to be necessary.

#### 5.7.2.2. Interviews

One participant did note that it would be ‘nice’ to remember the person who added a substantial amount of variation to a tune, such as Joe Cooley with regard to his arrangement ‘Joe Cooley’s Reel’. However, the respondent did not feel this should be a requirement with regard to arrangers. In fact, this point was echoed in the interviews. This kind of ‘arrangement’ attribution was generally thought of as best regulated by informal means. Another participant stated that at sessions or concerts musicians will often play someone else’s version of a tune and give attribution in respect of this. The participant stated:

*“We say... ‘let’s play someone else’s version of it ’ and we know what we are doing and we do it out of sort of love and respect for the tune and the people who used to play it in order to keep it alive”*

On the informal nature of attribution of performer-arrangers, the participant was not in favour of enforcing a formal requirement of attribution. The participant stated:

*“Prefer to keep it informal... It does work.”*

Similarly, regarding attribution in relation to where a tune was learned from i.e. a teacher, or a recording, one participant noted that he did not think copyright should interfere with this process. He stated:

*“I think it works quite well informally.”*



### 5.7.3. The Integrity Right

From the empirical data below, it appears that the integrity right has a specific understanding within the context of ITM, with some composers willing to allow the network to ‘self-regulate’. In fact, from the results below it appears the integrity right does not seem vitally important in this context. It is suggested here that generally, composers seem pleased that their compositions are performed, even if this means that the compositions will be altered via this process.

#### 5.7.3.1. Survey

In relation to the integrity right, the answers to the infringement question above are relevant because the question mentioned the right to ‘object’ to alterations to e.g. the copyright composition. For instance, one respondent commented:

*“He can object, but not prevent...”*

It is hard to know what the exact meaning of this statement is. It certainly appears to envisage the composer or arranger possessing some rights, but it also strongly argues against allowing the ‘objection’ to prevent the alteration. In other words, it might be possible for a composer or arranger to register an objection without preventing use of the tune. Another respondent appeared to strike a more conciliatory tone on the issue:

*“let the composer know beforehand what your intentions are”*

#### 5.7.3.2. Interviews

From the interviews, it appears that composers do not appear unduly worried that a particular version of their composition might be ‘derogatory’. In fact, it seems that some composers generally believe that the system of music itself will regulate so that only the best variations of their tunes will be passed on. As a result, it appears that Irish

traditional composers and ‘performer-arrangers’ generally do not object to later performers making changes to their works. Although this could be seen as a violation of the integrity right, many composers appear to be happy to have their compositions played and accepted within the tradition. The fact that Irish traditional tunes are constantly in a state of flux, with new variations constantly being performed on the same themes, means that composers of ITM do not have a fixed idea of what their composition should sound like. In other words, composers do not have a fixed idea of the ‘integrity’ of their compositions. For instance, during an interview, one composer stated that he had faith that the network of musicians will self regulate on this issue. The participant stated:

*“...You might say I would be in favour of playing it the way you originally did it, but I suppose there is room for something else as well, because again if you do that people can make up their minds... yeah... ‘I like that I play it the original way and I’ll play this newer version or whatever’... So I think there is room for both there. Hopefully, you wouldn’t think ‘oh I’m so disappointed that was changed’ – that might be your original reaction but I think there’s a good chance you would say ‘oh well there’s room for scope there’.”*

When asked whether he thought that he, as the composer, should have the right to control or object to changes made to his composition, he gave the following response:

*“No, I don’t think so... I don’t really think there is a need for that because people can make up their own minds... Generally you don’t find a lot of people, or many people, I don’t think would all be saying ‘oh, we much prefer this way so we’ll scrap the old way’... If something’s changed and people might think ‘that’s a really beautiful version there of doing that’. If that is the case then a lot of people might end up playing that more but then that might be a good thing because that might mean that actually that’s been improved because a lot of people have voted with their um.... fingers there... actually playing that one... There will still be the other way of playing it as well so there definitely is room.”*

In other words, the interviewee believed that any changes that are made to the tune will be in line with the tradition, and that these changes will add, rather than detract, from the integrity of the tune. In this view, composers do not see these changes as derogatory, and

to the extent that they could be perceived as being derogatory, composers have faith that these changes will not be passed on through the traditional process.

On this issue, Dr. Reg Hall simply stated:

*“The reality is that I would be thrilled to bits to think that somebody had taken my tune and improved it or put their own stamp on it.”*

In light of the interviews, it appears that composers believe that only the best new tunes come out of the traditional process of transmission. Furthermore, only when a tune is in a constant state of flux that can it be said to form part of the living ‘tradition’. Unlike the right to attribution, there is very little evidence to suggest that composers of ITM are concerned regarding the integrity right.

## **5.8. Copyright Licensing in the Context of Irish Traditional Music**

Regardless of whether a tune is in the public domain or is a recent composition, it has been said that once the tunes are accepted into the body of ITM, they are generally treated in the same way. As Farrell has remarked:

*“All the tunes are available to all players.”<sup>1124</sup>*

However, as discussed further below, this statement does not encapsulate the unique ways music is used in the Irish traditional network.

### **5.8.1. Mapping the Social and Commercial Uses of Irish Traditional Music**

It is important to note, as Knowlton has done, that within the context of ITM there is acceptance that there are both legitimate ‘social’ and ‘commercial’ uses of the music<sup>1125</sup>.

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<sup>1124</sup> Farrell, *op. cit.*

Even musicians who pursue professional careers<sup>1126</sup> also partake in many of the social aspects of traditional music, such as playing informally in relaxed pub sessions or giving workshops at music gatherings<sup>1127</sup>. To some extent, when a tune has been accepted by the network, the network appears to become part-author and part-owner of the tune. This has been described as a form of ‘community authorship’ by Knowlton<sup>1128</sup>. Through the system of attribution outlined above, the tune may be passed around, with or without the composer’s name, or the tune’s intended title. In fact, as noted above, there are many examples of a tune being passed around with incorrect origin or title.

Therefore, a system of informal social norms appears to allow ‘free’ sharing of tunes in ITM. This may be described as a form of self-regulation, based on social norms, as noted below. As noted in 3.6, composers rely on performers and listeners to ‘accept’ their compositions. Furthermore, this type of acceptance is linked with ‘awarding of social status’ to composers whose compositions are accepted, which is arguably more of an incentive to compose new works than the possibility of meagre financial benefit<sup>1129</sup>. The comparatively low sales of ITM CDs would mean that licensing royalties would be very small for the majority of composers. Until the ‘commercialisation’ of Irish traditional music in the 1980s and 1990s, few composers would have sought royalties for their compositions under copyright law<sup>1130</sup>. However there is some evidence that this is changing, even within the relatively small market of ITM. Nonetheless, it has recently been stated that ‘apart from acknowledgement of their authorship’ newer tunes are treated comparably with older tunes of unknown authorship<sup>1131</sup>. Some composers do register with collecting societies, while others do not<sup>1132</sup>. In addition, it seems that while many performers make an effort to credit the composers of tunes, some do not<sup>1133</sup>. One reason for this is that the provenance of tunes is not always known.

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<sup>1125</sup> Knowlton, *op. cit.*, 32.

<sup>1126</sup> e.g. by releasing commercial recordings and playing at festivals.

<sup>1127</sup> An example might include Charlie Lennon (see <http://taramusic.com.slleavenotes/cd4018.htm> where he is identified as an IMRO member). See also Knowlton, *op. cit.*, 32.

