



Beyond the commons : the expansion of the Irish Music Rights Organisation, the elimination of uncertainty, and the politics of enclosure

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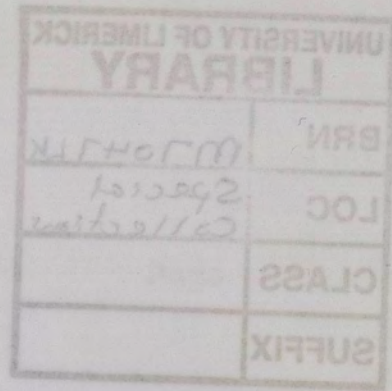
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Beyond the Commons:

**The Expansion of the Irish Music Rights Organisation,
The Elimination of Uncertainty,
and
The Politics of Enclosure**

Volume 1 of 2

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A thesis submitted for the degree of
Doctor of Philosophy

The University of Limerick

Supervisor: Dr. John O'Connell

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Introduction

A Cup of Tea, A Letter, and Words of Bold Confusion

It was raining, as it usually did in Galway, and it was quite cold. I was glad of the chance to nip inside the pub, and anyway, I had to discuss the details of a possible forthcoming gig with the proprietor. I wasn't driving, so calling for a pint wouldn't have been a problem, but, quite frankly, I was more in the mood for a cup of tea.

Having taken off my coat, seated myself on the barstool, sipped my tea, and passed quickly over the ceremonial weather blather, the conversation soon deepened, as conversations with barman in Ireland usually do. The barman wasn't from Galway, as his thick Cork accent let you know in no uncertain terms, and there were those who would tell you in rushed tones that he wasn't from Cork either.

He wasn't a happy man, wherever he was from. From what I could make out, he had opened his mail to a letter which he was not inclined in the least to agree with. It had come from the Irish Music Rights Organisation, the national performing rights collection agency, known to friends as IMRO. They wanted him to pay money, which was bad enough as far as he was concerned, but what was worse was that they had I rhyme to see myself, to set the darkness echoing on in the bar a few times a week. Although they were by no means the most raucous of sessions in Galway, a tourist mecca at the best of times, the barman as he was concerned, 'traditional'.

I was vaguely aware of the problem that now concerned the barman, as every session-going traditional musician was, although I had tended to avoid seeking out the details. It seemed all a bit too confusing and ever so slightly dangerous, suggestive of signs that proclaim "Here Be Dragons!" I really wasn't a very political animal. Mostly, all I knew was that a lot of publicans had been getting more than a little peeved as IMRO continued to seek payment for royalty licenses. I didn't really understand how they worked. I didn't know anybody who did. Not really. It crossed my mind at the time that contesting payment for 'traditional sessions' was an important point, but that, to be honest, money was the bottom line for this guy. I was moonlighting as a journalist, so I decided to listen anyway. You never know where a conversation with a barman is going to lead you.

He produced the letter he had received from IMRO, and read it out. It seemed to be pretty much a pro-forma letter as would be written by anyone demanding money from a publican. One line struck me, though: "I wish to explain that our interest lies in the public performance of copyright music and as traditional does not automatically mean non-copyright we are therefore pursuing royalties with you for these performances". I got him to repeat the line, slowly, very slowly. My attempt to make sense of the logic of that sentence was to lead me to places that I had never even imagined.

I have often found myself in casual conversation with musicians. There is one question I dread: "So, what's your thesis about?" Personally, I find this a very difficult question to answer. For a long time I wasn't really sure what the answer was myself. I tend to overpromise. The simple answer I usually give is "music and copyright". People hear "music" and there's a flicker of interest. They hear "copyright" and their eyes glaze over. If I get a reaction that indicates the presence of life it is often the rolling of eyes to heaven. The mention of "copyright" most often signals that it's time to talk about

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something else. It is hardly a subject to provoke widespread enthusiasm or interest, being as it is ensconced in legal particularities and often mind-bending paradoxes. People sometimes, in seriousness, tell me that I have chosen a 'sexy topic'. These people are never musicians.

In this thesis I provide a theoretical analysis of the expansion of the Irish Music Rights Organisation (IMRO) during the period 1995-2000 as an example of the process and practices of enclosure. Enclosure, I eventually argue, is dispositional, founded on a disposition towards the elimination of uncertainty. Unquestioned acceptance of the Irish Music Rights Organisation entails unquestioned acceptance of the labels, categories, meanings, and expectations of law, intellectual property, performing rights, and copyright. Such acceptance, I argue, contributes to very particular effects of power in the ways that people relate to each other as they negotiate social interaction.

My research is complicated by my membership of the Irish Music Rights Organisation. I have laboured as a singer-songwriter since I was nineteen. I can honestly say, however, that my early dreams of music-business glory have been replaced by quieter concerns with stories well told, and songs well crafted. Nevertheless, I have experienced all the confusion, and uncertainty outlined in this thesis on a very personal level. To question the position of the Irish Music Rights Organisation has been, in my own case, to question myself. I have become aware that I have different and often conflicting ways of making sense of the worlds I live in. I have found myself questioning some of the most taken-for-granted elements of my personally-earned understandings.

Research

This study is the outcome of research carried out from January 1995 until January 2002. From 1994 until 1997 I undertook an M.Phil. in Irish Studies at University College, Galway. During March 1998 I held a Royal Irish Academy/British Academy Research Award for study at the University of Oxford. I held the position of Fulbright Research Scholar at the Smithsonian

Center for Folklife and Cultural Heritage, Washington DC from September 1998 until July 1999. While at the Center I was engaged as one of the project coordinators for the UNESCO/Smithsonian World Conference: "A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation" held at the Smithsonian Institution in Washington DC, from June 27-30, 1999 (see Seitel, ed. 2001). I was registered as a doctoral candidate in Ethnomusicology at the Irish World Music Centre, University of Limerick from 1997 until 2002.

Extensive multi-site fieldwork interviews were conducted with recognised 'traditional' musicians from 1997 through 1999. The most intense period of fieldwork took place from October 1998 until May 1999, during my stay at the Smithsonian. Fieldwork sites at this time included Seattle, Philadelphia, Chicago, Boston, Baltimore, Bloomington, and Washington DC. Only a small number of interviews conducted will be referred to directly, but all have been crucial in coming to an understanding of the issues in this thesis. The reasons for this are explored in Chapter 1. Interviews were accompanied by prolonged periods of participant-observation among 'traditional' musicians as a bodhrán player and unaccompanied singer. This work was a reflective extension of my participation in similar contexts for a number of years prior to the commencement of this research. I am grateful to many people for regular feedback and critical comments which enabled me to periodically triangulate my findings.

The term 'fieldwork' is something of a retrospective label, which perhaps wrongly suggests a high degree of formalisation. The 'fieldwork process' here refers, in many cases, to the development and maintenance of friendships based around common interests. Many of the 'interviews' would, in another context, be regarded simply as 'friendly conversations from which I learned a lot'. I found that I was aware of learning more from those I had not previously known. People who were already close friends often left many things unstated under the assumption of shared knowledge, and, similarly, I perhaps left many questions unasked.

I have attempted to gather a wide range of information relevant to the affairs of the Irish Music Rights Organisation, including working papers, interviews with staff, publicity material, internal documents, informational and promotional literature. Interviews with representatives of the Irish Music Rights Organisation were conducted, although the tendency for officials to repeat a "party line" consistent with documentation and legislation was noted. Thenceforth, reports, press releases, newspaper articles, and official presentations were primarily used as source material. Being myself a member of the Irish Music Rights Organisation I was in receipt of regular IMRO newsletters, an invaluable source with which to gauge the official representations made by the organisation. I also made a research visit to the IMRO library archives in Dublin. Considerable information on the organisation is freely available at the IMRO website (<http://www.imro.ie>), although a number of pages sourced during the research are no longer available. This is noted in footnotes where relevant. It must be noted here that this thesis does not provide a case study of the organisation. A case study analysis would have required a considerably different methodology. Rather this is a *theoretical* analysis of the relational implications of IMRO's expansion from 1995-2000. My focus on the expansion of the Irish Music Rights Organisation has led me to regard analysis of both the Mechanical Copyright Protection Society (MCPS) and of Phonographic Performance Ireland (PPI), similar organisations in many ways, as being beyond the scope of this inquiry.

I would like to be able to claim that "to embody a sensitivity to the marginalized - absences and inaudibilities in contemporary cultural spheres - I have avoided limiting this study to reported cases or even to litigated disputes" (Coombe 1998:9). The truth is that there are few directly relevant reported cases or litigated disputes to which I have been able to gain access. The representatives of the Irish Music Rights Organisation will not even consider taking up a case unless victory is guaranteed, and those cases taken have largely been settled out of court, leaving little but anecdotal evidence. Furthermore, "there has never been a fully comprehensive system

of law reporting in Ireland" (Ó Máille 1990:v). The judgements of the High Court, Supreme Court, and Court of Criminal Appeal, are increasingly available, but there is no system for reporting District Court and Circuit Court decisions and judgements, those most relevant to my concerns here. In this thesis I have had to rely, with caution, on the internal reporting of the Irish Music Rights Organisation in their members' newsletter.

All of the debates conducted in the Dáil (Irish parliament) on the Copyright and Related Rights bill during the period 1997-2000 are available as full transcripts on the Internet. These transcripts are lengthy and repetitive, but are particularly illuminating for the degree to which the standard discourses of copyright and intellectual property are reinforced within the debates of central government. It is beyond the scope of this thesis to elaborate on this point. It does, however, merit further investigation. Also available on the Internet are the texts of decisions passed down by the Irish Competition Authority. All website addresses are listed in footnotes where relevant.

Stylistic Features

The project was initially driven by my interest in what is considered 'traditional' music and song in Ireland. I approached it as a person who sings songs and plays the odd tune, and as an ex-journalist in the field of 'traditional' music. More correctly, perhaps, it is driven by love and respect for people I have met in 'traditional' contexts over the years. Many people I have met on my travels know more about what it means to be human than I could ever find out with twenty theses like this one.

Subsequently, this thesis has been written not only for an academic audience, but also mindful of a more general readership. In this respect, I have structured the thesis so that the concentration of formal theoretical analysis increases as the thesis progresses. Thus, it is hoped that most of the thesis is accessible to most readers, and that later theoretical stages emerge in a less abrupt manner. I have attempted to use a minimum of theoretical jargon, employing technical terms with discretion. I have tried to

be as clear as possible where theoretical analysis is concerned. Any failings in this respect are my own.

A key factor in this quest for accessibility is the incorporation of a number of 'ethnographic passages' into the body of the thesis, such as is offered at the beginning of this introduction. These passages review key moments in the development of my research. They are presented in the personal manner in which they were experienced. I try to provide some insight into what it was like to experience these moments as they happened. This is not done in the structuralist sense of trying to freeze time in a synchronic "ethnographic moment" (see Fabian 1983). Rather, it is more sympathetic with a journalistic approach often found in feature articles that tries to give a sense of having been there. I think it is vitally important that I convey a sense of the intense personal impact that the expansionary activities of the Irish Music Rights Organisation have had on many people. These passages give some idea of the competing meanings and expectations that came to light in the midst of uncertainty, confusion, and conflict. An awareness of local and specific interpretive arenas also leads to an awareness of the importance of individually-negotiated social interaction. Participants in these exchanges, myself included¹, are compelled to adapt and shift with the nuances of what happens amidst a co-existence of voices, perspectives, discourses, and personalities. The issues, then, are not experienced as merely abstract concerns, but as proximate realities in "dialogic moments that, however halting, chaotic, or conflictual, form the core of human social and personal life"².

Chapter 4 contains three such passages. The first, "The Rumble at the Crossroads", recounts the exchanges that occurred following a paper presentation at a conference in Dublin in April, 1996. The paper, given by William Hammond, was perhaps the first formal airing of the confusion and

¹ It is important to remember that I experienced these events as a signed-up member of the Irish Music Rights Organisation. I also regarded myself as a neophyte member of a 'traditional' community. The conflicts reported here reflect personal tensions in the course of my research.

² William Washabaugh (http://www.uwm.edu/~wash/102_18.htm).

bewilderment that many in 'traditional music' circles felt in the face of the expansion of the Irish Music Rights Organisation. Hammond's presentation, and its aftermath, could be considered a significant flashpoint in IMRO's cycle of expansion in the 'traditional' domain. The second passage, "Copyright Nearly Killed the Radio Star", reports a heated discussion that took place in February, 1997, on Today With Pat Kenny, a popular daily radio talkshow on the national broadcast network, RTÉ (*Raidió Teilifís Éireann*). Two people had been invited to speak on the show. They were to discuss demands that representatives of the Irish Music Rights Organisation were making with regard to 'Irish traditional sessions'. On one side of the debate was Hugh Duffy, then Chief Executive Officer of IMRO; on the other was Fintan Vallely, a respected musician, journalist, and ethnomusicologist who specialises in 'traditional music' issues. The third passage, "The Marsh", reviews a specially-convened seminar on 'traditional music' and copyright that took place in Letterkenny, Co. Donegal, in October, 1997. This seminar provided yet another opportunity for the issue to be debated.³

The fifth and final ethnographic passage is presented in Chapter 9. This provides an overview of an Extraordinary and Annual General Meeting of the Irish Music Rights Organisation as it occurred in Dublin in September, 2000. This passage offers an opportunity to ethnographically illustrate some of the features of enclosure that have been discussed up to that point.

Writing style has become quite problematic within anthropological research. Many of the tensions between literary representation and claims to ethnographic validity are discussed at length in the seminal collection Writing Culture (Clifford and Marcus, eds. 1986). There are a number of different writing styles employed in the course of "Beyond the Commons". This is intended to convey the variety of linguistic and social registers in and through which we move in the course of our lives. In writing I often move from a playful and colloquial approach to a more formal, theoretical tone, and back

³ It is notable that in each case there is an absence of official *Comhaltas Ceoltóirí Éireann* (CCÉ) representation. The relationship between Comhaltas and IMRO is dealt with in detail in Chapter 4.

again. A wide range of grammatical and rhetorical techniques are used to broaden the associations evoked in the negotiation of both writing and reading this thesis. I also frequently intended to evoke the ever-presence of uncertainty in our experience. To this end, then, there are very few definitive statements, each statement being wary of the possibilities of alternatives, the persistence of windows to the 'otherwise'.

Where my specifically individually-negotiated experience is referred to I use the first person singular. Where I refer to development of the argument presented I use the first person plural, in rhetorical acknowledgement of the participation of readers. I have also taken the paradoxical step of making extensive use of the passive voice while also seeking to emphasise the importance of personally experienced specificity.

Often words and references in the text are offered playfully so that they might resonate quietly with other words and references elsewhere. These are never signposted and are left for the reader to discover for themselves. There are, for example, a number of running motifs that I hope are not overstated. Where possible I have allowed room for readers to make their own connections.

A number of Irish-language phrases are used in the text. Where a term is not italicised, the term is used regularly in the English language in Ireland. Conversely, where a term is italicised, it is rarely used in spoken or written English. Elsewhere italics are used for emphasis.

Bibliography

Within the field of what might be called 'intellectual property studies' I found myself with a vast array of positions to contend with, ranging from economic analyses of intellectual property law (e.g., Merges 1996) to deeply concerned arguments against the encroachment of intellectual property upon the lives of indigenous peoples (e.g., Greaves, ed. 1994; Posey and Dutfield 1996; Brush and Stabinsky, eds. 1996). The literature on copyright within the

discipline of legal studies alone runs far and wide. I found the work of Goldstein (1990, 1994), Ginsburg (1997), Patterson and Lindberg (1991), Samuelson (1991, 1994, 1996, 1996a, 1998), and Litman (1996, 1997, 1998) particularly engaging. I maintained a bibliographic database⁴ of related material, all the while narrowing the focus of the research. I received particular assistance in compiling this database from the staffs of the libraries of the Working Group on Traditional Resource Rights, affiliated to Mansfield College, Oxford, and the Folklife Reading Room of the Library of Congress in Washington, D.C.. The bibliographic style is consistent with that of the journal *Ethnomusicology*.

The direction of the thesis changed considerably during the course of my research, however. These changes are discussed in detail in Chapter 1. The appended bibliography reflects the entire research period from 1996 until 2001. As a result of the many shifts in research focus, not all of the publications in the bibliography have been cited in the body of the text. Nevertheless, I felt it important to provide a comprehensive record of the range of material consulted. In many ways the bibliography represents the photographic negative of my thesis. Also, this research has proceeded largely on the basis of associative thinking and often on the basis of serendipity and synchronicity. The character of my bibliography speaks of this. I would further hope that this bibliography serves as a resource for people engaged in the study of issues related to this thesis. An expanding and thematically-organised version of this bibliography will be maintained on the Internet at a later stage.

Ethnomusicology or 'Eh ... no music-ology'?

This thesis is undertaken within the research field of ethnomusicology. In 1979 the ethnomusicologist George List said that:

The field of study known as ethnomusicology has expanded so rapidly that it now encompasses almost any type of human activity that conceivably can be related in

⁴ A select bibliography on music and copyright, drawn from this database, is maintained at <http://orpheus.tamu.edu/pmssem/pmssem.htm>

some manner to what may be termed music. The data and methods used are derived from many disciplines found in the arts, the humanities, the social sciences, and the physical sciences. The variety of philosophies, approaches, and methods utilized is enormous. It is impossible to encompass them all within one definition (cited in Myers, ed. 1992:14).

In the course of my research it has become clear that the field of ethnomusicology is as hopelessly interdisciplinary as my own thesis has turned out to be, which has been more than comforting. Not only that, but my personal curse of finding most commonly-used terms in most fields partially objectionable is also reflected in the field of ethnomusicology, and I believe this to be no bad thing:

In the 1990s, the conscientious ethnomusicologist is often at a loss for descriptive words to explain his enterprise, having been stripped during the last several decades of his working vocabulary of vivid, colourful terms. In the kingdom of exiled words live the labels condemned as pejorative: the old-timers, 'savage', 'primitive', 'exotic', 'Oriental', 'Far Eastern'; some newcomers, 'folk', 'non-Western', 'non-literate', 'pre-literate'; and recently 'world'. 'Traditional' survived the trial of the seventies, leaving ethnomusicologists with an impotent concept that refers, in the world of music, to everything and therefore nothing (Myers 1992:11).

In the late 1960s it was stated that: "Ethnomusicology is concerned with the music of other peoples" (Wachsmann cited in Myers, ed. 1992:8). This is still a popular notion of the field and one which at first made me question my role as an Irish doctoral student doing research in Ireland in an Irish university under the umbrella of the field of Ethnomusicology. But, as Rice writes: "Even so-called "insider" ethnomusicologists, those born into the cultures they study, undergo a productive distancing necessary to the explanation and critical understanding of their own cultures" (1994:6). The term "ethnomusicology" engenders something of the same reaction that the word "copyright" does among the uninitiated - typically, glazed eyes and a vacant stare - which threatened to condemn me to a somewhat isolationist pursuit in the course of my research (Thankfully, this has not been the case). I shall not seek to define ethnomusicology. From a pragmatic perspective, the field of ethnomusicology has allowed me to hold a research position in a university department, permitting me to delve into the fields of anthropology, sociology, folklore, and critical legal theory. Starting from within ethnomusicology has also led me to question the use of the term "music" at all. To paraphrase Foucault: "... it is precisely this idea of [music] *in itself* that we cannot accept without examination" (1990:152).

Things that are presented as natural, inevitable, or necessary, then maybe

The term 'music' is such a commonplace that it seems natural, and inevitable, that it be used as a category for analysis in ethnomusicology. It seems to be understood that we know what it is that we are referring to when we use the word, that there is "a cultural phenomenon called "music"" (Wallis and Malm 1984). There are innumerable books, recordings, classes, and conferences to support such a claim. Like those in the fields of musicology and ethnomusicology, those who participate in the discourses of the law, economics, intellectual property, and copyright presume that there is such a thing as "music". There is nothing in our experiences of the music industry, technologies, music education, concert performance, and aesthetic appreciation to suggest otherwise, it is assumed. Almost my entire journalistic experience, for example, was based on the assumption that 'music' was the focus of my inquiry.

What if there isn't a 'thing' called music? What if our acceptance of the abstraction of a singular category of "music" is counterproductive to our research concerns, at least those weighted towards the disciplines of anthropology and sociology? What if we are able to analyse "music" because we set out to analyse "music", and classify, separate, and differentiate in ways which justify our analysis and satisfy our curiosity, systematically forming the object of which we speak (Foucault 1972:49). As an intellectual exercise, what if we try to understand what we have been trying to understand without using the term "music" as a category on which to base our analyses? I realise that this is so radical as to be virtually unthinkable, and is hardly likely to find widespread support. A lot of people have a lot of power invested in and justified by the presumption of the existence of 'music' as a universal phenomenon. As an initial analytic category, though, I have found that the label "music" has hindered my own attempts in this thesis to find new ways to think about the puzzles and paradoxes of copyright. It has hindered the search for common theoretical grounds for the comparative analysis of power relations and the transformative potential in our negotiations of meaning in social interaction. If we are trying to find perspectives that offer windows to the otherwise, that deconstruct those

things that are presented as natural, inevitable, or necessary, then maybe seeking radically new ways to speak about what it is we do is a fundamental task.

Seeking to understand 'music' as a universal or total phenomenon draws us to the safest common denominators of similarity in comparative analysis, which are music-as-sound, music-as-vision (e.g., notation), or music-as-thing (e.g., recorded product). This safety replicates the biases towards visualisation, auralisation, and fixation that can be found within the discursive formations of law and copyright. 'Music' is analytically separated and abstracted from social context in order to justify the validity of using the category as a universal label at all, and to justify the place of 'music' as product and commodity within discourses of copyright and intellectual property. This leads us to reduce our understanding of 'music' to those aspects which, as they become reified, guide us to blind ourselves to the specificity of locally-negotiated meanings and relations.

I feel that ethnomusicology is, in many ways, an attempt to back-pedal from this totalising abstraction of 'music' while still retaining 'music' at the centre of inquiry. Some, like Martin Stokes (1994), cope with such problems by suspending 'music' as a 'vague category' while also saying that "music 'is' what any social group consider[s] it to be, contrary to the essentialist definitions and quests for musical 'universals' of 1960s ethnomusicology, or text-oriented techniques of musicological analysis" (5). One option is to take up the challenge of Anthony Seeger's (1987) "musical anthropology" to overcome the theoretical divide between the study of music and the study of society. Another is to confront the challenge of Christopher Small, and recognise that "The apparent thing "music" is a figment, an abstraction of the action, whose reality vanishes as soon as we examine it at all closely" (1998:2). Small's use of the label of "musicking", while it draws attention to activity and the specificity of social context, still fails to recognise its own fundamental insight, that the most fruitful theoretical engagements with whatever people might mean by "music" are those conducted in such a way as to leave sound, vision, and material product as, at the very least,

secondary concerns that can only really be addressed successfully in the wake of comprehensive anthropological or sociological analysis.

This is the challenge I believe I must confront if I am to properly engage with questions of meaning, power, and expectation within social contexts increasingly dominated by the discourses of 'music and copyright'. The task is to remain vigilant and to minimize my complicity in the very discourses I seek to challenge. As Foucault puts it, speaking in the context of an exploration of madness: "This is doubtless an uncomfortable region. To explore it we must renounce the convenience of terminal truths, and never let ourselves be guided by what we know ..." (1988:ix).

This is not, then, an orthodox ethnomusicological thesis. As an ethnomusicologist I approach my work with an absence of music theory and a strong inclination towards anthropology, sociology, and philosophy. I was not trained in 'music theory', and have no formal musical training beyond knowing enough to play an Eb tenor horn at band practice on Sunday afternoons as a teenager. It is enough to learn a tune on my banjo from a book. This thesis contains no musicological analysis. It contains no strict analysis of musical practice. Whatever I or anyone else might understand by "music" is not the primary focus of my explorations. If you are looking for 'music', you won't find it here.

Towards theories of negotiation and enclosure

What you will find are attempts to think about the research area, and, ultimately, about life, in other ways. In Chapters 7, 8, and 9 of this thesis I attempt to lay the grounds for a new theoretical system. In Chapters 7 and 8 I present a theory of what I term 'negotiation'. In Chapter 9, I present a theory of enclosure. I am very aware that the theoretical suggestions offered here are underdeveloped. The fact that they are squeezed into three chapters of a doctoral thesis says this clearly enough. In many ways, however, these ideas are presented only as brief, preliminary, skeletal outlines to provide some measure of guidance in my future work. Presenting a fully developed

theoretical system is far beyond the scope of this thesis. This thesis offers no definitive answers. It hopefully provides some insight into some of the ways in which I make sense of my world. The ideas in this thesis are not intended as authoritative pronouncements, but, rather, as invitations to think, connect, and dream, in and through the doing of the doing.

And finally ...

Throughout the course of this research one of the most difficult things has been to convince myself, never mind others, that there is an issue, that there are issues, that this research is important, urgent, and that the problems, conflicts, and confusion that arise as copyright is applied within our lives is changing the way in which we understand what we do and who we are. It has often been difficult to retain focus. When in doubt I look to the words of Irish journalist Fintan O'Toole:

... there is still, in Ireland, a great deal to be said. Those of us who work in the media become affected by a paradoxical mixture of weary futility and self-centred arrogance in which we both undervalue and over-rate the work we do. We get tired of dealing with the same issues time and time again, and often lose the conviction that there is any point in saying them. But we also assume that because we are weary of an issue, its importance has somehow diminished. We forget why it arose in the first place - because it touches the lives of the people we are supposed to serve (O'Toole 1996:234).

Chapter 1

The Field

Introduction

This thesis provides an analysis of the role and activities of the Irish Music Rights Organisation during the period 1995-2000. The Irish Music Rights Organisation, more commonly referred to as IMRO, administers 'music rights'. More specifically, the organisation administers the performing rights

Chapter 1

One Ring to rule them all, One Ring to find them,
One Ring to bring them all and in the darkness bind them ...

J. R. R. Tolkien, The Lord of the Rings, 1954

¹ Copyrights protect works of authorship (literary, dramatic, and musical works), while 'neighbouring rights' protect the rights of performers (e.g., 'arrangements' of tunes) in a manner similar to (hence, "neighbouring") copyright. Neighbouring rights also protect the rights of phonogram producers and broadcast organisations. They seek to protect the interpretive artist when they take another person's creative work and embody it in a publicly consumable fashion (Sinacore-Guinn 1993:158). Generally it is understood that three rights are covered by this concept: the rights of performing artists in their performances; the rights of producers of phonograms in their phonograms; and the rights of broadcasting organisations in their radio and television broadcasts (WIPO 1997b:5). 'Related' rights include all creative works that cannot be clearly identified as falling under either category (Sinacore-Guinn 1993:159). Generally, when the term 'copyright' is used it probably includes both neighbouring rights and related rights. When the terms 'neighbouring rights' or 'related rights' are used they usually only refer to those rights specifically identified as neighbouring rights (119).

The rights of performers in their performance were given support by the Berne Union for the Protection of Literary and Artistic Works at its Diplomatic Conference in Rome in 1928. There it was proposed that "when a musical work has been adapted to a mechanical instrument by the contribution of performing artists these latter should also benefit from the protection granted to that adaptation" (WIPO 1997b:437). In 1960 a committee of experts was convened jointly by WIPO, UNESCO, and the International Labour Office to consider the growing recognition of neighbouring rights. Meeting in the Hague, this committee drafted the basis for the Rome Convention of October 26, 1961, also known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. The Rome Convention specifically established a link between copyright protection and the neighbouring rights under consideration, the first article providing that the protection granted under the terms of the Convention would in no way affect the protection of copyright in literary and artistic works (428). What was interesting about the Rome Convention was the fact that it pioneered developments in national legislations, defining standards for the protection of neighbouring rights at a time when few countries had any legislation enacted for the protection of performing artists, producers of

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Introduction

This thesis provides an analysis of the role and activities of the Irish Music Rights Organisation during the period 1995-2000. The Irish Music Rights Organisation, more commonly referred to as IMRO, administers 'music rights'. More specifically, the organisation administers the performing rights of its publisher, songwriter, and composer members by the granting of licenses and the collection and distribution of royalties. Organisations such as IMRO are known as 'collection agencies', 'collective rights organisations', or 'performing rights organisations'. Performing rights arise from the branch of intellectual property law known as copyright.¹ The primary substance of

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copyright is that a creator who creates an 'original' 'work' of 'authorship' reaps the financial benefit accruing from other people's 'use' and 'consumption' of the work. Copyright seeks to protect that reward (Sinacore-Guinn 1993:158). The law of copyright, it is claimed, seeks to balance the need to encourage creative activity and the need to protect broad public access to the fruits of such activity.

The dominant feature of the Irish Music Rights Organisation's activities from 1995-2000 is the systematic expansion of the organisation's authority. In the early years of this period, IMRO was the focus of widespread discontent, and even demonisation. In 1996, in particular, primary schools, publicans, and people in support of 'traditional music', offered vociferous resistance to IMRO's aggressive pursuit of music royalties. This negative reaction reverberated across many registers of Irish life, from casual social gatherings to the corridors of Irish government. The visibility of antagonism towards the Irish Music Rights Organisation at this time seemed like the onslaught of a public relations disaster.

By the end of this five year period, however, the Irish Music Rights Organisation seemed to occupy a position of acceptance in Irish life. Resistance was no longer an issue. A series of skillful negotiations and strategic contracts had served to consolidate the organisation's operations. No longer the pariahs of Irish life, the representatives of IMRO could now claim to be the champions of members' rights, serving the needs of songwriters, composers, and musicians everywhere. Indeed, by the year 2000, the Irish Music Rights Organisation appeared to operate in a climate of both legally-sanctioned economic monopoly and unquestioned political hegemony.

In this thesis I ask how and why this transformation occurred. I ask how, after a period of such intense feeling, confusion, debate, and resistance, opposition to the Irish Music Rights Organisation's expansion suddenly fell

phonograms and broadcasting organisations. This was in contrast to earlier conventions, which had developed from national laws (443).

silent. I unearth the main concerns in the resistance to IMRO's activities, exploring how social contexts previously unassociated with commercial concerns were deemed commercially relevant to the cause of the Irish Music Rights Organisation by virtue of the concept of copyright. I examine the character of claims promulgated by representatives of IMRO, and ask how it is that the authority of the organisation is often deemed value-free, politically-neutral, natural, inevitable, and necessary. I identify the underlying principles and forces behind the extension and consolidation of the organisation's authority. I focus on the expansionary activities of the organisation as an example of a particular character of social and political relations, and explore the implications of acquiescence to IMRO's authority for personal negotiations of meaning, power, and expectation. In effect, a theoretical analysis of the relational implications of law, intellectual property, copyright, and performing rights emerges from our examination of the expansion of the Irish Music Rights Organisation during the period 1995-2000.

Surveying the Field

This theoretical analysis of the expansion of the Irish Music Rights Organisation is undertaken from within the discipline of ethnomusicology. In recent years, issues raised by discourses of law, intellectual property, and copyright have begun to be widely recognised within the field of ethnomusicology, not only as interesting, and academically challenging, but as ethically urgent. The literature covered in the following section comes from a variety of disciplines and independent scholars. It nonetheless is beginning to constitute a coherent field of inquiry. By surveying this field of literature, an appreciation of the ways in which this study intersects and dialogues with work already done can be achieved.

Early Explorations

Until the 1980s, publications relating intellectual property and copyright to music or song were sporadic, and produced in isolation. Although a thorough investigation of the presence and distribution of relevant literature in the

years before 1980 is still required, it is possible to get some idea of the lack of a coherent field by briefly surveying the range and nature of publications. As a direct result of the Folk Revival, especially in the United States and in Britain (see Rosenberg, ed. 1993), and particularly in the 1960s, the issue of copyright became a concern among revivalists, confused and concerned by the disconnect they sensed between the 'folk ethic'² and the claims of copyright, as promoted by song collectors and music industry professionals:

This is the saddest part of the situation: it has reached the point where everyone feels obliged to copyright something before someone else does it, even though the claim may be questionable in the first place. Fear begets fear, money begets only money, and the question of morality is left behind (J. Cohen and M. Seeger 1964:37).

Although discussion was undoubtedly widespread and often heated, written comment was largely confined to letters pages, magazine articles, book prefaces, and autobiographical material³ (e.g., Gooding 1961; Wilgus 1961; J. Cohen and M. Seeger, eds. 1964; P. Seeger 1972). This confusion seems to have been met with little by way of response in academic literature of the time. What response there was came from the field of folklore studies (e.g., Karpeles 1963; Wales 1973; Boos 1977). This was in turn reflected in a small number of legal publications (e.g., Klarman 1965; Coon 1971). By the 1970s, and the further increase in the expectations of a growing music industry, the issue of copyright had come to light in other genres that seemed, like 'folk music', to bridge commercial and non-commercial contexts of musical practice, such as 'Blues' (Rohter 1977) or 'Gospel' (Crawford 1977). However, at this time there was nothing to indicate that scholarship concerning 'music and copyright' constituted a recursive field of inquiry.

² Although sometimes understood as an ambiguous, romantic, anti-industrial ideal, advocates of the 'folk-ethic' embraced, indeed still embrace, codes of generosity, sharing, and a nostalgic appreciation for social "tradition" and authenticity. It is most vigorously expressed in the letters pages of magazines such as the U.S. publication Sing Out! or the Scottish publication Living Tradition. For extended explorations see N. V. Rosenberg, ed. (1993).

³ The general tenor of much written comment at the time is epitomised by a song submitted to Sing Out! Magazine. The song was written by Sydney Carter, and entitled "A Reel of Recording Tape". The words of the song reflect a widespread suspicion of copyright concerns, while also drawing upon a long (and heavily gendered) tradition of parody: "Never trust a collector girls,/ Whoever he may be/ When his hand's upon his microphone/ And not above your knee,/ He's thinking of your melody/ And not about your shape,/ And he'll rob you of your copyright/ With a reel of recording tape" (Carter 1960).

Since 1980, however, there has been a growing and relatively coherent body of relevant literature.

The Growing Importance of Intellectual Property

Frith (1987, 1993) has noted that the 1980s signalled a shift in emphasis within the 'music industry'. The "age of manufacture" of the 1960s and 1970s had come to an end as companies, which had previously been organised around the manufacture of 'things' in the form of commodities for consumers, now depended on the creation, acquisition, distribution, and exploitation of 'musical properties as baskets of rights'. This is something of a false opposition, in the sense that rights were also 'manufactured' to some extent, and were often conceptualised as 'things' that could be created, sold, exchanged, and distributed. What is true, however, is that from the 1980s a major emphasis was placed on the exploitation of intellectual property rights for the production of capital in the contexts of what was understood as a rapidly growing music industry. This is hardly surprising if we consider that public performance payments for performing rights have provided the greatest source of revenue in the U.S. music industry (Fabbri 1993:159). In a wider context, intellectual property in general has rapidly become an economic force to be reckoned with. By 1999 the intellectual-property driven "creative economy" was worth about \$2,240 billion worldwide. It continues to grow by 5 per cent a year (Howkins 2001:13).

However, despite the growing importance of issues of intellectual property and copyright, in 1992 the field of ethnomusicology was criticised from within for failing to recognise the need for substantial practical and theoretical engagement in the area. Anthony Seeger noted a "theoretical predisposition to ignore juridical concepts related to music in our research, an uncritical (and perhaps unconscious) re-elaboration of the concepts of twentieth century copyright law in our writings, and a lack of intellectual engagement with the globalization of the world's economy and its implications for the objects of our research" (1992:345-346). By neglecting these issues, Seeger stated, ethnomusicologists were impoverishing their discipline. They would

increasingly find it difficult to contribute significantly to dialogue about musical practices which were increasingly being shaped by the very processes that ethnomusicologists seemed to be ignoring.

In 1993, Franco Fabbri was able to note that “copyright stands as an unknown continent that music researchers *must* explore” (1993:159). Seeger again, in 1996, reiterated the failures of musicologists and ethnomusicologists to consider the implications of local, regional, national, and international legislation for their research in the face of “the transformation of all music to potentially for-profit “intellectual property” throughout the world” (88). He argued that this academic negligence ran the risk of compromising the relationships that ethnomusicologists so delicately foster while doing fieldwork: “Our failure to act both intellectually and practically in this area can only vitiate our analyses, damage our reputations, and make us suspect in the communities in which we wish to work” (ibid.). This thesis aims to address this neglect.

Five Modes of Inquiry

At the risk of being too reductionist, the work of those few who have engaged theoretically and practically with issues of ‘music and copyright’ can generally be characterised as disclosing any of five approaches⁴: descriptive, sponsorial, revisionist, sociohistorical, and analytic. In the section that follows, each approach is outlined and exemplified. Classifying the literature in this way seeks to offer structure and clarity to examination of the dominant

⁴ This classification builds on a characterisation of feminist approaches to literary canons and authorship. Feminist scholars such as Hélène Cixous, Nancy K. Miller, Sandra M. Gilbert and Susan Gubar have argued that the border between authorship and writing is policed by patriarchy and defined in terms of the hierarchies of patriarchal prejudice (see S. Burke, ed. 1995). Women have predominantly been designated ‘writers’ rather than ‘authors’. Seán Burke characterises three phases of feminists’ response to “the author-question”, which he terms “sponsorial”, “revisionist”, and “theoretical”. For Burke, the sponsorial phase denotes “the assertion by the female author of the right of belonging to the state and estate of authorship”; the revisionist phase signals “the attempt to redefine authorship over and against the patriarchal model and to promote a counter-canon of female authors”; and the theoretical phase indicates “the recognition that authorship and canonicity are inherently and inalienably patriarchal institutions which feminist thought should pass beyond” (1995:145). The theoretical phase in Burke’s classification corresponds to what is referred to later in this thesis as “retheorising”.

issues and concerns within the field. We can thereby assess the strengths and weaknesses of theoretical undertakings thus far. This will allow us to better situate this study as it undertakes a theoretical analysis of the expansion of the Irish Music Rights Organisation.

Descriptive Approaches

These are approaches that describe legislation, the legal system, and the institutional supports for copyright and performing rights within what is understood as the music industry. Often practical guidelines are offered for those who wish to gain competent and ethical knowledge of 'best practices'. Simplistically characterised as: "How to negotiate the intricacies of copyright legislation and turn it to your best advantage."

The vast majority of descriptive texts are written from the perspective of United States legal and business practice. For example, Wadhams (1990), Baskerville (1995), or Halloran (1996). Billboard magazine's annual publication This Business of Music (Shemel and Krasilovsky 2000) is a key text in this regard.⁵ The practices of what is considered the "music industry" are suffused with the basic assumptions of intellectual property and copyright, a relationship which merits further investigation. This literature provides an interesting source for the analysis of these assumptions. It must not be forgotten that descriptive guides also prove very useful for professional musicians and composers as they negotiate the often treacherous waters of the legal aspects of the music business. Within the field of ethnomusicology the work of Seeger (1992, 1996, 1997) stands out, offering clear and practical advice for ethnomusicologists seeking to navigate legal complexities within their professional practices. Also notable is the fieldwork guide prepared by the Society for Ethnomusicology, A Manual for Documentation, Fieldwork, and Preservation for Ethnomusicologists (Post et al 1994).⁶ More recently, the Music Librarians Association, the Consortium of College and University Media Centers, the Consortium for Educational Technology in University Systems, and the Music and Fair Use Forum of the

⁵ A comprehensive list of descriptive texts is available on the Internet at the Texas Music Office website: <http://www.governor.state.tx.us/music/read.htm>.

⁶ Summaries of international efforts to encompass problems of intellectual property and copyright as they concern what is understood as traditional culture or folklore, such as is provided in Malm (1998), might also be seen to fall within the descriptive approach.

Society for Ethnomusicology have each sought to provide descriptive guidelines for their members in regard to issues of music and fair use.

It is perhaps useful to note that the next four approaches are underpinned by two concerns: the analysis of justifications for copyright, and assessment of the adequacy of those justifications.

Sponsorial Approaches

These are approaches that assert the right to include a musical tradition, genre, or practice⁷ within the rubrics of copyright legislation and seek to find ways to justify that inclusion. Simplistically characterised as "It may not be obvious that we belong to the copyright club, but we do, and we're going to prove it."

Advocates of sponsorial approaches first of all assert the 'otherness' of a musical tradition, genre, or practice. Second, they argue that this otherness poses a challenge to copyright law. Nevertheless, the argument proceeds, ways will be found to justify its inclusion within the legal system. It is frequently argued that the practices in question abide by understandings of creativity, collaboration, and participation that together add up to the antithesis of text-based, individualist, and essentially capitalist intellectual property regimes. Hence, the argument often runs, there is a need to develop a *sui generis* system of protection. *Sui generis* systems, however, can generally be characterised as pertaining to the realm of the yet-to-be-imagined. As such, they are frequently held out as an aspiration, while issues of "rights" ('moral', 'civil', 'human') in legal systems are struggled with in an attempt to find a legislative compromise.

A large number of sponsorial approaches that might be included in discussions of 'music and copyright' can be found in work dealing with 'folklore' or 'traditional culture'. They persist in response to the sustained recognition that "at present there is no international standard of protection for

⁷ This rather contorted phraseology is used to highlight the diversity of terminologies and theoretical perspectives from which characterisation of the approach is distilled. Although the terminologies and theoretical perspectives may vary greatly, the strategies employed are broadly similar. Furthermore, the use of all three terms is suggestive of an uneasiness with

folklore and that the copyright regime is not adequate to ensure such protection" (WIPO 1997:16). Although the arguments, of course, vary from publication to publication, the article "The Problem of Oral Copyright: The Case of Ghana" (Collins 1993) offers a typical example. John Collins asserts the otherness of "African folklore" by setting up a rhetorical opposition between a Eurocentric copyright system that cannot cope with folklore because of "the fact that in Europe the folkloric tradition is dead (and safely stowed away in museums)" (1993:153), and the active, "living folk tradition" to be found in Africa and many countries of the "Third World". This stereotypical assertion of otherness is restated through a number of similar dichotomies throughout the article, not least of which is the opposition of orality and literacy. Despite these claims to otherness, however, ways are suggested in which this otherness might be validated and protected by the existing system, as Collins looks at copyright law and WIPO recommendations which might encompass Ghanaian and African folklore successfully. Other sponsorial approaches dealing with 'folklore' have included Jabbour (1982), Gavrilov (1984), Bell (1985), or Weiner (1987).

What runs as a theme through many such approaches is a sustained rhetoric of protectionism, an expressed need to 'protect' against the "distortion, mutilation, and misinterpretation" of 'folklore' in the face of commercial pressures. Other concerns in this regard include misappropriation, wrongful attribution, and the need for rightful remuneration in the case of commercial exploitation of 'folkloric works'. Again, it should be noted that these concerns are primarily object-oriented. They generally discuss how best to deal with "things" in need of protection. Another common characteristic of sponsorial approaches is the use of binary oppositions. The individual rights associated with copyright, for example, are often contrasted with the need to assert the collective rights of communities or nations. It is also common to see appeals to international policy guidelines, treaties, and declarations, such as those provided by WIPO or UNESCO, in particular the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit

terminology like this. As detailed later, in this thesis I am uncomfortable with a focus on "music" at all.

Exploitation and Other Prejudicial Actions (1982), or the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore (1989).

A significant example of the sponsorial approach in ethnomusicology is Mills (1996). It remains, to my knowledge, the only article written by a trained lawyer on 'music and copyright' in the field. This article was, for a long time, the only publication that engaged at length with United States copyright legislation, and its impact on what was framed as "non-Western music". It also shows how national legislations were being developed in Senegal and Brazil at that time to counter the encroachment of commercial exploitation. Mill's article clearly illustrates characteristic elements of the sponsorial approach. The rhetoric of protectionism is a foundational premise:

Technological breakthroughs in recording techniques, the rise of the music industry and the public interest in "world music" are combining to create an immense market for new, diverse sounds. Unfortunately, as the cultures collide, respect for the needs and beliefs of non-Western communities continues to lag behind and non-Western music remains unprotected and exploitable under the intellectual property laws of most Western nations (1996:58).

It is clear even from this passage that the generalized binary of Western and non-Western structures Mills argument. This binary is replayed as individual/collective, or 'industry countries'/'source countries'. Thus, an othering narrative is crafted, in which weak, unprotected, passive, and non-commercial non-Western traditions suffer at the hands of dominant, oppressive, active, and commercial Western imperialism. As Scherzinger (1999) was to remark, as part of a rigorous, prolonged (and equally sponsorial) critique of Mills' contribution: "basing changes on an oppositional logic of discrete cultural units risks a greater ethnocentrism than the law requires in its present form" (1999:118). Mills conclusion is unapologetically sponsorial in its approach. She suggests in conclusion that "it is essential to create laws which assure that the originating community retains control over their music and enjoys the same protection as their Western counterparts" (1996:82). These laws, Mills suggests, would be most effective if they were to focus on issues of regulation, disclosure, and consent.

