‘Hierarchy of Protection’ and ‘Hierarchy of Culture’: The Effects of Copyright Law on Traditional Music

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Abstract

This dissertation examines the effects of copyright law on traditional music of the marginalised communities. Traditional music of the marginalised communities has been exploited by music collectors from the dominant group, historically and contemporarily. The exploitation is often justified and legalised by the proposition that traditional music is unprotectable under copyright law, which can be described as a 'hierarchy of protection.' Further, traditional music of the marginalised communities is often perceived as inferior to classical or art music of the dominant groups, which can be described as a 'hierarchy of culture.' This dissertation aims to examine the role of copyright law in the exploitation of traditional music and in shaping the cultural perception or cultural status of traditional music. This is accomplished through a cross analysis of publishing processes and legal treatments of traditional music. Four sub-questions are examined to answer the main research question: 1) whether traditional music can be protected as musical works under three copyright requirements, originality, authorship, and fixation; 2) whether these copyright requirements are socio-cultural neutral or informed by broader industrial and cultural contexts, thus embedding cultural biases towards traditional music; 3) how traditional music was processed in music publishing and what were the relative legal consequences of these processes; 4) whether and how the compound of music publishing and copyright law influences the cultural perception of traditional music. This cross analysis facilitates the dissertation's original contributions, including challenging the view that traditional music is unprotectable under copyright law. Theoretical patterns emerge from analysing the dynamic interaction between the 'hierarchy of protection' and the 'hierarchy of culture.' That is, copyright law has implemented the 'hierarchy of protection' in the legal field, thus constructing and reinforcing the 'hierarchy of culture' in the music field. The contributions underpin the implications of the dissertation: redressing the 'hierarchy' effect is essential for properly protecting traditional music against exploitation, and in the broader sense, for promoting socio-cultural equality between the dominant group and the marginalised communities.

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Author's Declaration

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Signature:

Abbreviations

CLPRC- Copyright Law of the People's Republic of China

CDPA – Copyright, Designs and Patents Act

CJEU – Court of Justice of the European Union

ECJ – European Court of Justice

EU – European Union

IP – Intellectual Property

RICLPRC- Regulation on the Implementation of the Copyright Law of the People's Republic of China

TCE – Traditional Cultural Expressions

TK – Traditional Knowledge

UK – United Kingdom

US– United States/United States of America

WIPO – World Intellectual Property Organisation

WPPT – WIPO Performers and Phonograms Treaty

WTO–World Trade Organization

1. Introduction

1.1 Background: where the research question comes from

Traditional music is orally created and transmitted in a local community through generations.[1] It has significant social and cultural values to the community and presents commercial values to outside groups.[2] Traditional music of the marginalised communities has been uncompensated and unacknowledged exploited by music collectors from the dominant groups.[3] It is contested whether traditional musicians, local populaces, and their communities can control such exploitation by protecting traditional music as copyright musical works, which are supposed to be original expressions of identifiable authorship and ideally in fixation forms.[4] Copyright law, compounded with music publishing, may facilitate the exploitation and reshape the cultural perception or status of traditional music,[5] which is the primary concern of this dissertation. The main research question of the dissertation asks: what are the effects of copyright law on traditional music of the marginalised communities?

[1] The definition and characteristics of traditional music are explained below.
[2] Paul Kuruk, *Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property: A Global Primer* (Edward Elgar Publishing 2020) 14–16.
[3] See William Cornish, 'Conserving Culture and Copyright: A Partial History' (2009) 13 The Edinburgh law review 8. The description of the relationship between traditional musicians and music collectors is stylised, while the situation could be more complex. Some traditional musicians might utilise traditional music for commercial interests, while some music collectors might publish traditional music to preserve traditional music. The motivations of pursuing commercial interests and preserving traditional music showed some extent of overlap. This dissertation, however, focuses on traditional musicians who usually practised their music for non-commercial interests and music collectors who published traditional music (i.e., 'English collectors of Scottish song') with commercial interests in mind. See Wilhelm Kutter, 'Radio as the Destroyer, Collector and Restorer of Folk Music' (1957) 9 Journal of the International Folk Music Council 34; Karen McAulay, *Our Ancient National Airs: Scottish Song Collecting from the Enlightenment to the Romantic Era* (Ashgate 2013) 8–9, 246, 249; Simon McKerrell, *Focus: Scottish Traditional Music* (Routledge 2015) 41, 63, 87.
[4] Anne Barron, 'Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice' (2006) 15 Social & Legal Studies 25.
[5] As explained below, cultural perception or status relates to the aesthetic assessment of music. Namely, whether the music is regarded as 'high culture' or 'high art' or 'low culture' or 'low art.'

Traditional music is one representative of the cultural productions[6] known as traditional cultural expressions (TCEs) or expressions of folklore (EoF).[7] TCEs is usually identified by 'oral nature, group features, and mode of transmission through generations of people.'[8] For instance, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) defines TCEs as 'productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community…in particular…*musical expressions, such as folk songs and instrumental music*.'[9] Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions defines TCEs as 'tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include *traditional music*.'[10]

Traditional music is reported as one of the most vulnerable forms of TCEs in the face of exploitation.[11] Thus, the situation of traditional music can be an epitome of other forms of TCEs regarding exploitation. This dissertation analyses traditional music with TCEs as a broader reference, and the findings may be applicable for considering the effects of copyright law on other forms of TCEs. As TCEs are generally the cultural productions of

[6] In academic literature discussing TCEs, traditional music is one of the most used examples. Thus, the dissertation draws on the literature focusing on traditional music and cites the literature discussing overall TCEs. See Giovanna Carugno, 'How to Protect Traditional Folk Music? Some Reflections upon Traditional Knowledge and Copyright Law' (2018) 31 International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique 261.

[7] This dissertation uses the term TCEs, while TCEs and EoF are often used interchangeably and synonymously. TCEs is preferred because some communities claim that the term EoF has biased meanings of primitive and uncivilised. Another relevant term is indigenous knowledge (IK), the knowledge of indigenous communities, peoples, and nations, but not all TCEs and TK are IK. See Owen Morgan, 'Assessing the Work of the WIPO IGC' (2014) 36 European Intecllectual Property Review 319; 'The Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline of Policy Options and Legal Mechanisms' <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=32525> accessed 16 January 2022.

[8] Kuruk (n 2) 2.

[9] Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (adopted 15 February 1983). Section 2.

[10] 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410022> accessed 16 January 2022.

[11] 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365> accessed 16 January 2022.

marginalised communities, the research has significance and implications for promoting socio-cultural equality between the dominant groups and the marginalised communities.[12]

The terms 'traditional music' and 'folk music' are often used interchangeably, and 'traditional folk music' is another frequently used term.[13] This dissertation uses the term 'traditional music' in most cases because it is noted that this term reflects the process of music-making.[14] The dissertation also uses other terms that are referred to in a specific cultural context or literature. The definition of traditional music is not unanimously agreed upon.[15] For example, Karpeles defines it as 'has been submitted to the process of oral transmission. It is the product of evolution and is dependent on the circumstances of continuity, variation and selection.'[16] Gelbart defines it as 'part of a communal tradition, usually disseminated anonymously through oral communication, and thus undergoing constant minor variations and additions.'[17] At the same time, music literature generally agrees on some characteristics of traditional music. Firstly, a traditional tune incorporates pre-existing musical expressions and newly created elements.[18] Secondly, a traditional tune initially originates from an identifiable musician but is subsequently absorbed into the music tradition of a community.[19] Thirdly, traditional music is created and transmitted in oral practice, such as singing or instrumental playing.[20]

[12] The implications of the research are explained in chapter 5.
[13] Other similar and relative terms include aboriginal music, indigenous music, and national music (in eighteenth and nineteenth-century Europe in cultural nationalism). Each term is used in a specific cultural context rather than strictly delimit a music genre, and the music under these terms shares the characteristics as analysed below. See Albrecht Schneider and James Porter, 'The Traditional Music of Britain and Ireland. A Select Bibliography and Research Guide' (1991) 36 Jahrbuch für Volksliedforschung 173; Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 The International and comparative law quarterly 61; Karen E McAulay, 'Wynds, Vennels and Dual Carriageways: The Changing Nature of Scottish Music', *Understanding Scotland Musically* (Routledge 2018).
[14] Luke McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' in Nicola Lucchi and Bonadio Enrico (eds), *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* (Edward Elgar Publishing 2018).
[15] Carugno (n 6).
[16] Maud Karpeles, 'Definition of Folk Music' (1955) 7 Journal of the International Folk Music Council 6.
[17] Matthew Gelbart, *The Invention of 'folk Music' and 'art Music': Emerging Categories from Ossian to Wagner*, vol 16 (Cambridge University Press 2007) 1.
[18] Karpeles (n 16); Francis Collinson, 'Scottish Folkmusic: An Historical Survey' (1971) 3 Yearbook of the International Folk Music Council 34; Yingshi Chen, 'Folk Songs', *Encyclopedia of China, Music and Dance Volume* (Encyclopedia of China Publishing House 1989) 455; McKerrell (n 3) 4; Carugno (n 6); McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' (n 14).
[19] Ibid.
[20] Ibid.

As reported in the literature, historically and contemporarily, traditional music of the marginalised communities has been collected and published by outside private entities, and these music collectors and publishers (hereafter music collectors) are usually from the dominant cultural background. They collected and published traditional music to fulfil cultural interests and pursue publishing profits.[21] Further, it is noted that they generally registered the published music as their own copyright works.[22] Alternatively, copyright automatically attached to the published music after the formality requirement was abolished under international and national legislation.[23] Meanwhile, traditional musicians and their communities often gained no acknowledgement, compensation, and the share of benefits arising from the published music.[24]

When seeking protection against exploitation under existing legal mechanisms, copyright is an option. First, traditional music is similar to copyright subject matter-musical works. Both embody creativity, which is supposed to gain some incentivisation and rewards from copyright protection.[25] Second, copyright includes a wide range of moral and economic rights, which can be used to claim acknowledgement, compensation, and the share of benefits.[26] In addition, the marginalised communities have 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'[27] This fundamental human right is precisely protected by copyright. Therefore, copyright has the potential to protect traditional music from the uncompensated and unacknowledged exploitation.

Historically, traditional musicians and their communities largely lacked the legal awareness of copyright or the interest in claiming the right.[28] Contemporarily, as reported in empirical

[21] Simon McKerrell, Gary West, and Taylor & Francis Group, *Understanding Scotland Musically: Folk, Tradition and Policy* (Routledge 2018) 17–29. McKerrell (n 3) 51. Cornish (n 3).
[22] Cornish (n 3).
[23] The Berne Convention Berlin Text 1908 first prescribed that the rights granted under the Convention should not depend on national formalities. Hence, formalities such as registration are not preconditions for copyright protection. See Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* (Oxford University Press 2006) 415.
[24] Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009) 18 Social & Legal Studies 479.
[25] Kuruk (n 2) 34–37.
[26] Kuruk (n 2) 1.
[27] The Universal Declaration of Human Rights (adopted 10 December 1948). Article 27 (2). The International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966). Article 15 (c).
[28] Helen Rees, 'The Age of Consent: Traditional Music, Intellectual Property and Changing Attitudes in the People's Republic of China' (2003) 12 British journal of ethnomusicology 137.

studies, within the community context, traditional musicians rely on social norms to regulate music production as they did in the past.[29] The social norms generally emphasise the sharing of tunes and the reciprocal relationship, and thus, traditional musicians rarely claim music ownership against their fellow musicians.[30] In contrast, out of the community context, traditional musicians demand legal rights to protect their music from exploitation, especially when outside groups take 'undue advantage' without rewarding them and their communities.[31] For example, McDonagh proposes that UK and Ireland traditional musicians tend to seek copyright protection when their music is used for commercial purposes by outside groups.[32] Li reports that most Chinese TCEs creators, including traditional musicians, hold a supportive attitude towards the copyright protection of TCEs, including traditional music.[33] It can be seen that traditional musicians have already considered copyright as an option to protect their music from exploitation.

Traditional music can gain the most extensive protection against exploitation if it is identified as copyright musical works, although it is possible to gain some protection as sound recordings, performance, anonymous unpublished works, music-form TCEs, and intangible cultural heritage (ICH).

First, the copyright system grants differing levels of protection to 'regular' musical works, sound recordings, and performance.[34] The protection term for musical works is generally longer than for sound recordings and performance. More significantly, if a traditional tune is protected as a musical work, as the copyright owner, the traditional musician can control and profit from the reproduction and distribution of printed copies of the tune, public

[29] Luke Thomas McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians? A Study of the Impact of Law on a Traditional Music Network' (PhD Thesis, 2011) 118, 136. Kuruk (n 2) 314–350.
[30] Ibid.
[31] Kuruk (n 2) 341–350.
[32] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 274–75.
[33] Luo Li, *Intellectual Property Protection of Traditional Cultural Expressions: Folklore in China* (Springer 2014) 86.
[34] At the international level, sound recordings and performance are protected by neighbouring rights (or related rights) prescribed in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (adopted 26 October 1961); WIPO Performances and Phonograms Treaty (adopted 20 December 1996); Beijing Treaty on Audiovisual Performances (adopted 24 June 2012).

performance of the tune, and mechanical reproduction of the tune.[35] In comparison, if a traditional tune is fixed into a sound recording, by copyright or neighbouring rights (or related rights), the traditional musician can only control and profit from the reproduction and distribution of the sound recording.[36] However, it is noted that in practice, the right owners of sound recordings are usually record labels rather than traditional musicians.[37] If a traditional tune is identified as a performance of a musical expression in the public domain, by performers' rights, the traditional musician can merely authorise the fixation of the tune and may share some profits arising from the reproduction and distribution of the fixation form.

Further, as right owners of sound recordings and performers, traditional musicians cannot prevent others from unauthorised utilising their tunes in the way of transcribing, remaking (known as cover versions), performing, and recording (known as sound-alike versions).[38] In comparison, as copyright owners of musical works, traditional musicians can prevent these unauthorised utilisations. In other words, if a traditional tune is not protected as a copyright musical work, others can adapt it, perform it, and make an independent fixation of the performance.[39] Thus, traditional music cannot be effectively protected from exploitation.

Second, it is possible for traditional music to gain some protection as anonymous unpublished works. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[40] is the most important international treaty governing copyright, which is administrated by the World Intellectual Property Organisation (WIPO). The Convention protects anonymous unpublished works under Article 15 (4), and the legislative history shows that the main application of this article is EoF and TCEs.[41]

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[35] Ruth Towse, 'Copyright and Music Publishing in the UK' in Ilde Rizzo and Ruth Towse (eds), *The Artful Economist: A New Look at Cultural Economics* (Springer International Publishing 2016).
[36] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 148.
[37] 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (n 11).
[38] Annette Kur, Thomas Dreier and Stefan Luginbühl, *European Intellectual Property Law: Text, Cases and Materials* (Second / Annette Kur, Thomas Dreier, Stefan Luginbühl, Edward Elgar Publishing 2019) 242.
[39] Or say, as musical works, traditional music can be protected against imitation. In contrast, as performance and or musical expressions in sound recordings, traditional music cannot be protected from imitation. Bently and Sherman (n 36) 148.
[40] Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, revised 4 May 1896, 13 November 1908, 20 May 1914, 2 June 1928, 26 June 1948, 14 July 1967, 24 July 1971, 28 September 1979).
[41] Ricketson and Ginsburg (n 23) 511–14.

However, the protection 'shall expire fifty years after the work has been lawfully made available to the public', and a competent authority shall be designated by national legislation to enforce copyright in such works.[42] It is noted that this provision risks depriving traditional musicians and their communities of control of their music.[43]

Third, as music-form TCEs, traditional music may gain some protection under a 'sui-generis' arrangement in national legislation. For example, the Ghana Copyright Act 2005 protects 'expressions of folklore' against reproduction, adaptation, and other transformation. The rights are 'vested in the President on behalf of and in trust for the people of the Republic.'[44] The sui-generis protection was first developed by international organisations.[45] For example, in 1976 and 1982, WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) co-issued the Tunis Model Law on Copyright for Developing Countries and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. However, under sui-generis protection, the rights in TCEs are generally granted to a competent authority, as shown in the Ghana Copyright Act.[46] Therefore, this kind of protection also risks depriving traditional musicians and their communities of control of their music.

Fourth, it is possible for traditional music to gain some protection as ICH. The Convention for the Safeguarding of the Intangible Cultural Heritage defines ICH as 'transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity.'[47] Traditional music fits the category 'oral expressions and

[42] Berne Convention for the Protection of Literary and Artistic Works, Stockholm Act (adopted 14 July 1976), Article 7 (3), Article 15 (4).
[43] 'Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions. WIPO/GRTKF/IC/5/INF/3 ANNEX' (2003) <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_inf_3.pdf>; Martin A Girsberger, 'Legal Protection of Traditional Cultural Expressions: A Policy Perspective' (2008) 2008 See Graber & Burri-Nenova 123.
[44] Copyright Act, 2005 [Act 690].
[45] 'Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions. WIPO/GRTKF/IC/5/INF/3 ANNEX' (n 43).
[46] Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (adopted 15 February 1983), Section 9.
[47] See The Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003). Article 2.

performing arts.'[48] However, ICH indicates the non-property nature of its subject matters, which replaced the previous term 'intangible cultural property.'[49] Accordingly, the 'protection' for ICH means identification, documentation, preservation, promotion, and education.[50] Moreover, the Convention prescribes that the protection does not affect 'the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights.'[51] Therefore, this kind of protection cannot prevent outside groups from using ICH and then protecting the resulting products with intellectual property. In other words, this approach cannot effectively protect traditional music from exploitation.

Therefore, copyright protection for musical works is possibly a more effective mechanism to counter the uncompensated and unacknowledged exploitation than other mechanisms. The protection for sound recordings, performance, and ICH cannot effectively protect traditional music from exploitation. The protection for anonymous unpublished works and TCEs risks depriving traditional musicians and their communities of control of their music. This shows the necessity to protect traditional music as copyright musical works.

1.2 Four sub-questions: how the dissertation approaches the research question

To answer the main research question, four sub-questions have to be addressed. The first sub-question is: whether traditional music can be protected as musical works under formal legal terms of copyright? In general, under most national copyright legislation, musical

[48] Ibid.
[49] The term cultural property was used in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property. Cultural heritage subsequently replaced cultural property in the 1972 UNESCO Convention on the Protection of World Cultural and Natural Heritage. Several reasons account for the replacement. First, cultural property was regarded as inadequate to cover the subject matter of cultural heritage. Second, cultural property indicates the right to exploit and exclude, which does not meet the aims of the preservation and protection of cultural heritage. Third, in dominant legal discourse, the subject matter is common resources of all humans rather than belonging to its communities of origin. See Lyndel V Prott and Patrick J O'Keefe, ''Cultural Heritage'or "Cultural Property"?' (1992) 1 International Journal of Cultural Property 307. Fiona Macmillan, 'Cultural Property and Community Rights to Cultural Heritage' in Ting Xu and Jean Allain (eds), *Property and Human Rights in a Global Context* (Bloomsbury Publishing 2016).
[50] The Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003). Article 2.
[51] ibid. Article 3.

expressions must meet three requirements to be protected as musical works: originality, authorship, and fixation (in common law copyright tradition).[52] Thus, the dissertation explores the research question with these requirements as parameters.

It is argued in some literature that traditional music cannot be protected as 'regular' musical works because it does not meet these copyright requirements.[53] In other words, there are incompatibilities between traditional music and copyright requirements. To be specific, firstly, traditional music is old musical materials inherited from the past, so it lacks originality and has expired the term of copyright protection.[54] Secondly, traditional music is the product of collective efforts, and any individual contribution is untraceable, so it lacks an identifiable author to whom copyright is conferred.[55] Thirdly, traditional music generally subsists in oral transmission, so it lacks the fixation form to attract copyright in those jurisdictions requiring fixation.[56] The incompatibilities indicate that traditional music is in the public domain. [57]

To answer this sub-question, the dissertation critically examines the alleged incompatibilities between traditional music and copyright requirements. The dissertation questions whether the alleged incompatibilities conflate the cultural nature and legal nature of traditional music. Specifically, it explores 1) whether a traditional tune that incorporates pre-existing musical expressions can meet the standard of originality; 2) whether traditional musicians, who conventionally call themselves performers or arrangers,[58] can

[52] Ricketson and Ginsburg (n 23) 511–514. Lionel Bently and others, *Intellectual Property Law* (5th edn, Oxford University Press 2018) 91–121.
[53] The incompatibilities are analysed in detail in the following chapters. There are some enumerations of the literature that support or criticise the incompatibilities. Martha Woodmansee and Peter Jaszi, 'The Ethical Reaches of "Authorship"' [1996] Faculty Publications 947–977; Lee Marshall, *Bootlegging: Romanticism and Copyright in the Music Industry* (Sage 2005) 89; Barron (n 4); Ricketson and Ginsburg (n 33) 511–514; Molly Torsen, 'Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues' (2008) 3 Intercultural Hum. Rts. L. Rev. 199; Li (n 31) 13–14; Carugno (n 1).
[54] Ibid.
[55] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 136.
[56] Torsen (n 53).
[57] Johanna Gibson, *Community Resources: Intellectual Property, International Trade, and Protection of Traditional Knowledge* (Routledge 2005) 8; Ruth L Okediji, 'Traditional Knowledge and the Public Domain in Intellectual Property' in Carlos Correa and Xavier Seuba (eds), *Intellectual Property and Development: Understanding the Interfaces* (Springer 2019).
[58] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 133.

qualify as authors and joint authors of musical works; 3) whether orally expressed traditional tunes can be protected as musical works upon (third-party) fixation.

The second sub-question is: whether the copyright requirements are socio-cultural neutral or premised on broader industrial and cultural contexts, thus embedding some cultural biases towards traditional music? First, it is reported that the historical developments of copyright requirements were intricately intertwined with the publishing industry. For example, Carroll argues that 'copyright was invented to solve a particular problem for book publishers in eighteenth-century England and that the subsequent expansion of copyright's domain has been neither natural nor inevitable.'[59] Bently, Kretschmer, and Deazley emphasise that the publishing industry's history influenced copyright law's history.[60] Marshall and Frith propose that vital theoretical assumptions of copyright were developed in music publishing. Thus, although music is currently associated with 'the recorded song', copyright remains focusing on 'the composed work', the main product of music publishing.[61] According to these propositions, music publishing is the proper context to examine copyright requirements.

Second, it is noted that there exist some plausible resonances between protectable musical works satisfying those copyright requirements and classical music practices in the formal music tradition of the Western world. Classical (or art) music is described as '…authorship is clearly established, and pieces are communicated as fixed texts reflecting that author's apparent intentions.'[62] Firstly, classical music is seen as the 'author's apparent intentions', while protectable musical works are supposed to contain some 'original' contribution from

[59] Michael W Carroll, 'The Struggle for Music Copyright' (2005) 57 Fla. L. Rev. 907.
[60] Lionel Bently and others, *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 14.
[61] Lee Marshall and Simon Frith, 'Making Sense of Copyright' in Lee Marshall and Simon Frith (eds), *Music and Copyright* (Taylor & Francis Group 2004) 1–2.
[62] Gelbart (n 17) 1. In the narrow sense, classical music indicates music compositions produced in the classical period (approximately 1750s-1840s) of the formal musical tradition, the post-Baroque and pre-Romantic periods. Nevertheless, its influence extended to later periods of Romantic and Modernism. Therefore, in the general sense, classical music refers to works produced by professional composers conforming to formal compositional rules. See George Grove Sir and Stanley Sadie, *The New Grove Dictionary of Music and Musicians* (Macmillan 2001) 596–603; Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson (eds), 'Classical', *The Oxford Dictionary of Music* (Oxford University Press 2013) <http://www.oxfordreference.com/view/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-1943> accessed 17 January 2022; Joep Leerssen, 'Romanticism, Music, Nationalism' (2014) 20 Nations and nationalism 606.

the author.[63] Secondly, classical music features 'clearly established' authorship, while protectable musical works principally have identifiable author(s). Thirdly, classical music is 'communicated as fixed texts', while protectable musical works often have fixation forms.[64]

Barron argues that copyright law 'privileges certain musical elements that happen to be important in "classical' music"' and conceives musical works 'as a bounded expressive form originating in the compositional efforts of some individual: a fixed, reified work of authorship.'[65] McDonagh argues that there are mutual influences between the legal concept of musical works and the 'notions of musical work present in "Romantic" and "Classical" musicological literature.'[66] However, the literature has not yet articulated how the resonances formed and what roles copyright played.