<sup>1128</sup> See generally Knowlton, *op. cit.* As noted in 3.3, it might be better described as a relational system of authorship.

<sup>1129</sup> *Ibid.*, 5

<sup>1130</sup> Ó hAllmhuráin, ‘History,’ *op. cit.*, 153

<sup>1131</sup> Farrell, *op. cit.*

<sup>1132</sup> An example of a traditional composer who does seek publishing royalties for use of his compositions is Peadar O’Riada; accessible at

[http://peadaroriada.ie/index.php?option=com\\_content&view=article&id=89&Itemid=105](http://peadaroriada.ie/index.php?option=com_content&view=article&id=89&Itemid=105)

<sup>1133</sup> Examples of recordings which do list the composers are available at

<http://www.thesession.org/tunes/display/150>

In relation to the empirical research, from the data below it appears that formal copyright licensing appears to play a minimal role in ITM. Instead, the social norms appear to be crucial. Nonetheless, as the survey evidence shows, a number of composers have registered their compositions with a collecting society and are using the formal copyright licensing system.

## **5.8.2. Attitudes towards Collecting Societies**

In correspondence undertaken during 2010, both PRS for Music and IMRO confirmed that they do not keep particular statistics on compositions and arrangements of traditional music. For this reason it was not possible to establish how prevalent this type of licensing actually is from the point of view of the collecting societies. The musicians' perspective is evaluated in relation to the responses below.

### *5.8.2.1. Survey*

In the survey, respondents were asked if they were members of a collecting society:

- 6 respondents stated they were members of a collecting society (approx 17.6%).
- 23 respondents stated they were not members of a collecting society, though they were aware of the role of collecting societies (approx 67.7%).
- 5 respondents stated they were not aware of the role of collecting societies, and thus, were not members (approx 14.7%).

Interestingly, only 17.6% of respondents were members of a collecting society, though knowledge of the role of collecting societies was still strong. Furthermore, the respondents were invited, but not required to give their opinions on the role of collecting societies in the context of ITM. 3 respondents chose to do so. Their responses are as follows:

- *“I have heard of PRS but I don't know what they do other than prosecute people who don't follow their rules.”*

- *“Their function should be to collect for contemporary composers for their compositions. In my view they do not own and never should own or collect money for traditional tunes.”*
- *“with respect to traditional music totally disagree with IMRO”*

With these three views, it is possible to observe a certain amount of negativity regarding the role of collecting societies with respect to ITM. For instance, the final two views appear to disagree in principle with the idea that a collecting society collects royalties for ‘traditional tunes’, but only for ‘contemporary’ tunes. Given the fact that only 3 out of 34 respondents gave a comment, these comments may not be representative. Furthermore, as noted below in relation to the interviews, some composers and performer-arrangers suggested that joining a collecting society is a possibility, but only whether there is a chance that money would be made. Overall, it is possible to ascertain a high level of indifference to the role of the collecting societies. The majority of musicians appear to see no reason to join.

#### 5.8.2.2. Interviews

Regarding traditional musicians joining collecting societies, one composer, who was not a member of a collecting society, stated:

*“I think that sounds like a good idea... because it might be that something that you have recorded, or made up, composed, whatever, is played on the radio and they might say that there are royalties due to you and you may not know about this. So it would be good to be aware of it. And if there was something then you would be grateful for that.”*

Regarding the collecting societies, the composer went on to say that he felt that these royalties should be of limited application. In particular, he was in favour of receiving a royalty for the use of a composition if it is played on the radio, but he was not in favour of charging a royalty for the use by a fellow musician e.g. on a recording. Regarding joining collecting societies, Dr. Reg Hall stated:

*“You are only going to get professional musicians who are going to do that.”*

This statement appears to indicate that if money is likely to be made, a musician will join. In addition, a number of the musicians interviewed were aware of the role of collecting societies, but were not themselves members. Other interviewees were members but took an ambivalent view regarding the roles of PRS and IMRO. The main reason for this ambivalence was that in the experience of two musicians in particular, the royalty revenue from these organisations amounted to very little. However, one musician, whose IMRO royalties were negligible, stated that the RAAP, which collects equitable remuneration for performers, was more useful to traditional musicians, due to the fact that in his case a reasonable amount of income could be distributed based on radio play etc. This may give weight to the argument that performers' rights may be a relatively uncontroversial way for musicians to earn income in the context of Irish traditional music.

### **5.8.3. Attitudes towards Licensing of Compositions and Arrangements**

#### *5.8.3.1. Survey*

Respondents were asked about their opinions on the composer's right to receive payment for the use of his composition. Respondents had the freedom to pick more than one option. The results were as follows:

- 5 stated 'Never' (approx 14.7%).
- 24 stated 'When it is recorded by another traditional musician on a cd?' (approx 70.6%).
- 27 stated 'When it is recorded or used by a commercial artist e.g. Riverdance etc.?' (approx 79.4%)
- 1 stated 'When it is performed by other traditional musicians at sessions?' (approx 3.4%)
- 13 stated 'When it is performed by other traditional musicians at professional live gigs?' (approx 38.4%)
- 22 stated 'When a performance of the tune is broadcast on radio/TV?' (approx 64.75%)
- 25 stated 'When it is used in a TV show, commercial or film?' (approx 73.5%)

- 9 stated 'Other' and gave an explanation in the comment box (approx 26.5%)

Regarding the category of 'other', the respondents were required to explain their responses:

- *"I believe it's up to that composer. If they choose to waive that right in return for clear agreement about how the music will be used, that's OK."*
- *"Of greatest concern to me is that, if the composer is known and living, that they are asked permission. Then, a courtesy, if there is profit attached, would be to consider remuneration, or at least asking if it is expected or would be appreciated. Most important is giving credit where it is deserved. If you like something enough to want to put it into a project that brings profit, then at least offer the opportunity for a few bob to the composer..."*
- *"On a CD if possible, but not essential. On TV if the music is more than incidental the situation is analogous to the CD"*
- *"Only if it was composed specifically for that purpose, and not recorded or played elsewhere."*
- *"Payment should reflect the performing artists revenue for the performance"*
- *"Please note re my above comment about 'traditional' MUST exclude the idea of a composer. You can only compose in a traditional style, it will be for future generations to decide if it has become a traditional tune. And, if someone is making money from the performance of composed music, the composer is entitled to their royalty, however small."*
- *"That is of course if they want payment, or they just want to share their tunes."*
- *"This question is meaningless. What constitutes an 'Irish traditional tune'? You can try and define style (good luck on that one) if you want but if it has been composed by a named composer that provides it's own answer - it is the 'intellectual' property of the composer. Pecuniary reward is another matter."*
- *"Whenever the player receives payment for the performance. Prices/rates should be set low enough though to allow easy payment."*

Interestingly, while high proportions favoured payment to composers for recording (approx 70.6% and 79.4%), broadcast (approx 64.75%) and synchronisation (approx 73.5%), a tiny proportion favoured payment for live session performances (approx



3.4%), and a relatively small proportion favoured payment for professional live gigs (approx 38.4%).