The sponsorial approach can also be found in some of the work on music sampling and digital technology (see Sakolsky and Wei-han Ho, eds. 1996). New technologies and digital sampling devices, it is argued, show that the literary bias of the concept of the individual author-subject-creator, and concomitant understandings of originality and creativity, are inadequate to cope with collaborative, fragmented, and appropriative sampling practices. By contrasting the antiquated romantic ideology of copyright with the postmodern sophistication of modern technology, otherness is thus asserted. Nevertheless, it is sometimes argued that a re-evaluation of the law is all that is required to overcome these difficulties. Théberge (1997), for example, argues that legislative conceptions of music as a set of fixed forms (scores, recorded sounds, digital sequences) need to be replaced by a conception of music as a specific kind of creative activity with its own modes of expression. This would then lead to more flexible legal attitudes towards different kinds of musical activity:

... it is not surprising that copyright law has been overly focused on spectacular cases of sampling. It has done so, however, at the expense of a more thorough-going analysis of the nature of musical practice and its commitments to specific forms of musical reproduction (Théberge 1997:241).

Revisionist Approaches

These are approaches that seek to redefine the relationship between music and intellectual property by asserting the absolute otherness of a musical tradition, genre, or practice, in opposition to current intellectual property regimes. Simplistically: "Copyright's way of thinking is alien to us. It has nothing to do with us. We will never recognise it. Give us a chance and we'll bring it down", or, alternatively: "We wouldn't belong to any club that would have us as a member."

It is often proposed by advocates of revisionist approaches that the tradition, genre, or practice in question actually challenges the inherent principles of copyright and may even lead eventually to the breakdown of copyright law as we know it. This is a common strategy in discussions of music sampling. As in sponsorial approaches, the otherness of sampling practices is asserted by pointing to the collaborative nature of its collage forms. These, it is argued, undermine central pillars of copyright law such as authorship and originality, and force new conceptualizations of creativity. As Jones claims: "new technologies that enable a diffusion of authorship and ready reproduction are

wreaking havoc with traditional copyright protection" (1992:95).⁸ Unlike sponsorial approaches, however, in revisionist approaches these challenges of otherness can often be presented as a fundamental threat to the very existence of copyright law itself: "the most likely source of a breakdown in existing laws is the new generation of digital sampling devices" (Frith 1987:66). McGraith suggests that the practices of the 'sound exchange network' of sampling and appropriation art offer a direct challenge to the copyright regime:

In that this sound exchange network offers its product freely, or at least, in a shadow economy outside of the capitalist marketplace, in addition to challenging the ideology of copyright, it represents a potent political threat to the culture industry's hegemony. Whether the individual's own position is for or against copyright and the industry, their practice is in conflict with it (1990:78).

Often this polarisation is restated as a hardline stance against any and all copyright practices, on the principle that they are morally wrong. For example, McGraith, denounces copyright as outright theft, in a move redolent of Proudhon's infamous denunciation of private property⁹: "Copyright presents as the property of one, that which is taken from the lives of many" (ibid.).

A clear example of the revisionist position within the field of ethnomusicology is offered by Charles Keil in the collection Music Grooves (Keil and Feld 1994). Instead of the othering of a particular tradition, genre, or practice, however, Keil presents 'music' as a whole as the Absolute Other of copyright. In perhaps the most blatant anti-copyright statement within the field, Keil sets up a clear binary opposition between individualist, materialist 'copyright', and communal, spiritual 'music'. As with sponsorial approaches, such binary relationships are fundamental to revisionist discourse. Instead of

⁸ A selection of key issues in the cultures of sampling can be found in Hebdige (1987), Jones (1992), Frith, ed. (1993), T. Rose (1994), Sakolsky and Wei-han Ho, eds. (1996), and Théberge (1997). See also the doctoral dissertation by Schloss (2000).

⁹ "Property is Theft!" (Proudhon 1994:13). Pierre-Joseph Proudhon's What is Property? first appeared in 1840. Proudhon takes the stance of a revolutionary anarchist throughout this work: "One author teaches that property is a civil right, based on occupation and sanctioned by law; another holds that it is a natural right, arising from labour; and these doctrines, though they seem opposed, are both encouraged and applauded. I contend that neither occupation nor labour nor law can create property, which is rather an effect without a cause" (ibid.).

seeking to reconcile or seek compromise through legislation, war is declared on the copyright system:

Once you have come to the conclusion that music is in its very essence communal, spiritual, the opposite of private property, and at its best a totally shared experience, like love, a number of strong and clear positions on "the music industry" can be stated: There shouldn't be a music industry. Music shouldn't be written or mechanically reproduced and mass-mediated. Music should exist live, for the moment, in present time, and its makers should be rewarded with happiness and barterlike reciprocities.

Virtually all the music written or recorded has been turned into things for sale. Writing or recording music and copyrighting the results as property to be sold for profits is a process that human beings in general, but certainly all ethnomusicologists, should oppose in principle and try to combat in practice (Keil and Feld 1994:228-229).

Sociohistorical Approaches

These are approaches that seek to retrace or even rewrite the history of copyright as it is understood to relate to what was and is understood as music. Simplistically: "See, it all happened like this ... No, actually, like this ... No, it really happened like this ..."

There is still a general lack of detailed sociohistorical literature within the field of 'music and copyright'. This reflects a similar lack in the field of intellectual property scholarship generally (Sherman and Strowel, eds. 1994). Continued absences in this regard place limitations on the horizons of history and our ability to challenge dominant historical narratives: "Paradoxically, the more the past is neglected, the more control it is able to wield over the future" (Sherman and Bently 1999:2). Orthodox histories of the growing importance of performing and mechanical rights during the twentieth century in Britain can be found in Peacock and Weir (1975) and Ehrlich (1989). These studies are generally uncritical of the conceptual construction of these rights. Primarily, they examine the impact of social and technological changes on the economic position of the social roles of composer, publisher, and musician. In particular, they offer well-documented accounts of the formation of the London-based Performing Right Society (PRS) in 1914, and the subsequent extension of its interests. Ehrlich, for example, portrays the expansion of PRS as the increasing provision of an "indispensable service as a link between consumers and producers of music" (1989:viii).¹⁰

¹⁰ As we shall see in Chapter 5, the presentation of a performing rights organisation as a facilitative conduit between 'consumers' and 'producers' is crucial for the maintenance of the organisation's authority (see pp. 118-126).

Three significant sociohistorical contributions to the 'music and copyright' field appeared in 1985. All three, though clearly important, are largely ignored in the literature. The first is Coover's Music Publishing, Copyright and Piracy in Victorian England (1985). Coover's achievement in particular remains unequalled in a field otherwise devoid of detailed historical source material. He presents, largely without comment, a series of reports that appeared in the Musical Opinion and Music Trade Review from 1881 to 1906 in order to document the twenty-five year struggle in England between music copyright 'pirates' and the Music Publishers' Association that preceded the ratification of the Copyright Act of 1906. The lack of explanatory social, historical, or theoretical commentary should not be seen to detract from the importance of Coover's volume. It provides an exemplary chronology, and a window into the specificity of historical discussions on the music and copyright issue.

The second is Ryan's The Production of Culture in the Music Industry - the ASCAP-BMI Controversy (1985). In this study Ryan rebuilds a narrative of the growth and expansion of the American Society of Composers, Authors and Publishers (ASCAP) and its activities in the cause of performance royalty collection. He follows the growth of ASCAP from the passage of the 1909 United States Copyright Act through the challenges the organisation faced from a rival organisation, Broadcast Music Incorporated (BMI). Ryan shows that the major conflict that arose between ASCAP and BMI during the 1940s was to have a profound effect on the diversification of popular music genres within the U.S., establishing country music and rhythm and blues as viable commercial-music forms. This research discloses the precarious early history of performing rights, as ASCAP members struggled to achieve an early legal precedent with which to legitimate their demands for royalties. Ryan's analysis of the expansion of ASCAP provides an important precedent for this present study.

The third, Noise: The Political Economy of Music (1985), was written by professional economist Jacques Attali. Noise is a complex and poetic work

whose theoretical concerns are not easily summarised. A chapter entitled "Representing" traces the increasing commercialisation and professionalisation of music within French life in a broad sweep from the 16th to the 20th century. Attali traces the impact of printing technology, the French Revolution, the rise of the concert hall, the growth of the orchestra, and the increasing importance of celebrity, virtuosity, and composition on social life in France. These changes contributed to greater and greater abstraction and commodification of 'music'. In turn, the same changes favoured the centrality of the work-concept as an 'object' of exchange. It was in this social and technological climate that the Syndicat des Auteurs, Compositeurs, et Editeurs de Musique (SACEM), the first ever performing rights collection agency, arose in 1851: "Its function was to demand, on behalf of the authors and editors, payment of royalties for every representation of a musical work, regardless of its importance" (1985:78).

A clear, but again curtailed history of 'copyright and royalties' is to be found in Chanan (1994). Michael Chanan builds on the work of Peacock and Weir, and Attali, while also drawing on the work of social historians like William Weber (1975) and Cyril Ehrlich (1985). The overview that Chanan provides is heavily weighted towards economic analysis and descriptive history. Like Attali's Noise (1985), the whole of Chanan's Musica Practica cannot be easily summarised. It is a hugely ambitious work which seeks to follow the 'trajectory' of the increasing capitalization and technologization of 'Western music', challenging the 'closure' of much musical analysis, while also drawing attention to the widespread displacement of practical musical knowledge into specialized, commercial contexts. Chanan draws together a wide variety of cultural commentators, including Marx, (Max) Weber, Adorno, Lévi-Strauss, Barthes, and Eco, in order to achieve a comprehensive analysis of music as "an expression of actual or ideal social relations" (1994:11). It is important to place this work within the range of historical approaches to copyright and music if only to appreciate the place of copyright within wider social and historical discourses of 'music'.

Analytic Approaches

These are approaches that undertake to detail the conflicts, paradoxes, and contradictions that arise as people working within a particular musical tradition, genre, or practice encounter the legal complexities of intellectual property and copyright. Simplistically: "Hey! Come and look at this great big can of worms we just opened!"

Issues relating to 'music and copyright' constitute a complex field of analytic inquiry. Or, as someone working in the entertainment industry once phrased it: "The whole question of copyright is just a super, super can of worms"¹¹. Analytic approaches often take out the tin-opener, revealing conflicts, paradoxes, and contradictions in all their nematodal glory. In some respects, these approaches satisfy Marcus Breen's call to open "the often self-contained internal regulatory systems of the music industry's copyright régimes" to public scrutiny (1993:121). Analytic approaches provide very valuable interrogations of current music industry practices and ways of thinking. In other respects, these approaches disclose a wide range of economic, social, and cultural problematics that expose the current explanatory frameworks in this field as inadequate.

The seminal contribution of Wallis and Malm, Big Sounds from Small Peoples (1984) provides an examination of the role and impact of the systematic expansion of transnational music companies and electronic technology on local life in twelve "small countries": Jamaica, Trinidad, Tanzania, Kenya, Sri Lanka, Finland, Sweden, Denmark, Norway, Chile, and Wales. The detail in this work was unprecedented at the time of its publication, as Wallis and Malm outlined the expansion of the 'Big Five' transnational record companies into increasingly diverse domains of commercial activity, driven by the search for profit, and the work of local music producers to maintain commercial interests in an industrial climate of uncertainty and external pressures. The chapter "Copyright: Where does all the money go?" was the most comprehensive survey then available of the practices of performing and mechanical rights societies, the collection and

¹¹ This quotation can be found in Rohter (1977:21). These immortal words were spoken by Peter Kuykendall, former administrator of Wynwood Music, and at that time editor of Bluegrass Unlimited.

distribution of copyright royalties, and the paradoxes, contradictions, and ethical dilemmas of copyright practices.

Big Sounds clearly illustrates, for example, the confusion and difficulties that can arise as a result of the adjective 'traditional' within copyright regimes. Through a series of case studies, it is shown that the designation of 'traditional', understood as 'public domain', has often been used as an excuse for people to copyright songs or tunes for commercial gain: "Indeed, one can observe here a pattern emerging whereby songs from small countries are often picked up and exploited internationally, with the original collector or publisher claiming the copyright on the 'first there, first claim' principle, and with the original *local* composers or 'collectors' getting left out" (1984:190-191). What becomes clear from the interviews conducted during the study is that, as I also found in my own research, the term 'traditional' is generally represented by music industry professionals as being the opposite of 'original' or 'fixed', synonymous with 'anonymous' and 'public domain', and therefore 'non-copyright'. Similar discussions can be found in Boos (1977) and J. Hall (1995).¹²

For all its detail and pioneering research, Wallis and Malm's work, however, suffers the failings of over-ambitious comparative analysis. Perhaps the most significant hindrance to the adequacy of such analysis is the over-simplistic theoretical model which frames the work. This leads to an over-reliance on the category of the nation-state as a fundamental unit of analysis, and an explanatory model of industrialization and social change based on an unapologetically evolutionist model. It is curious that while Wallis and Malm make a clear disclaimer that their criticisms "should *not* be interpreted as dismissal of the performing right copyright system" (1984:173), they

¹² It is also noted in Wallis and Malm's study that "many collecting societies, run by professional administrators on behalf of copyright holders, prefer to be as tight as a limpet when asked to express opinions about publishers, or divulge details of internal conflicts" (1984:170). Explanations offered include difficulties experienced in maintaining equitable distribution, and "a general feeling of uncertainty about things to come" (173). This is interesting in view of Chapter 5 which examines, among other things, the pervasive protectionism of the Irish Music Rights Organisation (see pp. 133-141).

nonetheless conclude that: "As things are developing now, the copyright system could collapse in a matter of years" (1984:319).

The much-cited article by Simon Frith, "Copyright and the music business" (1987), published in the journal Popular Music, provides an analysis of the implications of intellectual property and copyright for our understandings of music, and also of the implications of understandings of music for our engagement with intellectual property and copyright. In particular, Frith seeks to outline the ways in which record companies use copyright law, and the defensive ideologies with which they justify copyright. He also details some of the ways in which law can define music and determine the possibilities of musical 'exploitation'. Frith makes the connection between copyright, expansion, and prescription very clear: "The history of copyright law is the history of the steady extension of legal clauses on what *can't* be done, and by and large ... the law has worked to preserve copyright owners' monopoly rights whatever the changes in the means of reproduction" (1987:71). He does not seek to develop a coherent argument, making the case that "the details of music copyright are themselves a somewhat incoherent response to changing circumstance" (1987:33). Laing's (1988) brief response to Frith's article welcomed the article for opening up the debate on music and copyright. Nevertheless, Laing criticised the contribution for not fully grasping the weight, significance, and effectivity of 'copyright', and for not indicating fruitful avenues for future research. Laing also signalled the danger of falling into simplistic analyses that set up binary oppositions of consumers versus monopoly media in seeking to explain the political dynamics of the field of music and copyright.

Frith expands his 1987 analysis in the edited volume Music and Copyright (Frith, ed. 1993), which brings together a number of writers "to reflect on the problems of music and copyright from a number of international perspectives" (ix). The subject of copyright, Frith argues, should be seen as "the key to cultural analysis" (x). It unlocks, among other things, the contradictions inherent in the 'bourgeois ideology of art' with its "simultaneous stress on individual creativity and individual ownership" (1),

leading to the interrogation of concepts such as originality, creativity, authorship, public domain, and nationality. Paul Théberge argues that these analytic approaches to the issue of copyright also open doors to the institutional operations that allow “the legal framework of copyright law to become the basis for a realised economic right” (1993:41). As Franco Fabbri notes, by investigating the ‘neutral’ procedures and documents used by performing rights societies one can find “some of the most ideologically loaded assumptions” in the music industry (1993:162). New technologies are seen, throughout the volume, to pose complex problems for legal definitions of authorship and music use, at the same time as ‘harmonisation’ of copyright legislation across national boundaries becomes a top priority for multi-national leisure corporations and internationally-affiliated collection agencies: “Harmonisation is not pursued for aesthetic or ethical reasons, for all the musical metaphor. Rather, international companies seek to spread ‘best practice’ (translation: most profitable practice) everywhere” (Frith 1993:xi). Tôru Mitsui suggests that this expansion of copyright protection might be read as part of a general process of Western cultural and commercial imperialism (1993:125-145), an approach that recalls Laing’s warning against simplistic models of cultural analysis.

Retheorising

Care needs to be taken with regard to descriptive, sponsorial, revisionist, sociohistorical, and analytic approaches to the study of ‘music and copyright’. They should not be followed without question. It is difficult to undertake any assessment of practices related to law and copyright without implicitly or complicitly reinforcing the assumptions of their foundational discourses in the very terminology we use. In the following section, the dangers of such complicity are highlighted. It is consequently acknowledged that vigilance is important. However, it is also suggested that we go further. In a bid to find less partial grounds for analysis, a sixth approach is proposed, that of *retheorising*, which attempts to find new explanatory models for issues of ‘music and copyright’.

One of the difficulties in assessing the role, activities, and expansion of the Irish Music Rights Organisation is that the assumptions and expectations of law, intellectual property, and copyright are often reinforced in scholarly approaches to 'music and copyright'. Such complicity is inevitable, of course, in descriptive approaches which do not seek to challenge the status of the system. It also happens, however, in other approaches where the purpose is one of challenge or transformation. Feminist theory has drawn attention to the "alienation of utterance," when women "become aware of modes of speaking, writing, and thinking" that take their powers of expression away from them even as they use them (Smith 1990:199-200). Although there have been invitations and intimations to new approaches to 'music and copyright', none have successfully engaged with the challenge posed by this alienation of utterance, the vicious circles of discursive complicity. As Keil puts it, plainly: "They're not changing that equation" (Keil and Feld 1994:327). It is this 'alienation of utterance' that we now address.

What is particularly powerful about the discourse of copyright is the way in which it is comprised of elements from a number of different and often paradoxical literary, economic and legal discourses that coalesce around a regularising terminology of creativity, originality, authorship, incentive, rights, property, and individualism. What happens is that a challenge to one aspect of this working assembly of discourses is often undertaken in the language of another one of copyright's constituent discourses. A clear example of this is Boyle (1996), who analyses the social construction of authorship in the language of economics and public goods analysis. Another common example is the way in which pleas are made for practices obviously incompatible with copyright, but on the basis of the logic of the public domain. The public domain is itself a construct of copyright discourses, which has even been referred to as "the cornerstone of copyright law and indeed of intellectual property doctrine generally" (Frow 1997:209). Such strategies are self-defeating in that they are unable to find central terms of discussion that are not already heavily compromised: "... the convenience of using traditional

terminology usually works against the revolutionary force and gives a place to revolutionaries that is more firmly within than clearly beyond the status quo" (Goehr 1992:270).

In both descriptive and revisionist approaches the "aims, nature, and role of copyright law ... are taken as fixed givens and, as such, are not open to discussion" (Sherman 1994:116). Descriptive approaches do so by using the parameters of copyright law as the primary terms of reference and guidance. Revisionist approaches do so by setting up a discursive framework of polarised conflict between copyright and an Absolute Other of copyright. In neither case is the 'closure', that is, the self-referentiality of copyright law challenged: "This heightened self-referentiality means that copyright law refers ... to its own criteria for evaluation, models for change, and, perhaps most importantly of all, self-criticism" (Sherman 1994:115).

Sponsorial approaches are based on the assumption that copyright law is not all bad, or, at the very least, that it is not going to go away. Therefore, we have to do what we can with it to handle conflicts and inconsistencies while we're here. The aim of a sponsorial approach is often to provide short-term, practical solutions, and ameliorate often-bitter disputes. Although this aim is often achieved, it is arguable that sponsorial approaches are complicit in compounding the unequal relations of power supported by the copyright system in the long term. It may well be that localized meanings and practices are often not compatible with the interpretative expectations of copyright law. If this is the case, then finding ways to meet the expectations of copyright law is hardly an adequate response, unless it is assumed that the universalizing interpretative authority of copyright law is to have priority over the authority of locally negotiated meanings. Sponsorial approaches run the risk that local meanings might only achieve the status of valid knowledge through the official discourses and structures of intellectual property and the legal system. As Gudeman points out: "the larger economic asymmetries, that are connected to financial control and power, remain. The bestowal of intellectual property rights will not transform these" (1996:118). It has also been pointed out that highlighting conflict and inconsistency within the law is often done to

show the failure of law in providing efficient and adequate legal protection for new (or old) cultural forms. This has consequences for the way problems are perceived in the law:

... questions as to whether the modes of regulation used in copyright law add to the juridification of the social sphere or, indeed, whether copyright law can achieve the goals set for it, are not seen as issues deserving of attention. Rather, with efficiency as the main evaluative criterion, problems are merely interruptions that occur in the system's optimization of the relationship between inputs and outputs (Sherman 1995:43).

Sociohistorical and analytic approaches can be incredibly useful for exposing the contingencies and contradictions of the discourses of law and copyright. Some scholars, however, like Halbert (1999), are painfully aware of the lack of adequate transformational thinking in sociohistorical or analytic approaches. With this kind of self-critical vigilance these approaches offer much hope that alternative historical and explanatory narratives will arise as we "brush history against the grain" (Benjamin cited in Simon 1992:138). We need narratives that confront us with what is always there, "a plurality of possibility" (117). Such narratives can point us towards transformational alternatives, in the knowledge that things could be otherwise:

We must question those ready-made syntheses, those groupings that we normally accept before any examination, those links whose validity is recognized from the outset; we must oust those forms and obscure forces by which we usually link the discourse of one man with that of another; they must be driven out from the darkness in which they reign (Foucault 1972:22).

A Sixth Approach

A sixth approach is proposed in this thesis, which I call 'retheorising'. Retheorising is premised on the belief that the terms and conceptual constraints within which most discussions relating to 'music and copyright' are conducted are inherently flawed, implicitly reinforcing the very assumptions which they seek to challenge. Thus, it is argued, we need new ways to conceptualize the issues involved in order to displace the complicit terminologies that compromise the often transformative efforts of sponsorial, sociohistorical, and analytic approaches. Retheorising entails a call to go 'back to basics', to reconfigure our ways of thinking about these issues. It seeks to displace a dominant objectifying focus on abstracted, generalized

'things' or 'rights in/over things' with a renewed awareness of people, lives, meaning, and relations of power. There is, as of yet, no explicit retheorising emphasis within the literature generally available in the area of 'music and copyright'. Retheorising requires a rejection of the frameworks, concepts, and terminologies that law, intellectual property, copyright, and performing rights provide.

Counterinduction and the Anthropology of the Present.

The first step in retheorising is counterinduction. The term "counterinduction" is used by Paul Feyerabend in Against Method (1978). Feyerabend is a maverick philosopher of science who advocates the position of "epistemological anarchism"¹³ against the absolutist methodologies of scientific rationalism.¹⁴ Counterinduction, or "the invention and elaboration of hypotheses inconsistent with a point of view that is highly confirmed and generally accepted" (47), is a key step in Feyerabend's counter-methodology. He writes:

[H]ow can we possibly examine something we are using all the time? How can we analyse the terms in which we habitually express our most simple and straightforward observations, and reveal their assumptions? How can we discover the kind of world we presuppose when proceeding as we do?

The answer is clear: we cannot discover it from the *inside*. We need an *external* standard of criticism, we need a set of alternative assumptions ... The first step in our criticism of familiar concepts and procedures ... must therefore be an attempt to break the circle (32).

Retheorising is counterinductive in that it seeks to overcome that which is taken-for-granted by the application of an external standard of criticism. The orthodox assumptions of law, economics, intellectual property, copyright, and performing rights are deemed inadequate and inappropriate. The quest is for

¹³ Feyerabend himself admits that his epistemological anarchism is not so much related to what he sees as the potential destructiveness of political anarchism as it is to Dadaism, that is "prepared to initiate joyful experiments even in those domains where change and experimentation seem to be out of the question" (1978:21, n.12).

¹⁴ Feyerabend argues that: "... the idea of a fixed method, or of a fixed theory of rationality, rests on too naive a view of man and his social surroundings. To those who look at the rich material provided by history, and who are not intent on impoverishing it in order to please their lower instincts, their craving for intellectual security in the form of clarity, precision, 'objectivity', 'truth', it will become clear that there is only *one* principle that can be defended under *all* circumstances and in *all* stages of human development. It is the principle: *anything goes*" (1978:27-28).

an alternative set of assumptions. Retheorising leads us forward, then, to what Richard Fox (1991) refers to as an “anthropology of the present”. Shore and Wright outline the counterinductive character of such an anthropology:

“The task for an anthropology of the present ... is to unsettle and dislodge the certainties and orthodoxies that govern the present. This is not simply a question of ‘exoticising the familiar’. Rather, it involves detaching and repositioning oneself sufficiently far enough from the norms and categories of thought that give security and meaning to the moral universe of one’s society in order to interrogate the supposed natural or axiomatic ‘order of things’” (1997:17).

Thus, retheorising works to break open what Paolo Freire once referred to as the “circle of certainty” (1997:21), or in this case, the circle of copyright, requiring us to embrace uncertainty and doubt. With that uncertainty, however, comes an openness to the emergence of that-which-has-yet-to-be-imagined and that-which-has-not-yet-been-noticed. Such epiphanies will never be afforded by the answers of orthodoxy. As Foucault puts it, speaking in the context of an exploration of madness: “This is doubtless an uncomfortable region. To explore it we must renounce the convenience of terminal truths, and never let ourselves be guided by what we know ...” (1988:ix).

The Emergence of Theory

The retheorising approach of this thesis, then, presents a direct challenge to the ‘natural’ and ‘necessary’ order that sustains the hegemonic status of the Irish Music Rights Organisation. It involves a methodological rejection of the terms of reference that structure the authority and activities of the Irish Music Rights Organisation. This is a counterinductive move that frees up the theoretical terrain.

The second step in retheorising is the emergence of theory, the emergence of a new set of assumptions: “We must invent a new conceptual system that suspends, or clashes with the most carefully established observational results, [and] confounds the most plausible theoretical principles” (Feyerabend 1978:32). Having effectively taken the theoretical ground from under their own feet, the researcher moves forward in the expectation that a

more adequate explanatory framework will emerge in and through engagement with empirical fieldwork and detailed case study analysis.

The theoretical structure of this thesis has arisen in the examination of the expansion of the Irish Music Rights Organisation during the period 1995-2000. In retrospect, the way in which a theoretical pattern has emerged is broadly consistent with a journey through the approaches to 'music and copyright' that have been outlined in this chapter. In the earliest stage of research¹⁵, the research objectives were primarily descriptive. I wanted to describe the life and social codes of what might be considered the amateur and commercial practices of 'Irish traditional music', in Ireland and abroad. This was also something of a professional interest. From 1995-1997 I worked part-time as a freelance journalist and music critic specialising in Irish traditional music. The early research was also 'descriptive' to the extent that I had encountered a series of personal and public conflicts concerning copyright, and was trying to establish basic 'facts' about them. I set about gathering information from descriptive sources on intellectual property, copyright, and performing rights. To this end, I undertook research in university and specialist libraries in Galway, Limerick, and Oxford. I believed that a clear understanding of both the social dynamics of 'Irish traditional music' and of the legislative intricacies of copyright, would allow me to better understand the ways in which the concepts and practices of copyright conflicted with 'traditional' practices. It seemed clear that they did.

As I officially embarked upon doctoral study, the research entered a sponsorial phase. The thesis was to be entitled: "Redefining Tradition: An Analysis of Copyright in the Context of Irish Traditional Music". I sought to assert the otherness of 'Irish traditional music' by redefining the central concept of 'tradition' in opposition to the conceptual frameworks of copyright. I argued that "traditional culture, and traditional music and song in

¹⁵ I undertook two years of part-time research on the basis of personal curiosity, and parallel to Masters research in Irish Studies, before enrolling in the Ph.D. programme at the University of Limerick.

particular”¹⁶ comes into conflict with the conceptual frameworks of copyright in two fundamental ways.

- First, what I understood as an emphasis on process and variation in the communal dissemination of repertoire seemed to be in direct opposition to the “narrowly-defined, text-based concept of the “literary or artistic work”, which has at its core particular philosophical premises relating to authorship, creativity, originality, individualism, and intellectual property”.
- Second, I thought that the key to understanding ‘Irish traditional music’ was the concept of “community economy”. The ‘tradition’, I was ready to argue, constituted “a system of non-reciprocal sharing which privileges participation, the ‘doing of the doing’, and generosity of distribution, none of which conform readily to the concepts of Market Economy, private property, commodification, and copyright”.

A binary opposition was thus established between ‘Irish traditional music’ and ‘copyright’. Nevertheless, I also exhibited the trust in the legal system that is characteristic of the sponsorial approach, stating that “It is hoped that the proposed research will help to effect change in current Irish copyright legislation and assist in the development of an adequate and sympathetic legal system for traditional Irish music”. Thus, I imagined, “this thesis will propose solutions to the problems outlined, in order to achieve optimum compatibility between musical practice and the legal system in Irish traditional music”.

The clearest statement of my sponsorial approach at this time can be found in an article published in the journal Ethnomusicology, entitled “All That is Not Given is Lost”¹⁷ (McCann 2001). This piece was originally presented as a paper at the annual conference of the Society for Ethnomusicology, in Bloomington, Indiana, in 1998. By this time the binary opposition was more pronounced. On one side, I sought “to clarify the nature of the social relationships that are inextricably bound up with Irish traditional musical practice” (89). For this purpose I used the concept of the “musical commons”. I surmised that the social contexts of ‘Irish traditional music’ are “based on the idea of gift, which supports what could be seen as a characteristically

¹⁶ The following extracts are taken from an early research proposal for submission to the University of Limerick in 1997.

¹⁷ The title of this article was taken from a proverb cited at the beginning of the film City of Joy. The film was directed by Roland Joffé (1992) and starred Patrick Swayze, Pauline Collins, and Om Puri. It was based on a novel of the same name by Dominique Lapierre.

non-commodified common property resource" (95). This "commons" of "gift"¹⁸ was presented as "inherently non-commodified" and "deeply embedded in cultural practice" (97). I was influenced in this move by the research area of common property studies.¹⁹ On the other side, in direct opposition, I placed the Irish Music Rights Organisation (IMRO), and the commodifying constraints of copyright. Having established that the practices of 'Irish traditional music' constituted a commons of gift, I argued for the usefulness of the concept of enclosure: "It would not be too difficult to then see the commodifying processes of neo-classical economics, commercialism in music, and of the conceptually-bound and conceptually-driven agency of the Irish Music Rights Organisation as an example of enclosure in a musical context" (95). In this line of thinking, it was only through an analysis of the commons that an understanding of enclosure could emerge. Despite this simplistic polarisation, however, I nonetheless invoked the protectionism of the sponsorial approach. I wrote of "the need to develop a *sui generis* system of protection for traditional culture and traditional musical expression, one that grows from the nature of traditional systems as they are, rather than one imposed on them as the way they should be" (90). I concluded the article with a sponsorial flourish:

It is crucial that the legal system, informed by consultative scholarship, recognizes the wealth, the breadth, and, most importantly, the social nature of traditional musics and transmission, and that it invites a fair, accurate, and proportioned representation of the music and its cultural context. ... The challenge is to find ways to support traditional practices, by legal means, in education, and in community action (98).

¹⁸ This emphasis on 'gift' led me to consider the works of Titmuss (1972), Mauss (1974), Gregory (1982), Hyde (1983), Frow (1997), and Schrift, ed. (1997).

¹⁹ I came across this field thanks to the associative functions of the internet. I had encountered someone who spoke about 'Irish traditional music' as 'common property' in the context of copyright disputes with the Irish Music Rights Organisation. I then entered the term 'common property' into a search engine. The results of this search led me to the website of the International Association for the Study of Common Property (IASCP). Intrigued by the possibilities and connections that might arise in relation to my own study of the 'commons', I attended the 1998 biennial conference of the IASCP in Vancouver. There I met many people who have continued to be very helpful and encouraging in my research. Common property theory is dominated by new institutional analysis and political economics, and is suffused with foundational assumptions of methodological individualism, self-interested rationality, and utility maximization. The vast majority of literature relating to common property studies can be accessed via the website of the International Association for the Study of Common Property, based at the Workshop in Political Theory and Policy Analysis at Indiana University, <http://www.iascp.org>.

In the period following the conference presentation of "All That is Not Given is Lost", the emphasis of research gradually shifted from a sponsorial to a revisionist approach. The binary dichotomies remained, but the focus drifted almost entirely towards analysing the social contexts of 'Irish traditional music' insofar as they constituted a "commons".²⁰ For the following two years I undertook a period of intensive fieldwork, including interviews, participant-observation, and theoretical investigation,²¹ in a bid to isolate the features of the "musical commons". An analysis of these features would show, I surmised, that the underlying principles of 'Irish traditional music' are anathema to the underlying principles of copyright and performing rights. To this end, I approached 'traditional music' as a 'resource' threatened by the encroachment of copyright. Following examples from common property studies, I used categories of subtractability and non-excludability to characterise the features of the 'commons' I had identified, and paddled in the pool of public goods analysis (e.g., Berge 1994; Baden 1998).

At this time, however, I encountered a critique of common property theory offered by Steins (1999), which deconstructs the dominant post-positivist or critical realist approaches of common pool resource (CPR) theory. Steins argues that present theoretical notions in CPR theory are based on oversimplified representations of the internal characteristics of use and management of common-pool resources. She also argues that variables linking collective action and the wider world are absent. CPR theory tends to focus on the internal dynamics of collective resource management only,

²⁰ The shift, as I say, was gradual. At a Society for Applied Anthropology conference in Tucson, Arizona, in April 1999, I argued for what I thought was a "total reorientation of our approach to the intellectual property debate. We are no longer speaking about just songs, but singing, not just stories, narration, not just knowledge as ideas or facts, but the act of transmitting that knowledge from one person to another". Although the conclusion was the same as that used at the SEM conference, the paper at times hinted at a creeping revisionism. Folklorist Lauri Honko, for example, was cited as saying that "Copyright as such cannot be applied to folk traditions". The protectionism of the sponsorial approach was eschewed in favour of equally protectionist demands from a revisionist perspective: "Communities should have the right, where they so choose, to engage in traditional practices of a non-commercial type without the encroachment of commercializing external forces, such as intellectual property application, well-meaning non-governmental organisations, or government sponsored tourism". This was protection that could not be afforded by the legislative intricacies of copyright. This paper was an adaptation of the 1998 SEM paper (McCann 1999).

²¹ The times and places are detailed in the introduction.

thereby lacking in the explanatory power required for more complex problems. Another criticism is that, within CPR theory, collective action is primarily regarded as strategic behaviour aimed at the maximisation of utility (Steins 1999:17). In particular, Steins argued that “the development and use of prescriptive design principles inevitably results in the establishment of normative criteria for measuring outcomes, taking attention away from the users’ construction and perception of CPR management and the process through which collective action evolves” (1999:19). Prakash makes similar criticisms:

For the most part the conceptual analysis of the commons (also described as common property resources, common pool resources and CPRs) has concentrated on the universal principles, conditions or rules that characterise successful regimes and institutions In the process the analysis has largely circumvented the implications of internal differentiation or asymmetry including the plurality of beliefs, norms and interests involved in interactions between resource users, the effects of complex variations in culture and society, as well as wider aspects of social, political and economic conflict relating to the commons (1998:168).

Continued application of resource and goods analysis, then, would simply reinforce the objectifying processes I felt I was trying to counter. The foundational assumptions of methodological individualism, self-interested rationality, rule-guided behaviour, and maximizing strategies seemed to support many of the foundational economic assumptions underlying understandings of copyright. This clearly supported a resource-centred approach to the ‘commons’, rather than the people-centred approach that I sought in my own research. Awareness of this led me to reconsider and question the relevancy of a focus on a “*musical commons*”. A broader perspective was required if the research was to embrace a primary focus on people and the dynamic character of social relationships. I still believed, however, that the social practices that I encountered were inherently and essentially incompatible with the logic of copyright, or the practices of the Irish Music Rights Organisation, insofar as they constituted a ‘commons’.²²

It first appeared that an understanding of ‘traditional transmission’ would provide the key to the central features of the commons of the Irish ‘tradition’.

By March, 2000, I had begun to analyse 'traditional transmission' as a 'cultural commons'.²³ This term was used in order to deflect attention away from an earlier focus on 'music', and to suggest that the primary feature of the commons under consideration was that it constituted an autonomous cultural system:

Traditional transmission ... constitutes a commons in the sense that this is the system of a community which is under threat of enclosure, not so much physical enclosure, but the enclosure of one way of being, doing, and acting by another ... By viewing traditional transmission as a cultural commons we highlight the need for protection, we can identify what it is that needs protecting, and hopefully we can do something to counteract the impending crisis (McCann 2000a)²⁴.

To reiterate, I regarded traditional transmission as a commons *because* of the perceived threat of enclosure. Thinking of the commons in this way is quite typical: "It is arguably only in reaction to invasion, dispossession or other threats to accustomed security of access that the concept of common rights emerges" (Goldsmith et al. 1992:126). And if enclosure of the commons was the problem, then the solution seemed to be the achievement of protection for the commons.²⁵

However, my focus on the 'commons' itself was becoming increasingly frustrating. The tendency for my focus on a 'commons' to offer simplistic, static, and essentialising binary analyses was in stark contrast to the dynamic, fluid, and relational approach that I felt I needed to account for the infinite complexities of human relationships in social interaction and the implications of copyright. The key elements, it seemed to me, were the centrality of people, personalities, and the character of relationships.

²² This presented me with something of a problem, for at that time I was still a member of IMRO in my capacity as a singer-songwriter. The strict binary opposition I established presented me with very particular personal tensions.

²³ In this regard, I made a presentation entitled, "Traditional Transmission as Cultural Commons: The Conflicts and Crisis of Commodification", at the conference of the International Association for the Study of Common Property (IASCP) in Bloomington, Indiana, on March 27, 2000. The presentation itself varied greatly from the paper that had been submitted in advance (McCann 2000a). Nevertheless, the text of the paper gives some indication of the general positions I held at this time. See also McCann (2000).

²⁴ See <http://dlc.dlib.indiana.edu/documents/dir0/00/00/03/02/>

²⁵ I was greatly encouraged in this line of thinking by *Whose Common Future?*, a special edition of *Ecologist Magazine* (Goldsmith et al. 1992). This provided a useful, diverse, and accessible introductory survey of the dynamics of common property and enclosure. This publication was important in the early development of my research, greatly increasing my political awareness in regard to the issues.

Sociohistorical and analytic literature on 'music and copyright', while informative and thought-provoking, did not appear to offer much assistance for research that was increasingly moving towards a focus on more general, underlying anthropological, sociological, and, indeed, political concerns of agency and power, operative in every context, and not just in those assumed to relate to whatever might be understood as 'music' or 'musical production'.

Theoretically, it seemed, I had backed myself into a corner. I had been trying hard to essentialise the commons. In the process, I had ignored two things. First, that the 'commons' was only really a commons insofar as I had defined it in relation to enclosure. The emphasis, then, should not be on the commons but on the notion of enclosure. Second, I didn't really know what enclosure was.

I would focus on the process and practices of enclosure, and leave aside the concept of the commons entirely. The point where enclosure became the focus was the point where a counterinductive retheorising became the method. It was a heart-felt case of 'back to the drawing board' in order to find a way through the paradoxes and puzzles of copyright. This thesis, then, as its title suggests, provides a theoretical analysis of the expansion of the Irish Music Rights Organisation during the period 1995-2000. In particular, "Beyond the Commons" explores the relational implications of the expansion of this performing rights organisation as an example of the process and practices of enclosure *without the commons*.

A theoretical perspective on enclosure did not exist. I did not, then, undertake analysis of the expansion of the Irish Music Rights Organisation with any particular, coherent theoretical framework. Nonetheless, certain principles guided my quest for an alternative set of assumptions.

- Perhaps first among these is the belief that people's experience takes priority over abstract representation of that experience. Where abstraction is privileged, people are often left behind. I believe that one of the true sadnesses in this world is that putting people first is regarded as a radical political move.
- A second principle, related to the first, is a belief that uncertainty lies at the heart of our experience of the world. I have often seen that a refusal to acknowledge or

accept uncertainty leads to people and personal relationships being subordinated to abstraction.

- A third guiding principle is that we are all active participants in our experience of meaning and power, whether we realise it or not.
- The fourth principle is related to the other three, that nothing has to be the way it is, that nothing is necessary, that nothing is fixed (though many things are experienced as stable and structured). This last principle is a principle of hope:

Hope is the acknowledgement of more openness in a situation than the situation easily reveals; openness above all to possibilities for human attachments, expressions, and assertions. The hopeful person does not merely envisage this possibility as a wish; the hopeful person acts upon it now by loosening and refusing the hold that taken-for-granted realities and routines have over imagination (Simon 1992:3).²⁶

Building on these principles, I have allowed a theory of enclosure to emerge in the course of the research, one that I feel is adequate for the analysis of the expansion of IMRO. The methodology of emergence employed throughout this thesis is, therefore, broadly sympathetic with the qualitative research method of grounded theory. This method was first presented by Barney Glaser and Anselm Strauss in The Discovery of Grounded Theory (1967).²⁷ The primary characteristic of a grounded theory approach is that the research proceeds inductively, that is, “the intent of a grounded theory is to generate or *discover* a theory, an abstract analytical schema of a phenomenon, that relates to a particular situation” (Creswell 1998:55-56). A grounded theory approach is consistent, then, with the counterinductive approach of retheorising, in that it does not test an *a priori* hypothesis, but “grounds” an emergent theory in empirical analysis: “One does not begin with a theory, then prove it. Rather, one begins with an area of study and what is relevant to that area is allowed to emerge” (Strauss and Corbin 1990:23). This emergence of theory is reflected in the structure of the thesis that follows:

²⁶ Hope is not understood here as some teleological aspiration, towards which we yearn. Rather, in this thesis hope arises from understandings of power and authority that acknowledge our active participation in experiences of uncertainty, meaning, and power as people-among-people. These issues will be explored at length in Chapters 7, 8, and 9.

²⁷ Since Glaser and Strauss’ initial publication, followers of grounded theory have split into ‘Glaserian’ and ‘Straussian’ camps. Glaser’s work remains grounded in a positivist approach that considers the research process to be value-free, while Strauss acknowledges the active involvement of the researcher as a participant in the research process. The approach of this thesis is more sympathetic to the Straussian approach which “allows for the potential of

Chapters 2, 3, and 4

The Expansion of the Irish Music Rights Organisation

Chapters 2-4 offer what is primarily a descriptive examination of the expansion of the Irish Music Rights Organisation from 1995-2000. In these chapters we clearly see the transformation of IMRO's status from national pariah to fully-legitimated organisation.

Chapters 5 and 6

The Elimination of Uncertainty

The first steps towards an explanatory framework are taken in Chapters 5 and 6, in which analyses are undertaken of both the political dynamics and the authority of the organisation.

Chapters 7, 8, and 9

The Politics of Enclosure

Chapters 7 and 8 offer a new set of theoretical assumptions with which to advance the arguments that are being made. Chapter 9 concludes the theoretical development of the thesis, building on all previous chapters to provide a preliminary theoretical analysis of the expansion of the Irish Music Rights Organisation as an example of the process and practices of enclosure.

Figure 1. The Thesis Structure

Chapter Overview

Chapter 1, as we have seen, establishes the need for a theory that can cope with the *relational implications* of the expansion of the Irish Music Rights Organisation. This chapter provides the first clear thematic overview of the literature of music and copyright. Previous approaches to 'music and copyright', it is argued, can be roughly categorised into five approaches: descriptive, sponsorial, revisionist, sociohistorical, and analytic. Each of these tends to fall into the trap of a damaging discursive complicity if used to critically analyse situations of 'music and copyright'. None are adequate to the analysis of the relational implications of law, intellectual property, copyright, and performing rights. Neither, then, do I find them adequate for my assessment of the expansion of IMRO.

existing theory, non-academic publications, and personal and professional experiences to help researchers gain insight into the data" (Steins 1999:75).

