

ARTICLE

## Exploring “ownership” of Irish traditional dance music: Heritage or property?

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### Abstract

Dance has rarely been accepted as the subject of copyright protection because works of dance and choreography have lacked commodified property-object status in intellectual property law. If dance is “haunted by its own ephemerality” and, thus, rarely embodied as property, then what of dance music? Music composed, performed, and recorded with a dance audience in mind has formed, on many occasions, the subject matter of intellectual property law claims, as the rancorous recent litigation over the nightclub (and online-streaming) hit “Blurred Lines” demonstrates. In this article, I utilize 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 acknowledgment (attribution). I consider 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. I observe that Irish traditional dance music provides an example of “heritage as resistance” – a mode of cultural and social practice that continues to thrive as a living tradition, even in the contemporary market-oriented world of the global North.

### Introduction

Dance has rarely been accepted as the subject of copyright protection because works of dance and choreography have typically lacked commodified property-object status in intellectual property law.<sup>1</sup> If dance is “haunted by its own ephemerality” and, thus, rarely embodied as property, then what of dance music?<sup>2</sup> Music composed, performed, and recorded with a dance audience in mind has formed, on many occasions, the subject matter of intellectual property law claims, as the rancorous recent litigation over the nightclub (and online-streaming) hit “Blurred Lines” demonstrates.<sup>3</sup> 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 acknowledgment (attribution).<sup>4</sup> I critique how Irish traditional

<sup>1</sup> Kraut 2015.

<sup>2</sup> Ravetto-Biagioli 2020, 101, 102.

<sup>3</sup> Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018).

<sup>4</sup> 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.

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 focus the legal responsibilities on states to document and safeguard cultural practices and expressions under the 2003 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on Safeguarding the Intangible Cultural Heritage (CSICH).<sup>5</sup> 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 emphasizes cultural nationalism; and, finally, a governmental link with tourism from Ireland’s diaspora. Despite Ireland’s 2016 ratification of the CSICH, claims to universalist heritage appear to lack resonance due to the competing social, cultural nationalist 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 as 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 categorization. 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 theory that artists should assert rights in their commodified labors.<sup>6</sup> Rather than requiring copyright licenses 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 recognized via community practices of attribution – a finding that echoes the work of Elinor Ostrom.<sup>7</sup> In this vein, the culture of Irish dance music demonstrates an ethos of sharing while also providing space for individual personhood to be expressed.<sup>8</sup> 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”).<sup>9</sup> 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 the extended WIPO’s concept of TK, which has not yet been given an internationally accepted definition, but which seeks to find ways within the formal IP system to prevent the misappropriation of expressions of traditional culture such as music and dance. Yet, as with the relative absence of the international (UNESCO) dimension in 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 commercialization, and can become inflamed when the commodification of Irish traditional dance music occurs as part of global stage shows such as Riverdance or in film or television soundtracks, such tensions do not dominate the discourse. The

<sup>5</sup> Convention for the Safeguarding of Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1 (CISCH).

<sup>6</sup> Karapapa and McDonagh 2019, 1–17.

<sup>7</sup> Ostrom 1990; Ellickson 1991.

<sup>8</sup> 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 Fell in Love with Irish Dancing,” *British Broadcasting Corporation*, 18 July 2020, <https://www.bbc.co.uk/news/av/world-us-canada-53452080> (accessed 31 March 2022).

<sup>9</sup> Leach 2014, 458, 460.

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 formalize 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 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, analyzing the extent to which commercial concerns have affected the transmission of the music. I conclude by observing that Irish traditional dance music is an example of "heritage as resistance" – a mode of cultural and social practice that continues to thrive as a living tradition, even in the contemporary market-oriented world of the global North.<sup>10</sup>

### Musicological background: what is Irish traditional dance music?

Traditional music is generally thought of as old or even ancient, meaning that it is often categorized as pre-modern.<sup>11</sup> Although the terms "traditional" and "folk" are sometimes used interchangeably, the term "traditional music" is preferable.<sup>12</sup> James Porter argues that "traditional" more clearly implies a process (something that "folk" does not).<sup>13</sup> In this vein, for the most part, I refer to traditional music in this article.<sup>14</sup>

In historical practice, what distinguished traditional music – whether European dance music,<sup>15</sup> African American blues and jazz music,<sup>16</sup> or indigenous music in South America,<sup>17</sup> Asia,<sup>18</sup> and Africa<sup>19</sup> – from other forms of music was the 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, for example, 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.<sup>20</sup>

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."<sup>21</sup> As a musical form, it has developed in Ireland over the last 300 years from both "native" and external influences.<sup>22</sup> It is often described as "Celtic."<sup>23</sup> Yet, Porter criticizes the general use of this term, opining that it is "riddled with linguistic, cultural and ideological implications."<sup>24</sup>

<sup>10</sup> Bruncevic 2021, 7–22; Macmillan 2021, 202–20.

<sup>11</sup> Ó Laoire 2003, 113. On the traditional/modern binary, see Latour 1993; Dutfield 2017.

<sup>12</sup> Porter 1989, x. Porter notes that "folk" contains "overtones of 19th century romanticism and condescension."

<sup>13</sup> Porter 1989, xi.

<sup>14</sup> Breathnach 1993. I make use of the term "folk" on a small number of occasions when it does not lead to ambiguity.

<sup>15</sup> Lind 1997.

<sup>16</sup> Whyton 2010; see also Arewa 2006a, 277.

<sup>17</sup> Kuss 2004.

<sup>18</sup> Malm 1996.

<sup>19</sup> Kwabena Nketia 1974.

<sup>20</sup> Toynebee 2006, 77.

