

Introduction

Dance has rarely been accepted as the subject of copyright protection because works of dance and choreography have often lacked commodified, property-object status in intellectual property law.¹ If dance is ‘haunted by its own ephemerality’ and thus rarely embodied as property-object, then what of dance music?² Music composed, performed and recorded with a dance audience in mind has, on many occasions, formed the subject-matter of intellectual property law claims, as the rancorous recent litigation over the nightclub (and online-streaming) hit ‘Blurred Lines’ demonstrates.³ In this article, I put forward the case study of traditional Irish dance music to explore how traditional music occupies a space somewhat outside the formal legal system, defined by informal social norms such as reciprocity, sharing and acknowledgement (attribution).⁴ I critique how Irish traditional music can be represented as heritage and as property, reflecting on the type of ownership at play in the Irish traditional music community.

‘Heritage’ in this context brings into play the legal responsibilities on states to document and safeguard cultural practices and expressions under the 2003 UNESCO Convention on Safeguarding the Intangible Cultural Heritage (ICH). I observe that there are three overlapping claims to Irish traditional dance music *as heritage*: a performative, social sense of ‘passing on’ the music via person-to-person connections; a perspective that emphasises cultural nationalism; and finally, a governmental link with tourism from Ireland’s diaspora. Despite Ireland’s 2016 ratification of the 2003 UNESCO Convention, claims to *universalist* heritage appear to lack resonance due to the competing social, cultural nationalist

¹ Kraut 2015.

² Ravetto-Biagioli 2020: 101, 102.

³ *Williams v Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018).

⁴ For the purposes of this article, I largely exclude other forms of Irish traditional music such as songs and ‘slow airs’ as despite their importance - and beauty - they are not part of the dance music tradition.

and diasporic claims to the music as heritage, which appear to be sufficiently supportive of the tradition to the extent that seeking international recognition is, at best, an afterthought.

‘Property’ in this context brings up issues of copyright (and public domain) under national and regional legal systems, as well the notion of traditional knowledge (TK) within the remit of the World Intellectual Property Organization (WIPO). In assessing Irish traditional dance music *as property*, I argue that like dance itself, traditional music tends to resist intellectual property categorisation. Nevertheless, although much of the existing body of the music is in the public domain, new compositions and arrangements are covered by copyright law. Yet, practitioners of Irish traditional dance music typically do not follow the Lockean liberal-utilitarian labour theory that artists should assert rights in their commodified labours.⁵ Rather than requiring copyright licences from one another, the practitioners of Irish traditional dance music tend to treat the music as a kind of shared resource, governed collectively, with individual authorial acts recognised via community practices of attribution - a finding which echoes with the work of Elinor Ostrom.⁶ In this vein, the culture of Irish dance music demonstrates an ethos of sharing while also providing space for individual personhood to be expressed.⁷ Traditional Irish dance music thus resists commodification, resembling instead what James Leach calls ‘the gift form’, a mode that ‘establishes the conditions for ongoing relations between the parties’ (and which can be contrasted with the commodity form – ‘a mechanism for separating one party from goods’).⁸ Leach’s gift form concept resonates in the context of the community practices of Irish traditional dance music due to its focus on social relations, reciprocity and sharing.

At first glance these embedded values may appear compatible with WIPO’s concept of traditional knowledge (TK). Yet, as with the relative absence of the international (UNESCO) dimension in

⁵ Karapapa and McDonagh 2019: 1-17.

⁶ Ostrom 1990, Ellickson 1991.

⁷ Irish traditional dance is not immune to ethnic and race discrimination. When the African-American dancer Morgan Bullock ‘went viral’ with her interpretation of Irish traditional dance, some on social media accused her of cultural appropriation of Irish dance. See M. Bullock, ‘Why I feel in love with Irish dancing’ BBC (18 July 2020) - <https://www.bbc.co.uk/news/av/world-us-canada-53452080>

⁸ Leach 2014: 458, 460.

discussions of Irish music as heritage, there is comparatively little reference to the WIPO TK debates in the discourse surrounding traditional dance music. Although some tensions exist within the Irish traditional music community over commercialisation, and can become inflamed when commodification of Irish traditional dance music occurs as part of global stage shows such as Riverdance, or as part of film or TV soundtracks, such tensions do not dominate the discourse. The overwhelming majority of Irish traditional musicians remain embedded within a social world of creativity that largely forgoes commercial concerns. WIPO's concept of TK lacks appeal as it would formalise the informal, normative ways by which traditional musicians share tunes and govern the music.

In this article I begin by exploring the musicological context of Irish traditional dance music, outlining its musical structures as well as its archetypal instruments. I assess what makes it distinctive as a form of music by focusing on its musical characteristics, its range of styles and the emphasis placed on melodic ornamentation and rhythmic variation. I then discuss the music from the perspectives of heritage and property. I assess possible conflicts between community governance of the music and individual property claims, analysing the extent to which commercial concerns have affected the transmission of the music. I conclude by putting Irish traditional dance music forward as an example of 'heritage as resistance' – a mode of cultural and social practice which continues to thrive as a living tradition, even in the contemporary market-oriented world of the Global North.⁹

Musicological Background – What is Irish Traditional Dance Music?

Traditional music is generally thought of as old or even ancient - meaning it is often categorised as pre-modern.¹⁰ Although the terms 'traditional' and 'folk' are sometimes used interchangeably, the term traditional music is preferable.¹¹ Porter argues that 'traditional' more clearly implies a process,

⁹ Ravetto-Biagioli (n 2).

¹⁰ Ó Laoire 2003: 113. On the traditional/modern binary, see Latour 1993 and Dutfield, 2017.

¹¹ Porter 1989: x. Porter noted that 'folk' contains 'overtones of 19th century romanticism and condescension.