Thus, in relation to the online survey, the majority of musicians do not think it is appropriate for a composer to receive a royalty for the playing of this composition in all circumstances. In the case of a purely commercial use such as use by a broadcaster, or use by a commercial artist such as ‘Riverdance’, musicians generally agree that the composer should be paid. In contrast, very few thought it appropriate for a composer to receive a royalty for use in pub ‘session’ playing, and not many thought it appropriate to ask for a royalty when used by a fellow musician in a live gig context. The musicians were roughly split on the issue of whether a composer should be paid for use by a musician in recording the composition on a CD recording.

Regarding licensing of arrangements, respondents were asked when they considered it to be appropriate for a performer-arranger of ITM to receive payment, for the use of an arrangement. Respondents were free to tick multiple boxes as appropriate:

- 14 stated ‘Never’ (approx 41.1%)
- 1 stated ‘When that particular arrangement of the tune is performed by other traditional musicians at sessions?’ (approx 3.4%)
- 9 stated ‘When it is performed by other traditional musicians at professional live gigs?’ (approx 26.5%)
- 14 stated ‘When a performance of the tune is broadcast on radio/TV?’ (approx 41.1%)
- 19 stated ‘When it is used in a TV show, commercial or film?’ (approx 55.9%)
- 9 stated ‘Other’ and gave an explanation in the comment box (approx 26.5%)

Regarding the category of ‘other’, the respondents were required to explain their responses:

- *“Again, I don't see that the boundaries to "playing someone elses arrangement" are meaningful here. It's not as if we play the same thing every time anyway, as if there were "dots" that define what we do.”*
- *“but it should reflect what the profit is”*

- *“If a musician is going to gain reward then recompense should be made. However if it is at a small venue, say, less than a hundred people the ability of the performer to pay is severely limited, also is the performer a full timer or semi-professional? Is it worth pursuing an occasional performer for performance rights?”*
- *“if used on a commercial recording”*
- *“Never, unless it is the selling of a score or tune collection, something in print with a price tag on it.”*
- *“Only if their actual recording is used.”*
- *“Only in the case of their own performance (whether live, but not in sessions, or recorded) of their own arrangement of a public domain piece.”*
- *“When money is changing hands the appropriate royalties should be paid.”*
- *“Whenever payment for that arrangement is received by the performers”*

Arguably, the enforcement of arrangement copyright of ITM may be difficult in practice, which does negate some of the potential problems outlined above. However, the potential remains that the above licensing conflicts have potential to change the perception of the way the music is authored within the Irish traditional network. This in turn, could affect the music itself. Hence, this aspect of ITM can be said to have thrived due to the absence of copyright law, or at least the absence of strict enforcement of the licensing requirements of copyright law, particularly in relation to arrangements. Musicians who play ITM professionally rely more on revenue from touring than from record sales. As Knowlton has said, it is accepted within the network that there are ‘social’ and ‘commercial’ uses of the music<sup>1134</sup>. However, due to the fact that the majority of musicians are not professional musicians, the social aspect of the music has arguably remained paramount<sup>1135</sup>. The majority of musicians, even where they partake in both ‘commercial’ and ‘social’ uses of the music continue to pursue a share-ethic in relation to attribution and acceptance, as noted above.

### 5.8.3.2. Interviews

Regarding the possibility of receiving a licence fee or royalty for the use of his composition, one participant noted:

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<sup>1134</sup> Knowlton, *op. cit.*, 32.

<sup>1135</sup> *Ibid.*

*“I thought about it, I suppose it would be nice if it happened... if it was recorded by some bands or somebody and if it sold quite a lot and you thought ‘there might be something coming to me there’ that might be nice. But I think with the traditional music field that it is a smaller... market.... A lot of these people are your friends, and so really... I think that unless it some band or a big star records something you have made up... and a lot of money is made... then you might think ‘that would be nice – to get something there – a token’. Of course, I suppose if you have copyright and it’s played on the radio then that’s a different thing and you’ll get copyright from that, and that’s fair. But I think that with the Irish traditional music market we are such are like a big family anyway, you’d be asking to get royalties off your friends and you don’t want that, you know.”*

Another participant simply noted:

*“I’d like to be completely idealist about that. This is for sharing and if it provides enjoyment then I’ve already succeeded then I’ve had my payment, I’ve had my reward...”*

Another participant, a performer-arranger, stated that the recording of new compositions by living composers was not strictly regulated. For instance, for one composition by a living composer, the performer-arranger did pay a licence fee of around £250 to the composer via his membership of IMRO. However, for another new composition by a different composer, the performer-arranger did not realise the origin of the tune at the time of the record’s release. For that reason, no licence fee was paid to the composer and the composer was not attributed. Nonetheless, there was no response from the composer over this matter. From the interviews it appears that some composers register their tunes, while others do not. It appears that composers are making choices regarding registration that potentially affect the formal licensing of their tunes. Another interviewee, who has composed a tune that has been recorded by several different performer-arrangers, stated that he had not registered the composition or made any effort to enforce his copyright.

Another participant, a composer and performer-arranger of ITM, also composes and music for TV and film soundtracks and also plays in a more commercially minded ‘fusion’ band. Interestingly, he made a firm distinction between his traditional

compositions and arrangements, and his ‘non-traditional’ material with regard to licensing. He stated that he did typically did not expect payment for the use of one of his ‘traditional’ compositions on a recording by another musician, although he did expect to be attributed as the author of the composition. He further stated:

*“The distinction is very simple – if a piece of music is earning or is likely to earn me significant revenue, I will lock down tight the copyright and may even licence to sub-publishers who might place the material. On the other hand, I am not terribly concerned about, say, the material on a CD of myself... playing old tunes which is unlikely to sell many copies, be played often on radio/TV or be synched for film or adverts. As a person who likes to get things right, I tend to log all my “works” but if the inevitable error creeps in I don’t get excited about it unless there is money to be lost. As a person who likes to get things right, I tend to log all my “works” but if the inevitable error creeps in I don’t get excited about it unless there is money to be lost. A rough idea of a breakdown of earnings would be that traditional Irish music’s share of my copyright earnings sits around 5%.”*

## **5.9. Use of ‘the Potential Solutions’**

Over the course of the survey and interviews, it was possible to broadly discuss the potential solutions. The relevant responses are discussed below.

### **5.9.1. Survey**

Respondents were asked whether they had any knowledge of the alternatives to copyright, as shown below:

- 12 stated they were aware of ‘Fair Dealing or Fair Use under Copyright’ (approx 35.3%)
- 12 stated they were aware of ‘The Public Domain’ (approx 35.3%)
- 10 stated they were aware of ‘Alternative Licences such as Creative Commons’ (approx 29.4%)
- 4 stated they were aware of ‘Traditional Knowledge’ (approx 11.8%)

- 20 stated 'I have little knowledge of these subjects' (approx 58.8%)

Regarding the respondents who were aware of some of the options, they were asked a further question regarding whether they would be willing to use any of these alternatives in relation to Irish traditional music:

- *"DEFINITELY NOT"*
- *"I would consider creative commons although my knowledge of it is sketchy."*
- *"No - I'm a pro musician and I need to make money from my job."*
- *"So far I've not had a problem, but I would like to better understand the issues involved. As with most things, possibly old-wives tales, the stories hold in the mind and things legal have a certain fear and lack of clarity fogging up any approach to the topic. Funny that, while it professes to pursue a fair and open, clear set of regulations, most of us are confused by the gobble-de-goop of the language used. For others it is out and out scary stuff, to be avoided at all costs, hoping that we'll never have to deal with it. When forced, the experience is rarely a good one, for either side, even if there's a gain in monies or property..."*
- *"Would need to know more about the specifics of licences and remuneration."*
- *"yes"*
- *"Yes, both of these."*