<sup>21</sup> Waldron 2006, 1, 3.

<sup>22</sup> Breathnach 1993, 88.

<sup>23</sup> Mollenhauer 2015, 35–54.

<sup>24</sup> Porter 1989, 205.

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, 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 Brittany and Galicia.<sup>25</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.<sup>26</sup>

### The origins of Irish traditional music

The origins of Irish traditional music are much debated. Marie McCarthy notes that in the past Ireland has often been written about in terms of a false dualism that places classical music, colonialism, and Anglo-Irish society on one side and traditional music and Gaelicism on the other.<sup>27</sup> 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 local and foreign music.<sup>28</sup> Fintan Vallely 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.<sup>29</sup> 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.”<sup>30</sup>

Breandan 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 eighteenth and early nineteenth centuries.<sup>31</sup> 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.<sup>32</sup> The lack of a written form until the eighteenth and nineteenth centuries, when collections of notated tunes were finally published (by Anglo-Irish enthusiasts such as George Petrie) means that it is difficult to gauge with accuracy the age of many traditional tunes.<sup>33</sup> For this reason, even if some melodies are pre-seventeenth century in origin, labeling them as such is largely conjecture.<sup>34</sup> On this issue, Breathnach refers to one of the 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.”<sup>35</sup>

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.”<sup>36</sup> 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

<sup>25</sup> Porter 1989, 211.

<sup>26</sup> Vallely 2003, 201, 208.

<sup>27</sup> McCarthy 1999.

<sup>28</sup> Vallely 2003.

<sup>29</sup> Vallely 2003, 202.

<sup>30</sup> Vallely 2003, 204.

<sup>31</sup> Breathnach 1993.

<sup>32</sup> Breathnach 1993, 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.”

<sup>33</sup> Breathnach 1993, 16; Ó Laoire 2003, 115.

<sup>34</sup> Breathnach 1993.

<sup>35</sup> Breathnach 1993.

<sup>36</sup> Breathnach 1993.

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 on a written, documented form (such as in the case of Western classical music). The way in which 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 eighteenth and nineteenth centuries in which dance was a primary medium of self-expression.<sup>37</sup> This culture left modern Ireland with a remarkable inheritance: an extraordinarily rich legacy of dance music including at least six thousand individual pieces.<sup>38</sup> 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 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 part is known as “the turn.”<sup>39</sup> 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.”<sup>40</sup>

The reel is the most common type of Irish dance tune played today.<sup>41</sup> It is thought that this form of dance music “evolved” in the mid-eighteenth century.<sup>42</sup> Reels usually follow a 4/4 time signature, and they are generally played in a steady, consistent fashion to aid dancers.<sup>43</sup> A reel usually has at least two parts, and each part is 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.<sup>44</sup> 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.<sup>45</sup> For instance, the reel recorded in the United States in the early twentieth century by emigrant Irish musician Michael Coleman as “Bonnie Kate” was in fact originally composed by Daniel Dow, a fiddler from Perthshire in Scotland.<sup>46</sup> Similarly, “The Boyne Hunt,” which has been recorded by numerous musicians, including the famous Irish accordion player Joe Cooley,<sup>47</sup> was composed by Miss Stirling of Ardoch and published in 1780.<sup>48</sup> There are numerous other examples of the adoption of Scottish tunes into the Irish

<sup>37</sup> Ó Laoire 2005, 267.

<sup>38</sup> Breathnach 1993, 56.

<sup>39</sup> Breathnach 1993, 57.

<sup>40</sup> Breathnach 1993, 56.

<sup>41</sup> Breathnach 1993, 59.

<sup>42</sup> Breathnach 1993, 60.

<sup>43</sup> Breathnach 1993, 88.

<sup>44</sup> Breathnach 1993, 56.

<sup>45</sup> Breathnach 1993, 60.

<sup>46</sup> Breathnach 1993.

<sup>47</sup> The tune can be found on the Joe Cooley, Cooley (1975) and other recordings listed at <http://www.thesession.org/recordings/display/211> (accessed 31 March 2022).

<sup>48</sup> Breathnach 1993, 61.

tradition.<sup>49</sup> Via the oral/aural process of transmission, these tunes, which were 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.<sup>50</sup>

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).<sup>51</sup> There are various forms including double jigs, treble jigs, slip jigs, and single or hop jigs.<sup>52</sup> 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 eighteenth and nineteenth centuries.<sup>53</sup> Despite this, the source of the actual word “jig” is thought to be French or Italian.<sup>54</sup>

The hornpipe is English in origin. In its present dance form it can be dated to around 1760.<sup>55</sup> During the late eighteenth century, this form of music was typically performed and danced on stages “between the acts and scenes of plays.”<sup>56</sup> 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 emphasized, and they are usually played in a more deliberate manner.<sup>57</sup> 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.<sup>58</sup> Another class of dance tune – the “set dance” – is often played to a hornpipe rhythm.<sup>59</sup>

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.<sup>60</sup> Polkas have a 2/4 time signature and are played at a fast, steady pace, which is ideal for dancing.<sup>61</sup> 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.<sup>62</sup>

The way in which the various tunes are played depends, to some extent, on the particularities of each instrument.<sup>63</sup> 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.<sup>64</sup> The archetypal traditional instruments that feature in the playing of this

<sup>49</sup> See Mac Aoidh (1994, 19) who notes: “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>50</sup> Breathnach 1993, 61.

<sup>51</sup> Breathnach 1993, 57.

<sup>52</sup> Ó Laoire 2005.

<sup>53</sup> Breathnach 1993, 59.