To answer this sub-question, from the historical perspective, the dissertation examines 1) how the music publishing industry influenced the historical developments of the copyright requirements; 2) whether and how the historical developments provide a root or explanation for the legal treatment of traditional music; 3) how the resonances between copyright requirements and classical music practices formed, and what roles copyright played.

The third sub-question is: how traditional music was processed in music publishing and what were the relative legal consequences of these processes. The dissertation provides a cross analysis of music literature[67] which records the publishing processes and legal literature and judgements that demonstrate the legal consequences. A close examination of

[63] As analysed in Chapter 2, the originality required for protectable musical works is essentially different (much lowered than) from the 'author's apparent intentions.'
[64] These features of classical music are generally agreed upon. See Robin Moore, 'The Decline of Improvisation in Western Art Music: An Interpretation of Change' (1992) 23 International review of the aesthetics and sociology of music 61; Michael Talbot, 'The Work-Concept and Composer-Centredness' [2000] The musical work: reality or invention 168; Hope Strayer, 'From Neumes to Notes: The Evolution of Music Notation' (2013) 4 Musical offerings 1.
[65] Barron, 'Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice' (n 4).
[66] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 43.
[67] How the dissertation selects music literature is explained in the methodology part.

music literature shows, first, music collectors usually 'textualised'[68] orally expressed traditional tunes into notated versions.

Second, music collectors (or arrangers they commissioned) mediated traditional tunes in simple arrangements. Typically, they added instrumental accompaniments to traditional tunes. As the accompaniments were in the simplest form and dictated by music rules (i.e., bass lines),[69] they were described as the 'natural outgrowth' of traditional tunes and 'straight application' of music rules.[70] Under copyright law, an original arrangement of an existing musical composition can attract a separate copyright, which covers the arrangement but not the underlying composition (whether the composition is copyrighted or in the public domain).[71] Accordingly, the arranger can be remunerated for the original arrangement, such as receiving copyright royalties, licensing the use of the arrangement, and being acknowledged as the author of the arrangement. But the arranger cannot be remunerated for the underlying composition. Thus, in the context of traditional music, a collector or an arranger can be remunerated for an original arrangement but not for the underlying traditional tune.

Third, music collectors erased the names of traditional musicians who presented tunes when attaching their own names or fabricated authors' names to the published music.[72] It is noted that music collectors did this 'partly for copyright purposes.'[73]

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[68] David Atkinson, 'Folk Songs in Print: Text and Tradition' [2004] Folk Music Journal 456.
[69] Davis Leith, 'At "Sang about": Scottish Song and the Challenge to British Culture' in Davis Leith, Lan Duncan and Janet Sorensen (eds), *Scotland and the borders of romanticism* (Cambridge University Press 2004); Kirsteen McCue, 'Thomson's Collections in Their Scottish Cultural Context' (2004) 8. 4 Haydn-Studien 305; Liu Ching-chih and Liu Jingzhi, *A Critical History of New Music in China* (The Chinese University Press 2010); Richard Will, 'Haydn Invents Scotland' in Mary Hunter and Richard Will (eds), *Engaging Haydn: Culture, Context, and Criticism* (Cambridge University Press 2012); Robert Dunbar, 'Vernacular Gaelic Tradition' in Sarah Dunnigan and Suzanne Gilbert (eds), *The Edinburgh companion to Scottish traditional literatures* (Edinburgh University Press 2013); McAulay, *Our Ancient National Airs* (n 3) 41.
[70] Béla Bartók, 'The Influence of Peasant Music on Modern Music' [1950] Tempo (London) 19; Ronald P Smith, 'Arrangements and Editions of Public Domain Music: Originality in Finite System' (1983) 34 Case Western Reserve law review 104.
[71] *Fisher v Brooker [2007] EMLR 9*; Luke McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry: The Potential Significance of Fisher v Brooker' [2012] Intellectual property quarterly 64.
[72] Ibid.
[73] Cornish (n 3). Some music collectors did not mean to establish copyright, but copyright law had such irresistible effects. As Seeger argues, 'people with the best of intentions can find themselves powerless to

To answer this sub-question, these processes are examined in detail in the following chapters. The dissertation explores 1) whether the simple arrangements and the original traditional tunes were determined as 'original' by copyright law; 2) whether music collectors gained the rights attached to authorship in the published music, and how traditional musicians were identified and treated under copyright law; 3) whether the notated versions were protected as musical works, and whether the notated versions as fixation forms brought copyright to the underlying traditional tunes.

The fourth sub-question is: whether and how the compound of music publishing and copyright law influences the cultural perception or cultural status of traditional music. Cultural perception or status relates to the aesthetic assessment of music, namely, whether the music is regarded as 'high culture' (or 'high art') or 'low culture' (or 'low art').

There are important correspondences between the legal field and the music (cultural) field. In the music field, it is proposed that a 'hierarchy of culture' was established at the turn of the nineteenth century.[74] Classical (or art) music of the dominant group was regarded as the 'high culture', that is cultivated and civilised, whereas traditional (or folk) music of the marginalised communities was regarded as the 'low culture', that is primitive and uncivilised.[75] It was not until the 1960s that the hierarchy was widely criticised.[76] For instance, Kodály argues that the distinction between folk (traditional) music and art (classical) music was 'caused by historical, national, social and cultural stratification.'[77] Lawrence notes that the 'hierarchy of culture' was informed by the uneven power distribution between the dominant groups (i.e., UK, Western Europe) and the marginalised

reverse exploitative uses of the materials they have acquired on the understanding that they were not to be used for commercial purposes.' See Anthony Seeger, 'Traditional Music Ownership in a Commodified World' in Lee Marshall and Simon Frith (eds), *Music and Copyright* (Taylor & Francis Group 2004) 167.

[74] The hierarchy was developed by UK and European music theories, such as Jean-Jacques Rousseau and Johann Herder. This point is explained in detail in the following chapters. See Bence Szabolcsi, 'Folk Music, Art Music, History of Music' (1965) 7 Studia musicologica. Academiae Scientiarum Hungarica 171; Howard Brofsky, 'Doctor Burney and Padre Martini: Writing a General History of Music' (1979) 65 The musical quarterly 313; Judith Becker, 'Is Western Art Music Superior?' (1986) 72 The Musical Quarterly 341; William Weber, *The Rise of Musical Classics in Eighteenth-Century England: A Study in Canon, Ritual and Ideology* (Clarendon 1992); Gary Tomlinson, 'Musicology, Anthropology, History' in Martin Clayton, Trevor Herbert and Richard Middleton (eds), *The cultural study of music: a critical introduction* (2nd edn, Taylor & Francis Group 2012); Anne G Gilchrist, 'Lambkin: A Study in Evolution' (1932) 1 Journal of the English Folk Dance and Song Society 1.

[75] Ibid.

[76] Szabolcsi (n 74).

[77] Zoltán Kodály, 'Folk Music and Art Music in Hungary' [1963] Tempo 28.

communities (i.e., minorities, colonised).[78] Szabolcsi proposes that 'spread by word of mouth or in a fixed written shape, a final or changing form, individual invention or variation, original or not original position, all these have failed to prove definitive, differential criteria.'[79]

In the legal field, it is argued that the intellectual property system has implemented 'a hierarchy of protection.'[80] Arewa proposes that 'hierarchies of cultures…were factors in determining what was to be protected under national, bilateral, and multilateral intellectual property structures.'[81] Tehranian argues that the law is 'privileging certain forms of cultural content creates a hierarchy of protection', and thus, 'the seemingly neutral laws of copyright' may serve hegemonic interests.[82] However, Arewa analyses the 'hierarchy of culture' in a general manner in the whole intellectual property system, and Tehranian examines the 'hierarchy of protection' in US literature and US copyright law. The dissertation elaborates Arewa's theory in a specific manner in the copyright system, and it applies Tehranian's theory to music and UK and Chinese copyright law.

Moreover, this dissertation combines the two formulas and explores the dynamic interaction between the 'hierarchy of protection' and the 'hierarchy of culture.' In particular, the dissertation emphasises the effects of the 'hierarchy protection' on the 'hierarchy of culture.'

To answer this sub-question, each of the following chapters respectively explores one of these questions: 1) whether and how the originality requirement has influenced the alteration and reinterpretation of classical music and traditional music; 2) whether and how the authorship requirement has influenced the perception of classical music composers and traditional musicians; 3) whether and how the fixation requirement has influenced the

[78] Lawrence Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America*, vol 1986 (Harvard University Press 1990) 128.
[79] Szabolcsi (n 74).
[80] Olufunmilayo Arewa, 'Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property' (Social Science Research Network 2006) SSRN Scholarly Paper ID 596921; John Tehranian, 'Towards a Critical IP Theory: Copyright, Consecration, and Control' [2012] BYU L. Rev. 1237; Anjali Vats and Deidré A Keller, 'Critical Race IP' (2018) 36 Cardozo Arts & Ent. LJ 735.
[81] Arewa, 'Piracy, Biopiracy and Borrowing' (n 80).
[82] Tehranian (n 80).

perception of classical music (regarding a 'museum tradition'[83]) and traditional music (regarding its oral tradition).

Based on the exploration of these four sub-questions, the dissertation answers the main research question. 'Hierarchy' is a term used by the dissertation to indicate a vertical stratification of culture. The dissertation does not use the term 'cultural class' because it usually relates to the social class divide.[84] For example, cultural goods are seen as indicators of social class.[85] In the current research, the vertical stratification of culture is primarily related to the legal treatment of the culture, namely, the 'hierarchy of protection.'

1.3 Methodology

The contexts of analysis are set in the UK and China. There are several reasons supporting this selection. First, there is a comparatively apparent 'hierarchy of culture' between the dominant group and the marginalised communities in these two countries. In the UK, Scottish traditional music was historically regarded as the cultural otherness inferior to the classical music of Anglo-Saxon English.[86] Meanwhile, located within the UK, Scottish people's attitudes can be 'conflict directly with the national legal codes',[87] and the Anglo-Scottish conflict played a role in the historical development of copyright law.[88] The UK also represents the developed country. In China, there is diverse traditional folk music from different marginalised communities, which is seen as distinct from the music of Han Chinese (the main ethnic group in China).[89] In addition, in the early twentieth century, classical music from the Western world was introduced to China by military bands,

[83] Moore (n 64); Talbot (n 64); Strayer (n 64).
[84] Kees van Rees, Jeroen Vermunt and Marc Verboord, 'Cultural Classifications under Discussion Latent Class Analysis of Highbrow and Lowbrow Reading' (1999) 26 Poetics (Amsterdam) 349; Magne Flemmen, Vegard Jarness and Lennart Rosenlund, 'Social Space and Cultural Class Divisions: The Forms of Capital and Contemporary Lifestyle Differentiation' (2018) 69 The British journal of sociology 124.
[85] Cultural divide can come from 'race, religion, income and other dimensions.' See Klaus Desmet and Romain Wacziarg, 'The Cultural Divide' (2021) 131 The Economic journal (London) 2058.
[86] Leith (n 69); John Purser, *Scotland's Music: A History of the Traditional and Classical Music of Scotland from Early Times to the Present Day* (New enl, Mainstream Publishing 2007) <https://go.exlibris.link/n2Nz9pSl> accessed 16 January 2022; McAulay, 'Wynds, Vennels and Dual Carriageways' (n 13) 230–39.
[87] Seeger (n 73) 159.
[88] For example, the well-known 'battle of booksellers' was between London-based publishers and Scottish publishers. See
[89] Alan R Thrasher, 'The Sociology of Chinese Music: An Introduction' (1981) 12 Asian music 17; Alison Tokita, 'The Formation of Modern Musical Identity in Japan, Korea and China through the Art Song' (2017) 14 Nihon Dentoo Ongaku Kenkyuu (Japanese Traditional Music Research) 1.

Christian missions, and mission schools in European colonisation.[90] Therefore, the Chinee context also demonstrates the 'hierarchy of culture' between classical music in the Western world and traditional folk music in China. China also represents a developing country. Although classical music was also introduced to Japan and South Korea,[91] these two are developed countries under the World Trade Organization (WTO) economic designations, presenting different situations from China.

Second, the publishing processes and legal treatments of traditional music present many commonalities in the two contexts. As the dissertation will demonstrate, first, music collectors in the two contexts had processed traditional music in similar manners. Second, the copyright requirements in the two contexts show similarities. Chinese copyright law is heavily influenced by the Berne Convention and Western copyright laws (i.e., UK copyright law).[92] The minimum comparative elements further prove the interplay between the publishing processes and the legal treatments of traditional music.

Third, the two contexts present dynamic timeframes to analyse copyright's repeated and lasting treatment of traditional music. The UK formulated the first modern copyright law in the world. Therefore, the UK context reflects the legal treatment of traditional music at the origin point of the copyright system. While the dissertation focuses on UK copyright law, references are also made to contemporaneous copyright developments in other jurisdictions, especially German idealism. Scotland is not set as an independent jurisdiction because it has no devolved powers to formulate copyright law. Copyright law formulated by the UK parliament has also governed copyright issues in Scotland since the eighteenth century.[93] Chinese copyright law has a very short history. The first Chinese copyright law

[90] Ching-chih and Jingzhi (n 69) 14–17; Hao Huang, 'Why Chinese People Play Western Classical Music: Transcultural Roots of Music Philosophy' (2012) 30 International journal of music education 161.
[91] Mina Yang, 'East Meets West in the Concert Hall: Asians and Classical Music in the Century of Imperialism, Post-Colonialism, and Multiculturalism' (2007) 38 Asian music 1; Tokita (n 89).
[92] Chengsi Zheng, *Copyright Law* (2nd edn, China Renmin University Press 1997) 184; Lin Zhou, 'Several Issues in the Research of Chinese Copyright History' (1999) 6 Intellectual Property 23; Qian Wang, *Intellectual Property Law* (4th edn, China Renmin University Press 2015) 43; Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 16.
[93] Reserved Matters, C4, Part 1, Schedule 5, The Scotland Act (1998) (c. 46); see, for instance, Part V, s. 111, "Regulation of Tweed and Esk Fisheries".

was enforced in 1991, and its newest amendment was enforced in 2021.[94] Therefore, China provides the recent contemporary repercussions to the historical context.

Fourth, music literature reports that the music of Scotland and China was the earliest juxtaposed archetypes of traditional music. Traditional music of the two was believed to share musical heritages passed down from ancient Greek.[95] For example, in 1774, Johann Herder coined the term Volkslied (folk song) with Scottish music as the specific illustration.[96] And nineteenth-century theorists (i.e., Charles Burney) linked traditional music of Scotland and China based on the same pentatonic scales.[97] This belief lasted in the discourse of traditional music from the late eighteenth century (when copyright law started to regulate music) to the mid-twentieth century.[98]

In the UK, the timeframe is set from the 1710s to the 1840s. From the perceptive of law, copyright requirements were significantly developed in this period. The Statute of Anne (the 1710 Act) was the first modern copyright law, and the Copyright Act 1842 is seen as the crystallisation of modern copyright law.[99] From the perspective of music, music

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[94] In China, printing injunctions scatteringly appeared from the Song Dynasty (960-1279), but only a very few books were protected. Printing injunctions did not develop into modern copyright law. The systematic commercial publishing and institutionalised guild monopoly did not exist in traditional Chinese society. During European colonialism in East Asia in the early twentieth century, the Qing Empire (1644-1912) promulgated one copyright law in 1910, but it did not protect musical works. The Republic of China (ROC) issued Copyright Law in 1928, and its 1944 amendment enclosed musical notation as copyright works. These two laws were not implemented in practice for historical and political reasons. See Zhou (n 92). Ken Shao, 'The Promotion of Learning in Chinese History: Discovering the Lost Soul of Modern Copyright' (2010) 24 Columbia journal of Asian law 63. Seung-Hwan Mun, 'Printing Press without Copyright: A Historical Analysis of Printing and Publishing in Song, China' (2013) 6 Chinese journal of communication 1.

[95] Brofsky (n 74). Tomlinson (n 74). McKerrell (n 3) 58. Nathan Jonn Martin, 'Rousseau's Air Chinois' (2021) 18 Eighteenth-century music 41.

[96] Before the term folk song was introduced to the UK in the early nineteenth century, Scottish traditional music was called national music. See William Weber, 'The Intellectual Origins of Musical Canon in Eighteenth-Century England' (1994) 47 Journal of the American Musicological Society 488; Karen McAulay, *Our Ancient National Airs: Scottish Song Collecting from the Enlightenment to the Romantic Era* (Ashgate 2013) 8; Johann Gottfried Herder and Philip V Bohlman, *Song Loves the Masses: Herder on Music and Nationalism* (University of California Press 2017) 1.

[97] Classical or art music generally uses diatonic scales (major and minor scales), and pentatonic scales were regarded as less developed than diatonic scales, thus signifying primitive and uncivilised. For instance, music historian Charles Burney's General History of Music (1789) claimed that pentatonic scales were the infancy of arts. Music publisher George Thomson reiterated this opinion in his Dissertation on the National Melodies of Scotland (1822-23). Pentatonic scales did exist in the traditional music of Scotland and China, but traditional music indeed existed beyond the equal-tempered scale types of classical music. Instead, traditional musicians preferred local or personal temperaments. See Brofsky (n 74); Tomlinson (n 74); McKerrell (n 3) 58; Martin (n 95).

[98] Ibid.

[99] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press 1999) 119.

literature proposes that the categories of folk (or traditional) music and art (or classical) music co-emerged interdependently from the 1760s to the 1840s. [100]

In China, the timeframe is set from the 1950s to the 2000s. From the perspective of law, copyright disputes about traditional music only arose around the 2000s after the enforcement of the first Chinese copyright law. From the perspective of music, the nationwide collection and publication of traditional music were conducted in the 1950s, as explained in detail in the following chapters.[101] Therefore, the timespan displays the publishing processes and legal treatments of traditional music.[102]

The dissertation bases its analysis on legislation, influential cases, and legal and music academic literature. UK legislation and cases are collected from Westlaw UK and LexisLibrary. UK legal and music literature is collected from the library of the University of Glasgow. The records and comments on the historical development of copyright law are collected from Primary Sources on Copyright (1450-1900).[103] Chinese legislation and cases are collected from PKULAW[104] and Chinalawinfo Database.[105] Official English translations of Chinese legislation are collected from English Laws and Regulations database of PKULAW.[106] Chinese legal and music literature is collected from the Chinese National Knowledge Infrastructure (CNKI).[107] The information about Chinese cases and literature is translated by the author.

The dissertation selects music literature that records traditional music publishing in the UK and China and in the specified timeframes outlined above.[108] Music literature that reflects

[100] Gelbart (n 17) 106.
[101] Antoinet Schimmelpennynck and Frank Kouwenhoven, 'Folk Song Collecting in China - a Short Survey' (1988) 3 China information 43.
[102] In addition, the author obtained bachelor and master degrees in China and is currently pursuing a doctoral degree in the UK, so the author is able to analyse Chinese and UK literature.
[103] https://www.copyrighthistory.org/cam/index.php
[104] https://www.pkulaw.net/
[105] https://www.lawinfochina.com/
[106] https://www.pkulaw.com/en
[107] https://www.cnki.net/
[108] The main literature includes the following: David Harker, Fakesong: The Manufacture of British 'folksong' 1700 to the Present Day (Open University Press 1985). John Purser, Scotland's Music: A History of the Traditional and Classical Music of Scotland from Early Times to the Present Day (New enl, Mainstream Publishing 2007). Matthew Gelbart, The Invention of 'Folk Music' and 'Art Music': Emerging Categories from Ossian to Wagner, vol 16 (Cambridge University Press 2007). Simon McKerrell, Focus: Scottish Traditional Music (Routledge 2015). Karen McAulay, Our Ancient National Airs: Scottish Song

Scottish traditional music publishing is adequate. Music literature that records Chinese traditional music publishing is not as adequate, detailed, and systematic as the UK ones, so the dissertation also collects the relative information from legal verdicts.

Several music technical terms referred to in the dissertation need explanation. Traditional music and classical music share the same basic elements, including melody, rhythm, timbre, and form.[109] Melody is the ordered sequence of sounds, varying in pitch and the relative highness or lowness of sound.[110] Melody can be divided into larger or smaller melodic units, such as motifs, subjects, and phrases.[111] Rhythm is the temporal relation of sounds (duration, the relative length of a sound) and the array of strong and weak sounds (loudness, the relative strength of a sound) in a measured time.[112] Timbre, tone colour, or tone quality result from the interactions between pitches, durations, and loudness of sounds.[113] Form or structure is the organisation of a music piece with melodic and rhythmic elements.[114] In addition, classical music also emphasises harmony and tonality. Harmony is the relation of chords and the progression of chords.[115] Tonality is the 'observance of a single tonic key' of a piece of music.[116]

Collecting from the Enlightenment to the Romantic Era (Ashgate 2013). More references are listed in chapters 2, 3, and 4.

[109] Richard Middleton, *Studying Popular Music* (Open University Press 1990) 104–106; Andreas Rahmatian, 'Music and Creativity as Perceived by Copyright Law' (2005) 3 Intellectual Property Quarterly 267; Alfred Blatter, *Revisiting Music Theory: Basic Principles* (2nd edn, Routledge 2016) 1.

[110] Middleton (n 109) 104–106; Rahmatian, 'Music and Creativity as Perceived by Copyright Law' (n 109); Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson (eds), 'Melody', *The Oxford Dictionary of Music* (Oxford University Press 2013) <http://www.oxfordreference.com/view/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-5968> accessed 4 February 2022; Blatter (n 109) 1.

[111] Ibid.

[112] Rahmatian, 'Music and Creativity as Perceived by Copyright Law' (n 109); Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson (eds), 'Rhythm', *The Oxford Dictionary of Music* (Oxford University Press 2013) <http://www.oxfordreference.com/view/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-10316> accessed 4 February 2022; Blatter (n 109) 1.

[113] Blatter (n 109) 1.

[114] Rahmatian, 'Music and Creativity as Perceived by Copyright Law' (n 109); Blatter (n 109) 301.

[115] Andreas Rahmatian 1967, 'Music and Creativity as Perceived by Copyright Law' [2005] Intellectual property quarterly 267.

[116] See 'tonality.' In Kennedy, Joyce, Michael Kennedy, and Tim Rutherford-Johnson, The Oxford Dictionary of Music (Oxford University Press, 2012). https://www-oxfordreference-com.ezproxy.lib.gla.ac.uk/view/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-9155.

1.4 Limitations of the research scope

First, the dissertation analyses secular traditional music rather than sacred traditional music, which is 'being part of sacred traditions or religious ceremonies.'[117] Secular traditional music was more often published, so it is more relative to the research question. Further, the dissertation analyses secular traditional music created in a customary manner: improvisation rather than sophisticated composition and oral expressions rather than musical notations. In modern times, some traditional music may be produced in the way of composition and in notation form, which is not the focus of the current research.