Generally, it appears that knowledge of the potential alternatives to copyright is not strong amongst either the musicians surveyed or those who were interviewed. A significant number had not heard of any of the potential alternatives. A slim majority had heard of at least one of the alternatives. Of these alternatives, musicians tended to be most aware of 'fair use' or 'fair dealing'. A small minority were aware of the public domain and alternative licences. Very few had knowledge of 'Traditional Knowledge'. However, even where musicians were aware of these alternatives, they were not sufficiently aware of them to say for certain whether they would be willing to use any of the alternatives. As a result, it must be stated that even where a potential solution exists e.g. use of an alternative licence, there appears to be only a slim chance of it actually being used by musicians in practice. This lack of knowledge could be changed by dissemination of information/education. In this regard, perhaps guidelines on the issue ought to be provided by IMRO or CCE. Since CCE has already begun to avail of the CC

licensing system for its audio and video recordings<sup>1136</sup>, the organisation might be in the best position to do this, perhaps in league with the ‘Creative Commons Ireland’ initiative at University College Cork<sup>1137</sup>.

Furthermore, this can be contrasted with the situation involving other types of alternative licences, such as open-source software licences, where the users i.e. software programmers, have a strong knowledge of the licences. Furthermore, by providing such a universal, individualistic solution to copyright licensing difficulties, ‘Creative Commons’ ignores the fact that in the recent past, many smaller creators and users, including those within the Irish traditional music network, largely ignored copyright whilst sharing creative works. If, as Vaidhyathan has remarked, a ‘leaky’ copyright system works best<sup>1138</sup>, it is important to reiterate that CC licences may actually prevent ‘leaks’ in the system.

For the final question, survey respondents were given the option of adding their own final thoughts on the subject of copyright and Irish traditional music? There were 14 responses, though 2 merely stated ‘no’ or ‘not really’. The responses were as follows:

- *“Almost all of the "professional" trad players make such little money it's counter productive to have a complex system of distribution. If a tune gets used in a blockbuster film tough, that's a different matter. Maybe have a specific cut off point, beneath which, the law is more relaxed. Also, you say that a tune only becomes copyrighted when the composer records or writes it down. This is silly as most of the tunes me and my mates have written an play regularly have never been recorded or written down. Would this mean such a tune could be used legally without paying royalties in a big blockbuster?”*
- *“Composers deserve royalties for commercial recordings of their work. Copyright does not arise in casual playing.”*

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<sup>1136</sup> <http://comhaltasarchive.ie/terms> - However, the IT officer at CCE recently admitted that CCÉ does not attempt to clear the underlying rights in the compositions/arrangements, but instead operates a pro-active ‘takedown policy’ (Comments made by Breandan Knowlton at a ‘Copyright and Traditional Music’ workshop at Queen Mary, University of London on 19/1/2011 -notes on file with author).

<sup>1137</sup> <http://creativecommons.org/international/ie/>

<sup>1138</sup> Vaidhyathan, *op. cit.*, 184.

- *“I think you are researching a very interesting topic. Please never lose sight of the roots of the tradition and the joy of playing the music while you are doing it. Best of luck! :)”*
- *“I worked for many years for the BBC where we took all forms of copyright extremely seriously. Now I've left and am creating my own music with others, it seems an irrelevance to the ordinary person - and it seems pretty unenforceable. My experience, though, is that people ask permission to embed my work in their sites or otherwise use my music. However, I was asked if I could contribute to arrangement of a commercial song for YouTube, and I refused because I don't believe the group asked permission of the copyright holder.”*
- *“I would be curious to know who is going to be monitoring and policing all these areas.”*
- *“If a tune or a song makes it into it's fifth decade of existence it should be considered as 'out of copyright'. In my opinion if a tune or song makes it that far it should be available for all to use - not as 'cash cow' for so called copyright holders e.g. corporations like recording companies.”*
- *“If an artist makes a copy of a painting, the copy, as far as I am aware, is a work of art in its own right. Music should be the same.”*
- *“Newly composed pieces (in a traditional vein) should be acknowledged and credited 100% to composers. Arrangements of trad or PD material should be treated as they are by IMRO in Ireland”*
- *“The aquisition by Comhaltas and other oraanisations of the so called rights to traditional tunes in fundamentally wrong. These tunes are the legacy of many past players passed to today's and tomorrow's players. They should not be subject to ownership and these organisations should be ashamed that they have sought to profit from what they do not own.”*
- *“There should never be a loss of awareness that music, even the commercial pap stuff, should be considered a community possession, something to be shared, but that should not infringe on the rights of those that do sell it and live by it, including the composers and artists, and including the Irish, and traditions. But then we're also crossing in to a territory not part of this survey, recordings. Of course I have opinion there, and this house is a piracy free one, on all counts, no exceptions... The artists and companies that do the work to provide these joys for our ears, they deserve the respect of a bit of coinage...”*

- *“Tricky subject and would make a lot of folks feel scared if they had to pay for copyright on low level performances like sessions. Surely PRS covers live performance for money? If not, it should.”*
- *“We should make every effort to resist US style legal interference with our music.”*

## **5.9.2. Interviews**

Dr. Reg Hall was of the opinion that generally, there was little, if any money in ITM. In his opinion, pursuing the copyright licensing model was largely fruitless. Nonetheless, he thought that traditional composers and performer-arrangers should be granted their copyrights as the default position, since this would give them the choice of what to do. Nonetheless, he thought that the attitude of ‘keep the law out of it’ was the best one to take. On the possibility of using ‘alternative licensing’ he noted:

*“I can understand that system being brought out or being brought in, but what I can’t visualise is anyone wanting to use it.”*

Another participant stated that he thought that composers and performer-arrangers should have their rights in case the works were ever taken up for commercial use e.g. in films or broadcasts:

*“We suddenly become aware of our rights when the possibility of money rears its ugly head but... I would like to keep all of this out of the traditional music scene – it’s not where it came from and I don’t think it’s where it should be going. It came from ‘around the fireside’, you know.”*

On whether a new formalised system is necessary another participant noted:

*“I’d like to think informally it should work the way it is, because then it would give you the liberty that if suddenly the possibility of me becoming like Michael Flatley started to... then maybe I might move my ground and also and by that stage I might be putting so much energy of my life into that and then in terms of human justice it would only be right that some remuneration should be coming back.”*



On the possibility of shortening duration for Irish traditional works i.e. enlarging the public domain via blanket proposal, one participant gave the following response:

*“Viewing it as a general principle, I would hesitate to make that as a blanket arrangement yeah, because I think of what other people’s needs and expectations would be...”*

Overall this kind of attitude was generally reflected by most participants when commenting on blanket proposals such as expanding the public domain by shortening copyright duration or applying broad TK rules to the ITM network. The participants were of the opinion that composers and performer-arrangers ought to be given their rights as the default position, and that the use of any alternatives to the copyright system should only be at the behest of the individual author. In this sense, allowing the possibility of donation to the public domain remains a valid option, as does making provision for the use of alternative licences so that the author has this option. Furthermore, incorporating a broader fair dealing or fair use standard would probably not have a negative effect on the network, while it may have a positive effect in the future should more cases arise.