<sup>54</sup> Breathnach 1993, 57.

<sup>55</sup> Breathnach 1993, 61.

<sup>56</sup> Breathnach 1993.

<sup>57</sup> Breathnach 1993.

<sup>58</sup> Hall 1994.

<sup>59</sup> Breathnach 1993, 62.

<sup>60</sup> See comments under the discussion title “The Ballydesmond Polka” at the “thesession.org,” <http://www.thesession.org/tunes/display/1410> (accessed 31 March 2022).

<sup>61</sup> Rimmer 1987, 164.

<sup>62</sup> Mac Aoidh 1994, 20.

<sup>63</sup> O’Canainn 1978.

<sup>64</sup> Ó hAllmhuráin 1999, 9.

music are the harp, the *uilleann*<sup>65</sup> (union) pipes (a type of bag pipes played by exertion using the elbow),<sup>66</sup> the fiddle, the flute, and the tin whistle. Over time, the accordion and concertina have been absorbed into the tradition. Furthermore, since the 1950s and 1960s, the guitar, the tenor banjo, the mandolin, and even the Greek bouzouki have become very popular.<sup>67</sup> 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.<sup>68</sup> In this way, tunes that were once suited to one instrument (for example, the pipes or the harp) can be reinterpreted to suit another (for example, the fiddle or the mandolin).<sup>69</sup> Person-to-person, instrument-to-instrument, the transmission process doubles as a process of collective authorship, whereby individual contributions are subsumed to the communal tradition.

### The defining characteristics of Irish traditional dance music

From a musicological perspective, Irish traditional dance music has several defining characteristics that make it 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 recognizable musical coherency. Margaret Farrell observes the prevalence of a B-minor "motif," or melodic figure, in many tunes, meaning that there are many pieces that share similar, if not identical, musical parts.<sup>70</sup> A number of the old piping tunes have, via performance and transmission, "branched off" into distinctive variants.<sup>71</sup> These variants share melodic parts while being distinct tunes. For example, Caoimhín 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,"<sup>72</sup> both of which derive from a root melody known as "Sleepy Maggie," published in Scotland in 1734.<sup>73</sup> The reel "Toss the Feathers" has at least four distinct versions, and each one contains subtle differences. However, each version is still musically recognizable as "Toss the Feathers."<sup>74</sup> 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 the same time.

There are several regional (and many individual) styles that enhance variance. Gearóid Ó Allmhuráin 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 revealed a more precise topography of musical dialects. Many of these are based on older clachán-type communities (rural clusters of extended kin and

<sup>65</sup> "Elbow" in the Irish language.

<sup>66</sup> Breathnach 1993, 75.

<sup>67</sup> See generally M. Maher, "An Irishwoman's Diary," *Irish Times*, 13 July 2002, <https://www.irishtimes.com/opinion/an-irishwoman-s-diary-1.1088487> (accessed 31 March 2022).

<sup>68</sup> Mac Aoidh 1994, 37.

<sup>69</sup> Breathnach 1993, 93. Much of the use of variation, ornamentation, and decoration by flute and whistle players derives from piping styles.

<sup>70</sup> Farrell 2003.

<sup>71</sup> Mac Aoidh 1994, 42.

<sup>72</sup> This translates as "Sean in the Fog."

<sup>73</sup> Mac Aoidh 1994, 42.

<sup>74</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* (1977).

neighbours) which have remained intact since the post-famine era and are distinguished by specific dance rhythms, repertoires and other features.<sup>75</sup>

The styles reflect regional topographies and do not recognize 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 minimalist and lonesome sounding, whereas the western style is more ornamented.<sup>76</sup> However, even county borders can be misleading – the musical styles of the neighboring 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.<sup>77</sup> Moreover, the Donegal style is strongly related to Scottish music, but it has its own distinct character.<sup>78</sup> As Desi Wilkinson observes, “[n]o 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>79</sup>

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 remarks 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.”<sup>80</sup> 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, Janice Waldron compares the musical practices and processes of Irish traditional dance music to jazz.<sup>81</sup> 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.<sup>82</sup> 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 concertina players often use “rhythmical or metrical variations” in line with the practical limits of their instrument.<sup>83</sup> As I outline later on, from a legal perspective the variation of a tune can be described as creating a new arrangement – a type of musical work under copyright.

### 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 United States, adapted his style of playing to suit his American “vaudeville” audience. Touhey’s is said to be the first Irish American style.<sup>84</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

<sup>75</sup> Ó hAllmhuráin 1999, 7.

<sup>76</sup> B. Taffe, “Regional Fiddle Styles in Ireland,” October 2006, <http://www.fiddlesessions.com/oct06/Taaffe.pdf> (accessed 31 March 2022).

<sup>77</sup> Taffe, “Regional Fiddle Styles.”

<sup>78</sup> Mac Aoidh 1994, 20.

<sup>79</sup> Wilkinson 1992, 5.

<sup>80</sup> See generally “A Lilt All His Own: Interview with Martin Hayes,” *Fiddler Magazine*, Spring 1994, [http://www.ceolas.org/artists/Martin\\_Hayes/interview/html](http://www.ceolas.org/artists/Martin_Hayes/interview/html) (accessed 31 March 2022).

<sup>81</sup> Waldron 2006, 4.

<sup>82</sup> Waldron 2006.

<sup>83</sup> Waldron 2006.

