



PROTECTING INTANGIBLE CULTURAL EXPRESSION IN IRELAND¹

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ABSTRACT: Irish cultural activities, structures, patterns of living and expressing the human condition are distinct and yet methods of protecting the existence and integrity of that culture require re-evaluation at this time. International standards of protection are evolving and developing with the conclusion of new texts such as the Beijing Convention 2012 and the 2005 Council of Europe Convention (Faro) extending protection for performers and intangible cultural expressions respectively. Ireland has yet to update national legislation to take account of developments that post-date the 1972 UNESCO Convention in respect of intangible cultural expression. In the first part of this article the author addresses the range of international legal instruments that provide legal standards of protection from both intellectual property and cultural protection perspectives. In Part two of the article the author engages with the debate over the extent to which copyright and related rights such as performer's protection and database rights may provide some means of responding to threats to the existence and integrity of intangible cultural expressions. After reviewing recent case-law from Ireland and the United Kingdom he concludes that public domain materials can be used to create new and derivative works (Sawkins, Fisher v. Brooker) and that in some instances contributions by performers may not be protected or recognised via copyright at all (Gormley, Barrett). In general, copyright is not intended to apply for cultural protection purposes although database rights may be valuable but ill-suited to the task at hand. In Part three of the article the author considers what existing Irish law protects, concluding that, while tangible

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¹ Leading texts include Indigenous Heritage and Intellectual Property, Second Edition (ed.) von Lewinski (2008); Intangible Heritage (ed.) Smith and A Kagwa (2008); Intangible Cultural Heritage and Intellectual Property (ed.) Kono (2008); Art as Cultural Heritage: Law, Policy and Practice (ed.) Hoffman (2009).

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expression is recognised and protected via cultural institutions, intangible expression is not overtly recognised outside the realm of folklore. The folklore provisions in the Copyright and Related Rights Act 2000 do not provide adequate protections. The author argues for Ireland to not only adhere to and ratify the Faro Convention but that Ireland should allow cultural institutions and representative organisations who can satisfy the High Court as to *locus standi* to seek judicial remedies when intangible cultural expression is damaged by misrepresentation or misappropriation.

KEYWORDS: Intangible and tangible cultural expression – treaty law – UNESCO – Council of Europe – Copyright – design law – folklore – Ireland – Faro Convention – *locus standi* – inadequate resources.

PALABRAS CLAVE: Expresiones Culturales tangibles e intangibles – Tratado – UNESCO – Consejo de Europa – Derechos de Autor – Diseño – folclore – Irlanda – Convención Faro – *locus standi* – recursos inadecuados

SUMMARY. Introduction. 1. The Wider Content. 1.1. Cultural Expression Protection and Intellectual Property Law – Some Overlap. 1.2. Some International Law Aspects of Cultural Heritage Obligations. 1.2.1. Tangible versus Intangible Expression. 1.2.2. Performers Rights. 1.3. Intangible Cultural Heritage Explained. 1.4. WIPO Developments. 2. Indigenous Heritage and Copyright Issues. 2.1 Copyright Protection – Fixation, Originality and Authorship Requirements. 2.2. Public Domain Works. 2.3. Unauthorised Use of Works. 2.4. Database Protection as a Possibility. 3. Some Irish Issues. 3.1. Performance of Folklore under CRRA 2000. 3.2. Existing Measures are Wholly Inadequate. 3.3. Irish Resources. 4. Conclusion

Introduction

Ireland clearly has a long and rich tradition in terms of its diverse heritage that encompasses buildings, objects, archaeological discoveries and language. Language gives rise to oral traditions that are carried forward in terms of cultural conversations, patterns of speech and modes of living. The social, ethical and religious practices and beliefs of Irish people are both constant and in a state of flux, conditioned, as even these core values are, by political, social and theological events. Biblical scholarship shows that even the Christian Bible has and is an evolving text.³ When Yeats collected both oral and earlier written forms of fairy and folk tales⁴ he also engaged in acts of authorship.⁵ Amani⁶ points to the links between Ireland and Romania in relation to folk tales of the living dead and speculates on the impact of folk beliefs for Joseph Sheridan's *Carmillia* and Bram Stoker's *Dracula* but neither Sheridan or Stoker were denied any

³ Did Jesus Christ really have a wife? www.guardian.co.uk/world/2012/sep/79/Jesus; Holy Matrimony' *Sunday Times* September 23, 2012.

⁴ *Fairy and Folk Tales of the Irish Peasantry* (1888).

⁵ Previously published tales (e.g. *Lady Wilde*) formed part of Yeats's collection, while notes and introductory materials he added were original copyright works.

⁶ *Fact, Fiction or Folklore* [1999] IPJ 237 at 238.

intellectual property rights by plundering the cultural traditions of what the Council of Europe would see as examples of “a common European cultural heritage”.⁷ The publication by JM Singe of his great play, The Playboy of the Western World, written from a story Singe heard on the Aran Islands caused riots in Dublin in 1907 and in New York in 1911. The ‘Playboy’ riots were in part the reaction of persons with an idealised and nationalist sense of how Irish men and women would react in a given situation.⁸ Cultural heritage and its use and abuse, in other words, are powerful forces with economic value to those who deploy or take from it, but users have responsibilities too. These simple truths are explored in this article in the hope that a debate can be stimulated in Ireland on the most appropriate mechanisms that we should adopt in protecting all forms of cultural heritage, whether tangible or intangible, fixed or ethereal, static or in performance.

Although we shall see that standard intellectual property concepts do not readily apply to intangible cultural expressions - the way a community engages in everyday living, methods of painting, dancing or creating objects, celebrating or ritualising human experiences, and so on - it is important to note that intellectual property licensing practices recognise the importance of such phenomena. Trade secrets can be licensed. Licensing agreements specifically require the transfer of techniques and even skilled personnel to demonstrate or train the assignee or licensee in matters that are not disclosed or disclosable, in a patent, for example. Such parts of an intellectual property licence are often described as “know-how” or “show-how” provisions. If licensing practices recognise and value this kind of skill or knowledge, it is surprising perhaps that positive law has significant difficulties in this respect. Intangible cultural expression in Ireland can consist of local or regional patterns of speech or language and storytelling: the focus is on the teller of the folk story rather than the story itself. In relation to music the attention is to be drawn to the way a musical instrument is made or played rather than on the music itself. For the craftsperson the use of traditional methods of composition such as the choice of fabric, clay, shape and colours used will both constrain and stimulate the way in which an object is composed and even developed along with the weft and weave of social and cultural patterns of human development.

The Objectives of this Paper

This article is written from the perspective of an intellectual property lawyer without any deep understanding of the wider international cultural heritage debates. There is no attempt made here to engage with any rights based analysis – whether cultural property as a human right should be the point of departure, for example – and the largely US focussed debate on whether cultural protection can be secured in the courts, in the absence of any identifiable property rights, appears to this author to be a rather sterile one that may well only be of value in designing a jurisprudence masters course. The present article

⁷ Council of Europe Framework Convention on the Value of Cultural Heritage For Society Faro 27..2005. Blake, On Defining the Cultural Heritage (2000) 49 ICLQ61 has some telling observations on the political dimensions of supposed shared cultural heritage amongst nations and states.

⁸ Even Singe’s text has been reinterpreted in a collaboration between Irish writer Roddy Doyle and Nigerian Bisi Adigun, and located in West Dublin: Arambe Productions 2007, first mounted in 2007, the centenary of the original 1907 Abbey staging.

seeks to stimulate an agenda within Ireland based upon an appreciation of how cultural heritage protection has been promoted within an international law context and to advance the realisation that if intangible cultural heritage/expressions of folklore are to be able to withstand globalisation pressures and inappropriate exploitation, legal norms will have to be modified or new ones built. While much of the debate on indigenous local peoples is peripheral to Irish conditions, the wider context is nevertheless of considerable interest in teasing out issues and possible solutions.

Rights based discourses for protecting the integrity of traditional knowledge and culture, particularly in indigenous communities, are made all the more difficult because of the complexity of the subject matter. The subject “traverses not only the boundaries between properties – real, personal and intellectual – but also the boundaries between international, domestic and tribal law”.⁹ Some scholars favour a change based on a stewardship model rather than traditional ownership models and the debate in the USA must be seen in this light¹⁰, as well as the fact that some of the most egregious cases of cultural despoliation seem to occur in the USA.¹¹ Australian courts¹² have appeared the most flexible defenders of indigenous peoples, using collective ownership and fiduciary obligations concepts that mirror a cultural stewardship model. In contrast, Gallison¹³ examined Canadian law in relation to the protection of native peoples and the preservation of oral traditions and found the law, in 1992 to be inadequate at both an individual and collective rights level. Looking at this in a NAFTA context in 1997, Amani described the Canadian legislative as “wilfully blind to legitimate cultural demands”¹⁴. Irish law currently mirrors the limited provisions found in UK law but this author believes that some foundations can be built upon, once the shortcomings of existing law are identified. WIPO itself summarises the kinds of situation where traditional knowledge and indigenous cultural expression collide with commercially astute but culturally insensitive utilisation – “indigenous art copied onto carpets, T-shirts and greetings cards, traditional music fused with techno–house dance rhythms to produce bestselling “world-music” albums; hand-woven carpets and handicrafts copied and sold as ‘authentic’; the process for making a traditional music instrument patented; indigenous words and names trademarked and used commercially”¹⁵.

⁹ Carpenter, Katyal and Riley, In Defense of Property 118 Yale L.J. 1022 at 1025 (2009). This article is extremely critical of the more traditional property based critique of indigenous intangible property set out in Mezey, The Paradoxes of Cultural Property 107 Col. L. Rev. 2004 (2007). For general reading see Daes, Intellectual Property and Indigenous Peoples 95 A. S. Int. Proc. 143 (2001). Kuruk, Cultural Heritage, Traditional Knowledge and Indigenous Rights [2004] *MqJLIC Env Law* 5. See Chapter 7 of Helfer and Austin, Human Rights and Intellectual Property (2011) (CUP) for a useful set of source materials.

¹⁰ E.g. Carpenter, Katyal and Riley (op cit) argue coherently for the notion of custodial duties being used to control use, this being divorced from notions of ownerships or property as matters of collective obligation and practical necessity.

¹¹ See Riley, Recovering Collectivity 18 Cardozo Arts and Ent. L.J. 175 at 177 (2000) citing the “Song of Joy” theft from the Ami people.

¹² Bulun Bulun v. RoT Textiles (1998) 41IPR; Blakeney [1995] EIPR 442 explains the broader historical links to Aboriginal culture and ownership concepts.

¹³ Appropriation of Aboriginal Oral Traditions (1995) 29 UBCLR 161 at 181.

¹⁴ [1999] IPJ 237 at 300.

¹⁵ IPO Booklet No. 1: Intellectual Property and Traditional Cultural Expressions/Folklore p.1.