Second, the dissertation does not examine all copyright issues regarding traditional music. Copyright issues can be very different within and out of the community context, as explained above. Within the community context, copyright disputes may involve traditional musicians, fellow musicians, and their communities. These disputes are not related to the research question of the dissertation. Out of the community context, copyright disputes involve traditional musicians, their communities, and outside entities, such as music collectors. These disputes are related to the research question and will be examined.

Third, this dissertation is not arguing that copyright regulation is the sole determinate factor of the problems examined. Instead, as reported in the literature, several influencing factors involved and complicated the role of copyright.[118] Nevertheless, this dissertation cannot analyse every influencing factor. As a law dissertation, it focuses on copyright law.

Fourth, as explained above, it is possible for traditional music to gain some protection under other legal mechanisms. The dissertation cannot analyse every mechanism. The protections for sound recordings, performance, and anonymous unpublished works are analysed and compared to the copyright protection for musical works, while the protections for TCEs and ICH are not examined.

[117] McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' (n 14).
[118] John Butt, 'What Is a "Musical Work"? Reflections on the Origins of the 'Work Concept'in Western Art Music', *Concepts of music and copyright* (Edward Elgar Publishing 2015) 4.

1.5 Dissertation structure

The dissertation has five chapters. In addition to the introduction and concluding chapters, three parallel thematic chapters (Chapters 2, 3,4) respectively discuss the requirements of originality, authorship, and fixation. The main research question and the four sub-questions are explored throughout these thematic chapters. Each chapter is organised in a self-contained manner, and interconnected aspects of other themes are also cross-referenced. The background and processes of traditional music publishing are explained in each chapter, but the contents and focuses are different in line with the question analysed in each chapter.

Chapters 2, 3, and 4 follow the same structure. Part 1 is the introduction of the chapter, which outlines the sub-questions explored in the chapter. Part 2 explains one of the three copyright requirements in UK legislation and cases, primarily focusing on its relation to musical works. Based on this, part 2 analyses whether traditional music can be protected as musical works under the specific requirement.

Part 3 analyses the historical development of the specific copyright requirement. The analysis focuses on the influence of the UK publishing industry, but it also considers the influence of German idealism and some notions of Romanticism. Then, in the same historical context, part 3 examines the copyright requirement's effects on the changes in classical music, such as the view of classical music composers and the centralisation of musical notation.

Part 4 examines the publishing of Scottish traditional music. Specifically, how was traditional music processed in music publishing, what were the legal consequences of these processes, and whether and how the compound of music publishing and copyright law influences the cultural perception of traditional music.

Part 5 and 6 respectively echo parts 2 and 4 and analyse the same questions, but the analysis context is China. Part 7 offers the conclusion of the chapter and answers the main research question.

The concluding chapter (Chapter 5) integrates the main findings and arguments in the thematic chapters and presents a final answer to the main research question. It also explains the research's original contributions, significance and implications, and limitations. It also proposes some suggestions for further studies on the same topic.

2. Making out of originality in the 'finite system' of music: traditional music under the requirement of originality

2.1 Introduction

Music is a 'finite system', as the literature shows.[119] Making out of original expression in such a finite system is not always easy. For example, a simple arrangement of a pre-existing musical expression is likely to be a 'natural outgrowth' of the expression[120] and 'straight application' of music rules.[121] Meanwhile, in the copyright system, works must show requisite originality to attract copyright protection, known as the requirement of originality.[122] Originality 'determines the scope of legal protection.'[123] It deserves to explore whether such a simple arrangement can be determined as 'original' under copyright law and what are the relative consequences of the determination. This chapter explores 1) under formal legal terms, whether a tune of traditional music incorporating pre-existing musical expression can meet the standard of originality; 2) how the notion of originality was interpreted in its historical development; 3) in music publishing, how music collectors arranged traditional tunes, and how copyright law determined the originality issue of the arrangements (or the arranged versions); 4) under the originality requirement, what are the effects of copyright law on traditional music of the marginalised communities.

2.2 explains the originality requirement in UK copyright law and examines whether Scottish traditional music can meet the originality requirement. 2.3 analyses how the notion of originality was interpreted in history. It focuses on music publishers' demands to protect trivially arranged old tunes. This analysis provides a historical root for the law's treatment of traditional music. 2.4 analyses the role of copyright law in the publishing of Scottish traditional music. 2.5 echoes 2.2 and explains the originality requirement in Chinese copyright law, and it examines whether Chinese traditional folk music can meet the originality requirement. 2.6 echoes 2.4 and analyses the role of copyright law in the

[119] Smith (n 70).
[120] Bartók (n 70).
[121] Smith (n 70).
[122] Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' in Mark Perry (ed) (Springer International Publishing 2016) 85.
[123] Agustin Waisman, 'Revisiting Originality' (2009) 31 European intellectual property review 370.

publishing of Chinese traditional folk music. 2.7 compares the UK and China contexts and analyses the effects of copyright law in two aspects: the exploitation of traditional music and the cultural perception or status of traditional music.

2.2 The requirement of originality in UK copyright law and its relation to Scottish traditional music

This part focuses on the UK context and questions whether the requirement of originality is an obstacle for Scottish traditional music to gain copyright protection as musical works. To answer this question, 2.2.1 reviews the originality requirement in UK legislation and cases. Based on this, 2.2.2 examines whether Scottish traditional music can meet the original requirement and thus be protected as musical works under formal legal terms.

2.2.1 The requirement of originality in formal legal terms

2.2.1.1 Originality in international copyright law and UK copyright law

Originality is a requirement that works need to satisfy to attract copyright. At the international level, the Berne Convention is the primary international treaty governing copyright, but it is noted that the Convention does not provide a 'precise statutory definition' of originality but only implicitly mentions originality as 'intellectual creations.'[124] In article 2 (5), the Convention stipulates that 'collections of literary or artistic works…constitute intellectual creations shall be protected…'[125] As a member country of the Berne Union, the originality requirement in UK copyright law needs to comply with the requirement of 'intellectual creations.' This is not a problem for the law as the Convention leaves national laws to determine the precise meaning of 'intellectual creations' and the threshold for works to attract copyright. [126]

[124] Margoni (n 121).
[125] Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, revised 4 May 1896, 13 November 1908, 20 May 1914, 2 June 1928, 26 June 1948, 14 July 1967, 24 July 1971, 28 September 1979). Article 2 (5).
[126] Ricketson and Ginsburg (n 23) 404.

In common law tradition, originality emphasises that the work must 'originate with the author.'[127] This indicates that the author has made substantial investments in making the work, which has a foundation in the labour theory of property of Locke.[128] In civil law traditions, originality emphasises the personal connection between the author and the work.[129] That is, the work reflects the personality of the author, which has a foundation in the personality theory of Hegel.[130] For example, Act on Copyright and Related Rights in Germany stipulates that 'only the author's own intellectual creations constitute works',[131] and Intellectual Property Code in France protects 'a work of the mind' of the author.[132]

Following the common law tradition, in the UK, originality conventionally emphasises that a work originates from the author. That is, it is the product of the author's 'skill, labour and effort, expenses and judgement.'[133] This standard is a lowered one as creativity and aesthetic merits are not concerned.[134] *Walter v. Lane*[135] provided an evident demonstration of this standard. In the case, the court recognised the originality in a verbatim transcription of an oral speech produced by a news reporter as the reporter had exercised his labour in producing the transcription.[136]

In addition, before the end of the Brexit transition period,[137] as a member country of the European Union (EU), UK copyright law must conform to EU copyright law. In EU law harmonisation on originality, the Court of Justice of the European Union (CJEU) defines the standard of originality as the 'author's intellectual creation' through some crucial cases.[138] After *Infopaq v. Danske*, this standard applies to all subject matter under EU

[127] Margoni (n 121).
[128] Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate 1996) 56–64.
[129] Margoni (n 121).
[130] Drahos (n 128) 89–99.
[131] Act on Copyright and Related Rights (adopted 9 September 1965), Section 2.
[132] Intellectual Property Code (adopted 1 July 1992), Article L111-1.
[133] Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 IIC - International Review of Intellectual Property and Competition Law 4.
[134] Stef van Gompel, 'Creativity, Autonomy and Personal Touch. A Critical Appraisal of the CJEU's Originality Test for Copyright', *The work of authorship* (Amsterdam University Press 2014) 95–144.
[135] *Walter v Lane [1899] 2 Ch 749, [1900] AC 539*.
[136] ibid.
[137] The period ended on 31 January 2020.
[138] For example, *Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569*; *Eva-Maria Painer v Standard VerlagsGmbH and Others (Third Chamber) [2011] ECR I-12533*.

copyright law.[139] It is reported that this standard emphasises the qualitative (i.e., creative choices, personal stamp) rather than the quantitative (i.e., labour, skill) aspects of authorial input.[140] Therefore, a work of significant quantitative input without qualitative input can meet the old UK standard but not necessarily the EU standard.[141] In addition, the EU standard is also seen as a compromise between the standards of civil law and common law traditions.[142]

In post-Brexit time, the standard of originality in the UK depends on whether the courts interpret it by the old UK standard or the EU standard, but either is not high to attain.[143] Under the EU standard, creative choices and personal stamps do not require works to be new or novel. Indeed, after *Infopaq v. Danske*, EU cases have recognised works of trivial creative merits as original (i.e., *Eva-Maria Painer v. Standard VerlagsGmbH*[144]). Further, it is proposed that most musical works can meet the relatively higher EU standard.[145]

2.2.1.2 Originality of 'works based on existing works'

The same standard of originality also applies to a new work produced based on other existing works.[146] The new work needs to show some original attributes to attract copyright, and the copyright only covers these newly added original additions.[147] If existing works are copyrighted, the making of the new work generally needs authorisations given by copyright owners of existing works. Otherwise, the new work may cause an infringement on existing works, even though it is recognised as original.[148] In comparison, if existing works are in the public domain, the making of the new work does not need any

[139] Eleonora Rosati, *Originality in EU Copyright: Full Harmonisation through Case Law* (Edward Elgar Publishing 2013) 189–207.
[140] Bently and Sherman (n 36) 102.
[141] Margoni (n 121).
[142] Ana Quintela Ribeiro Neves Ramalho, 'Copyright After Brexit' (2017) 12 Journal of intellectual property law & practice 669; Yin Harn Lee, 'United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020' (2021) 52 IIC - International Review of Intellectual Property and Competition Law 319.
[143] Stef van Gompel and Erlend Lavik, 'Quality, Merit, Aesthetics and Purpose: An Inquiry into EU Copyright Law's Eschewal of Other Criteria than Originality' [2013] Revue Internationale du Droit d'Auteur (RIDA) 100.
[144] *Eva-Maria Painer v Standard VerlagsGmbH and Others (Third Chamber) [2011] ECR I-12533* (n 138).
[145] McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry' (n 71).
[146] These works are referred to as 'derivative works' under the Berne Convention.
[147] Ricketson and Ginsburg (n 23) 424，478.
[148] Bently and others (n 52) 94.

authorisation, but still, the copyright in the new work only covers the original parts rather than the parts in the public domain.

In the field of music, a work produced based on other existing works can be an arrangement of an existing musical composition. Thus, the same standard of originality also applies to the arrangement. *Fisher and Brooker*[149] gives a detailed clarification of this point, which deserves full quotation:

> a musical work is an arrangement of an earlier copyright work does not mean that the arrangement cannot attract a separate copyright. The question is whether by comparison with the original work the arrangement exhibits a sufficient degree of originality, namely the application by its author of skill and labour in its creation (beyond what is involved in reproducing the original work). If it does the arrangement is capable of constituting a separate copyright work. In principle the degree of originality required is no different from what is required in order to establish copyright in any other work (whether a work of sole authorship or one of joint authorship).[150]

In addition, originality is rarely analysed as a stand-alone question of whether a work is original, but it is usually analysed in an infringement lawsuit.[151] Typically, the plaintiff may argue that the defendant unauthorised reproduced, adapted, or performed his existing work, and the defendant may argue that the existing work is not original and protectable, as the following case shows.

2.2.1.3 Sawkins v. Hyperion Records Ltd

Sawkins v. Hyperion Records Ltd[152] is continuously cited as the 'most authoritative decision on the nature of the musical work in the UK',[153] although it is not a recent decision. Thus, its influence will continue in cases of musical works. In this case, Sawkins restored some music compositions of an eighteenth-century music composer, which are in the public domain. The old compositions were unperformable for modern musicians

[149] *Fisher v Brooker [2007] EMLR 9*.
[150] *Fisher v Brooker [2007] EMLR 9* [44].
[151] van Gompel (n 134).
[152] *Sawkins v Hyperion Records Ltd [2005] EWCA Civ 565; [2005] 1 WLR 3281*.
[153] McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' (n 14).

because of old notation methods. Sawkins collected scattered manuscripts of the old compositions, chose the most playable ones, and supplied performing indications to the old compositions. Sawkins' performing editions made the old compositions performable again. Hyperion was a record company which performed and recorded the performing editions without Sawkins's consent. Sawkins thus sued Hyperion for copyright infringement. Sawkins claimed that the performing editions were original musical works of copyright, while Hyperion argued that the editions were merely transcriptions of old compositions.[154]

The Court of Appeal firstly interpreted originality as: 'the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person.'[155] Then, the court confirmed the originality of the performing editions: 'Dr Sawkins originated the performing editions…he used his own substantial and independent effort, skill and time to create them.'[156] Finally, the Court of Appeal held that Hyperion infringed the copyright owned by Sawkins.

There is no doubt that the performing editions contained substantial labour, skill, and judgement but not many personal stamps of Sawkins. This is because they were intentionally made as close as possible to old compositions for the restoration purpose. As the judgement was made before the EU harmonisation on originality in *Infopaq*, personal imprints were not concerned. The editions were recognised as original, and Sawkins gained the right to prevent others from using the editions.[157]

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[154] *Sawkins v Hyperion Records Ltd [2005] EWCA Civ 565* [7]-[13].
[155] *Sawkins v. Hyperion Records Ltd. [2005] EWCA Civ 565* [31].
[156] *Sawkins v Hyperion Records Ltd [2005] EWCA Civ 565* [16].
[157] In a similar French case, *Sawkins v. Harmonia Mundi TGI Nanterre, 1re ch. 19 janvier. 2005: RIDA i/2006*, the Tribunal de Grande Instance de Nanterre also recognised the originality of Sawkins' editions. In this case, Sawkins made corrections, additions, and orchestral parts to Lalande's two compositions. The record label Harmonia Mundi unauthorised used the recording of Sawkin's editions that they made in 1990. The Tribunal held that Harmonia Mundi infringed Sawkins's copyright. The Tribunal also held that Cinemag Bodard (a film company) and the Société française de Production (SFP, a TV company) infringed Sawkins's rights. They produced a film (L'Allée du Roi) and unauthorised used Sawkins's editions made for Harmonia Mundi. As the Tribunal stated, 'in order to be eligible for copyright protection, a work must bear the intellectual and personal stamp of the author's contribution, irrespective of its degree of originality…the defendants have not proven a degree of strict faithfulness of the restored work to [the composer's] intention that would be capable of denying any personal character in the restoration and composition work such that it became a mere act of transcription.' The English translation is quoted from the case comment, 'Sawkins v. Harmonia Mundi' (2006) 37 IIC: International Review of Intellectual Property and Competition Law 116.

As clarified above, Sawkins's copyright covers only the original parts in the editions, the performing indications, while the old compositions are still in the public domain. From the perspective of law, any person can make other editions by adding new performing indications. However, from the perspective of music, the available or possible performing indications are restricted and predefined because they are subject to and serve the underlying compositions.[158] Therefore, other performing indications are very likely to show many similarities to those of Sawkins, and thus, it is possible for other editions to be accused of infringing the current performing editions. It has been noted that such restorative works cause the danger that 'public domain works being effectively brought back into copyright', although the danger should not be overstated.[159] The case nevertheless demonstrates how originality is conventionally determined in the UK.

2.2.2 The relation between the requirement of originality and Scottish traditional music

2.2.2.1 Old tunes and new tunes

As reported in the music literature, Scottish traditional music includes 'orally passed on, or newly composed music using musical materials derived from oral tradition.'[160] Specifically, on the one hand, Scottish traditional music includes old tunes and old musical materials transmitted from the past, such as basic motifs, melodic patterns, rhythmical patterns, motivic contents, and modal characteristics.[161] The reuse of such old materials maintains 'the aesthetic sense of traditionality' and the 'sense of conformity with the past.'[162] As McKerrell points out:

[158] Smith (n 70); William Lockhart, 'Trial by Ear: Legal Attitudes to Keyboard Arrangement in Nineteenth-Century Britain' (2012) 93 Music & letters 191.
[159] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 63.
[160] McKerrell, West, and Taylor & Francis Group (n 21) 9.
[161] Simon McKerrell, *Focus: Scottish Traditional Music* (Routledge 2015) 147, 154.
[162] ibid 154–157.

'there is a class of motifs that is shared across different modes and used as the melodic "building blocks" of oral tradition. It is these motivic "building blocks" that give coherence and a sense of melodic tradition.'[163]

On the other hand, Scottish traditional music also includes new tunes, which are created by reusing and arranging old materials.[164] For example, traditional musicians add ornamentations to basic motifs. As a result, new tunes manifest obvious or subtle changes,[165] informed by 'distinctive performative style', 'particularised vocal styles', 'local or personal temperaments', 'geographical styles', and styles of 'communities of practice.'[166] In contrast, the exact duplication of old materials that occupies a complete tune is rare or practically non-existent.[167]

There exist many co-existing tunes rather than one amalgamated tune.[168] These tunes are likely to present similarities and correspondences.[169] In contrast, if a tune avoids using the old materials and departs too far from the familiar sounds, it loses the unique features of the music tradition. Thus, it may not be accepted by the music tradition.[170]

Further, it is possible for a tune merging old materials and new elements to become a new variation. Kodály argues that 'strictly speaking a new…variation is produced by the lips of the singer on every occasion.'[171] Nicolaisen also notes that folk artists do not make mere imitative repetition but make their personal versions.[172] Szabolcsi proposes that folk music's 'true life' manifests in 'multitudes of variations' with 'ceaseless change.'[173] Glassie emphasises that through 'endless and subtle variability, tradition gains continuity.'[174]

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[163] ibid 156.
[164] ibid 147.
[165] WFH Nicolaisen, *Creativity and Tradition in Folklore: New Directions* (Utah State University Press 1992).
[166] McKerrell (n 3) 24,40,148.
[167] Collinson (n 18).
[168] McKerrell (n 3) 60.
[169] ibid 154–157.
[170] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 124.
[171] Kodály (n 77).
[172] Nicolaisen (n 165).
[173] Szabolcsi (n 74).
[174] Henry Glassie, 'Tradition' (1995) 108 The Journal of American Folklore 395.

2.2.2.2 Is Scottish traditional music original?

It is argued in some literature that traditional music does not meet the originality requirement, so it cannot be protected as musical works.[175] According to this argument, traditional music is transmitted from the past and has expired the term of copyright protection, so it is in the public domain. In addition, traditional music is the creative efforts of a community, so it is impossible to ascertain any original input of an identifiable author.[176] This argument is tenable for those old materials of Scottish traditional music, which were transmitted from the past and merged creative efforts of unidentifiable creators. However, it is not tenable for a tune that combines old materials and new changes or a new arrangement of an old tune.

As explained above, a work produced based on other existing works can be recognised as original.[177] Its originality can be justified by either quantitative (i.e., labour, skill) or qualitative (i.e., creative choices, personal stamp) input of the author,[178] respectively emphasised under the old UK standard and the EU standard. Further, both standards are not high to attain.[179] Therefore, a traditional tune that incorporates old materials and new changes can be original if the new changes show originality, and accordingly, a new arrangement of an old tune can also be original. The new change or arrangement originates from the labour of skill of an identifiable traditional musician. Moreover, it manifests the personal stamp of the traditional musician as it is imprinted with 'distinctive performative style', 'particularised vocal styles', or 'personal temperaments.'[180] Therefore, it could be argued that such a tune or arrangement is original either under the old UK standard or the EU standard.

In summary, traditional music is a 'living tradition' because it is constantly variated and enriched.[181] A traditional tune that incorporates old materials and new changes or a new

[175] Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer' (1997) 30 Conn. L. Rev. 1; Bryan Bachner, 'Facing the Music: Traditional Knowledge and Copyright' (2005) 12 Human Rights Brief 3.
[176] Torsen (n 53). Farley (n 175). Bachner (n 175). Carugno (n 6).
[177] Ricketson and Ginsburg (n 42) 424, 478.
[178] Bently and Sherman (n 36) 102.
[179] Gompel and Lavik (n 143).
[180] McKerrell (n 3) 24,40,148.
[181] Carugno (n 6).

arrangement of an old tune can be an original work of copyright, and the copyright only covers those original parts. Therefore, it is incorrect to say that traditional music is unoriginal. Instead, it could be said that a considerable number of traditional tunes are original in the copyright sense.

2.2.2.3 Roberton v Lewis

As noted in 2.2.1.2, an original arrangement of an existing musical composition can attract a separate copyright, which belongs to the arranger. The separate copyright only covers the arranger's original contributions rather than the underlying composition. Therefore, when the arranger claims that other works infringe on her or his copyright, the arranger must prove that other works have taken the originality in the arrangement (the arranger's original contributions).[182] However, in legal disputes, it is not easy for traditional musicians to claim infringement on their arrangements of traditional tunes. *Roberton v. Lewis* is a representative case in the UK context in the twentieth century regarding this issue.

In *Roberton v. Lewis*, Hugh Roberton, the leader of the Glasgow Orpheus Choir, arranged a song and published it in 1939, which he entitled Westering Home. The song was credited as 'old dance tune arranged by Hugh Stevenson Roberton.' In 1957, an English singer Vera Lynn sang the song Travellin' Home, recorded and released by Harry Lewis (trading as Virginia Music). Roberton's heirs and the music publisher sued Lewis, the songwriter of Travellin' Home, and Lynn for copyright infringement, claiming that Travellin' Home copied a refrain and a verse section in Westering Home without authorisation.[183]

The defendants argued that Travellin' Home was derived from other sources rather than Westering Home. On the defendants' side, the musical expert, Geoffrey Bush, and a solicitor's clerk, Gerald Pointon, managed to find out some traditional Scottish airs similar to Westering Home. They transcribed traditional tunes, Westering Home, and Travellin' Home on the same paper, with Westering Home in the middle. In addition, they transposed these songs into the same musical key to articulate the 'visual similarities' among these

[182] Luke McDonagh, 'Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?' (2012) 4 International Review of Intellectual Property and Competition Law (IIC) 401.
[183] *Roberton v Lewis [1976] RPC 169* [10]-[15].

songs.[184] Further, as the judge could not read musical notations to analyse visual similarities, they also brought recordings and a piano to the court to demonstrate aural similarities between these songs, and Pointon played the songs in the court. Based on these proofs, the defendants sought to prove that Travellin' Home was based on 'non-copyright sources of the musical ideas', and thus did not take originality from Westering Home.[185]

In addition to showing visual and aural similarities, on the defendants' side, some pipers from the band Scots Guards provided testimonies that they knew the refrain and the verse section of Westering Home before its publication in 1939, and Scots Guards played a similar tune in the 1950s.[186] This evidence suggested that a traditional tune close to Westering Home had been exposed to a broad audience, which could be a possible source of Travellin' Home.[187]

The plaintiffs and the defendants agreed that the refrain of Westering Home was similar to the refrains of two old Scottish airs, while the verse section of Westering Home differed from the verses of the two airs. In addition, the refrain of Westering Home is close to a Gaelic song, which has a refrain but not a verse section.[188]

Under the Copyright Act 1956, the Chancery Division refuted the plaintiff's claim of copyright infringement. In the court's opinion, the plaintiffs failed to prove that similarities between the two songs were Roberton's original contributions, and they failed to show that the defendants had made direct or indirect use of Roberton's arrangement. As the court stated, 'there is more than one possible source of knowledge of a tune which is constantly being played and sung, it is very difficult to say that any given person has derived his knowledge of it from one source rather than the other.'[189]

It can be seen that the existence of similar traditional tunes was decisive for the court's final decision. Because the defendants managed to locate traditional tunes similar to Westering Home, the plaintiffs needed to prove that Travellin' Home took originality from

[184] Jose Bellido, 'Popular Music and Copyright Law in the Sixties' (2013) 40 Journal of law and society 570.
[185] ibid.
[186] *Roberton v Lewis [1976] RPC 169* (n 183) [20].
[187] Bellido (n 184).
[188] *Roberton v Lewis [1976] RPC 169* (n 183) [15]-[25].
[189] ibid [30]-[35].