(something which ‘folk’ does not).¹² In this vein, for the most part I refer to traditional music in this article.¹³

In historical practice, what distinguished traditional music – whether European dance music,¹⁴ African-American blues and jazz music,¹⁵ or indigenous music in South America,¹⁶ Asia¹⁷ and Africa¹⁸ – from other forms of music was dependence on a process of person-to-person transmission (orality/aurality). This oral/aural process differed – and continues to differ – from the written, documented forms of learning and transmission common to e.g., Western classical music. Although today many performers of traditional music often augment the techniques of oral/aural transmission with some form of notation to aid their learning (usually recordings or transcriptions) making and maintaining personal, social connections between musicians remains central to the music’s lifeworld.¹⁹

Irish traditional dance music can be described as music from Ireland that is traditional in the sense of ‘origin, idiom or in the transmission or performance style’.²⁰ As musical form it has developed in Ireland over the last 300 years, from both ‘native’ and external influences.²¹ It is often described as ‘Celtic’.²² Yet, Porter criticises the general use of this term, opining that it is ‘riddled with linguistic, cultural and ideological implications’.²³ Gaelic *sean nós* songs can justifiably claim to be Celtic in the sense that they have song lyrics in a Celtic language (Irish/*An Gaeilge*). However, it would be inaccurate to say that other forms of Irish traditional dance music are Celtic. Some aspects of the dance music of Ireland, especially the reels and hornpipes, have as much - if not more - in common with the lowland Scots and northern English forms of dance music than the traditional music of other Celtic communities in

¹² Ibid., xi.

¹³ Breathnach 1993. I make use of the term folk on a small number of occasions when it does not lead to ambiguity.

¹⁴ Lind 1997.

¹⁵ Whyton 2010; see also Arewa 2006a: 277.

¹⁶ Kuss 2004.

¹⁷ Malm 1996.

¹⁸ Kwabena Nketia 1974.

¹⁹ Toynbee 2006: 77.

²⁰ Waldron 2006: 1, 3.

²¹ Breathnach (n 13) 88.

²² J. Mollenhauer 2015: 35-54

²³ Porter (n 11) 205.

Brittany and Galicia.²⁴ 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.²⁵

The Origins of Irish traditional music

The origins of Irish traditional music are much debated. McCarthy notes 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.²⁶ This dichotomy does not take into account the many different sources that went into the creation of the body of Irish traditional music, including a mixture of indigenous and foreign music.²⁷ Valley explains that Irish traditional music contains a balance of ‘indigenous base material’, influences from classical music, Baroque structures, and material borrowed from the Scottish, English, and French traditions.²⁸ The music also includes the form of ‘indigenous classical music of the onetime court harpers who had become redundant due to Gaelic dispossession prior to the eighteenth century’.²⁹

Breathnach opines that the majority of Irish traditional melodies came into being over the last three or four centuries, with the majority of tunes composed or adapted during the late 18th and early 19th centuries.³⁰ It is certainly possible that there are earlier musical elements present in the body of tradition ‘sustained like particles of matter in a stream’ but this cannot be proven.³¹ The lack of the written form until the 18th and 19th centuries, when collections of notated tunes were finally published (often by Anglo-Irish enthusiasts such as George Petrie) means that it is difficult to gauge with accuracy the age of many traditional tunes.³² For this reason, even if some melodies are pre-17th century in origin,

²⁴ Ibid., 211.

²⁵ Valley 2003: 201, 208.

²⁶ McCarthy 1999.

²⁷ Valley (n 25).

²⁸ Ibid., 202.

²⁹ Ibid., 204.

³⁰ Breathnach (n 13).

³¹ Ibid., 18. Breathnach notes that there are a small number of melodic airs that can definitively be dated to earlier times, such as ‘Cailín ó Chois tSiúre mé’.

³² Ibid., 16. Ó Laoire (n 10) 115.

labelling them as such is largely conjecture.³³ On this Breathnach refers to one of these key collections – by Edward Bunting (1773–1843) - stating:

“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.”³⁴

While many melodies have undoubtedly been lost over the past three centuries it is evident that ‘the tradition is still living, the national store maintains itself, later additions offsetting losses of older material’.³⁵ This notion of the music as a living tradition is crucial. The music is not static; it is in a constant state of redefinition. As discussed further below, the creation of new compositions and arrangements plays an important role in maintaining this living tradition.

Furthermore, although printed collections have grown in influence, Irish instrumental music remains largely dependent on the traditional process of person-to-person transmission rather than a written, documented form (such as in the case of Western classical music). The way the music is transmitted is also the way it is ‘authored’ and, as we shall see, while the individual is present, the overriding focus is on a collective sense of ownership.

Examining the Structures of Irish traditional dance music and the various traditional instruments

Irish traditional music emerged in the vibrant rural culture of the 18th and 19th centuries in which dance was a primary medium of self-expression.³⁶ This culture left modern Ireland with a remarkable inheritance: an extraordinarily rich legacy of dance music including at least six thousand individual

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ó Laoire 2005: 267.

pieces of music.³⁷ Dance remains central to the structure of the music even if the music is played for a listening audience (rather than dancing participants). The strict patterns of the various reels, jigs, polkas and hornpipes match the dance steps that go along with each type of tune. There are some exceptions, but it is generally commonplace today that when playing a tune, each part of the tune is repeated, just as dance steps may be. The first part is sometimes known as the ‘tune’ and the second is known as ‘the turn’.³⁸ Breathnach remarks:

“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.”³⁹

The reel is the most common type of Irish dance tune in played today.⁴⁰ It is thought that this form of dance music ‘evolved’ in the mid-1700s.⁴¹ Reels usually follow a 4/4-time signature, and they are generally played in a steady, consistent fashion to aid dancers.⁴² A reel usually has at least two parts, and each part is usually eight bars in length. Each part is commonly played twice in sequence, although there are some ‘single reels’ where each part is played only once.⁴³ Many Irish reels are likely derived from Scottish sources - there is a scarcity of reels in early Irish collections compared with Scottish reel ‘music sheets’ which indicates that migration from Scotland to Ireland brought many such tunes into the Irish tradition.⁴⁴ For instance, the reel recorded in the US in the early 20th century by emigrant Irish musician Michael Coleman as ‘Bonnie Kate’ was in fact originally composed by Daniel Dow, a fiddler from Perthshire in Scotland.⁴⁵ Similarly, ‘The Boyne Hunt’, which has been recorded by numerous musicians, including the famous Irish accordion player Joe Cooley,⁴⁶ was composed by Miss Stirling

³⁷ Breathnach (n 13), 56.

