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# Protecting traditional music under copyright (and choosing not to enforce it)

**Luke McDonagh**

## 1. INTRODUCTION

This chapter examines how music is defined and protected under copyright law, with a focus on traditional music, and outlines the reasons why, even if their music is protectable, traditional musicians might decide not to enforce copyright in their works. The particular jurisdiction I focus on is the UK, but the underlying principles of the chapter are relevant to copyright elsewhere, for example in the EU, the US, Canada, Australia and New Zealand. This chapter complements the work of Mazziotti in this volume.<sup>1</sup>

The next part of this chapter outlines what traditional music is and why it poses a challenge to copyright. Section 3 explores how the musical work is defined within UK case law as well as in international conventions. Section 4 examines how musicians who add originality to the arrangement of a recorded tune or song may be entitled to copyright over that arrangement as a musical work in its own right.<sup>2</sup> Following on from this, the chapter argues that it is perfectly possible to protect traditional music under copyright (and to enforce it) – but there are cogent reasons why this might not be in the best interests of the process of music-making.<sup>3</sup> Moreover, while there is space for some use of innovative licensing, inspired by FOSS and Creative Commons, it should not be viewed as a panacea; instead, acknowledgement and maintenance of the social norms within traditional music communities is of vital importance, rather than dramatic legal changes.

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<sup>1</sup> See Giuseppe Mazziotti, Chapter 8.

<sup>2</sup> Luke McDonagh, *Is Creative Use of Musical Works without a Licence Acceptable under Copyright?*, 43 *Int'l Rev. Intell. Prop. & Competition L. (IIC)* 401, 401–426 (2012).

<sup>3</sup> Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 *N. C. L. Rev.* 547 (2006).

## 2. WHAT IS 'TRADITIONAL' MUSIC AND HOW IS IT RELEVANT TO COPYRIGHT LAW?

What we call 'traditional' or 'folk' music is generally thought of as old, ancient and pre-modern.<sup>4</sup> The terms 'folk' and 'traditional' music are sometimes used interchangeably, though it has been argued that the term 'traditional music' is preferable as it more clearly implies the 'process' of music-making.<sup>5</sup> In this chapter I do not make a firm distinction between the two terms, but 'traditional' music will be used as much as possible, although 'folk' music will be used where related academic literature explicitly uses the term.

Historically, traditional music – whether European folk music,<sup>6</sup> African-American blues and jazz music,<sup>7</sup> or indigenous music in South America,<sup>8</sup> Asia<sup>9</sup> and Africa<sup>10</sup> – has been dependent on a process of person-to-person transmission, rather than a written, documented form such as in Western classical music. Today, however, many performers of traditional music use some form of documentation to aid their learning, usually recordings or transcriptions.<sup>11</sup> This illustrates one of the most important elements of traditional music: although music follows established patterns it is not set in stone; it is in a constant state of redefinition. Furthermore, although an established body of public domain tunes/songs exists

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<sup>4</sup> Lillis O'Laoire, *Fieldwork in Common Places: An Ethnographer's Experiences in Tory Island*, 12 *Ethnomusicology Forum* 113 (2003).

<sup>5</sup> James Porter, *Traditional Music of Britain and Ireland: A Select Bibliography and Research Guide* (Garland, 1989).

<sup>6</sup> Jan Lind, *A History of European Folk Music* (University of Rochester Press, 1997).

<sup>7</sup> Tony Whyton, *Jazz Icons: Heroes, Myths and the Jazz Tradition* (CUP, 2010); see also Olufunmilayo Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 *Rutgers L. J.* 277, 278–290 (2006).

<sup>8</sup> Malena Kuss, *Performing Beliefs: Indigenous Peoples of South American, Central America and Mexico*. In *Music in Latin America and the Caribbean: An Encyclopedic History* (University of Texas Press, 2010).

<sup>9</sup> William P. Malm, *Music Cultures of the Pacific, the Near East, and Asia* (Prentice Hall, 1996).

<sup>10</sup> J.H. Kwabena Nketia, *The Music of Africa* (W.W. Norton & Company, 1974).

<sup>11</sup> Jason Toynbee, *Copyright, the Work and Phonographic Orality in Music*, 15 *Soc. and Legal Stud.* 77, 79–99 (2006).

in many forms of traditional music, the creation of new compositions and arrangements plays a key role in maintaining the ‘living tradition’.<sup>12</sup>

My focus in this chapter is on forms of secular traditional music in Europe and North America, especially Irish instrumental dance music (e.g. jigs and reels) and African-American blues and jazz music (e.g. the 12-bar blues progression).<sup>13</sup> What marks out these traditional forms of music from popular or ‘pop industry’ music is the style of composition and performance. Traditional songs and melodies tend to follow accepted patterns, often in line with specific dance steps. Jigs are usually comprised of two or three musical parts, played repeatedly in 6/8 or 9/8 time, while reels are played in 4/4.<sup>14</sup> 12-bar blues songs are often played in 4/4 or 3/4 and tend to feature a minor-based scale played over major chords.<sup>15</sup> New compositions that enter the tradition usually feature familiar rhythms and musical phrases. Where authorship is observable it is often viewed along a ‘chain’ of musicians who have added their own creativity and variations to an existing tune. If a musician performs or records an evocative variation of an old Irish reel it can lead to the musician’s name becoming attached to the tune (e.g. ‘Joe Cooley’s Reel’ - associated with the playing of the Irish accordion player Joe Cooley); similarly, a blues or jazz musician’s adaptation of an existing song can become famous, and perhaps even definitive, within the tradition e.g. ‘Mississippi’ John Hurt’s version of ‘Frankie and Albert’).<sup>16</sup>

What makes traditional music an interesting topic for scholars of intellectual property is that the authorship and performance of traditional music does not neatly correspond to the

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<sup>12</sup> McDonagh, *supra* note 2.

<sup>13</sup> Byron Dueck, *Jazz Endings, Aesthetic Discourse, and Musical Publics*, 33 *Black Music Research Journal* 91, 91–115 (2013).

<sup>14</sup> Brendan Breathnach, *Folk Music and Dances of Ireland* (Ossian, 1993) 57–61.

<sup>15</sup> Peter Spitzer, *Jazz Theory Handbook* (Mel Bay Publications, 2001) 63.