Westering Home and that Westering Home was the source of Travellin' Home. However, this is not easy in the context of traditional music, as analysed below.

A similar judgement appears in the field of popular music in a recent case judged in 2022. In Sheeran v Chokri, Chancery Division also denied copyright infringement based on the ground that the alleged infringed work was not an obvious source of the alleged infringing work. In this case, the defendants, Sami Chokri and others, wrote and released the song Oh Why in 2015. The Claimants, Ed Sheeran and others, released the song Shape of You in 2017. The defendants alleged that the OI phrase in Shape of You copied the OW phrase in Oh Why, based on the two phrases showing similarities. In 2018, the claimants started a lawsuit to seek a declaration that they did not infringe copyright, as the Performing Rights Society Limited suspended payments to them regarding the public performances and broadcasts of Shape of You.[190]

The judge was musically literate and found visual similarities between the two phrases by comparing musical notations. The judge also found aural similarities by hearing the songs' recordings. However, the court refuted that similarities were indicative of coping. As the court explained, the similarities were 'short, simple, commonplace', containing chord progressions that are 'generic and commonplace' in pop music.[191] And the two phrases presented contrasting moods and played different roles in their respective songs.[192] Further, the OW phrase was not original in popular music and thus did not confer originality on Oh Why.[193] In other words, the court did not see such phrases as the original contribution of the defendants. Therefore, the court held that the similarities could not prove that Oh Why is an 'obvious source' of Shape of You, and the defendants did not deliberately or subconsciously copy the OI phrase from the OW phrase.[194]

These judgements show that similarities between two musical works are not necessarily sufficient in claiming the act of copying and copyright infringement. In contrast, it is sometimes necessary to prove that the alleged infringed work is the source of the alleged

[190] *Sheeran v Chokri [2022] EWHC 827 (CH)* [45]
[191] ibid [46]-[48], [157], [206].
[192] ibid.
[193] *Sheeran v Chokri [2022] EWHC 827 (CH)* (n 190) [157], [206].
[194] ibid [203], [206].

infringing work. On the one hand, these judgements prevent copyright owners from monopolising commonly used musical materials and maintain the freedom of creativity.[195] On the other hand, they also pose challenges to traditional musicians. As discussed in 2.2.2.1, traditional tunes generally derive from remaking old materials and arranging old tunes, presenting homology and similarity to existing tunes.

Moreover, it is noteworthy that the above two courts both put importance on aural similarities, evidenced by recordings or live performances of disputed songs, even when the judge could read musical notations and compare visual similarities. In the context of traditional music, many tunes sound similar as they are meant to keep aural similarities to maintain the cultural continuity of the music. Therefore, when many similar and homologous traditional tunes exist, including those in the public domain, outside musicians can always argue that their works derive from other sources, especially those in the public domain. As a result, traditional musicians can find it hard to claim that their original arrangement is the source of alleged infringing works when claiming copyright infringement. As Cornish and McDonagh argued, it is difficult to enforce rights in an arrangement of a traditional tune unless showing a clear case of copying the exact notes.[196]

2.3 Interpreting originality with flexibility: the historical development of the notion of originality

This part analyses the historical development of the notion of originality. McCutcheon proposes that eighteenth-century UK *book publishers* interpreted the originality notion to fulfil two demands: on the one hand, they 'exploited the low legal threshold of originality to publish and copyright…mainly or strictly intertextual works'; on the other hand, they 'prosecuted infringers, pirates, and generous quoters to defend their monopolies on original texts.'[197] This part argues that contemporaneous *music publishers* also manipulated the originality notion to fulfil two demands. 2.3.1 examines how music publishers manipulated 'the low legal threshold of originality' to profit from trivially arranged old tunes. 2.3.2

[195] Hayleigh Bosher, 'Sheeran Succeeds in "Shape of You" Music Copyright Infringement Claim' [2022] Journal of intellectual property law & practice.
[196] Cornish (n 3); McDonagh, 'Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?' (n 182).
[197] Mark A McCutcheon, 'The Cento, Romanticism, and Copyright' (2012) 38 English Studies in Canada 71.

examines how music publishers made use of the originality notion to 'prosecuted infringers, pirates', who published unauthorised adaptations of 'large works' of art music. 2.3.3 analyses copyright law's reaction to these two demands and the relative effects on traditional music and art music.

2.3.1 The protection of trivial arrangements of old tunes of traditional music

2.3.1.1 From privileges to copyright

In the UK, originality conventionally emphasises that a work originates from the author's labour, effort, and skill, which is a lowered standard as creativity is not required.[198] This notion and standard of originality can be traced back to the first copyright law of the UK (and the world), the Statute of Anne (the 1710 Act).[199]

The 1710 Act succeeded the printing privilege system in regulating the market of printed materials. The system had existed since the sixteenth century,[200] which was affirmed by the Licensing Act 1662[201] and declined with the lapse of the Act in 1695.[202] Both the privileges and copyright granted exclusive rights to print and publish books,[203] provided the books were registered at the Stationers' Company.[204] Meanwhile, the 1710 Act had apparent differences compared to the privilege system, and two differences are especially relevant to the notion of originality.

First, the privileges were granted by the Stationers' Company to publishers and thus affirmed the monopoly of the Stationers' Company.[205] In comparison, copyright was

[198] Rahmatian, 'Originality in UK Copyright Law' (n 133).
[199] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[200] Martin Kretschmer and Friedemann Kawohl, 'The History and Philosophy of Copyright' in Lee Marshall and Simon Frith (eds) (Edinburgh University Press 2004).
[201] Liscensing Act, 1662. See Licensing Act, London (1662), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[202] Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity' (1992) 10 Cardozo arts & entertainment law journal 293.
[203] Bently and others (n 60) 22. John Feather, 'From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries' (1992) 10 Cardozo arts & entertainment law journal 455.
[204] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org. Clause 3.
[205] Kretschmer and Kawohl (n 200).

granted to 'Authors and Purchasers' and thus established private ownership of authors.[206] It has been noted that private ownership was legitimised based on the labour theory of property of Locke.[207] According to the theory, if a person mixes his labour with the common good, the resulted product is converted into the 'private domain' of the person.[208] Originality was the notion that divides 'the privately-owned from the commons…among the various parcels in private ownership.'[209] Accordingly, the notion of originality focused on that a work originates from the author rather than creative input, which became a lowered standard.[210]

Second, the privileges could be granted to original works but also previously published works,[211] from which book publishers constantly made profits.[212] In comparison, the term of copyright protection provided by the 1710 Act was limited to fourteen years, which was allowed to be renewed one time if the author of the works still lived.[213] Therefore, publishers could not profit from published works after fourteen or twenty-eight years.[214] They thus turned to print slightly renewed works and utilised the lowered standard of originality to protect these works.[215]

2.3.1.2 The production of slightly renewed works

In the field of literature, publishers produced slightly renewed editions of previously published works in the forms of adaptation, anthology, and compilation.[216] For example, they printed specials, compilations of verses and proses excerpted from old books, and

[206] ibid.
[207] Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) 130–140; Drahos (n 128) 56–64; Kretschmer and Kawohl (n 200).
[208] Kretschmer and Kawohl (n 200).
[209] Jessica Litman, 'The Public Domain' (1990) 39 Emory law journal 965.
[210] Rose (n 207) 130–140; Drahos (n 128) 56–64; Kretschmer and Kawohl (n 200).
[211] Kretschmer and Kawohl (n 200).
[212] Carroll (n 59).
[213] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[214] See Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 Representations 51; Rose (n 207) 67–91; Kretschmer and Kawohl (n 200); Bently and others (n 60) 51.
[215] McCutcheon (n 197).
[216] Simon Stern, 'Copyright, Originality, and the Public Domain in Eighteenth-Century England', *Originality and Intellectual Property in the French and English Enlightenment* (Routledge 2008); McCutcheon (n 197).

anthologies of quotations taken from periodicals.[217] One famous example is Alexander Ross's poem Virgilii Evangelisantis Christiados, which took all verses from prior works.[218]

In the field of music, publishers produced trivial arrangements of 'old tunes.'[219] Printed sheet music was recognised as the subject matter of the 1710 Act from 1777 in the case *Bach v. Longman*.[220] Music production of the time widely used pre-existing materials in the forms of verbatim copying, quotation, borrowing, imitation, emulation, re-composition, and paraphrasing.[221] For example, the representative composer George Frideric Handel's *Israel in Egypt* copied music phrases made by Dionigi Erba, and his *Acis and Galatea* included music phrases made by Reinhard Keiser.[222]

Further, old tunes were packaged in trivial arrangements for publishing. For example, Bela Bartok's music incorporated Hungarian folk music, and Dvorak's symphony quoted the folk song *Swing Low Sweet Chariot*.[223] This common practice manifested in litigations involving music. When Thomas Arne sued Henry Roberts for piracy, Roberts argued that Arne only arranged 'some old Songs.'[224] Similarly, when Isaac Bickerstaff sued Robert Falkener for piracy, Falkener claimed that Bickerstaff did not compose any 'New Tunes or New Music' but arranged 'Old Tunes which had been Used in Common by all persons for many years.'[225] George Bickham was accused of piracy several times, and he also complained that his music was 'pirated, mimicked, imitated and torn to pieces.'[226]

These slightly renewed works were protected by copyright.[227] As Stern pointed out, 'the publication of imitations, anthologies, revisions, and the like proceeded' were not treated

[217] Stern (n 216).
[218] McCutcheon (n 197).
[219] David Hunter, 'Music Copyright in Britain to 1800' (1986) 67 Music & Letters 269; Olufunmilayo B Arewa, 'From JC Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context' (2005) 84 NCL Rev. 547; Stern (n 216).
[220] *Bach v Longman (1777) 2 Cowp 623*. See John Small, 'J. C. Bach Goes to Law' (1985) 126 The Musical Times 526; Ronald J Rabin and Steven Zohn, 'Arne, Handel, Walsh, and Music as Intellectual Property: Two Eighteenth-Century Lawsuits' (1995) 120 Journal of the Royal Musical Association 112; 'Deazley, R. (2008) 'Commentary on Bach v. Longman (1777)', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org'.
[221] Arewa, 'From JC Bach to Hip Hop' (n 219).
[222] Ibid.
[223] Arewa, 'From JC Bach to Hip Hop' (n 219).
[224] Carroll (n 59).
[225] ibid.
[226] Hunter (n 219).
[227] Rose (n 207) 130–140.

as piracy.[228] Therefore, the lowered standard of originality enabled music publishers to profit from trivial arrangements of 'old tunes.' The following case is a representative of this common publishing practice, which demonstrated how the courts interpreted the notion of originality regarding trivially arranged old tunes.

2.3.1.3 Leader v. Purday

The case *Leader v. Purday*[229] involved a folk song *Pestal*. William Bellamy heard the song, transcribed the song, asked his friend C.E. Horne to arrange piano accompaniment for the song for his sake, and sold the arranged song to Leader. Leader then published it in 1845, which credited the song to a dead army officer Colonel Pestal and credited the arrangement to Horne. Another publisher, Thomas Purday, printed and sold another arranged version of *Pestal*, in which Grantham made the piano accompaniment. Purday's version ascribed the song to the dead officer and the arrangement to Grantham. Leader thus sued Purday for unauthorised copied his version of *Pestal*.[230] In this case, the core disputes were whether Leader's version of *Pestal* was original and eligible for copyright and whether the similarities were from unauthorised copying.

Regarding the originality of Leader's version, Purday claimed it was not original and protectable as the folk song had existed for over twenty years.[231] On Purday's side, some members of a military band from London stated that the band had performed the song for many years before Leader's version.[232] Nevertheless, the court recognised the originality of the version. According to the court,

> When Mr. Bellamy first conceived the notion of adapting the air of Pestal […] and of adding an accompaniment, he acquired to himself that which unquestionably might be the subject of copyright […] and the accompaniment was composed, at his suggestion, and for his benefit, by his friend Horne […] therefore, became his property […] To justify a claim of copyright, it is not necessary that there should be entire originality in every part of the

[228] Stern (n 216).
[229] *Leader and Cock v Purday (1849) 7 C B 4*.
[230] *Leader and Cock v Purday (1849) 7 C B 4* [1]-[8].
[231] *Leader and Cock v Purday (1849) 7 C B 4* [4], [5].
[232] *Leader and Cock v Purday (1849) 7 C B 4* [10].

work […] This is very like the common case of improvements in a machine, where the patent is taken out for an improved machine.[233]

This statement clearly demonstrated the conventional notion and standard of originality in the UK. The court emphasised that Leader's version originated from Bellamy. Bellamy first proposed the idea of arranging the folk song and commissioned Horn to make the arrangement. In addition, the standard was lowered as creativity was not concerned.

Then, the dispute arose as to whether Purday infringed Leader's copyright. As the copyright only covered the added arrangements rather than the underlying folk song, infringement would be found if the similarities in the two arrangements were due to unauthorised copying. On Leader's side, two musical experts provided testimonies to verify the copying, based on the same musical errors in the two versions.[234]

Purday argued that his arrangement was made by Grantham rather than copied from Leader's version, and the similarities between the two arrangements were accidental. Moreover, Purday presented another arranged version of *Pestal* made by Jefferies, and the three versions were found to be close to each other by the court.[235] This suggests that the similarities were natural and inevitable because of the restrictions of the laws of harmony.[236] Even the two music experts on Leader's side admitted that 'the laws of harmony would require the composers of both to use pretty much the same notes.' The court let the jury decide, who concluded that the similarities were from copying for unclear reasons.[237] Based on the jury's opinion, the court held that Purday infringed Leader's copyright.

[233] *Leader and Cock v Purday (1849) 7 C B 4* [17]-[19].
[234] *Leader and Cock v Purday (1849) 7 C B 4* [9], [10].
[235] *Leader and Cock v Purday (1849) 7 C B 4* [10], [11].
[236] Nisi Prius, 'COPYRIGHT QUESTION. LEADER AND ANOTHER V. PURDAY.' (1847) 22 The Musical World 742; Lockhart (n 158).
[237] *Leader and Cock v Purday (1849) 7 C B 4* [9]-[14].

2.3.1.4 'Natural outgrowth' of basic tunes and 'straight application' of music rules

From the perspective of music, the arrangement is restricted by the underlying tune and music rules.[238] Regarding the underlying tune, it is emphasised that 'borrowing a tune means being bound by its individual peculiarity', so simple arrangements could be 'merely the natural outgrowth' of basic tunes.[239] It has been noted that 'music is a finite system' with a limited number of tones and scales[240] to which the arrangement must conform. These restrictions only allow a very few feasible arrangements. As Arewa points out,

> The twelve tones of the music scale are combined in musical expression with harmonic and other structures that constrain compositional choices in important ways […] certain harmonic chord progressions are typical […] both construct and anticipate future sequences of notes and harmonic elements.'[241]

Arrangements must conform to music rules when serving the underlying tune,[242] so the available arrangements for a tune are very limited.[243] Therefore, a simple arrangement could be the straight application of music rules rather than 'a level of artistic decisionmaking which evinces originality.'[244] In this situation, if an arrangement is simple and trivial, it is natural, logical, and inevitable for other arrangements of the same tune to show some similarities to the arrangement.[245] As Prius argued,

> tonal melody will always imply tonal harmony, and perhaps even a specific accompaniment style and mood, it is not surprising or worthy of litigation two (very simple) settings of the same melody manifest numerous similarities.[246]

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[238] Prius (n 96); F Meadows White, 'A Concise View of the Law of Copyright as Affecting Composers of Music' (1880) 7 Proceedings of the Musical Association 135. Accessed through https://go.exlibris.link/sYQkpwTr; Béla Bartók, 'The Inflence of Peasant Music on Modern Music' [1950] Tempo (London) 19; Smith (n 31); Lockhart (n 31).
[239] Bartók (n 70).
[240] Smith (n 70).
[241] Olufunmilayo B Arewa, 'A Musical Work Is a Set of Instructions' (2014) 52 Houston law review 467.
[242] Arewa, 'From JC Bach to Hip Hop' (n 219).
[243] Prius (n 236); Smith (n 70).
[244] Smith (n 70).
[245] Prius (n 236); Smith (n 70); Lockhart (n 158).
[246] Prius (n 236). Accessed through https://journalarchives-jisc-ac-uk.ezproxy.lib.gla.ac.uk/media/pdf/bp/1000303/13693/1847/13693_18471120_7546957.pdf

Therefore, it is not easy for copyright law to determine originality in a finite system of music, where an arrangement is restricted and predefined by the basic tune and music rules. In the current case, it has been noted that Leader's version was mediated in the simplest form.[247] The arranged version consisted of two parts. The first part was an instrumental introduction, which is the epitome of the folk song. The second part presented the folk song and supplied it with accompaniments, which were dictated by the laws of harmony. The full version was intentionally made simple to fit the playing skill of amateur piano players.[248] Therefore, it could be said that Leader's version was the 'natural outgrowth' of the underlying folk song and straight application of musical rules. Accordingly, Purday's version was inevitable to show similarities to Leader's version because it was also subject to the same tune and music rules.

Leader v. Purday reflected the common practice of music publishing of the time. As explained above, music publishers produced trivial arrangements of old tunes to make profits.[249] Because originality emphasised that a work originated from the author and was a lowered standard, the trivial arrangement was deemed original and attained copyright protection,[250] even though it was the 'natural outgrowth' of basic tunes[251] and straight application of music rules.[252] Moreover, *Leader v. Purday* anticipated the publishing of Scottish traditional music, where copyright protection of trivial arrangements enabled music publishers to profit from traditional music, as analysed in 2.4.

2.3.2 The prevention of unauthorised adaptation of large works of art music

2.3.2.1 The production of short excerpts of large works of art music

The originality notion was not only utilised to protect trivial arrangements of old tunes of traditional music, but it was also manipulated to prevent unauthorised adaptation of large works of art music, such as symphonies and operas.[253] Around the 1800s, art music was

[247] ibid; Lockhart (n 158).
[248] Prius (n 236); Lockhart (n 158).
[249] Hunter (n 219); Arewa, 'From JC Bach to Hip Hop' (n 219); Stern (n 216).
[250] Ibid.
[251] Bartók (n 70).
[252] Smith (n 70).
[253] Rabin and Zohn (n 220); Ruth Towse, 'Economics of Music Publishing: Copyright and the Market' (2016) 41 Journal of cultural economics 403.

first performed and subsequently printed. This was because publishers had to invest a vast sum of money in printing large works. Performance tested the popularity of a work, by which publishers decided whether to print a work and how many copies would be printed.[254] After the first performance, if a large work showed saleability, the publisher registered the work at the Stationers' Company and then legitimately printed the work. [255]

As the production of large works needed a vast sum of investment, the legitimate publishers set the price above that which many music buyers could afford.[256] In addition, these publishers also produced keyboard arrangements (i.e., piano reductions) of large works and sold them at a comparatively lower price.[257]

At the same time, other publishers excerpted the most popular parts of the large works and adapted the short excerpts into keyboard arrangements, often without the authorisation given by legitimate publishers.[258] Typically, an aria was extracted from an opera and adapted into piano arrangements suitable for home amateur players.[259] Those most popular arias in large works were 'pirated on a massive scale.'[260] For example, Gioachino Antonio Rossini was the most accomplished opera composer of the early nineteenth century, and many arias taken from his operas were unauthorised published in the form of piano arrangements.[261]

The production of the short excerpts required less investment than 'printing a full score of an opera or oratorio',[262] and thus the short excerpts were sold at a low price. The short

[254] Rabin and Zohn (n 220); Carroll (n 59).
[255] Ibid.
[256] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[257] ibid.
[258] Rabin and Zohn (n 220).
[259] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[260] ibid. As Ruth explained, the underlying economic theory is that 'a copier does not take the risk of the work's first publisher because he only copies works that are successful on the market. Therefore, the copier can supply the work at a much lower price than the first publisher, who will not be able to compete and cover his production costs.' See Ruth Towse, 'Copyright and Economics' in Lee Marshall and Simon Frith (eds), *Music and Copyright* (Taylor & Francis Group 2004) 57.
[261] Francesco Teopini Terzetti Casagrande, 'Investigating Nineteenth-Century Transcriptions through History of Opera and Music Publishing' (2019) 8 Malaysian Journal of Music 19.
[262] Towse, 'Copyright and Music Publishing in the UK' (n 35).

excerpts became popular and saleable among music buyers, who could afford this kind of product and select to buy their favourite excerpts. As Mangsen specified,

Keyboard or chamber arrangements of larger works served as the primary means by which music lovers could acquaint themselves with or reexperience the opera arias, string quartets, and symphonies they could otherwise heard only when larger or more appropriate forces were available.'[263]

As the keyboard arrangements of short excerpts were sold and diffused more easily,[264] the 'pirates' carved up the profits of legitimate publishers, who thus demanded to prevent the unauthorised adaptation of large works of art music.

However, as explained above, following the labour theory of property, originality was a lowered standard based on which trivial arrangements of old tunes could be recognised as original and protected by copyright.[265] If the same notion and standard of originality were applied to short excerpts of art music, they would be recognised as original rather than piracy. To prevent unauthorised adaptation, the court drew aesthetic discourses to interpret originality, as the following case demonstrates.[266]

2.3.2.2 Interpreting originality 'borrowing' aesthetic discourses

When the case regarding unauthorised adaptation was brought to the court, the dominant aesthetics in the UK was Romanticism.[267] Romanticism can be understood by comparing another aesthetics, Classicism, which prevailed in the UK until Romanticism crystallised around the 1800s. According to Classicism, works came from manipulating predefined

[263] Sandra Mangsen, *Songs without Words: Keyboard Arrangements of Vocal Music in England, 1560-1760*, vol 133; (University of Rochester Press 2016) 1–6. And as Moore points out, 'scores and written arrangements for the piano were imperative to the dissemination of elite music among a broader audience…Sheet music became a means of learning aristocratic music for those who had no exposure to it in its original context.' See Moore (n 64).
[264] Peter Szendy, Jean-Luc Nancy and Charlotte Mandell, *Listen: A History of Our Ears* (Fordham University Press 2008) 45.
[265] Rose (n 207) 130–140.
[266] Jane C Ginsburg, 'Opera and Copyright' (*The Media Institute*) <https://www.mediainstitute.org/2013/08/13/opera-and-copyright/> accessed 16 January 2022.
[267] Romanticism was a literary and artistic movement in England (1780s-1830s), Germany (1790-1830), France (1800-1843), Italy (1816-1850), and Spain (1830-1845). It dominated the aesthetics of cultural creativity from 1800 onwards. Artistic here is in a broader sense, including music. See Lilian R Furst, 'Further Discriminations of Romanticism' (1975) 3 Neohelicon (Budapest) 9.

rules (i.e., literature rhetoric, music grammars) on existing materials.[268] In comparison, Romanticism considered works as original expressions of authors, whereas the use of existing materials was criticised as 'mechanic' and inferior.[269] As reported in the literature, Edward Young praised original expressions as genius while criticised imitation as mechanics. He justified the idea by the famous organic metaphor, which analogises a work as a vegetable that 'rises spontaneously from the vital root of genius.'[270] William Wordsworth proposed that original works were something new, and 'genius is the introduction of a new element into the intellectual universe.'[271]

It can be seen that under Romanticism, originality indicates new and creative.[272] This idea of originality did not necessarily reflect the creation of art music, which showed likenesses to or contained existing compositions. As Szabolcsi proposes, 'even the greatest masters are also mere imitations, often scarcely differing from the compositions of their predecessors. Their originality, individual tones develop only step by step.'[273] Nevertheless, these aesthetic discourses were borrowed in legal judgements, as the following case shows.