³⁸ Ibid., 57.

³⁹ Ibid., 56.

⁴⁰ Ibid., 59.

⁴¹ Ibid., 60.

⁴² Ibid., 88.

⁴³ Ibid., 56.

⁴⁴ Ibid., 60.

⁴⁵ Ibid.

⁴⁶ The tune can be found on the Joe Cooley, *Cooley* (Gael Linn, 1975) and other recordings listed at <http://www.thesession.org/recordings/display/211>

of Ardoch and published in 1780.⁴⁷ There are numerous other examples of the adoption of Scottish tunes into the Irish tradition.⁴⁸ Via the oral/aural process of transmission, these tunes, Scottish in origin, have flourished in their Irish settings, and they are now markedly different from their original versions, acquiring new names as well as new musical phrases.⁴⁹

The jig is the oldest form of dance music in the Irish tradition and is the second most-common type of Irish dance tune (after the reel).⁵⁰ There are various forms including double jigs, treble jigs, slip jigs, and single or hop jigs.⁵¹ 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. Most of the jigs in the tradition can be described as Irish in origin, with the majority composed by the Irish pipers and fiddlers of the 18th and 19th centuries.⁵² Despite this, the source of the actual word ‘jig’ is thought to be Italian.⁵³

The hornpipe is English in origin. In its present dance form it can be dated to around 1760.⁵⁴ During the late 18th century this form of music was typically performed and danced on stages ‘between the acts and scenes of plays’.⁵⁵ Hornpipes are somewhat similar to reels in that they usually have a 4/4-time signature; but they differ from reels in the way certain notes are emphasised – and they are usually played in a more deliberate manner.⁵⁶ The structure of the hornpipe, and the fact that it is often played at a slower pace than a reel, means the hornpipe can often become a vehicle for individual musical expression, via the addition of melodic variations.⁵⁷ Another class of dance tune, the ‘set dance’ is often played to a hornpipe rhythm.⁵⁸

⁴⁷ Breathnach (n 13) 61.

⁴⁸ Mac Aoidh 1994: 19 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.’

⁴⁹ Breathnach (n 13) 61.

⁵⁰ *Ibid.*, 57.

⁵¹ Ó Laoire (n 36).

⁵² Breathnach (n 13) 59

⁵³ *Ibid.*, 57.

⁵⁴ *Ibid.*, 61.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Hall 1994.

⁵⁸ Breathnach (n 13) 62

The polka dance is indelibly associated with the southern counties of Ireland, especially Kerry. The Irish polka varies distinctively from the Eastern European polka form.⁵⁹ Polkas have a 2/4-time signature and are played at a fast, steady pace, which is ideal for dancing.⁶⁰ Apart from reels, jigs, hornpipes and polkas, there are additional forms of dance music that are less commonplace, such as strathspeys, flings and mazurkas, all of which are particularly prevalent in the Northern counties of Ireland such as Donegal. While many of these tunes do have a certain Irish melodic quality, they remain strongly influenced by Scottish music.⁶¹

The way the various tunes are played depends, to some extent, on the particularities of each instrument.⁶² The first instrument of all music is, of course, the voice. Due to the influence of the Gaelic *sean nós* style, which includes the singing of dance tunes ('mouth music'), the human voice has undoubtedly influenced the instrumental dance tradition.⁶³ The archetypal traditional instruments that feature in the playing of this music are the harp, the *uilleann*⁶⁴ (union) pipes (a type of bag pipes played by exertion using the elbow⁶⁵), the fiddle, the flute, and the tin whistle. Furthermore, since the 1950s and 1960s the guitar, the tenor banjo, the mandolin, and even the Greek bouzouki, have become very popular.⁶⁶ At times, the music itself has been altered 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 the instrument.⁶⁷ In this way, tunes that were once suited to one instrument (e.g., the pipes or the harp) can be re-interpreted to suit another (e.g., the fiddle or the mandolin).⁶⁸

⁵⁹ See comments at <http://www.thesession.org/tunes/display/1410>

⁶⁰ Rimmer 1987: 164.

⁶¹ Mac Aoidh (n 47) 20.

⁶² O'Canainn 1978.

⁶³ Ó hAllmhuráin 1999: 9.

⁶⁴ 'Elbow' in the Irish language.

⁶⁵ Breathnach (n 13) 75.

⁶⁶ See generally M. Maher, 'An Irishwoman's Diary,' *The Irish Times* (2002) accessible at; <http://www.mickmoloney.com/articles/maher.html>

⁶⁷ Mac Aoidh (n 48) 37.

⁶⁸ Breathnach (n 13) 93. Much of the use of variation, ornamentation and decoration by flute and whistle players derives from piping styles.

The Defining Characteristics of Irish traditional dance music

From a musicological perspective Irish traditional dance music has several defining characteristics that make it unique and distinctive. Here I focus on three: the inherent melodic coherency and character of the music; the distinctive regional and individual styles; and the use of variation and ornamentation.