To an extent this article is an example of the kind that Michael Brown disparaged in 2005. After noting that lawyers have done much of the “heavy lifting” in respect of providing critiques of cultural appropriation because of the need to deter or provide compensation via legal rules, he wrote:

“A typical article on law and intangible heritage goes something like this. The author notes the injustices arising from the ability of outsiders to alienate elements of traditional knowledge or expressive culture at will, largely because folklore is legally defined as residing in the public domain, where it is accessible to all. There is then a review of ways that existing intellectual property law might be modified to encompass folklore and traditional knowledge – say, by making it subject to trade-secrets statutes, broadening the definition of trademark, or by inventing marks of authenticity for folklore products. This is followed by a systematic survey of other areas of law that might offer additional protections; land titling, anti-defamation statutes and notions of group libel, historic-preservation law, civil-rights law, legislation mandating the repatriation of human remains and sacred objects, and international human-rights protocols. The prototype article closes by observing that none of these legal strategies fit the circumstances of intangible heritage particularly well and that it probably makes sense to create new sui generis regulatory regimes to meet the specific needs of traditional communities, especially indigenous ones.”¹⁶

Michael Brown, as an anthropologist, rejects many of the assumptions that legal discourse imposes on cultural heritage problems. Culture is not static and capable of being placed on a tangible footing as diversity is a core feature of cultural phenomena. The fixation of cultural heritage actually assists in the commodification of cultures and unauthorised appropriation. This is no doubt true in respect of what a copyright lawyer would see as an unauthorised recording of the performance of a work of folklore, but there are two responses to this, at least in legal terms. Firstly, many national laws, and increasingly international treaty law, especially in the form of the Beijing 2012 Treaty¹⁷ are providing some protection against the unauthorised recording of performances of folklore. Secondly, it is arguable that minor adjustments to some aspects of existing law (certainly in Ireland) might well forestall the need for new sui generis regulatory regimes in respect of intangible cultural heritage.

Having explained this author’s motivation and objectives that have led to the production of this article, we move on to explain the structure of the article. There are three parts. In part one an effort is made to identify overlaps between on-going debates on copyright and cultural expression protections and the wider international law considerations. In part two we stress how copyright protection is not an obviously easy means of protecting cultural expressions. In part three, the underdeveloped state of Irish law and the limited Irish national debate is

¹⁶ Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property (2005) 12 IJCP 40 at 44-45; his best known text is Who Owns Culture? (2003). Like Lawrence Lessig, Brown is an enthusiast for non-proprietary solutions to information flow difficulties, hence his promoting of “cultural and intellectual commons2.

¹⁷ Adopted at WIPO by the Diplomatic Conference on the Protection of Audiovisual Performances, Beijing, June 24, 2012.

deprecated, with a modest proposal for developing a pragmatic response being outlined.

1.- THE WIDER CONTENT

1.1. Cultural Expression Protection and Intellectual Property Law – Some Overlap

Peter Yu¹⁸ provides a useful summary of the differences between the forms and goals that intellectual property law and cultural property norms take and pursue. Intellectual property allows rights holders to control the creation of objects such as texts, and their reproduction. Value can reside in duplication. In contrast, copies of cultural objects are of comparatively little value. Cultural relics are protected under law in order to ensure the objects themselves are preserved and authenticated. Cultural property protection is typically a matter of legitimate interest to countries that are culturally diverse and rich in artefacts – China is oft cited in this regard. Intellectual property legislation does not seek to preserve cultural heritage and it is no accident that “IP rich” jurisdictions such as the USA are not similarly rich in relation to laws protecting cultural relics.¹⁹

Finally, ownership of cultural property is often collective rather than individual. Yu also draws attention to some similarities – for example he sees the authentication agenda in cultural property to be reflected in moral rights issues under the Berne Convention and he says that enforcement and anti-piracy measures raise similar issues. We can agree that there are differences and similarities and that attention must be paid towards the development of a new international framework for the protection of intangible cultural heritage by drawing from both cultural relic protection regimes and intellectual property law²⁰.

Just as there is an on-going controversy over the effectiveness of using copyright law in order to protect rights owners in respect of digital content, there are strong differences of view held about whether cultural heritage protection can ever be effective when the subject matter is intangible. Registration mechanisms that may be suitable in an analogue world simply do not work in relation to the intangible or evanescent. It is also fundamentally unfair to deny access to, and the use of, cultural expressions that no person can assert ownership rights over, so the argument goes.

Another overlap between the contemporary debates on copyright law and intangible cultural heritage protection is the existence of a diverse lobby arguing that protection under both regimes “locks up” works, objects and cultural materials, hindering innovation and denying freedom of expression. The correct

¹⁸ Cultural Relics, Intellectual Property and Intangible Heritage 81 Temple L.R. 433 (2008).

¹⁹ Yu, ibid at p 448. This is an assertion that might be disputed. The USA is a party to International Conventions and UN Declarations on cultural heritage but National law in the USA is largely unresponsive to intangible cultural expression protection via intellectual property or sui generis measures. Views commonly disparaged as “Political Correctness” or peer pressure are often helpful enforcement mechanisms. See the recent US controversy over the No Doubt pop video and native American exploitation: “No Doubt exploiting ‘hot’ native American stereotypes is never OK” Guardian November 6, 2012.

²⁰ Yu, ibid, at 506.

response is said to be to limit the scope and duration of any exclusive rights or abolish them altogether: the commodification of rights over works and cultural heritage leads to protected expression falling into the “wrong” hands – publishers, media barons, museums and archives, often wealthy multinationals being dominant within a market or activity.

But if copyright is to be replaced by some limited exploitation right, for example, a right to exploit a work for only a matter of months (in the case of very popular works) with the separate exploitation right being restricted to the creative work itself (rather than similar works) we are faced with the question of whether such a scenario would protect cultural expressions or leave cultural expressions susceptible to a free-for-all. Advocates of such a libertarian position such as Joost Smiers²¹ appear to do so in order to free up the public domain so as to resist the trend towards monopoly that cultural industries in the West currently enjoy. The objective here is to open up all forms of performance and artistic expression, freeing creativity from intellectual property rights. But, viewed from the viewpoint of the persons charged with the task of protecting cultural expressions, replacing what Smiers describes as “cultural imperialism” and “cultural piracy”, in the control of “western cultural conglomerates”, with anarchy at the level of international law (and a rather optimistic faith in negotiated agreements within specific creative sectors in a given culture)²² affords no guarantee of the preservation of cultural identity and the integrity of cultural expressions.

The balance between fostering creativity and preserving integrity and authenticity is a difficult one to draw, but, living cultural traditions are not to be found, much less confined, to museums for this must be possible if, as Smiers suggests, “creative adaptation would become widely accepted again”.²³ Cases in which individuals have appropriated cultural expression for personal gain suggest that collective ownership of culture and its incidents is a powerful counterweight to the appropriation by individuals of rights in all forms of expression. This writer agrees with Smiers when he asks, rhetorically,

“has creative adaption not been the practice and driving force of all cultures everywhere in the world?”²⁴

However, for cultural preservation purposes even limited property rights remain important in enabling a community to resist piracy and unauthorised appropriation, whether from within the community or from external threats. In the

²¹ Arts under Pressure. Promoting Cultural Diversity in the Age of Globalisation (2003); Creative Improper Property, in Macmillan, New Directions in Copyright Laws Vol 1 (2004) (hereafter Macmillan).

²² Australian Aboriginal rights activist Terri Janke, author of Indigenous Intangible Cultural Heritage and Ownership of Copyright, in (ed. Kono) Intangible Cultural Heritage and Intellectual Property (at p. 159) pointed to the use of contracts to establish and clear rights, the placing of conditions of access on archives and the drafting of protocols in respect of the use of distinct forms of cultural expression. He continues, at page 186 to say that: “Despite the widespread use of the above measures, Indigenous people still call for the Australian law to recognise their rights to traditional cultural expressions, in the same way that recognition is given to the rights of copyright owners, by requiring that their prior informed consent be obtained before use”.

²³ Smiers, in Macmillan, p. 3.

²⁴ Ibid.

absence of copyright being abolished, as Smiers rather optimistically hopes, copyright and performing rights will continue to serve for such purposes when litigation is envisaged, especially in a Berne/Rome Convention and TRIPs context. And, if anti-infringement litigation is to succeed, cultural fixations by different users will have to withstand challenge and scrutiny. It is becoming clear that the digital capture of works within copyright and cultural heritage objects, performances, and other ephemera for archiving purposes will not necessarily satisfy a recording or preservation agenda. Digitisation has a “build in obsolescence” problem that UNESCO²⁵ and critics like Michael Brown recognise.²⁶

1.2. Some International Law Aspects of Cultural Heritage Obligations

1.2.1. Tangible *versus* Intangible Expression

Emphasis on the protection of cultural heritage as transcending the individual interests of Nation states exists in the literature²⁷ but one learned author has concluded that States owe customary peacetime obligations in respect of cultural heritage situated on their territory; whether the state be a party to the World Heritage Treaty or not; the only recourse when cultural objects are threatened however is via diplomatic pressure.²⁸ The distinction between cultural heritage obligations owed by States in peacetime and in time of war reflects the importance of the 1954 *Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict* in relation to moveable and immoveable property.²⁹ World War II however was also important in stimulating statements of principle vis-à-vis human cultural property. International Law affords some high level statements concerning the rights of individuals in relation to cultural expression. Article 27 of the United Nations Universal Declaration of Human Rights³⁰ declares:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Article 15 of the International Covenant on Economic, Social and Cultural Rights³¹ builds upon Article 27 by requiring States Parties to recognise and realise the cultural rights of individuals by taking steps which are “necessary for the conservation, the development and diffusion of science and culture”.

²⁵ See the UNESCO Charter on the Preservation of the Digital Heritage (2003).

²⁶ *Who Owns Culture*, page 48.

²⁷ E.g. O’Keefe, (2004) 53 ICLQ 189. Francioni, *Beyond State Sovereignty* (2004) 25 Mich. J.I.L. 1209.

²⁸ O’Keefe (op cit).

²⁹ For World War II and looting of cultural property see Lynn Nicholas, *The Rape of Europe* (Knopf, 1994). The 1907 Hague Convention, articles 46, 47, 51 and 52 had provisions that were relevant to pillage and confiscation of property.

³⁰ 1948.

³¹ 1966.

International law norms that can protect cultural property originate from diverse backgrounds such as the laws of war, human rights norms as well as some intellectual property texts. For example, the Berne Convention itself, in Article 15(4) provides a mechanism whereby Member States may designate a competent authority to exercise powers to protect unpublished works when the identity of the author is unknown. While the word “folklore” is not used in the text this part of Berne, (as well as article 2(2), which makes fixation requirements a matter of national competence) is important³² in suggesting that the international copyright system per se is not hostile to, or incompatible with, cultural heritage protection.

In recent months the International Community has made progress in respect of providing performers rights and moral rights protection for Audio Visual Performers. *The Beijing Treaty Audio-visual Performances* (2012)³³ applies to, inter alia, performers of expressions of folklore, and the economic rights afforded to performers include authorisation and communication to the public of “live” (unfixed performances), the reproduction of fixations of performers, distribution and rental rights and a making available right (e.g. over the internet). Moral rights of paternity and integrity are also afforded. Article 11 has a flexible provision allowing States to afford either exclusive rights or a right to equitable remuneration to the broadcasting and communication to the public of fixed performances.