In this thesis, then, a sixth approach is required, which is here termed *retheorising*. There are two elements to this approach. The first, counterinduction, frees up the conceptual terrain by rejecting orthodox assumptions. This is done with a view to elaborating hypotheses that are inconsistent with generally accepted but inadequate points of view. The second element is the emergence of theory, in which new sets of assumptions emerge from the theoretical uncertainty engendered by counterinduction. This thesis retheorizes 'music and copyright' in and through an emergent analysis of the expansion of the Irish Music Rights Organisation during the period 1995-2000. In so doing, this thesis presents the first monographic analysis of the organisation that is not primarily economic in orientation.

Chapter 2 begins this examination. It describes the central operating concerns of the Irish Music Rights Organisation. These depend almost entirely on a successful programme of performing rights licensing. A performing right is a statutory right analogous to copyright. This chapter also describes how the organisation is allowed to undertake these licensing operations on the basis of an economic monopoly in the Irish state. IMRO members attained independence for their organisation in 1995. In the same year, the activities of the organisation received important official sanction on the basis of two important rulings. The first was passed down from the Dublin District Court and confirmed IMRO's authority to collect royalties for its members. The second ruling was delivered by the Irish Competition Authority, and cleared IMRO of accusations of monopoly abuse. These rulings provided legal precedent and official legitimation, supporting the *de facto* and *de jure* monopoly position of the Irish Music Rights Organisation.

Chapter 3 extends this examination. It follows the Irish Music Rights Organisation in the achievement of hegemony. By hegemony is meant the unquestioned authority of the monopolistic operations of the Irish Music Rights Organisation, insofar as they proceed with governmental and legislative support. This chapter establishes that expansion is undoubtedly

the dominant feature of IMRO's activities during the period 1995-2000. This expansion was, however, often vigorously opposed. The chapter focuses on disputes between the Irish Music Rights Organisation and both primary schools and the Vintners' Association of Ireland. This examination discloses what we might call a 'cycle of expansion', that is, a cycle of expansion, resistance, legitimisation, and further expansion. The cycle ran as follows. The Irish Music Rights Organisation would lay claim to a domain of jurisdiction. Resistance would then be offered to that claim. However, representatives of IMRO would successfully secure legitimating support from official governmental and legislative quarters, and expansion would continue with further claims of jurisdiction. By 1998 the Irish Music Rights Organisation had successfully achieved a number of important legal decisions and strategic alliances that effectively ended disputes and established an hegemony which underpinned all subsequent moves to expand the interests of the organisation.

Chapter 4 provides a further illustration of the expansionary dynamic of the Irish Music Rights Organisation during the period 1995-2000. Using the structural backdrop of the 'cycle of expansion', this chapter follows IMRO's expansion as it impacted upon the domain of what is considered 'Irish traditional music'. The claims of the performing rights organisation were met with fierce resistance. Widespread anger and confusion arose among supporters of 'traditional music' amidst fears of legislative enclosure. The cycle of expansion in this regard is especially illustrated by the case of the national traditional music body, *Comhaltas Ceoltóirí Éireann* (CCÉ, or 'Comhaltas'), and, in particular, by the statements and actions of the *Ard-Stiúrthóir* (Director-General) of CCÉ, Labhrás Ó Murchú. In the space of two years, the official position of Comhaltas moved from one of absolute non-involvement with the Irish Music Rights Organisation to one which embraced the policies of IMRO by the signing of a contractual agreement. By the end of 1998, all official dispute between IMRO and Comhaltas had been quashed. The cycle of expansion clearly characterises IMRO's activities from 1995-2000.

Where Chapters 2-4 are primarily descriptive in orientation, **Chapter 5** offers an explanatory framework for the expansionary dynamic of the Irish Music Rights Organisation, drawn from the work of economist John Kenneth Galbraith. This is the first research to use the work of Galbraith to provide an explanatory basis for empirical case study analysis. It has already been established that the dominant feature of IMRO's activities from 1995-2000 is expansion. Galbraith identifies expansion as one of the defining features of firms that conform to what he calls the "Planning System". Modern corporations, Galbraith argues, do not so much respond to the market as *control* the market environment in which they operate. Firms in the Planning System, then, can be characterised by a general and pervasive tendency towards the achievement of control. Here this is understood as a general organisational tendency towards the elimination of uncertainty.

In this chapter, correlations are drawn between certain political features of the Irish Music Rights Organisation and Galbraith's Planning System model. It is argued that the expansionary dynamic of IMRO is underpinned, then, by a general and pervasive tendency towards the achievement of control and the elimination of uncertainty. Galbraith makes the case that analyses based on neo-classical economics are inadequate to understand the political dynamics of such firms. His own analysis lays bare the political strategies employed by such firms. Similarly, use of Galbraith's insights allows us to see the political dynamics of organisational operation within the Irish Music Rights Organisation. In particular, it becomes clear that the existence and operation of IMRO rests entirely on widespread acceptance of the organisation's claims to authority and jurisdiction.

Chapter 6 undertakes an analysis of the character of the authoritative claims of the Irish Music Rights Organisation. It is argued that the claims of the organisation can be understood in the light of Mikhail Bakhtin's characterisation of the "authoritative word" or as "monologic authority". Such authority gains its power from its presumed incontrovertibility, in the face of which is expected unconditional allegiance. This is authority consistent with the expectation of eliminated uncertainty, authority understood as the

provision of certitude. IMRO's authority is often assumed to be unquestionable because it is understood to be based on the natural, inevitable, universal, and unchallengeable principles of copyright law. To question that authority is to question the existence of the organisation itself.

In this chapter, the claims of the organisation are undermined. They are rendered visible as *claims* by turning to literature within the fields of critical legal studies and the sociology of law. It is argued that the workings of law are not separated from social life, that they are neither value-free nor politically neutral. Furthermore, the logic, discourses, and practices of law, intellectual property, copyright, and performing rights are neither natural inevitable, nor necessary. Nevertheless, they continue to play a crucial role in our experience of meaning, power, and expectation. Our unquestioning acceptance of the presence and activities of the Irish Music Rights Organisation structures our expectations, thereby guiding and shaping our lives. In this chapter, then, we undermine the authority of IMRO and assert that the expansion of IMRO has *relational implications* for the character of our social relationships, for the way we live our lives.

Chapter 7 and **Chapter 8** provide the theoretical foundation for this claim. These chapters are perhaps the most important from the perspective of retheorising. It is here that an alternative set of assumptions is provided. These new assumptions allow us to undertake an analysis of the relational implications of the expansion of the Irish Music Rights Organisation as an example of a particular character of social and political relations, viewed from the perspective of humans-among-humans. To this end, these chapters unfold a theory of "negotiation". Negotiation, it is argued, is constituted by four elements, which are explained in depth in the course of the chapter:

- The ever-presence of uncertainty
- The emergence of certainty
- Social Interaction
- Expectation.

Chapter 7 presents the first two elements of negotiation. Uncertainty, it is argued, is a constant and dynamic aspect of our experience of consciousness. Certainty also, it is suggested, is also a constant and dynamic aspect of our experience of consciousness. Our experience of certainty is, then, suffused with our experience of uncertainty. The understanding of certainty here is contrasted with understandings in which certainty is equated with certitude, or the absence of doubt. Drawing upon the field of neuropsychology, our experience of certainty is here posited as emergent, cumulative, adaptive, individually negotiated, and structured.

In **Chapter 8** the final two elements of negotiation are presented: social interaction, and expectation. In this chapter the argument is extended, from an emphasis on the physiological or neural correlates for our experience of uncertainty and certainty to issues of power and expectation. Social interaction is presented as the 'cauldron of power' in our discussion of negotiation, referring to the relational environment in which we find ourselves. The power analyses of Michel Foucault are extended by drawing upon the discussions in Chapter 7 concerning uncertainty and certainty. Expectation is then offered as perhaps the most crucial aspect of negotiation. Drawing on the field of social psychology, it is argued that the notion of expectation provides a meeting point for the understandings of uncertainty, certainty, and social interaction that have already been presented. By focusing on the interrelationship of the four elements of negotiation we can come closer to an appreciation of how it is that law, intellectual property, copyright, performing rights, and the monopolistic hegemony of the Irish Music Rights Organisation can guide our experience of meaning and power, and thereby shape our lives.

Chapter 9 provides an analysis of the relational implications of the expansion of the Irish Music Rights Organisation in and through the presentation of a theoretical framework for the analysis of enclosure. This chapter first clarifies some of the dominant understandings of the term 'enclosure'. Simplifying in the extreme, 'enclosure' refers, on the one hand, to 'land, property, and the commons'. On the other, it refers to 'resources,

intellectual property, and the commons'. Almost invariably, enclosure is understood in terms of 'enclosure of'. In this thesis, however, we move towards an understanding of enclosure without taking recourse to the notion of the commons.

It is argued that the analysis of IMRO's expansion allows us to identify three key features in the process and practices of enclosure: framing, expansion, and consolidation, each of which is explored in the light of the theory of negotiation. The framing of enclosure, it is suggested, is constituted by three operations of power: monologic generalisation, closure, and separation. The expansion of enclosure can be analysed as comprising two elements: representation and resistance. The consolidation of enclosure is understood to have three elements: displacement, legitimisation, and hegemony. Through this theory of enclosure we can arrive at an appreciation of wide-ranging social and political implications of the expansion of the Irish Music Rights Organisation. IMRO's expansion discloses a particular modality of power relations, which we here understand through the features of enclosure. Enclosure, then, is not an abstract process, but, rather, the process and practices of enclosure implicate us all in a call to greater understandings of authority, power, meaning, and expectation in our lives. This is the first systematic theoretical exposition of the process of enclosure without taking recourse to the notion of the commons. This chapter also offers new understandings of 'frames', 'expansion', 'authority', 'representation', 'resistance', 'legitimation', and 'hegemony'.

Chapter 2

The Irish Music Rights Organisation and the Achievement of Monopoly

Introduction

This chapter provides a descriptive examination of the operations and monopoly status of the Irish Music Rights Organisation (IMRO) during the period 1995-2000. The three fundamental elements upon which the activities of IMRO rest are performing rights, licensing, and the juridical structure of the

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licensing operations, supported by a context of law.

The legal support with which IMRO operates is highlighted in an examination of how the organisation is able to operate on the basis of an economic monopoly within the Irish state. The Irish Music Rights Organisation (IMRO) was established in 1989 under the auspices of the London-based Performing Right Society, and achieved independence in 1995. This independence was consolidated in 1995 on account of two rulings, one from the Dublin District Court and another from the Irish Competition Authority. These rulings provided official sanction and legal precedent for IMRO's activities, legitimating their collection of royalties throughout the Irish jurisdiction, thereby securing the position of the Irish Music Rights Organisation as both a *de facto* and *de jure* monopoly operation. In practical terms, this monopoly provides IMRO representatives with a *carte-blanche* for the expansion of the organisation's interests.

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The legal support with which IMRO operates is highlighted in an examination of how the organisation is able to operate on the basis of an economic monopoly within the Irish state. The Irish Music Rights Organisation (IMRO) was established in 1989 under the auspices of the London-based Performing Right Society, and achieved independence in 1995. This independence was consolidated in 1995 on account of two rulings, one from the Dublin District Court and another from the Irish Competition Authority. These rulings provided official sanction and legal precedent for IMRO's activities, legitimating their collection of royalties throughout the Irish jurisdiction, thereby securing the position of the Irish Music Rights Organisation as both a *de facto* and *de jure* monopoly operation. In practical terms, this monopoly provides IMRO representatives with a *carte-blanc* for the expansion of the organisation's interests.

Performing Rights and the Irish Music Rights Organisation

In this section we explore the role that performing rights play in the operations of the Irish Music Rights Organisation. Performing rights are statutory, that is, they exist solely on the basis of legislation. They are understood to be analogous to copyright. Like copyright, a primary function of performing rights is that they act as a prescriptive control, allowing one person to prescribe the actions of another unless a fee is paid. The Irish Music Rights Organisation is allowed to enforce performing rights because members assign their performing rights to the organisation. This permits IMRO representatives to license 'uses' of music. Licensing is the primary operation of the organisation, and it is on the basis of licensing that the Irish Music Rights Organisation earns its money. Therefore, for IMRO to operate successfully, licences must be enforced on the basis of either persuasion or the threat of litigation.

Performing Rights

According to the Copyright and Related Rights Act, 2000, "copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description" (17.1). Copyright, then, is a set of prescriptions on the actions of others in relation to a "literary or artistic work" which control what can or cannot be done by other people in relation to that "work". Generally copyright is understood to protect the expression of the author's ideas rather than the ideas themselves (WIPO 1997b:6).²⁸ This would explain why there is a felt need to fix a work in 'tangible' form, whether written or recorded in some other way, before it may qualify for copyright protection. Once a work can be pointed to as an 'expression', it qualifies. According to the Copyright and Related Rights Act, 2000 (4.37), the owner of a copyright has the exclusive right to undertake, or

²⁸ The World Intellectual Property Organisation (WIPO), based in Geneva, is regarded as the ultimate official arbiter in doctrinal matters of intellectual property. See <http://www.wipo.int>.

authorise others to undertake, all or any of the “acts restricted by copyright”. A person is understood to infringe the copyright in a work if they undertake or authorise another to undertake any of these acts without the licence of the copyright owner. The acts restricted by copyright are as follows:

- (a) to copy the work;
- (b) to make the work available to the public;
- (c) to make an adaptation of the work or to undertake either (a) or (b) in relation to an adaptation.

The “performing right”, although not specifically mentioned in the Copyright and Related Rights Act, is generally understood to pertain to (b), making a work available to the public. If the act of copying is the first act which requires authorization, then the second is the act of public performance: “The right to control this act of public performance is of interest not only to the owners of copyright in works originally designed for public performance. It is of interest also to the owners of copyright, and to persons authorized by them, when others may wish to arrange the public performance of works originally intended to be used by being reproduced and published” (WIPO 1997b:155). This ‘performance’ is understood to be analogous to copying. This includes performing, showing or playing a copy of the work in public; broadcasting a copy of the work in public; including a copy of the work in a cable programme service; issuing copies of the work to the public; renting copies of the work; or, lending copies of the work without the payment of remuneration to the owner of the copyright in the work. Performing rights are statutory, that is, they exist solely and exclusively by virtue of the laws that create and recognize them (Sinacore-Guinn 1993:14).

Licensing

Enforcement of the property right of copyright can be exercised by other persons by licence or assignment (WIPO 1997b:5). Licensing constitutes the primary activity of the Irish Music Rights Organisation during the period 1995-2000, for “the licensing of works is how collectives earn their money” (Sinacore-Guinn 1993:30). In 1999 licensing revenue for the Irish Music Rights Organisation came to IR£17,418,077. In 2000, the figure had risen to

IR£19,457,780 (IMRO 2000:6). Members grant IMRO the nonexclusive right to license non-dramatic public performances of their works, reserving to themselves the nonexclusive right to license holders. By way of a Deed of Assignment, the member vests the ownership of their performing rights and film synchronisation rights in the Irish Music Rights Organisation in order that IMRO might administer performances of works on the member's behalf. It is still technically possible for the member to license 'users' outside of IMRO. By virtue of the Deed of Assignment to which each member consents upon joining, the Irish Music Rights Organisation is empowered to license 'users' to perform all the works in its repertoire. Members also authorise IMRO to bring suits in their name against alleged copyright infringers, and appoint IMRO legal counsel to act on their behalf. Members also agree to accept and be bound by the organisation's distribution system by which individual royalties are determined.

The Irish Music Rights Organisation can then license 'music users', by way of contract, to perform all the works in its repertory. The primary objective of these societies is to enable their writer and publisher members to license all nondramatic public performances of their works. Being organised nationally, they can effectively license 'uses' on a national basis, and internationally, on the basis of reciprocal agreements with similar societies. They also police unauthorised 'uses' in a bid to maximise the royalty payments for their members. The benefit for those who might be considered 'music users' is that they are able to obtain the right to perform the works of all members of both the national society and those of the members of all internationally affiliated societies, without the burden of administrative and recordkeeping requirements (Korman and Koenigsberg 1986). The sum total of these works is often referred to as the 'repertoire' of the collection agency. Taking out a licence with IMRO gives the owner of a premises permission to 'perform' any music from the IMRO repertoire. Owners, of course, are not obliged to 'use' any of this music, but, once licensed, they are assumed to be doing so. The number of songs in the 'world repertoire' is considered to be in the region of 14.25 million (source: IMRO website).

Licensing is also, however, the most debated and litigated area of collective administration worldwide (Sinacore-Guinn 1993). In 1993 the Irish Music Rights Organisation paid out more than IR£47,000 in legal expenses (Curran 1994). By 1999 IMRO's legal, collection and professional fees came to IR£476,258, a rise from IR£413,453 the previous year. Musical performing rights entitle the copyright owner of a work to receive a royalty whenever their musical work is performed in public or broadcast. The responsibility for securing money from the 'public performance' of IMRO's repertoire, whether 'performed' by live performers or mechanical means, rests ultimately with IMRO's Director of Licensing and Finance.²⁹ It is important, first of all, to ensure that premises which are party to the performance of music are licensed, and, secondly, to maintain a system of continuous monitoring. Monitoring of licensed premises ensures that the appropriate performance royalty tariffs are applied, and that the number of performances reported by the premises is consistent with the number of performances that actually occur. Under the auspices of the Director of Licensing and Finance there are five account executives. Each of these is responsible for the collection and licensing activities in several counties.³⁰ In turn, these five executives supervise around 40 agents who deal directly with IMRO customers in the activities of collection and licensing. A new development is the presence of a 'telephone sales force', which concerns itself with licensing (Lyons 1999:7).

When the representatives of the Irish Music Rights Organisation identify that a premises requires an IMRO license the proprietor is approached, and asked to sign a standard public performance contract. The licence granted by IMRO permits the licensee "to perform copyright music from the IMRO repertoire on the premises, in return for paying royalties to IMRO according to the applicable tariff" (Lyons 1999:7). This blanket licence³¹ runs from year

²⁹ Some of the information in this section is drawn from the IMRO document The Irish Music Rights Organisation - Revenues, Costs and Distributions (Lyons 1999), which is available online as a .pdf file at http://www.imro.ie/about/imro_Costs_Revenues.shtml For further information on the organisational structure of the Irish Music Rights Organisation see the IMRO website at <http://www.imro.ie>.

³⁰ <http://www.imro.ie/Licensing/Licarea.htm>. Accessed 1999 (No longer active).

³¹ The immeasurable 'use' of 'music', by which is meant 'creative works', has provided the justification for both the need and the demand for cheap methods of licensing 'music' (creative works) in bulk. Blanket licences allow music users to choose and perform

to year, until such time as the licence is cancelled. The performance royalty tariff charged in the first year is 50% greater than that charged in the second year. The standard rate of royalty is deemed to be that charged from the second year on. The high first-year charge results from the tendency for IMRO representatives to have to make the first move in the licensing relationship. Most music users will not attempt to contact licensing collectives. Often they will only enter into a licensing agreement upon threat of litigation (Sinacore-Guinn 1993:36). As a result, collectives actively identify and pursue all potential music users:

It is an unfortunate fact of life that respect for the rights of creators is not the norm. A significant number of users avoid or even actively resist a collective's efforts to control the use of its repertoire of works. It is up to the collective to assert its rights and the rights of its affiliated rights owners in a way that will cause compliance (Sinacore-Guinn 1993:39).

Strong-arm, coercive tactics, including litigation, are generally avoided, as they are costly and generate bad public relations. If someone refuses to pay for an IMRO licence when approached, then the organisation takes recourse to the Circuit Court. If a licensing agreement has been contracted but royalties are not paid, then the 'music user' is sued by the Irish Music Rights Organisation as a commercial debtor. The use of debt-collection agencies is standard practice for IMRO as the last attempt at resolution before more substantial coercion. The use of persuasion is preferable for the organisation, so significant efforts are made to convince users of the necessity for proper licensing. Often a performing rights society will undertake cultural activities, programs, and sponsorships in order to encourage the creation of new works, educate people as to the nature of

copyrighted music without having to worry about obtaining licences from each and every copyright owner, or keeping a detailed account of each performance (Korman and Koenigsberg 1986). However, there are fears that blanket licences are not matched with equally comprehensive distribution of royalties. These fears arise from the logical impossibility that they ever could: the blanket licence is all-encompassing, covering every copyrighted work in the world repertoire. Although the number of those works which have been registered may be quantifiable, the number of potentially copyrightable and therefore licensable creative works stretches to infinity and beyond. The issuing of blanket licences creates something of a paradox. A blanket licence authorises music users to use any work within the world repertoire, without advance notice. In order to be fully equitable in distribution practices, however, the collective must find ways to monitor the uses of its works under blanket licences (Sinacore-Guinn 1993:36). If it were to monitor all of these uses, however, the collection and distribution of royalties would not be possible on account of the exorbitant administration costs.

creative rights, and garner support for those rights. The Irish Music Rights Organisation is very active in this regard. Such activities also perform the obvious functions of brand recognition and public relations.

IMRO agents are granted a right of free entry, for monitoring purposes, to any premises which has been licensed. The performance royalty rates vary greatly from premises to premises. They take account of the type and frequency of 'performances', the nature of the venue and other variable conditions. Royalties are paid annually and, in advance. If not based on a flat annual rate, payment in the first year is based on estimated 'music usage'. There are three categories from which tariffs are constructed: 'background music', 'featured music' and 'amusement music'. Background music is considered to be 'performances' which occur as a result of mechanical equipment, for example, a CD player, radio, or television set. The category of featured music for the most part refers to 'live performances', but is also considered to include music which is played on 'disco equipment' or karaoke machines. Amusement music is taken to refer to 'impromptu performances' by customers. Paying for royalties in advance makes the inclusion of an amusement music category something of a logical anomaly, unless the amusement rate is extended to cover every day of the year on the possibility that a customer might suddenly engage in music or song. To cover this, at the end of the year a 'return of usage' is submitted by the licensee, which is compared to the estimated 'usage', and a readjustment to the payment is made. Often a premises will be subject to two or more different tariffs.

Juridical Structure

Performing rights organisations operate within a multilevel juridical structure that regulates and controls their activities (Sinacore-Guinn 1993). Domestic legislation is the first level. Domestically, the representatives of the Irish Music Rights Organisation have looked to the Copyright Act, 1963, the Performers' Protection Act, 1968, the Competition Act, 1991, and, most recently, the Copyright and Related Rights Act, 2000, for support of their position. The organisation must also remain cognisant of company law in

regard to internal administration. The second level of the juridical structure is provided by the international copyright conventions which extend the qualification of copyright protection offered by domestic legislation. The most important of these are international creative rights conventions. These include: the Berne Convention for the Protection of Literary and Artistic Works, initially signed in 1886, revised in 1971, and amended in 1979; the Universal Copyright Convention, revised in 1971; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961, otherwise known as the 'Convention of Rome'; the World Intellectual Property Organisation (WIPO) Copyright Treaty of 1996; the WIPO Performances and Phonograms Treaty of 1996; and the 1994 World Trade Organisation GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The Irish Music Rights Organisation, like any other collective rights administration, also claims legitimacy from a range of other international agreements, reports, and recommendations, for example: the Subcommittee of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee (1975); the Committee of Government Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works (1982); the Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter convened by WIPO and UNESCO (1984); or, the Group of Experts on Direct Satellite Broadcasting (1985) (Sinacore-Guinn 1993:7). The third level of juridical governance is provided by the rules of international associations such as CISAC³² (International Confederation of Societies of Authors and Composers), an overarching body of performing rights organisations with which the Irish Music Rights Organisation is affiliated. The fourth level is provided by the rules, bylaws, and articles of association of the organisation itself.³³ The operations of the Irish Music Rights Organisation are

³² The acronym refers to the French title, *Confédération Internationale des Sociétés d'Auteurs et Compositeurs*. It is standard practice in English-speaking countries to follow the acronym CISAC with the English translation.

³³ Sinacore-Guinn also notes the importance of the European Community, or what is now known as the European Union: "Note must be taken of the European Community Treaty

underpinned, then, by the operations of law. This is clearly illustrated by following the organisation as it moved towards the achievement of monopoly status.

Towards the Achievement of Monopoly

In this section we highlight the milestones that led to the Irish Music Rights Organisation achieving monopoly status in the Irish state. In 1995 IMRO attained independence from the English Performing Right Society (PRS). This was also the year in which IMRO received official sanction on the basis of two important rulings. The first was passed down from the Dublin District Court and confirmed IMRO's authority to collect royalties for its members. The second ruling was delivered by the Irish Competition Authority, and cleared IMRO of accusations of monopoly abuse. These rulings provided legal precedent and official legitimisation for the licensing operations of the organisation. More than that, however, the rulings firmly established the *de facto* and *de jure* monopoly position of the Irish Music Rights Organisation.

The Road to Independence

On the 1st of January, 1989, a transfer of functions occurred between the Performing Right Society (PRS) and the newly-formed Irish Music Rights Organisation (IMRO), applicable for a period of 3 years, to be automatically renewed yearly thereafter. Up until this point the London-based PRS (see Peacock and Weir 1975; Ehrlich 1989) had acted as the performance royalty collection agency within the Irish territorial jurisdiction. That a British collection agency was still administering the licensing of Irish performing rights in 1988 was something of an anomaly, considering that Ireland had attained formal independence from British rule in 1922, and had been

Law, which, while it has a significant impact upon collective administration organizations, is *not* an international treaty; it is a supernational treaty creating a special political and social entity known as the European Community [now European Union]. As such, the EC Treaty has direct application to collective administration organizations without question as to whether they involve private or governmental acts" (1993:47-8).

declared a Republic in 1949.³⁴ Up until 1989, any Irish songwriters or composers who wished to receive royalty payments for works which they had copyrighted were obliged to join the Performing Right Society, and PRS were the sole distributors of licences for performing rights in Ireland. This led to accusations of an inequitable distribution system for Irish members (Vallely unpubl. 1996). As a 1992 Competition Authority³⁵ ruling was to show, the transfer of functions still meant that PRS and IMRO retained the relationship of parent and subsidiary companies respectively, and were therefore still to be regarded as separate branches of the same organisation. Under the first Articles of Association of the Irish Music Rights Organisation (1990), the Performing Right Society was still to control the composition of IMRO's Board of Directors and was to remain the 'ultimate parent company'³⁶. This Competition Authority ruling also reinforced the fact that IMRO had no freedom to determine its own course of action in the relevant market. The transfer of functions still required the Irish Music Rights Organisation to distribute its licence revenue, less operating expenses to the Performing Right Society, and by the end of the year 1990, for example, the net assets of the organisation were nil.³⁷

Under the transfer of functions agreement, The Irish Music Rights Organisation undertook to enforce the music rights licensed to the Performing Right Society within the Irish territory. IMRO was to supply PRS with any information for which it was asked concerning IMRO tariffs for 'music use'. If the English society determined that any legal 'or other' situation arose in the Republic of Ireland that was considered less favourable to its members than if the agreement hadn't existed, they could terminate the

³⁴ "The PRS spread its activities throughout the British colonies (where British copyright law usually applied). When Britain gave independence to its colonies, the PRS was not so quick to disband its empire" (Wallis and Malm 1984:164).

³⁵ The Competition Authority was established as a governmental body with the signing of the Competition Act, 1991. According to the Act: "The Authority may, at the request of the Minister [for Industry and Commerce], study and analyse and, when requested by the Minister, report to him the results of any such study or analysis, any practice or method of competition affecting the supply and distribution of goods or the provision of services" (11).

³⁶ Irish Competition Authority, Decision 5, 14 May, 1992. Full text of the decision is available at the Competition Authority website <http://www.tca.ie>.

agreement by notice in writing. IMRO was entitled to deduct a sum of money from the gross sum due to PRS in each year for future contingencies, providing prior consent was obtained from PRS in writing.

Although the 1992 ruling of the Competition Authority denied that the operations of the Performing Right Society constituted anti-competitive practices in Irish territory, by 1995 the Irish Music Rights Organisation had secured a ruling from the Competition Authority which allowed them independent status as the sole performance royalty collection agency operating within the Irish state. IMRO was thus established as an independent, registered, private company limited by guarantee, not having share capital, with non-profit status. It was registered with nine founding members, including PRS. The establishment of IMRO as an independent body was achieved following a considerable amount of lobbying activity on the part of Irish writer and publisher members of PRS who felt, as Ireland constituted a separate territory, and had its own separate Copyright Act (1963), there should be a separate Irish performing rights society. But it wasn't an easy task. In the words of IMRO chairman, Shay Hennessy, "[PRS] wouldn't go away. They just wouldn't let go" (personal interview, May 2000).

The District Court Ruling

1995 was most definitely a landmark year for the Irish Music Rights Organisation. As well as securing independent operational status, IMRO won a crucial case in Dublin District Court against the Vintners' Federation of Ireland (VFI). The District Court's was the first decision to come from approximately 800 cases in process at that time. These cases largely dealt with re-evaluations of music use and venue areas. Hugh Duffy, then Chief Executive Officer of IMRO, estimated in 1996 that 30% of payments were paid straight away, 30% were paid on reminder, and 40% would go to debt-

³⁷ All of these things go some way to explaining why the Association of Irish Traditional Musicians, a trade union organisation, might dismiss IMRO in 1996 as "an English import" (cited in Valley unpubl. 1996).

collection or litigation (Vallely unpubl. 1996). IMRO had taken a case against Bridie O'Sullivan, of The Tatler Jack Bar in Killarney, Co. Kerry, for non-payment of performance royalties. It started as a normal debt-collection action, pursued by the solicitors Matheson Ormsby & Prentice. In October 1994 the solicitors Niall Brosnan & Co. informed IMRO that the file had passed on to the Vintners' Federation of Ireland, who then nominated a solicitor in Dublin to deal with the affair. The case ran before the Dublin District Court between March 9 and December 15, 1995. District Justice Thelma King upheld IMRO's action, stating that there had been a valid contract between the parties, that she was satisfied that the musical performances had indeed taken place as alleged by the Irish Music Rights Organisation, and that therefore Mrs. O'Sullivan was bound by the terms of the contract. A decree for the sum claimed, IR£4,986.56, together with costs of £IR1,761.70 was awarded against Mrs. O'Sullivan in favour of IMRO.³⁸

Despite being decided solely on the basis of a valid contract between the parties, it was claimed in the Irish Music Rights Organisation newsletter that the "judgement, delivered in Dublin District Court ..., in writing, confirmed the right of IMRO to collect royalties for the public use of copyright" (IMRO 1996). Brendan Graham, then Chairman of IMRO, expanded upon the ramifications of this case in supporting IMRO's position; the court's decision was seen as a victory for justice in the face of exploitation:

This was more than a simple case of a disputed debt. What I heard in court was that people who use our songs and music want to deny us basic human rights:

1. The right that what we write and compose is our property.
2. The right to sell our property for hire.
3. The right to eat, feed and clothe our children and to have a living wage.

I felt anger and betrayal for every songwriter whose works are used nightly, the length and breadth of this country, to bring enjoyment to so many people. However, in the end the good guys won.

District Justice King upheld the long established right of creators of music to be paid for the use of their works. She judged that IMRO was entitled to be paid the amount claimed. She said the pub owners knew the royalty charges and had the choice to use or not use our music.

The Judge in effect said that creators of music could eat (IMRO 1996).

³⁸ See the IMRO members newsletter of January 1996 (IMRO 1996).

The Competition Authority Ruling

Also in 1995, IMRO received an important Competition Authority ruling in its favour, against submissions which complained of IMRO's monopolistic position in Ireland.³⁹ A challenge had been offered by organisations such as the Vintners' Federation of Ireland (VFI), RGDATA (the small shopkeepers' body), the Irish Music Users' Council (IMUC), Quinnsworth (a supermarket chain), Concert Promoters & Venue Owners Association, and the Ward-Anderson Cinema Group. The ruling declared that "The agreements between creators and IMRO represented an efficient, and for many creators, the only way to obtain payments lawfully due to them for the use of their work" (IMRO 1996a). The Competition Authority also recognised that the impracticalities and high transaction costs that would arise from individual agreements between creators and music users led to an acceptance that an IMRO blanket licence was a viable alternative. Without a blanket licence, the Authority stated, transaction costs would be prohibitive, and many music users "would therefore be denied the right to lawfully use copyright music". As one commentator put it: "the nature of the right to be recognised demands collective administration if it is to be of any value" (Sinacore-Guinn 1993:6).

Although clearly confusing the denial of rights with the creation of disincentives, the decision of the Competition Authority confirmed the status of the Irish Music Rights Organisation and officially sanctioned their monopoly position as not being in breach of Section 4(1) of the Competition Act 1991 (IMRO 1996a). The Chairman of the Competition Authority at this time, Patrick Lyons, was later to take up a position as an External Director on IMRO's Board of Directors (source: IMRO website). Lyons also acts as a consultant economist for the organisation (Lyons 1999). In an IMRO press release following the Competition Authority's ruling, the then Chief Executive Officer of IMRO, Hugh Duffy, "acknowledged the role of the Competition Authority in protecting the integrity of the Internal Market by ensuring that the product, performing rights, could be traded fairly within the European Union"

³⁹ Irish Competition Authority, Decision 457, 21 December, 1995. See full text at <http://www.tca.ie/decisions/457.doc>.

(ibid.). In the IMRO members' newsletter of January, 1996, Duffy stated that he saw both the District Court decision and the ruling of the Competition Authority as boosting their 'prime objective', "to secure more equitable treatment for songwriters and composers", and as confirming and endorsing IMRO policies and practices:

Music is a product, a most valued product in the context of the Irish economy. The successes being achieved by the music industry in this country are consistently contributing to job and wealth creation. ... Yet it is inexplicable that there has existed an inherent reluctance, and in some cases a downright refusal, on the part of owners of public premises ... to subscribe for performance licences. For example, music is used by owners of pubs throughout this country each year to attract millions of customers, from home and abroad and yet so many publicans, and indeed others, go to great lengths to avoid paying for the very ingredient that is being used to woo business. ... Hopefully, the recent decisions in our favour will send a clear and unambiguous message to the marketplace, that music is a commodity like any other, and just like any other product in a consumer society, it must be paid for (IMRO 1996b).

Monopoly Achieved

It is interesting to note that in the Competition Act 1991, the term "monopoly" "shall be construed as a reference to an abuse of a dominant position" (14.7). Legally speaking, then, the dominant position of the Irish Music Rights Organisation does not constitute a monopoly, insofar as the organisation has been cleared of any accusations of monopoly *abuse* by the Competition Authority. Practically, however, the monopoly remains. In the words of the then Chief Executive Officer of IMRO: "We don't have a monopoly ... I mean we have a monopoly here in this country. We have been cleared by the competition authority as being legitimate, as being the only way" (Colmcille 1400 1997). Economically, a monopoly is said to exist "when an industry is in the hands of a single firm selling a product for which there are no close substitutes. Since one business unit has the market for the product all to itself, the firm and the industry are synonymous" (Morrice 1972:96). The Irish Music Rights Organisation is the only 'business unit' sanctioned to license performing rights in the Irish state. In Ireland, to all intents and purposes, the operations of performing rights and the operations of IMRO are synonymous. The organisation retains and exercises exclusive control of the market for performing right royalties, apparently merely facilitating consumer-producer

transactions while also defending the rights of IMRO members. As Sinacore-Guinn notes: "It is a practical reality that most collectives throughout the world operate as *de facto* or *de jure* monopolies within their territory of primary administration" (Sinacore-Guinn 1993:16).

Summary

In this chapter we first focused on the operations of the Irish Music Rights Organisation, specifically in its role as a performing rights organisation. Performing rights are statutory rights; that is, they only exist insofar as copyright legislation allows them to exist. These rights provide the basis for IMRO's licensing operations. Members assign their performing rights to the Irish Music Rights Organisation. This allows IMRO representatives to exercise prescriptive control over others, that is, the organisation is sanctioned by member mandate to prescribe the actions of others unless a fee is paid for music 'use'. The licensing of performing rights constitutes the primary activity of the Irish Music Rights Organisation during the period 1995-2000. It is on the basis of licensing that IMRO gathers revenue, and it could be said that licensing provides the *raison d'être* of the organisation. Successful operation of the Irish Music Rights Organisation relies on the successful operation of licensing activity. Hence, licensing must be maintained on the basis of either persuasion or the threat of litigation.

The second section of the chapter followed the Irish Music Rights Organisation as it moved towards the achievement of monopoly. Since 1995, the licensing operations of IMRO have been greatly assisted by the achievement of three things: independence from the Performing Right Society; legal precedent for the organisation's activities; and, official sanction from the Competition Authority for IMRO's monopoly position. These factors contribute greatly to the provision of a secure economic environment in which the Irish Music Rights Organisation might carry out its licensing operations. In the period following these rulings it is of no surprise, then, that the licensing operations of the organisation entered a period of intensification. This shall be the focus of the next chapter.

Introduction

Expansion was the most significant aspect of the activities of the Irish Music Rights Organisation during the period 1995-2000. In this chapter we follow the course of that expansion. It is no coincidence that an intensification in licensing activity occurred following the achievement of a secure monopoly position in 1995. We focus, in particular, on two disputes. The first arose in

Chapter 3

Look at all those naked words dancing together!

Everyone's very embarrassed.

Only one thing to do about it –

Off with your clothes

And join in the dance.

Naked words and people dancing together.

There's going to be trouble.

Here comes the Poetry Police!

Keep dancing.

Adrian Mitchell, 'What is Poetry'

These disputes allow us to characterise IMRO's expansionary activities between 1995-2000 as entailing what we term a "cycle of expansion", that is, a cycle of expansion, resistance, legitimisation, and further expansion. The representatives of the Irish Music Rights Organisation would lay claim to a domain of jurisdiction. Resistance would be offered to that claim. In response to resistance, however, IMRO would successfully turn to legitimating support in the form of government and legislation. Expansion would then continue as IMRO made further claims to jurisdiction in other domains. In this manner, the successful expansion of the Irish Music Rights Organisation led to the hegemonic acceptance of the role and activities of the Organisation in these domains before the end of the twentieth century. By 1999, IMRO had

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achieved a position of unchallenged authority from which to undertake activities and deploy strategies in all domains within the Irish state.

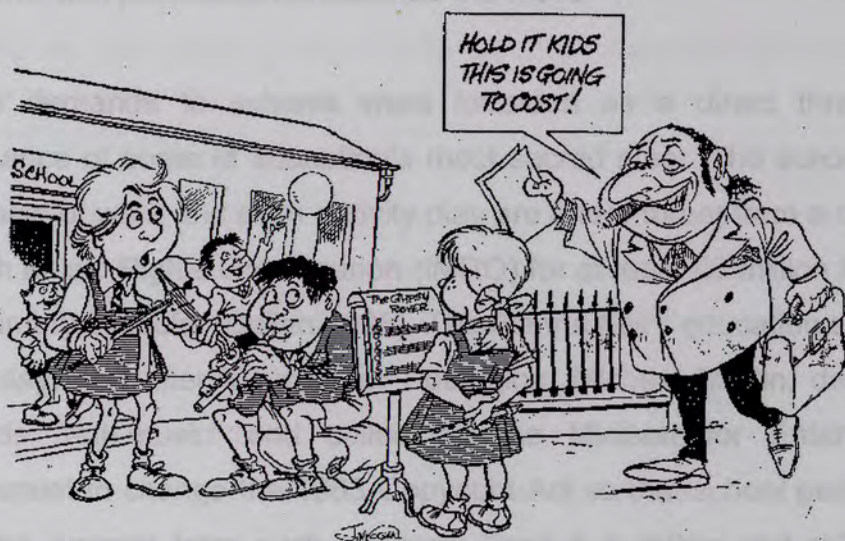


Figure 2. Sunday Independent Cartoon, 28th April, 1996

The Primary Schools

In one week at the end of April 1996 there was a short flurry of public outcry in the national media and in sessions of the Dáil (the Irish parliament)⁴⁰. On the 26th April the story even made the front of The Irish Times. The outcry arose as a result of The Irish Music Rights Organisation's dogged pursuit of performance royalties in relation to primary schools. Although primary schools were IMRO's target at that time, representatives of the organisation also announced their intention to approach second-level schools at a later

⁴⁰ "The *Oireachtas* or National Parliament consists of the President, a House of Representatives (*Dáil Éireann*) and a Senate (*Seanad Éireann*). The *Dáil*, consisting of 166 members, is elected by adult suffrage on the Single Transferable vote system in constituencies of 3, 4 or 5 members. Of the 60 members of the Senate, 11 are nominated by the *Taoiseach* (Prime Minister), 6 are elected by the universities and the remaining 43 are elected from 5 panels of candidates established on a vocational basis, representing the following public services and interests: (1) national language and culture, literature, art, education and such professional interests as may be defined by law for the purpose of this panel; (2) agricultural and allied interests, and fisheries; (3) labour, whether organized or unorganized; (4) industry and commerce, including banking, finance, accountancy, engineering and architecture; (5) public administration and social services, including voluntary social activities. The electing body comprises members of the *Dáil*, Senate, county boroughs and county councils" (B. Turner 2000:439).

date. The IMRO position was that songs and tunes were being used in public performances, and the writers and composers of those songs and tunes were therefore owed royalty payments for use of their property. Teachers, politicians, and journalists condemned the move.

IMRO's demands to schools were heralded as a direct threat to the continuance of some of education's most sacred rites: "The school concert, disco, sale of work and even nativity play are under threat from a demand by the Irish Music Rights Organisation (IMRO) for at least £3 million in royalties from primary schools" (Cullen 1996). The Fianna Fáil⁴¹ education spokesman of the day, and later Minister for Education, Micheál Martin, declared the demands "anti-music" and called on the Minister for Enterprise and Employment to change the 1963 Copyright Act so that school performances would be exempt from such charges: "Isn't it a rather sad reflection on modern society that we are at the stage where a child singing in a school concert is to be the subject of a licence fee?" (Keena 1996). The National Youth Council of Ireland were quoted on the front page of The Irish Times as having called upon the representatives of the Irish Music Rights Organisation "to back off in their demands for royalties from schools", claiming that "the blatant greed" of the organisation would discourage music in schools (Keena 1996). There was recognition of the fact that the representatives of the organisation were within their legal rights to pursue royalties from primary schools, but the morality of such actions was questioned. The general secretary of the Irish National Teacher's Organisation, Senator Joe O'Toole, was reported as saying that IMRO had a legal right to seek a licence fee from schools, but that it was not right to pursue it (Keena 1996).

Representatives of the Irish Music Rights Organisation argued that it was obliged under Irish and international law to collect royalties for composers and songwriters, especially those who were "not currently being compensated for their product" (Cullen 1996). Brian Power, Field Services Manager for IMRO, was reported as saying: "The performing right is a traded

⁴¹ Fianna Fáil is the republican nationalist political party in the Republic of Ireland.

commodity; it doesn't come down the chimney" (quoted in Cullen 1996). In a peculiarly Irish-Catholic claim to legitimation, Power referred to the fact that in Germany the Catholic hierarchy offered to meet the cost of curricular and extra-curricular royalty payments in schools: "Even the Vatican pays copyright, so why should Irish schools be any different?" (quoted in Cullen 1996). One of the reasons that such demands hadn't been made of Irish schools before was that the London-based Performing Right Society had, in IMRO's estimation, been lax in their duties. Since attaining independence in 1995, it was stated, the Irish Music Rights Organisation had "tightened up our affairs" (quoted in Keena 1996).