Regarding the music's 'Irish' character, the fact that many tunes share similar melodic motifs is indicative of a recognisable musical coherency. Farrell observes the prevalence of a B-minor 'motif', or melodic figure, in many tunes, meaning that there are many tunes that share similar, if not identical, musical parts.⁶⁹ A number of the older, piping tunes have, via performance and transmission, 'branched off' into distinctive variants.⁷⁰ These variants share melodic parts while being distinct tunes. For example, Mac Aoidh remarks that the tune 'The Tullaghan Lassies Reel' is known in at least two other variants as 'Lough Isle Castle' and '*Seán Sa Cheo*'⁷¹ both of which derive from a root melody known as 'Sleepy Maggie', published in Scotland in 1734.⁷² The well-known reel 'Toss the Feathers' has at least four distinct versions and each one contains subtle differences. However, each version is still musically recognisable as 'Toss the Feathers'.⁷³ The existence of these shared melodic motifs, as well as identical tune parts, gives a unique character to Irish traditional dance music – demonstrating continuity and variance at once.

There are several regional (and many individual) styles that enhance variance. Gearóid Ó hAllmhuráin states:

"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

⁶⁹ Farrell 2003 - accessible at <http://musicandcopyright.beyondthecommons.com/farrell.html>

⁷⁰ Mac Aoidh (n 48) 42.

⁷¹ This translates as 'Sean in the fog'.

⁷² Mac Aoidh (n 48) 42.

⁷³ 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).

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”⁷⁴.

The styles reflect regional topographies and do not recognise county borders. An example of this can be seen 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.⁷⁵ However, even county borders can be misleading - the musical styles of the bordering villages of East Galway and East Clare share many characteristics, such that they have more in common musically to each other than the East Clare style does to the West Clare style.⁷⁶ Moreover, the Donegal style is strongly related to Scottish music, but it has its own distinct character.⁷⁷ Wilkinson observes:

“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.”⁷⁸

Further to this, many contemporary performers have attempted to mould their own individual styles, which may lean on one or more regional styles. The celebrated fiddler Martin Hayes has stated that individual styles are the only way for the Irish tradition to continue to evolve into modern times, even if departure from a regional style may lead to criticism from a minority of ‘purists’.⁷⁹ In any event, the ability to add melodic variation and ornamentation to a performance of a tune is vital to the living tradition of Irish traditional dance music. In this respect, Waldron compares the musical practices and

⁷⁴ Ó hAllmhuráin (n 63) 7.

⁷⁵ B. Taffe, ‘Regional Fiddle Styles in Ireland,’ (October, 2006) - accessible at <http://www.fiddlelessons.com/oct06/Taaffe.pdf>

⁷⁶ Ibid.

⁷⁷ Mac Aoidh (n 48) 20.

⁷⁸ Wilkinson 1992: 5.

⁷⁹ 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

processes of Irish traditional dance music to jazz.⁸⁰ Ornamentation, such as the use of a ‘crann’, ‘roll’, or ‘triplet’, can play a prominent part in a musician’s individual performance of a tune.⁸¹ Each instrument’s own demands and limitations will also determine what type of adornment can be added. For example, pipers generally use melodic embellishment in their playing ‘because this suits their instrument’ whereas as concertina players often use ‘rhythmical or metrical variations’ in line with the practical limits of their instrument.⁸²

Modern Forms of Transmission via Recordings, Social ‘Sessions’ and Online Facilities

The availability of recording technology has had a profound influence on traditional styles. For instance, the *uilleann* piper Patsy Touhey - an immigrant to the US - adapted his style of playing to suit his American ‘vaudeville’ audience. Touhey’s is said to be the first Irish-American style.⁸³ 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 back in Ireland.⁸⁴ Meanwhile, changes in the styles of accordion playing during the 20th century onward demonstrate a detailed example of the effect of recordings on traditional ways of playing. The first button accordions that were used for Irish traditional dance music were single-row melodeons, made popular by recordings of players such as John Kimmel in the 1920s.⁸⁵ Subsequently, in the 1950s recordings of the chromatic B/C style accordion player Paddy O’Brien helped establish a ‘new style’ of playing Irish tunes on the button accordion, which led to the older ‘melodeon’ style of C#/D becoming almost obsolete.⁸⁶ Later, in the 1970s, recordings of C#/D accordion player Jackie Daly became popular, and this led to a resurrection in popularity for the older style. Today both styles are widespread.⁸⁷ From this we can observe that the availability of recordings can alter the process of learning the music, leaving an indelible mark on it. This continues today: many

⁸⁰ Waldron (n 20) 4.

⁸¹ Ibid.

⁸² Ibid.

⁸³ S. K. S. Smith 2001: 111, 117.

⁸⁴ Mac Aoidh (n 48) 19.

⁸⁵ G. Smith 1997: 436.

⁸⁶ Ibid., 437.

⁸⁷ Ibid., 451.

musicians learn tunes directly from recordings, rather than exclusively through a person-to-person process. Nonetheless, the use of technology has not replaced in person sociality and transmission.⁸⁸

In the contemporary world the person-to-person transmission of music ‘by ear’ often takes place during the ‘session’. The session is a social gathering based around the informal playing and learning of Irish traditional dance music. It can be described as a ‘musical context that occurs most generally in pubs, but also occasionally in private houses, with three or more musicians’.⁸⁹ Dancers may occasionally be present – where there is space to dance – but in general the music is played for listeners. Although communal sociality has always been present in Irish traditional dance music, the session in its modern form is a relatively recent phenomenon. Pub sessions began in emigrant cities such as London in the early to mid-20th century, when playing music in public houses became a workable alternative to kitchen, house and hall dances.⁹⁰ It was not until post-WWII, and particularly from the early 1960s onwards, that pub sessions became common throughout Ireland itself.⁹¹

The session is inherently egalitarian since it typically involves the sharing of melodies, variations, and historical information about the tunes.⁹² Today, some Irish traditional dance music sessions are specifically aimed at encouraging inexperienced players - tunes will generally be played a slower pace so that learners can listen for patterns as part of a contextual musical education.⁹³ Waldron emphasises that Irish musicians value their connections with each other precisely because this enables the sharing of tunes and variations in social settings.⁹⁴ Observing Irish traditional performers, as well as Delta Blues musicians, in his hometown of Boston, Smith remarks that both groups of instrumentalists share similar traits: there is a strong sense of artistry within each set of musicians, but also a commitment to ‘mutual social respect’ and ‘a sense of a place for all within the community’.⁹⁵

⁸⁸ Toynebee 2006: 77, 77-79.