<sup>84</sup> S. Smith 2001, 111, 117.



musicians back in Ireland.<sup>85</sup> Meanwhile, changes in the styles of accordion playing during the twentieth century 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> From this history, we can observe how the availability of recordings can alter the process of learning the music, leaving an indelible mark on it. This process continues today: many 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.<sup>89</sup>

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."<sup>90</sup> 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-twentieth century, when playing music in public houses became a workable alternative to kitchen, house, and hall dances.<sup>91</sup> It was not until post-World War II, and particularly from the early 1960s onwards, that pub sessions became common throughout Ireland itself.<sup>92</sup>

The session is inherently egalitarian since it typically involves the sharing of melodies, variations, and historical information about the tunes.<sup>93</sup> Today, some Irish traditional dance music sessions are specifically aimed at encouraging inexperienced players – tunes are generally played at a slower pace so that learners can listen for patterns as part of a contextual musical education.<sup>94</sup> Waldron emphasizes that Irish musicians value their connections with each other precisely because this enables the sharing of tunes and variations in social settings.<sup>95</sup> Observing Irish traditional performers, as well as Delta Blues musicians, in his hometown of Boston, Christopher Smith remarks that both groups of instrumentalists share similar traits: there is a strong sense of artistry within each set of musicians as well as a commitment to "mutual social respect" and "a sense of a place for all within the community."<sup>96</sup> Not everyone agrees that pub sessions are a positive part of the

<sup>85</sup> Mac Aoidh 1994, 19.

<sup>86</sup> G. Smith 1997, 436.

<sup>87</sup> G. Smith 1997, 437.

<sup>88</sup> G. Smith 1997, 451.

<sup>89</sup> Toynbee 2006, 77, 77–79.

<sup>90</sup> Kaul 2007, 703, 704.

<sup>91</sup> Kaul 2007, 705.

<sup>92</sup> Kaul 2007.

<sup>93</sup> Kaul 2007.

<sup>94</sup> Waldron 2006, 9.

<sup>95</sup> Waldron 2006, 16.

<sup>96</sup> C. Smith 2006, 14.

Irish tradition. Some contend that the session can often be a “loud, smoky, drink-filled experience.”<sup>97</sup> Breathnach laments that the popularity of the group session has led to a devaluing of the more subtle “solo art” function of traditional music.<sup>98</sup> Despite this observation, there is little doubt that the session provides an important transmission (collective authorship).

In addition to the availability of pub sessions, there are also a growing number of online community facilities such as “IRTRAD”<sup>99</sup> and “Thesession.org.”<sup>100</sup> In particular, Thesession.org 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.<sup>101</sup> In the years since, it has continued to grow by 3,000–4,000 new members per year.<sup>102</sup> 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 United Kingdom, the United States, Canada, and Japan. The folklorist Nicholas Carolan describes these new online transmission facilities as forming a “secondary aurality.”<sup>103</sup> Secondary or not, new technology appears to be playing an ever-increasing role in ensuring that the collective authorship of Irish traditional dance music thrives in the twenty-first century.

### Sharing property and commodification: Exploring Irish traditional dance music in the modern world

The beginnings of commercialization of Irish traditional dance music in Ireland can be traced to the boom in house dances and dance halls that occurred in the 1920s and 1930s. The boom was limited not only to Irish traditional dance music but also included set dances and jazz dance clubs. The government of the Irish Free State (1922–37) came under pressure from the Catholic clergy, who believed that the house dances and dance halls were encouraging “indecent” dancing.<sup>104</sup> As a result, the Irish government brought into law the restrictive Public Dance Halls Act in 1935.<sup>105</sup> The Act’s provisions meant that all public dancing required a license.<sup>106</sup>

The licensed dance halls were often parish halls owned by the Catholic Church. The clergy would charge people for entry to dances, collecting the revenues for church activities.<sup>107</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 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 *céilí* bands that performed in such venues. *Céilí* bands possess a hybrid traditional-modern sound that sometimes includes drums and the saxophone alongside more “traditional” instruments such as the

<sup>97</sup> S. Smith 2001, 121.

<sup>98</sup> Breathnach 1983, 170.

<sup>99</sup> “IRTRAD,” <https://listserv.heanet.ie/cgi-bin/wa?A0=IRTRAD-L> (accessed 31 March 2022).

<sup>100</sup> “thesession.org,” <http://www.thesession.org>.

<sup>101</sup> See the discussion titled “Yellow Board Roll Call,” “thesession.org,” <http://www.thesession.org/discussions/display/14741/comments#comment304007> (accessed 31 March 2022). The available figures come from comments by the website moderator “Jeremy.”

<sup>102</sup> See the discussion titled “A look back at 2020 on thesession.org,” “thesession.org,” <https://thesession.org/discussions/45709> (accessed 31 March 2022).

<sup>103</sup> Cited in S. Smith 2001, 124, referring to a lecture by Nicholas Carolan.

<sup>104</sup> McDonagh 2019, 1192.

<sup>105</sup> Public Dance Halls Act, 1935, <https://www.irishstatutebook.ie/eli/1935/act/2/enacted/en/html> (accessed 31 March 2022).

<sup>106</sup> Ó hAllmhuráin 2005, 11.

<sup>107</sup> Ó hAllmhuráin 2005, 16.

fiddle and accordion.<sup>108</sup> Subsequently, the pub session's growth from the 1950s to the 1960s onward led to small-group playing in pub sessions overtaking the formal *céilí* band in performance popularity. Today, both *céilí* bands and pub sessions – both creatures of modernity – exist as part of the living tradition.