Heritage preservation standards in International law mark the link between cultural identity and historical forms of tangible human achievement. The 1972 *UNESCO World Heritage Convention* is of key importance, following on from a series of international texts that asserted the need to preserve architectural and other human cultural achievements. Early texts include the *Athens Charter for the Restoration of Historic Monuments* (- 1931)³⁴ and the *International Charter for the Conservation and Restoration of Monuments and Sites*, the Venice Charter of 1964.³⁵

The *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage* proved to be a vitally important text insofar as this 1972 Convention created structures and mechanisms for defining and classifying cultural heritage, as well as ostensibly protecting heritage properties. The cumulative effect of emphasising the importance of buildings and sites on the 1972 convention was summarised by Janet Blake³⁶ who, after citing³⁷ an anthropological definition of culture, said that the definition is

³² See Ricketson and Ginsberg, *International Copyright and Neighbouring Rights* p.513 (OUP, 2006).

³³ Adopted by the Diplomatic Conference on the Protection of Audio Visual Performances, Beijing, June 24, 2012.

³⁴ Adopted at the First International Congress of Architects and Technicians of Historic Monuments, Athens, 1931.

³⁵ Adopted at the 2nd International Congress of Architects and Technicians of Historic Monuments, Venice, 1964. The sponsoring body is the International Council on Monuments and Sites – see www.international.icomos.org. In Ireland see www.icomos.ie

³⁶ *On defining the Cultural Heritage* (2000) 49 ICLQ 61

³⁷ That of GM Sider in *Culture and Class in Anthropology and History* (CUP)(1986) p.6.

“far too extensive and inclusive to be of use as the basis for defining the “culture” at the root of cultural heritage legislation. It does, however, underline the existence of a strong intangible element to culture and it is clear that the material culture – the apparent subject of most existing cultural heritage legislation – makes up only a part of all that might be regarded as “culture”. Cultural heritage is obviously a more limited category than that of “culture”, with “heritage” acting as a qualifier which allows us to narrow it down to a more manageable set of elements. The concept of “heritage” also provides one of the central characteristics of the phrase which determine its legal significance. It would include such elements as the “material culture, ritual culture, symbolic culture” and even “language-as-culture, values, beliefs, while, in some circumstances, “ideas ideologies, [and] meanings” might also be included. Clearly a useful definition of cultural heritage for the purposes of this study cannot include “everything in society”. Rather, our understanding of the term will be gained by understanding the relationship between cultural heritage and culture itself. It is the symbolic relationship of the cultural heritage to culture in its widest sense (culture-as-society) which is central to understanding the nature of cultural heritage.”³⁸

Blake’s observations are valuable in cautioning against accepting an over-broad subjective assessment of cultural heritage whilst pointing out that a separation between cultural buildings and landscapes and how human societies live within them is artificial and impractical.

The emphasis placed in the 1972 UNESCO Convention on buildings, objects, landscapes and tangibles generally was later identified as a source of under-protection of cultural heritage.³⁹ The 1994 Report of the World Commission on Culture and Development⁴⁰ drew attention to the shortcomings of a definition of heritage that focused on highly symbolic objects, leading to popular and prosaic forms of everyday cultural expression being ignored and undervalued. Protection values of authenticity, it has been claimed, further tilted the perception of “value” towards the materials, the workmanship, status and design of heritage objects, while ignoring cultural settings, social structures, ways of life, beliefs, systems of knowledge, representations of different past and present cultures throughout the world. The shift is a largely anthropological one but the relationship between the protection of physical heritage and intangible heritage must be understood. The International Council of Movements and Sites, the sponsoring body for both the Athens and Venice Charters has provided a pithy summary:

“The distinction between physical heritage is now seen as artificial. Physical heritage can only attain its true significance when it sheds light

³⁸ (2000) 49 ICLQ 61 at 68.

³⁹ Contrast the definition of architectural property in article 1(a) of the Convention for the Protection of Cultural Property in the Event of Conflict (the 1954 Hague Convention).

⁴⁰ Our Creative Diversity (1994) (UNESCO). The expert meeting on the Global Strategy in 1994, the Nara Declaration on Authenticity (1994) caused a sea change in relation to these issues. See Munjeri, Tangible and Intangible Heritage (2004) 56 Museum International 12.

*on its underlying values. Conversely, intangible heritage must be made incarnate in tangible manifestations.*⁴¹

Márilona Alivizatou summarises the transition from the 1972 Convention to the 2003 intangible cultural heritage convention extremely well:

“Once the 1972 World Heritage Convention came into force, and the prestigious World Heritage List began to be populated, the international community was faced with a rather disturbing fact. What had been defined as world heritage or the cultural heritage of humanity did not actually represent the whole world, but rather adhered to a predominantly Western ethos of scientific and historical authenticity. As a consequence the majority of the sites on the World Heritage List were archaeological sites, cathedrals, and historic town centres situated in Europe. For a significant number of UNESCO member states the World Heritage Convention and List were thus considered excluding and contributing to the perpetuation of the West and non-West divide. Moreover, they suggested that nations without monuments and sites falling within the criteria of the Convention were people without a heritage.

*It was largely against this backdrop that a more inclusive definition of cultural heritage was sought; one that in principle would not prioritise Western canons of authenticity and materiality, but that would be able to encompass more subtle processes of intergenerational transmission through the human body. Here earlier efforts by Japan and Korea in the 1950s and 1960s to protect folk traditions and cultural practices were an important source of legislative inspiration. By the early 1990s it was thus officially recognised that the cultural heritage of humanity is not only embodied in monuments, sites, and material relics of the past.*⁴²

UNESCO policy is aimed at clustering intangible cultural heritage into five broad domains:

- Oral traditions and expression, including language as a vehicle of intangible cultural heritage;
- Performing arts;
- Social practices, rituals and festive events;
- Knowledge and practices concerning nature and the universe;
- Traditional craftsmanship.

As UNESCO point out, this classification is inclusive rather than exclusive and the practice within different communities must be recognised: it is,

⁴¹ See Munjeri, (2004) 56 *Museum International* 12 at 18.

⁴² *Intangible Cultural Heritage and Erasure* (2011) *IJCP* 37 at 38-39. For a good treatment of the 2003 Convention see Kono in *Intangible Cultural Heritage and Intellectual Property* op cit. p.3-39.

*“difficult, if not impossible, to impose rigid categories externally. While one community might regard their chanted verse as a form of ritual, another would interpret it as song. Similarly, what one community defines as “theatre” might be interpreted as “dance” in a different cultural context”.*⁴³

1.2.2. Performers Rights

International Treaty Law provides protection to performers. The most significant Treaty in terms of longevity is the 1961 Rome Convention.⁴⁴ Lack of clarity and the permissive nature of the provisions meant that the Convention was not entirely successful. The 1996 WIPO Performers and Phonogram Producers Treaty is a much more significant text, not least because, unlike the Rome Convention which required performance of literary or artistic works, WPPT applies to folklore.

Article 2(a) provides that performers are:

“actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore.”

Although there is no definition of “expressions of folklore” in the WPPT, the economic rights that the Treaty affords in relation to unfixed performances are actually quite broad. Performers are to enjoy the exclusive right of authorising “the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance”, as well as the exclusive right to authorise “the fixation of their unfixed performances.”⁴⁵ So, a live broadcast and streaming of a performance and the fixation of an unfixed performance would, without prior consent, infringe three separate rights. Performers whose performances are fixed in phonograms, that is, sound recordings of performances, enjoy reproduction, distribution and rental rights⁴⁶ as well as rights in respect of the making available of performances fixed in phonograms over the Internet.⁴⁷ Remuneration rights for performers and record companies also exist vis-à-vis phonograms which are broadcast and communicated to the public.⁴⁸

While these provisions are in some respects stronger than those available under the Rome Convention – in particular the Rome Convention applies only to performers who perform literary or artistic works – it is very much a compromise text. The limited protection given in respect of moral rights to be identified as “the performer of his performances”, and to ensure the performance is not subject to any distortion, mutilation or other modification which would be prejudicial to the performer’s reputation, only apply in respect of live aural performances or

⁴³ www.unesco.org/culture/ich/index.

⁴⁴ International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (WIPO).

⁴⁵ Article 6 WPPT.

⁴⁶ Articles 7, 8 and 9 WPPT respectively.

⁴⁷ Article 11 WPPT.

⁴⁸ Article 15 WPPT.

performances fixed in phonograms.⁴⁹ Audio visual performances are not protected by the moral rights provisions in the WPPT. But moral rights for performers were not available under Article 6 bis of Berne, nor were moral rights included in the Rome Convention.

However, the conclusion of the Beijing Convention on Audio-visual Performances on June 26, 2012 is a significant step forward. “Performers” are defined so as to include persons who perform expressions of folklore in an audiovisual context. Exclusive economic rights include the right to authorise the fixation of unfixed performances and performers are also to have the exclusive right to authorise the direct or indirect reproduction of their performances fixed in audiovisual fixations. Article 5 of the Treaty is so important that it is here reproduced in full:

Article 5

Moral rights

- (1) *Independently of a performer’s economic rights, and even after the transfer of those rights the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right:*
 - i. *to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and*
 - ii. *to object to any distortion, mutilation or other medication of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.*
- (2) *The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties who legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.*
- (3) *The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.*

At first sight this provision appears to add little to the existing moral rights provisions in some national laws such as the Irish Copyright and Related Rights Act 2000 (which does not preclude moral rights from being available to audiovisual performers) many of the moral rights provisions in Irish law are hedged in by qualifications (e.g. employees are not entitled to enjoy such rights: rights can be adjusted or waived under a contract). It may be that the Irish State

⁴⁹ Article 5 WPPT.

may simply use Article 13 of the Beijing Convention on limitations and exceptions to make few, if any, changes to Irish domestic law but on the international front, this Convention is an important one for intangible cultural heritage protection; in terms of general principle the Beijing Convention is an important landmark.

1.3. Intangible Cultural Heritage Explained

Intangible Cultural Heritage is widely seen as being under threat in much the same way that biodiversity is seen as being under attack from a variety of directions. Linguistic diversity and the disappearance of languages and dialects can be compared to pressures on farmers to use plant varieties from the West. In other words, globalisation and intellectual property strengthening via TRIPS, ACTA, etc. are having negative effects. Musical traditions, cultural expression, culinary heritage and patterns of living and the ritualization of beliefs, for instance, must be preserved and catalogued, be the subject of measures aimed at ensuring their integrity and that due respect be paid to such patterns of living and human expression. More controversially, the question whether such forms of endeavour may be open for further exploitation, either within the relevant community, or outside that community, raise complex anthropological and legal questions that generally mirror the current debate on how copyright law should be “liberalised” to facilitate freedom of expression or “innovation” by entities seeking to make use of “expression” (i.e. copyright works) that predate the intended “downstream” use.

