

Full Fat, Semi-skimmed or No Milk Today – Creative Commons Licences and English Folk Music

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ABSTRACT *Considerable portions of Lessig’s writing concern the relationship between intellectual property regimes and music. In Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity he reviews the unequal use of copyright in the reward for writing and performance of music on the radio. In The Future of Ideas: The Fate of the Commons in a Connected World he argues that intellectual property regimes need not be ‘full on’ (full fat) or ‘full off’ but partial (semi-skimmed). These ideas have found form in a more flexible regime of copyright through a series of alternative licensing contracts usually referred to as the Creative Commons licences. After reviewing what is considered to be folk music this paper will analyse the extent to which developments in the English law of copyright are stifling the folk music tradition and consider the extent to which the mechanisms proposed by the Creative Commons licences and the open source movement offer better solutions more suited to the needs of this tradition.*

Q1

Intellectual Property Rights, Copyright and Folk Music

The justifications given for intellectual property rights can be conveniently divided between the ‘moral’ grounds and the creativity grounds. Morally it is argued that it is right and proper to recognize these rights or, as it is more commonly put in literature from the USA, that the author has a moral right to own and exploit the fruits of their labour. Creativity, on the other hand, is enabled by incentives that encourage people to devote themselves to intellectual and artistic creations. Whatever view is taken it is

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Q2

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unlikely that theoretical justifications play any significant part in the formulation of a new law.¹ What is evident, however, is a tendency to see the customers of any intellectual property system as those seeking protection from it rather than the consumers of their products. In the process underlying justifications for the system functions, such as the encouragement of creativity, can become lost.

The relationship between the public domain² and copyright is at the heart of Lessig's³ concerns relating to overweening intellectual property rights. A large and active public domain (a commons) is seen as important for enabling creativity. We see attempts at privatizing common heritage, common knowledge, shared creation and public domain information in various fields. The question should always be what do we want from our intellectual property systems and is the present system maintaining the balance between reward and creativity?

Folk Music and Copyright

The classic definition of traditional music would suggest that it was a prime example of public domain material: 'music originating among the common people of a nation or region and spread about or passed down orally, often with considerable variation'.

Berman explained the conventional view of the process by which the music is varied when commenting that

In furtherance of this project, Sharp published in 1907 his theoretical work on folk song, *English Folk-Song: Some Conclusions*. His key points were that folksong is anonymous, multiform, and that folk tunes are modal in nature. He proposed an evolutionary model for folk song comprising continuity, variation, and selection. Continuity refers to the persistence of recognizably the same songs in different places and at different times; variation to subtle differences in words and melody which render each manifestation of the song the same but different; and selection to the way in which a singer may introduce their own variations into words and tune, but the community will favour certain alterations over others and so determine which forms of a song are preserved and transmitted.⁴

Q3

Folk music has in addition acquired a number of secondary meanings related to style and philosophy. We need not reduce it to the absurdum, whereby every acoustic singer/songwriter is called a folk singer, a trend particularly noticeable in the USA. However, historically many tunes that have become part of the folk repertoire have a traceable author. Likewise, it would take a real purist not to acknowledge that much modern music has been written in a traditional style and assimilated to what many would now call folk music. Fortunately there is relatively little attempt to monopolize style (which would fall foul of the expression/idea dichotomy), but there is always a need for vigilance.

Q4

Since the early twentieth century English folk music has undergone a revival, a movement made up of singers, dancers and members or organizers of folk clubs working to ensure that music outside commercial control remained alive. In the early days of the revival there was an underlying philosophy among some practitioners (not to be too naive) of a communal effort where commoditization of the product was undesirable or even unavailable. As Boyes commented

... by constructing the concept of a rural, uneducated, uncreative Folk as the cultural source of their definition, the proponents of the survivals thesis obviated the need for

close examination of the role and individual contribution of performers of all folk traditions . . . As mere temporary custodians of a common culture, they had no individual rights of ownership in what was clearly a heritage of the nation as a whole.⁵

Atkinson echoed this:

As they live in an organic community – buttressed, almost to the present day, from the corrupt outside world – any song belongs to all and none belongs to anyone in particular. Thus it is not the singer who sings the song but the song that sings the singer, and therefore in performance it is the singer, not the song, that is the aesthetic artefact, the work of art. In a perfect world, in the future, everyone will live this way.⁶

Woody Guthrie captured this mood in the following copyright notice he placed on his recordings in the 1940s:

This song is Copyrighted in U.S., under Seal of Copyright # 154085, for a period of 28 years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do.

UK Copyright Law

Copyright, although often dated from the Statute of Anne 1710, owes its modern form to the Copyright Act 1911. The present UK law is found in the Copyright, Design and Patents Act 1988 (and numerous European Union directives). Section 1 states that

Copyright shall subsist . . . in every original literary, dramatic or musical work which is unpublished, and of which the author was a qualified person at the time when the work was made.

Section 3(1) defines a literary work as 'any work . . . which is written, spoken or sung . . .' and a musical work as 'a work consisting of music exclusive of any words or action intended to be sung, spoken or performed with the music'.

The usual elements of a song will therefore be protected in copyright as both a musical work (the music) and a literary work (the lyrics). Variation and selection are also potentially protectable activities in copyright terms. Performing rights, previously legislated separately, is now incorporated within the 1998 act and, as a result of amendments, the rights of performers are now virtually equivalent to authors.⁷ The act also created a new set of moral rights for authors: these protect the author's non-pecuniary interests and include the right to be acknowledged as the author and a right of integrity over the work.⁸ The 1998 act also created a number of exceptions to copyright protection. These exceptions specify that certain acts do not count as copyright infringement, the most significant of which is the defence of fair use in sections 29 and 30.