⁸⁹ Kaul 2007: 703, 704.

⁹⁰ *Ibid.*, 705.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Waldron (n 20) 9.

⁹⁴ *Ibid.*, 16.

⁹⁵ C. Smith 2006: 14.

Not everyone agrees that pub sessions are a positive part of the Irish tradition. Some contend that the session can often be a ‘loud, smoky, drink-filled experience’.⁹⁶ Breathnach laments that the popularity of the group session has led to a devaluing of the more subtle ‘solo art’ function of traditional music.⁹⁷ Despite this, there is little doubt that the session provides an important social and transmission function.

In addition to the availability of pub sessions, there are also a growing number of online community facilities such as ‘IRTRAD’⁹⁸ and ‘thesession.org’.⁹⁹ In particular, thesession.org website is one of the most widely used of these internet sites - by 2007 it had over 38,000 members and over 6,000 active contributors.¹⁰⁰ In the years since it has continued to grow by 3000-4000 new members per year.¹⁰¹ The website allows musicians to share Irish tunes and variations. It also provides a discussion forum and a facility for advertising sessions in locations in countries including Ireland, the UK, the US, Canada, and Japan. The folklorist Nicholas Carolan describes these new online transmission facilities as forming a ‘secondary aurality’.¹⁰² Secondary or not, new technology appears to be playing an ever-increasing role in ensuring that Irish traditional dance music thrives in the 21st century.

Sharing, Property and Commodification - Exploring Irish traditional dance music in the Modern World

The beginnings of commercialisation of Irish traditional dance music in Ireland can be traced to the boom in house dances and dance halls that occurred in the 1920s-1930s. The boom was not limited to Irish traditional dance music but also included set dances and jazz dance clubs. The government of the Irish Free State (1922-1937) came under pressure from the Catholic clergy, who believed the house

⁹⁶ Smith (n 83) 121.

⁹⁷ Breathnach 1983: 170.

⁹⁸ <https://listserv.heanet.ie/cgi-bin/wa?A0=IRTRAD-L>

⁹⁹ www.thesession.org

¹⁰⁰ <http://www.thesession.org/discussions/display/14741/comments#comment304007> – The available figures come from comments by the website moderator ‘Jeremy’.

¹⁰¹ <https://thesession.org/discussions/45709>

¹⁰² Smith (n 83) 124, referring to a lecture by Nicholas Carolan.

dances and dance halls were encouraging ‘indecent’ dancing.¹⁰³ As a result the Irish government brought into law the restrictive Public Dance Halls Act in 1935.¹⁰⁴ The Act’s provisions meant that all public dancing required a licence.¹⁰⁵

The licensed dance halls were often parish halls owned by the Catholic church. The clergy would often charge people for entry to dances, collecting the revenues for church activities.¹⁰⁶ 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 rural life 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 *céili* bands that performed in such venues. *Céili* bands possess a hybrid traditional-modern sound that sometimes includes drums and the saxophone alongside more ‘traditional’ instruments such as fiddle and accordion.¹⁰⁷ Subsequently, the pub session’s growth from the 1950s-1960s onward led to small-group playing in pub sessions overtaking the formal *céili* band in performance popularity. Today both *céili* bands and pub sessions – both creatures of modernity – exist as part of the living tradition.

Commercialisation via the recording industry occurred from the early 20th century onward, beginning in the US. As noted earlier, in the US several recordings were made of Irish immigrant musicians such as Michael Coleman and James Morrison during the 1920s and 1930s. These commercial recordings eventually found their way back to Ireland where they proved influential amongst native musicians. Post-WWII, the 1960s ‘folk revival’ led to a boom in commercial recordings of Irish traditional music.¹⁰⁸ Ballad groups such as The Clancy Brothers and The Dubliners generally played ‘rocked up’ versions of traditional songs, even having some success on the pop charts in the US and the UK (as did

¹⁰³ McDonagh 2019: 1192.

¹⁰⁴ Public Dance Halls Act, 1935.

¹⁰⁵ Ó hAllmhuráin 2005: 11.

¹⁰⁶ Ibid., 16.

¹⁰⁷ Ibid., 18.

¹⁰⁸ B. Whelan, ‘Globalising Irish Music’ – Lecture accessible at http://www.ucd.ie/scholarcast/transcripts/Globalising_Irish_Music.pdf.

the hard rock band Thin Lizzy with a 1973 version of the traditional ‘Whiskey in the Jar’). The Dubliners typically recorded a number of dance tunes – jigs and reels – on their albums, with their banjo player Barney McKenna becoming a major influence on many subsequent traditional players. Irish traditional instrumentals were recorded during the 1960s-1970s by successful groups such as The Chieftains, Planxty, The Bothy Band and De Danann, bringing such tunes to a new audience.

It was not until the 1990s that Irish traditional dance music became truly commercialised at the global level as part of the ‘World music’ brand. This culminated in the global success of the musical Riverdance which found a huge transnational audience.¹⁰⁹ Irish traditional dance music, which had emerged as a communal, rural folk art, could now become a privatised commodity in the music industry.

As the music became more commercially viable, some musicians became more professionally minded, with traditional musicians such as Liam O’Flynn and Donal Lunny or groups such as The Chieftains and Beola occasionally collaborating with pop musicians such as Kate Bush, Sting, Mark Knofler or Ed Sheeran. Today, the most successful professional musicians of Irish traditional dance music tend to release recordings either on their own labels, or with the assistance of major distributors.¹¹⁰ Contemporary performers who bring aspects of jazz, pop or classical music to traditional dance music can obtain a wider audience. The most popular of these at present is The Gloaming, a five-piece group that offers a modern twist on traditional melodies.¹¹¹ Such innovations are not always appreciated by purists, but they have their own space within the broader tradition. The professional, or semi-professional, musicians undertake concert tours, stopping off at folk and traditional festivals around the world in countries as far apart as Australia, Japan and the US. Notably, however, the impact of the commercial scene on the majority of (skilled amateur) musicians has been minimal. The community has continued to thrive at the local levels. Even the most commercially successful musicians - such as

¹⁰⁹ Ó hAllmhuráin (n 63) 5.