<sup>16</sup> Luke McDonagh, *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*, 151–156 (PhD Thesis, School of Law, Queen Mary University, 2011), Roberta Freund Schwartz, *Early Blues: The First Stars of Blues Guitar* by Jas Obrecht (review), 55 *American Studies* 91, 91–92 (2016), and Bjorn Heile, *Who Wrote Duke Ellington’s Music? Authorship and Collective Creativity in ‘Mood Indigo’*. In Andreas Rahmatian, ed., *Concepts of Music and Copyright: How Much Music Perceives Itself and How Copyright Perceives Music* (Edward Elgar Publishing, 2015) 123, 123–141.

commonly accepted copyright model within the music industry. Within that model, pop composers are usually easily identifiable as authors and owners of copyright works, whereas, in accordance with industry practice, performers have a different role; although they are entitled to performers' rights, they are not viewed as authors or owners of the underlying musical compositions.<sup>17</sup>

Traditional music is different. For one thing, in the case of older tunes and songs within a body of traditional music – many of which are in the public domain or are orphan works – it is often impossible to identify a single author or joint authors. Moreover, such songs and tunes can exist in several regional and local variants that have arisen from the creative arrangement of tunes by skilled performers (such as the Joe Cooley and Mississippi John Hurt examples cited above). Yet, new compositions by living authors can become accepted as part of the tradition over time. Thus, traditional music brings up many questions for copyright lawyers. I do not aim to answer all of them in a single chapter. What I intend to explore is whether traditional music can be protected under copyright; and, if it can be protected, what options do musicians have should they wish, or not, to enforce their copyrights? Finally, I consider the fact that the process of traditional music-making has parallels with the experiences of creators across a diverse range of non-conventional spaces, including free and open source software (FOSS), comedy, magic and graffiti.<sup>18</sup>

One important limitation of this chapter is that I do not intend to deal with the complex questions concerning the rights of indigenous or tribal communities in Asia, Africa and Latin America to traditional music that forms part of sacred traditions or religious ceremonies.<sup>19</sup> Nonetheless, the two are not mutually exclusive. Some of the problems faced by members of traditional or indigenous communities are similar to the challenges faced by

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<sup>17</sup> Richard Arnold, *Performers' Rights* (5th edn, Sweet & Maxwell, 2015).

<sup>18</sup> Luke McDonagh, FOSS and Alternative Licensing in the United Kingdom: Assessing the Dual Importance of Contract Law and Copyright Law. In A. Metzger, ed., *Free and Open Source Software (FOSS) and Other Alternative Licensing Models: A Comparative Analysis of the Main Legal Issues* (Springer, 2016) 461, 461–476; Dotan Oliar and Christopher Sprigman, There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy, 94 Va. L. Rev. 1787 (2008); Jacob Loshin, Secrets Revealed: Protecting Magicians' Intellectual Property without Law. In Christine A. Corcos, ed., *Law and Magic: A Collection of Essays* (Carolina Academic Press, 2010) 123, 140; and Marta Iljadica, *Copyright Beyond Law: Regulating Creating in the Graffiti Subculture* (Bloomsbury, 2016).

<sup>19</sup> Karen Ralls-MacLeod and Graham Harvey, *Indigenous Religious Musics* (Routledge, 2000).

e.g. Irish traditional musicians or software programmers, as both make objections to individualist notions of copyright.<sup>20</sup> These objections are founded upon a belief that intellectual property law fails to adequately facilitate the processes of cultural innovation within their environment.<sup>21</sup> Given that this chapter evaluates these objections the analysis provided has relevance beyond its immediate focus.

### 3. DEFINING AND PROTECTING THE MUSICAL WORK UNDER COPYRIGHT

It is not the intention of this chapter to explore the history of copyright in great detail; expansive studies on this subject have been undertaken elsewhere.<sup>22</sup> However, a number of relevant points are worth noting regarding the beginning of the relationship between modern copyright law and music. Although the first ‘letters patent’ were issued to music publishers in England during the late 16th century,<sup>23</sup> at the time of the enactment of the Statute of Anne in 1710<sup>24</sup> music was ‘not thought to be protected’.<sup>25</sup> This changed towards the latter half of the 1700s, when there was a ‘shift in judicial understanding of the possible objects of property’ to

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<sup>20</sup> Kathy Bowery, *Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices*, 6 *Macquarie Law Journal* 65, 89–95 (2006).

<sup>21</sup> *Ibid.*

<sup>22</sup> See for example John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 *Publishing History* 19 (1980); Trevor Ross, *Copyright and the Invention of Tradition*, 26 *Eighteenth-Century Studies* 1 (1992); Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993); Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (CUP, 1999); and Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag* (CUP, 2006). See also, Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Georgetown Law Journal* 287 (1988) and Jeremy Waldron, *From Authors to Copiers*, 68 *Chicago-Kent Law Review* 841 (1988).

<sup>23</sup> Michael Carroll, *Whose Music is it Anyway? How We Came to View Musical Expression as a Form of Property*, 72 *University of Cincinnati Law Review* 1405, 1463 (2004).

<sup>24</sup> Statute of Anne, 1710, [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp) (last accessed Nov. 24, 2017).

<sup>25</sup> David Hunter, *Musical Copyright in Britain to 1800*, 67 *Music and Letters* 269, 274 (1986).

encompass music.<sup>26</sup> In 1777, the seminal decision in *Bach v Longman*<sup>27</sup> established that musical compositions were covered by the Statute of Anne.<sup>28</sup>

Three conditions necessitated the application of copyright protection to music in England during the 18th century:<sup>29</sup> (i) the existence of printing technology; (ii) a general acceptance of the concept of ‘intellectual property’ in some form at a governmental level; and (iii) a rapidly expanding market for sheet music (and, consequently, a black market in ‘unauthorised publication of musical works’).<sup>30</sup> On this, Deazley notes that it was the economic rights of publishers that were of paramount importance to the legislature when the Statute of Anne was enacted – not the rights of authors or composers.<sup>31</sup>

Whatever the intent of legislators, the ability to enforce copyright over musical works had a tangible effect on the attitudes and practices of major classical composers, who began to take a more authorial view of their compositions during the 18th and 19th centuries.<sup>32</sup> Interestingly, due to the emphasis on oral learning/transmission and a general lack of commerciality, traditional music was relatively unaffected by this – the collective remained key, and individual musicians were rarely credited as authors/composers.<sup>33</sup> Sheet music was only of tangential interest in the traditional context, mainly to upper-class collectors of the music.<sup>34</sup> Thus, in the classical field, where music was commercially viable, composers increasingly saw themselves as authors; whereas the shift towards individual or ‘Romantic’

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<sup>26</sup> Anne Barron, Copyright Law’s Musical Work, 15 *Social and Legal Studies* 101, 106 (2006).

<sup>27</sup> *Bach v Longman* 98 ER [1777] 1274.

<sup>28</sup> John Small, J.C. Bach Goes to Law, 126 *The Musical Times* 526 (1985).

<sup>29</sup> David Hunter, Musical Copyright in Britain to 1800, 67 *Music and Letters* 269, 270–274 (1986).

<sup>30</sup> *Ibid.*

<sup>31</sup> Ronan Deazley, *On the Origin of the Right to Copy* (Bloomsbury, 2004) xix.

<sup>32</sup> Frederic M. Scherer, The Emergence of Musical Copyright in Europe from 1709 to 1850, 5 *Review of Economic Research on Copyright Issues* 3, 11 (2008).

<sup>33</sup> An exception in Irish traditional music is the harper Turlough O’Carolan, who was active in the late 17th and early 18th centuries and who blended elements of the folk tradition with contemporary classical themes –see Harry White, Carolan and the Dislocation of Music in Ireland, 4 *Eighteenth-Century Ireland* 55, 55–64 (1989).

<sup>34</sup> For a full account of this period see generally Matthew Gelbart, *The Invention of ‘Folk Music’ and ‘Art Music’: Emerging Categories from Ossian to Wagner* (CUP, 2007).

authorship did not occur in traditional music until the commercial ‘folk boom’ in the 1960s; and even then, collective ideals remained strong in many areas of traditional music, and persist to this day.