2.3.2.3 D'Almaine v. Boosey

In *d'Almaine v Boosey*,[274] Daniel Auber composed the opera *Lestocq* and sold it to a music publisher, d'Almaine. D'Almaine registered the opera at the Stationers' Company and printed the whole opera. Another music publisher, Boosey, extracted some arias from the opera and commissioned Philipe Musard to adapt them into dance music, entitled *57th Set of Quadrilles, 58th Set of Quadrilles,* and *42nd Set of Waltzes*. Boosey published and sold

[268] Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 Eighteenth-century studies 425.
[269] Giancarlo F Frosio, 'A History of Aesthetics from Homer to Digital Mash-Ups: Cumulative Creativity and the Demise of Copyright Exclusivity' (2015) 9 Law and humanities 262.
[270] Woodmansee (n 268); Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship' (1991) 2 Duke law journal 455.
[271] Ibid.
[272] Carys J Craig, 'Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self' in Irene Calboli and Srividhya Ragavan (eds), *Diversity with Intellectual Property Law* (Cambridge University Press 2015).
[273] Szabolcsi (n 74).
[274] *D'Almaine v Boosey (1835) 1 Y&C 288*.

the dance music without the authorisation of d'Almaine. D'Almaine thus filed a bill against Boosey and sought an injunction.[275]

On *d'Almaine*'s side, an expert affidavit clarified the similarities between the opera and the dance music. According to the affidavit, in the *57th Set of Quadrilles*, the quadrilles were similar to the *melodies* of the operatic arias, 'with some variations in certain bars.'[276] In the *58th Set of Quadrilles*, those quadrilles were 'founded on, though much varied from' the arias, and 'there were sixteen bars which were not in the original air.'[277] This affidavit was used to prove the infringement. However, it demonstrated that the dance music made significant adaptations to the operatic arias. The similarities between the operatic arias and dance music were only found in *melodies*, and the dance music added new accompaniments, variations, and bars to the arias.

On Boosey's side, these significant adaptations were especially emphasised. Boosey argued that 'a very considerable degree of musical skill and talent is necessary to make the dance adaptation, especially manifested in those 'necessary breaks and portions of melody' designed for dance.[278] One judge also stated that 'there is considerable exercise of mind in these adaptations, independently of what is derived from the original composition.'[279]

Following the conventional notion and standard of originality, a work would be original if it originated from the author. Had the court interpreted originality by this approach, the dance music would be recognised as original, based on the significant adaptations. However, the court interpreted originality with aesthetic discourses. The court held:

> The mere adaptation of the aria, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject […] The original aria requires the aid of genius for its construction, but a mere

[275] *D'Almaine v Boosey (1835) 1 Y&C 288* [3]-[7].
[276] *D'Almaine v Boosey (1835) 1 Y&C 288* [8].
[277] *D'Almaine v Boosey (1835) 1 Y&C 288* [8].
[278] *D'Almaine v Boosey (1835) 1 Y&C 288* [11], [12].
[279] To counter the accusation of infringement, Boosey also applied the fair abridgement doctrine set in Gyles v Wilcox (1740) 26 ER 489. The doctrine indicates that real and fair abridgement shows the author's invention, learning, and judgement, thus was not copyright infringement, but this argument was not adopted by the court See *D'Almaine v Boosey (1835) 1 Y&C 288* [16].

mechanic in music can make the adaptation or accompaniment […] The adding variations makes no difference in the principle.[280]

Here, the court borrowed aesthetic discourses to interpret originality: 'genius' justified the originality of the operatic arias and 'mechanic' indicated the opposite attribute of the dance adaptations.[281] Moreover, the court's aesthetic assessment of music also manifested in its statement that the opera 'is intended for the higher purposes of music, while that of the defendant is adapted entirely and exclusively for dancing.'[282] In addition, to prove the dance music was not a competitive product of the opera, Boosey also argued that the dance music composer 'possess an inferior degree of talent to the original composer of the opera, who, from his superior talent, would not occupy his time or attention upon such a subject.'[283]

Bently proposes that the legal judgement made itself more convincing by bridging the legal understanding of culture and the dominant aesthetic understanding of culture.[284] As a result of this interpretation of originality, the court prevented the unauthorised adaptation of large works of art music. It is worth noting that the borrowing of aesthetic discourses does not mean that Romanticism had a causal force on copyright law.[285] *Leader v. Purday* was judged after *d'Almaine v Boosey*, but originality was interpreted by the labour theory of property. Therefore, it could be said that borrowing aesthetic discourses was a temporary workaround to interpret originality.

2.3.3 Summary: the result of the flexible interpretation of originality

When comparing the two cases, it is apparent that originality was interpreted with flexibility through two approaches: the labour theory of property in *Leader v. Purday* and the Romantic idea of originality in *d'Almaine v. Boosey.*

[280] *D'Almaine v Boosey (1835) 1 Y&C 288* [24].
[281] Anne Barron, 'Copyright Law's Musical Work' (2006) 15 Social & legal studies 101.
[282] *D'Almaine v Boosey (1835) 1 Y&C 288* [16].
[283] *D'Almaine v Boosey (1835) 1 Y&C 288* [11].
[284] Lionel Bently, 'Authorship of Popular Music in UK Copyright Law' (2009) 12 Information, communication & society 179.
[285] Barron, 'Copyright Law's Musical Work' (n 281).

In *Leader v. Purday*, the judgement would be different if the court interpreted originality with the Romantic idea. As explained above, Romanticism regarded originality as new and creative and the use of existing materials as unoriginal. The arrangement in Leader's version was very simple and trivial, which could be seen as the 'natural outgrowth' of the basic tune[286] and 'straight application' of musical rules,[287] and thus, it would be determined as unoriginal.

In *d'Almaine v. Boosey*, the result would also be different if the court interpreted originality with the labour theory of property. The theory emphasised that a work originates from the author, in line with which originality was a lowered standard.[288] The dance adaptations were the product of Boosey's labour, effort, skill, and judgement, and thus, they would be recognised as original.

The flexibility reveals that legal decisions could be implicated by music genres. *D'Almaine v. Boosey* shows that the law implicitly privileged art music. The court praised the opera as a work made by 'the aid of genius' and 'for the higher purposes of music.' Indeed, art music constituted a vital strand of Romanticism. [289] For example, Ernst Amadeus Hoffman saw it as the most romantic among all arts, and Georg Friedrich Hegel regarded it as one essential approach to achieving Romanticism.[290] In this sense, it is not unexpected that the court drew Romantic aesthetic discourses to prevent the unauthorised adaptation of art music. In turn, the case protected art music from arbitrary adaptation and thus safeguarded it as sacred, inviolable high culture.

Originality was introduced in the Copyright Act 1842 as a threshold criterion of merit, and unauthorised adaptations (and performance) of musical works became illegal in codified

[286] Bartók (n 70).
[287] Smith (n 70).
[288] Rose (n 207) 130–140.
[289] Matthew David, 'Romanticism, Creativity and Copyright: Visions and Nightmares' (2006) 9 European Journal of Social Theory 425. Woodmansee (n 268).
[290] Steven Cassedy, 'Beethoven the Romantic: How E.T.A. Hoffman Got It Right' (2010) 71 Journal of the history of ideas 1.

legal terms.[291] Since then, copyright owners of protected musical works could prevent others from adapting (and performing) the musical works.

In summary, to protect trivial arrangements of old tunes, originality was interpreted when emphasising that a work originated from the author, by which music publishers managed to profit from old tunes. Meanwhile, to prevent the unauthorised adaptation of large works of art music, originality was temporarily explained when borrowing aesthetic discourses, by which music publishers managed to secure their profits in producing art music.

The historical development of the originality notion provides a historical root for the lasting legal treatment of traditional music. The following part analyses the publishing of Scottish traditional music, in which music publishers profited from the music by producing trivial arrangements and justifying their copyright with the originality notion.

2.4 The publishing of traditional music in the UK

This part analyses the publishing of traditional music in the UK. 2.4.1 presents the background and overview of music publishing, focusing on the arrangement process. It explains why Scottish traditional music was mediated in the simplest manner by music collectors. 2.4.2 examines how music collectors processed traditional music with some influential publications as examples. From the perspective of originality, 2.4.3 analyses the effects on traditional music of the compound of legal treatment and publishing practice.

2.4.1 The publishing processes

2.4.1.1 Background

The mid-eighteenth century was an important point in UK music publishing, from when the rising middle class gained surplus incomes and leisure time to participate in musical activities.[292] They bought printed sheet music for home entertainment and thus underpinned

[291] Copyright Act 1842. See Copyright Act, London (1842), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[292] Hunter (n 219).

a massive market.[293] The interests of music buyers and music publishers coincided. For buyers, printed sheet music was the most convenient product for home music consumption.[294] For publishers, printed sheet music was the most significant product for making profits.[295] Classical or art music, such as arias of operas and segments of symphonies, was adapted into piano arrangements and produced as sheet music (as the case of *d'Almaine v. Boosey*).

Further, Scottish traditional music, typically folk songs, was also adapted into piano arrangements and produced as sheet music (as the case of *Leader v. Purday*). Music publishers and collectors (hereafter collectors) utilised Scottish traditional music because it supplied the familiar classical inventory with fresh elements and thus increased sales of printed sheet music.[296] The convergent interests provided a social basis for the publishing of Scottish traditional music.

Music collectors solicited Scottish traditional music from traditional musicians and local populaces (hereafter traditional musicians).[297] In the collection process, a traditional musician sang or played a tune, and collectors transcribed the tune in a written musical notation. As explained in 2.2.2.1, Scottish traditional musicians created new tunes by adding new elements to old materials and arranging old tunes. As a result, there existed many co-existing tunes rather than one amalgamated tune,[298] while publishers selected and transcribed one or two variations. As the famous traditional musician, Carson proposed, 'variation is a principle of traditional music. The same tune is never the same tune twice. A traditional tune printed in a book is not the tune; it is a description of one of its many possible shapes.[299]

[293] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[294] Moore (n 64).
[295] John Storey, *Inventing Popular Culture: From Folklore to Globalization* (Blackweel Publishing 2003) 6.
[296] Leith (n 69).
[297] Cornish (n 3).
[298] McKerrell (n 3) 60.
[299] Ciaran Carson, *Irish Traditional Music* (Appletree Press 1999) 7–8.

2.4.1.2 The making of simple arrangements

Following the collection process, collectors commissioned classical music composers to arrange the collected music. As a general practice, composers added instrumental accompaniments (and sometimes preludes, interludes, and postludes) to vocal lines, even though folk songs were usually sung without accompaniments.[300] The resulting arranged versions thus consisted of traditional tunes and instrumental accompaniments.

Furthermore, it is noted that the overall principle of arrangement was packaging 'authentic' melodies in the simplest arrangements. For example, musician William Tytler proposed that the golden standard of arranging Scottish traditional music was 'plain', 'thin', and 'unnoisy', while complicated arrangements would destroy the authenticity of the melodies.[301] Contemporaneous music critic John Leyden observed that the arrangements were intentionally mediated in the simplest form.[302]

Three reasons accounted for this. First, publishers were very concerned about the sales and marketability of arranged versions, especially whether the instrumental accompaniments were playable for home music amateurs.[303] Simple arrangements suited the playing skills of home players and thus secured the sales of the arranged versions.[304] Second, publishers intended to present a stereotyped image of Scottish traditional music. As explained in chapter 1, although located within the UK, Scotland was historically regarded as an internal cultural otherness, whose music was primitive and uncultivated.[305] Publishers emphasised the simplicity and thus primitiveness to prove the authenticity of traditional melodies in their music products.[306] Third, as analysed in 2.3.1, arrangements were restricted and predefined by basic tunes and musical rules. This was verified by the fact that composers living in different decades made similar arrangements, as shown below.

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[300] Leith (n 69) 188–203.
[301] McAulay, *Our Ancient National Airs* (n 3) 63.
[302] Ibid.
[303] McKerrell (n 3) 59.
[304] Peter Holman, 'Eighteenth-Century English Music: Past, Present, Future' in D Wyn Jones (ed), *Music in Eighteenth-century Britain* (Ashgate 2000) 1–13.
[305] McKerrell (n 3) 149.
[306] David Harker, *Fakesong: The Manufacture of British 'folksong' 1700 to the Present Day* (Open University Press 1985) 11.

The next part examines some influential publications of Scottish traditional music from the perceptive of originality.

2.4.2 Influential publications

A considerable number of Scottish traditional tunes was arranged and published between 1777 and 1850. Joseph MacDonald and Patrick MacDonald's *A Collection of Highland Vocal Airs* (1784) supplied vocal melodies with the simplest form of arrangements-bass lines. It is noted that Patrick was unwilling to add accompaniments to melodies at first, but he changed his idea to satisfy sheet music buyers. Arrangements were made simple to fit the playing skills of home music amateurs, and vocal melodies were regularised in equal-bar rhythms that were easy to play.[307]

James Johnson's *The Scots Musical Museum* (1787-1803) only supplied the most straightforward and bland accompaniments for traditional melodies, the bass lines. The first volume was labelled as 'original music embellished with Thorough Basses', and the last volume was marked as 'Scots songs with proper basses.' Johnson's arrangements were found close to MacDonald's.[308] This proved their arrangements were essentially the straight application of music rules.

In George Thomson's *A Select Collection of Original Scotish Airs* (1793-1805, and 1818), Thomson commissioned the most famous classical music composers to arrange Scottish traditional music, including Ludwig van Beethoven, Franz Joseph Haydn, Johann Nepomuk Hummel, and Carl Maria von Weber. Thomson intended to present traditional music in a natural and unaffected way, so composers were requested to make plain arrangements.[309] In correspondence between Thomson and Beethoven, Thomson complained that Beethoven's arrangements were too complicated and requested Beethoven to rewrite simple arrangements.[310]

[307] McAulay, *Our Ancient National Airs* (n 3) 41.
[308] Ibid; Jane Millgate, 'The Early Publication History of Scott's" Minstrelsy of the Scottish Border"' (2000) 94 The Papers of the Bibliographical Society of America 551.
[309] McAulay, *Our Ancient National Airs* (n 3) 80.
[310] Donald W MacArdle, 'Beethoven and George Thomson' (1956) 37 Music & letters 27.

In Alexander Campbell's *Albyn's Anthology,* or *a Select Collection of the Melodies and Vocal Poetry Peculiar to Scotland and the Isles* (1816-1818), Campbell supplied Scottish traditional tunes through bass lines.[311] James Hogg's *Jacobite Relics of Scotland* (1819-1821) presented some traditional melodies without arrangement.[312] Then, Robert Smith's *Scotish Minstrel*: *a Selection from the Vocal Melodies of Scotland* (1821-1824) included some traditional melodies given by Hogg, and Smith rearranged these melodies in simple arrangements.[313]

After the 1830s, arrangements became a little more complicated but still obeyed the overall principle of arrangement.[314] Publications of this period include George Graham's *A Selection of Celtic Melodies* (1830), Finlay Dun and John Thomson's *Vocal Melodies of Scotland* (1836-38), William Dauney's *Ancient Scotish Melodies* (1838), Finlay Dun's *Orain nah-Albain* (1848), George Graham and John Wood's *Songs of Scotland* (1848-1849). It is found that these music collectors made simple arrangements and carefully avoided delicate embellishments, ornamentations, and cadenzas.[315] Because of the intentionally made simplest arrangements, music publishing exaggerated the stereotyped, biased view of published Scottish traditional music, namely, the music was simple and primitive.[316]

2.4.3 Analysis

2.3.1 has explained that books, including music books, were required to be registered at the Stationers' Company before the printing and publishing.[317] There was no prior verification of originality before registration. As a matter of fact, in line with the notion of originality and the judgement of *Leader v. Purday,*[318] the arranged versions of Scottish traditional music would satisfy the originality requirement. This is because those music collectors had

[311] Dunbar (n 69) 51–62.
[312] The book also included some newly composed tunes. See David Baptie, *Musical Scotland, Past and Present: Being a Dictionary of Scottish Musicians from about 1400 till the Present Time, to Which Is Added a Bibliography of Musical Publications Connected with Scotland from 1611* (G Olms 1972) 74.
[313] Ibid.
[314] Purser (n 86).
[315] Millgate (n 308).
[316] McAulay, *Our Ancient National Airs* (n 3) 144.
[317] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org. Clause 3.
[318] *Leader and Cock v. Purday (1849) 7 C. B. 4.* (n 229).

invested labour, effort, and skill in producing the arranged versions. Following registration, music collectors gained copyright, the exclusive rights to print and publish the arranged versions. Further, music collectors also gained exclusive rights to adapt (and perform) the arranged versions following the judgement of *d'Almaine v. Boosey*[319] and the Copyright Act 1842.[320]

The publishing of Scottish traditional music echoed *Leader v. Purday*.[321] The arrangements were also subjected to basic tunes and music rules, and they were also made in the simplest form. When determining originality, the more complicated an arrangement is, the more original it is likely to be. In other words, it is contradictory between making the simplest arrangements and making the works of originality. As explained in 2.3.1, in the 'finite system' of music, 'tonal melody will always imply tonal harmony', so the available arrangements for a tune are very limited.[322] In this sense, it could be said that these simplest arrangements were the 'natural outgrowth' of Scottish traditional tunes and 'straight application' of music rules.[323]

The simplest arrangements packaged traditional music into copyright works-private intellectual property of musical collectors. Copyright protection of the arrangements enabled music collectors to profit from traditional music.[324] There was no indication that traditional musicians and their communities ever initiated lawsuits in the late eighteenth century and early nineteenth century. They largely lacked the legal awareness of copyright protection of traditional music. In addition, compared to music collectors from the dominant background, traditional musicians also lacked the financial ability to file a suit.[325]

[319] *D'Almaine v. Boosey (1835) 1 Y&C 288* (n 274).
[320] Copyright Act 1842. See Copyright Act, London (1842), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[321] *Leader and Cock v. Purday (1849) 7 C. B. 4.* (n 229).
[322] Prius (n 236); Smith (n 70).
[323] Bartók (n 70). Smith (n 70).
[324] In addition, the use of old tunes could also be influenced by copyright of music collectors. As Towse reported, publisher Henry Wall started a private business in 1875 and intentionally registered and bought copyrights of older works (i.e., She Wore a Wreath of Roses). Then, based on copyright law that prescribed fines for unauthorised public performance, Wall sued performers, the 'unsuspecting infringers', and charged them fines. See Towse, 'Copyright and Music Publishing in the UK' (n 35).
[325] Gibson (n 57) 8; Okediji (n 57).

As a result, under the notion and standard of originality, the simplest arrangements of traditional music were deemed original and attained copyright, by which music collectors profited from traditional music. This point is further analysed in 2.7. The next part analyses the effects of copyright law in the Chinese context.

2.5 The requirement of originality in Chinese copyright law and its relation to Chinese traditional folk music

This part focuses on the Chinese context and questions whether the requirement of originality is an obstacle for Chinese traditional folk music to gain copyright protection as musical works. To answer this question, 2.5.1 explains the production of literature and music in the Chinese cultural context. 2.5.2 explains the originality requirement in Chinese legislation and cases: 'independent creation.' Based on this, 2.5.3 analyses whether Chinese traditional folk music can be recognised as original musical works under formal legal terms.

2.5.1 The production of literature and music in the Chinese cultural context

Chinese traditional music includes traditional folk music and traditional literati music ('Chinese classical music').[326] Traditional folk music is further divided into five sub-groups: opera, dance music, folk song, instrumental music, and singing and telling art.[327] China has had a unique cultural context. Before the mid-twentieth century, traditional Chinese society was a hierarchical system consisting of scholar-officials and literate intellectuals, farmers, artisans, and merchants.[328] Scholar-officials and literate intellectuals produced literature and literati music.[329] Farmers, artisans, and merchants produced traditional folk music.

[326] Traditional religious music and traditional royal court music are the other two small groups. Stephen Jones, 'Source and Stream: Early Music and Living Traditions in China' (1996) 24 Early music 374; Edward Ho, 'Aesthetic Considerations in Understanding Chinese Literati Musical Behaviour' (1997) 6 British Journal of Ethnomusicology 35.
[327] Ibid.
[328] Thrasher (n 89); Mun (n 94).
[329] Jing Jia, 'A Comparison of the Origin and Development of Chinese and European Musics' (2015) 11 Canadian Social Science 140.

Scholar-officials and literate intellectuals made cultural productions to fulfil their interests, whereas profits were not considered.[330] They even saw the pursuit of profits as unethical.[331] In addition, they also had the default social responsibility to share their cultural productions in exchange for their highest social strata, which provided them with legal prerogatives (i.e., exemption from military service, civic taxes, and criminal punishments).[332]

Influenced by Confucianism, the production of literature and literati music had the convention of 'learning by copying.'[333] In literature, copying and imitating authoritative works was the standard way of writing,[334] while new creation was made by quoting and re-interpreting authoritative works.[335] For example, in the civil service examinations that recruited officials for governments, nine Confucian classic books were designated as authoritative works, and candidates were requested to copy, imitate, quote, and re-interpret these works.[336]

In literati music, copying music classics was the way to learn the virtues and moralities of the ancient sages.[337] On the contrary, the deviation from music classics was seen as moral corruption and undisciplined behaviour.[338] Literati intellectuals were expected to express their ideas in old forms and styles, while new music creations were not encouraged.[339] As Jia reported, 'the achievement of virtue is the superior goal, the achievement of art, inferior.'[340] As a result, old music classics were continuously refined. In addition, literati music valued the use of external plainness to convey profound internal richness.[341]

[330] Ho (n 326).
[331] Ibid.
[332] John Alan Lehman, 'Intellectual Property Rights and Chinese Tradition Section: Philosophical Foundations' (2006) 69 Journal of business ethics 1.
[333] ibid.
[334] Sanford G Thatcher, 'China's Copyright Dilemma' (2008) 21 Learned publishing 278.
[335] Kwang-tsing Wu, 'Scholarship, Book Production, and Libraries in China (618-1644)' (PhD Thesis, The University of Chicago 1944) 88.
[336] Shao (n 94).
[337] Ho (n 326); Kathleen Higgins, 'Confucius' Opposition to the "New Music"' (2017) 16 Dao : a journal of comparative philosophy 309.
[338] Higgins (n 337).
[339] Thrasher (n 89).
[340] Jia (n 329).
[341] Thrasher (n 89); Jia (n 329).

Therefore, simple rather than complicated musical expressions were praised, which also restricted new creations in literati music.[342]

In a word, tradition and stability were more valued than original creation in the cultural context of 'learning by copying'.[343] Thus, no notion of originality emerged in the Chinese cultural context.