¹¹⁰ The most successful contemporary Irish traditional musician is Martin Hayes, who records and tours as a professional musician – www.martinhayes.com

¹¹¹ See the website for the band at www.thegloaming.net

Martin Hayes, a member of The Gloaming - still attend local sessions and participate in community transmission at events such as the Feakle Music Festival.¹¹²

Overall, it is revealing that just as the music is constantly being re-defined by its practitioners, the modes of transmission are continuously being expanded to encompass new technologies and elements of commercialism. Remarkably, this occurs without destroying Irish traditional dance music's essential sociality or its common sense of shared ownership.

Is Irish traditional music owned by anyone? Heritage or Property? Or both?

Is Irish traditional music heritage? Is it property? It may, in fact, be both of these at the same time. Not only that, its existence as heritage may in fact be multifaceted. There are many possible *claims* to Irish traditional dance music as heritage. These claims can be observed by reference to performative sociality (person-to-person connections), to cultural nationalism and to Irish governmental action. On the social (person-to-person) level Breathnach argues that there is a clear sense of heritage in the transmission processes of Irish traditional dance music, referring to the fact that the music is something to be passed on from person-to-person and from one age to the next.¹¹³

Another claim to heritage is made by the cultural nationalist organisation *Comhaltas Ceoltóirí Éireann* (CCÉ) which was founded in the early 1950s with the aim of promoting and teaching Irish traditional music at home and abroad.¹¹⁴ CCÉ is a major organiser of sessions, summer schools and Irish music classes and it also provides some online audio and video facilities via its website.¹¹⁵ From its early days CCÉ quickly became influential in identifying what is 'proper' in the performance of Irish traditional dance music.¹¹⁶ Inevitably, this has been somewhat controversial since there is arguably no correct or

¹¹² <https://www.feaklefestival.ie>

¹¹³ Breathnach (n 13). See also B. Kirshenblatt-Gimblett 2015: 163–174.

¹¹⁴ A full history of CCÉ can be accessed at www.comhaltas.ie

¹¹⁵ <http://comhaltas.ie/music/>

¹¹⁶ Vallely (n 25) 204

incorrect style. In fact, Mac Aoidh criticises CCÉ for promulgating what he calls a form of nationalist ‘cultural imperialism’ - an ideology which in the recent past ‘was not entirely appreciative of stylistic diversity and was, in some cases, hostile to certain styles of playing’.¹¹⁷

Another strong claim to heritage comes from the Irish government in its guise as the Irish tourist board: Irish Tourism.¹¹⁸ Kaul notes there has been a boom in diasporic ‘musical tourism’ to Ireland over the past thirty years, such that attending a pub session or traditional dance music festival has become a part of the commodified ‘experience’ of a trip to Ireland for many tourists.¹¹⁹

Amongst these competing, yet at times overlapping, claims to heritage it is possible to note the relative absence of *universalist* claims to heritage. Ireland was very slow to ratify the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, not doing so until 2016.¹²⁰ Still, there is little doubt that the Irish state’s actions to promote and safeguard the music and dance culture are in compliance with the Convention. The Irish government provides a great deal of funding to Irish traditional music and dance organisations that document and support the music, and the state also promotes the culture through the Irish Tourism.

Irish traditional dance music may be a rare example where the social, cultural nationalist and governmental claims to heritage are so powerful within the state (and among emigrant communities abroad) that universalist claims have little resonance, and perhaps, little purpose.¹²¹ Yet, although definitions of heritage may ‘empower’ they may also ‘silence’.¹²² The case of Morgan Bullock, the African-American dancer whose modern take on Irish traditional dancing became a TikTok sensation

¹¹⁷ Mac Aoidh 1997: 67, 71.

¹¹⁸ <https://www.tourismireland.com>

¹¹⁹ Kaul (n 89) 705-6. This is most apparent from the 1960s onwards. Kaul’s study focuses on Doolin, Co. Clare, which hosts many sessions, especially during the summer months when tourism is at its peak.

¹²⁰ In accordance with the terms of Article 34 of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, the Convention entered into force with respect to Ireland on 22 March 2016: http://portal.unesco.org/en/ev.php-URL_ID=49349&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹²¹ Blake 2000: 85.

¹²² Beardslee 2006: 89.

during 2020, raises an interesting question: is the cultural nationalist view of Irish traditional dance music problematic, even exclusionary? While Bullock received a wide amount of praise within Irish media, and even an invitation to join Riverdance as a guest performer, she also received racially-motivated criticism from a minority on social media that she was ‘appropriating’ Irish cultural heritage.¹²³ It is possible that taking a less nationalistic, and more universalist, view of Irish traditional music and dance could help to prevent such dubious criticisms of cultural appropriation arising.

What then of claims to *property* in Irish traditional dance music? In terms of intellectual property, a work of music can be viewed as either in copyright or in the public domain. Copyright arises automatically on the creation and fixation of an original work, and an existing work falls into the public domain when the copyright term expires (70 years after the life of the author in the EU, UK and US).¹²⁴ Nonetheless, the boundaries of the copyright-public domain relationship are uncertain.¹²⁵ A musical work may actually contain a mixture of public domain material (stylistic conventions, basic patterns, etc) and original elements (new melodies, variations, arrangements of notes, etc).¹²⁶ For present purposes I interpret the public domain concept as broadly as possible, to include musical works that have fallen out of copyright; ideas and non-original expressions such as musical conventions and patterns; and the elements covered by the numerous copyright exceptions (fair dealing/fair use) which allow use of music without a licence in limited circumstances, such as quotation.¹²⁷

Due to its age the key elements of Irish traditional dance music – the tunes (musical works) and the stylistic conventions (patterns and motifs) – reside in the public domain. These existing compositions and stylistic conventions can be used freely by all composers and arrangers in the creation of new musical works. However, there are also many examples of compositions in the traditional style created by living, or recently-deceased, composers which are accepted as part of the living tradition.