Commercialization via the recording industry occurred from the early twentieth century onward, beginning in the United States. As noted earlier, in the United States, several recordings were made of Irish immigrant musicians such as Michael Coleman, Patsy Touhey 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. Following World War II, the 1960s “folk revival” led to a boom in commercial recordings of Irish traditional music.<sup>109</sup> Ballad groups such as The Clancy Brothers and The Dubliners played “rocked up” versions of traditional songs, even having some success on the pop charts in the United States and the United Kingdom (as did 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 and 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 commercialized at the global level as part of the “World Music” brand. This culminated in the success of the musical *Riverdance*, which found a huge transnational audience.<sup>110</sup> Irish traditional dance music, which had emerged as a communal, rural folk art, could now become a privatized 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, and 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.<sup>111</sup> 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.<sup>112</sup> 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 United States. 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 Martin Hayes, a member of The Gloaming – still attend local sessions and participate in community transmission at events such as the Feakle Music Festival.<sup>113</sup>

<sup>108</sup> Ó hAllmhuráin 2005, 18.

<sup>109</sup> B. Whelan, “Globalising Irish Music,” [http://www.ucd.ie/scholarcast/transcripts/Globalising\\_Irish\\_Music.pdf](http://www.ucd.ie/scholarcast/transcripts/Globalising_Irish_Music.pdf) (accessed 31 March 2022).

<sup>110</sup> Ó hAllmhuráin 1999, 5.

<sup>111</sup> The most successful contemporary Irish traditional musician is Martin Hayes, who records and tours as a professional musician, as noted in a description headed “Martin Hayes is regarded as one of the most significant talents to emerge in the world of Irish traditional music,” <http://www.martinhayes.com/about> (accessed 31 March 2022).

<sup>112</sup> See “The Gloaming,” [www.thegloaming.net](http://www.thegloaming.net) (accessed 31 March 2022).

<sup>113</sup> “Feakle Music Festival,” <https://www.feaklefestival.ie> (accessed 31 March 2022).

Overall, it is revealing that just as the music is constantly being reauthored by its practitioners, the modes of transmission are continuously being expanded to encompass new technologies and elements of commercialism. Remarkably, this expansion occurs without destroying Irish traditional dance music's essential sociality or its common sense of shared ownership. Musicians continue to freely share tunes, including new original compositions and arrangements, with each other.

### Is Irish traditional music owned by anyone: Heritage, 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.<sup>114</sup>

Another claim to heritage is made by the cultural nationalist organization *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.<sup>115</sup> CCÉ is a major organizer of sessions, summer schools, and Irish music classes, and it also provides some online audio and video facilities via its website.<sup>116</sup> From its early days, CCÉ quickly became influential in identifying what is “proper” in the performance of Irish traditional dance music.<sup>117</sup> Inevitably, this definition has been somewhat controversial since there is arguably no correct or incorrect style. Mac Aoidh criticizes CCÉ for promulgating what he calls a form of nationalist “cultural imperialism” – an ideology that in the recent past “was not entirely appreciative of stylistic diversity and was, in some cases, hostile to certain styles of playing.”<sup>118</sup>

Another strong claim to heritage comes from the Irish government in its guise as the Irish tourist board: Irish Tourism.<sup>119</sup> Adam Kaul notes that there has been a boom in diasporic “musical tourism” to Ireland over the past 30 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.<sup>120</sup> Amongst these competing, yet at times overlapping, claims to heritage it is possible to note the relative absence of universalist claims. Ireland was very slow to ratify the CISCH, not doing so until 2016.<sup>121</sup> 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

<sup>114</sup> *Breathnach* 1993; see also Kirshenblatt-Gimblett 2015, 163–74.

<sup>115</sup> A full history of *Comhaltas Ceoltóirí Éireann* can be accessed at <http://www.comhaltas.ie> (accessed 31 March 2022).

<sup>116</sup> The CCÉ website gives a description of its activities at <http://comhaltas.ie/music/> (accessed 31 March 2022).

<sup>117</sup> Valley 2003, 204

<sup>118</sup> Mac Aoidh 1997, 67, 71.

<sup>119</sup> “Irish Tourism,” <https://www.tourismireland.com> (accessed 31 March 2022).

<sup>120</sup> Kaul 2007, 705–6. This is most apparent from the 1960s onwards. Kaul's study focuses on Doolin, County Clare, which hosts many sessions, especially during the summer months when tourism is at its peak.

<sup>121</sup> In accordance with the terms of Article 34 of the CISCH, the Convention entered into force with respect to Ireland on 22 March 2016, as noted on the UNESCO website where it states: “On 22 December 2015, Ireland deposited with the Director-General its instrument of ratification of the Convention for the Safeguarding of the Intangible Cultural Heritage.” “UNESCO,” [http://portal.unesco.org/en/ev.php-URL\\_ID=49349&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=49349&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 31 March 2022).

music and dance organizations that document and support the music, and the state also promotes the culture through 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.<sup>122</sup> Yet, although celebratory definitions of national heritage may “empower,” they may also “silence.”<sup>123</sup> The case of Morgan Bullock, the African American dancer whose modern take on Irish traditional dancing became a TikTok sensation 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 of people on social media that she was “appropriating” Irish cultural heritage.<sup>124</sup> 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 being 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 European Union (EU), the United Kingdom, and the United States).<sup>125</sup> Nonetheless, the boundaries of the copyright-public domain relationship are uncertain.<sup>126</sup> A musical work may actually contain a mixture of public domain material (stylistic conventions, basic patterns, and so on) and original elements (new melodies, variations, arrangements of notes, and so on).<sup>127</sup> 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) that allow use of music without a license in limited circumstances, such as quotations.<sup>128</sup>

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 that are accepted as part of the living tradition. 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 (for example, via notation or recording).<sup>129</sup> 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 online), such new compositions fall under copyright.<sup>130</sup>

<sup>122</sup> Blake 2000, 85.