### 3.1 International Conventions

In addition to UK common law and legislative developments, the development of music copyright in the centuries since *Bach v Longman* has been shaped by enactments at the international level.<sup>35</sup> Key here is the Berne Convention of 1886, which has been adopted by much of the global community and which provides an international framework for copyright in relation to musical works.<sup>36</sup> Many of its standards also form part of the 1994 TRIPS agreement.<sup>37</sup>

Berne protects the ‘musical composition with or without words’ and ‘dramatico-musical works’, but does not define ‘music’ or ‘musical composition’.<sup>38</sup> Indeed, there are surprisingly few definitions of ‘musical work’ in national and international copyright law. In 1994 TRIPS merely adopted the terms of the Berne Convention and did not provide a further definition of musical work.<sup>39</sup> The WIPO World Copyright Treaty of 1996<sup>40</sup> does not attempt

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<sup>35</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S Treaty Doc. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) (hereinafter Berne Convention).

<sup>36</sup> Universal Copyright Convention (1952). This was enacted to provide international protection standards for countries that were unwilling to accept certain terms of the Berne Convention. Today the Universal Copyright Convention is less relevant due to the requirement that countries accede to the TRIPS agreement for WTO membership. Universal Copyright Convention, Sept. 6, 1952, revised at Paris July 24, 1971, 25 U.S.T. 1341.

<sup>37</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (hereinafter: TRIPS). However, the Berne Convention only covers literary and artistic works. The later ‘Rome Convention’ was enacted to provide protection for other rights such as rights over sound recording and performers’ rights. See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43 (hereinafter Rome Convention).

<sup>38</sup> Article 2(1) Berne Convention, *op. cit.*

<sup>39</sup> Similarly, under TRIPS Articles 1–21 of the Berne Convention are adopted with no expansion of the definition of ‘musical work’, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](http://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1) (last accessed Nov. 24, 2017).

to define it. Similarly, the relevant US legislation does not provide a definition.<sup>41</sup> What this indicates is that legislative bodies, both national and international, accept that the terms ‘music’ and ‘musical work’ are inherently difficult to define (and/or that it is not necessary to define the terms strictly for copyright purposes).<sup>42</sup> Interestingly, as explored in this chapter, the UK courts have, over time, developed a rich and useful definition.

### 3.2 Defining the Musical Work – UK Case Law

The Imperial Copyright Act of 1911 brought the Berne Convention standards into UK law (as well as to the rest of the Empire, becoming the foundational copyright statute for nations as diverse as India, Israel and Ireland).<sup>43</sup> It was followed by the Copyright Act of 1956.<sup>44</sup> Neither Act, however, provided a definition of ‘musical work’. This changed in 1988 when the Copyright, Designs and Patents Act (CDPA) repealed the 1956 Act. Under the CDPA, a musical work is described as ‘a work consisting of music, exclusive of any words or action

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<sup>40</sup> WIPO Copyright Treaty (1996) (hereafter referred to as WCT). This exists in compliance with Article 20 of the Berne Convention and it complies with the Berne definition of ‘literary and artistic works’. The WCT was enacted primarily to address the issues surrounding copyright and digital technology, [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P51\\_3806](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806) (last accessed Nov. 24, 2017).

<sup>41</sup> United States Copyright Act 1976 s 102(a)(2), <http://www.law.cornell.edu/copyright/copyright.act.chapt1a.html#17usc102> (last accessed Nov. 24, 2017).

<sup>42</sup> An important shift occurred when the Berne Convention was revised in 1908: it was decided that copyright should arise automatically, in other words that there should be no need for registration (though the US retained a registration system until the 1970s). Article 4, Convention for the Protection of Literary and Artistic Works (1908) (hereafter referred to as Berlin Act), [http://en.wikisource.org/wiki/Convention\\_for\\_the\\_Protection\\_of\\_Literary\\_and\\_Artistic\\_Works\\_\(Berlin\\_Act,\\_1908\)](http://en.wikisource.org/wiki/Convention_for_the_Protection_of_Literary_and_Artistic_Works_(Berlin_Act,_1908)) (last accessed Nov. 24, 2017). It was also agreed that the minimum term should be 50 years after the life of the author.

<sup>43</sup> Copyright Act, 1911 (hereafter referred to as CA 1911), [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga\\_19110046\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga_19110046_en_1) (last accessed Nov. 24, 2017).

<sup>44</sup> Copyright Act, 1956 (hereafter referred to as CA 1956), [http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga\\_19560074\\_en.pdf](http://www.opsi.gov.uk/acts/acts1956/pdf/ukpga_19560074_en.pdf) (last accessed Nov. 24, 2017).

intended to be sung, spoken or performed with the music'.<sup>45</sup> Nevertheless, the statute does not define what amounts to a piece of 'music'.<sup>46</sup>

One advantage of the lack of a definition of 'music' within the CDPA is that it gives the courts leeway to take a broad interpretation of what is encompassed by a musical work.<sup>47</sup> The Court of Appeal decision in *Sawkins v Hyperion*<sup>48</sup> is the most recent, authoritative decision on the nature of the musical work in the UK. In *Sawkins*, the claimant successfully argued that he owned the copyright in performing editions that he had prepared of public domain works originally composed by Michel-Richard Lalande during the early modern period. Mummery L.J. stated that 'the essence of music is combining sounds for listening to'.<sup>49</sup> He further remarked:

{quotation}Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it ... There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or improvisations of sounds by a group of people with or without musical instruments should not be regarded as 'music' for copyright purposes.<sup>50</sup>{/quotation}

Clearly, this notion of music is not limited to harmony or melody. Mummery L.J. further stated that it would be incorrect to 'single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some

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<sup>45</sup> CDPA s 3(1).

<sup>46</sup> Cheng Lim Saw, 'Protecting the Sound of Silence in 4'33" – A Timely Revisit of Basic Principles in Copyright Law', 27 *European Intellectual Property Review* 467, 469 (2005) and David Seymour, 'This is the Piece that Everyone Here has Come to Experience: The Challenges to Copyright of John Cage's 4'33"', 33 *Legal Studies* 532, 537–548 (2013).

<sup>47</sup> Andreas Rahmatian, 'Music and Creativity as Perceived by Copyright Law', 3 *Intellectual Property Quarterly* 267, 268 (2005).

<sup>48</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565; [2005] 1 WLR 3281.

<sup>49</sup> *Ibid.* at para. 53.