¹²³ M. Bullock, ‘Why I feel in love with Irish dancing’ *BBC* (18 July 2020) - <https://www.bbc.co.uk/news/av/world-us-canada-53452080>

¹²⁴ See for example the UK Copyright, Designs and Patents Act (CDPA) 1988.

¹²⁵ Benabou and Dusollier 2007: 161, 163.

¹²⁶ Johnson 2008: 587. See generally Coombe 1998: 129.

¹²⁷ Benabou and Dusollier (n 125) 173.

Technically, these works fall under copyright even if the composers never sought formal legal recognition, because copyright arises automatically upon the creation of an original composition that is fixed in some way (e.g., via notation or recording).¹²⁸ Given that most, if not all, new compositions are likely to be sufficiently creative (original) and will be fixed in some form (even if just in the notation shared via thesession.org) such new compositions fall under copyright.¹²⁹ In addition to these new compositions, copyright may arise in new arrangements in circumstances where a musician takes an existing public domain tune and add sufficient originality to it (in the form of musical variations/additions). In a prior publication I have discussed the fact that this means Irish traditional musicians *can* claim copyright on their original arrangements, as such adaptations are invariably ‘intellectually creative’ (and thus meet the requirements of the originality standard under, for example, EU and UK copyright law).¹³⁰ Although it is sometimes said that authorship/ownership of new arrangements of public domain works threatens to put up property barriers over material that is often assumed to be public domain, this fear tends to be overstated.¹³¹ Authors only have copyright protection in relation to the specific originality that they have added to the extant musical work, and they cannot claim any underlying public domain material *per se*. In other words, the copyright protection only covers each exact arrangement. The existing tune itself remains in the public domain. Despite this, copyright – whether in new compositions or new arrangements – cannot be discounted as a relevant factor when assessing ideas of ownership in the contemporary Irish traditional dance music scene, particular one that features a number of well-known professional musicians and groups.

If copyright law enables and encourages individual property claims, what of the notion that Irish traditional dance music is a resource that is owned, shared and governed *collectively*? Could property conflicts arise between the rights of individual composers/arrangers and those who view the musical

¹²⁸ McDonagh 2018: 151. See also s. 1 CDPA 1988.

¹²⁹ Ibid.

¹³⁰ Ibid. See in the EU context the CJEU ruling in *Infopaq International v Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495, as applied in the UK in *Newspaper Licensing Agency Ltd and others v. Meltwater Holding BV and other companies* [2010] EWHC 3099 (Ch), and on appeal [2011] EWCA Civ 890 and [2013] UKSC 18.

¹³¹ *Sawkins v Hyperion Records* [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] EMLR 688.

works as a kind of shared resource available to all?¹³² In theory, yes. An author has the right to restrict the performance, adaptation or use of the musical work (or a substantial part of it), meaning that unless the later musician obtains a licence, the work cannot be used legally.¹³³ Thus, a traditional composer or arranger could restrict the creative practices of another traditional musician, with the formal licensing system appearing to conflict with the ‘free’ sharing of tunes and the processes of relational authorship prevalent in the Irish traditional network.¹³⁴

However, in practice such property conflicts are rare. Although Irish traditional musicians may be willing to enforce their rights in a scenario where their compositions/arrangements are used on a commercial film/TV soundtrack, or in Riverdance, at the local level they tend not to enforce their copyrights against their fellow musicians. There are several reasons for this – for one, the market for Irish traditional dance music is relatively small when compared with pop music, and in most cases there would be little monetary incentive to enforce an intellectual property claim. Furthermore, empirical qualitative data (interviews and survey responses) show that considerations of the law are not paramount in this context – instead, social norms govern the use of Irish traditional music.¹³⁵

There is a clear sense of shared, communal ownership over the body of music as a whole, with the norms of sharing, attribution and reciprocity vital to the way this ‘commons’ is governed.¹³⁶ The network of Irish traditional musicians operates in a flexible enough manner to accommodate some forms of individual authorship and ownership – through attribution in the main part – with copyright invoked only at the commercial edges e.g., with regard to recordings, musicals and soundtracks. Hence, where conflicts arise between notions of individual property (copyright) and the creative practices of Irish

¹³² For a perspective critical of the idea of ‘rights’ to public domain materials, see generally Cahir 2007: 35.

¹³³ See in the EU context the CJEU ruling in *Infopaq International v Danske Dagblades Forening (C-5/08)* [2010] F.S.R. 495, as applied in the UK in *Newspaper Licensing Agency Ltd and others v. Meltwater Holding BV and other companies* [2010] EWHC 3099 (Ch), and on appeal [2011] EWCA Civ 890 and [2013] UKSC 18.

¹³⁴ See generally Craig 2011 and McDonagh 2021.

¹³⁵ McDonagh (n 128). See also Schwartz 2016: 91, 92, and Heile 2015: 123.

¹³⁶ McDonagh 2011: 151–156. Studies have shown that social norms are important to a range of different creative activities, including software programming, stand-up comedy, magic, and street art/graffiti. See generally McDonagh 2016: 461; Oliar and Sprigman 2008; Loshin 2010: 123, 140; and Ilijadica 2016.

traditional musicians these are typically resolved in accordance with the above accepted social norms rather than e.g., via legal means (legal action/litigation). Thus, the ‘commons’ of Irish traditional dance music persists as a site of shared ownership, while also providing space for individual personhood to be expressed via traditional musical styles. Individual property is not absent, but neither is it predominant.