2.5.2 The requirement of originality in formal legal terms

2.5.2.1 Originality as 'independent creation'

As no endogenous originality notion existed in the Chinese cultural context, originality in Chinese copyright law is influenced by international copyright law. As analysed in 2.2.1, the Berne Convention does not give a 'precise statutory definition' of originality but only implicitly mentions originality as 'intellectual creations.'[344] China became a member country of the Berne Union in 1992, right after the first Chinese copyright law took effect, so originality in China also has to comply with 'intellectual creations.' This is not a problem for Chinese copyright law as the Berne Convention leaves member countries to determine what constitutes 'intellectual creations.'[345]

Copyright Law of the People's Republic of China (CLPRC, 1990, 2001, 2010) does not mention originality. Regulations on the Implementation of the Copyright Law of the People's Republic of China (RICLPRC, 2002, 2011, 2013) prescribes to protect 'original intellectual creations', but it does not indicate what constitutes 'original intellectual creations.'[346] CLPRC 2020 stipulates to protect 'ingenious intellectual achievements.' [347] This provision takes 'original intellectual creations' from RICLPRC to CLPRC, and the

[342] Hao Huang and Ramona Sohn Allen, 'Transcultural Aspects of Music: What Did Confucius Say?' (2000) 49 The American Music Teacher 33.
[343] Thrasher (n 89).
[344] Margoni (n 122).
[345] Ricketson and Ginsburg (n 23) 404.
[346] See RICLPRC, 1991, 2002, 2011, 2013. Article 2.
[347] See CLPRC 2020. Article 3.

phrases are the same in the Chinese language and only different in official English translations. Therefore, the law does not make substantial revisions on originality.[348]

'Original intellectual creation' is interpreted as 'independent creation' in Chinese legal practice and academic comments.[349] 'Independent' is interpreted as that a work is produced by the author rather than copied from others, and 'creation' is interpreted as that a work has minimal creativity.[350] For example, Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright interprets originality as 'the expression of the work is completed independently and is creative.' [351] Because of the reference to 'creative', it is sometimes argued that the originality standard in Chinese copyright law is close to the standard in the civil law tradition. However, both CLPRC and RICLPRC do not indicate the standard of originality. [352]

Further, it has been noted that the originality standard is not unified in judicial practice. [353] For example, In *Lego Company v. Guangdong Xiaobailong Animation Toy Industry Co., Ltd* (2013), the Supreme People's Court states:

Originality means that a work is independently completed by the author and shows the author's unique personality and thoughts. Originality is an issue that needs to be judged

[348] Chengshi Liu, 'On the Important Amendment and Positive Influence of the Copyright Law' (2021) 1 Electronics Intellectual Property 4.
[349] Chengsi Zheng, *Copyright Law* (2nd edn, China Renmin University Press 1997) 184; Yufeng Li, 'Copyright Protection in China' in Rohan Kariyawasam (ed), Chinese intellectual property and technology laws (Edward Elgar Publishing 2011) 86. Qian Wang, *Intellecttual Property Law* (4th edn, China Renmin University Press 2015) 28–38.
[350] Ibid.
[351] See The interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright. Supreme People's Court, No. 31 [2002] of Legal Interpretation. https://www.pkulaw.com/chl/7cb5edb75335d1f6bdfb.html?keyword=%E8%91%97%E4%BD%9C%E6%9D%83%20 ; The interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright. Supreme People's Court, No. 19 [2020] of Legal Interpretation. https://www.pkulaw.com/chl/015c74c9e3b16325bdfb.html?keyword=%E8%91%97%E4%BD%9C%E6%9D%83%20. Translated by the author.
[352] Zheng (n 92) 184; Wang (n 92) 28–38.
[353] Zheng (n 92) 184; Wang (n 92) 28–38; Ke Jiang, 'The Flexible "Entrance" and "Exit" Structure of Copyright Law' (2021) 2 Peking University Law Journal 327.

based on specific facts, and there is not a unified standard applying to all works. Different work categories have different standards of originality. [354]

2.5.2.2 Originality of derivative works

For works made based on other existing works-derivative works, CLPRC prescribes,

> where a work is created by adaptation, translation, annotation or arrangement of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adapter translator, annotator or arranger, provided that the copyright in the original work is not infringed upon.[355]

Derivative works need to meet the same standard of originality to attract copyright,[356] and copyright in a derivative work only covers the 'original intellectual creations' of the derivative author.[357]

If other existing work is copyrighted, unless allowed by CLPRC, the making of a derivative work needs the authorisation given by the copyright owner of the existing work.[358] As the above article stipulated, 'the copyright in the original work is not infringed upon.' However, this provision may have no practical effect regarding derivative works made based on traditional folk music.

This is because it is unclear whether traditional folk music and other expressions of folklore (EoF) can be protected by copyright. CLPRC stipulates that a regulation will be issued to protect EoF. The first draft, Regulation for the Copyright Protection of the Works of Folklore (Draft for Solicitation of Comments),[359] was issued in 2014. It grants copyright in EoF to its origin nation, ethnic group, or community. However, the draft was not passed. If traditional folk music is not protectable, the making of derivative work will not infringe

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[354] *Lego Company v Guangdong Xiaobailong Animation Toy Industry Co, Ltd (2013) The Supreme People's Court No 1262*.
[355] See CLPRC 1990, 2001, 2010, Article 12; CLPRC 2020, Article 13.
[356] Zheng (n 92) 184.
[357] Wang (n 92) 43.
[358] Jiang (n 353).
[359] 'Regulation for the Copyright Protection of the Works of Folklore (Draft for Solicitation of Comments)' <http://www.awpub.com/news_info.asp?nid=577> accessed 17 January 2022.

non-extent copyright. In addition, some opinions hold that even if derivative works infringe original works, derivative authors can still exercise copyright against others.[360] The following case demonstrates the notion of originality in Chinese copyright law.

2.5.2.3 Yang Qing v. Li Hao

The case is about some 'translating editions' of ancient Chinese literati music. Qin (a seven-stringed plucked zither) music is a representative of literati music.[361] Unlike staff notations that record melodies and rhythms, conventional qin notations (character notations and symbol notations) only record melodies by describing pitches, fingerings, and string orders. Rhythms are not recorded in notations but are specified and transmitted in oral instructions.[362] From the mid-twentieth century, qin musicians began to translate conventional notations into staff notations.[363] The aim was to preserve the original status of old qin repertoires, so musicians' artistic creativity was not considered.[364] They gained melodies from conventional notations (i.e., *Shen Qi Mi Pu*, 1425) and learned rhythms from older generations in face-to-face teaching. Hence, the resulting translating editions included both melodies and rhythms.[365]

In the current case, *Yang Qing v. Li Hao,*[366] the plaintiff Yang translated some qin repertories from conventional notations into staff notations and published the staff notations in *Guqin for Children Learning* (2009). The defendant Li published another book *Gugin and Chinese culture* (2013), including eleven qin repertories that were included in Yang's book. In 2017, Yang sued Li for copyright infringement.[367]

The core dispute of the case was whether Yang's translating editions were original musical works of copyright. Yang claimed that his editions were original- 'independent creation' because he figured out the most suitable rhythms under the restrictions of melodies. On the

[360] Wang (n 92) 181.
[361] Ho (n 326).
[362] Marc Leman and others, 'Sharing Musical Expression Through Embodied Listening: A Case Study Based on Chinese Guqin Music' (2009) 26 Music perception 263.
[363] Jones (n 326).
[364] ibid.
[365] Fuxi Zha, *Collection of Existing Guqin Scores* (Beijing Music Press 1957) 3–44.
[366] *Yang Qing v Li Hao (2017) Fujian Intermediate People's Court No 3754*.
[367] CLPRC 2001, Article 10.

other side, Li argued that Yang's editions were not original because the rhythms of those repertoires were already specified and stabilised in oral transmission.

For this dispute, the first and second instance courts (Gulou District People's Court, Fuzhou City; Intermediate People's Court, Fuzhou City) referred to the *Chinese Music Dictionary* (People's Music Publishing House, 1984)[368] to explain the process of making translating editions. According to the dictionary, the process is 'playing the music according to the notation. The player must be familiar with the general rules and playing techniques of the music, understand the moods of the music and restore the original appearance of the music.'[369] This explanation indicates that the process is conducted independently but may lack creativity for its restoration purpose. Despite this explanation, the first- and second- instance courts held that Yang's translating editions were original musical works of copyright. According to the courts,

> The process of making translating editions has some creative parts. In general, there are differences between the translating editions and the original notations, influenced by the styles of the performing group to which the player belongs, changes in temperament, and the overall situation of the art. These differences reflect the independent creation of the player. Therefore, the translating editions constitute original works in the copyright sense.[370]

Then, the courts held that Li infringed Yang's copyright. Chinese copyright law determines infringement based on substantial similarity and access.[371] If the alleged infringing work is substantially similar to the alleged infringed work and it is assumed to have access to the infringed work, infringement will be found.[372] In the current case, it was uncontroversial that Li's editions showed substantial similarities with Yang's editions, and Li had access to

[368] Zhong Guo Yin Yue Ci Dian. Translated by the author.
[369] Translated by the author.
[370] *Yang Qing v. Li Hao. (2017) Fujian Intermediate People's Court No. 3754* (n 366).
[371] Handong Wu, 'On the Analysis of Rules of Substantial Similarity and Access in Infringement Judgement' (2015) 8 Law 63.
[372] See CLPRC 1990, Article 22; CLPRC 2001, Article 22 and 23; CLPRC 2010, Article 22 and 23; CLPRC 2020, Article 24 and 25. See Haoning Feng, 'On the Choice of the Standard for Judgement of Substantial Similarity in Copyright Law' (2016) 6 Chinese Copyright 77.

Yang's editions because they were published earlier. Therefore, infringement was confirmed.

This case demonstrates the connotations of independent creation-originality in Chinese copyright law. Firstly, a work is produced by the author, manifesting as that the courts held that Yang independently produced the translating editions. Secondly, a work has minimal creativity, manifesting as that the courts held the making of translating editions has some 'creative parts.' However, the creativity in the translating editions is minimum as the rhythms have already been specified and stabilised in oral transmission. Therefore, it could be said that even though 'creativity' is required to satisfy 'independent creation', it is not a high-to-attain standard.

This case shows some similarities to the UK case *Sawkins v. Hyperion Records Ltd*.[373] In both cases, musicians converted old notations to modern notations, and their purposes were to restore the original status of old notations rather than produce new works. On the other hand, there also exist significant differences. In *Sawkins*, Sawkins's performing editions made old compositions performable again, whereas in the current case, all eleven compositions have been constantly played by contemporaneous qin musicians. The melodies are recorded in old notations, and the rhythms are specified in oral instructions. Therefore, without Yang's translating editions, these compositions are still performable. Nevertheless, although under different standards of originality, the restorative editions were recognised as original musical works. This reflects that the originality standard in Chinese copyright law is not much higher than the standard in UK copyright law.

2.5.3 The relation between the requirement of originality and Chinese traditional folk music

2.5.3.1 Stable aspect and changeable aspect

Chinese traditional folk music is produced by traditional musicians and local populaces (hereafter traditional musicians) in different cultural, ethnic, and geographical

[373] *Sawkins v. Hyperion Records Ltd. [2005] EWCA Civ 565; [2005] 1 WLR 3281* (n 153).

communities,[374] whose style is influenced by the environment, language, and customs of the community.[375] Traditional folk music is the spontaneous creation of traditional musicians who do not conform to professional compositional rules.[376] Therefore, it is noted that Chinese traditional folk music does not include adaptations and arrangements produced by professional composers.[377]

The literature shows that Chinese traditional folk music has a stable aspect and a changeable aspect.[378] Regarding the stable aspect, the music contains some basic patterns or formulas.[379] Typically, a melody is based on and restricted by 'fixed lyrical schemes', so some 'nuclear melodies' are formed.[380] These basic patterns are imprinted with unique features of a certain community and inherited through generations within the community.[381] Regarding the changeable aspect, the basic patterns are constantly evolving in the transmission process.[382] Further, new changes, such as ornaments, decorations, and cadenzas, are extempore taken in according to the personal demands of the singers.[383] In addition, compared to literati music that pursues plain expressions, traditional folk music values improvised variations, which further promotes the making of new changes.[384]

As a result, traditional folk music is not the outcome of mechanical copying, but each tune produced in singing or playing incorporates some new changes.[385] Traditional folk music has many co-existing variations produced by different individual musicians rather than one amalgamated and definitive version.[386] The phenomena of 'same piece, different name', 'same name, different piece', and 'different versions of the same piece' widely exist.[387]

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[374] Chen (n 18).
[375] Thrasher (n 89); Ho Lu-Ting and Han Kuo-huang, 'On Chinese Scales and National Modes' (1982) 14 Asian music 132.
[376] Chen (n 18).
[377] Ibid.
[378] Thrasher (n 89).
[379] Luo Li, *Intellectual Property Protection of Traditional Cultural Expressions: Folklore in China* (Springer 2014) 35-36.
[380] Jones (n 326).
[381] ibid 35-36.
[382] Chen (n 18).
[383] Schimmelpennynck and Kouwenhoven (n 101); Jones (n 326).
[384] Lu-Ting and Kuo-huang (n 375).
[385] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 25–26.
[386] Jones (n 326); Stephen Jones, 'Reading between the Lines: Reflections on the Massive "Anthology of Folk Music of the Chinese Peoples"' (2003) 47 Ethnomusicology 287.
[387] Ibid.

2.2.3.2 Is Chinese traditional folk music original?

It is argued in some literature that Chinese traditional folk music does not meet the originality requirement in Chinese copyright law. For example, it is proposed that music manifestations of folklore are the instruments to record the culture, history, and religion of a community, and traditional artists are expected to respect their community and not arbitrarily add personal creations.[388] Because of the 'faithfulness to the tradition', traditional folk music does not meet the originality requirement.[389]

This opinion is tenable to those basic patterns of traditional folk music, which are faithful to the tradition and unoriginal. The question is whether a traditional tune that combines basic patterns and new changes can be recognised as original in the copyright sense. As explained in 2.5.2, the originality standard is not prescribed in formal legal terms or unified in judicial practice, but it is not high-to-attain.[390] Since the new changes are produced by a traditional musician and may contain minimal creativity, it could be said that such a tune is very likely to be original to attract copyright, and copyright only covers those new changes.

To summarise this section, Chinese traditional folk music is a 'living tradition' because of its changeable aspect.[391] For a traditional tune that combines basic patterns and new changes, if the new changes show originality, the tune should be recognised as original in the copyright sense. Therefore, it could be said that a considerable number of traditional folk tunes are eligible for copyright protection. The following part analyses the publishing of Chinese traditional folk music, focusing on the legal assessment of the originality of traditional tunes and their arrangements.

2.6 The publishing of traditional music in China

This part analyses the publishing of traditional music in China. 2.6.1 presents the background and overview of music publishing. The focus is the arrangement process, but

[388] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 13–14.
[389] ibid 13–14.
[390] Zheng (n 92) 184; Wang (n 92) 28–38; Jiang (n 353).
[391] Jones (n 326).

the collection process is also explained because it is relative to the current analysis. 2.6.2 examines some influential lawsuits. With these specific examples, this section reveals how Chinese copyright law assesses the originality of arrangements and traditional tunes. From the perspective of originality, 2.6.3 analyses the effects on traditional music of the compound of legal treatment and publishing practice.

2.6.1 The publishing processes

2.6.1.1 Background

A nationwide collection of Chinese traditional folk music was conducted in the 1950s in China.[392] It was loosely organised by local cultural bureaux (i.e., town bureau of culture, city bureau of culture, provision bureau of culture) and local branches of the Chinese Musicians' Association and the Central Conservatory of Music of China. [393] The primary purpose was to preserve traditional folk music and encourage new music creation, whereas publishing profits were not concerned. There existed two main processes in publishing: collection and arrangement.[394]

2.6.1.2 The collection process

In the collection process, a traditional musician sang or played a tune, and music collectors transcribed the tune in a written musical notation.[395] As discussed in 2.5.3, in Chinese traditional folk music, each tune produced in singing or playing incorporates some new changes.[396] Consequently, there are many co-existing variations produced by different individual musicians, while music collectors selected and collected one of the tunes.[397]

Music collectors involved in this process usually had very elementary musical knowledge, so they produced standard notations of orally expressed tunes, which kept the 'raw nature'

[392] Schimmelpennynck and Kouwenhoven (n 101); Jones (n 326); Yang Mu, 'Ethnomusicology with Chinese Characteristics?: A Critical Commentary' (2003) 35 Yearbook for traditional music 1.
[393] Ibid.
[394] Schimmelpennynck and Kouwenhoven (n 101).
[395] Jones (n 326).
[396] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 25–26.
[397] Jones (n 326); Jones (n 386).

of traditional tunes 'without artistic polishing.'[398] Thus, these versions were 'honestly recording and reflecting on folklore' and 'hard to distinguish from folklore itself.'[399] In other words, these versions were more like transcriptions of traditional tunes.[400] Then, these transcribed versions were sent to higher-level cultural bureaux to be selected and further processed in the arrangement process.

2.6.1.3 The arrangement process

In the arrangement process, music collectors made 'artistic polishing' to traditional tunes.[401] Some of them were called 'conservatory musicians' because they had professional education in classical music of the Western tradition.[402] They regarded Chinese traditional folk music as primitive, backward, and unscientific.[403] And they believed classical music was advanced, manifesting in its complete music structures and the laws of harmony.[404] To 'improve' traditional folk music, these music collectors arranged Chinese traditional folk music following the rules of classical music.

First, Chinese traditional folk music is monophonic, whose values exist in 'its rich variety of timbre and linear melody' rather than the 'vertical structure of harmonic progressions.'[405] However, these music collectors thought that monophonic music was inferior to accompanied music,[406] so they added basic chordal accompaniments to traditional tunes.[407] Second, Chinese traditional folk music has unique scales, which are beyond the equal-tempered diatonic scales widely used in classical music.[408] In contrast,

[398] Ibid.
[399] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 130.
[400] Helen Rees, 'Environmental Crisis, Culture Loss, and a New Musical Aesthetic: China's "Original Ecology Folksongs" In Theory and Practice' (2016) 60 Ethnomusicology 53.
[401] Ibid.
[402] Jia (n 329).
[403] Mu (n 392).
[404] Yang (n 91).
[405] Mu (n 392).
[406] ibid.
[407] Rees (n 400).
[408] Lu-Ting and Kuo-huang (n 375).

music collectors mediated traditional tunes in diatonic scales.[409] It is noted that the arranged versions came to represent Chinese traditional folk music from the 1950s.[410]

2.6.1.4 The resulting works of the two processes

After the collection and arrangement processes, two versions of the same tune were produced: the transcribed version and the arranged version. These resulting works were scatteringly published in some songbooks or journals, and music collectors were usually credited as adapters or arrangers.[411] As reported in the literature, in the 1950s, these credits indicated that music collectors recorded traditional tunes rather than authorship. In addition, there was no clear conceptual distinction between transcription and adaptation in the 1950s,[412] which makes the situation more complicated.

The co-existence of the two versions triggered copyright lawsuits several decades later. The lawsuits appeared only after the 1990s. Two reasons accounted for this. First, the first Chinese copyright law was enforced in 1991. Hereafter, Chinese musicians begin to know about copyright issues.[413] Second, the socialist market economy was launched in China in 1992. Hereafter, music began to be regarded as intellectual property of economic values, and music publishing started to generate monetary rewards for relevant parties. This also facilitated the lawsuits about traditional folk music.[414]

As the lawsuits appeared only after the 1990s, Chinese copyright law must resolve disputes left over by history. The following section examines three representative lawsuits. In each case, the plaintiff was the music collector who published the transcribed version, and the defendant was the music collector who published the arranged version.

[409] Tokita (n 89).
[410] Rees (n 400).
[411] Rees (n 28).
[412] ibid.
[413] ibid.
[414] ibid.

2.6.2 Influential lawsuits

2.6.2.1 Hami folk song: Khalidan Wufujiang v. Wang Haicheng

The case involved a folk song orally transmitted in the Hami area in northwest China, where Han, Uyghurs, Kazakhs, Hui, and Mongol people live together. Ablikum Abdu first collected the folk song and published it under the name *How Beautiful My Garden Is* in *Rural Singing Materials* (1964). Wang Luobin was a famous Chinese musician who had professional education in classical music at the Music Faculty of Peking Normal University.[415] Wang published the same folk song under the title *Tall Poplar*, in *Luobin's Song Collection* (1983), *In That Distant Place* (1986), and *Dabancheng Girl* (1989).[416]

After Abdu died, her heir Khalidan Wufujiang registered *How Beautiful My Garden Is* at the Music Copyright Society of China in 2002. Wang Luobin's heir Wang Haicheng also registered *Tall Poplar* at the Society in 1996. Wufujiang and Wang thus respectively owned the copyright of *How Beautiful My Garden Is* and *Tall Poplar*. Chinese copyright law has no formality requirement (i.e., registration) following the automatic protection principle prescribed in the Berne Convention. Hence, copyright is automatically attached to the two versions.[417] Nevertheless, registration provides additional evidence for the subsistence of copyright. In registration, copyright bureaux only review formal rather than substantial information of works. For example, the registrant needs to provide manuscripts to show that she or he is the author.[418]

In 2001, Wufujiang sued Wang Haicheng for copyright infringement. According to Wufujiang, Wang Luobin unauthorised reproduced and published *How Beautiful My Garden Is*. In the opposite position, Wang argued that *Tall Poplar* was not the same song

[415] Jingdi Li, 'Politically Influenced Music in Post-Reform China' (PhD Thesis, University of York 2014) 99.
[416] *Wufujiang Halitan v Xinjiang Luobin Cultural Art Development Co, Ltd (2005) Xinjiang Higher People's Court No 2*.
[417] Trial Rules on Voluntary Registration of Works, 1994. See https://chinacopyrightandmedia.wordpress.com/1994/12/31/notice-concerning-distribution-of-the-trial-rules-on-voluntary-registration-of-works/. Article 2.
[418] ibid. Article 8.

as *How Beautiful My Garden Is.* Instead, *Tall Poplar* was independently arranged by Wang Luobin based on a traditional folk song.[419]

The core dispute of the litigation was whether *Tall Poplar* unauthorised reproduced *How Beautiful My Garden Is*. As explained in 2.5.2, the courts in China determine infringement based on substantial similarity and assumed access. In the first instance, Urumqi Intermediate People's Court commissioned Xinjiang Uygur Autonomous Region Art Research Institute to analyse the two songs. The accreditation report showed that the two songs were the same in melodies, rhythms, and structures. Based on this report, the first instance court affirmed substantial similarities between the two songs. In addition, the court found that *How Beautiful My Garden Is* was published earlier, and Wang Luobin was assumed to have access to it. Therefore, the court held that Wang Luobin unauthorised reproduced and adapted *How Beautiful My Garden Is* and caused infringement.[420]

In the second instance, the Higher People's Court of Xinjiang Uygur Autonomous Region commissioned the China Conservatories of Music to make another accreditation report. According to the report, the two songs were the same in melodies, rhythms, and structures and slightly different in ornamentations. Wang's song had more ornamentations than Abdu's song. Furthermore, a folk song was orally transmitted in the Hami area before the two songs were published. The two songs had the same melodies, rhythms, and structures as the folk song, showing as homologous to the Hami folk song. The court accepted this opinion.

The court stated that it was uncertain whether Wang's song was adapted from Abdu's song or the Hami folk song. It was possible that Wang Luobin independently adapted the Hami folk song. Finally, the court held that the two songs were both original works of copyright, and the plaintiff and defendant respectively owned the copyright in the two songs. The court refuted the claim of infringement. [421]

In this case, the transcribed version and the arranged version were found very close to the Hami folk song. As the two accreditation reports showed, the three songs were the same in

[419] *Wufujiang Halidan v. Wang Haicheng (2005) Xinjiang Higher People's Court No 2.* (n 416).
[420] ibid.
[421] ibid.

melodies, rhythms, and structures. In other words, the two music collectors made trivial, minimal original inputs in the two versions. However, the court confirmed the two versions as original works. Although copyright only covers the original additions, the lowered standard of originality enabled the music collectors to profit from traditional folk music.