# Chapter 6 - Conclusion

## Introduction

The primary questions of this thesis were outlined and explored over the course of the third chapter. The potential solutions were examined in the fourth chapter. In the fifth chapter, the empirical research was used to analyse both the potential conflicts and the potential solutions. With regard to the thesis questions, the following conclusions can be drawn.

### 6.1. Originality

The first question concerned whether musicians are capable of creating ‘original’ compositions and ‘original’ arrangements for the purpose of copyright law. As discussed in 3.1, it can be said that Irish traditional composers and arrangers are capable of creating original musical works for the purpose of copyright. Further to this, the analysis of the empirical research in 5.3 showed that originality is valued in the ITM network, but in most cases, originality of ‘arrangement-performance’ is more highly valued than originality in relation to composition. This conclusion would explain the fact that the most highly respected traditional musicians are performer-arrangers, rather than composers. However, composers are still respected, and it appears that originality is something that composers aspire to when composing tunes. In this regard, originality may have a particular meaning in the context of ITM. Nonetheless, the idea of originality overlaps with the idea of originality under copyright to the extent that both performer-arrangers and composers are entitled to copyright protection with respect to their works.

### 6.2. Authorship

The questions in this area concerned the attitude that composers take towards their compositions in relation to authorship and ownership. It appears that composers do not always seek to enforce their copyrights against their fellow musicians within the

‘relational’ network of ITM. In this regard, copyright is probably not a motivational factor that encourages composers of ITM to create. Composers of ITM tend to take a minimal approach to copyright law. Nonetheless, there is a strong consensus that emerges from the empirical research that favours giving composers their rights. However, there is also confidence on the part of many musicians that composers will choose to ‘freely’ share their compositions amongst their fellow musicians, even if they enforce some of their commercial rights. The question of whether composers should cede some rights to performer-arrangers in the context of ITM can be answered in the negative. There was little evidence that musicians wanted to take rights away from individual composers. Nonetheless, there was recognition that the ‘performer-arranger’ is the most important role in ITM. In line with this, there was some support for arrangers of traditional music in relation to their rights, but there was generally less support than for composers. In particular, with regard to arrangements musicians seemed less inclined to seek permission for use of the particular arrangement.

### **6.3. Joint Authorship**

It appears that some musicians are jointly authoring compositions and arrangements in line with the requirements of copyright law. This often occurs when traditional groups record albums and receive joint authorship in the arrangements they jointly create. However, with regard to the traditional process of transmission i.e. the process of ‘relational authorship’ outlined in 3.2 and 3.3, it is clear that copyright does not appear to envisage this type of collective authorship. Furthermore, from the empirical research in 5.5 it appears that musicians tend to want this type of ‘collective’ authorship to remain regulated on an informal basis. There was little indication of support for collective or group rights such as those available under TK rules.

### **6.4. Infringement**

Arguably, a strict enforcement of copyright by individual composers and arrangers could restrict the traditional creative transmission process. However, Irish traditional composers and performer-arrangers appear to rarely envisage taking infringement

actions concerning the use of their compositions and arrangements. In particular, composers and arrangers rarely seek to enforce their copyrights against their fellow musicians. One of the main reasons for this is the fact that the ITM market is quite small, and there is typically very little money involved. However, from 3.4 and 5.6 it is clear that there are some examples of situations where composers and performer-arrangers sought to be paid for the recording of a composition on a CD. Nonetheless, from the empirical research in 5.6 it appears that some musicians are reluctant to pursue legal infringement claims, even in cases where their works have been recorded or broadcast without their permission or knowledge. Musicians appear to have faith in the regulatory system of informal social norms present in the network.

## **6.5. Moral Rights**

Generally, attribution of new compositions was favoured by musicians. To a lesser extent, attribution of arrangements was also favoured. However, given the complexity associated with correctly identifying the origins of tune, it appears that it is not uncommon for composers or arrangers to be not attributed, or falsely attributed as authors of tunes. Musicians generally valued attribution strongly, even with regard to described ‘transmission’ attribution, which does not necessarily denote ‘authorship’ of a tune, but instead denotes the provenance of a tune. However, musicians appeared to favour keeping this attribution system informal and based on the social norms of the traditional network. Regarding the integrity right, this right appears to matter little to composers or performer-arrangers. Musicians generally did not see the possible changes to their works as potentially having a ‘derogatory’ effect on their reputation and they had faith that the social norms would resolve any such situations effectively.

## **6.6. Licensing**

In this context, there was a general consensus that composers, and to a slightly lesser extent arrangers, should have the right to formally license tunes in relation to commercial uses. However, within the traditional network of musicians it was observed by many musicians that such formal licensing was unlikely to occur due to the ‘free’ sharing that goes on within the network and the lack of a monetary incentive in this regard.

Furthermore, attribution, rather than payment, is the main way of acknowledging authorship. A tune's acceptance, and its subsequent popularity amongst the participants of the network, may sometimes also lead to a small financial reward for the composer, but this does not appear to be the primary incentive for the creativity. Some Irish traditional composers and arrangers register compositions with a collecting society, while others do not. There was a strong consensus about leaving this choice open to the authors. Therefore, it appears that the formal licensing of copyright in relation to compositions and arrangements is not overtly restricting the creative practices of musicians.

## 6.7. Final Comments and Recommendations

Arguably, the 'free' software movement thrived because it was based upon a kind of network ethos, whereby individuals identified with each other on a reciprocal basis. As Farchy noted, the establishment of social norms was crucial to the success of network-based creativity within the 'free' software movement<sup>1139</sup>. Westkamp has stated that it is possible to observe that open-source networks are 'built upon an ethos of sharing'<sup>1140</sup>. Nonetheless, finding ways to regulate this ethos within the law is not a straightforward matter<sup>1141</sup>. A similar range of social norms could be said to apply in the network of musicians, as shown above. It is this system of social norms that appears to be of paramount importance in the network of musicians, not the law. In line with this, Loren has stated that the current system of copyright, which provides for automatic protection upon fixation, does not take account of the author's actual motivation for creating the work<sup>1142</sup>. As a result, an author may possess more rights than he or she desires. However, as noted above, this does not necessarily matter, if the author feels that the social rules of his or her creative system are more important than the strict enforcement of copyright law.

However, a number of legal proposals can be made to improve the law's regulation of musical works in the context of ITM, as outlined below.

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<sup>1139</sup> Farchy, *op. cit.*, 261.

<sup>1140</sup> Westkamp, *op. cit.*, 57.

<sup>1141</sup> *Ibid.*

<sup>1142</sup> Loren, *op. cit.*, 17.

- Firstly, a narrow fair dealing exception, or preferably a broad fair use provision, ought to be enacted into the CDPA and CRRA, via EU law or otherwise, to allow transformative dealing/use of musical works along the lines outlined in 4.1. Once enacted, specific fair dealing/fair use guidelines should be provided by IMRO/CCE to help guide musicians in this regard.
  
- Secondly, the CDPA and CRRA should be amended to allow an author to donate a copyright work, or at least the economic rights covering the work, to the public domain. This could encourage composers and arrangers of ITM to donate works to the public domain and it may also help to clarify which tunes are 'free' to use. In the context of ITM, it would be preferable if the moral right of attribution could still be retained by the author.
  
- Thirdly, the use of alternative licences such as CC is to be cautiously encouraged as these licences allow the author to license works as he or she sees fit. However, the caveat to this proposal concerns the fact that this proposal could effectively formalise the essentially informal system of social norms that currently regulates ITM.