What is Wanted from Copyright?

Copyright, for the author, should protect new effort and encourage creativity. It should not stifle creativity or corral the common heritage away from the public domain. From the perspective of the performer and the performer's creativity, copyright is a two-faceted problem. On the one hand, they require the availability of the works for interpretation free of others rights but, on the other, they seek to exploit their own version against

plagiarizers. The performer is thus a consumer of both the public domain and, potentially, the copyright system.

Ironically an analogy for this dilemma in respect of the oldest of material can be found in the debates surrounding the newest of technologies. Many software developments have been born in communal activity and yet much corporate ingenuity has been expended upon privatizing the results of that communal property. Perhaps *Apple Computers v. Microsoft*⁹ is the apogee of that process with the plaintiffs claiming monopoly over a standard graphical user interface. The claim was rejected in part because the court recognized that many features of the interface had been derived from the efforts of the wider community. In terms of creativity there is a stark contrast between the views expressed in *Lotus Development v. Paperback Software International*¹⁰ and those contained in *Apple Computers v. Microsoft*. In the former there is great emphasis placed on the need to protect against 'free-riders' who would 'rip off' others' creativity so that the way to further creativity is a strong monopoly that forces the new arrival in a field to use ingenuity in avoiding infringement. In contrast the *Apple Computers v. Microsoft* case seems to encourage the use of the public domain as a starting point upon which to build creativity without wasteful expenditure on re-creating that which already exists into a different form.

In folk music terms the need is to seek new arrangements and interpretation in order to encourage interest and maintain individuality within the tradition. That which does not change and adapt has lost its vitality and essential features of variation and selection. Repetition of the same arrangements leads to pastiche and tedium. But does an over-mighty copyright law lead to change for change's sake – to a loss of tradition? Does overemphasis on a new arrangement lead to a loss of community interest in a song so that it comes to be identified as X's song rather than merely X's version of song. Over-strong copyright could halt the development of communal versions. The contrasting danger is that identified by Farrell:

an emphasis on innovation in reaction to copyright concerns may lead tune composers to shy away from familiar motifs and may then change the character of the musical style itself.¹¹

Changing Perceptions of Copyright

There is no doubt that there has been a gradual extension of copyright regulation. The period of copyright has gradually been extended, there is no longer the need to renew copyright and the scope of material has extended to cover derivative works. Much infringement has been criminalized and technical protection devices recognized. There has also been an evident strengthening of the remedies in relation to fair use. For example, in relation to parodies most are seen as infringements, the focus being on the amount of taking by the defendant, rather than their original contribution.¹² Furthermore, the ability to parody has also come under pressure from the increased development of the concept of moral rights. As an activity parody has much in common with a developing tradition such as folk music.

Lessig analysed the ills bedevilling intellectual property regimes. He suggested that the commonweal is enclosed by ever developing technologies and is diminished by the gradual extensions to the scope of copyright. He pointed to the material covered, including derivative works, the period of protection and those regulated and linked this increase

to judicial restrictions imposed through the requirements for originality and the limited availability of fair use. This tendency is exacerbated by the increased availability of so-called digital rights management systems.

From this context, Lessig¹³ went on to consider the impact of these extensions. Through the use of a wide range of examples including film placement, sampling and the use of film clips, he concluded that the balance in copyright has shifted the balance in favour of existing IP rights holders. He argued that this reduces the potential for creativity by others. His conclusion was that the combination of technology and copyright's reach has extended regulation. As such culture and the public domain¹⁴ is the casualty.

Q5

The property right that is copyright is no longer the balanced right that it was, or was intended to be. The property right that is copyright has become unbalanced, tilted toward an extreme.¹⁵

The problem is exacerbated by concentration of the considerable musical and film catalogues in the hands of a few companies. This removes the individual from the intellectual property equation and brings into question whether there is any justification for the commodification of knowledge within the intellectual property regime.¹⁶

Changing Perceptions of Folk Music

Considerable controversy surrounds the concept of the 'folk song'. In *English Folk Song. Some Conclusions* Cecil Sharpe, the main activist of the revival period in the early twentieth century, proposed an evolutionary model for the development of a folk song around three terms: (1) continuity, whereby the same songs can be found in different places, (2) variation, whereby subtle differences may be found in each manifestation of the song and (3) selection, whereby variants of the song will be judged by the community and accepted and passed on or, if not favoured, discarded. For Sharpe the imperative was to find, collect and transcribe the folk song that had 'survived' as a vestige of some earlier cultural observance. The 'folk' were seen to have passed on the folk song, but had no conception of this process and, in consequence, made no creative contribution to the song. This 'revival', prompted by collectors such as Sharpe and the consequent survivals theory is not without its critics.¹⁷ The accusation is that those advocating a survival theory are undertaking an exercise in the artificial. They have created rather than discovered the concepts of 'the village', 'folk' and 'folk song'. These creations were to replace an ailing and perverted national culture. For survivalists 'artistic, social and political salvation lay in the pure, quintessentially English culture of the rural Folk'.¹⁸

Q6

For others, including Boyes, the concept of the folk song as 'surviving' is fundamentally flawed and ignores the creative role of the performers and their communities. In addition to performance this creative role will involve new arrangements, the mixing of lyrics with different tunes and more complex mixing and sampling techniques, all allowing for the evolution and development of the song and tradition.