In his very helpful Summary of the 2003 Intangible Cultural Heritage Convention, Richard Kurin notes that the shift in terminology away from folklore has a profound impact upon meaning that goes beyond the terminological:

“The term 'intangible cultural heritage' replaced less technical-sounding and less culturally charged, but historically familiar, terms such as 'folklore,' 'traditional culture,' 'oral heritage,' and 'popular culture'. With the Convention, there was also an important shift of emphasis. Intangible cultural heritage was, foremost, living heritage as itself practiced and expressed by members of cultural communities through such forms as oral traditions, song, performance, rituals, craftsmanship and artistry and systems of knowledge. ICH was not the mere products, objectified remains or documentation of such living cultural forms⁵⁰. It was not the songs as recorded on sound tapes or in digital form, or their transcriptions. ICH is the actual singing of the songs.

But it is not the songs sung in any recreated or imitative form - no matter how well-meaning or how literally correct - by scholars, or performers, or members of some other community. It is the singing of the songs by the members of the very community who regard those songs as theirs, and indicative of their identity as a cultural group. It is the singing by the people who nurtured the traditions and who will, in all probability, transmit those songs to the next generation.

⁵⁰ Citing Seitel, 20 [Smithsonian Talk Story](#) p.13.

The definition assumes the agency of a group of people who recognise a particular form of cultural expression as a symbol of their communal identity, who place it conceptually in a self-reflexive category of 'heritage,' legitimised by historical practice and specifically noted as valuable⁵¹. This means that ICH cannot retain its designation as such if it is appropriated by others who are not members of that community - whether they be government officials, scholars, artists, businessmen or anyone else.

The definition also assumes that ICH is articulated with social processes and other aspects of life. It is not something that can easily be isolated from a larger constellation of lifestyles, nor de-articulated from a broader world of ecological, economic, political and geographic interactions⁵²."

The safeguarding of this heritage should take place in museums, archives, universities, etc., and even within the communities themselves. It is the fact that the heritage is living, observed and performed that is all-important. As a living heritage it can be expected to change, not ossify, within the community itself. The Convention itself does not specify who the persons or agencies to be charged with the role of guardians, and Kurin notes that in many communities where particular cultural patterns are under threat, the Government of that Nation State may be the least suitable guardian when genocide or cultural suppression is practiced. Even if a suitable range of guardians can be identified technical and economic resources may be a problem.

UNESCO provide a system of designation of cultural practices and expressions of intangible heritage that are considered to be in urgent need of protection. The Representative List of the Intangible Cultural Heritage of Humanity is built up from nominations made by States Members and relevant Communities within those States. This process is both awareness raising and a practical protection mechanism. Strict criteria and a nomination process must be observed: 90 "elements" were established in 2008.⁵³ 76 elements were added in 2009, 47 elements in 2010 and 29 added in 2011. While most elements are associated with Asian Communities, particularly in China and Japan, European countries that regularly use this designation mechanism include Belgium, Croatia, France, Italy and several former Soviet bloc countries. Spain has been particularly active; designations are the Mystery Play of Elche (2001), Patum of Berga (2005), Irrigator's Tribunals (Murcia and Valencia (2009)), the Whistled Language of La Gomera (2009), Chant of the Sybil on Majorca (2010), Falconry, a living heritage (2010 with 10 other States) Flamenco (2010), Catalanian human towers (2010), with the Festivity of "la Mare de Deu de la Salut" of Algemesi being added in 2011.

As Ireland is not a party to the UNESCO 2003 Convention (nor indeed the 2005 Council of Europe Framework Convention) there is no suggestion of what would be potentially designated as intangible cultural heritage in the event of Irish accession.

⁵¹ Citing Early and Seitel, 21 Smithsonian Talk Story, p.19-21.

⁵² Safeguarding Intangible Cultural Heritage [2007] International Journal of Intangible Cultural Heritage 10 at 12.

⁵³ These were previously designated as masterpieces of intangible cultural expression in 2003.

The experience gleaned from Irish use of the 1972 UNESCO World Heritage Convention may suggest that the UNESCO designation model is unlikely to be used very frequently in Ireland but this is no argument against accession.

Of the 937 world-listed properties and landscapes, the archaeological assembly at the bend of the Boyne and Sceilig Mhichal are the only Irish designations. The Giant's Causeway and the Causeway Coast are the only Irish designations of the 28 United Kingdom designations (some of which are non-UK colonial properties/landscapes).

The UNESCO Conventions start from a human rights basis and progress through buildings, landscapes and objects to the intangible. A similar progression is mirrored in Council of Europe texts. The European Cultural Convention⁵⁴ was intended to supplement bilateral Cultural Conventions and Agreements between Council of Europe States so as to foster the study of languages, history and civilisations of within European states "and of the civilisation which is common to all." Article 5 in particular requires contracting parties to take measures to safeguard and ensure reasonable access to "objects of European cultural value". Other Council of Europe Conventions that deal with Archaeological Heritage⁵⁵ and Architectural Heritage⁵⁶ also provide important heritage preservation and protection benchmarks, but are of course open to criticism that the emphasis is placed on structures and objects rather than the life of individuals and communities. The Council of Europe texts however, are of critical importance however, insofar as the Council of Europe Framework Convention on the Value of Cultural Heritage for Society⁵⁷ represents the most detailed statement on a European nation State's obligations in relation to digital preservation and dissemination of cultural heritage, this in itself being defined in neutral and expansive terms. Article 2 provides that for the purposes of this Convention

"cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;"

The Convention also stresses the importance of heritage communities, defined as "people who value the specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations." Like the 2003 UNESCO Convention, the Faro Convention has a human rights focus but the Faro Convention, in article 6(c) indicates that the Convention is not to create enforceable rights: in European Union language, the Faro Convention does not have direct effect.

1.4. WIPO Developments⁵⁸

⁵⁴ Council of Europe, 1954.

⁵⁵ Protection of the Archaeological Heritage (London, 1969) (No. 66) as revised at Valletta 1992 (No. 143).

⁵⁶ Convention on the Protection of the Architectural Heritage (Granada, 1985) (No. 121).

⁵⁷ Faro 2005 (No. 199).

⁵⁸ www.wipo.org.

Significant work has been done by the WIPO Intergovernmental Committee on Folklore and Traditional Cultural Expression/Traditional Knowledge. Various WIPO texts are in circulation but resolution of the issues appears some way off. It would be tedious in the extreme to summarise the process of negotiation that has attended the work of WIPO on legislating for folklore protection or expressions of cultural heritage. This process began in via the copyright path in Stockholm as part of the Berne Convention revision process (1967-1971) and a UNESCO and WIPO Model Provisions for National Laws template emerged in 1985. In recent years the two most important texts are WIPO/GRTKF/IC/9/4, prepared in January 2006, a text that has morphed through various processes into WIPO/GRTKF/IC/16/4 of March 22, 2010. The 2010 document consists of three parts, 1., Objectives, 2., General Guiding Principles, and 3., Substantive Principles. Suffice it to say, that the objectives include a desire to recognise the value of, and promote respect for, traditional cultural expression. There is a desire to meet the actual needs of communities, support customary cultures and practices, empower communities and support customary practices, preventing unauthorised IP rights and appropriation and misuse of traditional cultural expression, whilst encouraging innovation, creativity, artistic freedom and cultural diversity. This is a very difficult wish-list to deliver on. The general Guiding Principles also contain conflicting if not contradictory statements, such as a desire to be responsive to the aspirations of relevant communities while respecting international and regional agreements, obligations that are difficult to square if the International Agreements in question are IP texts. The Substantive Provisions, and there are eleven of them, are no doubt deliberately equivocal in regard to key issues such as defining the subject matter of protection, the beneficiaries and the need to comply with formalities requirements. Ireland appears to have no position or profile on these WIPO issues.

The authorship problem is addressed by the WIPO texts. Apart from the requirements for fixation and originality in copyright law, authorship is a further qualifying requirement. Some of the authorship issues overlap with originality, but the central question in relation to cultural heritage of all kinds is whether any one person can legitimately claim to be an author if the cultural expression in question has been handed down from one generation to another. A work that is truly anonymous has no human author who can come forward and claim the statutory copyright. Solutions posed in national legislations and international folklore texts include the recent draft WIPO Folklore Treaty,⁵⁹ Article 2 of which canvasses a range of options. One option is to designate as beneficiaries of protection for traditional cultural expressions the indigenous peoples/communities and local communities who “develop, use, hold and maintain the cultural expressions”. A further option is to provide an open ended list of beneficiaries “which may include” a range of communities as well as families, nations and individuals within the designated communities in question.⁶⁰ On this issue of the beneficiary, the possibility that there may be individual/family ownership is likely to prove divisive.⁶¹ The scope of the rights afforded to beneficiaries in Article 3 of the recent draft WIPO Folklore Treaty also contain options which either leave protection of economic and moral interests to national law, “in a reasonable and

⁵⁹ See www.wipo.org, the document is WIPO/GRTKF/IC/22/4, dated April 27, 2012.

⁶⁰ The Revised Provisions for the Protection of Traditional Cultural Expression of Folklore, extracted from WIPO/GRTKF/IC/9/4, Article 2 does not directly allow for individuals to benefit.

⁶¹ WIPO/GRTKF/IC/9/4, article 3 has a complex list of misappropriation provisions.

balanced manner” (option 1) or set out a prescriptive quasi-copyright model combining economic and moral rights provisions by reference to an “adequacy” test (option 2).

The issue of a mandatory registration requirement under any WIPO text also appears difficult to resolve at this time. The copyright system, at least in its International context, does not require rightholders to register copyright although some States (most notably, the USA) make registration an enforcement requirement in certain instances. Indeed, the Berne Convention makes it unlawful for Berne Union Member States to impose a registration requirement in respect of international enforcement of copyright. Formalities are a contentious matter in relation to folklore, particularly in relation to secret or social expressions. Fixation and/or disclosure to a registry of such expression can be compared to putting an inventory of one’s most valuable possessions on an open access website – an open invitation to thieves and robbers. Both the Inter-governmental Committee text and the 2012 draft Treaty recites that as “a general principle the protection of traditional cultural expressions shall not be subject to any formality”. However, the 2012 draft gives a number of instances where formalities may be imposed or required. This appears to be a sensible step but it will raise difficulties of evidence and proof in any dispute, although the Australian case-law suggests that oral and expert testimony will allow these to be overcome.

The Duration Problem must be addressed on a pragmatic basis. Under copyright law, the duration of copyright is a highly contentious matter. Copyright protection for an artistic work lasts for the life of the author plus 70 years after the author’s death. Sound recordings endure for a period of 50 years. A complex system of “measuring lives” determine the duration of copyright in a film. One argument favours assimilation protection of intangible cultural expression into the copyright work that the expression must closely approximate to, mostly literary work, artistic work and dramatic work protection. While many commentators think that copyright protection lasts too long, the general view in relation to cultural expressions is that protection should never expire⁶². A compromise position might be to establish an arbitrary period such as the period for performers’ protection which in EU law is to be set at 70 years⁶³ or make use of a term such as that found in Irish law. The Copyright and Related Rights Act 2000, Section 24(2), provides:

“(2) The copyright in a work [literary, dramatic, musical or artistic work] which is anonymous or pseudonymous shall expire 70 years after the date on which the work is first lawfully made available to the public.”