2.6.2.2 Long Song: Wang Yong v. Zhu Zhengben

Long Song was a traditional folk song orally transmitted in southern areas of Jiangxi Province. Wang Yong first collected *Long Song* in 1959 and entitled it *Farewell Soldiers to Beijing* (hereafter *Farewell*). The song was published in music journals *Song, Jinggang shan Songs Collection*, *Selection of Jiangxi Folk Songs*, and *Fifteen Jiangxi Folk Songs* from 1959. Most journals marked *Farewell* as a Jiangxi folk song, and only two of them credited Wang as the music collector. Zhu Zhengben was a 'conservatory musician', and he published another similar song, *Ten Farewell to the Red Army* (hereafter *Ten Farewell*), in *Song* (1961) and *One Thousand Chinese Famous Songs* (2004). In these journals, Zhu was credited as the music arranger. In 2003, Wang sued Zhu for copyright infringement.[422]

In the first instance, Wang claimed that Zhu unauthorised adapted *Farewell*. According to Wang, one-third of *Ten Farewell* was the same as *Farewell*, while only subtle differences existed in ornamentations and interludes. Further, *Farewell* was published earlier, and Zhu had access to it.

In the opposite position, Zhu argued that *Farewell* was not an original musical work of copyright. Instead, it was merely the transpiration of *Long Song* and incorporated no original input. Then, Zhu argued that *Ten Farewell* was directly adapted from the folk song. To prove this point, Zhu made a detailed comparison between *Ten Farewell* and the folk song and picked out many identical music phrases. Zhu claimed that *Farewell* and *Ten Farewell* were both adapted from the folk song, so the similarities between the two were inevitable. The folk song restricted the development of the melody, the choice of rhythm,

[422] *Wang Yong v Zhu Zhengben (2003) Beijing Haidian District People's Court No 19213*.

and the position of strong and weak accents. Moreover, Zhu emphasised that *Ten Farewell* manifested more creativity because it used the classical music structure, Rondo.[423]

The first instance court, Beijing Haidian District People's Court, compared the folk song and Wang's song. It was found that the two had close melodies, rhythms, tonalities, interludes, and structures. Then, the comparison between Zhu's song and the folk song came to the same conclusion. When comparing the two disputed songs, the court found that they had similar melodies, rhythms, tonalities, and interludes, while the most apparent difference was the structures. That is, Wang's song was of folk music structure, and Zhu's song was of classical music structure.

Despite the fact that the two songs showed many similarities to the folk song, the court confirmed their originality. As for Zhu's song, the court stated that it distinguished from the folk song in the whole style, thus satisfying originality. However, the court did not clarify what the whole style was. As for Wang's song, the court stated that it showed more creativity, manifesting in classical music structure, and thus, it satisfied originality. According to the court,

> The independent creations of the arrangers should be recognised […] Arrangers generally use pre-existing cultural heritage and add their new ideas. The originality of arrangers does not need to manifest in all contents of the entire arranged works.[424]

Then, the court stated that Zhu had access to both Wang's song and the folk song, so it was possible that Zhu independently arranged the folk song. In other words, the similarities between the two songs might not come from unauthorised copying and adapting. Based on this, the first-instance court held that both songs were original musical works and refuted the claim of infringement.[425]

In the second instance, Beijing First Intermediate People's Court compared the folk song and the two songs in dispute. The court found that Wang's song showed original input in five musical bars compared to the folk song. Four of the five bars also appeared in Zhu's

[423] ibid.
[424] ibid.
[425] ibid.

song, but they were not in one musical sentence. Based on this, the court refuted that the similarities between the two songs were from unauthorised copying and adapting. Then, the court found that Zhu's song manifested creativity in its structure, which showed that Zhu might have independently arranged the folk song. Finally, the court confirmed the originality of the two songs and denied infringement.[426] Moreover, the court made a statement about the essence of folk songs. As the court held,

A folk song has a long history and has been inherited, recreated, and developed by many generations of people. No one can exclusively own a folk song […] *Long Song* has many variations. These variations provide different creators with sources and inspirations.[427]

In this case, the transcribed version and the arranged version were found very to be close to the folk song. As revealed in the first instance, the three were the same in melodies, rhythms, tonalities, and interludes, while the difference only existed in styles and structures. This proves that the two music collectors made minimal original inputs, but the court confirmed the originality of their versions. At the same time, the court treated folk songs as 'cultural heritage' and 'sources and inspirations', even though the courts realised the existence of many variations.

2.6.2.3 Shi Wowo: Lin Nana v. He Chaoli

Shi Wowo is a traditional folk song orally transmitted by Zhuang ethnic minority who live in Guangxi Zhuang Autonomous Region. It has a stable pattern in two musical sentences. In 1955, Lin Changchun first collected *Shi Wowo* and produced a song named *Night Falling & Night Falling*. The song was published in *Songs* (1956), *Shanghai Singing* (1961), and *Songs and Sentiment* (1993), in which Lin was credited as an arranger. The song was also published in *Selection of Guangxi Folk Songs* (1980) under the title of *Shi Wowo*, and Lin was credited as a music collector. Lin also published an article *Experience of Arranging Folk Songs* in *Guangxi Literature and Art* (1961). According to the article,

[426] *Wang Yong v Zhu Zhengben (2005) Beijing First Intermediate People's Court No 3447*.
[427] *Wang Yong v. Zhu Zhengben (2003) Beijing Haidian District People's Court No 19213* (n 422).

Shi Wowo had several variations, and Lin collected one variation and produced *Night Falling & Night Falling.*[428]

In 2002, Nanning International Folk Song Art Festival Committee commissioned another musician He Chaoli to produce a new song, *Night Falling*. The song was published in *Nanning Broadcast and Television Newspaper* (2002), *Flying Songs on Earth* (2003), and *Recommended Songs for Guangxi Singers Competition* (2003). In 2007, Lin's heir Lin Nana sued He for unauthorised copying and adapting *Night Falling & Night Falling.*[429]

In the first instance, Nanning Intermediate People's Court compared the folk song and Lin's song. It was found that Lin retained the basic melodies and rhythms of the folk song when he changed the tonality and added some new bars. The court held that Lin's song was more a transcription of the folk song than an original musical work. Then, the court compared the two songs in dispute. It was found that the two were very close in melodies, rhythms, and preludes, and both showed as homologous to the folk song. Accordingly, the court held that the similarities between the two songs might come from the folk song and refuted the claim of infringement.[430]

In the second instance, Lin claimed that the song was an original musical work rather than a transcription of the folk song because Lin changed the tonality and added new bars. Besides, Lin's song and the folk song were indissociable, so He infringed Lin's copyright even though he also referred to the folk song. In the opposition position, He argued that Lin's song was not an original musical work because it only contained minimal changes compared to the folk song. Then, He argued that he had independently adapted the folk song, and the similarities between the two disputed songs were from the folk song, so there was no copyright infringement.

The second-instance court, the Higher People's Court of Guangxi Zhuang Autonomous Region, recognised that Lin changed the tonality of the folk song and added new bars. Based on these changes, the court stated that Lin's song was an original musical work rather than a transcription of the folk song. At this point, the second-instance court

[428] *Lin Nana v He Chaoli (2008) Guangxi Higher People's Court No 18*.
[429] ibid.
[430] ibid.

reversed the judgement in the first instance. Then, the court found many similarities between the two songs in dispute. Nevertheless, the court suspected whether the similarities came from unauthorised copying and adapting or the folk song. Finally, the court held that Lin and He respectively owned the copyright in their songs and refuted the infringement claim.[431] In addition, the court clarified that folk songs are the cultural heritage. According to the court, 'there is a folk song orally transmitted and inherited by the Zhuang people. The song has similar variations in different areas…Works of folklore are the cultural heritage source of all Chinese people.[432]

In this case, the transcribed version and the arranged version were found to be very close to the folk song. As revealed in the first and second instances, the three were the same in melodies, rhythms, and preludes. He proposed that Lin only made a transcription for the orally expressed folk song, and Lin also agreed that the transcribed version and the folk song were dissociable. This shows that music collectors made minimal original inputs in the two versions, but the court confirmed their originality. Further, the court treated traditional folk music as a 'cultural heritage source', despite the court realising the existence of different variations of the folk song.

2.6.3 Analysis

The legal judgements in these representative cases show consistency. Traditional folk tunes and the transcribed and arranged versions were under disparate treatment. On the one hand, the courts treated traditional folk music as the cultural heritage, although the courts realised the existence of different variations. On the other hand, the courts recognised the transcribed and arranged versions as original musical works, although the courts identified minimal original inputs from music collectors.

When considering the historical background of music publishing, the transcribed versions were only standard musical notations of orally expressed traditional tunes, and the arranged versions were mediated in a simple and basic manner. Namely, music collectors only supplied basic chordal accompaniments to traditional tunes and mediated diatonic

[431] ibid.
[432] ibid.

scales for tunes. Therefore, it could be said that these arrangements were the 'natural outgrowth' of traditional tunes[433] and 'straight application' of music rules.[434]

In this sense, it is questionable whether the courts had made the right judgements regarding originality. The originality standard in Chinese copyright law requires minimal creativity.[435] As these arrangements were dictated by basic tunes and music rules, they are unlikely to show minimal creativity. Further, the courts focused on the differences between the versions and traditional folk tunes when deciding on originality. As it was easy for music collectors to make some changes, the differences might be the 'random revision' rather than the necessary 'intellectual labour' of music collectors.[436]

Nevertheless, the transcribed and arranged versions were recognised as original musical works of copyright, and music collectors could profit from traditional folk music. Meanwhile, traditional folk tunes were treated as cultural heritage, indicating they were old, unoriginal music materials.

2.7 Conclusion: the effects of copyright law on traditional music under the requirement of originality

2.7.1 The exploitation of traditional music

Originality is a requirement that works of traditional music must satisfy to gain copyright protection. In the UK, originality can be satisfied by labour, skill, and judgement that the author has exercised in producing a work. In China, originality can be fulfilled by 'independent creation' and minimal creativity. In both jurisdictions, originality is not a high-to-attain standard.

[433] Bartók (n 70).
[434] Smith (n 70).
[435] See The interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright. Supreme People's Court, No. 31 [2002] of Legal Interpretation. https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretation-of-the-supreme-peoples-court-concerning-the-application-of-laws-in-the-trial-of-civil-disputes-over-copyright.pdf.
[436] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 45.

It is argued in some literature that traditional music cannot meet the originality requirement, based on the stereotyped understanding that traditional music is old tunes and old musical materials transmitted from the past and thus expired the term of copyright protection.[437] This chapter has shown that this proposition is only tenable to those old tunes and old musical materials (i.e., basic motifs). However, as a 'living tradition,'[438] traditional music practically subsists in new tunes combining old materials and new changes (i.e., ornamentations, decorations) and new arrangements of old tunes. These new tunes and arrangements are very likely to meet the originality standard. Therefore, in theory, it could be said that a considerable number of traditional tunes can be protected as original musical works. Traditional music should be protected from the exploitation conducted by outside entities - music collectors.

In practice, the close examination of music publishing in this chapter shows that these traditional tunes were not protected by copyright. In both UK and Chinese contexts, music publishing had similar processes. Traditional musicians presented (or, say, performed) their own tunes, and music collectors produced trivially arranged (and transcribed) versions of the tunes. As the arrangements were intentionally made in the simplest form, it could be said that these versions were the 'natural outgrowth' of traditional tunes and 'straight application' of music rules.[439] In other words, they contained minimal (or no) original inputs from music collectors.[440] Furthermore, copyright law also had the same reactions: trivially arranged versions were recognised as original musical works and gained copyright protection. In contrast, traditional tunes were determined as unoriginal.

As a result, music collectors gained copyright and thus could profit from the reproduction, distribution, adaptation, and performance of the arranged versions. In contrast, traditional musicians gained no copyright in their tunes.[441] They also gained no compensation from music publishing and no share of profits arising from the arranged versions. Due to the disparate treatments of the arranged versions and traditional tunes, music publishing

[437] Farley (n 175); Bachner (n 175).
[438] Carugno (n 6).
[439] Bartók (n 70). Smith (n 70).
[440] Smith (n 70).
[441] They may gain performers' rights, but these rights provide much fewer rewards than copyright, as analysed in the following two chapters.

conducted an 'IP-style exploitation'[442] of traditional music. That is, copyright law disguised the exploitation as the legitimate adaptation. The law 'facilitates and ultimately legitimates'[443] the exploitation by judging traditional tunes as unoriginal when recognising arranged versions as original.

This legal treatment of traditional music has a historical root. As analysed in 2.3, originality was interpreted with flexibility in its historical development to serve a specific demand of music publishers: profiting from the trivially arranged versions of old tunes. From the very beginning of copyright law, the originality notion was manipulated to serve the demands of music publishers, who were music collectors in traditional music publishing.

As a far-reaching effect, copyright law has exacerbated broader socio-cultural inequality between the dominant group and the marginalised communities. In judicial practice, on the one hand, by flexibly interpreting the originality requirement, the courts allowed music collectors from the dominant group to usurp the traditional cultural products of the marginalised communities. On the other hand, the claims of traditional musicians from the marginalised communities are delicately rejected for favouring the interests of the dominant group. The law serves the interests of the dominant group at the expense of the welfare of the marginalised communities.

2.7.2 The construction of the 'hierarchy of culture'

As reported in the literature, a 'hierarchy of culture' was constructed in the music sphere by nineteenth-century music theorists in the UK (and Europe).[444] Classical (or art) music of the dominant group was regarded as the 'high culture', whereas traditional (or folk) music of the marginalised communities was regarded as the 'low culture.'[445] Furthermore, it is noted that classical music took on a high cultural status based on a 'museum tradition'

[442] 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (n 11).
[443] Gibson (n 57) 7.
[444] Szabolcsi (n 74); Brofsky (n 74); Becker (n 74); Weber, *The Rise of Musical Classics in Eighteenth-Century England* (n 74); Tomlinson (n 74).
[445] Ibid.

established around the 1800s,[446] featuring musical classics and canons that 'should not be unchanged.'[447]

This chapter argues that copyright law has implemented a 'hierarchy of protection' with the originality requirement, reflecting and reinforcing the 'hierarchy of culture' in the music sphere. Copyright law and musicology provide each other with a comparator.

Copyright law has divided two groups of musical expressions through the flexible interpretation of the originality standard: the original and the unoriginal. When originality was interpreted by the Romantic idea of originality, the adaptation of classical (or art) music was identified as mechanic reproduction, and consequently, it was judged as infringement.[448] When originality was interpreted by the labour theory of property, the arrangement of traditional music was identified as original, and consequently, it was protected by copyright.

Accordingly, the law has implemented a 'hierarchy of protection': the more protected and the less protected. On the one hand, classical music of the dominant groups was more protected. The infringement judgement protected classical music from being altered, adapted, and reinterpreted, thus safeguarding its 'inviolability and canonic status.'[449] As the 'museum tradition' featured musical compositions that 'should not be unchanged',[450] copyright law reinforced this tradition and thus the high cultural status of classical music.

On the other hand, traditional music of the marginalised communities was less protected. Traditional tunes were left open to alteration and reinterpretation without the consent of traditional musicians. Traditional music was relegated to raw musical materials for the making of new cultural products. Thus, it could be argued that copyright law shaped the

[446] As the following two chapters analyse, classical music also owed its high cultural status to the view of classical music composers, which was partly shaped by the authorship notion, and the centralisation of musical notation, which was partly shaped by the protection of printed sheet music. See Jim Samson, 'Analysis in Context' in Nicholas Cook and Mark Everist (eds), *Rethinking Music* (Oxford University Press 2001) 49. Arewa, 'From JC Bach to Hip Hop' (n 219).
[447] See David Gramit, *Cultivating Music: The Aspirations, Interests, and Limits of German Musical Culture, 1770-1848* (Univ of California Press 2002) 231. Lydia Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music* (Revis, Oxford University Press 2007) 151. Arewa, 'From JC Bach to Hip Hop' (n 219).
[448] Barron, 'Copyright Law's Musical Work' (n 281).
[449] Tehranian (n 80).
[450] Gramit (n 447) 231. Goehr (n 447) 151. Arewa, 'From JC Bach to Hip Hop' (n 219).

cultural perception of traditional music. The ‘hierarchy of protection’ thus reinforced the ‘hierarchy of culture.’

In conclusion, with the originality requirement, copyright law facilitated the exploitation of traditional music. Further, the law contributed to the high cultural status of classical music and relegated traditional music as raw musical materials, thus contributing to the ‘hierarchy of culture.’ This chapter examines the effects of copyright law on traditional music with a particular focus on the originality requirement. The following chapter examines the effects of the law, focusing on the authorship requirement.

3. Who creates and who benefits: traditional music under the requirement of authorship

3.1 Introduction

Authorship is an important issue because the author of a work is usually the first owner of copyright in the work.[451] Meanwhile, the literature has reported that the chief beneficiaries of copyright are investors in creativity,[452] while 'musicians have never been the real beneficiaries.'[453] It deserves to examine who are the beneficiaries of traditional music under copyright law and what are the relative consequences. In traditional music publishing, two persons have made contributions: a traditional musician who presented a traditional tune and a music collector (and also a publisher) who converted the tune into a transcribed version.[454] This chapter explores 1) under formal legal terms, whether a traditional musician can qualify as an author (and joint author) of a traditional tune that she or he presents; 2) how the notion of authorship took shape in its historical development, and how it interacted with classical (or art) music; 3) in music publishing, how traditional musicians were acknowledged or credited, and how copyright law reacted to the credits; 4) under the authorship requirement, what are the effects of copyright law on traditional music of the marginalised communities.

3.2 explains the authorship requirement in UK copyright law and examines whether Scottish traditional musicians can qualify as authors and joint authors. 3.3 analyses how the authorship notion took shape in history. It focuses on the question of who were the chief beneficiaries of the rights attached to authorship[455] (copyright or authors' rights). The

[451] Jane C Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 The De Paul law review 1063.
[452] Martin Kretschmer, 'Intellectual Property in Music: A Historical Analysis of Rhetoric and Institutional Practices' (2000) 6 Studies in cultures, organizations and societies 197.
[453] Jason Toynbee, 'Musicians' in Lee Marshall and Simon Frith (eds), *Music and Copyright* (Taylor & Francis Group 2004).
[454] Smith (n 70). As Smith describes: 'Generally, folksongs are published through the efforts of two people, an informer and a collector. The informer is the native source of the song, the one who gives the tune to the collector. The informer is granted no copyright on the melody because he has not fixed it in a tangible form, such as notation or recording. The collector, on the other hand, can usually obtain a copyright. The policy behind this disparity of treatment is to reward the collector for the time and effort expended in searching out and recording a piece.'
[455] Thomas Margoni and Mark Perry, 'Ownership in Complex Authorship: A Comparative Study of Joint Works' (2012) 34 European intellectual property review 22.

section also analyses the role of the authorship notion in shaping the view of classical music composers. This analysis provides a historical explanation for the law's treatment of traditional music. 3.4 analyses the role of copyright law in the publishing of Scottish traditional music. 3.5 echoes 3.2 and explains the authorship requirement in Chinese copyright law. It also examines whether Chinese traditional musicians can qualify as authors and joint authors. 3.6 echoes 3.4 and analyses the role of copyright law in the publishing of Chinese traditional folk music. 3.7 compares the UK and China contexts and reveals the effects of copyright law in two aspects: the exploitation of traditional music and the cultural perception or status of traditional music.

3.2 The requirement of authorship in UK copyright law and its relation to Scottish traditional music

This part focuses on the UK context and questions whether the requirement of authorship is an obstacle for Scottish traditional musicians to gain copyright. To answer this question, 3.2.1 explains the authorship requirement in UK legislation and cases. Based on this, 3.2.2 examines whether Scottish traditional musicians can qualify as authors and joint authors under formal legal terms.

3.2.1 The requirement of authorship in formal legal terms

3.2.1.1 Works of authorship

Authorship is one of the core concepts in the copyright system. However, as the primary international treaty governing copyright, the Berne Convention does not define 'who is an author, or what authorship is.'[456] It only prescribes that authorship shall be identified according to the 'name to appear on the work in the usual manner.[457] Thus, as Ginsburg proposed, the Convention identifies the author as 'whoever says she is.'[458] In the UK, CDPA prescribes, 'where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared

[456] Ginsburg (n 451).
[457] The Berne Convention Paris Act 1971, Article 15 (1). See Ricketson and Ginsburg (n 23) 359.
[458] Ginsburg (n 451).

shall be presumed…to be the author of the work.' [459] Thus, it could be said that UK law also identifies the author as 'whoever says she is.' [460]

In addition, CDPA stipulates that 'author, in relation to a work, means the person who creates it.'[461] This provision defines the author as the 'creator' of a work. As Bently explained, the author of an authorial work (literary, dramatic, musical, and artistic works) is the person who creates the work. In comparison, the author of an entrepreneurial work (i.e., sound recordings, broadcasts) is the person 'who made the work possible.'[462] For example, the law prescribes that the producer of a sound recording is the author.[463] The producer can be understood as 'a legal fiction, which is used to allocate rights.'[464]

In terms of musical expression, the composer of a musical work is usually understood as the author of the work. The arranger of an original arrangement of an existing musical work is understood as the author of the arrangement.[465] In comparison, a performer is understood as the executor of a work or an arrangement.[466] This is premised on the understanding that performance derives from an underlying musical work or arrangement.[467]

In general, the author of a work is the first owner of copyright in the work. CDPA prescribes that 'the author of a work is the first owner of any copyright in it.'[468] By the rights attached to authorship (copyright or authors' rights in common law tradition), the author can control and benefit from the reproduction, distribution, performance, and adaptation of a musical work. Accordingly, the author can prevent others from imitating the work. In practice, authors can constantly profit from copyright royalties.

[459] CDPA 1988, s 104.
[460] Ginsburg (n 451).
[461] CDPA 1988, s 9(1). CDPA 1988 S 154 (1).
[462] Bently and others (n 52) 126.
[463] CDPA S 9.
[464] Bently and others (n 52) 126.
[465] Ananay Aguilar, 'Distributed Ownership in Music: Between Authorship and Performance' (2018) 27 Social & legal studies 776.
[466] ibid.
[467] Olufunmilayo B Arewa, 'Creativity, Improvisation, and Risk: Copyright and Musical Innovation' (2011) 86 The Notre Dame law review 1829.
[468] CDPA S 11.

In comparison, a performer does not have ownership of a musical expression that she or he presents. Performers' rights enable a performer to permit the fixation of a live performance and share some profits arising from selling copies of the fixation form (with the producer of the fixation form). However, a performer cannot prevent others from imitating the performance and making independent fixation of the imitating the performance. In practice, performers are usually paid a flat fee. Because of the distinction between authors' rights (copyright) and performers' rights, musicians identified as authors can benefit more from a musical expression than those identified as performers.

3.2.1.2 Works of joint authorship: Stuart v. Barrett and Beckingham v. Hodgens

UK copyright law protects works of joint authorship. CDPA prescribes that 'a work of joint authorship means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.'[469] According to this article, 'collaboration', 'contribution', and 'not distinct' are key elements for establishing joint authorship.