In conclusion, from the empirical research in chapter 5, it appears that for many composers and performer-arrangers of ITM it appears that to a large extent to have the composition or arrangement accepted and played as part of the living tradition is its own reward. Therefore, the general conclusion to be drawn from the above thesis is that authors should be granted rights under copyright as normal and then given the choice of whether to donate or license their works as they see fit. However, it is important to emphasise that the true regulation of ITM occurs internally and informally among the musicians themselves via a system of social norms.

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## **Lecture**

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## **Reports**

Association of Independent Video and Filmmakers (ANF) et al., *Documentary Filmmakers' Statement of Best Practices in Fair Use* (18 November 2005) at 1-2; accessible at

[http://centerforsocialmedia.org/files/pdf/fair\\_use\\_final.pdf](http://centerforsocialmedia.org/files/pdf/fair_use_final.pdf)

*Gowers Review of Intellectual Property* (London: HMSO, 2006); accessible at [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)

IPO, *Taking Forward the Gowers Review of Intellectual Property* (London: IPO, 2008), 21-27 and 32; accessible at; <http://www.ipa.gov.uk/consult-copyrightexceptions.pdf>

Monopolies and Mergers Commission, *The Supply of Recorded Music: A Report by the Monopolies and Mergers Commission on the Supply in the UK of Pre-recorded Compact Discs, Vinyl Discs and Tapes Containing Music Cm 2599* (London: HMSO, 1994)

African Copyright and Access to Knowledge, *Country Report on Uganda*; accessible at [www.aca2k.org/attachments/154\\_Uganda\\_Country\\_Report.pdf](http://www.aca2k.org/attachments/154_Uganda_Country_Report.pdf)

## **Additional Websites**

BBC: <http://news.bbc.co.uk/1/hi/entertainment/8258217.stm>

<http://news.bbc.co.uk/1/hi/business/3622285.stm>

Copyright Websites: [www.cla.co.uk](http://www.cla.co.uk)

<http://www.copyright.gov/title17/92chap1.html#107>

Creative Commons: [www.creativecommons.org](http://www.creativecommons.org)

<http://creativecommons.org/international/ie/>

<http://creativecommons.org/about/licenses>

<http://creativecommons.org/about/licenses/meet-the-licences>

<http://creativecommons.org/choose/zero>

<http://creativecommons.org/licenses/by-nc/3.0/legalcode>

<http://creativecommons.org/weblog/entry/4216>

Ed Reavy: <http://www.reavy.us/compositions.htm>

EU Legal Resources:

[http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm)

[http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm)

[http://europa.eu.int/comm/internal\\_market/en/intprop/docs/index.htm](http://europa.eu.int/comm/internal_market/en/intprop/docs/index.htm).

[\[lex.europa.eu/smartapi/cgi/sga\\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ENnumdoc=31991L0250&model=guichett\]\(http://lex.europa.eu/smartapi/cgi/sga\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=ENnumdoc=31991L0250&model=guichett\)](http://eur-</a></p></div><div data-bbox=)

<http://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>

[\[lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT\]\(http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0464:EN:NOT\)](http://eur-</a></p></div><div data-bbox=)

Frankie Gavin: [http://www.irishfiddle.com/frankie\\_gavin\\_interview.html](http://www.irishfiddle.com/frankie_gavin_interview.html)

Kevin Burke: <http://www.kevinburke.com/>



International Legal Resources:

[http://en.wikisource.org/wiki/Convention\\_for\\_the\\_Protection\\_of\\_Literary\\_and\\_Artistic\\_Works\\_\(Berlin\\_Act,\\_1908\)](http://en.wikisource.org/wiki/Convention_for_the_Protection_of_Literary_and_Artistic_Works_(Berlin_Act,_1908))

[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1)

[http://portal.unesco.org/culture/en/ev.php-](http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html)

[URL\\_ID=1814&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html)

[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

<http://www.efc.ca/pages/law/canada/rome.copyright.1928.html>

Irish Music Rights Organisation: <http://www.imro.ie/>

<http://www.imro.ie/content/traditional-music>

<http://www.imro.ie/content/what-we-do>

<http://www.imro.ie/mcps/about-mcps>

IPO: <http://www.ipo.gov.uk/preview.htm>

Magnatune: <http://magnatune.com/>

Martin Hayes: <http://www.martinhayes.com>

Mick O'Connor: <http://www.paragonclub.co.uk/micko'connor.html>

Music Industry News Websites:

<http://www.iht.com/articles/2008/07/06/business/MUSIC07.php>

<http://www.webbyawards.com/press/pressrelease.php?id=118>

[http://news.cnet.com/8301-10784\\_3-9812275-7.html](http://news.cnet.com/8301-10784_3-9812275-7.html)

[http://news.cnet.com/8301-10784\\_3-9894376-7.html](http://news.cnet.com/8301-10784_3-9894376-7.html)

New York Times: [http://www.nytimes.com/2010/06/27/movies/27spector.html?fta=y.](http://www.nytimes.com/2010/06/27/movies/27spector.html?fta=y)

Nobel Prize: [http://nobelprize.org/nobel\\_prizes/economics/laureates/2009/press.html](http://nobelprize.org/nobel_prizes/economics/laureates/2009/press.html)

Noel Hill: <http://www.noelhill.com/>

Open Source Resources: <http://www.gnu.org/philosophy/free-sw.html>

<http://www.ubuntu.com/>

<http://www.microsoft.com/opensource>

<http://www.opensource.org/licenses/artistic-license-2.0.php>

Peadar O’Riada:

[http://peadaroriada.ie/index.php?option=com\\_content&view=article&id=89&Itemid=10](http://peadaroriada.ie/index.php?option=com_content&view=article&id=89&Itemid=10)

[5](#)

PPL: <http://www.ppluk.com/>

<http://www.ppiltd.com/>

PRS for Music: <http://www.prsformusic.com/Pages/default.aspx>

[http://www.prsformusic.com/creators/wanttojoin/how\\_it\\_works/arrangements/Pages/arrangements.aspx](http://www.prsformusic.com/creators/wanttojoin/how_it_works/arrangements/Pages/arrangements.aspx)

<http://www.prsformusic.com/creators/membership/MCPSroyalties/Pages/MCPS.aspx>

<http://www.prsformusic.com/creators/membership/MCPSroyalties/mcpsprinciples/Pages/MCPSdistributionprinciples.aspx>

[http://www.prsformusic.com/creators/wanttojoin/join\\_us/Pages/Writerapplicationform.aspx](http://www.prsformusic.com/creators/wanttojoin/join_us/Pages/Writerapplicationform.aspx)

<http://www.prsformusic.com/Pages/default.aspx>

<http://www.prsformusic.com/creators/news/research/Pages/default.aspx>

RAAP: <http://www.raap.ie/index.php?go=introduction-to-raap>

Rambling House:

<http://www.ramblinghouse.org/2010/02/tg4-honour-ex-chieftain-sean-potts/>

Search engines:

<http://search.yahoo.com/cc>

[http://google.com/advanced\\_search](http://google.com/advanced_search)

<http://search.creativecommons.org>

Tara Music: <http://taramusic.com.sllevenotes/cd4018.htm>

TK Resources: <http://www.cbd.int/traditional/intro.shtml>

[http://www.nciv.net/Millennium/Definitions/some\\_indigenous\\_peoples\\_english.htm](http://www.nciv.net/Millennium/Definitions/some_indigenous_peoples_english.htm)