Then Chief Executive Officer of IMRO, Hugh Duffy, responded to the emotive charges that even nativity plays would be threatened, denying that his organisation wanted to charge for "music in the classrooms" or for nativity plays. The licensing fees were explained away as generally applying to music broadcast in staff rooms, for which £50 a year would be charged: "The composers of music are being discriminated against and it is our duty to collect this money. ... We could be sued if we don't look after people's copyright" (Sunday Independent 1996:2). In an article entitled "Sing a Song o' Sixpence, a pocketful of cash", Sunday Independent journalist Declan Lynch (1996) reported otherwise: "IMRO has written to 3,200 primary schools looking for at least £96 a year, plus VAT, and declaring that permission is required for any public performance, which is defined as anything outside of curricular activities attended only by pupils and teachers". Lynch denounced the organisation's actions as "petty" and "anti-social". As Lynch was also to comment, the controversy has "generated widespread odium" against the Irish Music Rights Organisation, confirming these disputes as a public relations disaster. Ultimately, however, the disputes were settled when, following negotiations, schools agreed to contract for performance royalty licenses at reduced rates. Following that week of controversy, IMRO were to have no more publicly-aired disputes with primary or secondary schools.⁴²

⁴² A similarly public outcry opposed the American Society of Composers, Authors and Publishers' decision in the Summer of 1996 to approach Girl Scout Camps in the United

If nothing else, the disputes involving the Irish Music Rights Organisation were increasing brand recognition for the organisation. From being described in an Irish Independent headline in 1994 as a 'Music Rights group' (Cullen 1994), by 1996 IMRO's name had reached a level of widespread infamy. Even bad publicity is publicity. All that was left for the organisation to do was to convince those in opposition that they were legitimate, and worthy of widespread support. There were some, however, who were determined to milk the atmosphere of controversy and anti-IMRO antagonism in a spirit of blatant opportunism. On Sunday, 12th May, 1996, the company Heatley Tector Limited, providers of background music, took out an advertisement in the Sunday Independent. Explicitly directed at "PUBLICANS. HOTELIERS. RETAILERS. RESTAURATEURS. [sic.]", the advertisement led with a series of newspaper headlines condemning IMRO. These were most likely fictitious, but the spirit in which they were written was indicative of the general level of animosity the representatives of the Irish Music Rights Organisation were facing nationwide at that time. Therein lay the power of this advertisement. It even offered a 24-hour telephone hotline. By reinforcing the sense of threat that many were feeling on account of IMRO's actions, Heatley Tector Ltd. tapped into a wide range of deeply felt concerns, and offered an alternative to people who felt themselves trapped. In fact, the advertisement portrayed the dilemma as a 'Royalty Trap', and portrayed the Irish Music Rights Organisation variously as hunters ("IMRO Chases £1M"), terrorists and/or extortion-racket gangsters ("Showbiz 'bagmen in balaclavas'"), and avaricious over-reachers ("IMRO move smacks of greed"). It even indulged in a pun worthy of a jail-sentence: "IMRO out of tune with reality". What was being offered was a service of 15 hours of copyright-free music "in a wide

States for performance royalty licences. The Wall Street Journal reported that ASCAP had informed camps across the U.S. that they must pay licence fees to use any of the four million copyrighted songs written or published by ASCAP's 68,000 members. SESAC, another performing rights organisation, also announced their intention to ask camps for royalties. Rather than risk lawsuits, many camps were provoked into excluding copyrighted songs from their activities. The Wall Street Journal article left the enduring image of 214 Girl Scouts at the Diablo Day Camp 3 p.m. sing-along, learning the Macarena dance: "Keeping time by slapping their hands across their arms and hips, they jiggle, hop and stomp. They spin, wiggle and shake. They bounce for two minutes. In silence" (Bannon 1996).

variety of moods and styles" for a "one-off payment of just £400 plus VAT @ 21%":

The music is yours to use as often as you like - and completely free of recurring copyright charges. So, if you're among the growing number of business people who are fed up paying through the nose for musical copyright, this is your opportunity to break out of the royalty rut once and for all (Heatley Tector 1996).⁴³

Members of the Vintners' Federation of Ireland (VFI), which represented publicans outside the Dublin area, were among those who clearly sympathised with the tone of this advertisement. The Vintners' Federation had been contesting payments to PRS-IMRO since 1984. In 1993 the publicans' lobbying led Seamus Brennan, later Minister for Trade and Marketing, to commission a report from Cooney Carey Consultants on the issues involved, through his personal secretary Dick Doyle⁴⁴. This report, coordinated by Angela Butler, was subsequently shelved (Vallely unpubl. 1996). 1996 saw an escalation of the ongoing disputes between the Vintners' Federation and the Irish Music Rights Organisation, and a concentration of IMRO's efforts to resolve them. By the end of 1996, the VFI, on the other hand, were the only major music-using group with which IMRO had been unable to agree a tariff for performing rights licences.⁴⁵

It must be remembered that publicans, for the most part, weren't arguing that performance royalties shouldn't be paid to the Irish Music Rights Organisation at all, as had been the case with primary schools. Rather, what was in dispute was the level of the tariff which publicans were being charged for blanket licences. As in the case of primary schools, some felt that the Irish Music Rights Organisation's pursuit of royalties was unnecessarily aggressive. Other reasons, or rather justifications, were given for opposition to IMRO; among them, that the organisation was undemocratic and unregulated, and in practical terms accountable to no-one. It was felt that the levels of payment requested from the publicans were arbitrary, 'made-up',

⁴³ It is interesting that an IMRO document (Lyons 1999) notes that Heatley Tector have, in 1999, a licence from IMRO, and supply IMRO with set lists.

⁴⁴ Doyle subsequently became chief executive of the recording industry organisation, PPI, a sister organisation to IMRO (Vallely unpubl. 1996).

and unjustifiable. It is true that the tariffs have been arrived at on the basis of convention, some would say arbitrary conjecture. However, one major point in IMRO's favour during negotiations was the fact that the tariffs offered by the organisation for performance royalty licences were and continue to be the lowest tariffs offered anywhere in the European Union.

As Vallely has noted (unpubl. 1996), the Vintners' Federation's opposition⁴⁶ was coordinated by a body called the Irish Music Users' Council (IMUC), which operated from the offices of the Vintners' Federation of Ireland (VFI) in Dublin, sharing their phone number. The Tatler Jack and Competition Authority rulings, mentioned earlier (see pp. 49-51), could only be considered major defeats. Vintners' Federation members received information from the Irish Music Rights Organisation following the District Court decision. According to one inside source, this was described in internal Vintners' Federation letters to members as 'propaganda' which was 'very one sided, selective, and biased'. The decision of the Competition Authority was characterised by the vintners as 'inconclusive'. The VFI leadership informed members that the decision reached was not in consideration of IMRO's alleged *abuse* of their monopoly position, a matter which would have been considered under Section 5 rather than Section 4 of the Competition Act,

⁴⁵ As early, relatively speaking, as November 1993, IMRO had secured a licensing agreement with the Licensed Vintners' Association (LVA), which represented publicans in the Dublin area (Lyons 1999).

⁴⁶ The organised and sustained opposition that IMRO has faced from the VFI in many ways echoes opposition that the PRS faced in the early days of the society, founded in 1914 following the 1911 Copyright Act. Peacock and Weir (1975) note that opposition to performance royalties and the principle of collection generally took one of two forms: "At the level of the individual dance hall owner, cinema owner or publican it simply consisted of denying the right and refusing to pay a licence fee. As such it served more as a time-wasting irritant and was usually dealt with by a lawyer's letter or, if that failed, by legal action for infringement. Whilst until the late 1920s every attempt to collect a licence royalty carried with it a potential legal action, such intransigent individuals were but a fact of everyday business and posed no serious threat to the Society. Much more worrying was the appearance of organized opposition amongst music users to the Society's activities. Although the Society established the principle of negotiating contracts with representative trade associations ... right from the outset, it was not a policy free from risk. Composers and publishers having united to assert their rights, it was just as likely that music users would group together to protect their own interests. So long as the aims of these Associations were simply to increase their members' bargaining power with the PRS and to lessen the transaction costs of individual negotiations, their activities from the PRS point of view were both legitimate and helpful, for they facilitated the collection of royalties" (73-4).

1991.⁴⁷ In fact, the Vintners' Federation promptly filed for appeal to the High Court, and continued to pursue the Irish Music Rights Organisation through the courts under Section 5. Members of the VFI were instructed not to sign any contracts with representatives of IMRO without first getting legal advice or the advice of the Federation. The conflict was portrayed in decidedly militaristic terms. Following the Competition Authority ruling it was announced (capital letters in original): "OUR BATTLES WITH IMRO ARE FAR FROM OVER" (VFI 1996). IMRO had made numerous attempts to achieve an agreement with the Vintners' Federation, and it was in their best interests to do so, both financially and from the point of view of public relations. The 1996 IMRO Director's Report and Financial Statements, however, indicated that 900 court cases were still in progress for non-payment of royalties, mainly against members of the VFI. In 1996, the bill for the Irish Music Rights Organisation's 'vigorous pursuit' of the outstanding debts owed by the Vintners' Federation of Ireland came to IR£361,293, or 14.7% of net operating expenses. In their annual report IMRO admitted that such expenses were "excessive and should be unnecessary", but continued: "However, the Board is implacable in its determination to pursue every single evasion of royalty payment due to you, through the courts if necessary, and we will continue to do so until all outstanding debts are paid" (IMRO 1996:ii).

The Vintners' Federation of Ireland's fourteen year dispute with PRS, PRS-IMRO, and IMRO ended anti-climactically in late December, 1997. The written documentation of the agreement was accepted at a meeting in Tuam, County Galway, between the VFI President, Paul O'Grady, and the then IMRO Chairman, Brendan Graham. The negotiations had led to an agreed tariff for the collection of performance royalty charges from publicans outside the Dublin area, effective from the 6th January, 1998. One of the most important aspects of the agreement was the establishment of an IMRO/VFI Arbitration Committee. Led by an Independent Chairman, the role of the new

⁴⁷ Section 4 of the Competition Act, 1991, concerns "anti-competitive agreements, decisions and concerted practices", that is, such as "have as their object or effect the prevention, restriction, or distortion of competition" (4.1). Section 5 deals with "abuse of dominant position" whereby "any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in a substantial part of the State is prohibited" (5.1).

committee was to resolve any further disputes between the Irish Music Rights Organisation and individual publicans without the need for legal proceedings, thereby cutting down on legal and administration costs. Under the newly-agreed PVFI tariff, it was stated that "Irish traditional music in the public domain is exempt ... but that copyright music will incur the full tariff. Disputes about matters such as the definition and categorisation of music, and the status of Irish traditional music, can be referred to the IMRO/VFI Arbitration Committee ..." (Lyons 1999:13). The agreement with the Vintners' Federation meant that all of the groups that IMRO had targeted as the main 'music users' in Ireland had agreed tariffs with the Irish Music Rights Organisation. IMRO's program of systematic expansion had been successfully completed.

The Cycle of Expansion

In The Production of Culture in the Music Industry (1985), John Ryan details the history of the ASCAP-BMI controversy over the collection of performing rights royalties in the United States. Ryan follows the development of the American Society of Composers, Authors and Publishers (ASCAP) from its establishment in 1914, and the subsequent conflict between ASCAP and a rival firm, Broadcast Music Incorporated (BMI). Ryan notes that: "ASCAP's early history was a continual cycle of laying claim to a particular domain, a challenge to this claim by concerned music users, legitimation of ASCAP's claim by the courts, followed by a new expansion of domain" (1985:31). The correlation in this regard between ASCAP's early history and the activities of the Irish Music Rights Organisation after 1995 are striking. The dynamic Ryan has identified we here term a "cycle of expansion". This is the fundamental pattern of IMRO's expansionary activities during the period 1995-2000. It can be simply restated as a cycle of expansion, resistance, and legitimation, followed by further expansion.

The term "expansion" is here used in two senses. It refers to an enlargement in the scale of IMRO's operations, and also to an increase in the number of domains or areas in which the representatives of the Irish Music Rights

Organisation claim jurisdiction. Because an increase in the scope of licensing, as IMRO's primary activity, automatically leads to an increase in the scale of the organisation's operations, these two senses are regarded as co-extensive. "Resistance" refers in this case to a manifestation of opposition to the expansion of the Irish Music Rights Organisation in such a way as hinders the licensing operations of the organisation. Resistance, in this sense, is an indication of a refusal to comply with IMRO's contractual expectations. In the case of both the primary schools and the Vintners' Federation, resistance was vociferous. The claims made by IMRO representatives were characterised in both disputes as being unnecessarily aggressive. In the case of primary schools, the claims to jurisdiction were even portrayed as being both inappropriate and immoral, though undeniably "legal". In the case of the Vintners' Federation, the most obvious resistance took the form of adversarial legal action in direct opposition to the demands of the Irish Music Rights Organisation. For the purposes of analysis, resistance can prove very useful. It is unlikely that the claims that IMRO representatives made regarding licensing would have even been noticed by anybody other than the contracting parties had it not been for the resistance offered by both primary schools and publicans. In this sense, identification of IMRO's cycle of expansion relies heavily on the identification of resistance.

"Legitimation" here refers to the confirmation of the authority of the Irish Music Rights Organisation by way of another justificatory authority, in such a way as to render IMRO's activities proper, rational, justifiable, or, simply, legally binding. Quite apart from appeals to legislation, other justifications were offered in the cause of legitimation. In reply to the resistance offered by primary schools, IMRO representatives justified their actions by stating that they were duty-bound to collect royalties for their members. Refusal to pay royalties was portrayed as discrimination against IMRO members. Not collecting royalties was an action portrayed as liable for litigation - members, it was claimed, would sue their own organisation if representatives of IMRO were unsuccessful in contracting for royalty licences. As we saw in Chapter 2, one of the legitimating arguments of the Irish Music Rights Organisation in response to resistance from the Vintners' Federation was that the refusal to

pay for music 'use' was a denial of "basic human rights" (see p. 51). It was also argued that music, as a product, contributed to the growth of the Irish economy, and that, therefore, it must be paid for (see pp. 52-53). Regardless of the details of the claims to legitimation, events eventually demonstrated that the combined legitimation strategies proved successful. Resistance to IMRO's efforts from both primary schools and publicans was ultimately rendered silent through a combination of aggressive demands, persuasive negotiation, and litigation. In one case the cycle of expansion had been completed in a week; in the other, the cycle lasted for fourteen years. In both cases the final outcome was the same - confirmation of the authority of the Irish Music Rights Organisation and consolidation of the organisation's monopolistic licensing operations.

Hegemony

With the accession of primary schools and the Vintner's Federation to IMRO's demands, the representatives of the Irish Music Rights Organisation had, then, taken a major step towards the achievement of hegemony. "Hegemony" is here understood as unchallenged authority for the Irish Music Rights Organisation to undertake activities and deploy strategies in all domains within the Irish state. This hegemony also includes the unquestioned status of the meanings and prescriptions that the representatives of the organisation propagate in the name of copyright, performing rights, members, and market economics. This is the power of hegemonic definition (Anderson 1988:130). Thus, one of the key features of hegemony, as developed in the Marxist tradition from the writings of Antonio Gramsci (1971), is a predominance that includes a particular way of understanding the world, human nature, and relationships:

It is different in this sense from the notion of 'world-view', in that the ways of seeing the world and ourselves and others are not just intellectual but political facts, expressed over a range from institutions to relationships and consciousness. It is also different from ideology ... in that it is seen to depend for its hold not only on its expression of the interests of a ruling class but also on its acceptance as 'normal reality' or 'commonsense' by those in practice subordinated to it (Williams 1976:117-118).

This aspect is vital in our considerations of the expansion of the Irish Music Rights Organisation. Following Bocock (1986:63), in hegemony the representatives of a group or organisation successfully achieve their objective of providing a dominant, prioritised, and centralised outlook that operates in all aspects of social life. The Irish Music Rights Organisation provides just such an outlook, at least insofar as copyright, music, and ownership are concerned. The effects of this hegemony, then, are felt across the island of Ireland, from the local pub to the seat of government.

A defining moment in IMRO's move towards hegemony was the report of the government task force on the music industry in Ireland, known as the FORTE report (FORTE 1996). The role that copyright played in this report gives some indication of the unquestioned place that copyright and the Irish Music Rights Organisation occupied in official circles at this time. The task force had been appointed in 1994 by the then Minister for Arts, Culture, and the Gaeltacht, Micheal D. Higgins. It became the subject of controversy in 1995 when IMRO's representatives on FORTE, Keith Donald and then IMRO chairman Brendan Graham, were allegedly instructed to resign unless Michael D. Higgins and his special adviser Colm Ó Briain desisted from lobbying efforts in favour of performance royalty payment exemptions for churches and heritage centres. According to satirical political magazine The Phoenix, such exemptions would be regarded by IMRO as "the thin end of the wedge" (1995:22). When the FORTE report was finally published, the absence of any extended examination of the role of copyright in the music industry was conspicuous, considering that copyright is the foundation on which the music business rests (see Frith, ed. 1993; Ryan 1985; Ehrlich 1989; Howkins 2001).

The reason for the absence, as represented in the report, was decidedly vague. The report made no reference to underlying controversies, stating: "The Task Force is directed not to take into consideration the matter of copyright/intellectual property rights as these are being dealt with by other agencies" (FORTE 1996:13). There was, nevertheless, a short general section on the 'vital role' of copyright, not only in the music industry but in the

'creative process'. Copyright protection was championed as the only guarantee that the international success of 'Irish music' would continue. In something of a circular formation, it was acknowledged that Irish music "forms the very root of the Irish music industry". Therefore, it was stated, "The Government and the Irish music industry must work together at all levels to ensure the highest level of protection possible for this creativity" (41). Ireland, it was noted, was "lagging behind many other countries in the area of copyright", particularly in light of the General Agreement on Tariffs and Trades (GATT) and Trade Related Intellectual Property Rights (TRIPS). "Music copyright," the report stated, "is an internationally traded service". If music copyright is a service, the report argued, the government therefore had a responsibility to ensure "that this property right is protected in the same way as any other goods or services that are traded within the European Union" (ibid.). If Irish legislation did not improve, it was stated, the Irish music industry would have difficulty securing payments due for the exploitation of Irish copyrights from other countries. Therefore, it was argued, to guarantee the future success of the Irish music industry the concept of copyright must undergo a "comprehensive underpinning". The report added that: "Copyright holders were gladdened by the statement of Justice Keane in the High Court decision in 1994 where he said "...it is the duty of the organs of the State, including the Courts, to ensure, as best they may, that these rights are protected from unjust attack and, in the case of injustice done, vindicated"" (ibid.). The voice of Irish government, the Irish legislature, and the operations of the Irish Music Rights Organisation are seen, then, to work in harmony.

This was symbolically affirmed when, in March 1998, the Irish Taoiseach (Prime Minister), Bertie Ahern, showed his support for the Irish Music Rights Organisation by giving a supportive speech at an IMRO dinner in the Conrad Hotel in Dublin. During the speech he promised changes to Ireland's copyright legislation that would coincide with the aims of the organisation. The importance of the Irish Music Rights Organisation to the social and cultural life of Ireland was indicated with the following sympathetic words: "Music and writing have always played a central role in the social and cultural

life of Ireland. Songwriters and music creators are the very bedrock of music. Without them there simply would be no industry⁴⁸ or source of employment and ... music, like any other resource or property, needs to be funded and paid for" (IMRO 1998a).

The authority of the Irish Music Rights Organisation goes unquestioned, then, despite (or because of) the absence of extended examination of the role of copyright and the activities of the Irish Music Rights Organisation. The understandings embedded in IMRO's expansion of authority become part and parcel of the 'commonsense', that is, "that-which-remains-unquestioned", of everyday life. The claims of the Irish Music Rights Organisation come to be seen as the natural, indeed inevitable claims of a *necessary* order. In acknowledging this, we might also follow organisation theorist J. D. Thompson, and consider IMRO's achievement to be one of "domain consensus" which:

defines a set of expectations both for members of an organization and for others with whom they interact, about what the organization will and will not do. It provides, although imperfectly, an image of the organization's role in a larger system, which in turn serves as a guide for the ordering of action in certain directions and not in others (Thompson 1967:29).

IMRO's hegemony thereby sets agendas for expectation, agendas for action, wherever the authority of the organisation remains accepted and unquestioned. The condition of hegemony in this case, then, refers to the unquestioned authority of the monopolistic operations of the Irish Music Rights Organisation, insofar as they proceed with governmental and legislative support. The condition of hegemony effectively signals 'the end of debate'; resistance is rendered ineffective because it is irrelevant. In hegemony, then, not only a monopoly of market but also a monopoly of meanings is achieved.

⁴⁸ It is hardly useful to know that without the participants in the music industry there would be no music industry.

Summary

The Irish Music Rights Organisation maintains a position of unchallenged economic dominance in the market environment in which it operates. IMRO is the only performing rights collection agency working in the Irish state. The organisation, then, operates in a monopoly environment. The primary activity of the Irish Music Rights Organisation is performing rights licensing. The representatives of IMRO issue licences that allow people to undertake 'music use' in exchange for the payment of an advance fee. One of the prime concerns of the organisation, therefore, is to convince people, by way of persuasion or by way of litigation, that performing rights licensing is both necessary and legitimate.

The Irish Music Rights Organisation achieved independence from the English Performing Right Society in 1995. In the period that followed, IMRO representatives intensified their efforts to increase the number of licences contracted with the company. This intensification was made visible on account of fierce resistance, as certain groups refused to comply with the purported need for IMRO licences. In this chapter we focused in particular on disputes that arose with primary schools and with the Vintners' Federation of Ireland (VFI). By 1998 the Irish Music Rights Organisation had successfully achieved a number of important legal decisions and strategic alliances that effectively ended these disputes. These decisions and alliances vindicated the organisation's pursuit of performance royalty payments on the basis of licensing contracts, further sanctioned IMRO's monopoly interest within the Irish State, and underpinned all subsequent moves to expand the interests of the organisation. By the end of 1998, all major 'music users' had contracted for IMRO licences.

It can be shown, then, that the dominant feature of the Irish Music Rights Organisation's activities from 1995-2000 was expansion. IMRO operations increased both in scale and in scope. We can see the pattern of this expansion by portraying it as cyclical. IMRO's cycle of expansion is a cycle of expansion, resistance, and legitimation, followed by further expansion. The

expansionary activities of the organisation at this time were underpinned by IMRO's monopoly position. As they proceeded, it became clear that the Irish Music Rights Organisation had achieved not only economic monopoly, but also the condition of hegemony, that is, unquestioned authority for its operations, with the backing of both governmental and legislative support. The condition of 'hegemony' signalled, in effect, the end of debate, and free rein for the licensing activities of the Irish Music Rights Organisation.

In the following chapter we once again demonstrate the cyclical dynamic of the expansion of the Irish Music Rights Organisation. We turn to the effects of IMRO's expansion in the domain of what is considered 'traditional music'. By following the cycle of expansion, resistance, and legitimation, we can reaffirm the monopolistic hegemony of the Irish Music Rights Organisation. We can also reaffirm that licensing, as IMRO's primary concern, underpins expansion as the dominant feature of the organisation's activities from 1995-2000 - expansion.

...all questions relating to the working of the farm were to be settled by a special committee of pigs, presided over by himself. These would meet in private and afterwards communicate their decisions to the others. The animals would still assemble on Sunday mornings to salute the flag, sing *Beasts of England*, and receive their orders for the week; but there would be no more debates.

George Orwell, *Animal Farm*, 1946

Chapter 4

Expansion, Resistance, and Legitimation in the 'Traditional' Domain

Introduction

This chapter again highlights the cycle of expansion, following the Irish Music Rights Organisation (IMRO) as it expanded its jurisdictional claims into the contexts of what many would consider 'traditional music'. This happened almost by accident. The issue of 'traditional music' had been co-opted by the

Chapter 4

Napoleon, with the dogs following him, now mounted on to the raised portion of the floor where Major had previously stood to deliver his speech. He announced that from now on the Sunday-morning Meetings would come to an end. They were unnecessary, he said, and wasted time. In future all questions relating to the working of the farm would be settled by a special committee of pigs, presided over by himself. These would meet in private and afterwards communicate their decisions to the others. The animals would still assemble on Sunday mornings to salute the flag, sing *Beasts of England*, and receive their orders for the week; but there would be no more debates.

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The issue of 'traditional music' was much more than a question of tariffs for people who played music and sang in what might have been considered 'traditional' contexts.⁴⁹ IMRO's activities, policy positions, and aggressive expansion were thought by many people to be wholly inappropriate to the casual, informal practices at the heart of 'traditional music'. There was widespread confusion and anger as fears of legislative enclosure set in. As a result, a high level of antagonism arose against the organisation, not least of all from the national traditional music body *Comhaltas Ceolóin Éireann* (CCE or 'Corphaltas'). Once the representatives of the Irish Music Rights Organisation had been alerted to the field of 'traditional music', establishing

⁴⁹ The term 'tradition' is a problematic one. This is shown, for example, in the writings of Shils (1981), or Hobbs and Ranger, eds. (1983). The term 'tradition' is not defined here. Nonetheless, what is interesting throughout this chapter is the way in which the term is used by many as a synonym for 'non-copyright' or 'public domain'. The breadth and variety of locally-negotiated understandings of 'traditional music' in Ireland will be the focus of future research, being beyond the scope of this thesis.

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unquestioned jurisdiction in this domain became an organisational imperative. This was made all the more urgent on account of the widespread vitriol levelled against IMRO in this regard. The disputes appeared as intractable as they were complex. By the end of 1998, however, it appeared legitimisation had been achieved and the issues had been solved. A contractual agreement was signed between the heads of CCÉ and IMRO, and “traditional music in its original form” was declared “copyright-free”.

The Rumble at the Crossroads

The conference organisers had done a great job under the circumstances. Somehow, the months of scramble for funding, presenters, amplification, and peace of mind had come to fruition. The conference, ‘Crosbhealach an Cheoil - The Crossroads Conference’ (April 19-21, 1996), had been convened as an independent forum in response to growing commercial development within Irish ‘traditional’ culture. The call for discussion had been answered by forty one speakers, and by another three hundred or so conference participants. This was not your usual conference. The corridors weren’t swelling with corporate delegates or academics. For perhaps the first time in history, a conference had been called at which practising traditional musicians were in the majority. Not only were they in the majority, but they had plenty to say, and they were going to make sure that they got to say it. Many were annoyed at a continuous stream of misrepresentation among documentary makers and the national media. Others were tired of those who continually trotted out the tradition versus innovation debate. Some were angry at what they saw as the dilution of the national race and its culture. Others just had a chip on their shoulder. Some were just there for the ‘crack’⁵⁰.

The Temple Bar Music Centre hadn’t been officially open for more than a year, and the building still had that vague mixture of promise and chaos about it. Outside was wet and windy, as could only be expected from an Irish April. Inside, up there in a newly-painted room on the third floor, a room probably reserved for the storage of sound equipment at some later date, there was quite a buzz in the air. It was the buzz of expectation, in anticipation of wigs upon the green. The general air was almost bloodthirsty. Up to this point there hadn’t been any fights.

The room was jammed, packed to the rafters. In the absence of a place to sit I had seated myself precariously and rather uncomfortably on the top of my wooden bodhrán case. Áine Hensey was in the process of wrapping up her presentation on Irish traditional music and the media from her perspective as a critic and radio presenter. A number of comments were raised from the floor regarding aesthetic

⁵⁰ As Terry Eagleton (1999) has noted, the word ‘crack’ or ‘craic’ is ‘rapidly approaching the status of ‘begorrah’. Most likely of Anglo-saxon rather than Gaelic etymology, the term most commonly refers in Ireland to an atmosphere of comfortable and pervasive conviviality, a complete absence of distrust in pleasant, relaxed, and relaxing company, most likely among friends. Heightened euphoria is not a necessary requirement. Those who wish to understand, participate in or experience ‘crack’ or ‘craic’ must commit themselves to its creation. Ciarán Carson indulges in a digression on the subject during his book *Last Night’s Fun*: “‘crack’... popularly and recently Gaelicised as *craic* and advertised in countless retro-renovated bars throughout the land, as in ‘Live Ceol [Music], Sandwiches and Craic’. Non Irish speakers in particular will insist on its ancient Gaelic lineage and will laboriously enunciate this shibboleth to foreigners who take it for a pharmacological rather than a social high. In fact, the Oxford English Dictionary dates crack, ‘chat, talk of the news’, to 1450” (1996:83). Carson suggests that ‘crack’ as a term was, until fairly recently, primarily confined to the North of Ireland.

judgment-calls and the role of media figures as mediators of judgment, but it wasn't Áine that most people had come to see. The lifeblood of this conference was rumoured to be controversy, and the paper that followed Áine's was nothing if not controversial. There must have been a good fifty people in a room which would have comfortably sat thirty.

It was to be entitled, "Irish Traditional Music - Whose Copyright?" As the applause died down for the previous speaker, William Hammond, the next speaker, took a seat in front of the microphone at the table. As he did so, I was aware of the presence, not two feet from where I sat, of the Chief Executive Officer of the Irish Music Rights Organisation (IMRO), Hugh Duffy. I imagined that the same man would have his ears cocked to listen to this particular paper. IMRO had been at the centre of a growing swirl of speculation and discontent among traditional musicians over the previous months, as IMRO had engaged with publicans around the country in pursuit of performance royalties for their members. This continued to cause controversy and confusion, many musicians feeling that one of the vital features of what they considered 'traditional music', the 'session', was now being placed under threat.

In his broad Cork accent, William Hammond proceeded to describe what he saw as a 'tollgate' on the 'crossroads' of Irish traditional music. Willie, known more for his prowess as a set-dancer and festival organiser than for his forays into legal difficulties, explained how, in his view, the life of traditional music was being hampered by overzealous collecting on the part of IMRO as they took on the publicans of the Vintners' Federation of Ireland. The Vintners' position was simple. While they respected IMRO's right to property, they were unable to agree upon charges which, in their view, were inequitable and which, they felt, derived from IMRO's monopolistic position.

Willie spoke quietly, and a little hesitantly, obviously not used to speaking in such terms in front of a crowd.

"You can picture the scene where a few lads and lassies who are fed up with competitions and fed up playing on their own, decide to find a place to play a few tunes on a Friday night, and they ask around, and one says,

- I've an uncle, he has a bar. He'll let us play a few tunes for a few pints and expenses.

So the uncle, who pays all his bills to IMRO and PPI for the radio, is delighted to have a few tunes on a Friday night. He decides to put an ad in the paper. So, on the Friday night the group comes in and they take a seat in the corner of the bar for a night of music-making, working out tunes, and tune-swapping.

This is where the law steps in. The local representative of the collection society sees the advert and decides to visit the pub. The representative, seeing the live music, copyrighted music, visits the uncle the next day saying,

- Listen here, you've live music going on here. You have to pay £500 a year in advance for the session.

So what does the publican do in that situation?"

Willie continued, admitting that he found it difficult to find where all the pieces fitted into what was overall a very confusing puzzle. He admitted that even finding the smallest amount of information had been a time-consuming exercise. Questioning whether performance rights should cover traditional sessions, he claimed that musicians were finding it harder to find new places to play, and that publicans were cutting back on the number of sessions that they held each week. He expressed worry that the session, the "practice room of Irish traditional music", was under threat: "No single person is responsible for that tradition. It's the collective work of many generations of Irish musicians. What rights does it have? None." Willie finished the talk with a suggestion that maybe it was time for a new society to be formed, a traditional music protection society. The room rang with considered applause. The room was small, the acoustics bright. A number of hands were quickly raised to the chairman as people sought a place to speak in reply.

Dermot McLaughlin, then Music Officer for the Arts Council, was one of the first to speak. He expressed reservations about the tone with which the paper had been delivered. "The paper suggested," he offered, "that copyright legislation is almost a bad thing, when, in fact, a fuller understanding of how the system works would

actually suggest something quite different. I think the specifics of how traditional music fits in is actually catered for in law. I think the copyright agencies have certainly done, in my opinion, a fair bit of work to bring traditional music back into the mainstream, so that people who trade and who earn a living from it can do so, and can enjoy the full protection and remuneration that the laws have already put in place. They guarantee a future and an income for the music."

Willie replied that his only area of conflict with copyright was where it interferes with traditional music. It was hard to hold Hugh Duffy of IMRO from speaking. He was obviously incensed, and undoubtedly confrontational in response to the paper. He stood up, barely waiting for permission to speak. Pointing out a number of inaccuracies in Willie's presentation, Mr. Duffy sternly reprimanded that he had found a lot of the information very biased.

"Purists like yourself," he began defiantly, "who defy innovation and question copyright-innovation have allowed the multi-national drinks industry to hijack you, and you are doing no service to the arrangers of copyright music! The arrangers of copyright have been pillaged for the last fifty years both in this country, in the UK, and in America. They haven't got a penny out of it, and massive fortunes have been made." "You make the case," he continued adamantly, "about the poor publican. The publicans are in the business of selling drink. They're not in the business of anything else ..." He restated his accusation of misinformation, and pointed out the financial support that IMRO had provided for the conference.

There were a number of other voices to be heard. Concern was expressed that copyright, developing out of a long tradition of publishing, composing and arranging, was not adequate to deal with an 'oral' tradition like Irish traditional music. Nicholas Carolan of the Irish Traditional Music Archive pointed out that copyright in sound recordings lasts for only fifty years, as contrasted with the general seventy year law, hence leaving a lot of early 78rpm Irish traditional recordings in the 'public domain'.

Sitting next to Hugh Duffy was record producer, song collector and record label director, Robin Morton, now based in Scotland. He rose animatedly to make a number of points:

"I've been interested in this issue of copyright protection for twenty five years, and have been fighting the same battle that IMRO have won. I think there's an awful lot of misunderstanding here of what IMRO's about and the battle they won with an English organisation called the Performing Right Society. They can put an awful lot of money into an awful lot of people's pockets in this country and they've done a damn good job, and you really should be talking to them. You shouldn't be coming here!

"The picture you developed there was rather like the picture of an Ancient Ireland where we all sit around in the pubs, and I was nearly crying into my pint, and it was a very emotional scene you were drawing up! This man's right," he said, pointing to Hugh Duffy, "The pub owner, this guy's uncle, is making a lot of money out of it, and you can rest assured that there's absolutely no reason why that shouldn't go back to traditional musicians. You can work out a system how that should happen and these people are open to it. I know, I've talked to them. They're reasonable people. They've put up a battle for a lot of great musicians in this country to be properly paid. You really should be talking to them, not fighting with them. For Christ's sake, get in there and talk to them and understand what they're saying and let them understand what you're saying!"

The Chair passed the right to speak to Tom Munnely, a longtime folklorist and song collector from Dublin, now living in County Clare, a place often regarded as the heartland of traditional music, if you're from County Clare.

"I live in an area of West Clare where there are quite a number of pubs and they do have music in them, and they supply a few pints. In fact, if the musicians were paid they'd probably be cheaper." Laughter broke the tension somewhat. "But this is from personal experience. I am a great believer in 'Public Domain'. I believe that traditional music and song genuinely belongs to anybody who cares to use it." He detailed how certain songs he had collected from a singer named John Reilly, for example, *The Well Below the Valley*, *Lord Baker*, and the *Raggle Taggle Gypsy*, had been recorded by singer Christy Moore and the Irish group *Planxty*. This he had no problem with.

"Where I do have a problem is when I get the Planxty songbook and I see 'The Well Below the Valley, Copyright Phil Coulter.' Now that pisses me off!"

Robin Morton jumped to Phil Coulter's defence, saying that if Phil Coulter had not copyrighted the song the money would have gone to some corporation elsewhere. He also testified as a friend to Coulter's good character, and insisted that there had been no malice intended in Coulter's actions. "There's money there to be earned," Morton insisted, as the Chair repeatedly made attempts to call the session to a close on account of time restrictions, "For God's sake, take the money from these big organisations! I think the real problem is that no-one knows where it's coming from. It's not a rip off!" At that the Chair called a halt to proceedings, joking that from that point on all were banned from speaking any more about this topic, as I raised myself gently from my bodhrán case.

The stand-off at the Crossroads was clearly adversarial in nature. Not only confusion, but open hostility was seen to emerge from the competing meanings that had been brought to the room. The protectionist position of William Hammond, strove to preserve the 'traditional session' from what was being increasingly perceived as a threat to its survival. The threat was seen to approach from a number of angles. It was felt that royalty collectors from the Irish Music Rights Organisation were going too far, and being overzealous. They were over-reaching their jurisdiction. This, it was claimed, was leading to fewer sessions.

'Irish traditional music' was portrayed as a thing in need of protection, a tradition 'without rights', the fragile, collective legacy of generations that was being dismissed on the basis of commercial gain. In reply, appeals were also made to the persuasive notion of protection, but to the protection of the livelihoods of the commercial musicians who make their living playing 'Irish Traditional Music'. It was stated that the law and copyright legislation adequately caters for commercial needs, and should be afforded respect accordingly. It was a good thing, it was claimed, that finally "a future and an income for the music" could be guaranteed. Traditionalist opposition was characterised as 'purist', in direct defiance of 'innovation', or the more curiously worded 'copyright-innovation'. Those in support of 'tradition' were also characterised as having allowed themselves to be hijacked by the multi-national drinks industry.

The retention of unclaimed or unpaid royalties was portrayed as 'pillage'. Putative massive fortunes in other people's hands were offered as a justification for fighting for the rights of 'arrangers' of 'traditional' tunes. Profit was championed, as was the Irish Music Rights Organisation as the bringer of profit. Objections to copyright and protectionism in behalf of the 'session' were portrayed as nostalgic and emotional.

The boundaries of the discussion still weren't particularly clear. The conflicts were surely significant, and 'traditional music' had certainly become an emotive issue in IMRO's political landscape. Still, the overwhelming impression of the rumble at the crossroads was more heat than light.

The Vintners and 'Traditional Music'

The opposition that arose from among the supporters of primary schools undoubtedly provided the Vintners' Federation with encouragement for their own opposition to the Irish Music Rights Organisation, and raised the emotional stakes in IMRO's "vigorous pursuit" of royalties. What had complicated the issue tremendously by 1996, however, was the co-optation of 'traditional music' as a major issue in the Vintners' negotiations. In October of 1996, for example, vintner associates threatened to boycott a music industry event, an Irish traditional Music Expo, ITMEX, in Ennis, County

Clare, unless IMRO withdrew their participation. As Vallely comments: "this was akin to having a board meeting without the treasurer" (unpubl. 1996:9). As the VFI continued to oppose royalty payments, they turned to the issue of performance royalties for 'traditional sessions' to further justify their opposition. This issue provided the Vintners' Federation with a justification, albeit a dubious one, for the reduction of tariffs for blanket licensing agreements, leading Hugh Duffy to claim that "the VFI are using the traditional music issue to lobby support for their reluctance to pay any writers' royalties at all" (cited in Vallely unpubl. 1996:8). This was very likely the case.

The "Session"

'Sessions' can be adequately or inadequately described, but never adequately defined, for the term 'session' can now be used as a label for any context in which two or more musicians or singers are gathered in social activity. In The Companion to Irish Traditional Music, Colin Hamilton describes a session as: "A loose association of musicians who meet, generally, but not always, in a pub to play an unpredetermined selection, mainly of dance music, but sometimes with solo pieces such as slow airs or songs. There will be one or more 'core' musicians, and others who are less regular" (1999:345). Scholars such as Hamilton (1977), and Vaysse (1996), have noted that the character of each 'session' ultimately arises from the personalities and social interaction of those engaged in the activity. In this sense, the meaning of the 'term' session can only really be adequately accounted for by looking to the particular circumstances implied by those who use the term. Some would look to the metaphor of casual conversation to characterise the musical activity taking place in what they would term a 'session': "Going to the pub, it's just like going for a drink and telling stories, or telling jokes or whatever. We're just telling tunes" (J. McCarthy quoted in Vaysse 1996:165). This view would be consistent with the view of Foy who, half-jokingly, describes a 'session' as:

... a gathering of Irish traditional musicians for the purpose of celebrating their common interest in the music by playing it together in a relaxed, informal setting, while

in the process generally beefing up the mystical cultural mantra that hums along uninterruptedly beneath all manifestations of Irishness worldwide ... an elaborate excuse for getting out of the house and spending an evening with friends over a few pints of beer (1999: 12-13).

Perhaps the most important word in this description, for our purposes, is “beer”. A detailed examination of relatively recent manifestations of the relationship between public houses and the “traditional session” is beyond the scope of this thesis, but this has already been explored in the works of Laurence Vaysse (1996), Colin Hamilton (1977), Hazel Fairbairn (1993), and Moya Kneafsey (2002).⁵¹ To date, however, Reg Hall (1995) is the only person to undertake a detailed historical investigation of this type of music-making in pubs before this date.⁵² Interestingly, Hall’s study focuses on an English context. In a complex overview, Hall shows that among Irish immigrants in London such music-making was to be found in the local Irish pubs by the 1940s. Landlords who tolerated musicians carefully negotiated licensing laws that allowed only two musicians at a time, and, “As musicians became confident in their new surroundings and as publicans realised their music-making attracted custom, the one-off, risky session became institutionalised as a regular weekly event, expected and looked forward to by musicians, landlord and customers alike” (1995:5). As sessions became a regular occurrence in London pubs during the early 1950s a shift occurred: “it became common for landlords to pay two or three musicians for a session. The established practice of other musicians joining in was unchanged, and there was no embarrassment about some being paid and others not” (1995:7). Vaysse records that in Ireland payment for the ‘anchoring’ of sessions has really only become frequent since the 1970s (1996:86). As Hamilton notes:

As the session became a standard aspect of Irish musical life, publicans, keen to have their bars known as centres of good music, began, from around the middle of the 1970s, to pay one or two musicians to turn up on a regular night, to ensure that a session would happen. If this ‘seeding’ worked, the publican was guaranteed a regular core of perhaps half a dozen musicians at a small cost. Almost all the current regular sessions are based on this principle, but at festivals and other like events, sessions are still normally impromptu and non-commercial (1999:345).

⁵¹ For less formal approaches see Carson (1986, 1996), Wilson (1995), and Foy (1999).

⁵² In the quest “to give a precise date of birth for the pub session” (Hamilton 1999:345) the historical confusion is often quite startling. Fairbairn, for example, in the same work attributes the ‘birth’ of the session to the 1940s, 1950s, and the 1960s (1993:25, 120, 122).

As Fairbairn has found, however, payment is not always an issue, and often a more informal arrangement between musicians and publican “allows them an elevated status of desirable clients, rather than that of employees. This means that the landlord is beholden to the musicians, he knows that the music attracts custom, but has no contractual security. In this way the musicians ensure good treatment” (1993:159). There are certainly some publicans with a personal fondness for particular musicians, and, indeed, with an interest and investment in what they consider ‘traditional music’. These ‘landlords’ are often well-known and well-loved, and are often musicians or singers themselves. Often the relationship with a publican is nondescript, but functional. Hamilton notes that “Even in cases where the host provides no encouragement to the players in the way of money or free drink, he at least provides a place for them to play” (1977:49). Many publicans, however, maintain a relationship with musicians that is at best business-like, and at worst testy and volatile. One city publican, for example, barred so many musicians from entering his pub during the 1990s that those nominated for prohibition gained a certain credibility among fellow musicians. That particular publican now runs a disco bar.

The “Session Issue”

But why was the issue of ‘traditional sessions’ brought into the dispute at all? Ultimately, as we saw in the last chapter, the aim of the Vintner Federation’s negotiations with the Irish Music Rights Organisation was to reduce the level of tariffs for performing royalty blanket licences. Many publicans felt that the issue of ‘traditional sessions’ could lead to a reduction in payments for licences. It was assumed that the ‘use’ of ‘traditional music’ or the hosting of ‘traditional sessions’ were qualitatively different from other ‘uses’ of music. Two claims were made by publicans. The first was that they shouldn’t have to pay performance royalties for ‘traditional sessions’ at all. The second was that ‘traditional sessions’ shouldn’t be charged as much as other musical events.

The first claim made by publicans stemmed from the assumption that music that was considered 'traditional' was automatically 'non-copyright'. This ran along the same lines as the question referred to earlier in this thesis: "But there is no copyright in traditional music?" The answer that the representatives of the Irish Music Rights Organisation would offer to this argument was the line that intrigued me in that bar in Galway, referred to at the opening of the thesis:

I wish to explain that our interest lies in the public performance of copyright music and as traditional does not automatically mean non-copyright we are therefore pursuing royalties with you for these performances (pp. i-ii).

There are two ways in which this line from the IMRO letter may be interpreted. One is to assume that the word 'traditional' refers to anything that for all intents and purposes 'sounds traditional', that is, sonic forms which seem to conform to the genre-limitations of what, in the opinion of the IMRO representative or the publican, is commonly considered to be 'traditional music'. The other is to assume that the representative of the Irish Music Rights Organisation is equating 'traditional' with 'anonymous' and, hence, with 'public domain'. In this scenario the IMRO representative would be referring to the practice in which some musicians engage in copyrighting 'arrangements' of 'traditional', understood as 'public domain', tunes or songs. They thereby secure a 100% performance royalty for any performance of the arrangement which they have recorded in some form, and, importantly, which they have registered with IMRO or some other performing right organisation. Every time they or someone else plays that 'arrangement', they are due a royalty. By contracting with IMRO for a blanket licence, the publican gains permission for the 'use' of the worldwide repertoire of copyrighted material. The onus, then, was on each publican to prove that not one copyrighted work or copyrighted arrangement of a 'public domain' work was 'used' on whichever night might be in question. This was an impossible task for publicans. They had no way of predicting or prescribing what might be played or sung after they had paid for the blanket licence in advance. Also, it was unlikely that they would bother to record and classify each incidence of music or song on the nights in question in order eventually to

show that no copyrighted material was 'used'. It was easier to pay the few extra pounds for the tariff.