If, for the time being, one accepts the falseness of the village image, then it could be argued that the cultural imperative for maintaining a tradition is weakened. The impetus for the discovery of an almost lost past affected through folk song gives way to the cynics. The songs could be treated just as any other songs: nothing special and, therefore, subject to the same regimes as any other song. However, when one talks of the protection of a culture then one is dealing with a word of slippery meaning. It is almost as slippery as the word forever associated with Lessig: 'code'. There is ambiguity

in both words. Does ‘culture’ need to carry the weight of history? Code may refer to the combined experience of everything since the Internet was first created – the intentions of the founders. Or it can mean the expectations – the Netiquette – perhaps based on myths, of the current users. There seem to be many other uses of the phrase. Folk culture can refer not only to the attempt to get to a possibly mythical past, but also to a set of values that one seeks within folk music: established values now based on the experience of the revival which, after all, has a history of over 100 years. Whatever one’s views are of the existence of historical continuity, the tunes were collected in a traditional context and this tradition has informed folk’s development.

So are the Dangers of Copyright to Folk Music Real?

The risk is that copyright extensions attack the core activities of variation, selection and performance, thereby reducing the availability of a comprehensive public domain and threatening the continuity that is inherent in the words ‘tradition’ and ‘folk’. Is there anything in the development of copyright that threatens the place of traditional music in the public domain? Does copyright allow for or even encourage reiteration and development in a performance plus creativity in an interpretation? Or is there a real risk that the common heritage can be taken out of the public domain and privatized?¹⁹

From the perspective of the history of the revival, when could the impact of copyright be felt? One might point to the time of collection or the subsequent use of the collected materials either in anthologies or by way of performance or even by way of inclusion in newly composed pieces by classical composers such as Vaughan Williams. In more recent times the concentration would be more on arrangement for the purposes of recording or a performance.

From the perspective of copyright law there is surprisingly little direct authority dealing with the availability of copyright, particularly covering the early pre-1956 act and collecting period. Even between 1956 and the 1988 act, the absence of a formal requirement of fixation²⁰ meant there was little consideration of what the ‘work’ to be protected amounted to. One is thus thrown back to extracting principles from cases on other issues such as co-ownership and parody or infringement and on analogy with other types of work. The conclusions are inevitably tentative.

The Collecting Process

Within the process of collecting there appears to be three potential activities that might enable the capture of the music for copyright. First, there is the technical skill of transcribing music heard into a written notation. Certainly if one imagines many of the collected pieces to be of different versions of the same tune or song, then the potential is there for a new copyright work to appear each time. Immediately one can discount the fixation fallacy. The idea arises from the fact that a written form is required to copyright a work.²¹ The fallacy is the idea that it is the fixed form that is the work itself. The ‘better’ view is that it merely provides evidence of the oral work in these circumstances. Thus, the collector’s claim must lie with showing some additional ‘musical’ skill. Of course the case of *Walter v. Lane*²² famously suggested that shorthand was a sufficient literary skill, but in the present context that case has been doubted as showing an insufficient quantity of the originality, which was not a requirement for copyright in 1900.

The case suggesting that was indeed a folk song collecting case, *Robertson v. Lewis*,²³ Q7 where it was held that transcription, while undoubtedly skilful, was not a musical skill in the artistic sense required for copyright. This presumably deals with any issue as to modern practices of recording followed by leisurely transcription, but is there any other copyrightable skill in the process? Certainly the mere process of recording itself, while it may require musical skills and be recognized as one of the entrepreneurial copyrights,²⁴ is not an authorial skill in nature and would not lead to copyright in the song itself.²⁵

Cornish and Llewellyn, basing itself on *Robertson v. Lewis*,²⁶ suggested that there may be aesthetic skill shown by the 'folk song hunter' who makes a recording. Again one would query whether this is a musical skill that is authorial in nature. The skills thus involved seem to be more those of research than those of the composer, which seems to be required, for example, in the co-authorship cases. In *Ray v. Classic FM plc*²⁷ Lightman J talks of a contribution of something 'equivalent to penmanship', whilst the language of 'authorship' is used by Laddie J in *Fylde Microsystems Limited v. Key Radio Systems Limited*.²⁸ It could be argued that the skills of Robin Ray in the former case were those of the researcher in compiling the database required by Classic FM. However, it is submitted that they could be better characterized as those of selection with the 'author' bringing his knowledge and aesthetic judgement to bear upon that 'problem'. Likewise it could be argued that the rewarded skill in the recent case of *Sawkins v. Hyperion Records Ltd*,²⁹ Q9 where the claimant in that case had prepared a definitive version of the works of the baroque composer Lalande. Were those skills of research rather than composition? Undoubtedly, it was the scholarship and research skills of Dr Sawkins that enabled him to produce such a work, but nevertheless it was the embodiment of the result of those skills in the completed work that was protected rather than the research itself that was protected.

The type of research produced by Dr Sawkins in any case seems rather different to that of the folk music collectors and it is difficult to see a similar problem arising in our context. The academic search for a particular past may suggest a search for a version of origin, but the characteristics of folk music in the living tradition described above (particularly that of variation) do not invite the search for a single definitive version of a song. Rather the academic exercise is more concerned with the isolation and comparison of difference between versions.

Arrangement and Performance

The extent to which each variation in performance creates a new work needs to be seen in the context of the UK's notoriously low standard of originality. The time honoured and well-nigh universal phrase on every album of 'trad. arr by . . .' is a tribute to the underlying assumptions resulting from that proposition. On the other hand the co-ownership cases show a reluctance to give ownership rights to the interpretive skills of the performer even though to some extent every interpreter of a song is going to infuse the song with a different flavour during its performance. The tests mentioned above from *Ray v. Classic FM plc* and *Fylde Microsystems Limited v. Key Radio Systems Limited*³⁰ were given in the attempt to differentiate the work of the author from those of others who have a role in the product derived from the authorial work.