The Beijing Convention is more enigmatic by providing that for audiovisual performances, the economic rights “shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed”. Moral rights granted to a performer in Article 5 of the Convention are, following

⁶² Article 6, Term of Protection of WIPO/GRTKF/IC/9/4 sets out an open ended duration provision reflecting whether the expression continues to be eligible for protection if it remains secret.

⁶³ Directive 2011/77/EU, increasing the period from 50 years after the performance. Transposition into national law must be made by 1 November 2013.

the death of the performer to “be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the Contracting Party where protection is claimed”.⁶⁴

2.- INDIGENOUS HERITAGE AND COPYRIGHT ISSUES

2.1. Copyright Protection – Fixation, Originality and Authorship Requirements

Copyright and copyright related norms are generally regarded as ineffectual in providing copyright protection for expressions of folklore. Lucas-Schloetter⁶⁵ points out that common law jurisdictions generally insist upon the fixation of works of folklore before copyright extends to that expression: this requirement prevents copyright from being recognised where oral traditions alone are used to transfer culture from one generation to another⁶⁶. Furthermore, as the majority of folktales, dances or songs are performed without reference to any prior fixation such as notation of dance steps, etc., these performances are similar to unchoreographed sports events⁶⁷ or firework displays⁶⁸ that of themselves cannot be copyright works. Any visual display which is then recorded on film will attract a film copyright (in the UK and Ireland films are copyright works not just protected as neighbouring rights) as well as broadcast copyrights (e.g. in the event of a “live” broadcast).

Similar questions have been raised in respect of the need for a copyright work to be original. European Union law now makes it clear that the test is whether a work represents the author’s own intellectual creation⁶⁹. At first blush this is a problem for as Farley points out:

“Although folklore can be entirely new, it is most often directly derived from pre-existing works. Folklore is the product of a slow process of creative development. It is not stagnant, but evolves slowly.

Innovation is simply not what is valued in indigenous art. Rather, faithful reproduction is prized. For the most part, the notion of original authorship is foreign to indigenous art and culture. The production of artwork in indigenous culture can best be described as a process of reinterpretation. The emphasis on derivation, and not deviation, from pre-existing works by indigenous artists is a result of the spiritual and educational nature of much indigenous art.

Because of indigenous art’s function as a historical and sacred text, innovation is restricted. As a result, artists are often not free to express their inspiration either from God or nature. Rather, the production of

⁶⁴ Beijing Treaty on the Protection of Audiovisual Performances June 26, 2012 (www.wipo.org).

⁶⁵ In von Lewinski, Indigenous Heritage and Intellectual Property (2nd ed) p. 383.

⁶⁶ Citing Riley, “Recovering Collectivity” (2000) 18 *Cardozo Arts and Ent. L.J.* 195.

⁶⁷ E.g. track and field sports; e.g. Australian Olympic Committee v. Big Fights Inc. (1999) 46 IPR 53.

⁶⁸ Nine Network Australian Pty v. Australian Broadcasting Corp. (1999) 48 IPR 333.

⁶⁹ Infopaq International v. Danske Dagblades Forening Case C-145/10; Football Datas and Others Case C-604/10.

*traditional art is very restricted. Because the works are so closely connected to sacred thoughts, it follows that these designs must be reproduced faithfully and accurately. Since these art forms are the main means of passing down their religion and their history from generation to generation, it is important that any "artistic license" be kept to a minimum.*⁷⁰

This theme is also emphasised by other eminent scholars who have drawn attention to the unpromising potential behind copyright law as a means of protecting cultural expression from unauthorised appropriation:

In her assessment of the suitability of copyright law as a vehicle for protecting folklore, Lucas- Schloetter wrote:⁷¹:

"stretching of the fundamental principles of copyright to deal with the problem of fixation in the common law systems and with originality, authorship and term reveals the inadequacy of this form of protection for folklore as such, Indeed, the obstacle is not merely of a technical nature, but derives from the very concept of copyright. Copyright's raison d'être is to permit the exploitation of intellectual works under the best conditions possible. However, expressions of folklore are not created initially and above all in order to be exploited. It is true that they are of a literary and artistic nature, but they have not been created to reach as broad a public as possible. They were originally intended solely for the community from which they originate and whose traditions and beliefs they embody.

The majority of them are even of a secret nature and are only transmitted from generation to generation through certain members of the community by virtue of their age, their sex or their status, i.e., the position they occupy within the community. Moreover, some of them are of a sacred nature, particularly those that concern rituals. Thus, their function is not to be disclosed outside the community concerned, and the damage caused by their exploitation against the will of the members of this community is not of an economic, but mainly of a moral nature. As far as concerns the expressions of folklore, the protection of the non-economic interests of the community affected is thus at least as important as, if not more important than, that of its economic interests."

Where an authorship requirement is in place, in common law jurisdictions, it can be met in a variety of ways. In particular, common law jurisdictions such as Ireland and the United Kingdom gloss over the boundary between "true" copyrights and neighbouring rights. Broadcasts, films and sound recordings are regarded as copyright works and the broadcaster, sound recording producer, and the film producer/principal director enjoy copyrights which are limited to actual use of the broadcast, film or sound recording. Rights do not extend to preventing "lookalike" or "soundalike" films or broadcasts. Record companies were unsuccessful in using these rights in the UK courts to prevent "bootleg"

⁷⁰ Protecting Folklore of Indigenous Peoples (1997) 30 Conn L.R. 1 at 22.

⁷¹ In von Lewinski, op cit p.390 (footnotes omitted).

recordings of live concerts for this reason.⁷² Copyright in literary and artistic works is much broader however, covering for example, live performance of a musical work. The boundary is closely policed for this and other reasons. “True” copyrights protect authorship while sound recording copyright, for example, recognises investment.

There are provisions in the 2000 Act that are intended to free up exploitation of works which are anonymous or pseudonymous⁷³; it is not an infringement of copyright in a work to undertake acts if it is not possible to ascertain or identify the author of the work by reasonable inquiry and it is reasonable to assume that the copyright has expired.⁷⁴ Similar legislative initiatives in respect of orphan works are under consideration in many jurisdictions, the most noteworthy being the recently agreed E.U. Orphan Works Directive.⁷⁵ The Directive is intended to allow the online access to works within copyright when the owner cannot be located in order to enable authorisation of use to take place. But this initiative does not extend beyond the copyright arena.⁷⁶

However, this kind of development in relation to “folklore”, to use the language of the Irish 2000 Act, rather misses the point. Acts of reproduction for the purposes of recording the work of folklore – preservation purposes specifically – are less likely to be controversial than downstream exploitation for personal gain by persons with no tangible or cultural link with the community from which the “work” originated. To use the current buzzword of “innovation”, raiding the public domain for the purpose of producing commercial products that clearly contain culturally specific references is not something that traditional craftspersons, communities and groups can currently contest, absent some underlying misuse of a copyright or a protected design. Indeed, authors like Michael Brown dispute the extent to which communities should be able to challenge downstream use of living cultural expression.

The need for the contribution to be of an “authorship” kind was central to the fate of the claim of Aston Barrett, one of the key members in the legendary Wailers formed in the 1960’s by Bob Marley and Peter Tosh⁷⁷. Aston Barrett claimed ownership of copyright in some musical compositions. His contribution consisted of his distinctive baseline in Bob Marley and the Wailers recordings, what one witness called “a raw haunting sound in which Aston’s bass served not just as a rhythmic marker but also carried the melody of the song, in the manner of a lead

⁷² E.g. Rickless v. United Artists [1988] QB 40 The English High Court in Rickless changed this by holding that performers could use the Rome Convention of 1961 to directly enforce civil remedies that domestic legislation had denied to performers.

⁷³ Section 24(2) of CRRRA 2000 provides protection in respect of anonymous works for 70 years after the work is first made “available” to the public.

⁷⁴ CRRRA 2000, s. 88(1). These are based on Berne Convention provisions.

⁷⁵ COM (2011) 289 Final (24 May 2011). Directive 2012/28/EU (October 25, 2012).

⁷⁶ It might be argued that as an anonymous and public domain image or object is not copyright protected, no consent is necessary. This misses the point about the insensitive or commercialising use of cultural heritage and removal of heritage manifestations from any underlying context.

⁷⁷ [2006] EWHC 1009. One of the Wailers, Junior Marvin testified “the way Bob Marley and the Wailers were at that time [1977], they were more a spiritual type of band. They were more into the One Love facets of expressing themselves and it was not about Babylon system and Babylon style of making money. So I do not feel comfortable to approach him [Bob] in Babylon style fashion. When I say Babylon, I mean Western World, capitalism and stuff like that”.

instrument”. Aston was also responsible for setting up and running a demo studio, having the role of technician and producer. But such contributions were not authorship contributions to the lyrics or the music, and in the absence of any claims to co-authorship with Bob Marley,⁷⁸ the Barrett claims to copyright failed. Clearly, these contributions were performance contributions but as the sound recordings and the film recordings were with the consent of the performers, any claims in such a direction would have been pointless. Nor were there any sustainable moral rights claims as the court found that the claimant was not an author and there was no claim of subsequent disparaging treatment of any work.

2.2. Public Domain Works

Moving on to consider the question of how material that is not protected by copyright can provide a subsequent user with intellectual property rights, it is clear that adaptations of earlier music such as folk tunes and public domain works will rather easily allow new works and rights to spring therefrom. This fact suggests that once intangible cultural expressions are fixed, at least copyrights in films or sound recordings will subsist. The problem is that those rights will not vest in the persons or communities that provide the source material. One of the urban myths that surround the debate on originality and derivative creations is that because the template against which a potential work is set is within the public domain, anything inspired by that earlier work may not easily attract copyright. In fact, rifling through the public domain and using earlier materials in a creative way can create new copyright works, especially in the area of musical copyright. In Fisher v Brooker⁷⁹, an 8 bar introduction, as repeated, to “A Whiter Shade of Pale”, composed by Fisher was held to constitute 40 per cent of the value of the work as a whole, notwithstanding that it was admittedly adapted from two organ works by J.S. Bach. In Hyperion Records Ltd. V. Sawkins⁸⁰, the plaintiff, a leading musicologist who was an authority on the work of Lalande, a French Court composer who died in 1726, spent over 300 hours working on neglected Lalande manuscripts, creating performance editions of four Lalande works for a modern orchestra. Those Lalande works could either not be played by a modern orchestra, had parts missing and contained numerous errors which Sawkins corrected. In filling in or correcting each notation, Sawkins relied on his own skill and knowledge of Lalande’s body of work. The English Court of Appeal stressed that the general policy of copyright:

“Is to prevent the unauthorised copying of certain material forms of expression (literary, dramatic, artistic and musical, for example) resulting from intellectual exertions of the human mind ... copyright can be used to prevent copying of a substantial part of the relevant form of expression, but it does not prevent use of the information, thoughts or emotions expressed in the copyright work. It does not prevent another person from coincidentally creating a similar work by his own independent efforts.... if the claim of Dr. Sawkins to copyright in the performing editions were upheld, that would not prevent other musicologists, composers performers or record companies from copying Lalande’s music directly or indirectly or

⁷⁸ Contrast Bamgboye v. Read [2004] EMLR 5.