The second claim, that 'traditional sessions' shouldn't be charged as much as other musical events, stemmed from the understanding that the majority of tunes played or songs sung at 'traditional sessions' were 'traditional', implying that they were therefore 'anonymous', therefore 'public domain', and that therefore a reduction in the amount paid could be justified. It was also argued that a standard tariff for 'sessions' did not discriminate between different premises and the vast range of social contexts to be found in pubs. Vallely quotes the then Vintners' Federation Chairman, Tadhg O'Sullivan, as saying:

The pub session is not full-blooded, public entertainment, and players' *arrangements* are not new tunes ... and anyway, the way that IMRO levies charges, why should a Kerry pub that has only a handful of customers at a session for the whole winter be obliged to pay the same as a similar premises in Dublin that is packed the year round? (quoted in Vallely 1997).

Again, with both blanket licences and the practice of copyrighting 'arrangements', there was no need for IMRO to concede a reduction in tariffs on this account, at least not on the basis of the publicans' reasoning. It was interesting that an issue was made of 'traditional music' at all, or that the representatives of the Irish Music Rights Organisation were drawn into a discussion concerning it. If one were to follow the logic dictated by copyright there should have been no distinction drawn between one type of music and another on the basis of genre (see WIPO 1997b). Within the logic of copyright discourse a 'work' has either been copyrighted or it has not, is either in copyright or is not. If the status of a 'work' is in question, genre should not enter into the issue, in the same way that aesthetic worth should not be taken into consideration for a work's originality requirement (Sherman 1995). Concessions, however, were granted to publicans, on a number of occasions.⁵³ According to letters received by one publican, representatives of

⁵³ It must be remembered that tariffs for performance royalty licences are arbitrarily constructed, often on the basis of comparative analysis of customary practice among other performing right organisations, and on the basis of self-referential economic analysis. There is no indisputable yardstick for determining the commercial value of music-as-sound, or of

IMRO decided as early as 1993 that as there was considerable use of 'non-copyright material' during sessions, publicans would be charged a lower public house tariff for sessions than the previous featured music rate. This tariff was termed the "amusement music" rate. At most it was based on a distinction between music that was amplified and music that was not. It seems to have been more a move to appease the financial concerns of publicans than any recognition of an alternative or newly-considered copyright status for 'traditional sessions'. This was formally recognised in an agreement with the Dublin-area Licensed Vintners' Association (LVA) in November 1993. As part of the negotiated contracts, classified as PLVA within the IMRO tariff system⁵⁴, a rebate of 50% was allowed "where music performed during a session contains in excess of 75% of public domain music, though it is noted that many old songs and airs have been rearranged [sic.] and, as such, are controlled by IMRO" (Lyons 1999:12-13).

The 'session issue' was arguably, then, only brought into negotiations by the Vintners' Federation of Ireland (VFI) in order to seek further reductions on the blanket licensing tariffs which they were contesting with the Irish Music Rights Organisation. It is important to understand that this was primarily an economic consideration. Although the justifications offered by the VFI were largely insubstantial, IMRO nevertheless conceded reductions in this regard as part of the deal secured. In retrospect, these concessions amounted to skilful negotiation and savvy public relations. What became clear during the course of these negotiations, however, was that for the people who played in the 'sessions' concerned, the issues extended beyond the merely economic. As the Irish Music Rights Organisation was to find out, the co-optation of 'traditional music' and the 'session' issue into the Vintners' negotiations had a sting in its tail.

'works', and there is ultimately no basis for the specific sums of tariffs other than the claim that they should be paid.

⁵⁴ There are 26 main tariff headings and 350 minor tariff headings within IMRO's internal operations. Among the main tariffs are: Aircraft (AC), Cinemas (C), Heritage and Cultural Centres (H), Jukeboxes (JB), Classical and Light Classical Music (LC), and Shopping Centres (SC). The two tariffs that are of most concern in this thesis are those for Dublin Area Public Houses (PLVA), and for Public Houses Outside the Dublin Area (PVFI).

A number of factors contributed to the growing visibility of copyright as an issue within 'traditional' contexts.⁵⁵ The growing popularity of what was labelled 'Irish traditional' or 'Celtic' music in music industry markets during the eighties and nineties created a climate in which PRS, PRS-IMRO, and then IMRO were called upon to meet the rising expectations of financial rewards from royalties. In turn, the growing recognition of financial reward for new compositions led to an increase in both the number of tunes being composed and registered, and in the number of arrangements being claimed as original and copyrighted. Until the mid-nineties, however, knowledge or awareness of copyright remained the preserve of those for whom financial considerations remained central to their experience of musical practice. For those who did not give much thought to commercial incentive, the issue of copyright remained irrelevant so long as it did not impinge on their lives. The tariff negotiations between the Vintners' Federation and the Irish Music Rights Organisation made a difference. It still remained something of an esoteric issue, but copyright had begun to impinge.

The growing awareness of copyright and performing rights among musicians started to influence the choice of tunes in sessions at least by 1996. Working from understandings that were nothing if not confused, some musicians would refuse to play certain tunes suggested by other players at 'traditional sessions'. This was because these tunes were considered 'copyright'. It was thought that 'copyright' tunes couldn't be played at a 'traditional session':

There was definitely that. I noticed that, that people were more aware of what they were playing and sort of said, 'Look we're not going to play any composed music, y'know, so we won't be playing any Paddy O'Brien or Hammy Hamilton or ...' cause a lot of them would know the music. Yeah, I suppose it shows you that the musicians

⁵⁵ It's really only in the last ten years that the issue of copyright has become familiar to people in 'traditional' social circles. Before then it was of interest mainly to collectors and archivists, and to the commercially-viable performers who always seemed to learn more about copyright in the aftermath of a shady deal than they ever knew going into one. But even then, it wasn't of any major concern to most people. As Nicholas Carolan, Director of the Irish Traditional Music Archive in Dublin, remembers it: "One had heard various stories, say, about how *Planxty* were ripped off, and they weren't making any money from their own records and that kind of thing, but that was so far removed from the experience of most people involved in traditional music. It was interesting but that was all it was. It wasn't personally pertinent" (Personal interview, Dublin, 2000).

didn't know anything about it if they thought that, like (Personal interview, Cork, 2001).

Other musicians refused to play their own tunes until such time as they had been released on a commercial recording, for fear they would lose their copyright. This was very practically an issue of self-censorship in a new awareness of a dichotomy between 'traditional' and 'copyrighted': "the absurdity of that scenario for the musicians would be the equivalent of censoring pub conversation to exclude mention of ideas in contemporary Irish literature" (Vallely, unpublished, 1996:6). Whether these concerns were based on correct interpretations of the law or on complete misunderstandings was of little matter. On the whole they contributed further to an atmosphere of confusion.

Incredulity

The initial reaction to the licensing of 'sessions' among many people was simple incredulity. They couldn't see how the ideas of 'copyright', 'intellectual property' or 'property' of any sort could be applied to 'traditional' contexts, and specifically the 'session'. There was a clear perception of a radical disconnect. This generally ran along the lines of: "But there *is* no copyright in traditional music?" It simply wasn't considered to have anything to do with what 'traditional music' was all about. As Martin Hayes, one of the most respected Irish musicians on the commercial scene, commented in Seattle: "I mean, like, nobody owns the stuff. You can't own this stuff" (Personal interview, 1998). Another musician in Philadelphia phrased it similarly: "The music doesn't belong to anybody, so if somebody's trying to learn it and you can help them, it's not yours, so it's not like you can hold back because it's not yours anyway" (Personal interview, 1998). That the idea of copyright and performance royalties could be so far removed from musicians' understandings of 'traditional' ways of thinking was exemplified by the colourful reaction of a commercially-successful and highly regarded Irish-American musician and composer to the news during an interview that 'sessions' in Ireland were deemed to be liable for performing rights licensing:

Get out of town! I can't believe that. ... Man that's so sticky. Holy cow, though, I can't even imagine them trying to pursue that. ... Oh no no no. Wait a second, from a session? ... So who pays? The pub or the musicians? So there would be somebody sitting there and marking down every tune that went by to see who it goes to? ... How do they divvy it up? How can they decide? It's bizarre. It's really bizarre (Personal interview, Chicago, 2000).

Many people who play music and also compose tunes find it hard to reconcile the logic of copyright with the fact that they would be quite delighted if their tunes were played at 'sessions', even if no-one knew that they had composed them. The attitude of Maighréad Ní Mhaonaigh, fiddler with successful music group Altán, is typical: "The best thing is to compose tunes and not have people recognise them as newly-composed, that they slip back into the tradition. For me that's the biggest thrill of all" (Personal interview, Galway, 1995). Vallely (1997a) quotes fiddler Máire Breathnach, another commercially-active performer, as saying: "That kind of recognition is superior to any payment", and elsewhere notes that many musicians and composers who welcome IMRO royalty cheques for their own work in overtly commercial contexts, are adamant that 'sessions' should not be liable (unpubl. 1996:8). As one musician said to me rather bluntly: "You're not entitled to a copyright if it's being played in the session, because that's alien to the whole culture to do something like that" (Personal interview, Cork, 2001).

Another Dance Halls Act?

The incredulity was tinged with real concern for some. It was widely believed that the 1935 Public Dance Halls Act had wreaked havoc on similar customary practices years before. The mythic status of this precedent of legislative enclosure was an important element in many's reaction to IMRO's pursuit of royalties for 'sessions' (e.g., Vallely unpubl. 1996; Ó hAllmhuráin 2000). Many were under the impression that the Public Dance Halls Act had inflicted untold damage on customary practices in rural areas, and had been a major contributing factor in what is often referred to as the separation of dancing from music (Austin 1993).⁵⁶ Colin Hamilton (1996) warns that it is

⁵⁶ The 1920s and 1930s had seen a rise in commercial dance halls as the foxtrot, two-step and shimmy-shake became popular. These dances were regarded by some clergy as a

difficult to assess the Public Dance Halls Act in such broad terms, and that “Conditions and the conclusions to be drawn from them vary wildly” (151). While there have been reports of priests who were very active in their disapproval of dancing, some even resorting to physical intervention (for example, allegedly beating people out of houses with a big stick or whip), Larry Lynch (1989) and Hamilton note that the Public Dance Halls Act was apparently applied very unevenly, some house dancing continuing unmolested up to the 1950s. Even if, as some would suggest (e.g., R. Hall 1999), the negative impact of the Public Dance Halls Act has been greatly exaggerated,⁵⁷ this did not prevent the 1935 Act casting a large shadow over understandings of IMRO’s activities.

Copyright Nearly Killed the Radio Star

One of the first things I would do in the morning was switch on the radio. This particular morning, Tuesday, February the fourth, 1997, I wasn’t all that happy with the music that was being played on the pop station, 2FM, or on the local station Galway Bay FM. As usual, outside it was raining. Stretching my arm out as I lay in bed, I twiddled the dial. I hit upon RTE Radio 1. Today With Pat Kenny. This was a daily national news and discussion programme, and this particular morning I recognised the voices of those in discussion. Both parties were being broadcast via a phone-in. And the conversation was very lively, if not hostile. Pat Kenny was doing his best to mediate. Good radio, I’m sure the producers were thinking.⁵⁸

moral threat to the integrity of Ireland’s youth, and the Catholic church in Ireland waged a campaign against the evils of dance, of whatever type. The clergy lobbied for the Dance Halls bill as what Austin calls “a sort of moral prophylactic”. Fianna Fáil, the ruling political party, looked favourably on the Church’s position, but was also interested in pushing through the bill as a response to largely unsubstantiated rumours that the proceeds from private dances were going to support organisations such as the Irish Republican Army, membership of which was subsequently deemed illegal from 1936. This was coupled with concerns about overcrowding in unregulated spaces. As Austin notes: “A further incentive was that a percentage of ticket receipts would go to the church and government” (1993:11). Once the bill was enacted, obtaining a dance hall licence was a privilege usually reserved for the parish priest, who thereupon would often construct a parish hall and enlist the help of the local Gardaí to quash any other dances that might be taking place. With the Public Dance Halls Act, dancing took place only in licensed halls under licensed supervision and strict fire and safety regulations. This limited the hosting of dancing to those of adequate financial means. The ‘traditional’ contexts of music and dancing, for example house-dances or dancing at the crossroads, were put under severe pressure, and those musicians who were unable to make the transition to dance halls “suffered loss of income as well as diminishing status within the community” (14).

⁵⁷ Some, like Austin suggest that: “the application, or misapplication of the Dance Halls Act was a primary cause of the disappearance of traditional music and dance in Ireland during the 1930s” (1993:7).

⁵⁸ This extract was recorded in a bleary-eyed state and transcribed at a later date. There are undoubtedly those who would suspect this to be a breach of copyright. I, however, do not believe this action to be unethical. Neither do I consider it illegal (‘ethical’ and ‘illegal’ are not necessarily synonyms). This recording and transcription of a public broadcast was for the purposes of academic research, criticism, and analysis. As such, it should be covered by the

Fintan Vallely was one voice. I knew Fintan as a leading traditional flute player, as a parodic songwriter, and as a part-time ethnomusicologist. He is also probably the most thought-provoking journalist writing about traditional music in Ireland. At that time he was working for the Irish Times, now with the Sunday Tribune. He was also one of the primary organisers of Crosbhealach an Cheoil - The Crossroads Conference. Though he lives in Dublin, Fintan has a recognisably Northern voice, and many would put his heightened political awareness down to his Northern Irish upbringing. The other voice was Hugh Duffy, Chief Executive Officer of the Irish Music Rights Organisation. A Southern voice. I had met Mr. Duffy on many occasions through my involvement with the National Federation of Music Collectives, and the Galway Songwriters Collective, Songcraft. I had seen him engage in heated debate over the traditional music issue at the Crossroads Conference the year previously.

I realised what it was that they were arguing about and listened intently. I caught it while Fintan was in full flow, speaking rapidly.

"You have the same in the Spailpín Fánach in Cork. Initially they had paid but now they're challenging. You had the same in the Lobby Bar in Cork and you took them to Court and eventually you settled with them, now that they've some other agreement worked out with you. So, I mean, you are challenging the bigger pubs, and what I'm saying is, then, that the organisation, then, maybe it's not your problem, but I mean, you can't distinguish between where casual music is being played ... and there is a difference, even if, I would argue, even if people are being paid a few quid to be anchor musicians in the session, and there are, despite your absence of information on this, there are scores of these, and during the summer there are hundreds of these sessions around the country, it doesn't make any difference," Hugh Duffy attempted to interrupt. Fintan kept going, "They are playing non-copyright music!" Hugh Duffy appealed to Pat Kenny,

"Could I ...?" but Fintan persisted,

"... Full stop! And your assessors are obviously not capable of assessing that." Hugh Duffy tried again,

"Could I ...?"

Pat Kenny stepped in. "Okay, let's hear from Hugh."

"There's no point in rubbishing my knowledge of music, 'cause I don't claim to have a knowledge of music. Now just to take a few points, and we have written about this to the Vintner's Federation. If there are any pubs who believe that they are only playing sessions, we will respect that. But what we will not respect is people putting signs outside the door and a sign up saying 'traditional music' ...

"Why not," Fintan interjected.

"... and you go into the pub then and you go into the pub then and there is nothing but modern copyright repertoire."

Fintan Vallely pushed into the space for a breath, incensed, "You don't know the difference, Hugh, this is the whole problem. You just said that you don't know anything about music. How can you now say that you know when you say that you don't know?"

The volume rose. "Just a second. I don't do the work. I'm not out on the circuit, going round to the pubs. There are people who do know the work ..."

Pat Kenny interrupted. "Can I clarify something? This MRBI⁵⁹ where they go around taping people. Most musicians do not allow themselves to be taped without prior permission or without maybe some payment being made, because you never know

'fair dealing' clauses of the Copyright and Related Rights Act, 2000 (50-51), which state: "... 'fair dealing' means the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright" (50.4). I would never knowingly do anything in breach of copyright law.

⁵⁹ The MRBI is the Market Research Bureau of Ireland Ltd. Further details may be found on the Internet at <http://www.esomar.nl/directory/110222.html>.

where a tape's going to end up, in somebody's car entertaining someone for instance."

"We have got permission from the Mechanical Copyright Society," Duffy replied, "and have got a license to tape copyright music."

"You can't tape performers without their permission," Kenny stated forcefully. "You know that."

"I know that," Duffy replied. Vallely mumbled something which I was unable to hear. It ended with the word "... permission." "Just a second," Duffy contested, "My people always identify themselves when they go in."

"To a session?" asked Vallely

"Yes, and if people object we just move off. That's a fact."

"I don't believe you," remarked Vallely, laughing briefly and sarcastically.

"You needn't believe me if you don't like, but are you suggesting that the MRBI go in with their things under their coat?"

"I don't know. What I am saying is that I don't know who the assessors are, and can you name ...?"

"We're not asking them to assess, we're just asking them to tape."

"Just to tape?" says Vallely, "But who assesses the tapes afterwards?"

"Just a second," said Duffy, "I was asked the question, 'How do you distribute the money?' and I explained how you distribute the money. We don't use MRBI or anyone else to decide what is traditional music or what isn't traditional music. People who register their songs with us and ... Who owns the tune is a matter of fact! It's property rights. It's nothing to do with us."

"That's fair enough," interrupted Kenny. "That's fair enough. If you decide that a place is playing copyright commercial music you collect the money and you distribute it and that's terrific. But it would strike me that in the case of any business you would actually look at the question of cost effectiveness. Now, what you've told me about sending the MRBI around, taping people, then getting experts in to decide whether it's copyright or not, in terms of the amount of money you're talking about for the seisiún, you're actually wasting the composers money by doing foolish things like this?"

"No, we're not doing anything foolish. Because ... for ... The simple reason is that the amount of the kind of pubs that we're talking about ... One of the pubs that was mentioned, and I don't like mentioning our customers, was the Lobby Bar. The Lobby Bar had tra-, a seisiún one night a week, but it had other music five nights a week, and we were entitled to collect for the five nights."

"Of course," says Vallely, obviously not meaning to interrupt.

"If people would explain to us when they are having seisiúns and when they are using traditional music only, we will respect that. We're not in the business of ... the only time we ever investigate is when people tell us that it's traditional music only."

"Okay, Fintan," says Kenny, "can I turn this around a bit? Off and on over the years I've heard people saying 'So and so robbed me tune'. If IMRO does their job right that will never happen again ...?"

"This has nothing to do with robbing tunes at all," replied Fintan. "Robbing tunes comes about where people are playing commercial gigs or making commercial recordings of somebody else's music and not paying, and IMRO collects for them, and I don't know any musician, casual or professional who has any problem with that at all. Nobody has any problem with that. What we are talking about here is an entirely different thing. We're talking about a mechanism where tunes are played and where people get together. What people are doing in session situations is probably the same as people playing darts or pool, or having a conversation about current literature in the pubs. There's no difference. What Hugh is saying is that they don't mind people playing sessions in pubs as long as they're not playing copyright tunes, but he also says that if there's a sign up saying 'Traditional Music Tonight' then they're going to move in there. A lot of session pubs around the country, in fact, advertise that there's a traditional session on on a certain night and that signals a couple of things. It signals a quiet night in the pub, that there's normally nothing else commercially viable happening. It also signals that people can go there and be guaranteed to hear music. It's also kind of a welcome."

Pat Kenny interrupts at this point. "Fintan, I have to take a commercial break. I'll give the last word to Hugh after this break." I paused the tape recorder and waited

till the advertisements had gone their merry way. "... Alright we had to take a break there and we have one more to go before the end of the programme. Hugh, last comment from you."

"Well, the simple answer is that we do not pay for traditional session- ... we do not charge for traditional session music, we charge for the use of copyright music, and that's all we charge for, and if there are publicans around the country having traditional sessions we honour that. But we will not have a situation where people set up a sign outside and say 'Traditional Music Every Night' and we go in and we find it isn't traditional music."

"We'll leave it there," says Kenny, and thanks to Fintan Vallely, and you can read his article in the Irish Times today, and thanks to Hugh Duffy, CEO of IMRO."

It wasn't long before I was out of bed, thanking Providence for the happenstance of the morning's radio offering, and rushing out to buy a copy of Fintan's article in the Irish Times. He had already sent me an unedited copy of a longer version, about thirteen pages, and I was sure that whatever ended up in the newspaper was bound to cause a stir.

The next Saturday, at my regular 'session', the topic was referred to often. Down at the office of the magazine where I worked part-time they were enthusiastic about doing a follow-up piece. They could see a juicy story in this conflict.

Personally, I wasn't particularly interested in doing a follow-up story. The radio debate had frustrated me no end. Every debate I came across in relation to the issue of IMRO and 'sessions' seemed to flounder again and again on the basis of cross-purposes, ill-defined terms, disparate terms of reference, and misunderstandings. I could think of nothing more infuriating than a protracted and open debate about copyright and traditional music when no one group or person had agreed with any other on definitions, context, or motivations. I could see how the end result might simply be a lot of hot air expended, a lot of angry musicians, a lot of angry IMRO representatives, and nothing resolved at the end of the day. A lot of loose and ill-informed comment was nourishing flagrant scare-mongering across the country. The issues were serious, yes, but I couldn't see any way towards clarifying them as the structure of arguments stood at that time. The smell of a fight seemed to be of more interest to most than the need to clear the air.

What we seemed to be dealing with were worlds of competing meanings and conflicting interpretations, largely revolving around misunderstandings of what was or wasn't 'traditional'. 'Traditional' even seemed at times to be put forward as intrinsic, essential characteristics of a particular tune or song. It was clear that many musicians and singers were using the word 'traditional' in ways that were not at all consistent with the understanding of IMRO representatives. Nevertheless, many times in the arguments it was assumed by both parties that the word 'traditional' was mutually intelligible, when the course of the discussion would suggest, rather, that the respective uses of the word 'traditional' were mutually incompatible. Little wonder, then, that fear and confusion did abound.

Save the Session

Some of the fears that 'traditional' supporters felt paralleled the concerns of the defenders of primary schools. There was concern, for example, that IMRO's demands might discourage publicans from allowing 'sessions' on their premises at all. Some, like William Hammond, felt that IMRO's actions were directly threatening the existence of 'the practice room' of 'traditional music' (1996:4). On the fourth of February, 1997, Fintan Vallely published a feature article in The Irish Times sensationally entitled "Save the Session". It

was the first nationally published statement on the matter, and the effect it had on conversations around the country, and, indeed, around the world, was swift. The issue of copyright briefly achieved celebrity status among musicians. The Irish traditional music mailing list on the internet, IRTRAD-L⁶⁰, with about 600 members at any time, was informed of the article on the day of its release. A list-member posted the article in its entirety for those without world wide web access. For the next two days the list engaged in passionate discussion of the issues. "Save the Session" undoubtedly provided the clearest commentary on the issue to date. The main concern seemed to be clear, and echoed the concerns that had been voiced previously. IMRO was approaching publicans regarding licensing for performance royalties due to their members. Where 'traditional' music was concerned, 'arrangements' of tunes whose copyright had expired, played by IMRO members, were deemed to accrue royalties. Three things seemed to justify IMRO's jurisdiction in this matter: these 'arrangements', the presence of newly-composed, copyrighted tunes at 'sessions', and the authority of legislation and international agreements. Many musicians expressed concern that this was inappropriate, and an intrusion, if not actually indirectly threatening the continuance of many sessions in pubs.

As late as June 1998, the Vintners' Federation would turn these fears to their own advantage, sending the following letter to members of the Irish Seanad (Senate) in an attempt to influence the course of debates concerning the Copyright and Related Rights bill, against IMRO's stated position:

In essence, this Bill sets out to enshrine in law that if any of the copyright collection agencies state that they own the copyright in a particular piece of music, then they own the copyright in that particular music until the contrary can be proven. This means that they could take any piece of music, traditional, ethnic, classical etc., which is long out of copyright, and simply declare it to be in copyright, or rearrange it and then declare it to be in copyright, and place the onus on the musician, proprietor etc., to prove that they do not own the copyright. I think you will agree that this would turn law, logic, justice and fairness totally on their respective heads. It has the potential to have extremely serious consequences for music users and for music players throughout the country. It will certainly spell the end of the "session" as we have come to know it in Ireland and in Irish pubs. We cannot enshrine into Irish law a provision which confers ownership of "a property" on someone who does not own that property. We cannot and must not take away the rights of all of our citizens to enjoy music which is theirs to enjoy, simply to boost the commercial profits of those who have no claim or right to its

⁶⁰ You can find IRTRAD-L at <http://listserv.heanet.ie>

ownership. This issue is about rights. The rights of our citizens must not be subverted to pander to the greed of a vociferous minority.⁶¹

Rumours abounded that sessions were being shut down on account of pressure placed on publicans by representatives of IMRO. It is clear from the passage above that the Vintners' Federation in no way sought to diminish these rumours.⁶² A number of publicans did not consider a 'session' a financial venture, but merely a favour to some local musicians. Were they obliged to think about it as a financial endeavour requiring a licence, they might well decide that not having a 'session' at all might be less hassle. But this would really only be an issue if no other music, of any sort, was 'used' on the premises. Any other 'music use' at all would require a blanket licence, rendering the 'session issue' largely irrelevant. All in all, the perceived threat to sessions was greatly exaggerated and largely erroneous.⁶³ It remained, though, a highly emotive and charged concern in the atmosphere of the Vintners' opposition to the Irish Music Rights Organisation. Furthermore, it created a dubious cause and effect scenario which helped to justify negative impressions of IMRO's role.

⁶¹ This was read out by Senator Coghlan during the proceedings of the Copyright (Amendment) Bill, Second Stage on 18 June, 1998. The full transcripts of all Irish parliamentary debates are available on the Internet at <http://www.oireachtas-debates.gov.ie/>.

⁶² The reasons that a publican might have for closing down a session are many and varied, and musicians would be as likely to find as many reasons to move on to another venue. Regular reasons include personalty clashes, changes to new ownership less appreciative of 'traditional music', or changes in the personality of an upwardly-mobile 'local' that gets transformed into a spacious and trendy 'superpub' in a bid to maximize income. Hosting a session might simply not be financially viable. A restaurant proprietor in Galway once expressed surprise to me, not that musicians were paid so little for a session, but that they were paid so much. Apparently, she felt, to offset the expense of musicians a publican would have to sell three times as much in value of alcohol to make it worth their while. For smaller pubs this is unlikely to happen. This would suggest either that musicians in these smaller venues would be unlikely to be paid. It might also suggest that any 'traditional' musical activity in these pubs at all is an indication that neither musicians or publican are particularly interested in framing the 'session' in terms of financial potential.

⁶³ According to one musician, the only direct knock-on effect of IMRO's licensing demands on sessions was that many publicans placed a moratorium on new sessions. Even this attitude lasted for only a short period, however, and, following the VFI agreement, things pretty much returned to normal (Personal interview, Cork, 2001).

Ryan (1985) reports that in the period following the establishment of ASCAP, musicians believed that they would be charged for the use of music.⁶⁴ Although this was not actually the case, it took until 1918 for the resultant rift between ASCAP and the musicians' union to heal. It is interesting, then, that the same reaction should be seen among those people who played music and sang in 'traditional' contexts. Such fears were exacerbated by inaccurate reporting resulting from a confusion of categories. Hammond wrote, for example: "Local sessions over the last 18 months or so have been approached by an organisation called IMRO for royalties for those sessions" (1996:4). This was not strictly true. Publicans, not 'sessions' or the people in sessions, had been approached by IMRO to take out blanket licences for performance royalties, which in many cases covered what were considered 'traditional sessions'.

This confusion, however, struck at the heart of one of the shakiest pillars of performing rights thinking - how is it that the publican is charged for commercial 'use' of music, when the musician is not? Surely musicians who are 'using' works as a dominant element of their commercial endeavour, should be charged at least as much as the publican who is merely using music, at most, to attract customers and have them feel comfortable on their premises? Musicians, indeed, going by the internal logic of performing rights, should in fact be charged *more* than publicans for the use of works in commercial contexts. Furthermore, that musicians are engaging in the 'performance' of 'works' is not as hard to fathom as the idea that the mechanical broadcasting of sounds over radios and televisions constitutes a 'performance'. The charging of musicians for the commercial performance of copyrighted works would, however, simply highlight the implausibility of the whole arrangement, and has never been pursued. If nothing else, it would provide performing rights organisations with a public relations nightmare.

⁶⁴ For a brief summary of Ryan (1985) see p. 14 of this thesis.

Although there was undoubtedly exaggerated demonisation of the role and activities of the Irish Music Rights Organisation, and a considerable amount of panic, rumour-mongering, and misinformation as to the damage that might be inflicted on 'the tradition', there were a number of more measured concerns. Among these were accusations that representatives of IMRO were speaking about 'traditional music', and applying the letter of the law to 'traditional music', without really knowing what they were talking about.⁶⁵ It was felt that the term 'traditional music' was being used by representatives of the organisation to communicate positions which many of those who played music and sang in these contexts felt were simply misrepresentative. It must be said, though, that it was easier for people to identify misrepresentation than it was to provide an alternative, articulated representation. The perception that IMRO representatives simply didn't know what they were talking about was reinforced by the understanding that they had been acting without consultation. During 1996, Hugh Duffy of IMRO allegedly pledged to institute regional public hearings on the issue of traditional music and copyright (Vallely 1999). These never occurred. In 1996 Vallely was able to write:

IMRO is not obliged to have, has never had, and does not believe it should have, consultations on actual tune ownership with any of the bodies involved in Traditional music, least of all the Irish Traditional Music Archive at Merrion Square, Dublin, the only state-funded reference point in the music (unpubl. 9).

Vallely suggested that relevant expertise and consultation was required before either IMRO or the VFI would be able to "comment or legislate aesthetically on Traditional music".⁶⁶ By acting without consultation in their

⁶⁵ Nicholas Carolan was somewhat bemused by early IMRO advances to the Irish Traditional Music Archive: "In my own experience in the early years of their involvement, with their targeting of traditional music, they didn't know what they were talking about. Even their own documentation doesn't make much sense, frankly. When they try to define their relationship to traditional music, it's gobbledeegook" (Personal interview, Dublin, 2000).

⁶⁶ Curiously, Vallely at the same time suggests that "the interests of Traditional musicians coincide with both IMRO and the Vintners' Federation" (unpubl. 1996:8). It is never made clear, however, specifically what interests these might be, or how in particular they might coincide. The widespread discontent clearly indicated that the interests of the parties concerned were anything but compatible.

bid to secure royalty payments for 'sessions', he offered, IMRO had shown that independent monitoring of their activities was necessary.

Blanketing the Issues

As we have seen before, however, it wasn't necessary that IMRO consider the views of a disparate 'traditional' lobby at all. IMRO's dispute with the Vintners' Federation was purely a contractual and financial one, based on disagreements over the level of tariffs. To argue that IMRO had no jurisdiction in these contexts was hardly likely to faze an organisation that claimed absolute jurisdiction in all places outside of the family circle where there might be the possibility of even one copyright work being played. Sinacore-Guinn (1993:29) reminds us that the licensing process is fundamentally adversarial - users and collectives ultimately wanting different things. There is no room to contribute to this equation unless one is either a licensor or a licensee. Furthermore, to argue that certain contexts were non-commercial was hardly likely to succeed in the face of an organisation whose representatives claimed that all contexts were commercial, and that the primary motivation of human life was economic.

Three binary oppositions were central to musicians' confusion about the inclusion of 'sessions' within the regulatory authority of the Irish Music Rights Organisation: 'traditional' or 'non-traditional'; 'commercial' or 'non-commercial'; and, 'for profit' and 'not for profit'. Each opposition was based on an assessment of the social and contextual elements of what may have been considered 'sessions'. Elements which might have been considered by someone seeking to make a judgement of a 'session' on the basis of such oppositions might have included whether or not any of the musicians were paid, whether or not the 'session' was amplified, or whether or not the pub-owner was seen to benefit commercially from the 'session'.

Ultimately, however, none of these concerns were really an issue for the representatives of the Irish Music Rights Organisation. The issuing of blanket licences, as well as the all-embracing logic of performance royalty collection,

ensured that anything judged by IMRO to be a 'performance' of a copyrighted work outside of the family circle was to be adjudged a 'public performance'. Any 'public performance' was a commercial concern, and therefore subject to a royalty payment. This was the case regardless of the musical genre. With the law on their side, it didn't really matter what anyone else thought. From the point of view of the representatives of the Irish Music Rights Organisation there is no such thing as a non-commercial, not-for-profit 'session', because musical activity implies 'works', which implies 'commercial interest'. Moreover, with blanket licences the onus was on the licensed premises to show that only non-copyright music was being played. If this were not shown to be the case, IMRO could claim complete and absolute jurisdiction without needing to consider the nature of the social conditions, or the genre of the musical activity. For 'traditional sessions', the representatives of the organisation could indeed claim complete jurisdiction, given that the presence of even one performance of a copyrighted 'arrangement', of a tune or song not itself considered to be in copyright, constituted a justification for licensing. Again, the burden of proof demanded disproof.

Don't Mourn, Don't Organise

One of the peculiarities that rendered much of the 'traditional' opposition to the Irish Music Rights Organisation ineffective was a general unwillingness to form organised lobby groups. For many people, the power and prescription of organisational structure is as anathema to the spirit of what they do as copyright is. One musician was very explicit about the quandary:

We tend to be laissez-faire, like, look whatever it is, it is and ... I agree with that. A number of years ago, in set-dancing, during the revival all the teachers got together and there was this big meeting that we should have this big organisation but then people sort of said, hold on a minute now, why not have no organisation whatsoever and just let it be as it is. Let's not analyse it, let's not go too much into it, let it just be there for everybody, and let's not have bosses and stuff like this, which always gets into power trips. I suppose music is a bit like that but there certainly needs to be ... When you see something like IMRO coming along and assuming control, ownership, total ownership of something that's not belonging to them at all, in any sense - Jesus, you'd nearly have to be organised in order to counter something like that. That's the paradox. If you're laissez-faire with the music then people are happy with that, they don't want organisation, they don't want bosses and they don't want people controlling

it. But there are people out there who see a niche and they sort of say, look there's nobody controlling that there now, that's out there, that's free, like the soil, to be pumped dry. It's off the coast, it's ours, we claim ownership to this. Nobody else needs to claim ownership to it. I think that seems to be the attitude of these collection agencies (Personal interview, Cork, 2001).

For many this presented a real difficulty, offering a fundamental challenge to the legendary anti-verbal stoicism of "shut up and play", held as a bottom-line mantra by many musicians.

A related factor also militated against an organised lobby. There was much concern, confusion, and anger among those who felt that IMRO's activities impinged upon their personal space, as it were. Furthermore, as could be seen at the Crossroads Conference in April 1996, some were certainly eager to look on if there was any fighting to be done. However, those who were interested enough to engage with the issues at length were few and far between. A major contributing factor to this lack of interest might be that law and legal doctrine are often perceived as esoteric, complex, and somehow distant from everyday life. One example provides clear evidence of this. In October 1997 a forum was convened in a large hotel function room in Letterkenny, County Donegal, to discuss the issue of traditional music and copyright. Three of the four scheduled speakers turned up, and one person arrived to hear what they had to say.

The Marsh

In October of 1997, Fintan Vallely, Hugh Duffy, and myself presented papers as invited speakers at a specially convened 'copyright forum', held at the Mount Errigal Hotel in Letterkenny as part of the Colmcille 1400 celebrations. Apart from the Chairperson and organiser, Conal Gillespie, and the speakers, only one other person was in attendance. This was John Moulden, a song scholar from Coleraine, and someone to whom I have looked from the start of my studies in this area for an approach that is balanced and reasonable. The sparse attendance, to say the least, was due to a number of factors. Despite the low attendance, there was a long and difficult discussion. The purpose of the forum was to clear the air of many misunderstandings that were starting to congeal in lengthy disputes.

The forum was convened around a table in a large room whose emptiness spoke volumes about the unrealistic expectations of the organisers. Copyright issues are too esoteric to be of interest to most people, never mind musicians. The official speakers read their papers informally, and the ensuing conversation was allowed to drift freely. It was yet another chance for me to hear the positions, and another opportunity to see whether any more progress could be made towards identifying the positions at stake.

Once again the debate came down to cross-purposes, ill-defined terminology, defensive declarations, and paradoxes. The talk was dominated by Hugh Duffy. He took an understandably defensive pose following Fintan Vallely's paper. This was a

development of Fintan's Irish Times article. My own paper undoubtedly added to Duffy's defensiveness. Ultimately, it had made a case against the increasing dominance of an economic world view in our lives.

"We have never, ever said that we will charge for sessions," Hugh Duffy declared at one point, "We don't claim to be arbiters of what is traditional and what isn't traditional," at another. At a later stage Hugh Duffy made the point that, "... as far as we are concerned if music is traditional, and I mean 'traditional', if it is non-arranged, then we have no right to collect for it, and we don't collect for it." He was also heard to say that, "Our blanket license covers the use of copyright music and that's all we're interested in. If some pub or session is a 'pure' session in the accepted sense of the word, we're not interested in that". Explaining some of the intricacies of the issue, Hugh Duffy offered:

"If the Chieftains are playing music in a pub, and they might regard it as traditional, it's copyright. If Frankie Gavin is playing in a pub, he's a member, so it's copyright music. It's his copyright. If you're playing music in a pub and you're a member, therefore you turn it into copyright music."

The Rule of Law for Hugh Duffy, and in his role as representative of IMRO, seemed to be the final arbiter for the issues, the ultimate arena for the verification of 'fact', "If the guy says it's traditional then it becomes a matter of fact whether it is or isn't. It has to be a matter of fact. Everything at the end of the day is a matter of fact." "Whatever we feel about it," he explained, "Whatever we feel is right or wrong or better or worse, it all gets down to the end of the day to whatever legislation, open to interpretation or misinterpretation, and the courts will determine what is or isn't." It remained necessary, he explained, for the Irish Music Rights Organisation to retain the reputation of unassailability in the face of legal challenges:

"The real test is that we have to go to court, and we're not going to go to court if we think we're likely to lose. We've never lost a case. We never bring a case if there is doubt."

Not only unassailability, but, indeed, total self-assuredness that, despite all of the contention and confusion, IMRO remained in a position which was fully and wholly correct, and therefore open to contest only in so far as their position was uncontestable:

"I have no objection, I welcome guys looking at this whole area, but from where I'm standing I have a very clear vision of what we're about. I know that at the edges there may be some crossover, some confusion at the edges, but there isn't any confusion about 90% of what we have done. And the 10% where there is confusion you'll find that it's vested, that it's not the issue ... from guys who don't want to pay."

IMRO's position was presented as uncontestable, but also as the only alternative:

"We don't have a monopoly ... I mean we have a monopoly here in this country. We have been cleared by the competition authority as being legitimate, as being the only way ..."

That 'way' was declared as the way of economics: "Our job is to collect the royalties. I think that we are in an economic world and I don't think there's any way around it." It was revealed during the discussion that IMRO had finally agreed on a deal with the Vintners' Federation concerning blanket licenses. It was Hugh Duffy's opinion that such a deal would soon take all of the heat out of arguments, and that the traditional music question was all but over, seeing that the legal and economic issues had been resolved.

Fintan Vallely was to exclaim in frustration at one point, "I feel as if I'm walking on a marsh. There's something moving and I can't really figure out what's going on!"

"What I want to say," said Fintan, "is that you make me appear kind of hysterical. What I'm saying, is that after the conference you clearly stated that it was IMRO's intention that when copyrighted music is being played that people were entitled to their copyright dues, regardless if it was in a session or not. If there's a crowd of people in a pub at a wedding singing "The Fields of Athenry", that the composer of the song is entitled to the royalties."

"Yeah, but we never get that," replied Hugh. "It's never reported to us."

"Let's say a session happens regularly. You said that you were encouraging all musicians to register all their versions of tunes." Fintan was doing his best to sound perfectly reasonable.

"If they want to. If they don't want to they don't want to."

"But you also said," continued Fintan, "that people can log their tunes and send them into IMRO at the end of the year. On the one hand, I would argue that you weren't aware of what a session was, or that you weren't aware of how many sessions there are in the country. But what I also have to say, and despite what you say, I do know of places of which money is being demanded for sessions. One particular pub, for instance, and there are several, and I'm not going to mention the name of the place, this happened just the week after that article I wrote in the Irish Times, where the IMRO inspector came in. He was disputing with this particular fella the size of the performance space, and there were a number of rock gigs on the Saturday night, and the inspector said he wanted to increase the fee they were charging ..."

"We've changed that now," defended Hugh.

"... but your man was disputing that," continued Fintan, "and the IMRO guy said "I believe you've a session here on a Sunday night. We're going to charge you for that as well." And the inspector left, and he was very aggressive with your man, and that particular case is just one."

"The point is," said Hugh, "that we have twenty thousand licenses in the country and we have 30 or 40 of these guys going around and they're all reputable guys; they're all ex-tax inspectors, ex-civil servants, ex-county council officials, ex-policemen, and at the end of the day they say that there's a session here, and it's a real session, and when it's looked at it's not a case that you can fight. And we've never lost a case, as I've said, and the reason we've never lost a case is because we always produce the evidence, and the evidence which, by and large, we produce, in fact, all the time we produce, is newspaper advertising about who's playing, and if it's a session, we're not crazy, we're not going to bring these guys to court."

"Half the pubs with sessions advertise," Fintan pointed out.

"But if they advertise sessions ..."

"They do."

"Ah, no they don't. Unless you had a particular case or I had a particular case, we could look at it. But there's an awful lot of hype about what we're charging and what we aren't charging. The reality is that we have to go to court if guys don't pay, and we certainly aren't going to go to court on a wing and a prayer, because if we got beaten in one court case there would be an avalanche of the bloody things, so we are more than careful."

I managed to get a lift from John Moulden as far as Galway. It was a long drive, and we managed to cover many concerns in the copyright debate on the way home, from the general rise of commercialism and the implications of new technologies, to social codes and etiquettes at sessions. I lamented out loud at one point that I had packed away my tape-recorder in the back of the car after leaving the forum. I felt that many of John's insights were valuable and sure to increase my understanding. I didn't trust my memory.

"Don't worry," said John wisely, "The thoughts will come round again."

No organised 'traditional' lobby group grew out of the diffuse resistance to the Irish Music Rights Organisation. However, the major Irish traditional music organisation already in existence, *Comhaltas Ceoltóirí Éireann* (CCÉ) ('Association of Musicians of Ireland'), provided somewhat more structured opposition.⁶⁷ At the time that 'traditional music' became a focus of the VFI-IMRO dispute the official position of *Comhaltas Ceoltóirí Éireann* as an organisation was one of unequivocal non-communication with regard to the Irish Music Rights Organisation. The full-time *Ard-Stiúrthóir* or Director-General of the organisation, Labhrás Ó Murchú, insisted to the members of his organisation that to talk to IMRO was to acknowledge their role and authority. In 1996, the members of *Comhaltas Ceoltóirí Éireann*

⁶⁷ An overview of *Comhaltas Ceoltóirí Éireann* has already been provided by Henry (1989) and Vallyely (1999a). A number of key points will be here drawn from these accounts, and from examination of the CCÉ Constitution (CCÉ 1996). The constitution of *Comhaltas Ceoltóirí Éireann* lays claim to nondenominational and nonpolitical status. The constitution indicates that membership is open to all who sympathise with the aims and objectives of the organisation, and who undertake to abide by its Constitution and Rules. Those whose actions are interpreted as being in opposition to the aims of the organisation are liable to suffer expulsion. The specific goals of the organisation, set forth in the constitution, are as follows:

1. To promote Irish Traditional Music in all its forms;
2. To restore the playing of the Harp and Uilleann Pipes in the National life of Ireland;
3. To promote Irish Traditional Dancing;
4. To foster and promote the Irish language at all times;
5. To create a closer bond among all lovers of Irish music;
6. To cooperate with all bodies working for the restoration of Irish Culture;
7. To establish Branches throughout the country and abroad to achieve the foregoing aims and objects (CCÉ 1996:3-5).

There are reportedly over 400 branches of the organisation in Ireland and internationally. The primary roles of these branches are the recruitment of new members and the teaching of Irish traditional music and dance. A series of competitions are held every year on a pyramidal county, provincial and national basis. The final competition is an annual festival called *Fleadh Cheoil na hÉireann*, or All-Ireland Fleadh, which draws competitors from an international catchment who have qualified from earlier rounds.