Of course there must be a question mark as to whether the issues of co-ownership provide a good analogy to the preparation and presentation of a performance. In the

former the performance is only an adjunct to the studio work of a group including everyone from the original writer to those with technical expertise. In our situation the control of the performance is in unitary hands. However, in a folk performance we are long past the stage where improvisation occurs at the moment of the performance and it is submitted that the analogy is valid.

Superficially *Hadley v. Kemp*³¹ and *Beckingham v. Hodgens*³² seem to give one result in each direction. Tony Hadley and the other non-composing members of Spandau Ballet had their efforts characterized as interpretation in performance rather than as authorial in nature. In contrast in *Beckingham v. Hodgens* the claimant had produced the separate violin part away from the remainder of the musicians performing in the studio. As such it appears to be out of line with the majority of cases in that it is not concerned purely with performance and interpretation. Although the reasoning and tests to be applied are the same, the conclusion is unusual. *Hadley v. Kemp* seems much more significant in that considerable modification in the manner of playing a composition was insufficient to give copyright ownership.

The result is that a degree of uncertainty does exist from the application of the distinction between the skills of a performer and those of an arranger. However, this creates no great problem to the survival of the tradition in the public domain as long as it is only the actual novel contribution that is protected and not the entire work as arranged. Nor is creativity endangered as long as the performer is satisfied that the line thus maintained does give protection to their composing skills without interfering with the availability of their repertoire. Thus, any dangers in the situation only arise if over-protection is given to arrangements by allowing the scope of infringement to go beyond the individual's creative additions.

Compilations

The traditional notion of compilation copyrights in the sense of anthologies of collected works would not seem to create a problem even in the sense of a folk song cycle. As long as infringement is restricted to the protection of the order and choice of the songs and not to the contents of individual songs, then the latter should be available to the community. Hopefully, some of the wilder statements from the *Ibcos* case³³ suggesting protection of the 'structure' of compilations as evidenced by their contents can be seen as confined to the computer program context.³⁴

This leaves two possibilities where compilation copyright could create problems.

1. The common situation where an artist will chose to use a particular tune for a set of lyrics that have previously and conventionally been attached to another tune. Essentially there are only two elements to this 'compilation'. Or is it more in that the process will inevitably involve a degree of original arrangement – the adaptation of words to the non-standard tune? The issue is one of how minimalist can a compilation be. Again we can find contrasting views in the computer program cases *Tips v. Daman*³⁵ and *Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd*.³⁶ In the former, the judge was unwilling to see a compilation copyright as existing when a company put together three individual programs as a suite or package of programs even though it was necessary to include some additional programming to coordinate the individual elements. In contrast, in the *Ibcos* case the judge was critical of the decision in *Tips v. Daman* and perceived compilation

copyright as a possibility even when bringing together elements within programs (routines or modules?). If the analogy holds good, then the *Tips* case seems factually closer to the situation being contemplated here in that it involved a limited number of elements, albeit with the need for some adaptation in order to make the elements come together. Further, the idea of seeing an entire program as cut into many separate elements which are then ‘compiled into a whole’ thereby creating a copyright in how the program is put together has at least been doubted in the computer context,³⁷ never mind extending it to the creative arts. As usual the key question revolves around identifying the copyright work and how to infringe it. The motive in the *Ibcos* case for identifying the so-called compilation copyright is to give protection for the structure thus compiled. It begins to become dangerous when the evidence for taking the structure concerns the contents of a program that are commonplace or in the public domain. If, as in *Tips v. Daman* or in the situation under discussion, it is possible to copyright the idea of putting together two or three elements from the public domain, then it would be difficult to see how such a copyright could be protected except by giving a monopoly over the combination. The risk is that infringement would extend not only to the method of adaptation, but maybe even to some *de facto* rights over the contents.

2. In a piece discussing copyright in the context of Irish traditional music Margaret Farrell emphasized the manner in which the music is renewed and refreshed by the emergence of new tunes from elements of existing tunes.³⁸ Drawing on the work of earlier authors, three elements are recognized in the process: ‘outlining’ ‘conjoining’ and ‘recombining’. It is the latter two elements that are important to the present argument. Cowdery described conjoining as being where tunes ‘have sections in common, while other sections differ’ and recombining as where ‘the tunes are “built from the same basic melodic motifs”’.³⁹

Here the compilation issues mentioned in point (1) above become acute. The combination consists of existing elements, which for present purposes we can assume to be in the public domain. To what extent do the combined elements have a separate life? If originality is perceived to exist in the combining of traditional song with traditional motifs, then there is a risk of overzealous protection resulting in the corralling of these elements away from the community. The problem of the *Ibcos* case is always present: if these processes are seen as combining the separate elements, then protection could be given to the process of combining them. Further, by seeing such a result as a compilation, then there is a tendency to see each element as a separate work so that, in terms of substantial, taking of the smaller element would seem quantitatively to be substantial. This would be particularly dangerous in respect of conjoining where the elements joined together are of a fair size (Farrell imagined an eight-bar phrase), as those elements could be part of the common heritage. However, the ultimate risk also relates to recombining, where motifs that might appear to be matters of traditional decoration and style could be hijacked from the public domain. Again the key to all this is the extent to which the *Ibcos* approach to infringement (discussed below) could lead to protection of non-original elements in a work and, thus, the corralling of the elements so combined out of the public domain. It is acknowledged that this would be an artificial way of looking at a song, but it is a risk inherent in the UK approach to copyright. We can see that the danger of recognizing copyright protection for relatively little original novelty lies in the danger that the monopoly will extend beyond those original elements into work that was previously in the public domain.