<sup>50</sup> *Ibid.*

contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators'.<sup>51</sup> Therefore, in the UK the musical work can be described as broad and flexible: it can encompass not only notes of music, but also other elements of musical practice and performance.<sup>52</sup>

The UK courts' open-minded view of music contrasts with the perspective of copyright taken by some scholars, who believe that the law imposes a necessarily 'Romantic' or 19th-century classical definition traced to the rise of individual authorship.<sup>53</sup> For example, Goehr describes copyright's musical work as 'a self-sufficiently formed unity, expressive in its synthesised form and content of a genius's idea'.<sup>54</sup> Yet, as Bently remarks, 'Mummery L.J.'s conception of the musical work' in *Sawkins* 'seems miles away from the image of the completed, notated score awaiting conversion by musical automatons – performers – into sounds appreciated by reverent, sedentary, passive audiences'.<sup>55</sup> Therefore, rather than viewing it as unduly formalist, it is more accurate to regard the musical work under UK copyright as a fluid concept, influenced by a number of aesthetic and abstract notions of musical work present in 'Romantic' and classical musicological literature, but not bound by them.<sup>56</sup> The reason this is a positive thing is that it is possible to envisage cases, e.g. involving

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<sup>51</sup> Ibid. at paras 55–56.

<sup>52</sup> A rare – though logical – limitation to this can be observed from the case of *Coffey v Warner* where it was held that a musical work cannot exist where it consists of mere 'extractions' from another work. Thus, to exist as a musical work in itself, a smaller work must be separable from a larger work – *Coffey v Warner/Chappell Music* [2005] FSR (34) 747. See also, Giuseppe Mazziotti, this volume, who points out that live performances/arrangements that are not fixed, will not be protected. It is worth mentioning, however, that such unfixed arrangements are highly unlikely to be infringed, as potential infringers would have nothing to work with other than the original, unfixed, ephemeral performance.

<sup>53</sup> Lionel Bently, *Authorship of Popular Music in UK Copyright Law*, 12 *Information, Communication and Society* 179, 184 (2009).

<sup>54</sup> Lyndia Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music* (OUP, 1992) 242.

<sup>55</sup> Bently, *supra* note 53.

<sup>56</sup> Anne Barron, *Copyright Law's Musical Work*, 15 *Social and Legal Studies* 101, 106–106 and 123–124 (2006).

‘avant-garde’ music,<sup>57</sup> where the provision of a strict definition of musical work might end up creating problems for judges, who may be unable to fit an avant-garde work within a formalist definition.<sup>58</sup> By contrast, the UK courts’ broad notion of musical work gives the courts room to manoeuvre.

In light of this, if there *are* challenges that arise from the application of copyright to traditional music under UK law, it can be said with confidence that that *these difficulties do not arise due to copyright’s definition of musical work*. Nonetheless, as discussed further below, complexities can arise in relation to cases involving the distinction between two different types of musical work – the ‘composition’ and the ‘arrangement’ – as well as the twin notions of authorship and joint authorship.

#### 4. THE DISTINCTION BETWEEN THE COMPOSITION AND THE ARRANGEMENT UNDER COPYRIGHT

Of particular importance to discussions of traditional music and copyright is the distinction between the copyright in the musical composition and the copyright in a subsequent ‘arrangement’ of that composition. Under UK law a separate copyright can subsist in an arrangement of a composition as long as the arrangement is sufficiently original<sup>59</sup> and the requisite originality comes from the arranger.<sup>60</sup> The owner of the original copyright in the composition is not the owner of the new arrangement copyright, which vests in the arranger.<sup>61</sup> In other words, copyright can recognise rights in multiple, original arrangements of the same composition.

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<sup>57</sup> Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP, 2005) 426.

<sup>58</sup> Justine Pila, Copyright and its Categories of Original Works, 30 *Oxford Journal of Legal Studies* 229, 236–242 (2010).

<sup>59</sup> *Austin v Columbia* [1917–1923] MacG CC 398. See also *Robertson v Lewis* [1976] RPC 169; *Lover v Davidson* (1856) 1 CBNS 182, which involved accompaniment to an old air; and *Wood v Boosey* (1868) LR 3 QB 223, which involved an operatic pianoforte score.

<sup>60</sup> *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 (QBD). However, a straightforward ‘cover’ of a work may lack sufficient originality – see *Aston Barrett v Universal Island Rec. Ltd* [2006] EWHC 1009 (Ch).

<sup>61</sup> This would usually be the case unless an alternative has been agreed between the two parties.

Key is the notion of originality underpinning this idea. Although the Berne Convention does not expressly state that there is a requirement of ‘originality’,<sup>62</sup> there is ‘a clear indication’ that the notion of intellectual creation is ‘implicit in the conception of a literary or artistic work’.<sup>63</sup> The same logic applies to a musical work. Crucially, whether one considers the traditional UK standard of ‘skill, labour and judgment’ or the CJEU standard of ‘intellectual creation’ it is clear that the threshold is not a burdensome one in the musical context: music performance and composition are inherently creative and thus have little problem satisfying this test.<sup>64</sup> Virtually any creative contribution to an existing tune or song will be sufficient for the arrangement to be protected. However, the effective use of this new arrangement copyright would be subject to licensing requirements because the copyright in the new arrangement does not replace or nullify the copyright in the underlying work. This means that an arranger of a copyright work must obtain a licence from the owner of the underlying copyright work in order to release the new arrangement because the right to make ‘adaptations’ is one of the rights of the copyright owner.<sup>65</sup> The only exception to this is if the new arrangement is based on a public domain work; if this is the case then the arranger will own the copyright in the arrangement, with no requirement to obtain a licence (though copyright only covers the original elements of the new arrangement - the underlying work remains in the public domain).

The conflict between these rights – the right of adaptation and the automatic protection of new original arrangements – has long been acknowledged. At the time of Berne

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<sup>62</sup> Ricketson and Ginsburg, *supra* note 57 402–403.

<sup>63</sup> Article 2(5) Berne Convention, *op. cit.* See also Ricketson and Ginsburg, *supra* note 57 402–403, noting that the preparatory documents for the Brussels Revision Conference appear to acknowledge that the expression ‘literary and artistic works’ encompassed a notion of ‘intellectual creation’.

<sup>64</sup> *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569 (ECJ (4th Chamber)); [2009] ECDR 16 259; *Newspaper Licensing Agency v Meltwater* [2010] EWHC 3099 (Ch); and *SAS Institute Inc. v World Programming Ltd* [2013] EWHC 69 (Ch); [2013] RPC 17. See also Luke McDonagh, Headlines and Hyperlinks: UK Copyright Law Post-*Infopaq*, 1 Queen Mary Journal of Intellectual Property 184, 185–187 (2011); Jonathan Griffiths, Dematerialisation, Pragmatism and the European Copyright Revolution, 33 Oxford Journal of Legal Studies 767, 788–790 (2013); Jonathan Griffiths, Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law, 38 European Law Review 65, 69–78 (2013).

<sup>65</sup> CDPA s 21.

‘musical arrangements’ were not protected as original works;<sup>66</sup> they were merely viewed as potentially ‘unauthorised indirect appropriations of works’ i.e. as examples of infringement.<sup>67</sup> However, following the Berlin Revision of the Berne Convention, arrangements were given protection under Article 2(3) as original works, ‘without prejudice to the copyright in the original work’.<sup>68</sup> This debate over the terms of Berne underlines the fact that a new arrangement of a copyright composition can simultaneously be an ‘original’ work in its own right, and also an ‘infringing’ work with respect to the underlying copyright in the composition (unless it is properly licensed).

