

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 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 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.

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 1993:158). 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 (438). 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 phonograms and broadcasting organisations. This was in contrast to earlier conventions, which had developed from national laws (443).

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 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. 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

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).

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 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

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”.

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 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.

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.

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 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

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

“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 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,

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).

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 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

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.).

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

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

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).

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.

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.

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 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

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).

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 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'.

The Perils of Discursive Complicity

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

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).

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 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

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.

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 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".

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

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 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

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.

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>.

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).

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).

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.

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, 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

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.

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. 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

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

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:

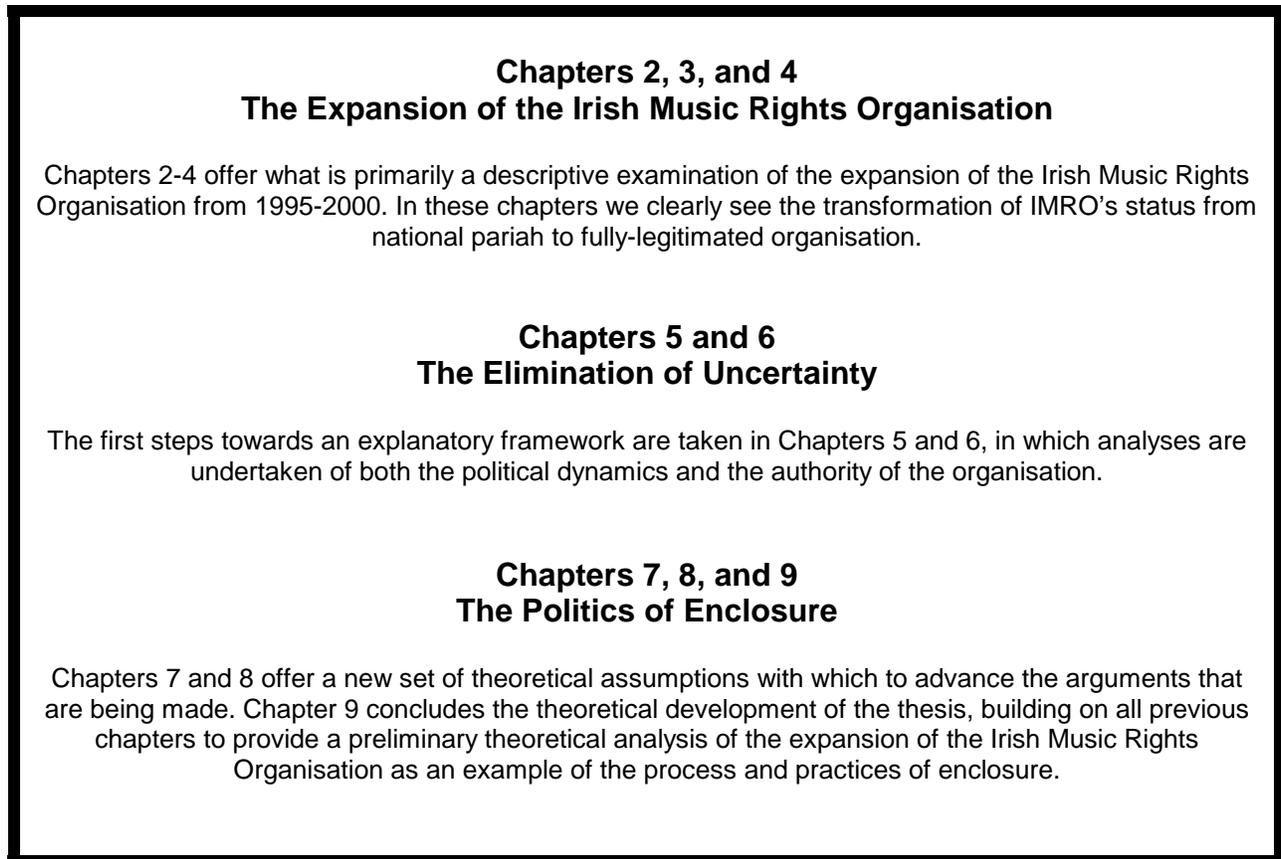


Figure 1. The Thesis Structure

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.

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, legitimation, 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'.