Infringement

The above discussion shows that there is no great harm in granting copyright protection and ownership to the arranger as long as that protection is restricted to their original contribution. Of course, the corollary to that is that such protection should be very limited. Infringement should be restricted to those who choose to perform precisely the same arrangement of the song and/or tune. One can imagine the artist who would regard that as insufficient and who would suspect plagiarism in, for example, someone who copies the same unusual combination of song and tune. However, such limitations are, it is submitted, necessary if traditional works are not to be corralled outside of the public domain. In the example, it is likely that the idea for the particular combination has come from the previous performer. In copyright terms, there is causation. However, that is just the sort of influence and reference that the living tradition has depended upon. In legal terms is that substantially taking the expression of the previous performer's work?

Whether these risks are real, depends on the interplay of three factors.

1. Firstly, one must establish causation, that is to say whether derivation from the original work can be proved.
2. Secondly, it needs to be established what is the original work that allegedly has been copied.
3. Thirdly, substantial taking from that original work must be shown.

It is a matter of judgement rather than principle as to how to characterize what amount of the work is to be compared and is to be adjudged substantial in newly composed works, but it is submitted that the interplay of the three elements becomes a matter of principle when one is dealing with the arrangement of matter in the public domain. Each of the elements raises some issues as to the corraling of traditional music by the commercial world, but it is when the courts fail to keep the elements separate that the greatest danger occurs.

Of itself the main problem with respect to causation is that the very nature of traditional music means that there are potential causes of similarity other than plagiarism. Derivation from the common heritage and tradition plus those elements of the styles associated with the performance of folk music could provide a convincing explanation of similarity without copying. Yet the classic and developing tests for causation derived from cases such as *Francis, Day & Hunter v. Bron*⁴⁰ encourages the courts to make presumptions from the existence of 'objective similarity'. The onus is *de facto* on the alleged infringer to prove that similarity does not arise from copying. However, the greatest danger comes when the roles of causation and substantiality are merged or fudged. Then the similarity that could be misused for 'proving' causation could also be used for 'proving' substantial taking. This is the frightening prospect suggested by the case of *Designers Guild v. Russell Williams*.⁴¹ In that case the House of Lords stated that, in cases of 'altered copying', then the objective similarity that was sufficient to prove causation would also be sufficient to show that there had been substantial taking. As the processes of developing traditional music involve interpretation from the sources, this potentially seems to be a view to be taken of adaptations of traditional music with a consequent restriction on future artists.

Looking at the same point from a different angle we need to acknowledge as legitimate and necessary the roles of taking inspiration from and making reference to the tradition in

developing the music. But does copyright infringement law make the same acknowledgment? If one looks for analogy the parody cases show reluctance in the courts to take account of motive in determining whether there has been substantial taking.⁴² The need to make reference in order to give strength to an argument is regarded as irrelevant to the issue of judging substantiality.

It is trite law that the comparison to be made is qualitative not quantitative.⁴³ That inevitably leads to concentration on the arrangement itself in showing substantiality. The risk is that the protection extends beyond that crucial element. For example if, as discussed above, a compilation copyright exists in bringing together traditional elements, then substantiality clearly would have to reside in the musical skill of combining the elements. But to what extent does that protection extend to either the mere idea of the combination or to the contents thus combined?

All this leads to the question of the measure of work: identifying what exactly it is that is being protected. One would expect that this would be crucial to the comparison between the work and the allegedly infringing work, particularly in order to adjudge substantiality. However, it has been argued by one of the authors⁴⁴ that the pragmatic approach of British judges has led them to totally ignore the issue. It is submitted that the concept should be used in at least two senses. The first concerns whether there are separate copyrights for the individual elements within a larger work. So, for example, in the context of computer programming, one might imagine a sequence of possibilities for protection from routine to program to suite of programs or in literature a sequence from poem to paragraph to chapter to book or from news item to article to page to newspaper. Generally it is suggested that this is only an issue in folk music in respect of the compilation copyright argument. Building on the ideas of Farrell one could suggest a sequence of phrase to chorus to lyrics or tune/song. If the measure is seen at the lower end of the scale then infringement is a much greater risk.

However, the main argument goes to the second sense. Here the question is whether the protected work equals the entire song/tune or only original additions, namely the value added by the individual performer or arranger. The fear is that the approach to infringement suggested in *Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd*,⁴⁵ now compounded by the approach to causation in *Designers Guild v. Russell Williams* discussed above, will lead to protection of the non-original elements. The key to the *Ibcos* case was that it eschewed the American approach to computer software copyright. There the abstraction–filtration–comparison test⁴⁶ seeks to identify the elements that are in the public domain and to exclude them from the protection offered. In contrast, the fourfold test suggested in the *Ibcos* case seeks to establish the existence of copyright by identifying that which is original but then, in considering both causation and substantiality, makes the comparison to the work as a whole rather than merely to those original parts. It is submitted that even in respect of causation this is dubious when dealing with a work consisting of the adaptation of traditional music. Dicta in the case suggesting that the presence of non-original elements could provide proof of copying seem inappropriate to the context in which folk music develops. It is even more dubious if there is no attempt to separate that which is in the tradition and, thus, in the public domain from the protected elements in the work in adjudging substantiality.

Thus, the greatest legal danger of privatizing the tradition comes from the blurring of the tests of causation and substantiality and from giving protection to the work as a whole. These are typical consequences of the pragmatic UK approach to infringement and makes fears of corraling genuine.

At very least over-great copyright protection poses a risk to the common use of the heritage that suggests that there is an unhappy fit between folk music and copyright. One needs to look at alternative approaches.