#### **4.1 Authorship and Joint Authorship of Musical Arrangements**

As noted earlier, an arranger can be the author of, and can own copyright in, an original arrangement of a public domain song/tune, though not the song/tune itself, which remains in the public domain. In theory, the arrangement copyright includes the right to object to ‘sound-a-like’ records which mimic the particular arrangement. However, such cases can be difficult to prove.<sup>69</sup>

There have been a number of UK music copyright cases where a particular arrangement of a composition has been the subject of a legal dispute. For example, in both *Godfrey v Lees*<sup>70</sup> and *Beckingham v Hodgens*<sup>71</sup> the disputes centred on the authorship of the specific copyright arrangements of existing songs. At the same time, courts have sometimes found it difficult to clarify the distinction between the underlying work and an arrangement, especially in joint authorship cases involving music. The nature of music performance as a group activity can lead to confusion over who is an author, and thus a copyright owner, and who is a mere performer, and thus not entitled to copyright protection.

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<sup>66</sup> Ricketson and Ginsburg, *supra* note 57.

<sup>67</sup> Ricketson and Ginsburg, *supra* note 57 at 435.

<sup>68</sup> Article 2(3) Berne Convention, *op. cit.*

<sup>69</sup> *CBS Records Australia Ltd v Gross* (1989) 15 IPR 385 at 393. Further, see *ZYX Music GmbH v King* [1997] 2 All ER 129.

<sup>70</sup> *Godfrey v Lees* [1995] EMLR 307 (Ch D).

<sup>71</sup> *Beckingham v Hodgens* [2002] EWHC 2143 (Ch); [2002] EMLR 45.

In *Hadley v Kemp*,<sup>72</sup> a number of the members of the group Spandau Ballet took a copyright case against their fellow band member and principal songwriter, Gary Kemp. During the early 1980s, Kemp had written the lyrics, chords and basic melody to the song ‘True’, one of the group’s biggest hits, and one of the works cited in the case. The key dispute over ‘True’ concerned its famous saxophone solo, which was performed on the recording by Steve Norman, a band member. The solo was significant – it lasted for 16 bars, approximately 9% of the song. Moreover, the melody of the solo was devised and improvised in the studio by Norman over the chords that Kemp presented to him. Despite Norman’s creativity, the court took the view that Kemp was the ‘author’ and Norman was a mere ‘performer’. Thus, it was held that the creation of the solo was not a ‘significant and original contribution’ to the work. Norman was left without a share in the copyright work.

As Arnold states, ‘in assessing claims to co-authorship of musical works, the vital first step is for the court correctly to identify the work the subject of the claim to copyright and to distinguish it from any antecedent work’.<sup>73</sup> One of the reasons the *Hadley* judgment is problematic is that it is unclear as to whether the court considered the musical work, as composed and recorded in ‘demo’ form by Kemp, to be the same ‘work’ as the eventual version of ‘True’, as recorded by the entire band, or whether the eventual band recording was an original ‘arrangement’ of Kemp’s composition.<sup>74</sup> In addition, on the author/performer distinction, the onerous ‘significant and original’ requirement placed on the saxophonist went far beyond the ordinary standard of originality under copyright – another reason to doubt the validity of Park J.’s decision.<sup>75</sup>

Thankfully, the more recent case of *Fisher v Brooker*<sup>76</sup> – a case with similar facts to *Hadley* – provided clarity regarding how to assess musical arrangements in the context of

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<sup>72</sup> *Hadley v Kemp* [1999] EMLR 589 (Ch D).

<sup>73</sup> Richard Arnold, Reflections on ‘The Triumph of Music’: Copyrights and Performers’ Rights in Music, 2 Intellectual Property Quarterly 153, 159 (2010).

<sup>74</sup> *Ibid.*

<sup>75</sup> Luke McDonagh, Rearranging the Roles of the Performer and the Composer in the Music Industry – the Potential Significance of *Fisher v Brooker*, 1 Intellectual Property Quarterly 64, 66–70 (2012).

<sup>76</sup> *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9, on appeal to the Court of Appeal in *Fisher v Brooker* [2008] EWCA Civ 287, and on appeal to House of Lords in *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764.

joint authorship. In *Fisher*, authorship of the famous 1960s song ‘A Whiter Shade of Pale’ was disputed. Gary Brooker had always been credited with the copyright in the musical work because he wrote the chords and melody of the song. According to Brooker, he recorded this as a bare ‘demo’, and presented it in the studio to the other band members, who then performed on the final recorded and released work – ‘A Whiter Shade of Pale’. The song is famous for its organ instrumental sections, which were not part of the song at the time the demo was recorded, but were instead improvised by band member Matthew Fisher during the performance and recording process. Therefore, as in *Hadley*, the instrumental sections in question were created by a band member (Fisher) in response and counterpoint to a chord structure devised by the main songwriter of the group (Brooker).<sup>77</sup>

Unfortunately, in its analysis the High Court in *Fisher* did not properly disentangle the composition, as represented by the demo, from the arrangement, as represented by the final recorded work. Thankfully, this was rectified by the Court of Appeal, which maintained a clear distinction between the demo and the final arrangement, and ultimately upheld the claim of Fisher that he ought to be viewed as a joint author and owner of the eventual recorded and arranged work known as ‘A Whiter Shade of Pale’.<sup>78</sup>

The principle that *Fisher* highlights is that ‘it will often be the case that a recorded piece of music created through performance is sufficiently original over any antecedent musical work to attract copyright’.<sup>79</sup> Again, this is not to say that the antecedent work will no longer have copyright protection; in fact, both works will have copyright protection, though as noted earlier, the owner of the subsequent or ‘derivative’ work will usually have to pay a licence fee for the use of the underlying, antecedent work. Thus, in *Fisher* the eventual famous version of the song, which Fisher contributed to and which was released as a hit single, would have required a licence for the use of Brooker’s original musical work, as presented in the demo recording. To resolve this, the Court of Appeal held that various

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<sup>77</sup> *Fisher v Brooker* [2007] EMLR 9 at para. 36, noting that both the initial song, as apparently first presented to the band members in demo form by Brooker, and the organ solo devised by Fisher, were adapted to some extent from separate musical pieces originally composed by Bach, in other words works which reside in the public domain.

<sup>78</sup> *Fisher v Brooker* [2008] Bus LR 1123, Mummery L.J. at para. 34.

<sup>79</sup> Richard Arnold, Reflections on ‘The Triumph of Music’: Copyrights and Performers’ Rights in Music, 2 *Intellectual Property Quarterly* 153, 163 (2010).

implied licences had been granted by the parties to each other over the prior 40-year period, and that these licences were only revoked once litigation between the parties commenced.<sup>80</sup> This further underscores the significance of licensing to cases involving musical arrangements.

## 5. PROTECTING TRADITIONAL MUSIC UNDER COPYRIGHT—CAN THE LAW AID MUSICIANS TO FACILITATE THE TRADITIONAL PROCESS?

What cases such as *Sawkins* and *Fisher* demonstrate is that (i) the definitions of music and musical work under the CDPA are broad and encompassing; (ii) arrangements can be protected as separate musical works to the underlying work; and (iii) the low threshold of originality will often be satisfied by the creative act of the performer(s) under the terms of authorship/joint authorship.