Administrative levels of the organisation include the branches, the county boards, and the provincial councils, all of which are overseen by a central executive council (CEC), based in Dublin. The CEC has a president, general secretary, five vice-chairpersons, a national treasurer, a national registrar, a competitions officer, a music officer, a public relations officer, and two delegates from each provincial council. Permanent trustees are appointed by the CEC. They are responsible for instituting any criminal or civil proceedings on the organisation's behalf. The property of the organisation is vested in the trustees. The Central Executive council meets three times a year to direct the policy of the organisation and to decide on the venue for the All-Ireland Fleadh. Once a year a congress is held, which is attended by the members of the central executive council, two delegates from each branch, and two delegates from each county board.

overwhelmingly passed a motion at their national congress pledging non-involvement with the Irish Music Rights Organisation under any conditions. In the same year a representative of CCÉ's subsidiary trade union, the Association of Irish Traditional Musicians, dismissed IMRO as "an English import", while Ó Murchú himself could not even be drawn to make a comment on the matter (Vallely unpubl. 1996:9).

Labhrás Ó Murchú has been in charge of the operations of *Comhaltas Ceoltóirí Éireann* since 1968. The position he holds is a lifetime appointment, and one not included in the organisation's constitution. Recently appointed as a trustee of the organisation, he also holds the positions of main spokesperson for Comhaltas, and is the editor of the organisation's journal, *Treoir*. In 1997 Ó Murchú was nominated and elected to the Culture and Education Panel of *Seanad Éireann*, the Irish Senate. He is a member of Oireachtas (government) committees on education, heritage and Irish language, and is the deputy government spokesperson on these matters within the *Seanad*.

The Copyright and Related Rights Bill

What particularly focused Ó Murchú's attention on the Irish Music Rights Organisation, and what caused him to break his public silence, was the passage of the Copyright and Related Rights bill through the Irish parliament. Said to be the largest piece of legislation ever to have passed through parliament, it was the first time that the issue of copyright had been specifically addressed in Irish legislation since the Copyright Act, 1963. The new legislation was to be a significant revision and expansion of the 1963 Act in line with advances in technology, international obligations, and the laws of the European Union. A draft of the proposed bill for the new Copyright and Related Rights Acts was published in early 1998, whereupon lobbying interests began to make their case known through the voices of Senators in the Irish Seanad.

In his role as Senator, Ó Murchú lobbied against the Copyright bill, which inconveniently placed him in opposition to the official line of the Chief Whip of his political party, Fianna Fáil. At this point it is clear that Ó Murchú's role as Senator and his role as *Ard-Stiúrthóir* of *Comhaltas Ceoltóirí Éireann* were not clearly distinguished from each other insofar as his representative capacity was concerned. In March, 1998, Ó Murchú attended a UNESCO conference in Stockholm, "The Power of Culture", as a member of a delegation from the Oireachtas. Quite by accident, he found himself at a session which discussed issues concerning the encroachment of intellectual property rights upon traditional cultures. The concerns expressed at this session, and the widely-expressed need that certain protective measures needed to be enacted, provided him with internationally-sanctioned conceptual support for the anti-copyright stance of his organisation and his lobbying efforts.⁶⁸

Reasons for Opposition

Ó Murchú's, and hence Comhaltas', position against IMRO very much reflected the concerns generally expressed around the country. They had, he felt, no expertise or appropriate understanding of what might be considered 'traditional music'. Furthermore, as far as the mandate of the Irish Music Rights Organisation was concerned, Ó Murchú claimed that the number of people in traditional music for whom copyright was an issue, whether they were commercially active or not, was negligible. He gave the clear impression that the vast majority of musicians involved in the commercial world would never even consider the issue of copyright, seeing traditional music as a free music, in the sense that everybody could play it, without restriction, without consideration of ownership.⁶⁹ The other side of that

⁶⁸ In the editorial of the second issue of *Treoir*, 1998, it was stated: "At the Stockholm conference there was widespread concern at the possibility of a nation's store of traditional music falling into private commercial hands as has already happened in some countries. This has obvious connotations for Ireland" (Ó Murchú 1998). What those connotations might be was not stated.

⁶⁹ "Now there'd be a very small section of musicians, and I'd say it would be very small, and particularly in more recent times, may see some advantage in a copyright-type situation but it raises huge questions, then, for the whole body of Irish traditional musicians" (Labhrás Ó Murchú, personal interview, Dublin, 1998).

argument, which Ó Murchú was very clear about, was that the copyright ethic of claiming ownership on tunes and songs that IMRO was promoting was anathema to the spirit of generosity which had sustained the types of “traditional” musical activity which *Comhaltas Ceoltóirí Éireann* represented.⁷⁰ While for representatives of the Irish Music Rights Organisation “traditional” primarily means “anonymous” and therefore in the “public domain”, Ó Murchú was adamant that this position was not one his organisation could go along with:

That would be a very serious thing from our point of view. Many of the tunes are not anonymous at all. The composers are well known, or at least would have been well known. We know the names etc. And they would have been very proud, even the relations of those people would be glad that the tune bearing the name of the relation or whatever was still being played, so no, it's not a question of anonymity (Personal interview, Dublin, 1998).

This clash of approaches to music or musical activity was fundamental. Because of it, the development and expansion of copyright as an issue, and the expansion of IMRO as an organisation, would lead, he felt, to certain behavioural changes and the self-imposition of restrictions among traditional musicians.⁷¹ He considered it the duty of his organisation to contribute to the debate in the Senate “before it's too late”. He believed that once the debate was opened up, and IMRO's intentions made clear, that it would have a considerable effect on musicians and the ways in which they thought about what they were doing. “Their intent,” he stated, “whatever about their mandate, is to expand and expand”. Ó Murchú was also somewhat concerned that the public relations efforts of the Irish Music Rights Organisation in this regard were contributing to a veil of positivity which made it difficult to focus on the issues of conflict which remained to be debated. The Irish Music Rights Organisation had been increasing the level

⁷⁰ “Now obviously a newly composed song could be copyrighted, if that is the wish of the author. Our hope would be that they wouldn't do that, that they would contribute that song to the corpus of traditional music like they themselves had got their songs from previous generations. We'd be looking for a degree of generosity there” (Labhrás Ó Murchú, personal interview, Dublin, 1998).

⁷¹ “But once it becomes widely known through debate as to what the intention is, then I think yes there will be alarm bells set off in the minds of a lot of musicians each time they go to play a tune, whether they're playing in a pub, or in a concert, or in a session, I think they're going to say, ‘we can play the first two reels, but we can't play the third reel’. Now you can see what that will do to music making” (Labhrás Ó Murchú, personal interview, Dublin, 1998).

of sponsorship for 'traditional music' events in a bid to increase levels of support for their project:

IMRO are trying to win support for their concept. They'll give a thousand pound to a festival here and they'll give £500 and they have their name, IMRO, on it, as the Arts Council would do, and therefore they are becoming user-friendly, and the people who get the £500 or £1000 say, "But we got money out of IMRO". That to some extent dulls the debate, because you can't get onto the broader issues of the dangers that exist. So there is a PR exercise going on there on IMRO's part (Personal interview, Dublin, 1998).

Ó Murchú's stated aim at this stage was to try to ensure that the 'corpus' of music that was already there could be protected by legislation. He expressed a need to sit down with the Irish Music Rights Organisation to work out some of the problems, rather than "doing this across tables and across headlines" (Ó Murchú 1998).⁷²

It is questionable whether Ó Murchú would have been interested in the idea of copyright at all had it not been for the aggressive manoeuvres of the Irish Music Rights Organisation towards venues and events which ran under the auspices of his organisation. The *Fleadh Cheoil na hÉireann* committee in Clonmel was, in 1996, billed by IMRO for the 'use' of copyrighted music during the course of the festival. At around the same time a Comhaltas centre in County Clare, *Cois na hAbhna*, and another in County Westmeath, *Dún na Sí*, also received bills for the 'use' of copyrighted music:

It was good in a way that it happened as it gave me ammunition subsequently. Luckily enough each of those three contacted me. There could always be the danger that one of them could have written a cheque and sent it to IMRO, but they all contacted me, and I rang IMRO and I said, "Look, back off." They weren't specifying any tunes played ... They backed off a little, not a hundred percent, but we paid no money, and then IMRO were invited in to come before the Oireachtas Committee on Heritage, of which I'm a member, and I presume they prompted the invitation for themselves, but they didn't come in to talk about traditional music. They came in to talk about the reason for copyright, etc., and luckily enough I availed of the opportunity and I was lauded for this by the chairman, and I raised this whole question of traditional music which changed the tone of the meeting entirely. First of all they responded by saying that it wasn't at all their intention to interfere with the ordinary session of music, and then I threw at them the three demands and said that was a mistake that shouldn't have happened. Now, the thing was it showed their intention. What it really said was, "We can't specify any copyrighted tune which was played at the Fleadh Cheoil in

⁷² "I think it's still vital that the individual musician feels free to hear a tune or tape it and replay it and not be wondering whether somebody is policing them and whether there's a royalty involved. I think IMRO have to alter the equation. They tell us they have, IMRO are telling us there's no danger to traditional music" (Labhrás Ó Murchú, personal interview, Dublin, 1998).

Clonmel, but we assume that somewhere, some place in Clonmel, in some pub, somebody played a copyrighted tune.” That would mean they could go anywhere on that basis, on that principle. I’ve used that with the Minister in my meetings and I’ve used it in the Senate as well that that shows the type of power that IMRO want in legislation (Personal interview, Dublin, 1998).

It was of great concern to Ó Murchú that the Copyright and Related Rights bill not allow for some legislative possibility that would severely impede the musical practices of those in his organisation and allow the expansion of the Irish Music Rights Organisation to continue unimpeded: “If anything gets into that which is going to create a loophole for IMRO or any collecting agencies we’ve a problem” (Personal interview, Dublin, 1998). Assurance had apparently been given in writing by Minister Tom Kitt, however, that “under no circumstances would the corpus of traditional music be interfered with” (ibid.).

Treoir magazine published an article entitled “Irish Traditional Music must not be licensed” in the second issue of 1998. The article was an almost verbatim report of Ó Murchú’s spoken contributions to a Joint Oireachtas Committee on Heritage to which IMRO representatives had been invited to speak. No other contributions were registered in this article. Stating that it was imperative that IMRO did not “stifle or inhibit the natural momentum of Irish traditional music”, Ó Murchú championed his organisation for having “ploughed a lonely furrow to save our music from extinction”. “To ask our musicians to take out a licence to play their music,” he added, “would be the equivalent of asking a young lad to pay for the privilege of hurling a sliothar [sic.]”⁷³. What was particularly interesting, and most definitely a sign of things to come, was the final line of the article: “The IMRO representatives gave an assurance that Irish traditional music, as outlined by Senator Ó Murchú, would not be restricted or hampered by IMRO.”⁷⁴

⁷³ A *sliotar* is a leather ball, approximately the size of a tennis ball, which is used in the game of hurling, one of Ireland’s ‘national’ sports. A *sliotar* can also be referred to as a “hurley ball”. To “hurl a *sliotar*” is to hit the ball with a hurling stick (*camán*), which stands waist-high and is normally made of ash.

⁷⁴ This apparently did not stem the flow of opposition, however. In a representation to the Irish Senate in June 1998, Labhrás Ó Murchú likened the “inherent dangers in copyright law” to the decree by “a Queen of England” which called for all pipers and harpists to be hanged.

The Agreement

Following a series of private meetings, Shay Hennessy, then Chairman of the Irish Music Rights Organisation, and Labhrás Ó Murchú, *Ard-Stiúrthóir* (Director-General) of *Comhaltas Ceoltóirí Éireann*, signed a 'Letter of Agreement' on the 21st December 1998. In this "wide-ranging agreement" CCÉ and IMRO agree to cooperate in the promotion of traditional Irish music, song, and dance, to the mutual benefit of members of both organisations. IMRO stated that they accepted that the provisions of copyright law "should not deprive Irish people of the right to make free use of music from their folk/heritage tradition in its original form". According to this agreement, *Comhaltas Ceoltóirí Éireann* contracted with the Irish Music Rights Organisation for a blanket licence to cover all official Comhaltas functions and centres, excluding broadcasts, for the sum of £1,000 per annum. In return for the blanket licence, and allegedly in recognition of the cultural work that Comhaltas undertake, IMRO agrees to make a "financial subvention" to Comhaltas for the sum of £50,000 per year, commencing in January 1999. This sum is to be reviewed at the end of a five-year term. As part of the agreement, IMRO also agrees to refer all requests for support for Traditional music to CCÉ. An additional sum of money, a "financial subvention" of £25,000 per year, was also included, going to Brú Ború, a cultural centre affiliated to *Comhaltas Ceoltóirí Éireann* in order to assist a "millenium project to encourage the creativity and development of composers and arrangers writing in the traditional idiom". CCÉ, in return, agreed to support IMRO's submission to the Irish Department of Enterprise, Trade and Employment in relation to the proposed Copyright bill.

The Agreement was announced in the first 1999 issue of *Treoir* magazine, under the heading: "IMRO and Comhaltas Sign Agreement" (6), and in the June, 1999 issue of the IMRO Members Newsletter, in an article entitled, "IMRO and Comhaltas Céoltóirí [sic] Éireann Sign Agreement to Benefit Traditional Irish Music". Although mention is made in both articles of both the

This refers to a request made by Elizabeth I to Lord Barrymore to "hang the harpers wherever found" (see Thuente 1994).

blanket licence and the financial contribution to Comhaltas, no mention is made of the sums involved or of any other details. The IMRO Newsletter simply states that: "In recognition of the work being done by Comhaltas, IMRO will provide financial support to help encourage and foster the creativity and development of composers and arrangers writing in their traditional idiom".⁷⁵ It continues:

Speaking on behalf of Comhaltas, Senator Labhrás Ó'Murchú [sic] said that the agreement will result in very significant benefits to both organisations. He also stressed the importance of a copyright-friendly environment as the digital age develops and pledged his organisations [sic] backing to the submissions made by IMRO to the Department of Enterprise, Trade & Employment in relation to the proposed Copyright Bill (1999:6).

The article in *Treoir* further reported that: "Senator Labhrás Ó Murchú, Ardstiúrthóir, *Comhaltas Ceoltóirí Éireann*, said that the agreement will result in very significant benefits to both organisations. 'Traditional Irish music is winning new audiences all over the world and this agreement will contribute further to its development in all its forms'." Although this was offered as having been said by the Senator, these were also the exact words found in the text of IMRO's 1998 *Annual Report and Accounts* (15). The two representative voices of the organisation had truly become one.

Then Minister for Enterprise, Trade, and Employment, Tom Kitt, published sanctioning remarks in *Treoir* magazine (Kitt 1999), which gave official legitimisation to the agreement between IMRO and *Comhaltas Ceoltóirí Éireann*. In an article whose title proclaimed "Pure Tradition Copyright Free", his own remarks clearly placed his understanding of the word "traditional" within cultural nationalist and romantic discourses of "the folk". His remarks contrasted that which is authentically traditional, communal, non-creative, non-original, and non-copyrightable, with that which is authored, individual, creative, original, and copyrightable.⁷⁶ Furthermore, his hope was that the

⁷⁵ By October of 1999 the IMRO Members Newsletter extended the remit of the agreement in paradoxically more vague and more specific terms: "Under the agreement IMRO will provide sponsorship for various events and will make available its experts for lectures and curriculum design. CCE [sic], in return, will support IMRO and its activities both nationally and internationally" (IMRO 1999a).

⁷⁶ "Clearly, for pure traditional music which is, by definition, without an author, and for which the question of originality cannot arise, there is no reason primary copyright should attach to it at all. Copyright considerations would not affect the right of players to play music which is

agreement which had been signed would go a long way to ensuring the eradication of conflict within “the music community”.

Initially, when no sums were disclosed, some members of Comhaltas inquired officially as to whether a licence-fee had been paid to the Irish Music Rights Organisation. Some were worried that the payment of a licence-fee would constitute recognition that the Irish Music Rights Organisation was a suitable licence-granting authority in contexts of traditional music, setting a significant precedent for similar organisations worldwide. They were assured by official representatives of *Comhaltas Ceoltóirí Éireann* that no licence had been paid for. This assurance was given three months after the agreement with IMRO had been signed, at which time the full sums of money involved had not yet become public knowledge. When they became public knowledge, it was understood that the licence fee of £1000 obviously constituted little more than a nominal payment. What was important about the licence fee, though, was that it officially granted the Irish Music Rights Organisation full nominal jurisdiction in the contexts of traditional Irish music, insofar as Labhrás Ó Murchú and *Comhaltas Ceoltóirí Éireann* were recognised by IMRO as being the primary authorities in those contexts.

The issue of Brú Ború itself was interesting. Not only is this cultural centre managed by Úna Uí Mhurchú, Labhrás Ó Murchú’s wife (and then Chairperson of the Irish Arts Council), but of all cultural centres affiliated to CCÉ, Brú Ború is the one centre that does not have to submit end-of-year financial accounts to the organisation. It later transpired that none of the members of *Comhaltas Ceoltóirí Éireann* had been informed in advance of the *Ard-Stiúrthóir*’s intention to sign an agreement with the Irish Music Rights Organisation, and in fact the first cheques were handed over before the official committees of CCÉ were able to approve the agreement as per the

part of a genuine traditional community resource and over which no primary copyright interest can exist. ... With regards to how disputes in this grey area might be avoided, I believe that interested parties, both in respect of traditional music and of music copyright, have a serious responsibility to behave sensibly and reasonably towards each other in asserting their respective rights. In this context, I welcome the recent demarcation agreement between *Comhaltas Ceoltóirí Éireann* and the Irish Music Rights Organisation

proper constitutional conventions of the organisation. As suggested above, neither were high-ranking members of CCÉ informed of the full financial details of the agreement until they had, in fact, become public knowledge following a series of possibly accidental information leaks.

One Year On

By Issue 1, 2000, of *Treoir*, the 'Letter of Agreement' had become "The Cooperation Agreement", the first birthday of which had been reached by December 1999. In this article, "A Protection for Ethnic Music", it was reaffirmed that 'the Agreement' "underlines the copyright-free status of Irish traditional music in its original form" (CCÉ 2000). This was stated despite any such claim being in the original letter of agreement. Neither had the agreement, or anything else for that matter, managed to arrive at a successful or adequate legal definition of what 'traditional' meant, never mind "Irish traditional music in its original form". That the phrase used in the original agreement was "music from their [Irish people's] folk/heritage tradition in its original form" simply added to the confusion. In the "Cooperation Agreement" article, more than a year after the agreement, there was still no disclosure of the sums of money involved, although at least now there was an admission that Brú Ború had received an undisclosed "financial subscription". To mark the anniversary, the article reported, Shay Hennessy, then IMRO Chairman, and Hugh Duffy, then IMRO's Chief Executive Officer, addressed the CCÉ *Ardchomhairle* ('Advisory Board'). It was reported that the 27 member *Ardchomhairle* "unanimously"⁷⁷ expressed satisfaction with the relationship to date between Comhaltas and IMRO and endorsed the discussions which are ongoing between both organisations over a range of issues that are important not only to both organisations but to

which should go a long way to ensuring that unnecessary and damaging disputes on such issues within the music community are avoided" (Kitt 1999:15).

⁷⁷ The claim to unanimity was patently untrue, as some dissension had been voiced at the meeting, and the 'ongoing discussions' between the organisations primarily meant that Labhrás Ó Murchú was still communicating with officials from the Irish Music Rights Organisation.

the future of Irish creators of all genres in the next century” (ibid.).⁷⁸ At this meeting it was repeatedly stated during the IMRO address that the agreement had, indeed, achieved the “copyright-free status of traditional music in its original form”.⁷⁹

Ó Murchú is convinced that ‘the end of debate’ has been reached, that the ‘problem’ of copyright and traditional music has been solved, that the role of *Comhaltas Ceoltóirí Éireann* as representative of Irish traditional music has been vindicated and legitimated, and that all problems have been eliminated: “What we now have is legislation, the Minister on the record, and an agreement with the collecting agency that traditional music in its original form is copyright-free. And the second part of it, that we are not going to be interfered with in our activities” (Ó Murchú 2000). Likewise, the representatives of the Irish Music Rights Organisation are satisfied that it has all worked out to the mutual advantage of both organisations. As the then-chairman of the organisation stated: “Comhaltas has about 37,000 members worldwide, which is a fairly large constituency of people, and certainly there are a potential 27,000 IMRO members in that constituency, or whatever percentage there might be of that 37,000, we’ll certainly be there assisting them and helping them to develop their creativity” (Shay Hennessy, personal interview, Dublin, 2000).

Summary

Once again, in this chapter we have seen the cycle of expansion dynamic at work within the working environment of the Irish Music Rights Organisation.

⁷⁸ An interesting development in the discourse available to *Treoir* readers in this article was the presence of acronyms, phrases, and taxonomy more familiar to the members of IMRO than the members of Comhaltas. Using the rhetoric of ‘protection’, ‘challenge’ and ‘opportunity’, in the space of three short paragraphs the article managed to shore up the joint activities of CCÉ and IMRO with the legitimating support of the WTO (World Trade Organisation) intellectual property negotiations, the EU (European Union) Rental and Lending Directive, and of Comhaltas members in the US and the UK. “The possibilities,” it reported, “of Comhaltas members in the US and the UK who create new music in these territories joining IMRO is at an advanced stage [sic.]” (CCÉ 2000).

⁷⁹ The fact that this was simply a rhetorical phrase to paper over conceptual cracks and stop people asking questions, was certainly not a point that any of those leading the meeting

The 'traditional' cycle that is detailed here is particularly interesting insofar as it constitutes something of an offshoot of IMRO's cycle of expansion in relation to the Vintners' Federation of Ireland (VFI). In some senses it could be argued, in fact, that the Vintners' Federation's negotiation strategies provided the Irish Music Rights Organisation with the opportunity and incentive to expand their claims of jurisdiction to cover the 'traditional' domain. Subsequently, IMRO's licensing claims in regard to 'traditional music' were met with considerable resistance, not least of all from 'traditional' musicians themselves. This was rarely voiced openly. If only for this reason it is difficult to gauge the intensity of general resistance to the organisation's expansion among 'traditional' interests. Nevertheless, occasions when resistance was clear and unequivocal, as detailed in the 'ethnographic passages', seemed like veritable flashpoints.

Resistance to the extension of IMRO's licensing claims was particularly strong from the national 'traditional music' body, *Comhaltas Ceoltóirí Éireann* (CCÉ). The shift in the relationship between the representatives of both IMRO and CCÉ allows us to see the cycle of expansion in high relief. The transformation of the official position of Comhaltas from complete opposition to complete alliance was nothing short of spectacular. Now, clearer than ever, we see the expansionary dynamic of expansion, resistance, and legitimisation. More importantly, perhaps, we see that the extension of the Irish Music Rights Organisation's interests is not merely a question of oppressive imposition, but, rather, a question of negotiation and acquiescence. Ultimately, all resistance was overcome or rendered ineffective through a series of contractual agreements which legitimated IMRO's claims to jurisdiction. By the signing of the Copyright and Related Rights Act, 2000, the representatives of IMRO had achieved widespread governmental and organisational support for their activities, effectively rendering their role and activities unchallenged. This effectively established a condition of unquestioned hegemony for the organisation and its expansionary dynamic.

were willing to dwell on. It remains a catchy phrase that doesn't really change anything as far as copyright or legislation is concerned.

The role and activities of the Irish Music Rights Organisation, then, constitute a prime example of a hegemonic order. The counterinductive purposes of retheorising (see pp. 22-25) are clearly suited, then, to the taken-for-granted orthodoxies of IMRO's position. What has been presented thus far, however, is a primarily descriptive examination of the organisation's activities from 1995-2000. This has shown us that licensing is the primary operation of the Irish Music Rights Organisation. Insofar as licensing is necessary for the organisation to exist, expansion of licensing claims is the dominant feature of the organisation's activities in the years following 1995. What is provided in the next chapter, however, are the first steps towards a more explanatory analysis of this expansion.

Chapter 5

He is supposed to be Turkish. Some say his father was German. Nobody believed he was real. Nobody ever saw him or knew anybody that ever worked directly for him, but to hear Kobayashi tell it, anybody could have worked for Soze. You never knew. That was his power. The greatest trick the Devil ever pulled was convincing the world he didn't exist.

Verbal Kint, The Usual Suspects, 1995

Chapter 5

The Irish Music Rights Organisation and John Kenneth Galbraith's Planning System

Introduction

The successful expansion of the Irish Music Rights Organisation from 1995-2000, then, has led to the achievement of a monopoly position and hegemonic status within the Irish state. Expansion, it has been argued, is a central dynamic, if not *the* central dynamic, of the role and activities of the Irish Music Rights Organisation in the period 1995-2000. In this chapter we look to economist John Kenneth Galbraith's "Planning System" for an explanatory theoretical model that will complement the descriptive character of the 'cycle of expansion' motif, underscoring some of the political dynamics of IMRO as an organisation.

John Kenneth Galbraith and American Institutionalism

John Kenneth Galbraith is an American economist, most commonly associated with analyses of the modern corporation. To situate the work of Galbraith it is useful to briefly highlight some of the tensions in economic theory, in particular North American economic theory, out of which his work arises. A brief overview is first presented of the fundamental principles of neo-classical economics. In particular, it is noted that orthodox economic theory effectively eliminates power as a concern in free market economics. It is then shown that the rapid rise of industrialisation and urbanisation in the United States at the end of the nineteenth and the beginning of the twentieth century highlighted that power was a central problematic, as large corporations began to exert major influence upon markets. Neo-classical models were acknowledged by a number of economists to be, in principle, inadequate to deal with these new organisational forms. A school of thought that subsequently developed from this tension between orthodoxy and social experience is known as American Institutionalism. Institutional economists

sought to understand economics not only in terms of neo-classical doctrine, or sometimes *not even* in terms of it, but also with a view to the social and historical context of economics, and an awareness of the role of power. The work of Galbraith can be understood within the wider context of this institutionalism.

Neo-classical Economics and the Theoretical Absence of Power

Orthodox neo-classical economic analyses have their foundation in at least two principles. The first is a behavioural principle, that of maximisation: "that all decisions are made in order to maximize according to a given objective function such as a profit or a utility function" (Boland 1997:134). This is typically grounded in a methodological individualism: "the view that allows *only* individuals to be the decision makers in any explanation of social phenomena" (169). Note that these decisions are typically understood to follow the profit or utility function of maximisation. The consumer, then, as the individual decision-maker set loose in the market, is the ultimate arbiter of all things in the market: "The individual being in charge, he cannot be in conflict with the economic or political system. He cannot be in conflict with what he commands" (Galbraith 1973:30). The second fundamental principle of orthodox neo-classical economics is that of market equilibrium (Boland 1997:126), that through the checks and balances of supply, demand, and market competition income is limited or equalised, and thus the market participation of individuals as consumers and producers is regulated and democratised. This principle ensures that: "In a freely competitive, decentralized market society ... the ultimate source of legitimacy in the social and economic sphere [is] largely the market itself" (Okroi 1988:5). Thus, it could be argued: "Economic power in a free market system theoretically did not exist, since any single producer's influence on the market was, relative to that of numerous other producers, infinitesimally small" (7). Nevertheless, within a neo-classical model, "The economic system functions in response to the instruction of the market and ultimately of the consumer" (Galbraith 1973:35).

One of the most influential neo-classical theorists is Alfred Marshall (1842-1924). Simplistic elaborations of neo-classical thought must be treated with caution. It has been argued for example that "It was not maintained ... that economic motives were the only spurs to human action, nor that all men acted as *homo economicus* in the conduct of the day-to-day business of life. Most neo-classical writers - and Marshall with particular emphasis - insisted that their study was restricted to the economic aspects of human action rather than the whole complex of man's aspirations. By the same token they did not wish to be interpreted as saying that all who participated in market transactions were rational calculators. Instead, they sought merely to establish that rationality as a behavioural postulate provided a realistic basis for the study of groups of people" (Barber 1967:170). Nevertheless, a distinction should be made between the nuances of neo-classical theory and the expectations generated by the influence of neo-classical theory on a daily basis in the working lives of managers and business people. Much of the 'workaday rhetoric' of management and business would seem to suggest that neo-classical principles are universal inasmuch as life is unquestioningly and universally to be considered in economic terms. In the words of IMRO's Hugh Duffy: "Our job is to collect the royalties. I think that we are in an economic world and I don't think there's any way around it" (see p. 96).

The Modern Corporation and American Institutionalism

The absence of considerations of power within neo-classical economic explanations of market economics became particularly problematic in the United States from the final decades of the nineteenth century through the first half of the twentieth century. The market system had undergone enormous changes. With the rise of industrial capitalism certain companies had grown to the point that they were able to exert considerable force upon the entire market structure:

Americans were presented with an obvious dilemma. If economic activity was no longer regulated by an impersonal market mechanism, but was instead dominated by a relatively few identifiable groups and organizations, the following questions arose: How did they obtain this power? By what right did they exercise it? If the market was

no longer “free,” how could one justify the results it produced, especially if some of them were widely judged to be undesirable? (Okroi 1988:7).

The neo-classical emphasis on the supremacy of the individual did not provide adequate answers for this changing social situation. In response to the increasingly inadequate provision of orthodox perspectives, a number of scholars voiced criticism of the fundamental assumptions of neo-classical *laissez-faire* capitalism, some advocating state intervention in the market economy. This type of approach led to the development of what was known as the “New School” of political economy, which included such thinkers as John Bates, Richard Ely, and Simon Patten (8). This new interest in the social and economic conditions of the United States fostered the work of maverick, idiosyncratic economist Thorstein Veblen at the turn of the twentieth century (see Heilbroner 1992). Veblen is particularly remembered for his The Theory of the Leisure Class (1889). He crucially rejected the singular focus on the role of the individual as the fulcrum of economic thought. As Okroi comments: “the important point to note is that Veblen rejected many of the basic axioms of classical economics and eschewed its narrow technical analysis of static economic relationships, concentrating instead on broader issues concerning the structure, dynamics, and historical evolution of economic institutions themselves” (1988:9).

Since Veblen, a number of scholars have studied economics with a broad, interdisciplinary approach wherein the American economy has been analysed from a variety of holistic perspectives. They have become known as “institutionalists” (ibid.).⁸⁰ One of the key institutionalist contributions has been The Modern Corporation and Private Property (Berle and Means 1932), which attacks the orthodox theoretical foundations of microeconomics (the theory of the firm). Adolf Berle and Gardiner Means argue, for example, that terms such as ‘ownership’, ‘private property’, or ‘competition’ had assumed a whole new range of meanings in the era of the modern corporation, far beyond those normally associated with small-scale entrepreneurs. Perhaps

⁸⁰ They are also sometimes referred to as ‘Old Institutionalists’ or ‘American Institutionalists’ to distinguish them from the political economy approach of ‘New Institutional Economics’.

most significantly, they argued that the economics of small and large corporations were “essentially different” (6).

Another significant contribution to this growing critique of neo-classical doctrine was the work of Englishman John Maynard Keynes, whose publication The General Theory of Employment, Interest, and Money (1936) is particularly noteworthy. Perhaps the major challenge presented by Keynes was to the principle of market equilibrium: “There was, he maintained, no reason to assume that a modern capitalist economy always tended toward the full employment of its human and material resources. This directly challenged the orthodox view that the market was a nearly perfect machine that automatically balanced demand and supply orders and maximized economic output” (Okroi 1988:15).⁸¹ Many Institutionalists found Keynes a sympathetic ally in their often wide-ranging critiques of orthodox neo-classical economics. Institutionalists, in summation, examined capitalism “not simply, or even primarily, from an economic standpoint, but instead with a fundamental regard for the social and historical contexts in which it operates” (xiii). We approach Galbraith here as an exemplary Institutionalist.

John Kenneth Galbraith and the Planning System

In 1934, John Kenneth Galbraith accepted a position in economics at Harvard University, and soon became involved in this debate concerning the role and structure of large corporations and the impact that such business might have on understandings of neo-classical market economics. Following Keynes’ publication in 1936, Galbraith became something of a Keynesian evangelist, while Harvard became the centre of Keynesian theory in the United States (Okroi 1988:32). His zeal led him to positions in governmental administration during the Second World War, where he worked within the complex politics of Franklin D. Roosevelt’s ‘New Deal’ economy. Various jobs followed, including a time as a director of the United States Strategic Bombing Survey, and a number of turns as editor of Fortune magazine. His

⁸¹ For a general guide to the economics of John Maynard Keynes see Hansen (1953). See also Barber (1967).

first book, American Capitalism: The Concept of Countervailing Power was published in 1952. In the early 1960s Galbraith spent time as United States Ambassador to India for the Kennedy administration. In 1963 he resigned this post to return to Harvard.

Galbraith is a much-neglected theorist of the firm, ignored by economists of all schools. This is the position of post-Keynesian economist Stephen P. Dunn (2001). The first reason that Dunn gives is that Galbraith has generally been associated with managerialist theories of the firm, which recognised that large firms were no longer controlled and dominated by their owners but instead by their managers. Such theories were well established at the time Galbraith was writing, in the '50s, '60s, and '70s, and he was clearly influenced by them. Dunn admits that while Galbraith's approach emphasises the widely-recognised separation of ownership from control, which we shall discuss later, his view of the modern corporation is more complex and subtle than is generally acknowledged (158). A second reason is what Dunn terms his "caustic and irreverent populist rhetorical style", which has led many theorists of the firm to view the work of Galbraith as less rigorous and more literary, and hence to be ignored. In the words of Loren Okroi: "With a keen and incisive prose style and a rapier wit in both oral and written forms of expression, he was to create armies of admirers and adversaries, leaving few in the neutral camp" (Okroi 1988:30). A third reason that is often given is that Galbraith's work is not wholly original from an economics standpoint, and is rather an exercise in system building and social philosophy:

The old adage about Marx: that philosophers think Marx a bad philosopher but a good political scientist and economist; that economists think Marx a bad economist but a good philosopher and political scientist; is more than apt for Galbraith. The cumulative effect of all these factors has been that Galbraith's vision of the modern corporation has not attracted the attention of contemporary theorists of the firm (Dunn 2001:159).

The positions presented in this chapter derive most inspiration from work that Galbraith produced between 1958 and 1973. In 1958 Galbraith published The Affluent Society, which is noted here in particular for its vigorous critique of the neo-classical doctrine of consumer demand. This book was considerably less orthodox in its approach than the earlier American

Capitalism, and it drew some negative reactions from the economic establishment. As Okroi notes: "The consensus within the profession was that Galbraith had some interesting and important things to say, but that most of his arguments were exaggerated, too unorthodox, or simply invalid" (1988:56). This present chapter does not draw specifically on The Affluent Society. Nevertheless, many of the key arguments presented in Galbraith's 1958 publication are reiterated in The New Industrial State (1967) and the more populist Economics and the Public Purpose (1973). What is important, however, is that the latter publications shifted Galbraith's focus almost entirely onto the role of large corporations in the market system, and, subsequently, onto the inability of neo-classical economics to explain the political dynamics of their existence:

... the prevailing theory still maintained that capitalists or their representatives had plenary control over corporate policy and that managers, scientists, and technicians, while increasingly important, were essentially hired personnel with no independent power, and that the goal of business leaders was what it had been in the nineteenth century: profit maximization. Textbooks acknowledged the act of oligopolistic competition; but authors continued to concentrate on the entrepreneurial firm as the basis for understanding the structure and behavior of *all* firms. The market power of large firms was noted in passing; but the unalterable law of supply and demand was said to be far more influential (Okroi 1988:60-61).

Institutionalists, as noted above, generally argue that the theoretical models provided by neo-classical economics are inadequate to deal with the analysis of large corporations, organisations which offer a clear break with orthodox economic doctrine. Galbraith addresses this inadequacy by proposing that these firms take their place in what he terms the 'Planning System'. This is a system characterised in general by a pervasive tendency towards predictability and control, and spawned by the demands of technology. In opposition to those who suggest that the primary motivation of this type of firm is profit motivation, Galbraith argues instead that the central concern of the Planning System is *growth*, and that all strategies within this kind of organisation can be understood in relation to this prime dynamic. I argue in this chapter that the expansion of the Irish Music Rights Organisation can be viewed within this explanatory framework of the Planning System developed by Galbraith for the analysis of large corporations. Galbraith's explanatory

framework is far more satisfactory than those most often provided to explain the role and activities of the Irish Music Rights Organisation.

The Twin Mandate

The activities and expansion of the Irish Music Rights Organisation are often explained by the operations of a twin mandate on the basis of membership and neo-classical economics. On the one hand, IMRO claims its mandate to license music use, collect licence revenue, and distribute royalties from its composer and songwriter members, in all genres, who assign their performing rights to the organisation. This is further sanctioned by the membership mandate of all societies with whom the Irish Music Rights Organisation claims affiliation. This is the most obvious mandate for IMRO's expansion. On the other hand, the neo-classical economic premises of supplier incentive and, as Galbraith (1973) has noted, consumer instruction operate as a second and powerful mandate within the frameworks of market economics, providing for the workaday rhetoric of the Irish Music Rights Organisation. This neo-classical mandate is often portrayed as a conduit issue, IMRO efficiently facilitating the financial exchange between composer-entrepreneurs and consumer-users by providing incentive on the one side and product on the other. Whether openly acknowledged or not, the deployment of this twin mandate effectively provides for the moral sanction of the Irish Music Rights Organisation. The authority for IMRO's activities is understood to emanate ultimately from the will of individuals, then, as either member-producers or consumer-users. This twin mandate hypothesis, however, is inadequate to explain the activities and expansion of the Irish Music Rights Organisation.

The Member Mandate

The membership mandate is perhaps the most often used justification for the role and activities of the Irish Music Rights Organisation. As detailed in Chapter 2, IMRO administers the performing rights of its publisher, songwriter, and composer members by the granting of licenses to music

users and the collection and distribution of royalties. It is able to do this because each individual member voluntarily grants IMRO the nonexclusive right to licence nondramatic public performances of their works. Members further authorise the Irish Music Rights Organisation to bring suit in their name against infringers and appoints IMRO as attorney-in-fact to conduct and resolve such suits. The Irish Music Rights Organisation is thus able to police infringing performances. By becoming a member of the organisation the member also agrees to be bound by IMRO's distribution system by which royalties are determined. It is important to note that the membership mandate for IMRO's activities also includes all of the members of affiliated organisations worldwide, on whose behalf the representatives of IMRO also administer royalties. As noted earlier (p. 43), the sum total of the works assigned by all members to the internationally-affiliated collection agencies is known as the 'world repertoire', and the number of works is currently considered to be in the region of 14.25 million (source: <http://www.imro.ie>). In 1999 there were 2,900 members of the Irish Music Rights Organisation. This non-profit performing rights organisation is thus understood as a membership society, controlled by a Board of Directors who are elected by the composer, songwriter, and publisher members (Duffy and Quinn unpubl. 1997).

The Mandate of Neo-classical Economics

The second major principle for the mandate of the Irish Music Rights Organisation is the systematic logic of neo-classical economics. Given the substance of IMRO's role, this is hardly surprising. It is almost impossible to separate intellectual property from its role as an instrument of commodification within capitalist or neo-classical systems (Bettig 1996). In fact, the development of capitalism and intellectual property have been concurrent (M. Rose 1993; Woodmansee and Jaszi 1994). The appearance in the eighteenth century of 'things of the mind' as transferable articles of property matured simultaneously with the capitalist system (Jaszi 1992). It could be argued that the application of intellectual property in any circumstance assumes the *a priori* application of the logic of neo-classical economics, where the production and distribution of goods depend on

invested private cultural capital and profit-making. Scholars such as Steohen Gudeman (1996) or Vandana Shiva (1993) have pointed out that abetting the acceptance of intellectual property necessarily leads to economic transformations because the adoption of intellectual property necessarily implies the adoption of the normative orthodoxies of capitalism and neo-classical thinking. One significant factor is that one of the underlying assumptions of intellectual property “is that human beings require economic reward to be intellectually or artistically creative. The philosophy of intellectual property reifies economic rationalism as a natural human trait” (Bettig 1996:25).⁸²

The Conduit Role of the Irish Music Rights Organisation

Neo-classical interpretations of the role of the Irish Music Rights Organisation thus revolve around a conduit narrative of production and consumption. Self-interested, commercially-motivated composer-entrepreneurs engage in “product differentiation innovation” (Burke 1993). The aim of this is to produce works with commercial potential. In order to protect the commercial value of this product, then, it is understood as property, and given property right protection. The use of this property by consumers, known as ‘music users’, requires the payment of royalties. Royalties provide the incentive for suppliers (composer-entrepreneurs) to produce. They also allow consumers legally to satisfy their demand for the product. Within this system the individual composer-entrepreneur is in command of their own business interests, and attempts to maximise profits by personally collecting the royalties due for use of their product. The fundamental economic transaction is posited, then, as that between the producer-supplier and the consumer-user.

However, the widespread use of technology has led to a situation where it is practically impossible for composer-entrepreneurs to identify or track the use

⁸² As Reichman (1991) notes, the neo-classical economic emphasis in discussions and justifications of copyright is particularly dominant in American scholarship. The economic

of their copyright works by consumers so that they might collect royalties for them. The only feasible method of enforcing a composer-entrepreneur's performing right, then, is to choose to affiliate oneself with an organisation, a performing right society (Korman and Koenigsberg 1986; Sinacore-Guinn 1993; Peacock and Weir 1975; Ehrlich 1989). By voluntarily sacrificing their individual exclusive right to license the performance of their work the composer-entrepreneur gains the advantage of collective surveillance and enforcement. Similarly, music users are faced with the practical impossibility of seeking out individual copyright owners and negotiating individual licences with them (Korman and Koenigsberg 1986:348). Thus, the administrative role of the Irish Music Rights Organisation facilitates this financial transaction between producer and consumer, balancing prices to achieve what neo-classical economists would refer to as the objectives of productive and allocative efficiency:

In relation to productive efficiency the price should be sufficiently high to provide an incentive for the product to be produced. Thus, in the case of performing rights the tariff must be sufficient to provide an incentive for composers to, write music which consumers like, promote its availability, and supply it to consumers. Allocative efficiency implies that the tariff rate should attempt to supply music to as many customers as possible given the costs of doing so (Burke 1997:1).

The Irish Music Rights Organisation does this then, by, on the one hand, "providing an incentive for suppliers to produce", and on the other, "ensuring that as many consumers as possible who want the product, get the product" (Burke 1997:2). IMRO's activities, it is argued, thereby provide a service, an efficient conduit for the exchange of the commodified 'work' between producer and consumer within a competitive market environment, based on the principle of profit-maximization.

The basic economic transaction on which most understandings of the Irish Music Rights Organisation are based is, then, the transaction that is deemed to occur between the supplier-producer-composer-entrepreneur and the music-user or consumer. IMRO's role is to facilitate this transaction with maximum efficiency. As long as this character of transaction remains the

justification for copyright is illustrated by the work of copyright theorists such as Goldstein (1990) or Patterson and Lindberg (1991).

central focus of the explanations it is possible to represent this economic relationship as conforming broadly to what Galbraith would call the Market System, where firms are characteristically under the command of one person, are generally subordinate to their economic environment, and conform broadly to the neo-classical model. In the Market System, if profits are good, the composer-entrepreneur will most likely increase their amount of 'tune innovation', but with the competitive environment that accompanies the negligible capital required to set up as a composer-entrepreneur, a monopoly position proves difficult to protect. To paraphrase Galbraith: "So, in the market system, production and prices are not likely to be effectively and reliably under the control of the [composer-entrepreneur]. Nor are they likely to be subject to the collective authority of a few [composer-entrepreneurs]. So, if profits are abnormal, they will soon come down. This means that the entrepreneur does not for long have the luxury of preoccupying himself with any goal except that of making money. He must always, where this is concerned, do the best he can" (Galbraith 1973:61). This is echoed in an economic position paper commissioned by the Irish Music Rights Organisation: "The high rewards secured by the successful minority of music compositions is relatively short lived as the scale of competition in the market ensures that such market power is temporary" (Burke 1997:2).