<sup>123</sup> Beardslee 2016, 89.

<sup>124</sup> M. Bullock, “Why I Feel in Love with Irish Dancing,” *British Broadcasting Corporation*, 18 July 2020, <https://www.bbc.co.uk/news/av/world-us-canada-53452080> (accessed 31 March 2022).

<sup>125</sup> See, for example, the Copyright, Designs and Patents Act 1988 (UK), c. 48 (CDPA).

<sup>126</sup> Benabou and Dusollier 2007, 161, 163.

<sup>127</sup> Johnson 2008, 587; see generally Coombe 1998, 129.

<sup>128</sup> Benabou and Dusollier 2007, 173.

<sup>129</sup> McDonagh 2018, 151; see also CDPA, s. 1.

<sup>130</sup> McDonagh 2018.

In addition to these new compositions, copyright may arise in new arrangements in circumstances where a musician takes an existing public domain tune and adds sufficient originality to it (in the form of musical variations/additions). In a prior publication, I have discussed the fact that this means that Irish traditional musicians can claim copyright on their original arrangements, because such adaptations are invariably “intellectually creative” (and thus meet the requirements of the originality standard under, for example, EU and UK copyright law).<sup>131</sup> Although it is sometimes said that authorship/ownership of new arrangements of public domain works may put property barriers around material that is often assumed to be public domain, this fear tends to be overstated.<sup>132</sup> 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, given that it 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 works as a kind of shared resource available to all?<sup>133</sup> 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 license, the work cannot be used legally.<sup>134</sup> 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.<sup>135</sup>

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/television 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 right. 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.<sup>136</sup>

There is a clear sense of 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.<sup>137</sup> The network of Irish traditional musicians operates in a flexible enough manner to

<sup>131</sup> McDonagh 2018. In the European Union context, the Court of Justice for the European Union’s ruling in *Infopaq International v. Danske Dagblades Forening* (C-5/08), [2010] F.S.R. 495, as applied in the United Kingdom in *Newspaper Licensing Agency Ltd and others v. Meltwater Holding BV and Other Companies*, [2010] EWHC 3099 (Ch), on appeal [2011] EWCA Civ 890 and [2013] UKSC 18.

<sup>132</sup> *Sawkins v. Hyperion Records* [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] EMLR 688.

<sup>133</sup> For a perspective critical of the idea of “rights” to public domain materials, see generally Cahir 2007, 35.

<sup>134</sup> See note 131 above.

<sup>135</sup> See generally Craig 2011; McDonagh 2021.

<sup>136</sup> McDonagh 2018; see also Heile 2015: 123; Schwartz 2016, 91, 92.

<sup>137</sup> McDonagh 2011, 151–56. 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 Oliari and Sprigman 2008; Loshin 2010, 123, 140; Iljadica 2016; McDonagh 2016, 461.

accommodate some forms of individual authorship and ownership – through attribution in the main part – with copyright invoked only at the commercial edges, for example, with regard to recordings, musicals, and soundtracks. Hence, where conflicts arise between notions of individual property (copyright) and the creative practices of Irish traditional musicians, these are typically resolved in accordance with the accepted social norms rather than, for example, 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 it is not predominant.

Thomas 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.<sup>138</sup> 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 in which organizations 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 James Leach calls the gift form, with the focus on community, social relations, reciprocity, and sharing.<sup>139</sup>

The potency of the social norms in this context means that there is little reason to resort to WIPO's legal concepts of TK and traditional cultural expressions (TCEs), notions that embody WIPO's attempt to create space within the intellectual property framework for societies that do not prioritize individuated (copyright) works.<sup>140</sup> Despite positive intentions, in WIPO debates over the past decades defining TCEs has proven to be a delicate, even controversial, task.<sup>141</sup> Relatedly, it has been difficult to decide whom should have responsibility for preventing misappropriation of 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 legal TK rules could cause more harm than good because TK rules would formalize the processes of the network.<sup>142</sup>

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, rather, includes many dispersed, networked individuals around the world. Overall, WIPO's concept of 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 – a lot of cultural production, music included, around the globe falls into this category. However, the fact 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

<sup>138</sup> Turino 2009, 95, 109.

<sup>139</sup> Leach 2014, 458, 460.

<sup>140</sup> See "Intellectual Property and Traditional Cultural Expressions/Folklore," *World Intellectual Property Organization*, [http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf) (accessed 31 March 2022).

<sup>141</sup> Kuruk 2004, 429; Brown 2005, 40; Arewa 2006b, 156; MacMillan 2008, 77.

<sup>142</sup> Teubner and Fischer-Lescano 2008, 17, 18–21.

intellectual property system that focuses on music primarily as property object: a sonic text typically embodied by notation or a recording. Despite this, it is apparent that Irish traditional dance music lives beyond mere sonic text and that its active participants value sociality, reciprocity, 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.<sup>143</sup> Thus, for the vast majority of its participants, Irish traditional dance music provides a site of resistance to market commodification.

## 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 as an individuated musical work (or, alternatively, as formalized TK/TCE). Irish traditional dance music tends to resist these formal categorizations, and practitioners of traditional music do not necessarily follow the liberal-utilitarian theory that artists should assert individual rights in their labors. Rather, they treat the music as a kind of shared resource.<sup>144</sup> 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 in which this commons is governed.<sup>145</sup> Indeed, the idea of a gift form resonates within the community practices of Irish traditional dance music due to the focus on social relations and sharing.<sup>146</sup> 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/television soundtracks.