Copyright and Lessig

As we commented earlier Lessig's⁴⁷ analysis of the ills bedevilling intellectual property regimes, cornered by ever developing technologies, concludes that the gradual extensions of the scope of copyright has significantly shifted the balance in favour of IP holders and as such reduces the potential for creativity. Add to this the developments in English law blurring the distinction between causation and substantiality, in effect giving protection to the arrangement and folk music faces the twin threats of the 'locking in' of music and collections and also the consequent erosion of the amount of material in the public domain through the corralling of material into copyright.

For Lessig the problem could be encapsulated as the 'locking down of culture'.⁴⁸ What then is the 'culture' with folk music that the law and, in particular, the overweening intellectual property regimes are locking down? Reflecting the critique of the survivalist claims, folk culture becomes not merely discovery of a lost and yearned for past, but also a set of values implicit within the constant regeneration of the music. The solutions proposed by Lessig⁴⁹ include the reintroduction of registration and renewal periods, shortening the period of protection and some relaxation of the rules governing fair use, particularly the introduction of a new statutory regime for governing derivative rights. The detailed jurisprudence we isolated with regard to the case law on copyright suggests that it will be impossible to make the necessary changes to the subtle interpretations of the concepts of originality and infringement in order to overcome the corralling of the public domain.

Lessig however had a broader option for saving culture. He advocated the use of a more flexible regime of copyright through a series of alternative licensing contracts, now more formally brought together under the umbrella of the Creative Commons licences. These seek flexibility through a series of agreements that allow the copyright holder to reserve and waive rights.⁵⁰ So, for example, the 'sharing licence' contains the phrase this licence allows others 'to take a sample from your song and include it in their own'. Although there are three basic licences, standard, sampling and share, authors may 'mix and match' amongst these to create a licence individual to their needs.

Within the context of a new arrangement, even if copyright is given for material less than novel through a Creative Commons sharing licence, the material becomes available for others. Similarly with cojoining copyright can enable the material to return to the public domain. It would also appear that the Creative Commons licence could deal with the greatest danger, that where the roles of causation and substantiality are merged or fudged. As we commented earlier 'this is the frightening prospect suggested by the case of *Designers Guild v. Russell Williams*'.⁵¹ The need to innovate is lessened if the previous material is held with a Creative Commons sharing licence, which would allow the composer to use the 'familiar motifs'.

Are we therefore able to conclude that the Creative Commons licence is the salvation of the folk music culture. We would submit it is not. Folk culture is not merely the mechanical mixing and joining of tunes and lyrics: it is a set of values reflected in a set of processes where the music is refreshed, emphasizing variation and selection but with little thought to individual rights. Herein lies the weakness of the Creative Commons system: the

reluctance of folk music composers and performers to enforce copyright in their works. This then leaves these works vulnerable to the copyright claims of others. As McCann commented

The reluctance of traditional composers to copyright their tunes ... stems from a complex web of social relationships and a recognition of a tradition that incorporates past, present, and future generations. Eroneous copyrighting of these tune and songs means that ... amateur traditional musicians may eventually be deprived of the free use of the music.⁵²

This was affirmed by WIPO in their report *Intellectual Property and Traditional Cultural Expressions, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*: Q10

... non-Indigenous and non-traditional persons ... are able to acquire copyright over 'new' folkloric expressions or folkloric expressions incorporated in derivative works, such as adaptations and arrangements of music.⁵³

Therefore, whilst providing much welcomed flexibility to creators of 'original' (but not in its extended form) copyrightable works these licences focus on the sharing and distribution of new music and are therefore less useful in the protection and encouragement of folk music where reliance is placed more on adaptation and development than on the creation of the new.⁵⁴ Thus, even with the extensive use of such licences there inevitably continues to be, with the present extension to the copyright regimes, an erosion of the amount of music available for free use.⁵⁵

All Creative Commons licences therefore retain at their heart the basic concepts of intellectual property regimes. The same is true of what alternatively may superficially be the most attractive method of promoting folk culture, the 'open source' concept. Open source 'involves the free distribution of creative content where others are free to use, copy, and alter content'.⁵⁶ Open source has exploited technologies that have transformed the creation, production and dissemination of content. Although usually thought of in terms of computer software the movement 'promises to reach far beyond software'.⁵⁷ If the traditional rationale for intellectual property rights is the encouragement of cultural and creative content by rewarding the innovator, then the open source movement undermines this by showing that the creation of content can occur outside the traditional reward structure. The principles behind the open source movement in relation to software are that the source code should be available to all so that others can take and improve on the original. Should such a user take some of this code then any licence they issue cannot charge others for its use or restrict them from making further modifications of the program. Each licensee agrees that all subsequent licensees may use or modify on the same terms as the original licensee. These provisions are found in the General Public Licence (GPL) prepared by the Free Software Movement and the many variants available.⁵⁸ The GPL is firmly rooted in traditional intellectual property regimes placing reliance on copyright ownership within a complex system of licences, both express and implied. The variant licences allow modification of the main variables in software development, price, redistribution rights, usage rights, source code availability and modifiability and ownership of derivatives. The complexity, governance and liability within the open source system have not yet been subject to detailed judicial scrutiny but the recent SCO⁵⁹ litigation may indicate where future battle lines may be drawn.⁶⁰

Yet the true understanding of open source lies not in the technicalities but in the process. As was evident in the comment from the so-called Halloween Documents: 'Unlike freely distributed binaries, Open Source encourages a process around a core code base and encourages extensions to the codebase by other developers'.⁶¹