Galbraith draws particular attention to one important aspect of such neo-classical theory that is not greatly emphasized; that is, that the moral sanction of the economic system depends on the individual consumer as the source of instruction in the market. Thus, Galbraith argues (1973:29-30), the economic system places the individual in ultimate command, in such a way that the individual consumer can never be in conflict with the economic system, for to be so would entail being in conflict with him or herself. Neo-classical thought, then, places the consumer in ultimate control of 'the system' within which the individual composer-entrepreneur operates, facilitated by the Irish Music Rights Organisation. This control is presumably democratized by the powerful systemic force of competition, which is understood to limit or equalize the income of IMRO members. For the Irish Music Rights Organisation, the instruction of composer, songwriter, and

publisher members, which we have already noted, is mirrored by the instruction of the consumer. The central linking premise of the twin mandate is that the ultimate sanction of the economic system, and of the Irish Music Rights Organisation, derives from its ultimate subordination to the will of the individual (32-33). The representatives of the Irish Music Rights Organisation can appeal to the authority of the twin mandate. They can turn to the issue of *member* choice, the decision to join the organisation, assign rights, and elect Board Members. Alternatively, they can turn to a neo-classical economics that revolves around the issue of *consumer* choice, the decision to purchase or reject products. Thus, understood within the interpretations of neo-classical economics the decision of the consumer becomes the driving force of the market and the foundation of the economic system within which IMRO operates, and the decision of the producer-member, and affiliated members worldwide, becomes the driving force of the organisation's administrative activity. Framing the activities of the organisation in this way makes consumers and members the sources of power, power understood by Galbraith as "the ability of an individual or a group to impose its purposes on others" (108). Presented in this way, the organisation itself cannot, then, exercise power, being merely an instrument in service of consumer and member choice.

The Inadequacy of the Twin Mandate Hypothesis

Galbraith is deeply critical of using the consumer-based neo-classical model to understand or explain organisational activity. As Galbraith demonstrates, orthodox neo-classical economics, founded on the principle of ultimate subordination to the will of the individual consumer, is totally unable to provide any explanation for what he sees as "the most basic tendency of modern economic society. That is for constituent firms to become vast and to keep on growing" (99). Expansion, as we have seen, is the most dominant feature of the activities of the Irish Music Rights Organisation in the period 1995-2000, and a feature which we have adequately described, but still not adequately explained. One of the primary effects of neo-classical thinking is to deny, or at least draw attention away from, the power exercised by

organisations, such as the Irish Music Rights Organisation. This, in turn, deflects attention away from their governing and self-perpetuating power elites, whose activity, once examined in detail, does not readily conform to the fundamental principles of neo-classical economics. The same effect is achieved by appeals to the member mandate, which likewise reduces all organisational activity to a function of individual choice through member sanction. To appeal to the systematic logic of consumer choice in the market, or producer choice by way of a membership mandate, is effectively to explain organisational expansion away by placing the representatives of the organisation "in the service of a higher deity" (21-22). They need not, then, be responsible for what they do, responding as they do to the theistic instruction of the market or their members. In this way, those interests that are served by an organisation's expansionary activity can be clothed in a rhetoric of necessity; for the interests of members and consumers *must* be serviced, and in the field of performing right(s) a collection agency provides the only way in which this might be done.

Furthermore, by frequently presenting the role of the Irish Music Rights Organisation as little more than a conduit between producers and consumers, it is possible to argue that the more efficiently IMRO facilitates the economic transactions in question, the less power the organisation exercises in relation to the parties concerned. Following Lakoff and Johnson, we see how the conduit metaphor provides "a ... subtle case of how a metaphorical concept can hide an aspect of our experience" (1980:10). In the conduit metaphor of performing rights, music is understood as economic units of transaction or "works", people as containers or "users", and "performance" as sending. This reinforces the type of thinking that suggests that "works" have meanings independent of contexts and people. However, the conduit metaphor, Lakoff and Johnson note, is "so much the conventional way of thinking ... that it is sometimes hard to imagine that it might not fit reality" (11). By limiting IMRO's role to that of a conduit it is presented as though it were simply a tube along which "works" pass between producers and consumers, "royalties" passing in the opposite direction. The implicit

metaphor conveniently does not allow for the representatives of the Irish Music Rights Organisation to be anything other than facilitators.

Hence, following Galbraith, we might argue that neo-classical economics and the member mandate fulfil an instrumental function in relation to the exercise of power within the Irish Music Rights Organisation, in that they serve, not the understanding or improvement of the system in which the organisation operates, but the goals of those who are in positions of power within that system (Galbraith 1973:23). They can guide attention away from "inconvenient fact and action" and hence offer "a formula for a quiet non-controversial life" (43). Galbraith is careful to point out, however, that "nothing should be attributed to conspiracy and not much to design" (23). What is at issue is that the privileging of consumer-user and producer-member instruction is the standard and accepted way to explain the activities of a performing right(s) organisation. This twin mandate is, then, the widely-accepted explanation for the activities of the Irish Music Rights Organisation: "As such it serves as a surrogate for ... legislators, civil servants, journalists, television commentators, professional prophets - all, indeed, who must speak, write or act on economic questions" (23). This explanation is, however, inadequate.

Galbraith's argument is that modern organisations and their expansionary dynamic provide a clear break with traditional, neo-classical economic doctrine. Continued adherence to orthodox economic doctrine, Galbraith argues, allows the power relations implicated in organisational activity to go unaccounted for. He is therefore keen to displace neo-classical understandings of organisational activity with a more adequate explanatory framework. Likewise, I argue that the activities and expansion of the Irish Music Rights Organisation cannot be adequately explained by the twin mandate of consumer-user and producer-member instruction that is most often used to explain the practices of performing right(s) organisations. Accepting this allows the relational implications of the specificities of IMRO's organisational activity to go largely unaccounted for, unacknowledged, or unrecognised. I am therefore seeking a more adequate explanatory

framework that brings the role and activities of the Irish Music Rights Organisation back to visibility. One may be found in Galbraith's theoretical elaboration of the Planning System.

The Planning System

Galbraith draws a distinction between the Market System, to some degree at least adequately served by the neo-classical model, and what he terms the Planning System, for which the neo-classical model cannot provide. In The New Industrial State, Galbraith identifies two meanings of the word *planning*. For the firm it "consists in foreseeing the actions required between the initiation of production and its completion and preparing for the accomplishment of these actions. And it consists also of foreseeing, and having a design for meeting, any unscheduled developments, favourable or otherwise, that may occur along the way" (1967:43). On the other hand, for economists or political scientists, planning "consists of replacing prices and the market as the mechanism for determining what will be produced with an authoritative determination of what will be produced and consumed and at what price" (43). Although it would seem as if 'planning' is being used in two different senses here, we can properly understand what Galbraith characterises as planning as a synthesis of the two, a pervasive systemic tendency towards the achievement of total predictability, as exhibited in the activities and strategies of those involved in corporate firms.

Following scholars such as Thompson (1967), Ryan (1985), and Dunn (2001), our understanding of planning can also be reconfigured as a general tendency towards the elimination of uncertainty. As sociologist Peter Marris points out, uncertainty arises in relation to our own preconceptions, "because events only appear as uncertain in some context of purposes of some expectation of orderliness. What constitutes as uncertainty depends on what we want to be able to predict, what we can predict, and what we might be able to do about it" (1996:16). For the Irish Music Rights Organisation, and, indeed, any firm conforming to the features of Galbraith's Planning System,

uncertainty can be understood as anything that falls short of complete predictability and control.

Firms that operate within the Planning System are those that could not exist were it not for organisation. Managers and workers in the Planning System strive for predictability and the elimination of uncertainty. They seek to control markets and prices. They also seek to mould and control the opinions and interests of consumers, the state, and their opposition, until such opinions and interests are consistent with their own. Most importantly, though, firms characterised by the Planning System have as their central goals not the maximization of profit, but growth and expansion. We have already seen how the primary dynamic of the Irish Music Rights Organisation during the period 1995-2000 disclosed an aggressive expansionary momentum. In the section that follows, the activities, expansionary practices, and monopoly status of collection agencies, and IMRO in particular, are shown to broadly conform to the characteristics of Galbraith's Planning System. By detailing the points of correlation between Galbraith's insights and IMRO's activities we are provided with a more accurate explanatory framework for the 'cycle of expansion'. One of the key aspects in Galbraith's analysis of the Planning System is the role of technology.

Technology

One of the most prevalent themes in discussions of copyright⁸³ is that the development of copyright has been hugely influenced by technology, in particular the introduction of the printing press (e.g., Bettig 1996; M. Rose 1993; Stewart and Sandison 1993). Hillel Schwartz has argued generally that "copyright law always lags behind the technologies of copying" (1996:243). The threat posed by the growth of musical technologies such as Berliner's wax discs (1895), the clock spring motor (1897), shellac discs (1904), and double sided discs (1905) to sales of sheet music contributed directly to the emergence of the performing right (Peacock and Weir 1975:45). Following

⁸³ Discourses of copyright will be further examined in Chapter 6 (see pp. 155-157).

comments made by Mark Rose (1993:142) in relation to the historical development of copyright, we might say that technology provides for one of the central tensions of performing rights. As copyright is often deemed to have arisen as a result of the rise of printing technology, so performing rights, it is regularly argued, is made possible by technology and the concomitant ability to make large numbers of "copies" ("performances") of a work available to the public. However, the same technological principles of mass reproduction propel the potential "use" of works to infinity and beyond. If it is assumed in principle that such "use" must be monitored, then the only condition that will adequately satisfy the needs imputed by the logic of performing rights is the ubiquity of the person doing the monitoring. Being in all places at all times is, of course, denied to any but the most extraordinary individuals. Organisations such as the Irish Music Rights Organisation, then, not only fulfil the role of conduit, but also that of ubiquitous surveillance, both roles, of course, facilitated by technology:

The introduction of a computer system is essential if the vast amount of music "consumed" nowadays is to be accompanied by accurate accounts, rapidly drawn up and circulated to authors and publishers. It is therefore advisable, when introducing collective administration of copyright for the first time, to have integrated computer systems available from the outset (WIPO 1997b:533-534).

For Galbraith, the single most important factor in the construction, maintenance, and general character of planning and its tendency towards predictability is the role and effect of technology, which Galbraith understands as "the development and application of scientific or systematic knowledge to practical tasks" (1973:54). This is what Thompson (1967:18) would refer to as "technical rationality". If planning is the inclination, technology is the method.

Organisation and the Transfer of Power from Individuals to the Technostructure

Firms that operate with the dynamics of the Planning System are governed by the commanding power of a 'technostructure' that supercedes the voice or authority of any one individual in the drive towards predictability (Galbraith 1973:98). The collective authority of the technostructure is epitomised by the

branding of the organisation with a single name or logo, in this case, the Irish Music Rights Organisation (IMRO). This transfer of power from individuals to the collective authority of the group is a central dynamic of the technostructure. As time passes and the firm increases in size, two factors in particular contribute to this dynamic. The first of these is the authoritarian character of collegial decision-making (100). The second is the concentration of managerial authority in the separation of ownership and control (100-102).

The use of technology, Galbraith argues, invariably requires the shared, specialised knowledge of more than one person, and hence organisation, organisation being defined by Galbraith as “an arrangement for substituting the more specialized effort or knowledge of several or many individuals for that of one” (97). This is particularly the case where recourse is taken to detailed legal and neo-classical economic argument characteristic of the Irish Music Rights Organisation. In addition, the introduction of technological equipment as capital, by all accounts an obligatory step for a performing rights collective, also requires specialists, and more organisation, for it to be effective. In fact, firms such as IMRO that operate with methods of technology in support of a general project of planning could not exist without organisation. There are two factors to keep in mind here. First, organisation is made *possible* by the predictability of standardised products and services. The more standardised the product or service, the less the product or service will be associated with, or complicated by, the personalities of the people involved at any stage. In the Irish Music Rights Organisation, and among performing rights organisations generally, this is epitomised by the concept of ‘harmonisation’, or the move towards total compatibility of national copyright legislations and work practices (see Dreier 1991). Changing trade practices and European Directives foster the trend towards a greater harmonisation of copyright legislation across the European Union (IMRO 1998). A major development in harmonisation practices has been the introduction of the CIS initiative among “copyright societies”. CIS stands for “Common Information System”, and the initiative seeks to improve the speed, accuracy, and cost-effectiveness of distribution systems:

The slogan for the CIS initiative is 'Do it once, do it right!'. The principle is that each society should, on behalf of all societies, maintain authoritative information about its own members, their works and their publishing agreements. By using common data standards and exchange formats, each society can make this information available to all other societies cheaply and quickly (IMRO 1999b:13).

A major phase of IMRO's involvement in the CIS initiative was completed in 1999. A key aspect to the standardisation of the CIS is the application of what is known as the "global unique identifier", or "International Standard Work Code" (ISWC) to each designated "work":

The International Standard Work Code (ISWC) is a numbering system for musical works, similar to the ISBN number used for books. The allocation of an ISWC to a work will mean that all societies will refer to the work by the same number thus reducing conflicts and inaccuracies in payments between societies. This numbering system forms the cornerstone of societies sharing their works information in a common database. We have been using this system for over a year and will continue to press our sister societies to keep up with this vital initiative (IMRO 1998c:8).

Second, organisation is deemed *necessary* on account of the number of specialists with detailed technical knowledge of the processes and products in question who are called into play: "organization is what brings specialists, who as individuals are technically incomplete and largely useless, into a working relationship with other specialists for a complete and useful result" (Galbraith 1973:97). As standardisation and specialisation lead to organisation, so organisation leads to the possibility of increased size. Increased size, as we see in the Irish Music Rights Organisation's cycle of expansion, is often accompanied by increased influence over markets and attitudes, and increased clout with the representatives of the state. This, in turn, calls forth another retinue of specialists to fill the range of occupations that accompanies the exercise of the organisation's increased power: "To perfect and guide the organization in which the specialists serve also requires specialists" (98). What we get, then, is a complex network of directors, managers, executives, lawyers, accountants, public relations experts, economists, administrators, and other specialists, that Galbraith terms the 'technostructure'.

We have already noted the importance of specialist knowledge within the structure of the Irish Music Rights Organisation, and that organisations in general arise from the need to combine the knowledge of specialists. When

decisions are to be made, therefore, it is necessary to pool all this specialist knowledge, information, and experience, in order that the organisational demands of specialisation be met. This typically happens in the form of committees. Once decisions are made in this structure, obedience is given to the authority of the decision-making body. There is a useful side-effect of this decision-making structure, one which echoes the earlier discussion of the ability of the twin mandate to cloak the activities of the representatives of the Irish Music Rights Organisation in the logic of membership and consumer choice. The collegial process allows “unpopular or socially reprehensible action” to be always attributed to higher authority: “Thus it is possible to have the reality of power without the penalties” (Galbraith 1973:103).

The second significant factor that contributes to the transfer of power from individuals to the collective authority of the technostucture is ‘the separation of ownership and control’. In this arrangement the management of an organisation can exercise a significant degree of control over the use that is made of resources without themselves owning any significant volume of assets. Since Adolf Berle and Gardiner Means published The Modern Corporation and Private Property in 1932, the separation of ownership and managerial control in organised corporate capitalism has been the source of significant interest in theories of management control (Chandler 1962; Hindley 1970; Nodoushani 1999). Galbraith notes that debate in this regard is largely theoretical, and “That power in the mature corporation passes from the stockholder to the management has long been conceded, in practice as distinct from theory, by economists” (1973:105). If we look at the primary contractual arrangement that sustains the Irish Music Rights Organisation, membership effectively surrenders both ownership *and* control by way of the Deed of Assignment. This means, in practical terms, that almost absolute authority in relation to the performing right is transferred by each individual member to the technostucture of the organisation. This is in contradistinction to claims by IMRO executives that the voting mechanisms of the organisation effectively mean that it is a member society run by a Board of Directors who are under the control of members (Duffy and Quinn unpubl. 1997). The

separation of ownership and control creates a problem for the neo-classical assumption of self-interested profit-maximization:

The acquisitiveness, avarice and cupidity that so valuably motivate the system are supplied by the managers - the technostucture - and their fruits go to the owners. The managers are not beholden to the owners. Thus the system works because those who are most acquisitive are also most conscientiously determined to toil on behalf of others. Avarice is philanthropically in the service of others (Galbraith 1973:106).

The case of the Irish Music Rights Organisation complicates the logic by effectively providing separation from ownership and control, but even here we find the same effect. In an article about a former IMRO Chairman, for example, we find that his "open and generous nature drove him to establishing and asserting the rights of his fellow songwriters and composers in Ireland, and he was many years to the forefront in helping to improve their lot" (O'Hara 2001:36). Viewed within the logic of neo-classical economics this is quite clearly a contradiction. A self-interested individual cannot be self-interested for others. However, "It is a problem that neo-classical economics solves mostly by ignoring it. It resorts to the most useful of the intellectual conventions of the economist which is, when inconvenient facts are encountered, to assume them away" (Galbraith 1973:106).

A key element in the perpetuation of the separation of ownership and control is the ritualistic approval of management decisions (Galbraith 1973:101). Authority and power are channelled primarily to the management of the Irish Music Rights Organisation, that is, to those who actively participate in the day-to-day collegial decision-making, those who contribute their specialist knowledge to decisions (100). They, after all, are the only ones with full access to the pool of specialist knowledge. As IMRO increases in size members become more numerous. Viewed in light of the authoritarian collegial decision-making process, as the members increase in number, so the individual power of each is diminished and the authority of the decision-making bodies is increased. What happens then, Galbraith argues, is that "stockholders [or, in this case, members], accepting the weakness of their position, become passive; they vote their proxies automatically for the management slate or they do not vote them at all" (101). The directors of an organisation also come to realise that their power comes from the

management and not from members: "they confine themselves, accordingly, to a ritualistic approval of management decisions" (102). Galbraith suggests that the power of management is "subject to elaborate disguise" (ibid.). This is effected in IMRO by the impression that the Board of Directors of the organisation are powerful, despite meeting, at most, only thirteen days of the year. The need for the Board to ratify financial transactions and accounts heightens this impression, for, as Galbraith remarks: "nothing better sustains an impression of omnipotence than association, however nominal, with large sums of money" (103).

The Protective Purposes of the Technostructure

The distribution of power within the Irish Music Rights Organisation is not, as the twin mandate would suggest, concentrated in the ultimate sanction of the will of individuals. Rather, the distribution of power is concentrated in the collegial decision-making process of the organisation's technostructure, a shift from individual to collective authority. Not only this, but within the technostructure, power primarily rests with the positions of management. The two major factors in this process are, first, the authoritarian character of collegial decision-making and, second, the separation of ownership and control, or, in the case of IMRO, the separation from both ownership and control. The transfer of power from individuals to the technostructure serves what Galbraith refers to as the 'protective purposes' of the technostructure as it tends towards predictability within the Planning System. The two primary protective needs of the technostructure identified by Galbraith are the need to secure existence and the need to minimize interference.

Securing Existence

The Irish Music Rights Organisation, technically speaking, produces nothing. Actively pursuing royalties is the *only way* for the organisation to recoup administrative and other expenses, to ensure a basic and uninterrupted level of earnings. In short, pursuing royalties is the only way for IMRO to survive. Anything that serves this purpose, then, is central to the efforts of IMRO's

technostructure: “[W]hen an organisation is faced with uncertainty of demand, adaptive action must be taken until the uncertainty is resolved and the situation returns to normal” (Borch cited in Ryan 1985:117). Most important in this regard is the management of consumer response. As we saw in Chapter 2, most “music users” will not attempt to contact licensing collectives. Often they will only enter into a licensing agreement upon threat of litigation (Sinacore-Guinn 1993:36). As a result, collectives actively identify and pursue all potential “music users”. Once again we can quote Sinacore-Guinn:

“It is an unfortunate fact of life that respect for the rights of creators is not the norm. A significant number of users avoid or even actively resist a collective’s efforts to control the use of its repertoire of works. It is up to the collective to assert its rights and the rights of its affiliated rights owners in a way that will cause compliance” (1993:39).

As noted previously, strong-arm, coercive tactics are generally avoided, as they are costly and generate bad public relations. The use of debt-collection agencies is standard practice for IMRO as the last attempt at resolution before more substantial coercion. Such measures, we noted, are costly and often generate bad publicity: “They thus expend significant efforts seeking to convince users of the necessity of obtaining proper licensing before any coercive enforcement or litigation efforts are made” (39).

“Supply” is not an issue for the Irish Music Rights Organisation. The “supply” of “works” for the performance of which royalties are to be collected is guaranteed by the existence of 14.25 million works in the catalogues of internationally-affiliated performing rights organisations. It can be further guaranteed in perpetuity by increasing the memberships of these organisations. The only real way in which the income stream of the organisation can be threatened, then, is to question the legitimacy of the claims that are made to justify the pursuit of royalties. If the fundamental bases of the system of copyright and performing rights can be shown to be spurious, for example, then the claims that representatives of IMRO make are in grave danger of being rejected. In fact, to question the principles of royalty collection is to question the *raison d’être* of the organisation itself, to challenge the purpose for its existence. It follows, then, that the most

important way to secure the income stream of the organisation is to reach a situation where “music users” and (at least the most influential) other people accept that what the organisation does is justifiable, fair, and based on solid foundations. The only way to secure existence is to maintain the condition whereby no questions are asked. This is achieved by pursuing what Galbraith calls “the cultivation of useful belief” (1973:22).

Often a performing rights society will undertake cultural activities, programs, and sponsorship in order to encourage the production of new works, educate people as to the purpose and character of creative rights, and garner support for those rights. Sponsorship is perhaps the most successful of IMRO’s strategies in this regard. Through sponsorship of festivals, competitions, and music events across Ireland, the representatives of the organisation achieve the status of bountiful providers. For the Irish Music Rights Organisation persuasion is a key concern, a core strategy in the achievement of a positive environment for the organisation’s activities: “We are continuing to lobby Government, legislators and those who use your music, on the importance of music both economically and culturally” (IMRO Report 1995:iii). This is what Galbraith calls the “cultivation of useful belief”: “It consists ... in inducing the individual to abandon the goals he would normally pursue and accept those of another person or organization” (1973:22). While noting the usefulness of the threats of physical suffering or economic deprivation in this regard, Galbraith argues that persuasion, “the altering of the individual’s belief so that he comes to agree that the goals of another person or organization are superior to his own” (22), is of increasing importance, and may even be regarded as the basic instrument for the exercise of organisational power.

Having persuaded “music users” that the IMRO’s demands are legitimate, it is necessary to consolidate the “useful belief” by the negotiation of contracts. We have already seen in Chapter 2 that the primary activity of the Irish Music Rights Organisation is licensing, which is, of course, contract based. This would be consistent with Galbraith’s remark that “Business in the Planning System, it can be said with only slight exaggeration, is mostly contract negotiation” (1973:143). The mechanism of the contract is central to the

protective purposes of the organisation, providing much-needed security for the its authority, income, and hence survival. As Dunn remarks: "Contracts and their enforceability are a major source of stability and security for the modern corporation" (2001:166). The stability of the technostucture of the Irish Music Rights Organisation, then, is founded on "a large and extensive web of money-denominated contracts"(ibid.). Most significant, however, are the large long-term contracts, such as those negotiated with the Vintners Federation of Ireland or *Comhaltas Ceoltóirí Éireann*. These could clearly be seen as cooperative strategies between interdependent organisations (Thompson 1967), enabling them to anticipate environmental action as they arrange negotiated environments (Cyert and March 1963). As Galbraith notes, this is not an unduly complicated process: "It is accomplished between friendly men who are concerned, primarily, with reconciling differing assessments of the same interest" (1973:145). Thus, the contract further secures the organisation's existence.

Minimising Interference

The second important protective purpose is the need to minimise the danger of external interference in the collegial decision-making of the Irish Music Rights Organisation. We have already noted the importance of specialist knowledge in the social structure of organisations, and that organisations arise from the need to combine the knowledge of specialists. When decisions are to be made, therefore, it is necessary to pool all this specialist knowledge, information, and experience, in order that the organisational demands of specialisation be met. This typically happens in the form of committees. Once decisions are made in this structure, obedience is given to the authority of the decision-making body. An important consequence of the collegial decision-making process required by specialisation and organisation is an increased sensitivity to the risk of outsider intervention. This, Galbraith says, arises because anyone who is not party to the multi-specialist deliberations of the group or organisation is regarded as uninformed. This is a necessary protective aspect of authoritarian group decision-making processes. Any attempted interference with group decisions or intrusion in

the politics of the organisation is thereby regarded by members of the organisation as potentially damaging as it is 'inadequate'. Such interference or intrusion will, then, be resisted:

An individual can yield to the decision of another individual whom he knows to be more knowledgeable than himself. A group will sense that it cannot so yield. What is often called bureaucratic arrogance reflects, in fact, the need to exclude the even more arrogant individual who does not know what he does not know (Galbraith 1973:101).

Two strategies in particular contribute to the minimisation of external interference within the Irish Music Rights Organisation. First, it is ensured that the members of the organisation receive a certain minimum level of earnings. Second, the use of the twin mandate maintains the exclusion of members, consumers, and government from the decision-making processes of the organisation. These strategies imply three consequential factors. First, the need to exclude outsiders is clearly and logically manifested as a fear of intrusion. Second, the protectionism of these strategies contributes forcefully to a general suspicion of the Irish Music Rights Organisation's activities. Third, following Simmel, the environment of threat that is nurtured by the polarisations of protectionism and suspicion leads to the strengthening of the group identity of the organisation, which further serves the protective purposes of the technostructure (Simmel 1950:193; Duke 1976:109).

One of the most basic strategies used to protect decision-making processes from the intrusion of owners or creditors is to ensure that they receive a certain minimum level of earnings: "Nothing else is so important. Given some basic level of earnings, stockholders are quiescent" (1973:110). In the case of performing rights this is interesting. Approximately two thirds of IMRO members receive no royalties at all. As Burke puts it, "only a fraction of composers in the Industry actually make a significant income: the rest 'live in hope'!" (1993:48).⁸⁴ The rules of the Irish Music Rights Organisation do

⁸⁴ Within the logic of neo-classical economics this can be conveniently explained away as a consequence of market economics: "the fact that a few artists make large rewards does not necessarily imply a failure in the market as it is the expectation of success that acts as the driving force" (Burke 1997:1). Towse (1997) has demonstrated that performing rights can only make a marginal impact on artists' earnings, casting doubt on their incentive value for the majority of people living in expectation of financial reward from composition. Throsby (1992) has argued persuasively that artists do not respond to income incentives.

ensure, however, that long-term non-earners will have their membership terminated. This may happen, for example, if no royalties are credited to a writer member over a five-year period. This maintains a policed boundary between “successful” and “unsuccessful” members. In fact, it ensures that the only real IMRO members are successful IMRO members. By excluding “unsuccessful” members in this way, decision-making processes are protected from the long-term intrusion of dissatisfied members. These processes are also maintained within the control of a technostructure that benefits financially from their deployment.

The Irish Music Rights Organisation, like any performing rights collective, claims to concern itself with private rights, that is, the property rights of individuals operating in a neo-classical market economy, reinforced by member mandate. Because of IMRO’s private status, it was possible to maintain a veil of secrecy over the agreement with *Comhaltas Ceoltóirí Éireann*, at least until the information came to light by other means (see pp. 103-108). This was because of the agreement’s status as a contract between private parties. This alerts us to another way in which interference with the organisation’s decision-making is minimised. Galbraith has noted that: “One of the instrumental and very useful services of neo-classical economics to the Planning System is in leaving those who are exposed to its instruction with the impression, however vague and undefined, that interference with private business decision is unnecessary and abnormal” (1973:113).

We can extend the scope of this observation in relation to the Irish Music Rights Organisation. The exclusion of members, consumers, or government from decision-making is maintained by the instrumentally-powerful conventions of the twin mandate, critiqued briefly earlier. The member has no reason to interfere with IMRO’s decisions if the organisation is subordinate to the member, through the control of the Board of Directors. The “music user” has no reason to interfere with IMRO’s decisions if the organisation is subordinate to the market and hence to the consumer. Likewise, the government has no need to intervene on behalf of the consumer. The public, through the consumer, is understood to already be in

charge, hence the public through the government need not and should not intervene: "This doctrine, reinforced by convention so nearly unchallenged as to be largely unrecognized, forbids government interference with any managerial decision of a *private* corporation" (Galbraith 1973:113-114). This is one of the central tenets of performing rights administration. As Sinacore-Guinn writes:

Where possible, all collective administration licensing should be allowed to proceed on a private, voluntary basis, with the only governmentally imposed restriction being that it operate fairly and reasonably within the market context within which it exists (Sinacore-Guinn 1993:825).

So it is that Ryan is able to characterise the role of ASCAP as peculiarly being that of a private organisation set up to enforce a public law (1985:17).⁸⁵

One musician who took it upon himself to find out more about copyright and the Irish Music Rights Organisation was quite perplexed by this ambiguous legal status:

My mind was sort of saying, 'What sort of an organisation is this?' This is not a public organisation. This is not like a state organisation, like a revenue commission, where you can sort of say 'Could you show me how you work or what is it that you do exactly?' That was a new thing to me, to have a seemingly company, well, sort of an organisation, that looked like as if it was a state organisation but it was actually a private company collecting for private people and with the authority of a state sort of thing, which like that's a big thing ... a lot of people don't know that. They don't know the powers that are there for these organisations, for these copyright organisations (Personal interview 2001).

The protective purposes of the technostucture of the Irish Music Rights Organisation contribute, then, to what Thompson (1967) would refer to as the organisational "closure" that accompanies the aspirations of technical rationality and the elimination of uncertainty. Thompson notes, of course, that the complete predictability implied by "technical rationality" is an abstraction that can only be achieved within a system of closed logic, containing all relevant variables, and only relevant variables: "A closed system of action corresponding to a closed system of logic would result in instrumental perfection in reality" (Thompson 1967:18). The hegemonic monopoly control of the Irish Music Rights Organisation, however, allows the representatives

⁸⁵ It is arguable that the Irish Music Rights Organisation could be loosely classified as a 'quango', or 'quasi-non-governmental organisation', which Cotterrell (1982:272-273), following Barker, characterises as an agency which carries out designated public responsibilities while not being part of local or central government.

of the organisation to labour under the impression that it is indeed a closed system of instrumental perfection, operating in conditions of certainty. The tendency towards closure is epitomised by the rule of practice within IMRO to not engage in litigation unless a court victory is guaranteed, as Hugh Duffy admitted during the Copyright Forum in Letterkenny (see p. 96).

Equally suggestive of such closure is Wallis and Malm's finding that professional administrators of performing right organisations "prefer to be as tight as a limpet when asked to express opinions about publishers, or divulge details of internal conflicts" (1984:170). Wallis and Malm offer a number of explanations for "these rather strange behavioural patterns". Historically, they point out, most collecting societies have had to work hard to establish their existence, all the while pursuing royalty payments and defending the activities of the organisation against dissatisfied members (166). Added to this, they say, is a general feeling of uncertainty about the future of the music industry, particularly in a technological climate where, despite all protestations to the contrary, it is "virtually impossible to keep track of the actual works that are performed" (173).⁸⁶ By viewing these tendencies within the general framework of Galbraith's Planning System, however, we are provided with a more satisfactory explanation.

We have seen that firms that conform to the dynamics of Galbraith's Planning System exhibit a pervasive systemic tendency towards the achievement of total predictability, the elimination of uncertainty. We have shown the importance of technology as a central methodological support for such planning. We have looked at the part that technology, standardisation, and specialisation play in the development of organisation and what Galbraith terms the 'technostructure'. We have explored the transfer of authority from individuals to the technostructure, and shown how this transfer is supported by authoritarian collegial decision-making and the separation of ownership and control, or, rather, separation from ownership and control. We have examined what Galbraith terms the 'protective purposes' of the

technostructure, in particular identifying the need to secure the firm's existence, and the need to minimise interference with the decision-making processes of the firm. At each step we have shown that the Irish Music Rights Organisation broadly conforms to the features of the Planning System. It would follow, then, that IMRO would also conform to perhaps the most significant dynamic of the Planning System - expansion.

The Affirmative Purposes of the Technostructure

If securing the existence of the organisation and the minimization of interference can be considered the primary protective purposes of the Irish Music Rights Organisation, then IMRO's primary *affirmative* purposes are growth and expansion. These arise as a consequence of technology, organisation, and the tendency towards predictability and control implied by the Planning System. The felt need to control the environment encourages growth in the size of the Irish Music Rights Organisation and expansion of its activities. The greater the size and expansion of the organisation, the greater will be its ability to cultivate useful belief. We have already noted that within the market system the growth of firms may be curtailed by geographically dispersed and unstandardised tasks, a demand for personalised service, or the limiting influence of professional ethos, trade union, or legislation. It follows, then, that the more that the tasks of a firm lend themselves to standardisation, depersonalisation, specialisation, and thus to organisation, the less likely it is that there will be a set limit to the size or expansion of the firm (1973:98). The growth of the firm and the expansion of its activities constitute, then, the dominant manifestations and primary goals of the tendency towards predictability of complex, organised, economic development (Galbraith 1973:56, 98-99). Growth and expansion are the most significant goals of the Planning System, and not the maximization of profit that neo-classical analysis would suggest.⁸⁷

⁸⁶ "New sources of income are constantly sought after ... without knowing whether any such remuneration can be correctly analyzed in respect to the rightful owners" (Wallis and Malm 1984:173).

⁸⁷ Again, growth and expansion are features which pass unexplained by the tenets of neo-classical economics. In the neo-classical model, as we have stated, the maximization of

We have already seen how important expansion is in the role and activities of the Irish Music Rights Organisation. In Chapters 3 and 4 we detailed aspects of what was termed IMRO's 'cycle of expansion' during the period 1995-2000. We saw that this cycle is characterised by claiming authority in one new domain after another, resistance to such extension of their authority, and, in each case, eventual acceptance of their activities as legitimate. Statistics confirm the steady annual trend of growth and expansion within the Irish Music Rights Organisation since gaining independence from PRS. IMRO's 1999 Annual Report announced a Gross Licence Revenue increase of 11% to 17.4m (€22.2m). Since 1995 licence revenue has increased by 57%. Public Performance licensing for 1999 increased by 12.5% to over £7m (€8.9m). Membership during 1999 increased by 371 to 2,900, while net distributable revenue increased 7.5% from the 1998 figure to IR£13.8m (€17.5) (IMRO 1999b:3).

Galbraith identifies two significant effects of growth and expansion (1973:116). The first is the reinforcement of the protective purposes of the technostucture. The larger the firm, the better able it is both to secure existence and minimise interference in its decision-making processes. As we have noted, for the Irish Music Rights Organisation "supply" is unlimited. Achieving acceptance of their authority is the primary way in which predictability is achieved within the organisation's working environment. This is because the authority of the organisation, as noted before, is all it has to rely on. If growth is generally understood here as the process of increasing a firm's productive capacity, and expansion relates to the extension of the authority of the organisation, then two things follow from IMRO's unlimited "supply". First, growth and expansion are largely coterminous, if not synonymous, when applied in the context of the Irish Music Rights

profits is the primary motivation. Costs, demand, and technology are largely determined by circumstances external to the firm. This leads to an optimal scale of operations, where the difference between cost and price, multiplied by sales, is greatest. If this optimal scale of operations is exceeded by the management it is explained away by "a malignant and irrational tendency to giantism which causes it to seek size in conflict with interest" (Galbraith 1973:99). As Galbraith remarks, the attribution of one of the most significant aspects of the modern corporation to simple stupidity is hardly intellectually satisfying (1973:122-123).

Organisation. Second, as long as “useful belief” continues to be successfully cultivated there need be no clear limit to the organisation’s expansion. IMRO has, after all, been cleared of monopoly abuse, which effectively provides official sanction for its monopoly position and its unlimited expansion. The more the organisation expands, the stronger is its monopoly position, and the less likely anyone will be to question it.

The second effect of growth and expansion is that they serve the direct pecuniary interest of the technostucture. Galbraith notes that people who work in firms that remain static tend to advance upon the death, disability, or retirement of people above them in the hierarchy. With an expanding organisation such as IMRO, however, new jobs are created, and promotion becomes a regular, viable possibility: “Promotion ceases to be a zero sum game in which what one wins, another loses. All can advance. All can succeed” (Galbraith 1973:116). This, of course, contributes greatly to organisational loyalty, and consolidates the centrality of growth as a priority: “Growth ... gains in importance as a goal because of the close relationship between those responsible for it and the resulting reward” (Galbraith 1973:117). Within the Irish Music Rights Organisation the relationship between responsibility and reward is even more important, given the commission structure of much payment within the organisation. Collectors, for example, are paid by commission, which greatly contributes to their motivation to expand the authority of the organisation continually, to seek out new venues, and new commercial premises, and to go where no performing rights society has gone before. Likewise, being registered as a non-profit organisation does not mean that growth and expansion have no effect on the financial benefits accruing to staff. It is common practice for performing rights organisations to deduct 10% of takings for administrative expenses (Sinacore-Guinn 1993). As the takings of the organisation increase so do the administrative expenses. This is often offset by increased sponsorship of cultural events, which once again contributes to the further cultivation of useful belief. As Galbraith notes of the firm (1973:118), with so many people finding the growth of the Irish Music Rights Organisation to their advantage, it is hardly surprising that they conclude that growth and expansion are ‘good

things', and that therefore the expansion of IMRO should remain unquestioned and unchallenged.

Summary

The role, activities, and expansion of the Irish Music Rights Organisation can be broadly shown to conform to the features outlined by Galbraith in his elaboration of what he calls the "Planning System". From an awareness of the importance of technology, standardisation, and specialisation, and organisation to an understanding of the protective and affirmative purposes of the organisation's 'technostructure', an analysis of IMRO discloses a pervasive systemic tendency towards planning and the achievement of total predictability, a tendency towards the elimination of uncertainty. Acknowledging this allows us to see that the use of rhetoric espousing a twin mandate of member and consumer instruction simply deflects attention away from the organisation's propensity towards control of its environment. An awareness of this draws us away from the twin mandate towards an examination of the specificities of IMRO's organisational activity, and the crucial importance of claims to authority for the organisation's survival.

Introduction

Through the use of Galbraith's 'Planning System' model it has become clear that the expansion of the Irish Music Rights Organisation is fundamentally rooted in a general and pervasive tendency towards the achievement of total predictability and control, otherwise understood as a general tendency towards the elimination of uncertainty. We also saw that getting people to

Chapter 6

The emperor walked beneath the beautiful canopy in the procession, and all the people in the street and in their windows said, "Goodness, the emperor's new clothes are incomparable! What a beautiful train on his jacket. What a perfect fit!" No one wanted it to be noticed that he could see nothing, for then it would be said that he was unfit for his position or that he was stupid. None of the emperor's clothes had ever before received such praise.

authority within the Planning System, a *Hans Christian Andersen, 1837* Rights Organisation, relies on the principle of certitude. Certitude, in this sense, refers to an absence of doubt, a condition in which eliminated uncertainty is presumed. In this chapter we challenge IMRO's certitudes and thereby challenge the very existence of the organisation itself.

Authority and Certitude

Among those few who have inquired into what the term might mean, 'authority' would seem to be most commonly understood as the provision of certitude:

The state of certitude, alone, excludes all prudent fear of error. When the judgment connects two simple, abstract concepts, whose comprehension is perfectly clear, the relation of subject to predicate is seen to be absolutely necessary and immutable, so that the object of our thought could not possibly be otherwise without a contradiction.

²⁶ Challenges to the authority of the organisation are, then, hardly likely to be greeted warmly. "It goes without saying that any attack on existing belief and the associated virtue will not be welcomed by those who reflect the attitudes and needs of the Planning System. Nor will it necessarily be welcomed by those who are chained by existing belief to the purposes of the Planning System" (Galbraith 19/3:244).

Introduction

Through the use of Galbraith's 'Planning System' model it has become clear that the expansion of the Irish Music Rights Organisation is fundamentally rooted in a general and pervasive tendency towards the achievement of total predictability and control, otherwise understood as a general tendency towards the elimination of uncertainty. We also saw that getting people to accept the authority of the organisation is the primary way in which this predictability is achieved within IMRO's working environment. This is because claims to authority are really all that the representatives of the organisation have to fall back on.⁸⁸ In Chapter 5 we also noted the authoritarian character of collegial decision-making within the Planning System. We now go further, and suggest that the general character of authority within the Planning System, and within the Irish Music Rights Organisation, relies on the principle of certitude. Certitude, in this sense, refers to an absence of doubt, a condition in which eliminated uncertainty is presumed. In this chapter we challenge IMRO's certitudes and thereby challenge the very existence of the organisation itself.

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in thought. With regard to such self-evident judgments - "*per se nota non solum in se sed quoad nos et omnes*" - there can be *no possibility* of error. Our assent is *compelled* (Coffey 1912:212).

Thus, G. C. Lewis suggests that the 'principle' of authority lies in "adopting the belief of others, on a matter of opinion, without reference to the particular grounds on which that belief may rest" (1849:7).⁸⁹ This is also consistent with Weldon's observations that "when people possess authority they seem to possess the capacity to produce reasons, if challenged, or at any rate are believed to have this capacity. At the same time 'People do what he (who possesses authority tells them without asking questions'" (1964:43). Similarly, de Jouvenel understands authority as "the faculty of gaining another man's assent" (1957:29).

This type of authority, then, can be either accepted or rejected. This is authority that must be claimed, acknowledged, and unquestioned for it to retain its status as authority. It follows then that this type of "authority is strongest when subordinates anticipate the commands of superiors even before they are voiced" (Peabody 1968:474). To question the certitude of this authority is to remove this authority as the provision of certitude. There is no middle ground.

The Authoritative Word

Mikhail Bakhtin characterises the exercise of such authority as "authoritative discourse" or "monologic utterance". Authoritative discourse gains its power from its presumed incontrovertibility, in the face of which is expected unconditional allegiance:

The authoritative word demands that we acknowledge it, that we make it our own; it binds us, quite independent of any power it might have to persuade us internally; we encounter it with its authority already fused to it. The authoritative word is located in a distanced zone, organically connected with a past that is felt to be hierarchically higher. It is, so to speak, the word of the fathers. Its authority was already *acknowledged* in the past. It is a *prior* discourse. It is therefore not a question of choosing it from among other possible discourses that are its equal. It is given (it sounds) in lofty spheres, not those of familiar contact. Its language is a special (as it were, hieratic) language. It can be profaned. It is akin to taboo, i.e., a name that must not be taken in vain (Bakhtin 1981:342).

⁸⁹ Cited in Friedrich (1964:43).

Most significantly for our purposes, Bakhtin notes that such authoritative utterance "is dissolubly fused with its authority - with political power, an institution, a person - and it stands and falls together with that authority" (1981:343-344). To question the authority of the Irish Music Rights Organisation is to question its very existence. Mary Douglas remarks that: "[I]nstitutions survive by harnessing all information processes to the task of establishing themselves. The instituted community blocks personal curiosity, organizes public memory, and heroically imposes certainty on uncertainty" (1986:102). Little wonder, then, that the authority of IMRO, with support of law and government, is often expressed in the imperative from within copyright's "circle of certainty" (Freire 1997:21). Critical legal scholars such as Rosemary Coombe (1998) note a strong correlation between the dominant discourses of law and intellectual property and Bakhtin's analysis of "monologic" relations. A crucial factor in any such analysis is a recognition that unquestionable or at least unquestioned monologic authority serves to stifle dialogue, end debate, and freeze meaning in the name of doctrine, leading Coombe to comment: "If what is quintessentially human is the capacity to make meaning, challenge meaning, and transform meaning, then we strip ourselves of our humanity through overzealous application and continuous expansion of intellectual property protections" (1998:84-85).

We have already critiqued the authority that the representatives of the Irish Music Rights Organisation derive from the twin mandate of membership and neo-classical economics. Perhaps the most powerful legitimating forces in the authoritative discourse of the organisation, however, are the established, orthodox discourses of law, copyright, and performing rights. These provide for the 'prior discourses', the 'distanced zone', the privileged hierarchies of activity. We might see this, then, as a clear example of what Weber refers to as the ideal type of "legal domination", that is, the acceptance of actions as legitimate insofar as they derive their authority from a legal order made up of an abstract system of rules (Weber 1968:Ch. 3). Weber regarded this as the dominant mode of organisation within modern industrial societies, and especially characteristic of bureaucratic organisations, such as IMRO. It is

noted in passing that Weber's critique of bureaucracy, efficiency, and rationalisation is broadly consistent with the identification of the tendency towards the elimination of uncertainty within Galbraith's Planning System. Also referred to as "rational-legal authority", legal domination involves acceptance of rules because they are rules. The systematic logical structures of the law provide for its legitimacy: "Thus, the autonomy of law takes on a sinister aspect. Law frees itself from the sources which could challenge its legitimacy" (Cotterrell 1984:166). Rational-legal authority, then, attaches to the clearly-defined bureaucratic positions or offices of IMRO's technostucture and the associated formal powers within the collegial decision-making process rather than to the office-holders themselves. Emerging out of deference for the 'rule of law', power is thereby exercised within the legitimacy of a legal framework.