Turino’s work on musical fields and associated norms and values is relevant here: Irish traditional music fits into Turino’s ‘participatory performance’ category, which stresses sociality and egalitarianism.¹³⁷ Strikingly, there are contrasts between the characteristics of this type of participatory musical practice, as valued by the participants, when compared with the values evident in the way organisations like WIPO focus on protection through the idea of exclusive (and thus, exclusionary) property. Traditional Irish dance music thus resists commodification. Rather than a commodity-type form, this musical culture resembles what Leach calls the gift form, with the focus on community, social relations, reciprocity and sharing.¹³⁸

The potency of the social norms in this context means there is little reason to resort to WIPO’s legal concepts of traditional knowledge (TK) and traditional cultural expressions (TCEs), notions which embody WIPO’s attempt to create space within the IP framework for societies that do not prioritise individuated (copyright) works.¹³⁹ Despite positive intentions, in WIPO debates over the past decades defining TCEs has proven a delicate, even controversial task.¹⁴⁰ Relatedly, it has been difficult to decide *whom* should have responsibility for overseeing TCEs, including how issues of prior-informed consent should be dealt with. Even if these core definitional difficulties could be overcome, it is hard to see how the TK model would provide any useful tools to the Irish traditional dance music community. In fact, defining Irish traditional music under strict TK rules could cause more harm than good, because TK

¹³⁷ Turino 2009: 95, 109.

¹³⁸ Leach 2014: 458, 460.

¹³⁹ See ‘Intellectual Property and Traditional Cultural Expressions/Folklore’ (WIPO) - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf

¹⁴⁰ MacMillan 2008: 77; Arewa 2006b: 156; Kuruk 2004: 429; and Brown 2005: 40.

rules would *formalise* the processes of the network.¹⁴¹ At present, the *informal* social rules of the Irish traditional community appear capable of taking account of collective authorship practices, as well as dealing with conflicts over individual authorship. These norms seem to be sufficient to maintain an appropriate balance between the conventions of collective governance and the claims of individual property. It is far from obvious that a TK-focused solution would better facilitate the equilibrium between these ideas of ownership, particularly in light of the fact that the network of musicians is not located in one physical community location, but is rather includes many dispersed, networked individuals around the world. Overall, WIPO's concept of traditional knowledge (TK) lacks appeal in this context – rather than a formal system of prior informed consent for use of TCEs, it would be better to maintain the existing social norms that have served Irish traditional dance music so well up to now.

Operating largely outside a formal legal system is not necessarily unique in itself - lots of cultural production, music included, around the globe falls into that category. However, that Irish dance music occupies a space somewhat external to the formal legal system is worth particular reflection. The culture of Ireland, situated centrally in the Global North (and its associated legal frameworks) would ordinarily be viewed as an apt fit for an intellectual property system that focuses on music primarily as property-object: a sonic text typically embodied by a recording. Despite this, from the above it is apparent that Irish traditional dance music lives beyond mere sonic text, and that its active participants value sociality, reciprocation, collective learning, adaptation, style variance, and so on, over some sort of commodified end product (in the form of sound) that can be easily thought of as individuated or formal property.¹⁴² Thus, for the vast majority of its participants, Irish traditional dance music provides a site of resistance to market commodification.

¹⁴¹ Teubner and Fischer-Lescano 2008: 17, 18-21

¹⁴² Small 1998.

Conclusion

The case study of Irish traditional music presented in this article demonstrates that dance music, like dance itself, arises from an intricate blend of artistic processes and sociality, generating a sonic result. Intellectual property, as overseen by WIPO, lays claim solely to the sonic result, but classifies and commodifies it under copyright it as individuated musical work (or alternatively, as formalised TK/TCE). Irish traditional dance music tends to resist these formal categorisations, and practitioners of traditional music do not necessarily follow the liberal-utilitarian labour theory that artists should assert individual rights in their labours. Rather, they treat the music as a kind of shared resource.¹⁴³ There is a manifest sense of collective ownership over the body of music as a whole, with the norms of sharing, attribution and reciprocity vital to the way this commons is governed.¹⁴⁴ Indeed, the idea of a gift form resonates within the community practices of Irish traditional dance music precisely due to the focus on social relations and sharing.¹⁴⁵ Nevertheless, the network remains flexible enough to accommodate, via social norms, certain forms of individual authorship and ownership through attribution in the main; and at the outer commercial edges, even some claims to copyright with respect to commercial recordings, musicals such as *Riverdance*, and film/TV soundtracks.

Simultaneously, there is apperception of heritage in Irish traditional dance music circles, marked from the acceptance that this form of dance music is something to be ‘passed on from one age to the next’.¹⁴⁶ This recognition of inheritance is reflected in social practices, cultural nationalism and even Irish governmental support. Universalist values, by contrast, seem notable by their absence - the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage does not appear to exert much appeal in this context. In fact, even though UNESCO’s framing of heritage seems, on the face of it, to encompass certain elemental aspects of the culture of Irish dance music (process, sonic result,

¹⁴³ Ostrom (n 6).

¹⁴⁴ McDonagh (n 128).

¹⁴⁵ Leach (n 8).

¹⁴⁶ Breathnach (n 13).

documentation), other key attributes (networks, sociality, locality) appear to lie beyond the UNESCO classification.

Therefore, although aspects of the culture of Irish traditional dance music can be viewed as both heritage and property, with heritage coming closer to the reality of how the community governs the music as a shared resource, the UNESCO framework ultimately proves unsatisfactory. Instead, the lifeworld of the active, thriving network of Irish traditional musicians - operating in a Global North context, yet to a great extent eluding its legal order - chimes with the revitalised concept of cultural heritage put forward by scholars such as Macmillan and Bruncevic, moving beyond the UNESCO classification and recasting heritage as a community's way of resisting market commodification.¹⁴⁷

¹⁴⁷ Macmillan 2021: 202-220 and Bruncevic 2021: 7-22.

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