Given the corraling effect of traditional copyright does the open source process offer a mechanism for enabling the retention of the elements of the folk music culture? Undoubtedly the open source concept does foster the ability to select, vary and perform traditional music, thereby allowing the music to be refreshed and invigorated. Yet again however the system is plagued by its dependence upon copyright. The SCO litigation illustrates the potential problem areas that could beset folk music. Initially disputes could centre, as in the SCO litigation, on original ownership of the material. If many of the songs in the folk music tradition are derivative rather than original it may not be obvious whom, if anyone, owns the original work. Others who claim previous copyright may challenge an individual composer placing a song with the open source licence, thus effectively negating any attempt to place the material as open source. Further, any intellectual property-based system has the potential for removing what it has given and it is open to the original licensee to terminate the open source licence, assuming, of course, that the licence is considered valid in that the work is considered to be 'new'. Finally, any arrangement of the open source material having the necessary elements of originality would itself be copyrightable and so therefore enable the holder to control future use over not only the arrangement but also possibly the original source.

Whilst not denying that these initiatives are extremely useful for the continuing development of the new works (and indeed allowing conjoining where tunes have sections in common, while other sections differ), neither system appears to offer the potential that the writings of Lessig suggest. His view that benefits can be obtained from modified or watered down intellectual property-based systems offers only limited protection for folk music tradition. Indeed, it might even be questioned whether the concept of a 'commons' as a return to a more effective system for better protecting culture is itself flawed. Within the debate around the meaning of 'folk' Boyes commented that 'the prospect the Revival offers is not simple a world as it had been but a world as it could be again'.⁶²

Q12

Is the Creative Commons initiative looking for a reality that never existed? Was there really a time where all was shared? The extensions of copyright for the minimum of originality mean that works subject to both Creative Commons and open source licences remain vulnerable to those who modify and then claim a new copyright: those with the new copyright may then use the extensions of infringement to claim infringement over many of the elements of the original song. The corraling effects of the extended intellectual property rights will not be halted by the use of Creative Commons or open source licences.

Conclusion

Q13

... the folk song is, by definition, and as far as we can tell, by reality, entirely a product of plagiarism.⁶³

... creative and tradition, individual and community, together produce vital variability...⁶⁴

The culture of folk music provides what may be an insurmountable challenge to any intellectual property regime, no matter how diluted. Most obviously intellectual property regimes seek to privatize ownership and are designed to be held by individuals or corporations, whereas folk music is considered to have a collective ownership. Intellectual property rights are time limited, whereas folk music is essentially passed from generation to generation. Finally, intellectual property systems seek to reward the inventive and the novel, whereas traditional innovation within folk music is more incremental and informal. Whilst the Creative Commons initiative is to be welcomed its concern is to allow new creative work to be available within the ‘commons’. However, it is less able to prevent continued corralling of the existing public domain with the consequent effect of drawing the lifeblood out of traditional music. Solutions need to be more radical and look outside intellectual property regimes. Whilst it is outside the scope of this paper the authors would tentatively suggest that consideration be given to the ever-growing work in and around traditional knowledge systems. Although they are often seen as the means for protecting static knowledge it has been acknowledged by WIPO that ‘... tradition can be an important source of creativity and innovation’.⁶⁵

Perhaps a culture such as that in folk music, which relies on both tradition and innovation, would be better served by a system more attuned to traditional knowledge, so indeed it will be ‘no milk today’.

Notes and References

Q14

- 1 G Austin, ‘Copyright’s modest ontology – theory and pragmatism’, in *Eldred v. Ashcroft* (2003) 16 Can. JL & Juris 163.
- 2 For a review of the meaning of the term public domain see D Lange, *Reimagining the Public Domain Law and Contemporary Problems*, Vol 66, pp 463–483, 2003.
- 3 L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin Press, New York, 2004 and L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, Vintage Books, New York, 2002.
- 4 C J Bearman, ‘Who were the folk? The demography of Cecil Sharp’s Somerset folk singers’, *Historical Journal*, Vol 43, No 3. pp 751–775.
- 5 G Boyes, *The Imagined Village: Culture, Ideology, and the English Folk Revival*, Manchester University Press, p 14, 1993.
- 6 D Atkinson, *English Folk Song Bibliography*, 2nd edn, 1999, <http://www.efdss.org/songbib.htm#1.%20Revivals>
- 7 Rental Rights Directive amending CDP Act 1998, creating fully assignable property rights.
- 8 UK Copyright, Design and Patents Act 1998, sections 77 and 80.
- 9 33 F3d 1435 (1994) discussed in E Cameron, *Apple v Microsoft*, *International Yearbook of Law Computers and Technology*, Vol 7, p 243, 1993.
- 10 740 F Supp 37 (1990) discussed in E Cameron: *Lotus v Paperback*, *International Yearbook of Law Computers and Technology*, Vol 6, p 213, 1992.
- 11 M Farrell, *Who Owns the Tunes? An Exploration of Composition Ownership in Irish Traditional Music*, 2003, <http://www.beyondthecommons.com/farrell.html>, discussed below.
- 12 *Glyn v. Weston Feature Film* [1916] 1 Ch. 261, *Williamson Music v. The Pearson Partnership* [1987] FSR 97.
- 13 L Lessig *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin Press, New York, 2004.
- 14 For a detailed review of the history of copyright and the public domain see D Hunter, *Culture Wars*, <http://ssrn.com/abstract=586463>, p 22.
- 15 Note 13, p 173.