These three points give credence to the argument that *there is nothing about traditional music of itself that makes it unprotectable under copyright law*. Original arrangements of traditional works – whether public domain works or those in copyright – are clearly protected by copyright. However, this has consequences: where there are multiple arrangements of an original tune/song which is still under copyright, the law says that licences are required from the copyright owner of that original tune/song. Furthermore, if a later arrangement featured original elements of an earlier arrangement, a licence would need to be granted by the earlier arranger. Given how important arrangements of songs/tunes are to the practices of traditional music in a wide range of contexts – including US blues<sup>81</sup> and jazz,<sup>82</sup>

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<sup>80</sup> Supra note 78 at paras 101–102.

<sup>81</sup> Candace G. Hines, Black Musical Traditions and Copyright Law: Historical Tensions, 10 Mich. J. Race & L. 463, 463–475 (2004). See generally Giles Oakley, *The Devil's Music: A History of the Blues* (BBC Books, 1976).

<sup>82</sup> Paul F. Berliner, *Thinking in Jazz: The Infinite Art of Improvisation* (University of Chicago Press, 2009) 61–85. See generally Ingrid Monson, *Saying Something: Jazz Improvisation and Interaction* (University of Chicago Press, 2009).

North American fiddle music,<sup>83</sup> and Irish traditional music<sup>84</sup> – this issue of licensing cannot be ignored. If all arrangers of traditional music attempted to enforce their arrangements of traditional songs and tunes against others, it would severely affect the processes of traditional music, which rely on free sharing of tunes, variations and, effectively, arrangements.<sup>85</sup>

An empirical study I carried out with Irish traditional musicians during 2007-2011 demonstrates that one of the reasons why traditional music is shared so freely is the existence of social norms of sharing and reciprocity.<sup>86</sup> These norms are valued highly. At the same time, many Irish traditional musicians do record albums and perform in commercial settings, so some knowledge of copyright is necessary. The empirical data I gathered from 2007-2011 show that although musicians might seek to enforce their rights over e.g. a composition or arrangement if used in a film or TV programme, musicians rarely do so when their compositions/arrangements are recorded on albums, or are performed at gigs/festivals, by their fellow musicians. The work of Toynbee and Okpaluba shows that similar traits can be observed in other musical contexts.<sup>87</sup>

Even if the norms are paramount, given that their compositions and arrangements are protected by copyright law, is there anything further that musicians working in a traditional idiom can do to balance their rights with those of the wider community or network? One plausible way in which composers and arrangers could try to ensure the traditional modes of

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<sup>83</sup> Earl Spielman, *The Fiddling Traditions of Cape Breton and Texas: A Study in Parallels and Contrasts*, 8 *Anuario Interamericano de Investigacion Musical* 39, 41–48 (1972).

<sup>84</sup> McDonagh, *supra* note 16.

<sup>85</sup> Musicians may incorporate variations they have heard from other musicians into their own arrangements and live improvisations. See generally Marie McCarthy, *Passing It On: The Transmission of Music in Irish Culture* (Cork University Press, 1999).

<sup>86</sup> McDonagh, *supra* note 16. As detailed in the thesis, this study involved an anonymous online survey of Irish traditional musicians and face-to-face interviews with a representative sample of traditional musicians, so these findings are based on two different streams of data, underpinned by a rigorous empirical methodology.

<sup>87</sup> Jason Toynbee, *Reggae Open Source: How the Absence of Copyright Enabled the Emergence of Popular Music in Jamaica*. In Lionel Bently, Jennifer Davis and Jane Ginsburg, eds, *Copyright and Piracy* (CUP, 2010) 357, 357–373, and Johnson Okpaluba, ‘Free-Riding on the Riddim’? *Open Source, Copyright Law and Reggae Music in Jamaica*. In Lionel Bently, Jennifer Davis and Jane Ginsburg, eds, *Copyright and Piracy* (CUP, 2010) 374, 375–386.

sharing and reciprocity continue is to *license their works openly* using an alternative licensing system.<sup>88</sup>

## 5.1 How Alternative Licensing Systems Work

As Kelty states, alternative licensing systems ‘rely on the existence of intellectual property to create and maintain the “commons” ... even as they occupy a position of challenge or resistance to the dominant forms of intellectual property’.<sup>89</sup> Hence, alternative licensing systems do not attempt to break away completely from intellectual property, but instead they attempt to bend IP so that it can be tailored to suit individual or collective creators.

Alternative licences, such as the ‘free and open-source software’ (FOSS) licences, have proven very successful, with prominent examples including Unix/Linux<sup>90</sup> and Google’s Android operating system.<sup>91</sup> Perhaps the most influential licence is the GNU General Public Licence, which allows the creators of FOSS to release their software with ‘open-source’ code that can be improved by subsequent programmers working along the chain.<sup>92</sup>

It is notable that the FOSS movement thrives because it is based upon a kind of *community ethos*. Indeed, social norms of sharing, responsibility and reciprocity are crucial to the success of community-based creativity within FOSS.<sup>93</sup> FOSS licences facilitate shared creativity – something that, like traditional music, could be described as a *chain of authorship*.

The most prominent attempt to bring the ethos of FOSS to other cultural fields is the Creative Commons (CC) licence, a type of alternative licence for a wide range of creative

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<sup>88</sup> There is the possibility, since 2014, under UK law of arguing for a fair dealing defence on the basis of quotation within CDPA s 30. However, no such musical case has, as yet, arisen in UK, law and a full theoretical analysis of that possibility is beyond the scope of this chapter.

<sup>89</sup> Christopher Kelty, *Punt to Culture*, 77 *Anthropological Quarterly* 547 (2004).

<sup>90</sup> See Ubuntu, Ubuntu Enterprise Summit <http://www.ubuntu.com/> (last accessed Nov. 24, 2017).

<sup>91</sup> See Microsoft + Open Source, [www.microsoft.com/opensource](http://www.microsoft.com/opensource) (last accessed Nov. 24, 2017).

<sup>92</sup> See GNU Operating System, *What is Free Software?*, <http://www.gnu.org/philosophy/free-sw.html> (last accessed Nov. 24, 2017).

<sup>93</sup> Guido Westkamp, *The Limits of Open Source: Lawful User Rights, Exhaustion and Co-Existence with Copyright Law*, 1 *Intellectual Property Quarterly* 14, 57 (2008).

works, including music, film and literature. CC is founded upon the principle of using licences to enable creators to claim ‘some rights reserved’ rather than ‘all rights reserved’.<sup>94</sup> Today CC is the most widely known and widely used type of alternative licence for artistic works.<sup>95</sup>

Under a CC licence, copyright in the work typically remains with the author, but the author can choose one of the CC licences in order to regulate further uses of the work by other artists or users.<sup>96</sup> CC licences are provided in three forms: first in legal language; secondly in clear, readable language; and thirdly, as ‘machine-readable’ content. The terms of the CC licence are for the initial author to choose. For instance, it is possible for an author to retain only the attribution right, and to allow all - even commercial - uses of the work.<sup>97</sup> In contrast, it is possible to restrict all rights except non-commercial distribution. Therefore, the core aspects of a CC licence are the terms covering attribution, non-commercial reproduction and derivative use. In addition, the licences entrench the idea of ‘share-alike’.<sup>98</sup> This share-alike notion envisages that ‘derivative works’ – akin to works created under the UK adaptation right, and thus relevant to arrangements – can be created using the licensed work, as long as these derivative works are themselves licensed under the same CC terms.