⁷⁹ Mummery L.J. [2006] EWHC 3239 (Ch) [2006]EWHC 3239(ch): [2009] UKHL41

⁸⁰ [2005] 3All ER 636; [2005] EWCA Civ 56

*from making fresh performing editions of their own. All that Dr. Sawkins can prevent them from doing, without his consent, is taking the short cut of copying his performing editions in order to save themselves the trouble that he went to in order to produce them*⁸¹

This is actually quite a tantalising case. The English Court of Appeal clearly held that effort, skill and time expended by Dr. Sawkins meant that new copyright works were created, even if he was working on a score made by another person. The score itself was out of copyright, and Dr. Sawkins himself had no intention of writing any new notes of music of his own. Dr. Sawkins was following a trail laid down over 250 years before by Lalande. The Court of Appeal also rejected an “aura” test of originality in the sense that the fact that his work was scholarly and performer-centric did not preclude copyright. Dr. Sawkin’s scholarly input went beyond the editorial, but, as the Court of Appeal pointed out, there is a “relatively modest” level of originality to be satisfied in music copyright⁸² cases.

Sawkins is a rather extreme case of a legal conflict between a putative author and a record company. As the record company focused on recording old works out of copyright, it not surprisingly resisted claims that Dr. Sawkins was entitled to royalties for assisting in the recording of original public domain works. Copyright royalties for a budget label like Hyperion constituted an added cost that from their perspective was best avoided. A not dissimilar situation arose in Gormley v. EMI Records (Ireland) Ltd.⁸³ In 1961, the plaintiff, then a schoolgirl aged 6 or 7 years, was told Bible stories in class: she, along with other children gave her ex.tempore version of the story that had just been related to her and the teacher recorded literally hundreds of these retellings on recording tape. Some of the retellings, including some of the plaintiffs, were edited and featured on a highly successful sound recording.⁸⁴ The plaintiff asserted copyright in the “work” encapsulated in the sound recording; ownership of the sound recording in itself by EMI was not disputed. The decision itself revolved around whether any underlying work was fixed in a form of notation. The Supreme Court upheld the view that a “notation” covered writing but that an electronic trace was not a form of “notation” recognised under the older Irish copyright statute. But there are deeper issues to be explored here.

Firstly, on the question of originality the Court indicated that any originality here was demonstrated by the teacher who had skilfully tailored down complex Bible stories⁸⁵ so as to be understood and able to inspire very young children. The children themselves were required to stick as closely as they could to the story related to them, minimising the opportunity for original skill and judgment in expression or their form of retelling.

Secondly, any originality evinced by the child was minimal. The plaintiff had described Judas Iscariot as an informer, that “dirty auld squealer”, but, colourful

⁸¹ [2005] EWCE Civ 56 at paragraphs 28-30

⁸² Per Mummery LJ., paras. 28-31

⁸³ [2000] 1 IR 84

⁸⁴ “Give Up Yer Aul Sins”. A film made later and using the sound recordings was Oscar nominated. Check it out on [YouTube!](#)

⁸⁵ And concepts of theology such as Christ’s ascension and resurrection, and the “Holy Ghost”, or holy trinity.

as the phrase was, the Supreme Court held that there can be no copyright in a phrase, as such. Furthermore, it is worth adding that part of the undoubted charm that the recordings have lie in the strong Dublin dialect with which the recordings are imbued. However, an accent, in a young child, is the result of cultural and environmental factors, and in terms of artistic expression, are probably best regarded as performance factors – “*the wrong kind of contribution*” to the making of a work, in other words.

Thirdly, it should be noted that in 1961, Ireland did not have a sound recording copyright for fixations of non-dramatic works. This copyright only subsisted after ratification of the Rome Convention under the Copyright Act 1963. It would be odd if a performer could retrospectively obtain a copyright or analogous right, even if later cases suggest that this can be so: See Hendrix⁸⁶

2.3. Unauthorised Use of Works

Where copyright does subsist, a user will have to decide to either go ahead and use in the hope that the rights-owner will either not find out or will be unconcerned by the infringement, or do the honest thing and seek to obtain permission, or skirt around the problem in some way.

Firstly, efforts might be taken to select either public domain content in conjunction with limited amounts, quantitatively and qualitatively, of copyright material. In essence this is not likely to satisfy anyone as the selection of limited, or insignificant works or material is hardly likely to meet the core objectives of a cultural institution. As an alternative, the curator may seek to obtain either a transfer of rights, by way of an assignment or an exclusive licence to reproduce and distribute content. Agreement from the rightholder might be forthcoming on gratis or nominal terms, but there are instances where rightholders may not do so other than on commercial terms. Some rightholders may be sensitive to the need to retain both the economic value and the cultural value of a body of work, and it is at such points that copyright and cultural imperatives can collide. Examples include the conflict between the University of Cork Press and the James Joyce Estate.⁸⁷ Cork University Press sought to include extracts from the works of James Joyce in an anthology, “Irish Writing in the Twentieth Century”. The collection was aimed at a student market and when permission was sought from the Joyce Estate a fee of £7,500 Sterling was demanded. The publishers proposed to publish anyway⁸⁸ but the Joyce Estate was successful in obtaining an injunction against the University Press because the intended extracts were contentious in themselves, coming from an edition of “Ulysses” that the estate was in dispute with at that time. It is possible to see this case as one in which the James Joyce Estate challenged the use of what it saw as a pirated edition of “Ulysses” for reasons other than economic ones. Maintaining the integrity and authenticity of Joyce’s works are compelling moral rights arguments that clearly resonate in respect of cultural heritage curation, both tangible and intangible. The authenticity of works, objects and ways of living are universal themes in

⁸⁶ Experience Hendrix LLC v. Purple Haze Records Ltd [2007] EWCA Civ 501

⁸⁷ Sweeney v. National University of Ireland [2001] 2 I.R.6

⁸⁸ Using a text produced by scholar Danis Rose which Rose claimed was authorised and did not infringe, something the James Joyce Trust disputed.

human communities, but whether copyright devices and concepts can be exported beyond copyright works is open to conjecture. Misappropriation of works of folklore are some of the most sensitive features of international folklore protection texts: who may use the work and for what purpose? In legal terms, which persons or communities may have the locus standi to complain, and to which person or body?

A second technique that appears to be used increasingly is to take a work and digitally alter the work in such a way as to conceal the identity and characteristics of that work. This may succeed if the rightsowner is fooled by manipulation or is unable to obtain compelling evidence that there is a causal link between the original and the defendant's "work". See the recent case of Naxos Rights International Ltd. v. Salmon⁸⁹ in which the digital stretching and corruption of a sound recording in order to give credence to a defence that the sound recording was not a copy of the plaintiff's sound recording failed, in the light of expert evidence submitted by the plaintiff.

In summary, there are formidable obstacles to using copyright law to protect the intangible and kinds of expression that have not been reduced into a set form, which is capable of being reproduced or multiplied several times. It is clear from the Australian artworks cases that individual artists who paint within customs and traditions that have been set by tribal communities can still satisfy originality requirements, often by dint of skill and judgment exercised in the execution of the work in question. Originality in expression rather than originality in respect of ideas and principles that underlie the work is the test. The link here is with decisions such as Sawkins. This is brought out if we consider how copyright protection may fare in respect of handicrafts. Both the CRRRA 2000 and the Industrial Designs Act 2001 recognise that copyright and design rights (including the three year community unregistered design right) may vest in handicrafts. But if a community produces cloth or ceramics for example, knowledge about how the cloth can be woven, or the pottery glazed, will not be copyright protected for this will probably be regarded as an "idea or principle ...[a] procedure" that underlies the work itself (i.e. the fabric or piece of pottery).⁹⁰ Similarly, such knowledge will be outside design protection which is directed at the appearance of the handicraft item rather than the method of its construction, and as the item would incorporate traditional features it would not necessarily pass the "novelty" and "individual character" tests in the legislation.⁹¹

Other provisions in the CRRRA 2000 demonstrate the extent to which copyright law may be insensitive on cultural heritage matters. Section 93 is a cause of some controversy.⁹² Where artistic works, in the sense of buildings, and sculptures, models of buildings and works of artistic craftsmanship are permanently situated in a public place, or on premises open to the public, it is not an infringement of any copyright to make a two dimensional copy – draw, photograph, film or include the work in a broadcast. If there is no copyright infringement in respect of these works that are the subject of artistic copyright,

⁸⁹ [2012] CSOH 158 (Scotland)

⁹⁰ CRRRA 2000, s. 17(3)

⁹¹ Industrial Designs Act 2001, sections 13 and 14.

⁹² See the New Zealand case of Radford v. Hallenstein Bros. Ltd. (High Court 27 February 2007)

then buildings etc. that are not works, but are cultural icons, may arguably be reproduced, e.g. on T shirts without infringing any proprietary rights of any kind.⁹³

2.4. Database Protection as a Possibility⁹⁴

Notwithstanding these difficulties in fashioning copyright so as to serve as a method of protecting intangible cultural heritage, there is a significant development within the European Union. Building upon the TRIPs Agreement (Article 10 of which affords copyright protection to original databases) the European legislator gives dual protection for both copyright in the originality of the collection and separate rights in relation to the contents of a collection, regardless of eligibility of the contents to copyright protection.

The EU Database Right⁹⁵ is the most important text in relation to the protection of images and other fixations of cultural heritage. Because the Directive provides protection in respect of both the collection itself as a copyright work as well as the contents of the database regardless of whether the contents are copyright works or not, the maker of a database who has made a substantial investment in obtaining, verifying or presenting the database has a right to prevent the extraction and/or reutilisation of the whole or of a substantial part of the database. The right extends to preventing repeated and systematic extraction of insubstantial parts of the database. This separate sui generis right applies as long as the substantial investment relates to the database as a database: by this we must exclude any investment that goes into the creation of the data to be included in the database – see ECJ cases British Horseracing Board v. William Hill⁹⁶ and Football Dataco and Others v. Yahoo! and Others⁹⁷

Although Canadian law does not contain provisions that mirror the EU Database Directive, the decision in Ital Press Ld. v. Sicoli⁹⁸ reflects the fact that the collection of culturally specific data – in this case decisions and judgments about Italian names, cuisine, etc. collected by a compiler – can appropriately be the subject of IP rights. The ECJ decision in Direct Media v. Albert Ludwigs Universitat⁹⁹ involved an academic compilation of “The 1100 Most Important Poems in German Literature between 1730 and 1900”. A commercial publisher who used that earlier compilation “as a guide in producing a commercial CD-ROM of “1000 Poems everyone Should Have” has held to have unlawfully extracted data from the earlier compilation so as to infringe database rights, notwithstanding that most of the poems themselves were in the public domain.

But if digitisation and the creation of a database might provide a means of recording and fixing cultural traditions, both tangible and intangible, one may ask

⁹³ e.g. Arguments about whether t shirts carrying the image of the “reconstructed” entrance to Newgrange are copyright rip-offs are thus rendered irrelevant.