Weber identifies two other ideal types of what he terms 'legitimate authority': 'traditional' authority; and 'charismatic' authority. Comprehensive discussions of these various ideal types of authority have been undertaken elsewhere and need not be repeated here (e.g., Friedrich, ed. 1958; Giddens 1971; Cotterrell 1984). What is of interest here, however, is that in each case, 'legitimate authority' is still understood as the provision of certitude. Thus, for Weber: "The authority of the leader is legitimate if, and only if, the *follower* believes that it is legitimate, and if he voluntarily obeys commands because of a belief that he has a moral duty to do so" (Duke 1976:49).⁹⁰

⁹⁰ This understanding of authority is also co-extensive Foucault's 'juridico-discursive' authority, in which "power acts by laying down the rule": "Power's hold ... is maintained through language, or rather, through the act of discourse that creates, from the very fact that it is articulated, a rule of law. It speaks, and that is the rule" (1990:83). It is also sympathetic with Edward Said's reflections on authority: "*Authority* suggests to me a constellation of linked meanings: not only, as the OED tells us, 'a power to enforce obedience,' or 'a derived or delegated power,' or 'a power to influence action,' or 'a power to inspire belief,' or 'a person whose opinion is accepted'; not only those, but a connection as well with *author* - that is, a person who originates or gives existence to something, a begetter, beginner, father, or ancestor, a person also who sets forth written statements. There is still another cluster of meanings: *author* is tied to the past participle *auctus* of the verb *augere*; therefore *auctor*, according to Eric Partridge, is literally an increaser and thus a founder. *Auctoritas* is production, invention, cause, in addition to meaning a right of possession. Finally, it means continuance, or a causing to continue. Taken together these meanings are all grounded in the following notions: (1) that of the power of an individual to initiate, institute, establish - in short, to begin; (2) that this power and its product are an increase over what had been there previously; (3) that the individual wielding this power controls its issue and what is derived

One of the most significant aspects of the expansion of the Irish Music Rights Organisation is that IMRO representatives assume the authority of the organisation is unquestionable because it is based on the natural, inevitable, universal, and unchallengeable principles of copyright law. Hence, one of IMRO's purposes for expansion and the cultivation of useful belief (see pp. 134-136) is to rid the world of error, to rid the world of copyright infringement: "Don't bother to claim the status of an innocent infringer: there are no innocent infringers. With or without notice, the work is fully protected by copyright" (Samuels 1993:158). As Galbraith notes, however: "Papal infallibility was powerfully served by the fact that the Holy Father defined error" (1973:178-179). Copyright is right, and the Irish Music Rights Organisation successfully conducts its affairs on that basis, therefore copyright is right. The presumed ubiquity and universality of copyright calls forth the ubiquity and universality of performing rights administration. All that is really required for the existence and successful expansion of the organisation is that other people believe that, in principle:

Any institution that is going to keep its shape needs to gain legitimacy by distinctive grounding in nature and in reason: then it affords to its members a set of analogies with which to explore the world and with which to justify the naturalness and reasonableness of the instituted rules, and it can keep its identifiable continuing form (Douglas 1986:112).

In this chapter, the claims to authority made by representatives of the Irish Music Rights Organisation in the cause of law, intellectual property, copyright, and performing rights will be undermined, and the authoritative word questioned. This is done in recognition that "law is one of the more voluble discourses which claims not only to reveal the truth but to authorise and consecrate it. The truth of law is not to be taken for granted but seen as a problem to be investigated" (Hunt and Wickham 1994:12). Appealing primarily to literature drawn from the fields of critical legal theory and the sociology of law, two points will be argued:

- First, the workings of law are not separated from social life, and are neither value-free nor politically neutral.

therefrom; (4) that authority maintains the continuity of its course" (cited in Gilbert and Gubar 1995:151-152).

- Second, the thinking and practices that go along with 'law', 'intellectual property', 'copyright', and 'performing rights' are neither natural, inevitable, nor necessary.

By drawing attention to these issues we render visible the claims of the representatives of the Irish Music Rights Organisation as *claims*, rather than as "proposition-free, natural and spontaneous affirmations about "reality"" (S. Hall 1998:1057). In acknowledging these points it will also be recognised, however, that the workings of law play a vital role in the production and generation of meaning, power, and knowledge in the social interactions of our everyday lives. By structuring our expectations they guide and shape our lives.

Neither Value-free nor Politically Neutral

In this section the phenomenon of "legal closure" is briefly examined. As will be shown, legal closure, a term referring to the orthodox position in legal practice, describes the way in which law and the practices of law are often understood to constitute an autonomous sphere of value-free and politically-neutral doctrine and activity. Following the work of Roberto Mangabeiro Unger, we can see legal closure as issuing primarily from the factors of objectivism and formalism. Legal closure finds a sympathetic environment within IMRO on account of an underlying workaday philosophy of logical positivism. As a result of this closure, the workings of law and the activities of the Irish Music Rights Organisation are increasingly perceived as arcane, esoteric, and largely irrelevant to the social interactions of our lives, while at the same time they increasingly play a part in those interactions. Thus, legal closure contributes further to the "cultivation of useful belief" and reinforces the protective purposes of IMRO's technostructure. Scholars working in the field of critical legal theory, however, have shown that the basic premises of legal closure are untenable. Arguing that closure effectively serves to shut off the possibility of critical inquiry and dialogue, critical legal theorists call for the recognition that there are no positions of theoretical innocence or value neutrality. Law, copyright, performing rights, and the authority of the Irish Music Rights Organisation should therefore be subject to critical analysis.

Legal Closure

For many people, law, the doctrines of law, the workings of law, the institutions of law, the concepts of law, seem to be separate from, and only tangentially relevant to, the everyday interactions of their lives. The apparent separation of law and, in particular, legal doctrine from the contingencies of social and political life is, in fact, one of the prime assertions of orthodox legal theory and one of the most influential foundations of legal practice (Hutchinson, ed. 1989; Fitzpatrick and Hunt, eds. 1987). We have already seen how, through enactment of the protective purposes of the Irish Music Rights Organisation, the technostucture of the organisation engages in practices that might be characterised as tending towards *organisational* "closure". Now, in a move encompassed by the term "legal closure", law, and practices legitimated by law, are characterised as autonomous, self-sufficient, value-free and politically-neutral (Blomley 1994). This is achieved, Unger has argued (1989:323-343), through the dominance of formalism and objectivism in legal practice. Formalism, in the sense that Unger identifies it, holds that legal reasoning is fundamentally composed of impersonal purposes, policies, and principles, indeed it is "only through such a restrained, relatively apolitical method of analysis" that legal doctrine is deemed possible (323). Analysis and practice remain internally referential, working within a circle of institutionally defined and closely guarded "canon of inference and argument" (ibid.) conceived as a collective tradition. Objectivism, presupposed in many ways by formalism, "is the belief that the authoritative legal materials - the system of statutes, cases, and accepted legal ideas - embody and sustain a defensible scheme of human association" (324). Legal materials, then, are presumed to suggest, at least, the normative force of an intelligible moral and practical order. The effect of formalism and objectivism within legal reasoning is "the presentation of legal knowledge and legal practice as divorced from quotidian human experience and political life ... uncontroversial and beyond individual control" (Blomley 1994:13).

Largely as a result of the processes of legal closure, law, for the most part, then, “appears as an arcane world of professionalism centred on a body of esoteric knowledge which is intimidating to the uninitiated in its bulk and obscurity” (Cotterrell 1984:17). This is perhaps especially the case for copyright. This is ironic, for as law increases in technical complexity, and is deemed by many people to be more and more irrelevant to everyday concerns, it intrudes more and more into our lives as “its increasingly detailed regulations relate it more and more concretely to particular narrowly defined situations and relationships” (186). This is one of the interesting things about the expanding role, activities, and authority of the Irish Music Rights Organisation. As copyright and intellectual property become more and more familiar aspects of the discursive landscape in Ireland through increasingly technological, standardised, specialist, and expansionary organisational practices, those same practices are increasingly regarded as legitimate, or, at least, unremarkable.⁹¹ It has been suggested that the “convoluted and archaic style” of judge-made common law systems, such as is found in Ireland⁹², may contribute even more to the mystification and self-

⁹¹ At the apparent height of conflict between IMRO and “traditional” lobbyists, two articles were published independently in relevant magazines making pleas for written responses to the issues involved, one written by William Hammond for *Irish Music Magazine* (1996), the other by myself for *Treoir* (1998). Together, the circulation of the articles ran into the tens of thousands. William received no responses. I received one, about 100 words in length. It didn’t seem to really matter all that much to a lot of people.

⁹² A detailed exposition of the development of common law in Ireland can be found in Grimes and Horgan’s *An Introduction to Law in the Republic of Ireland* (1981). For more general discussions of the development of common law see Hogue (1986) and Blomley (1994). Common law is the system currently in use within Ireland and within the Anglo-American tradition of law. The common law system is often contrasted with the civil law traditions of continental Europe. As a system of law it is practised almost exclusively within the context of the English language and “its continuity through almost eight centuries is unique in the history of European legal systems” (Hogue 1986:241-242). Founded in England by Henry II (1133-1189), common law had become a system of some complexity before the end of the 13th century, requiring, like the Brehon laws, professional specialisation. Up to this point in English history the sources of law were custom, the dictates of King and council, and, morally, the dictates of the church (Grimes and Horgan 1981). Common law in its medieval origins was principally land law, land being the principal source of wealth at that time, and, with the commercial and industrial revolutions, common law continued to provide the rule of law for the protection of wealth and personal property (Hogue 1986). Common law worked on the basis of a centralised administration, emphasising legalised uniformity and providing a consolidation of political power. The Norman imposition of feudalism, the rule of lord and serf, had heralded the “arrival of basic real property principles of rights, obligations and duties appertaining to the ownership and possession of land” (Grimes and Horgan 1981:22).

In 1155 Pope Adrian IV granted Henry II feudal lordship of Ireland. In 1171 Henry II arrived in Ireland. The late twelfth and early thirteenth centuries were a time of population explosion across Europe, with resultant land-hunger, migration, high food prices and low

legitimation of the legal system than in the more “visible” legal principles of civil codes.

Legal closure is, thus, another significant factor in the “cultivation of useful belief” for the Irish Music Rights Organisation (see pp. 134-136). Work by Sarat, reported in Cotterell (182), suggests that most people have an idealised and unrealistic conception of the way the legal system operates, and, while this persists, support for it will probably remain widespread. As Cotterell notes: “One of the strengths of law’s legitimacy is that few people acquire ... detailed knowledge of legal doctrine and practice and most of those who do have specific personal or professional commitments to the legal system” (184). This, for example, is particularly the case when professional musicians work to achieve a high degree of knowledge and competency in relation to copyright legislation, royalty collection, and the workings of the Irish Music Rights Organisation. It is in their interests that the system remain as it is, as long as they continue to benefit from, or have hopes of benefiting from, participation in the technostucture of the organisation. For those not personally committed in some way to the legal system, personal experience of the law often only arises when the law is felt to impact directly, positively or negatively, on the individual’s personal conditions of life (ibid.).

Critical Legal Theory

Scholars in the field of critical legal studies⁹³ (CLS) have argued persuasively that the presumptions of value-neutrality and apoliticality that accompany

labour costs. The attraction of large areas of underpopulated agricultural land in Ireland at such a time provided extra impetus to colonization as individuals took the initiative, acquiring feudal grants of land within a military system (Simms 1989). The Norman invasion resulted in the co-existence of two distinct and irreconcilable legal systems: common law within Dublin and the Pale, which essentially served to promote the interests of the feudal lords and their vassals, and brehon law which still prevailed beyond the Pale. By 1331, however, common law had, in principle at least, been extended to the whole of Ireland, although even as late as 1558 the brehon laws were still referred to as applying to certain litigants (Grimes and Horgan 1981:27).

⁹³ Useful introductions to critical legal theory can be found in Fitzpatrick and Hunt (eds. 1987), and Hutchinson (ed. 1989). A largely U.S. movement, critical legal studies (CLS) was officially established in 1977 at a conference held at the University of Wisconsin-Madison. It

legal closure are quite simply untenable. In fact, claims to interpretative authority and political representation that are presented as fixed, natural, prepolitical, necessary, and inevitable categorizations of legal culture, can often be shown to be highly contentious (Peller 1985). Portraying such claims as beyond doubt and indisputable effectively serves to close down critical inquiry and, often, to incapacitate those who might otherwise challenge the hegemonic order. Proponents of critical legal theory assume a general anti-positivist stance, reject the basis of dominant contemporary legal retheorising, and insist that "it is both possible and necessary to think differently about law" (Hunt 1987:6). It is asserted that there can be no positions of theoretical innocence or political neutrality, and that the silences and exclusions generated by assuming such positions must be overcome:

[The social life of law] must be seen ... in terms of "counterfactuals," the missing, the hidden, the repressed, the silenced, the misrecognized, and the traces of practices and persons underrepresented or unacknowledged in its legitimations. ... The law's impact may be felt where it is least evident and where those affected may have few resources to recognize or pursue their rights in institutional forums (Coombe 1998:9).

This thesis, then, joins critical legal theory in seeking to maintain an openness of critical inquiry, in recognition that law and legal consciousness are constitutive features of social life and change, "neither separate nor separable from disputes about the kind of world we want to live in" (Hutchinson 1989:4). Insofar as the representatives of the Irish Music Rights Organisation take recourse to legal authority, that authority must be subjected to critical social inquiry.

Through the expansion of the Irish Music Rights Organisation, "law can be seen as both the *expression* of power relations and an important mechanism for *formalising* and *regularising* such relations. It protects and legitimises power, for example, by guaranteeing economic power through the

initially drew heavily on radical political culture, many of its founding members having participated in social activism since the 1960s. Advocates of CLS continue to draw theoretical inspiration from social theory, political philosophy, economics, and literary theory. The movement owes a considerable debt to legal realism, a school of legal thought prevalent in the 1920s and 1930s which drew attention to the social context of the law, and in particular the imperfect humanity behind the common-law foundations of precedent and judicial decision-making. For a substantial critique of the foundations of both legal realism and critical legal theory see Boyle (1985). There are also growing movements of critical legal

development of concepts of property and maintenance of rules to protect property" (Cotterrell 1984:119). It has been clearly shown that one of the roles of law has been to preserve the operation of a free market economy (Dror 1969), and that, within an Anglo-American common-law system, "The formal rules that judges are supposed to follow in reaching decisions in particular areas of litigation are biased toward the protection of the capitalist economic system" (Bettig 1996:154). In very practical ways, the workings of law and the authoritative claims and practices of the Irish Music Rights Organisation are not 'neutral'. Unger would argue that the great power of law is that "it enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside and by means of social actors who largely believe in their own neutrality and the myth of legal reasoning" (1986:5). The representatives of the Irish Music Rights Organisation have this "power of law" at their disposal insofar as they claim it and that claim is accepted as valid.

Neither 'Natural', Inevitable, Universal, nor Necessary

The challenges of critical legal theory have been brought to the field of copyright research. Scholars have highlighted the need, for example, to question the mythical status of the traditional narratives of copyright history in which the development of copyright is portrayed as the inevitable outcome of a linear progress narrative. What is needed, they say, are new narratives, new ways of speaking about copyright. A number of scholars dealing with intellectual property, and in particular copyright, have taken up the challenges of critical legal theory: "[T]here has been a movement away from the attempt to explain or rationalize copyright law according to one or two unified and coherent principles or themes, and towards seeing copyright as a much more complex cultural phenomenon" (Sherman 1994:4).⁹⁴ The authority of the Irish Music Rights Organisation rests on the necessary

theory in Germany, France, and Britain, where the Critical Legal Conference was established in 1984 (Gaines 1991).

⁹⁴ It is interesting to see, in the same year, the following comment: "Law is not and never has been a unitary phenomenon, even though the assumption that it is has played a central role

authority of orthodox copyright narratives. However, in this section it is argued that *our understandings of law, copyright, and performing rights are neither 'natural', inevitable, nor necessary*. Rather, by drawing attention to the social construction of legal and copyright discourses, scholars have argued for recognition of the “otherwise” and the importance of contingency in our analysis of history. In this section contingent currents of history are emphasised, and the orthodoxies of copyright and performing rights are challenged. By looking in particular at key moments in the history of performing rights, we can trace the fault-lines in the rhetoric of necessity, and, hence, fault-lines in the authority of the Irish Music Rights Organisation.

Mark Rose (1993), Michael Chanan (1994), Ronald Bettig (1996), Debora Halbert (1999), and Brad Sherman and Lionel Bently (1999) reveal the history of copyright to be not a natural and inevitable evolution narrative⁹⁵, but a series of struggles that open us up to the possibility that the history of what we now understand as copyright could easily have been a very different one. Sherman and Bently argue, for example, “that, at least up until the 1850s, there was no law of copyright, patents, designs or trade marks, and certainly no intellectual property law” (1999:3). Intellectual property law as we know it, then, was only one of a number of ways in which the law could have been organised. Whether what Halbert refers to as the “traditional story of copyright” achieves dominance or more critical approaches prevail is, in fact, a very important issue. Copyright, says Halbert, “is a socially constructed discourse that has become a powerful social myth. This myth, constructed over the past 200 years, has taken on the power of truth in which its assumptions and history are ignored” (1999:2). By portraying the history of copyright as timeless, natural, and inevitable, Sherman and Bently remind

in most legal discourses and theories of law. We adhere to the view that law is a complex of practices, discourses and institutions” (Hunt and Wickham 1994:39).

⁹⁵ Bettig (1996) has noted that “Traditional histories of copyright provide adequate descriptions of the origins and evolution of copyright but lack any real explanation for its emergence and functions. These histories are also teleological; they treat the “evolution” of the concept of literary property as a reflection of the natural progressiveness of human beings” (1996:9). In this regard, Bettig particularly notes the histories of Bugbee (1967), Patterson (1968), and Putnam (1896). The most blatant and succinct example of the evolutionist narrative of copyright I have come across is in Stewart and Sandison (1993:26), in which copyright is seen to grow through history to reach its rightful place as a philosophically-justified ‘truth’, a unitary, totalized phenomenon.

us, we move away from the changes and power struggles that have occurred, we fail to recognise the particular narratives that dominate the operations of the law, we restrict the questions we might ask about them, and we limit the possibilities of bringing in new narratives to structure our lives. As Halbert writes: "... if new ways of thinking about what we call intellectual property are to be found, we must move outside the law and into other modes of speaking" (1999:156).

Challenging Orthodoxy

The circle of logic runs something like this: If the law is right then copyright is right, and if copyright is right then performing rights are right, and if performing rights are right then we can collect royalties for them, and since we can collect royalties for them with the support of governments, legislation, and performing right organisation members worldwide, then it is taken to be proven that performing rights are right, copyright is right, and the law is right. This circle of logic is supported by a rhetoric of necessity that presents 'works', 'performing rights', and "music use" as natural, inevitable, universal categories, with narrowly-defined meanings. This, despite the fact that none of these terms are defined in anything other than a descriptive or tautologous manner in either copyright legislation or IMRO documentation, if at all. This is another achievement of the process of "legal closure" in which "The rule of law ... appears rational, benign, and necessary" (Blomley 1994:9). As Peter Jazsi has commented: "The whole structure ... is grounded on an uncritical belief in the existence of a distinct and privileged category of activity, that generates products of special social value, entitling the practitioners (the "authors") to unique rewards" (1991:466). The solid status of copyright and the justifications for all practices relating to copyright, such as those of the Irish Music Rights Organisation, are taken for granted by many people not only as the way things are and the ways things ought to be, but as the way things *must* be.

The working assembly of concepts that make up the discourses of law, intellectual property, copyright, and performing rights is culturally, politically,

economically, and socially negotiated, however. These understandings have been, and continue to be shaped by people, social events, forces, and narratives that could have been (and could always be) different. They suffuse a broad network of social relations. Had different personalities been involved, for example, things could have turned out very differently. The work of Mark Rose (1993) and Woodmansee and Jazsi (1994) is interesting in this regard. They show the degree to which discourses of authorship, literary property, and copyright were, at key historical moments, influenced by politically-engaged, high-profile literary and legal figures, such as William Wordsworth, William Murray, or William Warburton, who lobbied forcefully on behalf of the extension of commercial interests. Had other people been as persuasive in opposition, history may well have been very different. Likewise, Rose shows that the dominance of particular themes and metaphors in copyright history often came down to the delicate contingencies of individual court cases.⁹⁶ He argues that far from copyright being “a transcendent moral idea”, it could instead be seen as the meeting point of a series of social and historical factors: printing technology, marketplace economics, and possessive individualism. Rose also contends that it is “an institution built on intellectual quicksand: the essentially religious concept of originality, the notion that certain extraordinary beings called authors conjure works out of thin air” (1993:142).

The orthodoxies of copyright do not simply reflect the ‘nature of things’. Martha Woodmansee (1984), Peter Jazsi (1991), Jane Gaines (1991), Mark Rose (1993), and James Boyle (1996) are among those who have highlighted the socially-situated nature of concepts of “authorship”, “genius”, and “originality”.⁹⁷ Jazsi (1991) argues that the “authorship” construct bridged

⁹⁶ The movements of Legal Realism and critical legal theory make the contingency of personality and humanity in the precedents of common law judicial decisions a very important additional consideration (see Boyle 1985).

⁹⁷ More famous, perhaps, is the work of Foucault in this regard. See Burke ed. (1995) for this and other key contributions to discussions on “authorship”, and Burke (1998) for an extended discussion of the work of Foucault, Barthes, and Derrida in this regard. A collection of essays more focused on the relationship between authorship and copyright can be found in Woodmansee and Jazsi, eds. (1994). A useful summary of various approaches to authorship and copyright can be found in Halbert (1999). For an interesting discussion of “originality” in relation to copyright see Sherman (1995). For a discussion of authorship, ownership, and intellectual property law see the doctoral dissertation by McLeod (2000).

a contradictory tension between control and access, which thereby rendered it unstable. Jaszi contends that this weakness was one of the factors that led to the emergence of the “work” concept “as a new source of guidance and constraint in copyright”. The commercialization and commodification of print culture throughout the eighteenth century were also major contributing factors. Lydia Goehr (1992) is one of those who has challenged the ‘natural’ status and “conceptual imperialism” of the work-concept in musical practice, showing that: “speaking about music in terms of works is neither an obvious nor a necessary mode of speech, despite the lack of ability we presently seem to have to speak about music in any other way” (243). These ways of organizing our meanings and our world are not inevitable, and there are many other ways. These tensions have been played out on the ‘international stage’. Robert Burrell (1998) highlights the intense pressure placed by the United States government upon the government of China during the 1980s to deploy universalizing models of intellectual property across the national jurisdiction. Burrell argues that the method of persuasion adopted was an ‘aggressive unilateralism’ which “fails to respect other voices and other traditions and instead posits the moral superiority of a value system which is far more recent than the tradition it seeks to condemn” (198). Similarly, Tôru Mitsui pointedly highlights the incompatibility of universalizing copyright legislation with local meanings in Japan:

Significantly, before Westernisation there didn't exist any concept in Japan that equated with ‘right’ or ‘droit’. The word *kenri* or its abridgement, *ken*, as is used as a part of *chosakuken* (copyright), was coined as a term to translate ‘right’ into Japanese in the late nineteenth century (it was one of many Western words for which no fitting equivalents existed, such as ‘society’, ‘individual’, ‘modern’, and ‘liberty’ - such words as ‘privacy’ are used as loan words without being translated). And *kenri* (right), which was forged with much difficulty . . . was a combination of *ken* (power, in the sense of control over others, authority, etc.) and *ri* (profit, advantage), giving unfavourable and more or less avaricious connotations to itself even in the present day, when it is used as a part of everyday language (1993:142).

Looked at as a series of contingent possibilities, the history of performing rights⁹⁸ is transformed from the inevitable unfolding of a progress narrative into the multiple spaces of personal articulations. As detailed in Korman and Koenigsberg (1986) and Ryan (1985), the first case decision in the United States⁹⁹ concerning the performing right came in 1917. The case centred on the “for profit” requirement. Shanley’s Restaurant had been sued by the composer Victor Herbert for unauthorized performances of songs from his own “Sweethearts”. In another case, which was ultimately consolidated with the Herbert suit, the music publisher in charge of John Philip Sousa’s works sued the Vanderbilt hotel for similar alleged infringement. The performances in both cases were admitted to be “public” performances, but a defence was raised that they were not “for profit” as no direct charge had been made for the music. The lower courts found in favour of the “music users”, and against the assertions of lobbyists for performing rights. In what has become one of the most important reversals in musical copyright history, the Supreme Court unanimously found in favour of the plaintiffs. The presiding judge, Justice Oliver Wendell Holmes, wrote that a direct charge at the door of the

⁹⁸ Descriptive overviews of the historical development of performing rights can be found in Peacock and Weir (1975), Ehrlich (1989), Thomas (1967), Korman and Koenigsberg (1986), Besen and Kirby (1989), Jehoram (1991), Sinacore-Guinn (1993), Stewart and Sandison (1993), and Laing (1993).

⁹⁹ The rise in popularity of the musical stage in the United States at the end of the nineteenth century led to increased economic value being placed on dramatic performances of music. This was especially true of light operas and operettas. This popularity also, however, led to an awareness of unauthorized performances, by which is meant performances from which the copyright owner received no financial return. In response, the US Congress extended the right of public performance to musical works in 1897 via an amendment to the Copyright Law. This amendment provided that anyone found performing a copyrighted dramatic or musical composition without the consent of ‘the proprietor of said dramatic or musical composition, or his heirs or assigns’ would be liable for damages of not less than one hundred dollars for the first and fifty dollars for every subsequent performance. If the unlawful performance were to be judged ‘willful and for profit’, the offender could face a jail sentence of up to a year (Korman and Koenigsberg 1986:336).

In the US Copyright Act of 1909 three general limitations were placed in the nondramatic performing right, which was the performing right under which musical works were considered. The stipulations were that in order to qualify for a performing right the rendition should be a “performance”, “public”, and “for profit”. Two exemptions at this time were granted, to coin-operated machines and for certain educational and religious uses (Korman and Koenigsberg 1986:337). With the advent of radio it was determined that radio, and later television “performed” music, rather than ‘copying’ or ‘duplicating’ it. Radio, then, coupled with the performing right, proceeded to provide copyright holders with a source of income to replace the dwindling revenue of sheet music (*ibid.*).

premises for the music was not necessary. This is important, because it shows that, ultimately, the legitimization of performing rights and the role and activities of royalty collection agencies rests on a single case precedent that was only won on appeal. It is hardly 'inevitable' that performing rights received official sanction, but when they did, it legitimated their application in the United States, and, by precedent, in other common law jurisdictions such as Britain or Ireland.

It was clear that Justice Holmes was operating on the ideal of full and perfect protection for copyrighted works, which was seen at its maximum reach to extend to as many circumstances as possible: "If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected". The law, he argued, intended music copyright holders to have a successful monopoly, and the use of works in performances such as those of the defendants was deemed to potentially "compete with and even destroy" the success of that monopoly. The performances were deemed "part of a total for which the public pays":

It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough (cited in Korman and Koenigsberg 1986:338-9).

Later US court decisions made on the basis of the 1909 Copyright Act were also to prove influential in reinforcing the status of the performing right. In 1929 radio broadcasters were deemed to perform "for profit", despite listeners not being charged. In 1944 a ruling determined that this would be the case even if the radio station were operated by a nonprofit foundation. Radio broadcasters had already been judged as performing "publicly" in 1925, even though the radio listenership was dispersed geographically and unable to communicate with one another. In judgements in 1958 and 1959 the suppliers of background music services and their subscribers were deemed to be jointly and severally liable for unauthorized renditions of music. Judgements were also passed which adjudged performances to have occurred by an extra step of mediation by mechanical means in the absence

of live musicians; In 1931 radio broadcasts over loudspeaker systems were included, and, in 1964, the playing of records or tapes (Korman and Koenigsberg 1986:339).

The structure of logic that had been erected by musical copyright within an economic framework, the immeasurable number of contexts in which music was performed, and the inability of anyone to keep track of “music uses” on their own, all made it a practical impossibility for a single copyright owner to determine where and how their works might be being performed. This, then, made the individual licensing of works a practical impossibility. It also made it virtually impossible to pursue alleged infringement on an individual basis. In many countries, this problem led to the formation of collective licensing organisations, otherwise known as performing rights societies. Once the logic of licensing and performing rights achieved the official sanction of the courts, it could be claimed that such measures were indeed ‘necessary’. Indeed, the absolute necessity of performing rights organisations is achieved by an intricate piece of circular reasoning:

Performing rights are valuable so we need an organisation to uphold them, and performing rights are only valuable if we have an organisation to uphold them, therefore we need an organisation to uphold them (adapted from Sinacore-Guinn 1993).

Within the logic of this syllogism, acceptance of the performing right necessarily entails the acceptance of collective rights administration. Where the argument makes its persuasive leap, however is in the leap from statutory recognition to organisational imperative. Performing rights are actually to be recognised only insofar as the statutes of copyright law allow them to be. This condition is dropped halfway through. Within the syllogism, the Irish Music Rights Organisation obviously has no value without performing rights, but neither do individual performing rights have any value without the Irish Music Rights Organisation. The circle of necessity is complete.

Had the initial *Church vs. Hilliard* and *Herbert vs. Shanley* court ruling of 1917 stood, however, the performing right and associated royalty collection

may well have been replaced by some other way to garner income from 'music'. There is little doubt that neighbouring rights have arisen as a result of technological development, whereby the apparent fixity of performance in recorded media follows the logic of copyright, authorship, and intellectual property to cover every angle in a drive to maximise protection and wealth-creating potential for creative achievements. Peacock and Weir (1975) provide interesting windows into the contingencies of copyright history in England and Britain, making clear, for example, that performing rights and mechanical rights provided convenient ways for publishers to fill an income gap left by a decline in sales of sheet music and concert hall attendances. It is something of a revelation to find that before the 1911 Copyright Act and the development of gramophone technology, many music publishers were incredibly hostile to the collection of fees for performing rights:

As William Boosey himself frankly admitted, 'I consider that the payment of a fee for the performance of new music, and even established music, was calculated to injure seriously the sales of established favourites, and was very detrimental to the popularizing of new works ...'. With the appearance of mechanical music Boosey had begun to change his opinion of the value of performing right fees by the early 1900s (45-46).

Had these rights not been seized upon, and subsequently given official legal sanction, the income gap would undoubtedly have been filled by some other strategy. It was in no way inevitable that the performing right would achieve such prominence. Difficulties accompany such concepts when claims are made which assert their natural, absolute, and universal validity, and when, as a consequence, actions are undertaken as 'necessary' on the basis of such claims. But, as we saw in the last chapter, the necessity of necessity is all that really sustains the role, activities, expansion, and authority of the Irish Music Rights Organisation, hence the necessity of the necessity of necessity.

Law Shapes Meaning and Expectations

It has been argued, in opposition to the orthodoxies of legal closure, that the domain of law does not constitute a value-free, politically-neutral, autonomous sphere of activity. Furthermore, it has been argued that the discourses of law, copyright, and performing rights are in no way "natural",

inevitable, or necessary ways of making sense of the world. Nevertheless, the workings of law continue to play a vital role in the production and generation of meaning, power, and knowledge in the social interactions of our lives, not least of all through the expansion and authority of the Irish Music Rights Organisation. *By accepting the meanings that structure the organisation, we also allow those same meanings to structure our expectations and our social relationships.* Our lives can also be structured by our misunderstandings of the law, misunderstandings which often arise as an indirect consequence of legal closure. By acknowledging the ways in which law can guide and shape our lives, we can also recognise IMRO's practices of expansion as *interpretive* practices, with relational implications for our negotiations of meaning and power in social interaction.

It is one thing to acknowledge that law, copyright, and performing rights do not constitute natural, inevitable, necessary, value-free, or politically-neutral ways of making sense of the world. It is perhaps more important to recognise that *the workings of law nevertheless play a vital role in the production and generation of meaning, power, and knowledge in the social interactions of our lives.* The sociology of law (see Cotterrell 1984; Aubert, ed. 1969) and critical legal theory (see Hutchinson 1989; Fitzpatrick and Hunt, eds. 1987) draw attention to the ways in which law, legal doctrine, legal practice, and, by association, the role, activities, and expansion of an organisation such as IMRO, are implicated in our everyday interactions and social relationships. Legislation consists of a set of prescriptions which specify the way in which legal subjects ought to behave. But law also “exists in the sense that it is embodied as a set of expectations or understandings about behaviour” (Cotterrell 1984:155), and it “only ‘exists’ if the prescriptions of conduct actually have some effect on the way people think or behave” (9). The legal consciousness promulgated by the representatives and members of the Irish Music Rights Organisation structures daily life through a social and interpretative politics of interaction, authority, representation, and legitimation: “The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken” (Cover 1983:45).

Legal forms are not just to be found in legislation and the workaday rhetoric of lawyers. For Rosemary Coombe, law operates hegemonically as it shapes and guides worlds of meaning. This happens not only in obvious institutional encounters such as those precipitated by the expansion of the Irish Music Rights Organisation, but also in and through processes of recognised and unrecognised apprehension:

Hegemonic power is operative when threats of legal action are made as well as when they are actually acted upon. People's imagination of what "the law says" may be a shaping force in those expressive activities that potentially violate it and in those practices that might be considered protected acts of "speech," constitutionally defined. People's anticipations of law (however reasonable, ill informed, mythical, or even paranoid) may actually shape law and the property rights it protects (Coombe 1998:9).

The narratives of law, intellectual property, copyright, and performing rights, suffuse the practices of the Irish Music Rights Organisation, and structure expectations of what music or musical practice is, and more importantly, what our expectations of music, musical practice, or social relationships *should be*.¹⁰⁰ As Robert Cover has written: "Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live" (1983:4-5). Coombe notes that what people imagine "the law says" may be a shaping force in the practices of their lives, and even more: "People's anticipations of law (however reasonable, ill informed, mythical, or even paranoid) may actually shape law and the property rights it protects" (1998:9). This is abundantly clear, for example, in the behaviour of musicians who effectively self-censor repertoire choices during a session in order to satisfy the imagined

¹⁰⁰ This thesis could conceivably, then, take its place among what have come to be known as 'legal impact studies' (see Cotterrell 1984). For the most part, legal impact studies have sought to assess "the effects or lack of effects of particular legislation or juridical decisions on behaviour or attitudes" (Cotterrell 1984:37). One failing of legal impact studies has been the over-reliance on primarily quantitative data, to the detriment of theoretical concerns, leading to their being used mainly as short-term policy guides. The qualitative approach of this thesis aims to partially redress this balance. As Cotterrell (1984) makes clear, while legal impact studies have provided important evidence of the effects or otherwise of laws, it is necessary to examine the impact of law within a much wider context. This has led Cotterrell to champion the 'sociological study of law' (see also Aubert, ed. 1969). For Cotterrell this entails a central focus on the influence of ideas on action, on the "sociological significance of the cognitive and evaluative ideas expressed in legal doctrine or presupposed by it" (1984:120). What is crucial in such an approach is the need to challenge those ideas which are accepted as 'given', self-evident, 'common sense', ideas that are "so obvious that the question of their origin may seem unreal because to not accept them seems unthinkable" (1984:121). It is precisely because ideas associated with law are largely

prescriptions of copyright law (see pp. 82-83). In such ways, the law becomes a palpable presence in people's lives, even though the standards and sanctions involved may be self-imposed or misinformed. Often what is most important is not so much the letter of the law as people's understanding of it, and their reactions to legal meanings based on that understanding.

Law, then, is understood as "a ... diffuse and pervasive force shaping social consciousness and behavior" (Coombe 1998:12). The work of the Irish Music Rights Organisation is implicated within a system of law and the work of law is implicated in the practices of the Irish Music Rights Organisation. Neither just a collection of rules, nor a collection of social effects, law should be understood, then, as "a complex interpretive activity, a practice of encoding and decoding social meaning that merges imperceptibly with rhetoric, ideology, "common sense," economic argument (of both a highly theoretical and a seat-of-the-pants kind), with social stereotype, narrative cliché and political theory of every level from high abstraction to civics class chant" (Boyle 1996:14). These interpretive practices must be deconstructed and revealed as interpretive practices.

Summary

It is helpful at this point to summarise the arguments presented in volume 1 of this thesis. It was noted in Chapter 1 (see pp. 25-32) that the early stages of this research focused on 'Irish traditional music' as a commons under threat from the enclosing practices of the Irish Music Rights Organisation. The research initially reflected a sponsorial approach that sought to identify the features of this 'commons' as being essentially incompatible with current copyright legislation and the enclosing practices of the Irish Music Rights Organisation. Yet, it was argued, *sui generis* intellectual property legislation should still be sought with which to protect the 'commons' of 'Irish traditional music' (McCann 2001). A gradual shift led to the adoption of a revisionist approach in which 'Irish traditional music' was championed as the *absolute*

unquestioned that they must be examined as having developed in and through particular social formations and social practices.

other of copyright legislation. The practices of IMRO were understood to be inherently different from practices in the 'musical commons' of the 'Irish tradition'. Attempts to essentialise this commons proved inadequate to the complexities of the issues under research. My focus on the 'commons' often led to simplistic, static, and essentialising binary oppositions, that directed me further and further away from the people-centred emphasis I sought. My initial research had been driven by a desire to understand the expansion of the Irish Music Rights Organisation as something that had specific and particular effects, that made a difference to the way people experienced their lives, and to the way I experienced my own. This desire was increasingly frustrated by my focus on a generalized and abstracted 'commons'.

In a counterinductive move, then, I turned the thesis around. I decided to focus not on the concept of the commons, but on the concept of enclosure. In the absence of a coherent theoretical perspective on enclosure I reconfigured my research approach, undertaking this thesis as a project of *retheorising*. This involved two steps. The first was counterinduction, or "the invention and elaboration of hypotheses inconsistent with a point of view that is highly confirmed and generally accepted" (Feyerabend 1978:47). In retrospect, the major counterinductive moves in this thesis have been: the evasion of 'music' as a central focus in an ethnomusicological thesis, with the purpose of exploring wider social and political concerns, as discussed briefly in the introduction; and the break from the binary opposition of enclosure and the commons in order to come to an understanding of enclosure *without the commons*. The second step of the retheorising approach of the research has been an openness to the emergence of a *theory of enclosure* as it arises from an examination of the expansion of the Irish Music Rights Organisation.

The Expansion of the Irish Music Rights Organisation

Chapters 2, 3, and 4 began this examination, providing what was primarily a descriptive analysis of the expansion of the Irish Music Rights Organisation during the period 1995-2000. The Irish Music Rights Organisation (IMRO) was shown to be a performing rights organisation. Performing rights licensing

constitutes the organisation's primary activity. Indeed, licensing operations provide the financial foundation for IMRO's existence, for licensing is how the organisation makes its money. This licensing, then, is grounded in a belief in the existence of performing rights, rights that are understood to be analogous to copyright. Performing rights are statutory rights, not 'natural' rights - they exist only insofar as legislation and common law court rulings say they exist. For the Irish Music Rights Organisation to operate at all it is necessary to convince people to accept the validity of performing rights and the necessity of performing rights licensing. Should persuasion fail, representatives of the organisation can threaten litigation, thus appealing to legislation and rulings from the Dublin District Court and the Irish Competition Authority to support their licensing claims.

Since 1995, IMRO has undertaken its licensing operations from a position of officially-sanctioned economic monopoly. Since at least 1998 it could be said that the Irish Music Rights Organisation has operated in a condition of hegemony, that is, unquestioned authority for the monopolistic operations of the organisation, insofar as they have achieved overt governmental and legislative support. With the achievement of economic monopoly, and later hegemony, IMRO's licensing claims were able to proceed in an optimum market environment. Thus, the dominant feature of the organisation's activities from 1995-2000 is expansion. This expansion is rendered visible by resistance to IMRO's licensing claims during this period. The operations of the Irish Music Rights Organisation can, then, be seen at this time to follow a cycle of expansion, resistance, and legitimation, followed by further expansion, backed by legal and governmental support. This cycle was exemplified by the three cases of primary schools, the Vintners' Federation of Ireland (VFI), and Comhaltas Ceoltóirí Éireann (CCÉ). By 1998, IMRO had successfully achieved a number of important legal decisions and strategic alliances that effectively ended disputes and rendered any residual resistance ineffective because irrelevant.

Chapter 5 moved beyond this descriptive analysis of the Irish Music Rights Organisation to offer a more explanatory approach. From an orthodox economic perspective, the activities of the Irish Music Rights Organisation can be explained on the basis of what we might term the “twin mandate hypothesis” - the organisational mandate of the organisation is understood to come from the needs of members on one side, and the demands of consumers on the other. The role of IMRO is portrayed, then, as being purely facilitative, in that it performs a ‘conduit’ role between producer-suppliers and consumer-users. Thus, the decision of the consumer becomes the driving force of the market and the foundation of the economic system within which IMRO operates, while the decision of the producer-member becomes the driving force of the organisation’s administrative activity. The organisation itself cannot, then, exercise power, as it merely functions as an instrument in the service of consumer and member choice. This can be broadly characterised as a neo-classical economic perspective.

By turning to the work of John Kenneth Galbraith, however, it was shown that this perspective cannot adequately account for expansion being the dominant tendency of modern firms. Expansion, we had already established, is the dominant organisational dynamic of IMRO’s activities from 1995-2000. Galbraith argues that the expansionary dynamic of modern organisations provides a clear break with neo-classical economic doctrine. Using the explanatory model of the ‘planning system’, contrasted with the ‘market system’ model, Galbraith shows that one of the key features of modern expansionary corporations is that *they do not so much respond to their market environment as achieve control over it*. The explanatory schemes of neo-classical economics do not disclose this feature of modern corporate life. By drawing correlations between the features of Galbraith’s planning system and the organisational dynamics of the Irish Music Rights Organisation it was argued that IMRO’s expansion is driven by *a general and pervasive organisational tendency towards the achievement of total market control and the elimination of uncertainty*. The achievements of monopoly and

hegemony, then, satisfy this organisational tendency, and leave the way clear for further expansion. What also becomes clear in this analysis is that the existence of the organisation does not rely on the twin mandate of member-suppliers and consumer-users, but, crucially, on the careful maintenance of widespread acceptance of the organisation's claims to authority and jurisdiction.

In Chapter 6 the authority of IMRO was questioned. This is a key counterinductive step in the analysis of the organisation's activities, for the success of the Irish Music Rights Organisation is entirely dependent on its claims to incontrovertible authority. In fact, it can be stated, consistent with the analysis presented in Chapter 5, that the authority of the Irish Music Rights Organisation relies on the condition of certitude, the absence of doubt, the elimination of uncertainty. It had already been established that the Irish Music Rights Organisation relies almost entirely on its licensing operations, and that these operations are based upon the statutory existence of performing rights. IMRO's activities, then, rely crucially on the unquestioned authority of the discourses of law and copyright. As a result of historically sedimented processes of what can be termed "legal closure", these discourses, and activities reliant on them, are often deemed to be value-free, politically-neutral, natural, inevitable, and necessary.

By turning to the fields of critical legal studies and the sociology of law, however, it was shown that the authority, and hence the very existence of the organisation can be challenged. Claims based on the discourses and institutions of law, intellectual property, copyright, and performing rights contribute to the formation of highly problematic yet powerful social myths of literary and artistic production. It was argued, then, that the authority of the Irish Music Rights Organisation is best viewed as being based on a sequence of overlapping and interdependent interpretive claims. These claims are largely maintained on the basis of circular, self-referential reasoning. Nevertheless, it was noted that the importance of the success of IMRO's claims is that they do, indeed, make a difference. By accepting the meanings that structure the organisation we also allow those same meanings

to contribute to the structuring of our expectations and, hence, to contribute to the character of our social interaction. The expansion of the Irish Music Rights Organisation, it was argued, has *relational implications*. The way we experience law guides and shapes our lives. The Irish Music Rights Organisation, as an enforcer and purveyor of law, also contributes to the guiding and shaping of lives. In order to provide a clearer understanding of what is meant by this, steps will now be taken to situate this study within wider social, theoretical, and political concerns. In the following two chapters a theoretical foundation is laid, providing a new set of assumptions for the retheorising of 'Beyond the Commons'. These assumptions centre around the notion of 'negotiation', and foreground the exposition of the theory of enclosure in Chapter 9.