Thus far, several courts, including those in the US and the Netherlands, have accepted such alternate licences as being legally valid.<sup>99</sup> Nonetheless, CC licences still pose some difficulties. As noted earlier, under CC licences works are protected by the underlying copyright law, but are licensed contractually under a set of terms chosen by the licensor. In this context, the question of what each term – for example, ‘commercial use’ – means is crucial. To take this one example, CC defines ‘commercial use’ as use exercised ‘in any

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<sup>94</sup> See Creative Commons: <https://creativecommons.org/> (last accessed Nov. 24, 2017).

<sup>95</sup> There are others such as the Artistic Licence 2.0 – see Open Source Initiative, Artistic Licence 2.0 <http://www.opensource.org/licenses/artistic-license-2.0.php> (last accessed Nov. 24, 2017).

<sup>96</sup> Joëlle Farchy, Are Free Licences Suitable for Cultural Works?, 31 *European Intellectual Property Review* 255, 257 (2009).

<sup>97</sup> See Creative Commons, About the Licenses: <http://creativecommons.org/about/licenses/meet-the-licenses> (last accessed Nov. 24, 2017).

<sup>98</sup> *Ibid.*

<sup>99</sup> See for example, the US case of *Jacobsen v Katser*, 535 F. 3d 1373 Fd. Cir. (2008) and the Dutch case of *Curry v Audax*, Case no. 334492/KG 06-176 SR (March, 2006).

manner that is primarily intended for, or directed toward, commercial advantage or private monetary compensation'.<sup>100</sup> Yet, different jurisdictions may interpret and define this term in their own ways, and the boundary between 'commercial' and 'non-commercial' may not always be clear.<sup>101</sup> Moreover, jurisdictions may disagree over principles of copyright law itself – for instance, UK judges typically take a different interpretation of the moral right of integrity when compared with the courts in France.<sup>102</sup> These factors mean that legal uniformity is far from certain. To try to ensure better compatibility with domestic laws some 'local' versions of CC licences have been developed, but uncertainty remains.<sup>103</sup>

Furthermore, the terms of collective licensing vary from territory to territory. For instance, in France, authors generally do not 'fragment' their body of work for 'independent management of the parts'.<sup>104</sup> The same is largely true in the UK and Ireland with respect to PRS for Music and IMRO.<sup>105</sup> This reduces flexibility – if the author wishes to release one work under a CC licence, he or she may be 'thwarted by his or her status as a member of a collecting society'.<sup>106</sup> Even if authors do succeed in disaggregating the licences for their works, this has the potential disadvantage of increasing complexity for users. Indeed, the large number of different CC licences that are available can make it difficult for users to comprehend precisely which uses are acceptable and legal.<sup>107</sup> To try to assuage concerns over

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<sup>100</sup> Creative Commons, Attribution-NonCommercial 3.0 Unported, S. 4.b  
<http://creativecommons.org/licenses/by-nc/3.0/legalcode> (last accessed Nov. 24, 2017).

<sup>101</sup> Adrienne K. Goss, *Codifying a Commons: Copyright, Copyleft, and the Creative Commons Project*, 82 *Chicago-Kent Law Review* 963, 964 (2007).

<sup>102</sup> Luke McDonagh, *Plays, Performances and Power Struggles – Examining Copyright's 'Integrity' in the Field of Theatre*, 77 *Modern Law Review* 533, 541–562 (2014).

<sup>103</sup> Catharina Maracke, *Creative Commons International: The International License Porting Project – Origins, Experiences, and Challenges*, 1 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 4, 6–7 (2010).

<sup>104</sup> Joëlle Farchy, *Are Free Licences Suitable for Cultural Works?*, 31 *European Intellectual Property Review* 255, 257 (2009).

<sup>105</sup> PRS for Music: <https://www.prsformusic.com/> (last accessed Nov. 24, 2017) and Irish Music Rights Organization: <https://www.imro.ie/> (last accessed Nov 24, 2017).

<sup>106</sup> Farchy *supra* note 104.

<sup>107</sup> Farchy, *supra* note 104.

this, CC has created a database of works/licences to make this task easier for users. Nonetheless, in some circumstances a potential user may have to contact the copyright holder directly, which may be inconvenient and burdensome.<sup>108</sup> Thus, while the CC licence system is a ‘worthy’ attempt at creating a universal alternative licence for creative works, it is not without its own difficulties.<sup>109</sup>

## 6. WHY ALTERNATIVE LICENSING IS NOT A PANACEA – FORMALITY AND INFORMALITY

There is little doubt that CC licences can apply to musical works – some of the most visible successes of CC licensed works include works by popular musicians such as Radiohead<sup>110</sup> and Nine Inch Nails.<sup>111</sup> Moreover, given the centrality of *reciprocity*, the idea of utilizing an alternative licensing system like CC is potentially attractive in the traditional music context because traditional composers/arrangers are unlikely to want to avail of all the rights associated with copyright, and CC gives composers/arrangers the choice to license their works as they choose.<sup>112</sup>

For example, a composer could, via CC, stipulate that his/her composition should be freely usable by other musicians in non-commercial contexts while retaining attribution rights and rights over commercial uses. An arranger could do the same. On the face of it, this certainly has the potential to prove useful in the context of traditional music. Nevertheless, there are reasons to be sceptical about the overall benefit of utilizing such licences in traditional music contexts.

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<sup>108</sup> Creative Commons, Search: <http://search.creativecommons.org/> (last accessed Nov. 24, 2017).

<sup>109</sup> Niva Elkin-Koren, Exploring Creative Commons: A Sceptical View of a Worthy Pursuit. In Lucie Guibault and P. Bernt Hugenholtz, eds, *The Future of the Public Domain* (Kluwer Law, 2006) 325, 337–339.

<sup>110</sup> See Greg Sandoval, Radiohead’s Web Venture Spooks Wall Street, CNET (Dec. 17, 2017) [http://news.cnet.com/8301-10784\\_3-9812275-7.html](http://news.cnet.com/8301-10784_3-9812275-7.html) (last accessed Nov. 24, 2017).

<sup>111</sup> See Greg Sandoval, Trent Reznor: Radiohead’s ‘In Rainbows’ promotion was ‘insincere’, CNET (Mar. 15, 2018) [http://news.cnet.com/8301-10784\\_3-9894376-7.html](http://news.cnet.com/8301-10784_3-9894376-7.html) (last accessed Nov. 24, 2017).

<sup>112</sup> Genevieve P. Rosloff, ‘Some Rights Reserved’: Finding the Space Between All Rights Reserved and the Public Domain, 33 *Columbia Journal of Law & the Arts* 37, 68–80 (2009).