Simultaneously, there is a perception of heritage in Irish traditional dance music circles, marked by the acceptance that this form of dance music is something to be “passed on from one age to the next.”<sup>147</sup> 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 CSICH 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, 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 – demands a revitalized concept of cultural heritage, moving beyond the UNESCO classification and recasting heritage as a community’s way of resisting market commodification.<sup>148</sup>

<sup>143</sup> Small 1998.

<sup>144</sup> Ostrom 1990.

<sup>145</sup> McDonagh 2018.

<sup>146</sup> Leach 2014.

<sup>147</sup> Breathnach 1993.

<sup>148</sup> Bruncevic 2021, 7–22; Macmillan 2021, 202–20.



## Bibliography

- Arewa, O. 2006a. "Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use." *Rutgers Law Journal* 37: 277–353.
- Arewa, O. 2006b. "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks." *Marquette Intellectual Property Review* 10: 155–80.
- Beardslee, T. 2016. "Whom Does Heritage Empower, and Whom Does It Silence? Intangible Cultural Heritage at the Jemaa El Fnaa, Marrakech." *International Journal of Heritage Studies* 22: 89–101.
- Benabou V.-L., and S. Dusollier. 2007. "Draw Me a Public Domain." In *Copyright Law: A Handbook of Contemporary Research*, edited by P. Torremans, 161–84. Cheltenham, UK: Edward Elgar.
- Blake, J. 2000. "On Defining the Cultural Heritage." *International and Comparative Law Quarterly* 49: 61–85.
- Breathnach, B. 1983. "The Traditional Music Scene in Ireland." In *Ireland and the Arts*, edited by T. P. Coogan, 170–75. London: Namara Press.
- Breathnach, B. 1993. *Folk Music and Dances of Ireland*. Dublin: Mercier Press.
- Brown, M. F. 2005. "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property." *International Journal of Cultural Property* 12: 40–61.
- Bruncevic, M. 2021. *Regulating Transnational Heritage: Memory, Identity and Diversity*. Abingdon, UK: Routledge.
- Cahir, J. 2007. "The Public Domain: Right or Liberty?" In *Intellectual Property: The Many Faces of the Public Domain*, edited by C. Waelde and H. MacQueen, 35–53. Cheltenham, UK: Edward Elgar.
- Coombe, R. 1998. *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. Durham, NC: Duke University Press.
- Craig, C. J. 2011. *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law*. Cheltenham, UK: Edward Elgar.
- Dutfield, G. 2017. "If We Have Never Been Modern, They Have Never Been Traditional 'Traditional Knowledge', Biodiversity, and the Flawed ABS Paradigm." In *Routledge Handbook of Biodiversity and the Law*, edited by C. R. McManis and B. Ong, 276–90. Abingdon, UK: Routledge.
- Ellickson, R. 1991. *Order without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.
- Farrell, M. 2003. "Who Owns the Tunes? An Exploration of Composition Ownership in Irish Traditional Music." Unpublished manuscript. [https://www.academia.edu/8893914/Who\\_Owns\\_the\\_Tunes\\_An\\_Exploration\\_of\\_Composition\\_Ownership\\_in\\_Irish\\_Traditional\\_Music\\_2003\\_](https://www.academia.edu/8893914/Who_Owns_the_Tunes_An_Exploration_of_Composition_Ownership_in_Irish_Traditional_Music_2003_) (accessed 31 March 2022).
- Hall, R. 1994. "Irish Music in Camden 1945–1970." PhD diss., University of Sussex, accessible at the Cecil Sharp House Library, London, United Kingdom.
- Heile, B. 2015. "Who Wrote Duke Ellington's Music? Authorship and Collective Creativity in 'Mood Indigo.'" In *Concepts of Music and Copyright: How Much Music Perceives Itself and How Copyright Perceives Music*, edited by A. Rahmatian, 123–42. Cheltenham, UK: Edward Elgar.
- Iljadica, M. 2016. *Copyright Beyond Law: Regulating Creating in the Graffiti Subculture*. Oxford: Hart Publishing.
- Johnson, P. 2008. "'Dedicating' Copyright to the Public Domain." *Modern Law Review* 71: 587–610.
- Kaul, A. R. 2007. "The Limits of Commodification in Traditional Irish Sessions." *Journal of the Royal Anthropological Institute* 13: 703–19.
- Karapapa, S., and L. McDonagh. 2019. *Intellectual Property Law*. Oxford: Oxford University Press.
- Kirshenblatt-Gimblett, B. 2015. "Intangible Heritage as Metacultural Production." *Museum International* 56: 52–65.
- Kraut, A. 2015. *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance*. Oxford: Oxford University Press.
- Kuruk, P. 2004. "Bridging the Gap between Traditional Knowledge and Intellectual Property Rights: Is Reciprocity an Answer?" *Journal of World Intellectual Property* 7: 429–46.
- Kuss, M., ed. 2004. *Music in Latin America and the Caribbean: An Encyclopedic History*. Austin, TX: University of Texas Press.
- Kwabena Nketia, J. H. 1974. *The Music of Africa*. New York: W. W. Norton & Company.
- Latour, B. 1993. *We Have Never Been Modern*. Cambridge, MA: Harvard University Press.
- Leach, J. 2014 "Choreographic Objects: Contemporary Dance, Digital Creations and Prototyping Social Visibility." *Journal of Cultural Economy* 7: 458–75.
- Lind, J. 1997. *A History of European Folk Music*. Rochester, NY: University of Rochester Press.
- Loshin, J. 2010. "Secrets Revealed: Protecting Magicians' Intellectual Property without Law." In *Law and Magic: A Collection of Essays*, edited by C. A. Corcos, 123–42. Durham: Carolina Academic Press.
- Mac Aoidh, C. 1994. *Between the Jigs and the Reels*. Leitrim, Ireland: Drumlin Publications.
- Mac Aoidh, 1997. "Donegal: A Voice in the Wilderness, or the Voice of Reason?" In *Blas: The Local Accent in Irish Traditional Music*, edited by T. Smith and M. Ó. Súilleabháin. 67–72. Dublin: Colour Books.