The Guardian: <http://www.guardian.co.uk/music/2009/apr/08/coldplay-deny-satriani-plagiarism-claims>

<http://www.guardian.co.uk/music/2009/may/05/coldplay-yusuf-islam>

The Irish Times:

<http://www.irishtimes.com/newspaper/features/2010/0205/1224263802056.html>

Thesession.org: <http://www.thesession.org>

<http://www.thesession.org/tunes/display/1>

<http://www.thesession.org/tunes/display/1880>

<http://www.thesession.org/tunes/display/177>

<http://www.thesession.org/tunes/display/27>

<http://www.thesession.org/tunes/display472>

<http://www.thesession.org/recordings/display/1873>

<http://www.thesession.org/tunes/display/1593>

<http://www.thesession.org/tunes/display/849>

<http://www.thesession.org/tunes/display/177>

<http://www.thesession.org/tunes/display/1880>

<http://www.thesession.org/tunes/display/771>

<http://www.thesession.org/recordings/display/2099>

<http://www.thesession.org/tunes/display/560>

<http://www.thesession.org/tunes/display/150>

<http://www.thesession.org/tunes/display/302>

<http://www.thesession.org/tunes/display/150>

<http://www.thesession.org/recordings/display/3406>

<http://www.thesession.org/discussions/display/25590/comments#comment538124>

<http://www.thesession.org/discussions/display/19122/comments#comment399720>

UK and Ireland Legal Resources:

[http://www.opsi.gov.uk/acts/acts1958/pdf/ukpga\\_19580044\\_en.pdf](http://www.opsi.gov.uk/acts/acts1958/pdf/ukpga_19580044_en.pdf)

[http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga\\_19560074\\_en.pdf](http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga_19560074_en.pdf)  
[http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga\\_19110046\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga_19110046_en_1)  
<http://www.opsi.gov.uk/si/si2006/20060018.htm>  
[http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp)  
<http://www.irishstatutebook.ie/1968/en/act/pub/0019/index.html>  
<http://www.constitution.ie/constitution-of-ireland/default.asp>  
<http://www.irishstatutebook.ie/1963/en/act/pub/0010/index.html>  
<http://www.irishstatutebook.ie/1927/en/act/pub/0016/index.html>

US Legal Resource:

<http://www.law.cornell.edu/copyright/copyright.act.chapt1a.html#17usc102>  
[http://centerforsocialmedia.org/files/pdf/fair\\_use\\_final.pdf](http://centerforsocialmedia.org/files/pdf/fair_use_final.pdf)

Wikipedia: [www.wikipedia.org](http://www.wikipedia.org)

WIPO: <http://www.wipo.int/portal/index.html.en>  
[http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html)  
[http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf)  
[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=55137](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=55137)  
[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P51\\_3806](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806)  
[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)  
<http://www.wipo.int/treaties/en/ip/wppt/>

# Annex I – Survey Questions

A copy of the survey, as visible to respondents, is shown below:

## **Background to the Survey**

Welcome to the Irish Traditional Music and Copyright Survey. Before you complete the survey you should read the following background information.

As well as being a Ph D law student, I am also a musician and I occasionally play mandolin or banjo at sessions around London. My initial interest in the subject came from observance of the sharing of tunes and variations between musicians. I am genuinely interested in the views of Irish traditional musicians concerning this subject and the questions in this survey have been designed to give you as much scope as possible to give any opinions you have.

However, you may want to note that I am not discussing questions surrounding the copyright of sound recordings i.e. cds, LPs, tapes etc. - What I am interested in is the composition of new tunes and the arrangement of existing traditional tunes and the subsequent ways these tunes are shared and passed around by Irish traditional musicians.

My thesis abstract is available at the link below.

If you would like further information, feel free to email me. My abstract and contact details are accessible at:

<http://www.law.qmul.ac.uk/people/research/mcdonagh.html>

Luke McDonagh,  
Ph D Candidate  
Queen Mary, University of London

## **Information for Participants**

Please read the following information concerning data protection.

All data collected in this survey will be held anonymously and securely. The anonymous data collected from this survey may be used in future publications.

As part of the survey you will be asked to confirm that you are only completing this survey once. This is important to safeguard the validity of the survey.

This survey is solely intended for Irish traditional musicians who live or work in the UK or Ireland. You must be over 18 to complete this survey.

If you live or work in another jurisdiction e.g. US, Canada, Australia, then you should NOT complete this survey. The reason for this is due to the fact that the copyright law is different in other countries and these jurisdictions are not covered by this thesis.

The survey is to be completed by you anonymously. It can be saved part of the way through and it takes around 5-10 minutes to complete.

By completing this survey, you have agreed to the conditions above

## Musician Details

Questions are **mandatory** unless marked otherwise.

### Irish Traditional Music and Copyright

1. Please confirm that this is the first and only time you are completing this survey

- I have not completed this survey before.

2. Which age bracket do you fall into?

- Age 18 - 30
- Age 31 - 45
- Age 46 - 60
- Age 60+

3. Please select one of the two states below (UK or Ireland) to describe where you currently live or work.

### Irish Traditional Music and Copyright

4. As a musician, how would you describe your understanding of copyright law in relation to Irish traditional music?

- I have some understanding of copyright law in this area

- I have a strong understanding of copyright law in this area
- I have little or no knowledge of copyright law in this area
- Other (*please specify*):

Were you aware that in the UK and Ireland, copyright arises automatically once your composition or your arrangement is written down or recorded i.e. you do not have to register a copyright?

- Yes, I was aware of this
- No I was not aware of this

**5.** Are you a member of a copyright royalty collecting society such as IMRO or PRS?

- Yes, I am a member
- No, I am not a member, though I am aware of the role of collecting societies
- I am not aware of the role of collecting societies

Would you like to say anything about the role of collecting societies in this area? (*Optional*)

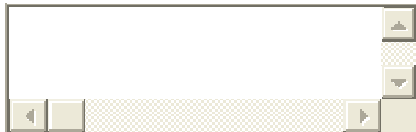


6. How would you describe yourself as a musician? Feel free to tick 2 or more boxes if applicable.

*(select all that apply)*

- Performer-Arranger i.e. you generally arrange tunes in your own style, or a regional style, and perform them on your instrument, adding variations, improvisation etc.
- Composer i.e. you have composed a tune that other Irish traditional musicians have played

Is there anything you would like to add regarding yourself or these descriptions? (More info is available in the tab on the right hand side of the question) *(Optional)*



7. Which of the following types of tunes do you play? Feel free to tick more than one of the boxes if applicable.

*(select all that apply)*

- Older tunes i.e. tunes that have no identifiable composer such as 'The Pipe on the Hob' etc.
- Newer tunes i.e. tunes that have been composed more recently by identifiable composers such as Ed Reavy, Vincent Broderick etc.

Newer arrangements of tunes i.e. older tunes that have become associated with certain musicians due to their arrangement of the tune e.g. Joe Cooley's Reel

Other (*please specify*):

### Traditional Music and Copyright

**8.** In your opinion, should the composer be acknowledged by name when his or her composition is recorded or performed by another Irish traditional musician?