For one thing, the challenge of defining the key terms of CC licences – in other words ‘commercial use’ – would not be any easier to overcome in the case of traditional music.<sup>113</sup> If a CC licence for a traditional song only allows ‘free, non-commercial use’ this could end up creating complications since, as noted earlier, many traditional musicians do in fact release recordings on LP, CD or mp3, and these ‘uses’ may fall into the ‘commercial use’ bracket.<sup>114</sup> As a result, a musician who records an arrangement of another musician’s CC-licensed composition may breach this term.

There is a more fundamental reason to be sceptical of CC in the context of traditional music. As noted earlier, it is the *informal* social norms of sharing and reciprocity that are key to the processes of Irish traditional music.<sup>115</sup> A similar trait can be observed in other traditional contexts.<sup>116</sup> CC, by contrast, could have the effect of entrenching the primacy of individual property rights, and thus, *formalising* the system of free sharing that occurs within traditional music networks of, for example, Irish or North American fiddle players or jazz trumpet players. Here it is worth recalling the old adage that a ‘leaky’ copyright system works best.<sup>117</sup> To some extent CC licences effectively ‘fill in the gaps’ left by the copyright system, something that may lead to the entrenching of individual property rights in areas where individual authors have generally ignored copyright. For example, in traditional contexts where there has been no financial incentive to enforce copyright, composers and arrangers have sometimes allowed, or even encouraged, their fellow musicians perform, re-arrange, and record their music freely, while enforcing rights against broadcasters and film and TV companies for soundtrack use. Such scenarios could be described as the ‘leaky’ copyright

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<sup>113</sup> The most popular CC licence is issued for ‘non-commercial use’ with the author retaining attribution rights; see CreativeCommons.org: <http://creativecommons.org/weblog/entry/4216> (last accessed Nov. 24, 2017).

<sup>114</sup> Although, the average traditional blues, jazz or Irish folk CD sells only a tiny fraction of what a commercially available ‘pop’ album sells, the traditional recording would arguably still be ‘commercially available’.

<sup>115</sup> McDonagh, *supra* note 16.

<sup>116</sup> Jason Toynbee, Reggae Open Source: How the Absence of Copyright Enabled the Emergence of Popular Music in Jamaica. In Lionel Bently, Jennifer Davis and Jane Ginsburg, eds, *Copyright and Piracy* (CUP, 2010) 357, 357–373 and Johnson Okpaluba, ‘Free-Riding on the Riddim’? Open Source, Copyright Law and Reggae Music in Jamaica. In Lionel Bently, Jennifer Davis and Jane Ginsburg, eds, *Copyright and Piracy* (CUP, 2010).

<sup>117</sup> Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (NYU Press, 2001) 184, referring to the opinion of James Madison.

system working well.<sup>118</sup> By contrast, encouraging the use of a new formal system of licensing may have unforeseen negative effects – it may even reduce the flexibility of ‘free sharing’ within the network. In other words, the informal, non-enforcement of copyright, which under traditional music is governed by flexible social norms, may become a formal, rigid system via alternative licensing.<sup>119</sup> Rather than facilitating ‘open’ culture, CC could lead to greater cultural ‘commodification’ by encouraging small-scale creators, many of whom have largely ignored IP in the past, to claim some formal rights over their works.<sup>120</sup>

It is also worth noting that CC, for all its grand aspirations, has only been a modest and uneven success. The iconic alternative licensing success stories have been communally created software and online knowledge projects such as Wikipedia, not CC-licensed creative works. With this realisation in mind, one conclusion to draw is that the type of licensed ‘peer production’ envisaged by Benkler may be more easily applicable in the context of software and web-based knowledge outlets than in other cultural contexts.<sup>121</sup> Perhaps it is also significant that software is a recorded product, and therefore susceptible to ‘wrapping up’ in licence terms, whereas music is essentially intangible, and for this reason perhaps less amenable to a pure licensing solution. In any event, for the reasons given, while CC should not be entirely ruled out as potentially useful to traditional musicians, neither should it be embraced wholeheartedly. Musicians should approach it cautiously, and if they do choose to avail themselves of it, carefully consider what uses they want their fellow musicians to make of their works.

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<sup>118</sup> Jessica D. Litman, *Lawful Personal Use*, 85 *Texas Law Review* 1871, 1912–1914 (2007).

<sup>119</sup> Dotan Oliar and Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *Va. L. Rev.* 1787 (2008); Jacob Loshin, *Secrets Revealed: Protecting Magicians’ Intellectual Property without Law*. In Christine A. Corcos, ed., *Law and Magic: A Collection of Essays* (Carolina Academic Press, 2010) 123, 140 and Marta Iljadica, *Copyright Beyond Law: Regulating Creating in the Graffiti Subculture* (Bloomsbury, 2016).

<sup>120</sup> Niva Elkin-Koren, *Exploring Creative Commons: A Sceptical View of a Worthy Pursuit*. In Lucie Guibault and P. Bernt Hugenholtz, eds, *The Future of the Public Domain* 325, 334–339 (Kluwer Law, 2006).

<sup>121</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedoms* (Yale University Press, 2006) 59–91.

## 7. CONCLUSION: REFLECTING ON THE IMPORTANCE OF THE NORMS OF SHARING AND RECIPROCITY

This chapter has demonstrated that copyright can, and does, protect works of traditional music, whether new compositions or original arrangements of traditional works. However, since traditional music emerges in the context of free sharing of songs and tunes, I have posited a key question: what would happen if these copyrights were enforced? The answer is that it would disrupt the practices of traditional musicians. As I have shown, arrangements of songs/tunes are crucial to traditional music in a wide range of contexts – including US blues<sup>122</sup> and jazz,<sup>123</sup> North American fiddle music,<sup>124</sup> and Irish traditional music.<sup>125</sup> If all arrangers of traditional music attempted to enforce their arrangements of traditional songs/tunes against others, it would severely affect the process of traditional music, which relies on free sharing.<sup>126</sup>

At the same time, while the use of alternative licensing systems, such as CC, is an option for traditional musicians, it does not necessarily provide the optimum solution. The legal challenges of multi-jurisdictional licensing, and the problem of bring formal legal concerns to an environment that has thrived on informal sharing, mean that CC is far from being a panacea. In fact, taking inspiration from the work of Elinor Ostrom, I argue that where a collective resource is being shared successfully – as it is in many traditional music contexts – the law should be akin to a bystander, rather than an active player.<sup>127</sup> Ultimately, for traditional music to continue to thrive, the informal norms of sharing and reciprocity are what must be encouraged and maintained – not the cold formality of the law.

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<sup>122</sup> Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 *Mich. J. Race & L.* 463, 463–475 (2004). See generally Giles Oakley, *The Devil's Music: A History of the Blues* (BBC Books, 1976).

<sup>123</sup> Berliner, *supra* note 82. See generally Monson, *supra* note 82.

<sup>124</sup> Earl Spielman, *The Fiddling Traditions of Cape Breton and Texas: A Study in Parallels and Contrasts*, 8 *Anuario Interamericano de Investigacion Musical* 39, 41–48 (1972).

<sup>125</sup> McDonagh, *supra* note 16.

<sup>126</sup> Musicians may incorporate variations they have heard from other musicians into their own arrangements and live improvisations. See generally McCarthy, *supra* note 85.

<sup>127</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP, 1990).