⁹⁴ For a discussion of the Directive and its impact in Germany, see Schwartz and Klinger, page 167 et seq in Hoffman, From Exploiting Images and Image Collections in the New Media: Gold Mine or Legal Minefield (Kluwer).

⁹⁵ Directive 96/9/EC.

⁹⁶ Case C – 203/02.

⁹⁷ Case C – 604/10.

⁹⁸ (1999) 86 CPR (3d) 129.

⁹⁹ Case C – 304/07.

if, in the current regulatory climate, this would necessarily be effective. Do communities have the resources to record cultural heritage in an accurate way? Would a digital recording be safe in the sense that it could, in the wrong hands, become a source of abuse? This is a very lively debate in relation to the protection of intangible cultural heritage and indigenous peoples where sacred and secret traditions are jealously guarded: Riley notes:

*“the idea of disclosing traditional knowledge within a public forum – even one with controlled access – represents a risk of exploitation and destruction that is, for many, far too great”.*¹⁰⁰

In contrast, enthusiasts for freedom of expression and an open cultural commons have a perhaps naïve faith in the ability of licences and contractual models to address difficulties. Kansa, Schultz and Bissell¹⁰¹ argue:

“attempts to respect and enforce indigenous IP rights and claims run the risk of inhibiting communication, innovation, and freedom by locking away native culture behind rigid legalistic barriers. Culture is continually created, contested, shared, mixed, and hybridized. This process unfolds within and between indigenous communities and with other communities across the globe. Sometimes people choose to hold information secret, sometimes they choose to share information according to culturally diverse rules and motivations,. Rigid legal categorizations of elements of culture as belonging to a particular group can inhibit this dynamic process of culture creation, imagination, and communication. Such “reservations of the mind” (as expressed by Michael Brown) would further impoverish the very indigenous societies that were being “protected”.

*The importance of a vital global information commons must be recognised and is a major motivation for us to discuss traditional-knowledge, intellectual-property concerns along with research-data, intellectual-property issues. It is our sincere hope that voluntary, negotiated some-rights-reserved frameworks may do much to guard against both unfair exploitation of knowledge and rigid and damaging regimes of overprotection. Putting up predetermined barriers that impede communication, balkanize culture, and reinforce cultural and ethnic boundaries would profoundly curtail freedom of expression and inhibit scientific understanding in many vitally significant areas. Ideally, the power to structure how (and even if) communication will take place should be held by its participants. Thus, we see great benefit in the Creative Commons model of some rights reserved, since this model enables people to voluntarily negotiate and set flexible terms and conditions for communication as they deem appropriate”.*¹⁰²

3.- SOME IRISH ISSUES

¹⁰⁰ Indigenous Peoples and the Promise of Globalisation 14 Kan J.L. & Pub Policy 159 at 160 (2004) cited in Yu, Cultural Relics, Intellectual Property and Intangible Heritage (2008) 81 Temple L.R. 433 at 496

¹⁰¹ Protecting Traditional Knowledge and Expanding Access to Scientific Data (2005) 12 I.J. C.P. 285.

¹⁰² Ibid at p.307 (footnotes omitted).

In this final part of the article the author considers how the protection of performers and the recording of cultural expression intersect under Irish law, drawing attention to legislative shortcomings and indifference to intangible cultural heritage protection by the Irish State. Irish legislation protects expression that comes within the 1972 UNESCO Convention only and in the light of scant resources and parliamentary inactivity, it should be for individuals and groups to seek to protect Irish heritage generally. A means of allowing cultural expression to be protected needs to be constructed.

3.1. Performances of Folklore under CRRA 2000

The Copyright and Related Rights Act 2000 (CRRA 2000) recognises folklore in regard to copyright protection for the first time. As we shall see the CRRA 2000 is perhaps more relevant to intangible cultural heritage when the provisions relating to performers are concerned, but the author's rights protections reflect a legislative desire to encourage the making of fixations of performances of folklore.

Section 92 of the Act, contained in that part of the Act that relates to authorship, provides that the fixation of a performance of an unpublished anonymous work, (unless the fixation infringes another copyright or a performer objects to the fixation, at the time the fixation is made), for the purpose of inclusion in an archive, maintained by a designated body, to be made available for research or private study, is lawful. This is an oddly drafted provision as it appears to envisage that a copyright (will subsist in the anonymous (i.e. folklore) work. The definition of a designated body is very wide and smacks of self certification as it covers:

*“any archive under the administration, management or control of a body which is not established or conducted for profit and which maintains an archive of fixations of works of folklore”.*¹⁰³

This provision begs the question whether the filming of a performance of folklore can infringe any author's right per se. Lucas-Schloetter points out that:

*“folklore is the ‘result of a constant and slow impersonal process of creative activity exercised by means of consecutive imitation within an ethnic community’. The very idea of folklore presupposes transmission from generation to generation, and ultimately a perpetual evolution. In many ethnic communities, art is considered as a means of communicating the history and the religious convictions of the tribe or the community, and the artist is bound by respect for the tradition and therefore cannot give free rein to his inspiration”.*¹⁰⁴

¹⁰³ SI No. 408 of 2000. Section 92 of CRRA is based on section 61 of the UK Copyright, Designs and Patents Act 1988 but it is much wider as it covers works of folklore (defined in section 92 as anonymous works but the marginal note is to folklore). It is this that helps to explain the odd drafting and phraseology in Section 92 CRRA.

¹⁰⁴ In von Lewinski, (op. cit.) at 384 (footnotes omitted).

To this extent, we are back to the issue raised earlier: absent some act of individual expression, it is difficult to see how copyright engages with intangible cultural heritage unless that intangible expression is fixed (incorporated into an object, film, etc.), but the fixation will not include the underlying “work” or expression.¹⁰⁵

The CRRA 2000 follows the international treaty standards for the protection of performers by giving fixation rights, live broadcasting rights, reproduction rights in respect of recordings and making copies of recordings available to the public, including providing internet access to such recordings. Distribution rights and rental and lending rights are also available and an equitable remuneration right is also available for sound recordings that have been played in public or included in a broadcast or cable program service. Performers are also given moral rights that mirror the moral rights in the Berne Convention rather than the lesser rights afforded to aural performers under the WPPT.

The definition of performers in CRRA adds to the general list of performers who perform or interpret literary, dramatic and musical works those persons who perform

“expressions of works of folklore, which is a live performance given by one or more individuals, and shall include a performance of a variety actor any similar presentation.”

However, the implementation of these provisions on folklore are not free from difficulty. There is no definition of expressions of works of folklore in relation to performers. The rights given are not perpetual but last, in the first instance for 50 years after the performance takes place.¹⁰⁶ There are no provisions which recognise any collective ownership although works of joint authorship are provided for in an entirely unrealistic manner. It follows that if a performer authorises a fixation of a performance, members of the community have no locus standi to object (e.g. to disparaging treatment) unless such persons could prove authorship of some other “expression of a work of folklore”. But if no fixed performance can be adduced by the complainant it is difficult to see how a subsequent “rogue” performance or fixation can be justiciable. The right to object to derogatory action in relation to a performer’s performance or a recording thereof¹⁰⁷ refers to post performance phenomena, not the cultural hinterland from which the performance has sprung. This is borne out by section 245, the archiving of performances provision which allows a section 92 designated body to make a copy of an unpublished recording for archival purposes when the making of the recording does not infringe any copyright and the making of the recording is not prohibited by any performer. Access by third parties to the copy in the archive for the purposes of research and private study, and only for such purposes is possible under section 245(3).

¹⁰⁵ Radford v. Hallenstein supra, footnote 91.

¹⁰⁶ Section 29, CRRA 2000, soon to be expanded by Directive 2011/77/EU to 70 years from November 1, 2013.

¹⁰⁷ CRRA 2000, s. 311.

Who would be able to invoke such a provision apart from the obvious institutions – Comhairle Bhealoideas Eireann, or Heritage Ireland for example? Consideration might be given to leaving it open to communities or representative groups to satisfy a court that *locus standi* exists for the purpose of seeking some form of declaratory or other relief.¹⁰⁸ Objections to this proposal may be seen as coming from interest groups and persons who want what they see as common cultural property to be open to all, and one has sympathy with this view. However, the emphasis should be on misrepresentation and misappropriation which is likely to seriously damage the reputation or integrity of cultural expressions. Such a test sets the bar at quite a high level. This writer does not envisage that litigation will become an everyday event if such a measure was passed into law but, in the absence of any other measures, something of this kind would be desirable.

3.2. Existing Measures are Wholly Inadequate

Despite the compelling case made by UNESCO for some form of legislative protection for the intangible, Ireland has a miserable record to defend. UNESCO point out

“Cultural heritage does not end at moments or collections of objects. It also includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts.”¹⁰⁹

Dr. Charles Mount¹¹⁰ gives us two examples of Irish intangible cultural heritage – he describes such heritage as “non material or living manifestations of cultural heritage” in contradistinction to material cultural heritage – i.e. individual tacit skills such as the ability to make curach boats or make and play the Uilleann pipes. Dr. Mount continues his analysis by observing:

“Ireland has many examples of intangible cultural heritage ranging from language and dialect, to sports, festivals, music, traditional crafts and foods. Some would merit inclusion on the list of intangible Cultural Heritage of Humanity. However, Ireland, to date, has not ratified the Convention and has had no items of intangible cultural heritage inscribed.”

Other notable absentees from the list of States Parties to the Convention include the United Kingdom, the USA, Canada, South Africa, Australia and New Zealand.¹¹¹ Whether States are ignoring both economic and cultural benefits to

¹⁰⁸ e.g. See Digital Rights Ireland Ltd. v. The Minister for Communications, Marine and Natural Resources [2010] IEHC 221 for a precedent.

¹⁰⁹ www.unesco.org/culture/ich/index.

¹¹⁰ www.charles-mount.com.

¹¹¹ The economic value of cultural tourism is a strong factor everywhere – see Smith, Waterton and Watson, The Cultural Moment in Tourism (2012). This is not a parochial issue. Note that Irish cultural heritage obligations are not confined to “the Irish”. Under the Council of Europe Faro Convention, Article 5, cultural heritage law and policies requires parties to “recognise the valued cultural heritage situated on territories under their jurisdiction, regardless of its origin”.

protecting intangible heritage is the topic for a separate debate¹¹² but it is ironic to see political leaders who are responsible for “rationalising” budgets and merging cultural heritage institutions embarking upon tours to sell Ireland as an attractive place to do business on the back of Ireland’s cultural offerings.¹¹³

While Ireland has not approved or ratified the 2003 Convention, it has ratified the 2005 UNESCO Convention on the Diversity of Cultural Expression¹¹⁴. This Convention is generally regarded as aspirational in nature and is intended, in part, to protect “*cultural content*”, “*cultural expressions*” and “*cultural activities, Goods and services*”, as defined. Article 5 puts the Convention into a human rights context and reaffirms the sovereign right of states to “*formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions*”. Article 6 provides for the measures that states may adopt to protect and promote the diversity of cultural expressions within its territory. The language of article 6 is, permissive and predicated within the context of national policies, but it also allows for regulatory measures aimed at protecting and promoting the diversity of cultural expressions. Article 7, which is directed at measures to promote cultural expressions is even more tentative, requiring, as it does, that “*members shall endeavour to create in their territory an environment which encourages individuals and social groups*” in creating, etc. their own cultural expressions, as well as recognising the role of artists in relation to cultural expressions. This is all very general, and it is hardly surprising that some states will more easily adhere to such a text in contradistinction to the 2003 UNESCO Indigenous Intangible Heritage Convention.