- Where possible the composer should be named
- It depends on what the composer wants
- Tunes are generally shared freely, and giving the name of the composer is not important
- I do not consider this to be an important issue
- Other (*please specify*):

**9.** In your opinion, should an Irish traditional musician ask for permission from a composer before recording his or her composition?

- Generally, the musician should ask permission from the composer
- It depends on what the composer wants
- Tunes tend to be shared freely and informally, therefore asking permission is not necessary

- I do not consider this to be an important issue
- Other (*please specify*):

Under copyright law, permission and licence would usually have to be granted in order for a composer's tune to be recorded by another musician. Do you think that there should be an exception to this for Irish traditional music?

**10.** In your opinion, should a composer be able to object if another musician makes changes to his tune, or uses part of it in the creation of another tune?

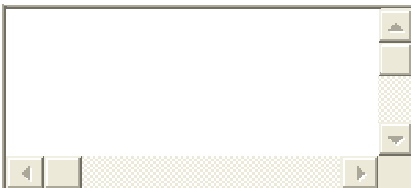
- Yes, the composer should have this right
- No, the composer should not have this right
- The sharing and creation of tunes should not be restricted in this way
- It depends on what the composer wants
- I do not consider this to be an important issue

Is there anything else you wish to say regarding this question (*Optional*)

**11.** When, if at all, do you think a composer of Irish traditional music should receive payment, for the use of his or her Irish traditional composition? Feel free to tick multiple boxes if appropriate

*(select all that apply)*

- Never
- When it is recorded by another traditional musician on a cd?
- When it is recorded or used by a commercial artist e.g. Riverdance etc.?
- When it is performed by other traditional musicians at sessions?
- When it is performed by other traditional musicians at professional live gigs?
- When a performance of the tune is broadcast on radio/TV?
- When it is used in a TV show, commercial or film?
- Other *(please specify)*:



**12.** In your opinion, should previous performer-arrangers be acknowledged by name when a tune that they have previously recorded is recorded or performed by another Irish traditional musician? (More info is available by clicking the tab on the right)

- Where possible previous performer-arrangers should be named
- It depends on what previous performer-arrangers want
- Tunes are generally shared freely, and giving the name of previous

performer-arrangers is not important

- I do not consider this to be an important issue
- Other (*please specify*):

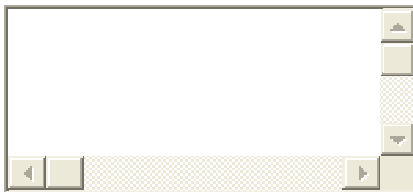
**13.** In your opinion, should an Irish traditional musician ask for permission from a previous performer-arranger before recording a version of a tune which is similar to the previous recorded arrangement?

- Generally, the musician should ask permission from previous performer-arrangers
- It depends on what previous performer-arrangers want
- Different versions of tunes are generally shared freely and informally, therefore asking permission is not necessary
- I do not consider this to be an important issue
- Other (*please specify*):

Under the strict enforcement of copyright law, permission and licence may have to be granted in order for a particular arrangement of a tune to be recorded by another musician. Do you think that there should be an exception to this for Irish traditional music?

**14.** When, if at all, do you think a performer-arranger of Irish traditional music should receive payment, for the use of an arrangement/performance of a tune? Feel free to tick multiple boxes if appropriate  
*(select all that apply)*

- Never
- When that particular arrangement of the tune is performed by other traditional musicians at sessions?
- When it is performed by other traditional musicians at professional live gigs?
- When a performance of the tune is broadcast on radio/TV?
- When it is used in a TV show, commercial or film?
- Other *(please specify)*:



**15.** In your opinion, what is the current effect of copyright law on Irish traditional music?

- Positive
- Negative
- It has little or no effect
- Other *(please specify)*:

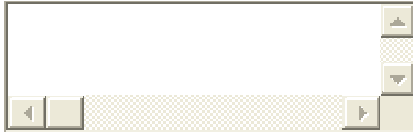
Please give a reason for your answer

**16.** Do you have any knowledge of one or more of the following legal areas? Feel free to tick more than one box if applicable  
(select all that apply)

- Fair Dealing or Fair Use under Copyright
- 'The Public Domain'
- Alternative Licences such as 'Creative Commons'
- 'Traditional Knowledge'
- I have little knowledge of these subjects

If you are aware of these legal areas, would you be willing to use any of these alternatives e.g. creative commons licences, fair dealing etc. in relation to Irish traditional music? (*Optional*)

**17.** Is there anything else you would like to add regarding the subject of copyright and Irish traditional music? (*Optional*)





# **Annex II – Sample Interview Questions**

## **Interview Question Guide – Exploring Potential Solutions to the Conflicts between Copyright and Irish Traditional Music**

### **Proposed Structure for one-to-one interviews (November 2009- September 2010)**

#### **Part A – Based on Conclusions from Chapters 2 and 3**

Firstly, I will introduce the idea of authorship in Irish traditional music and discuss my conceptual division of authorship in Irish traditional music i.e. a) creation through traditional transmission, b) individual composition and c) individual arrangement.

Thereafter I shall

- Ask participants if they have any thoughts on the traditional process of transmission (as detailed in chapter 3) - how important is this process to Irish traditional music?
- Ask participants about their views on new compositions by individual composers – what role this has, and whether they think individual composition is valuable to the culture of traditional music?
- Ask participants about their views on new arrangements by individual performers – what role does this have in the traditional process?
- Give them an opportunity to discuss their idea of authorship/performance in Irish traditional music

#### **Part B – Based on Conclusions from Chapter 3**

Here I will proceed to briefly introduce my outline of the concept of ownership under Irish traditional music and contrast this with elements of ownership and rights under copyright law such as attribution and licensing (as detailed in chapter 3).

Thereafter I shall

- Raise the crucial issue of Attribution – regarding the various forms of authorship outlined in Part A, is attribution important in ITM? Under copyright attribution usually only really protects the rights of individual or joint authors, so it is questionable whether there a need to formalise other types of attrib prevalent in ITM?
- Raise the issues concerning Licensing – do composers/arrangers expect to be paid and whom should pay? Issues to be raised in detail include: Should licences be obtained before new arrangements are made? Does licensing affect the traditional process of transmission/authorship? When tunes are passed around, who should be attributed? Multiple parties? If licences threaten to stifle the transmission process, should they be ignored?
- Raise the issue of Control – regarding licensing, should individual composers/arrangers have control? Issues to be raised in detail include: Should composers/arrangers use IMRO/PRS or not? An increasing amount of traditional musicians are members. Is this a good thing for the culture as a whole? Would composers/arrangers be satisfied with payments for some uses such as radio play, but not for recording, public performance?

#### **Part C – Based on Conclusions from Chapter 4**

Introduce the possible alternatives:

- Option 1 - Keep the system of Irish traditional music as it is – a largely informal system based upon social norms, with the choice of whether to enforce copyright left open to the individual composer/arranger/performer.
- Option 2 – The possible use of Alternative licences – this would give choice to each individual composer/arranger over rights they want to keep. Further points: Are musicians aware of these licences such as ‘Creative Commons’? In practice, would musicians actually avail of these licences?
- Option 3 – Use of fair dealing/use – does the interviewee understand this term?
- Option 4 – Use of traditional knowledge – does the interviewee understand this term?
- Option 4 - Donation to Public Domain – this avoids complications and could facilitate the traditional process of creation through transmission, but potentially, individual composers/arrangers would lose control of their works. Would composers be willing to do this? Would arrangers?