- Macmillan, F. 2008. "Human Rights, Cultural Property and Intellectual Property: Three Concepts in Search of a Relationship." In *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, edited by C. B. Graber and M. Burri-Nenova, 73–95. Cheltenham UK: Edward Elgar.
- Macmillan, F. 2021. *Intellectual and Cultural Property: Between Market and Community*. Abingdon, UK: Routledge.
- Malm, W. P. 1996. *Music Cultures of the Pacific, the Near East, and Asia*. Upper Saddle River, NJ: Prentice Hall.
- McCarthy, M. 1999. *Passing It On: The Transmission of Music in Irish Culture*. Cork: Cork University Press.
- McDonagh, L. 2011. "Does the Law of Copyright in the UK and Ireland Conflict with the Practices of Irish Traditional Musicians? A Study of the Impact of Law on a Traditional Music Network." PhD diss., School of Law, Queen Mary University.
- McDonagh, L. 2016. "FOSS and Alternative Licensing in the United Kingdom: Assessing the Dual Importance of Contract Law and Copyright Law." In *Free and Open Source Software (FOSS) and Other Alternative Licensing Models: A Comparative Analysis of the Main Legal Issues*, edited by A. Metzger, 461–76. Cham: Springer.
- McDonagh, L. 2018. "Protecting Traditional Music under Copyright (And Choosing Not to Enforce It)." In *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?*, edited by E. Bonadio and N. Lucchi, 151–73. Cheltenham, UK: Edward Elgar.
- McDonagh, L. 2019. "Losing Ireland, Losing the Empire: Dominion Status and the Irish Constitutions of 1922 and 1937." *International Journal of Constitutional Law* 17: 1192–1212.
- McDonagh, L. 2021. *Performing Copyright: Law, Theatre and Authorship*. Oxford: Hart Publishing.
- Mollenhauer, J. 2015. "Competitive Irish Dance: Culture and Community." *Australasian Journal of Irish Studies* 15: 35–54.
- O'Canainn, T. 1978. *Traditional Music of Ireland*. London: Routledge and Kegan Paul.
- Ó hAllmhuráin, G. 1999. *A Pocket History of Irish Traditional Music*. Dublin: O'Brien Press.
- Ó hAllmhuráin, G. 2005. "Dancing on the Hobs of Hell." *New Hibernia Review* 9: 9–18.
- Ó Laoire, L. 2003. "Fieldwork in Common Places: An Ethnographer's Experiences in Tory Island." *Ethnomusicology Forum* 12: 113–36.
- Ó Laoire, L. 2005. "Irish Music." In *The Cambridge Companion to Modern Irish Culture*, edited by J. Cleary and C. Connolly, 267–84. Cambridge, UK: Cambridge University Press.
- Oliar, D., and C. Sprigman, 2008. "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy." *Virginia Law Review* 94: 1787–1867.
- Ostrom, E. 1990. *Governing the Commons. The Evolution of Institutions for Collective Action*. Cambridge, UK: Cambridge University Press.
- Porter, J. 1989. *Traditional Music of Britain and Ireland*. New York: Garland.
- Ravetto-Biagioli, K. 2020 "Whose Dance Is It Anyway?: Property, Copyright and the Commons." *Theory, Culture & Society* 38: 101–26.
- Rimmer, J. 1987. "Patronage, Style and Structure in the Music Attached to Turlough Carolan." *Early Music* 15: 164–74.
- Schwartz, R. F. 2016. "Early Blues: The First Stars of Blues Guitar by Jas Obrecht (review)." *American Studies* 55: 91–92.
- Small, C. 1998. "Musicking : The Meanings of Performing and Listening." Hanover: University Press of New England.
- Smith, C. 2006. "Reclaiming the Commons, One Tune at a Time." *New Hibernia Review* 10: 9–20.
- Smith, G. 1997. "Modern-Style Irish Accordion Playing: History, Biography and Class." *Ethnomusicology* 41: 433–63.
- Smith, S. K. S. 2001. "Irish Traditional Music in a Modern World." *New Hibernia Review* 5: 111–25.
- Teubner, G., and A. Fischer-Lescano. 2008. "Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?" In *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, edited by C. B. Graber and M. Burri-Nenova, 17–48. Cheltenham, UK: Edward Elgar.
- Turino, T. 2009. "Four Fields of Music Making and Sustainable Living." *World of Music* 51: 95–117.
- Toynbee, J. 2006. "Copyright, The Work and Phonographic Orality in Music." *Social and Legal Studies* 15: 77–99.
- Vallely, F. 2003. "The Apollos of Shamrockery: Traditional Musics in the Modern Age." In *Celtic Modern*, edited by M. Stokes and P. V. Bohlman, 201–17. Lanham, MD: Scarecrow Press.
- Waldron, J. 2006. "Learning, Teaching, and Transmission in the Lives of Two Irish Musicians: An Ethnographic Case Study." *International Journal of Community Music* 4: 1–21.
- Whyton, T. 2010. *Jazz Icons: Heroes, Myths and the Jazz Tradition*. Cambridge, UK: Cambridge University Press.
- Wilkinson, D. 1992. "Play Me a Lonesome Reel." MA thesis, University of Limerick.

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