It would be unfortunate indeed if Ireland could not see the advantages of setting forward on a coherent programme of intangible cultural heritage preservation and some kind of national dialogue needs to take place on what this involves, both as human rights and cultural identity initiatives. If possible, cultural and intangible cultural heritage responsibilities should, at Government level be both recognised and vested in one body¹¹⁵, taking due account of the fact that many individuals, communities and specialist groups and institutions are currently carrying on heritage preservation functions. It will also be necessary to recognise that cultural heritage preservation can be contentious in many ways. Legislative recognition of the 2003 UNESCO Convention may have a legitimising and inclusive role to play and for this and other reasons it is hoped that even if Ireland cannot emulate Scotland in systematically recording its living culture, the Irish

¹¹² See “What about the Intangible Cultural Heritage of Ireland”, posted 18/5/2011 at the Charles Mount blog – www.charles-mount.com.

¹¹³ “Deenihan in China to expand cultural links” Irish Times December 29, 2012.

¹¹⁴ October 25, 2005. Ratification by Ireland took place on December 12, 2006.

¹¹⁵ The existing fragmented situation is illuminating. Culture Ireland promotes performing and other arts activities worldwide, via Department of Arts, Heritage and the Gaeltacht. That Department itself sets out an organisational structure that addresses built heritage, architectural policy, national monuments, EU Habitats and Birds Directives, science and biodiversity protection and parks and reserves management. The Department of Education and Skills is the Irish UNESCO National Commission parent body and the UNESCO documentation centre is location within that Department. The Department of Environment, Community and Local Government has clear functions in respect of recording and preservation of cultural material arising during contraction//environmental protection projects, as well as through rural development programmes, which in turn, are the primary responsibility of the Department of Agriculture, Food and the Marine. And so on.

State can demonstrate a more inclusive, indeed, universal approach to cultural heritage preservation¹¹⁶.

The most recent observation on the UNESCO 2003 Convention and what the copyright lawyer might see as a branch of the performing arts came from an unexpected source in a somewhat unique setting¹¹⁷. While one tends to consider cultural heritage not to have overtly political characteristics, it is a measure of just how fluid this may be as a concept that it may legitimately be invoked by the Orange Order. After a powerful speech recounting the history and achievements of the Orange Order – marching bands and community solidarity and so on - made to Seanad Eireann on 3rd July 2012, Drew Nelson, Grand Secretary, the Grand Orange Lodge of Ireland said of the Loyal Orange Institution that

*“this Institution and the Bands which we support are the guardians of the intangible cultural heritage of not only Northern Ireland but also the Republic of Ireland. I believe that Ireland would be a poorer place if that cultural heritage disappeared. Therefore, my challenge today is for the Government of the Republic of Ireland to ratify the 2003 UNESCO Convention for the safeguarding of Intangible Cultural Heritage.”*¹¹⁸

Observations of this kind make it clear that for Governments to undertake to honour indigenous cultural expression they will often have to face up to some challenging and at times uncomfortable facts and traditions. In Ireland, this will require an acceptance of diversity and conflicting traditions rather than the collection and preservation of some imagined national cultural identity. If the political establishment is not prepared to face up to this challenge, it is hardly surprising that Irish statute law currently falls short of the mark at this time.

Irish Legislation reflects a concern for protecting objects and landscapes – often the past, the archaic, the recently rediscovered rather than living traditions. The legislation that provides protection for Irish cultural heritage currently identifies monuments, objects and institutions. The National Monuments Acts 1930 to 2004, The Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act 1999, as well as the Local Government (Planning and Development) Acts 1999 (Part IV), as amended) deal very effectively with what can be classified as Architectural and archaeological heritage. The Heritage Act 1995 provides the necessary advisory body, the Heritage Council to protect archaeological objects, monuments, flora, fauna, habitats, parks and inland waterways, to name just a few national heritage subjects.

¹¹⁶ The most significant work in these islands has taken place in Scotland via entities working under the umbrella of the Scotland Committee of the UK National Commission for UNESCO (UKNC); see www.unesco.org.uk. A 2008 Report commissioned from Edinburgh Napier university has led to the creation of an online inventory to “record the living aspects of Scotland’s culture and, where applicable, inform decisions concerning its possible safeguarding.”

¹¹⁷ Other artistic outpourings from the Northern Ireland troubles in the form of books, plays, film and artwork (e.g. murals in areas of Belfast and Derry) can come to mind.

¹¹⁸ Vol. 215 Seanad Debates No. 7. Note that The Good Friday Agreement (10 August 1999) contains references to the governing authority in Northern Ireland to exercising authority. *Impartiality on behalf of all the people in the diversity of their identities and traditions ... founded on the principles of full respect for, and equality of, civil, political, social and cultural rights...*”

The National Cultural Institutions Act 1997 creates national institutions in respect of museum and library activities but again, the focus is on objects – e.g. “archaeological object”, “cultural object”.¹¹⁹ While the definition of “library material”¹²⁰ is more open ended, and may include digital forms, it is not acte clair what that National Library’s role is in respect of “folklore”. The definition of “museum heritage object” is also of great interest insofar as it refers to “folklife” (which is not defined)

“museum heritage object” means –

(a) any object in the collection of the Museum on the Museum establishment day,

(b) any object (including archaeological objects, objects relating to the decorative arts¹²¹ or natural sciences or to history or industry or folklife) over 25 years old considered appropriate by the Board for inclusion in the collection of the Museum concerning human life in Ireland, the natural history of Ireland, and of the relations of Ireland with other countries, and

(c) Any other similar objects;”¹²²

Should Ireland move towards adopting the 2003 UNESCO Intangible Cultural Heritage Convention, it is likely¹²³ that the Heritage Council would be called into performing a similar role in respect of intangible cultural heritage. But is this the most desirable approach in the short to medium term?

3.3. Irish Resources

Even if the Oireachtas were to ratify the 2003 UNESCO Convention on Intangible Cultural Expression this would not address underlying issues about how such expressions can be protected. Existing heritage institutions are already struggling to fulfil their goals and objectives. Some examples of this provide a dose of realism in relation to what can at times be a very esoteric subject.

The Heritage Council itself is claiming that “disproportionate cuts” in their Council’s Budget of 65 to 70% make essential work impossible¹²⁴. Other important cultural heritage custodians are under similar pressure. Indeed, the Local Government (Miscellaneous Provisions) Act 2012 dissolves the Library Council, An Chomhairle Leabharlanna, established under the Public Libraries Act 1947. The Library Council was extremely active in collecting, organising and digitising ephemeral cultural content under www.askaboutireland.ie and the

¹¹⁹ See section 2 of the National Cultural Institutions Act 1997.

¹²⁰ “Library material” includes any material, within the meaning of section 65 of the 1997 Act “concerning human life in Ireland.” Section 65 allows for the prescribing of published materials including digital records of performances, etc. See now section 199 of the CRRRA 2000.

¹²¹ See the definition of decorative arts objects in the Third Schedule.

¹²² National Cultural Institutions Act 1997 Section 2.

¹²³ See Section 9 of the Heritage Act 1995 which allows the Irish Government to confer additional functions onto the Heritage Council.

¹²⁴ See Annual Report 2011 at www.heritagecouncil.ie and “Heritage Council near catastrophic point from find lists” [Irish Times](http://www.irishtimes.com) June 28, 2012.

debates concerning the continuation of the work of An Chomhairle do not reassure this writer that this kind of work, as well as the Public Lending Right Scheme, will receive due to attention in the context of “*rationalisation*” measure in train.¹²⁵

There is excellent work being undertaken by a diverse range of cultural institutions and this must be lauded in the difficult economic circumstances the Irish State faces. The work of the National Library of Ireland in digitising its collection of James Joyce manuscripts, and a putting them on-line free of charge is both a welcome initiative¹²⁶ and a clear response to vested interests that could well have sought to restrict access, notwithstanding the expiry of the copyright extension under Directive 93/98/EEC¹²⁷, as replaced by the Consolidated Text¹²⁸. It is however difficult to see how cultural institutions that in historical terms are under staffed and under resourced could be expected to take on responsibility for identifying and preserving intangible cultural heritage in the current economic climate. A clear example of this has been provided by press reports indicating that the National Library has decided that it does not have the resources to finance the digitisation of its holdings and that the Library is to look for financial support on a joint venture basis.¹²⁹

Even if folklore preservation is a core obligation, will adequate funding be available? An example of this unsatisfactory position is provided by the financial position of the National Folklore Collection, located in University College Dublin. The National Folklore Collection, a collection that began in 1935 following upon the establishment of the Irish Folklore Commission in 1935 was transferred to UCD in 1972. The latest Annual Report of the current authority, Comhairle Bhealoideas Eireann catalogues the very modest resources available and the impressive work being done on slender resources and often on a voluntary basis¹³⁰

4. Conclusion

Resources of a kind other than financial and intellectual resources however also need to be deployed. The UNESCO Conventions of 1972 and 2003 are very “*top down*”. It is suggested that because cultural property and living traditions often exist at local and communal levels, there should be mechanisms in place that allow interested groups, communities and associations to seek to preserve both the existence and the integrity of cultural expression. In other words, legal

¹²⁵ See [Dail Debates](#) for 23 May 2012. Part 3 of the Act transfers functions to a motley collection of undefined bodies, local authorities, any Department of State or the Minister for the Environment, Community and Local Government.

¹²⁶ See “*Joycean Joy after library says ‘yes’*” [Irish Times](#) May 7, 2012

¹²⁷ Copyright and Related Rights Act 2000, sections 24 to 34 replaced S.I. 158 of 1995.

¹²⁸ 2006/11/EC

¹²⁹ “*Library seeks help to digitise collection*” [Irish Times](#) September 24, 2012. This article refers to joint venture agreements elsewhere with commercial publishers. Do such joint ventures afford adequate control to the content provider and libraries?

¹³⁰ Report, 1 September 2010 to 31 August 2011: “*Financial Support is a constant concern towards preservation, dissemination and development of the collection*” (p.5). “*An Chomhairle is a national body with a remit that goes beyond its host body, UCD, but provision for its current funding through the Higher Education Authority and UCD lacks clarity*” (p.7).

mechanisms should evolve to ensure that arguments about heritage distinction or misuse can be heard before the High Court. Existing copyright laws are only obliquely relevant, but there are some kinds of IP protections that are not too far away from providing a satisfactory precedent. Skilled craftsmen who represent, as a collective, standards of workmanship and tradition, may use the law of passing off to counteract others who misrepresent or misappropriate work to the detriment of the collective. Communities such as churches and professional associations may also use passing off reliefs. Some legislative intervention in cases of cultural misrepresentation or misappropriation which threatens to seriously damage the reputation or integrity of cultural expressions tangible and intangible, would be a reasonable and progressive step.