- 16 This topic is outside the scope of this paper and readers should refer to M Woodmansee, 'On the author effect: recovering collectivity', in M Woodmansee and P Jaszi (eds) *The Construction of Authorship*, Duke University Press, 1994 and S Fatima, 'A legal philosophy for technological informatics, in *15th BILETA Conference*, University of Warwick, April 2000, <<http://www.bileta.ac.uk/00papers/fatima.html> >
- 17 G Boyes. *The Imagined Village: Culture, Ideology, and the English Folk Revival*, Manchester University Press, Manchester, 1993 and D Harker, *Fakesong: The Manufacture of British 'Folksong', 1700 to the Present Day*, Open University Press, Milton Keynes, 1985.
- 18 Boyes, *op cit*, p 27.
- 19 For a discussion on the rights and wrongs of the erosion of the public domain see 'The Bellagio Declaration', in *From the Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era Rockerfeller Conference*, 1993, <http://www.cwru.edu/affil/sce/BellagioDec.html>
- 20 Although the consensus at that time was that there was an implied requirement.
- 21 S3(2) CDPA 1988 but previously – probably – regarded as an implied requirement.
- 22 [1900] AC 539.
- 23 (1960) reported at [1976] RPC 169.
- 24 ss1(1)(b); 5A CDPA 1988, sound recordings.
- 25 See *Norowzian v. Arks* [1998] FSR 394.
- 26 *Supra*. Cornish (check new edition pp 10–35).
- 27 [1998] FSR 449.
- 28 [1998] FSR 622; the two cases are discussed in Cameron, 'Structure and the classics', *International Review of Law Computers & Technology*, Vol 12, No 3, p 547, 1998.
- 29 [2004] EWHC 1530, [2004] All ER (D) 23.
- 30 *Supra*.
- 31 [1999] EMLR 589.
- 32 [2003] FSR 238.
- 33 See below [1994] FSR 275.
- 34 Although one of the joint authors of this piece has consistently argued that Ibcos is extremely dubious in this respect in the context of computer programs.
- 35 ACCL, 1991, *International Yearbook of Law, Computer and Technology*, 1992.
- 36 [1994] FSR 275.
- 37 See *Cantor Fitzgerald v. Tradition* [1999] 2 All ER 411 discussed in E Cameron, 'The pursuit of programmers by their ex-employers, *International Review of Law Computer & Technology*, Vol 13, No 2, p 255, 1999.
- 38 M Farrell, *Who Owns the Tunes? An Exploration of Composition Ownership in Irish Traditional Music*, 2003, <http://www.beyondthecommons.com/farrell.html>
- 39 Both passages cited by Farrell (*op cit*).
- 40 [1963] Ch 587.
- 41 [2001] FSR 11, [2001] 1 All ER 700.
- 42 See, for example, *Schweppes v. Wellington Ltd* [1984] FSR 210 and *Williamson Music v. The Pearson Partnership* [1987] FSR 97.
- 43 Lord Reid in *Ladbroke v. William Hill* [1964] 1 W.L.R. 273.
- 44 In the series *Major Cases in International Review of Law Computers & Technology* especially Cameron, 'The measure of the program in copyright', *International Review of Law Computers & Technology*, Vol 12, No 1, p 161, 1998.
- 45 [1994] FSR 275 discussed by Cameron, *Ibcos V Barclay's Mercantile*, *International Yearbook of Law Computers and Technology*, Vol 9, p 221, 1995.
- 46 *Computer Associates v. Altai* 982 F2d 693 (1992).
- 47 L Lessig, *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity*, pp 287–306.

- 48 L Lessig, *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity*, Penguin, New York, 2004.
- 49 L Lessig, *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity*, pp 287–306.
- 50 <http://creativecommons.org/about/legal/>
- 51 [2001] FSR 11, [2001] 1 All ER 700.
- 52 A McCann, Traditional music and copyright – the issues, presented at ‘Crossing Boundaries’, in *Seventh Annual Conference of the International Association for the Study of Common Property*, Vancouver, British Columbia, Canada, p 9, 10–14 June 1998, <http://www.indiana.edu/~iascp/abstracts/367.html>
- 53 *Intellectual Property and Traditional Cultural Expressions, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, WIPO, 2003, www.wipo.int/en/cultural/background/issuespaper.html
- 54 See Farrell, *op cit*.
- 55 For an exploration of the issues facing Irish traditional music in the context of performance rights see A McCann, ‘All that is not given is lost: Irish traditional music, copyright and common property’, *Ethnomusicology*, Vol 45, No 1, 2001.
- 56 GMU Project, Free Software Definition, <http://www.gnu.org/philosphy/free-sw.html>
- 57 D Hunter, *Culture Wars*, <http://ssrn.com/abstract=586463>, p 22.
- 58 <http://www.opensource.org/index.php>
- 59 For a brief overview of the litigation see the Informit Network, <http://www.informit.com/articles/article.asp?p=175171&seqNum=6>
- 60 The recent correspondence in the *Financial Times* between Richard Epstein and James Boyle raises many of the potential problem areas with the open source idea, <http://news.ft.com/cms/s/78d9812a-2386-11d9-ae5-0000e2511c8.html#U101244209021g4>
- 61 A set of internal memoranda distributed by Microsoft pointing to the challenge of open source software, <http://www.opensource.org/halloween/halloween1.php>
- 62 Boyes, *op cit* p 4.
- 63 P Seeger, *The Incomplete Folksinger*, quoted in A McCann, *Traditional Music and Copyright – The Issues*, *op cit*, p 5.
- 64 S J Bronner, *Creativity and Tradition in Folklore: New Directions*, quoted in McCann, *op cit*, p 6.
- 65 *WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, WIPO/GRTKF/IC/5/3 (2003) Annex para. 27.