First, 'collaboration' can manifest as 'common design' (*Godfrey v Lees*; *Hadley v. Kemp*).[470] Second, 'contribution' is required to be 'significant and original' (*Godfrey v. Lees*; *Hadley v. Kemp*).[471] 'Significant' has been explained as 'more than merely trivial', and 'original' is usually fulfilled by 'skill and labour' (*Fisher v. Brooker*), the same standard applied to works in general.[472] Although all contributions must be 'significant and original', they do not need to be 'equal in terms of either quantity, quality or originality (*Godfrey v. Lees*).[473] Meanwhile, joint authors normally own copyright in equal shares if there is no contrast arrangement (*Beckingham v. Hodgens*),[474] but the court may also designate a certain percentage of the share to a joint author. (*Fisher v. Brooker*).[475]

[469] CDPA 1988 S 10 (1).
[470] *Godfrey v Lees [1995] EMLR 307*; *Hadley v Kemp [1999] EMLR 589*.
[471] *Godfrey v. Lees [1995] EMLR 307* (n 470); *Hadley v Kemp [1999] E.M.L.R. 589* (n 470).
[472] *Fisher v Brooker [2007] EMLR 9* (n 71).
[473] *Godfrey v. Lees [1995] EMLR 307* (n 470).
[474] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45*.
[475] *Fisher v Brooker [2007] EMLR 9* (n 71).

Third, case law has explained 'not distinct' as 'heavily dependent on what is there already' (*Beckingham v. Hodgens*).[476] Specifically, if a musical contribution is 'not distinct', it 'would sound odd, and lose meaning' when other parts are stripped off.[477] Bently proposes that 'not distinct' means that 'the contributions must merge to form an integrated whole (rather than a series of distinct works).'[478] Arnold explains it as 'the contribution in question does not stand on its own'; otherwise, 'it is a separate work of different authorship.'[479]

The claim of joint authorship usually appears when a group of musicians perform an existing music piece together. There are two landmark cases. In *Stuart v. Barrett,*[480] Stuart claimed joint authorship of some songs performed by the pop band Keep it Dark, for which he contributed the 'drum part.'[481] Barrett, the songwriter of the band, was credited as the author of the songs.[482] Barrett argued that 'Stuart joined the group as a performer and was not promised any share of copyright profits.'[483]

The songs were recorded in a session when Barrett presented 'bits and pieces' of the songs, and other band members played their instrumental parts, including Stuart's 'drum part.'[484] As the court described:

> Whilst he may have had the original idea, in the sense of an opening phrase or of a series of notes in his head which ultimately provided the theme, the other members of the group themselves made important original contributions to the work […] Someone started to play and the rest joined in and improvised and improved the original idea. The final piece was indeed the product of the joint compositional skills of the members of the group present at the time.'[485]

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[476] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* (n 474).
[477] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 4*
[478] Bently (n 284).
[479] Richard Arnold, 'Reflections on the Triumph of Music: Copyrights and Performers' Rights in Music' [2010] Intellectual property quarterly 153.
[480] *Stuart v Barrett [1994] EMLR 448*.
[481] *Stuart v Barrett [1994] EMLR 448* 460.
[482] *Stuart v Barrett [1994] EMLR 448*.
[483] *Stuart v Barrett [1994] EMLR 448*.
[484] *Stuart v Barrett [1994] EMLR 448* 458-460.
[485] *Stuart v Barrett [1994] EMLR 448* 458.

The High Court held that Stuart 'participated in the creation of the musical composition pursuant to a common design', which fulfilled 'collaboration.'[486] Stuart played 'a significant and creative role in bringing the music of the songs to its final form',[487] which fulfilled 'original and significant contribution.' Based on this, the court recognised Stuart as a joint author of the songs and entitled him the 'copyright as to 25 per cent in the musical works.'[488]

In *Beckingham v. Hodgens*,[489] Valentino claimed joint authorship of the song *Young at Heart* performed by the pop band, the Bluebells, for which he contributed the 'violin part.'[490] Hodgens, the leader of the band, was credited as the author. Hodgens argued that Valentino was a performer rather than a composer of the song. The 'violin part' was created in the band's recording session.[491] As the court described, 'Hodgens gave Mr Valentino an idea of the sort of thing he wanted, by indicating the country style, the underlying chords and the rhythm,' and Valentino played the 'violin part.' [492]

The high court explained 'collaboration' as "joint labouring in the furtherance of a common design,' and 'contribution' as 'not trivial' and 'the right kind of skill and labour.'[493] In addition, the court held that the 'violin part' was 'memorable and catchy', suggesting its 'significant and original.' Based on this, the court confirmed Valentino as a joint author of the song and entitled him 'a share in the royalty income.'[494] In comparison, when he was treated as a performer, the band paid him a flat session fee of only seventy-five pounds.[495]

According to these landmark cases, when a group of musicians perform an existing music piece, the resulting musical expression is possible to be recognised as an original

[486] *Stuart v Barrett [1994] EMLR 448* 460.
[487] *Stuart v Barrett [1994] EMLR 448* 450.
[488] *Stuart v Barrett [1994] EMLR 448* 465.
[489] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* (n 474).
[490] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* [2].
[491] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* [2], [3].
[492] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* [38].
[493] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* [44], [45].
[494] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* [48]-[50].
[495] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* [55].

arrangement of the existing piece, considering the lowered standard of originality.[496] If a musician makes a 'significant and original' contribution to the arrangement, she or he is likely to qualify as a joint author of the arrangement.[497]

3.2.1.3 Works of unknown authorship

In addition to works of authorship and joint authorship, the Berne Convention protects anonymous unpublished works-works of unknown authorship. As article 15 (4) of the Convention prescribes,

> where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union',

The legislative history shows that the article was to protect works of folklore.[498] However, the protection 'shall expire fifty years after the work has been lawfully made available to the public.'[499] In addition, copyright in such works is entitled to a competent authority instead of a community or group that maintains the works. Thus, it is noted that this provision risks depriving the community of control of anonymous unpublished works.[500]

Following this article, CDPA may protect anonymous unpublished works with copyright.[501] However, the grant of copyright is subject to strict conditions. First, the author must be proved as 'a qualifying individual by connection with a country *outside* the United Kingdom.'[502] Second, the country must have appointed a body to 'protect and

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[496] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 70.
[497] An exception is *Hadley v Kemp [1999] EMLR 58*. This case is analysed in the following chapter.
[498] Ricketson and Ginsburg (n 23) 511–14.
[499] Berne Convention for the Protection of Literary and Artistic Works, Stockholm Act (adopted 14 July 1976), Article 7 (3), Article 15 (4).
[500] Girsberger (n 43); 'Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions. WIPO/GRTKF/IC/5/INF/3 ANNEX' (n 43).
[501] CDPA Section 169.
[502] CDPA 1988 S 169. Where in the case of an unpublished literary, dramatic, musical or artistic work of unknown authorship there is evidence that the author (or, in the case of a joint work, any of the authors) was a qualifying individual by connection with a country outside the United Kingdom, it shall be presumed until the contrary is proved that he was such a qualifying individual and that copyright accordingly subsists in the

enforce copyright in such works.' Third, only when 'Her Majesty may by Order in Council' the body can enforce copyright in the UK.

In addition, CDPA prescribes that copyright in a work is not infringed when '(a)it is not possible by reasonable inquiry to ascertain the identity of the author, and (b)it is reasonable to assume—(i) that copyright has expired, or (ii)that the author died [70 years] or more.'[503] According to this provision, if a traditional tune is regarded as from an anonymous author and passed on through many generations, the musician who presents the tune would be identified as a performer instead of an author.

3.2.2 The relation between the requirement of authorship and Scottish traditional musicians

3.2.2.1 Individual origin and collective possession

It is reported that Scottish traditional music features the individual origin and collective possession. In terms of individual origin, a traditional tune is initially from 'the creative impulse of the individual.'[504] Historically and contemporarily, when tunes are subsequently absorbed into the music tradition of a performing community, some lose individual origins, whereas others maintain traceable individual origins through oral transmission.[505] In other words, many Scottish traditional tunes have known authorship.[506] This situation contrasts with English folk songs, whose 'first criterion' is anonymous.[507]

Individual origin can be explained by the creation process of Scottish traditional music. As reported by the literature, it is not that a performing community collectively and directly worked on each traditional tune. In contrast, traditional musicians created multiform

work, subject to the provisions of this Part. (2) If under the law of that country a body is appointed to protect and enforce copyright in such works, Her Majesty may by Order in Council designate that body for the purposes of this section. (3)A body so designated shall be recognised in the United Kingdom as having authority to do in place of the copyright owner anything, other than assign copyright, which it is empowered to do under the law of that country; and it may, in particular, bring proceedings in its own name.
[503] CDPA 1988 Section 57.
[504] Karpeles (n 16).
[505] Ibid.
[506] Collinson (n 18).
[507] ibid.

'individual variations',[508] so there exist many co-existing variations.[509] Every variation intricately merges individual creativity and collective creativity.[510]

In terms of collective possession, most Scottish traditional musicians hold the commitment that traditional music is a 'collective possession' rather than an 'individual possession.'[511] Thus, traditional musicians share their tunes with their fellow musicians based on a reciprocal relationship.[512] This social norm allows traditional musicians to use tunes transmitted and circulated in a community, and no authorisation is needed.[513]

In addition, the literature shows that traditional musicians usually call themselves performers or arrangers in the community context, where 'the line between "composition" and the "arrangement" of that composition is frequently blurred.'[514] Accordingly, the roles of composers, arrangers, and performers are also blurred. Meanwhile, traditional musicians also hold an authorial attitude to their tunes. As Aguilar reported, musicians also use the 'expressions denoting ownership such as "my music."'[515] Theberge also notes that individual and collective ownership exist in traditional or indigenous music, contrary to the assumption that musicians lack a sense of ownership.[516]

3.2.2.2 Can Scottish traditional musicians qualify as authors?

It is argued in some literature that traditional musicians cannot qualify as authors under copyright law.[517] To be specific, in the generational transmission of traditional music, the initial author of a tune is untraceable and unidentifiable, and any individual effort has been merged into collective efforts, 'becoming an integral part of it, impossible to be

[508] ibid.
[509] Karpeles (n 16); Nicolaisen (n 165).
[510] Karpeles (n 16); McKerrell (n 3) 60, 147.
[511] McKerrell (n 3) 122.
[512] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 136.
[513] Karpeles (n 16).
[514] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 130.
[515] Aguilar (n 465).
[516] Paul Theberge, 'Technology, Creative Practice and Copyright' in Lee Marshall and Simon Frith (eds), *Music and Copyright* (Taylor & Francis Group 2004).
[517] Farley (n 175); Bachner (n 175).

autonomously isolated.'[518] This statement is arguably correct with regard to the old tunes and old musical materials. As analysed in 2.2.2, these tunes and materials have been absorbed into the music tradition of a community and refined by many community numbers.[519] Thus, they lost individual origins. However, this statement is neither tenable with regard to a traditional tune that incorporates old materials and new elements nor an original arrangement of an old tune.

As discussed in 2.2.2, traditional music is a 'living tradition.'[520] New tunes are constantly created by adding new elements (i.e., ornamentations) to old materials (i.e., basic motifs), and old tunes are constantly rearranged.[521] Moreover, as analysed in 3.2, the arranger of an original arrangement of an existing musical work is the author of the arrangement. In the same vein, a traditional musician can qualify as the author of the new elements and the original arrangement that she or he created. Therefore, it could be said that traditional musicians can qualify as authors under copyright law.

Authorship in the legal sense is irrelevant to how traditional musicians describe themselves in the cultural sense. Thus, even though traditional musicians call themselves performers or arrangers in their music circle, it does not mean that they cannot qualify as authors under copyright law.

3.2.2.3 Can Scottish traditional musicians qualify as joint authors?

Traditional music may result from the performance of a group of musicians. For example, pub sessions are reported as one of the 'most common ways in which people participate in Scottish traditional music.'[522] Pub sessions take place at a regular time and place, where traditional musicians meet and play music together in an informal and intimate atmosphere.[523] As Sanderson describes,

[518] Woodmansee and Jaszi (n 53); Torsen (n 53); Carugno (n 6).
[519] McKerrell (n 3) 147,154.
[520] Carugno (n 6).
[521] Nicolaisen (n 165); McKerrell (n 3) 24, 40, 148.
[522] McKerrell (n 3) 92.
[523] ibid 16–17.

The format of a session is prescribed to the extent that a certain musical elements will be included, but exactly which ones and where they fit are never determined by the players beforehand […] The form and direction each session takes is improvised according to the dynamics of the session, the individuals involved, their particular shared repertoire and the mood of the moment.[524]

This music-making process is the same as the one described in Stuart v Barrett.[525] Following the judgement of Stuart v. Barrett and Beckingham v. Hodgens,[526] when a group of traditional musicians perform together, the resulting works can be recognised as original arrangements of old tunes,[527] considering the lowered standard of originality. In addition, traditional musicians can qualify as joint authors of the arrangements.

First, it is apparent that there is 'collaboration' between musicians. For instance, the discussion about 'certain musical elements will be included' is a kind of common design. Second, it is likely that participating musicians can make a 'significant and original contribution' to the arrangement, either a fiddler who performs an interlude or a drummer who provides the 'drum part' throughout the performance. Therefore, it could be said that traditional musicians can qualify as joint authors under copyright law.

3.2.2.4 The unpractical conflict between authorship and collective possession

The above two sections demonstrate that traditional musicians can qualify as authors and joint authors. Authors own copyright to authorise the use of works by third parties. Joint authors normally own copyright in equal shares if there is no contrast arrangement.[528] Under UK copyright law, the use of joint works by third parties needs consent from all joint authors.[529] In either case, copyright is exclusively granted to a private entity.

[524] Griselda Iseult Sanderson, 'Creating a Dialogue through Improvisation in Cross-Cultural Collaborations' (2016) 5 Music and Arts in Action 19.
[525] *Stuart v. Barrett [1994] E.M.L.R. 448* (n 480).
[526] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* (n 474).
[527] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 70.
[528] *Beckingham v Hodgens [2002] EWHC 2143 (Ch); [2002] EMLR 45* (n 474).
[529] CDPA S 173. Bently and Sherman (n 36) 305.

It is argued in some literature that this private, exclusive nature of copyright conflicts with the 'collective possession' of traditional music, and thus authorship would restrict the transmission and creation of traditional music in a community. In theory, this concern is reasonable. If a traditional musician claims authorship of a tune, fellow musicians need to ask for authorisation for the use of the tune, and otherwise, the utilisation may cause infringement. Considering the creation of traditional music widely uses existing tunes and musical materials, authorship may risk restricting the free sharing of traditional music in a community.

In practice, however, this concern should not be overstated. As 3.2.2 shows, the social norm allows traditional musicians to use tunes of fellow musicians without authorisation. In addition, it is noted that traditional musicians rarely claim authorship against fellow musicians.[530] Even though when tunes are commercially released out of the community, fellow musicians usually can continue to use the tunes 'in an informal setting.'[531] Therefore, it could be argued that authorship would not restrict the transmission and creation of traditional music within the community context.

More significantly, traditional musicians need authorship to control the use of their music by outside parties, who take 'undue advantage' without rewarding the community.[532] In this situation, authorship is essential for traditional musicians and their communities to counter the outside parties.

In summary, authorship is identified according to the name attached to a work in UK copyright law. Scottish traditional musicians can qualify as authors of the new elements embodied in tunes and the original arrangements of old tunes. When a group of traditional musicians perform existing tunes together, musicians who make a 'significant and original' contribution can qualify as joint authors of the resulting works. In either case, traditional musicians are not merely performers.

[530] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 136.
[531] ibid.
[532] Kuruk (n 2) 341–350.

3.3 Who were beneficiaries of authors' rights? the historical development of the notion of authorship

This part analyses the historical development of the notion of authorship. Kretschmer proposes that the 'rhetoric of authors' rights' has been utilised by publishers-investors in creativity, who became 'the chief beneficiaries of extended protection.'[533] Frith and Lee argue that 'the history of music is a history of composers and artists, as well as their rights, being exploited.'[534] In this vein, this part argues that eighteenth-century book and music publishers manipulated the authorship notion to fulfil two co-existing demands. 3.3.1 examines how publishers manipulated the proprietary author concept to accuse or defend piracy, both for the purpose of profit maximisation. 3.3.2 examines how publishers and copyright owners manipulated the Romantic author concept to extend the term of copyright protection. 3.3.3 analyses the role of the authorship notion in shaping the view of classical music composers. 3.4 summarises the section, emphasising that music publishers, rather than musicians, were the chief beneficiaries of the rights attached to authorship.

3.3.1 The concept of proprietary author

3.3.1.1 Before the proprietary author concept: the 'buyout' of manuscripts

It is noted that music publishers were the investors of music creativity in the eighteenth century.[535] They bought manuscripts from composers, printed copies of manuscripts, and sold copies to music buyers.[536] Through their manipulation, music creativity became a kind of profitable product, and they also controlled the production and distribution of the product. As a standard practice of the time, composers were only paid a single fee when selling their manuscripts, but they could not share any profits from selling copies of their works.[537]

[533] Kretschmer (n 452).
[534] Marshall and Frith (n 61) 11.
[535] Hunter (n 219); Kretschmer (n 452); Towse, 'Copyright and Music Publishing in the UK' (n 35).
[536] Ibid.
[537] Towse, 'Economics of Music Publishing' (n 253).

Only a couple of composers got rid of the 'restrictive relationship' with music publishers, the most accomplished ones, such as George Frideric Handel, Johann Christian Bach, and Thomas Arne.[538] They self-published their music and thus were independent of professional publishers (who were only entrepreneurs but not composers). They were called 'self-publishers', self-publishing composers, or composer-publishers.[539]

However, most composers relied on music publishers to make their music reach music buyers. The single payment was insufficient for composers to make a living, so they had to work for aristocratic patronages, perform in public concert halls, and teach music.[540] In this sense, it could be said that publishers (investors) consumed the labour of composers (creators) to make publishing profits.

3.3.1.2 The role of the author in the first copyright law

As discussed in 2.3.1, before the passage of the 1710 Act, the market of printed materials in the UK was regulated by privileges.[541] The privileges meant the exclusive rights to print and publish books, granted by the Stationers' Company to its members only, primarily London-based publishers.[542] Thus, the company and its members monopolised the book market with privileges. In 1695, the lapse of the Licensing Act of 1662[543] signified the decline of the privileges.[544] London-based book publishers thus lobbied for a new legal mechanism to maintain their control over the book market, expecting that they would be recognised as the 'proprietors' of books.[545] Most music publishers did not participate in the lobby. As explained in the literature, music publishing became a distinct branch by the 1690s, so music publishers were not closely connected with book publishers.[546]

[538] Kretschmer (n 452).
[539] Hunter (n 219).
[540] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[541] Kretschmer and Kawohl (n 200).
[542] ibid.
[543] Liscensing Act, 1662. See Licensing Act, London (1662), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[544] Kretschmer and Kawohl (n 200).
[545] Jaszi (n 270).
[546] Holman (n 304).

In 1710, the UK parliament issued the Statute of Anne (the 1710 Act), which prescribed statutory copyright in 'copies of printed books.'[547] However, the foundation of copyright was ambiguous. On the one hand, the 1710 Act referred to authors as the proprietors of 'copies of printed books.' Thus, it seemed like copyright was to recognise the '"natural" form of property arising from the act of creation.'[548] Natural rights are based on Locke's possessive individualism.[549] In line with this theory, if an author mixes his intellectual labour with the common good, the resulting work is converted into his private domain and becomes his private property.[550] For example, an eighteenth-century writer, William Enfield, proposed, 'labour gives a man a natural right of property in that which he produces: literary compositions are the effect of labour; authors have therefore a natural right of property in their works.'[551] In this vein, the author was envisaged as the originator and thus the sole owner of a work, signifying the emergence of the proprietor author concept, as Rose and Jaszi point out.[552]

On the other hand, two prescriptions in the 1710 Act conflicted with the natural rights basis. First, if copyright was a natural right, it should not be able to alienate the author, but the 1710 Act allowed authors to assign copyright to others. Second, if copyright was a natural right, it should be perpetual, but the 1710 Act prescribed a limited term of copyright protection, fourteen years with a renewable chance. Thus, it seemed like copyright was a 'statutory monopoly granted for a limited period in the public interest.'[553]

The limited-term copyright protection would restrict publishers' perpetual monopoly on old classics of literature.[554] After books expired the term, more copies would pour into the

[547] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[548] Kretschmer (n 452).
[549] Rose (n 207) 130–140; Drahos (n 128) 56–64; Kretschmer and Kawohl (n 200).
[550] Ibid.
[551] William Enfield, *Observations on Literary Property* (Joseph Johnson 1774) 21.access through https://books.google.co.uk/books?hl=zh-CN&lr=&id=TjdfAAAAcAAJ&oi=fnd&pg=PA5&dq=Observations+on+Literary+Property&ots=tz0E_PAPWk&sig=RPcF77EdX1Lh3-NQuKmH-DlaaYc&redir_esc=y#v=onepage&q=Labour%20gives%20&f=false
[552] Rose (n 214). Jaszi (n 270).
[553] Kretschmer (n 452).
[554] ibid.

market and make books affordable to the reading public. The Act might intend to balance the interests of authors, publishers, and the public.

3.3.1.3 The 'rhetoric of authors' rights' and profit maximisation

The ambiguity left over by the 1710 Act led to the 'debate over literary property' or the 'battle of booksellers.' The debate revolved around whether authors' rights were term-limited statutory copyright or perpetual common law rights (natural rights). Nevertheless, on either side of the debate, the 'rhetoric of authors' rights' was utilised by publishers to serve their own demands.[555]

As the 1710 Act provided up to twenty-eight years of copyright protection, some copyrighted books began to expire the term around the 1740s. London-based publishers demanded to justify their piracy accusations against provincial publishers for expired books. As they argued, authors' rights were common law rights, so they were perpetual and remained perpetual after being assigned to publishers.[556] The 1710 Act affirmed rather than dismissed common law rights.[557] Through these propositions, London-based publishers tried to justify their accusation of piracy.

In the opposing position, provincial book publishers (i.e., publishers from Scotland) argued that the perpetual common law rights were impeached and replaced by the 1710 Act at the time of book publication.[558] The authors' rights were term-limited statutory copyright, so their reprinting and republishing of expired books were not piracy. Through these propositions, provincial publishers tried to refute the accusation of piracy.

The debate culminated in *Millar v. Taylor*[559] and *Donaldson v. Becket.*[560] In *Millar v. Taylor*, Millar bought and legitimately printed James Thomson's *Seasons*, while Taylor sold copies of *Seasons* unauthorised printed by a Scottish publisher, Donaldson. Thomson died in 1748, so in 1769, *Seasons* had expired the fourteen-year term of protection. Taylor

[555] ibid.
[556] Rose (n 214).
[557] See 'Deazley, R. (2008) 'Commentary on Bach v. Longman (1777)', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org' (n 220).
[558] ibid.
[559] *Millar v Taylor (1769) 4 Burr 2303*.
[560] *Donaldson v Becket (1774) 4 Burr 2408*.

thus argued that Millar had no right to prevent others from reprinting *Seasons*. However, the court held that the author (Thomson) had perpetual common law rights in his work (*Seasons*), and now the right had been transferred to the publisher (Millar). The court thus confirmed piracy and granted an injunction, which prevented Donaldson from reprinting *Seasons*.

When Becket used the injunction against Donaldson, Donaldson appealed, which led to *Donaldson v. Becket.* The dispute remained the same, but *Donaldson v. Becket* reserved *Millar v. Taylor*. The court held that common law rights were taken away by statutory copyright.[561] As the statutory copyright in *Seasons* had expired, the court overturned the injunction.

Despite opposite determinations, the two cases show convergence: publishers utilised the 'rhetoric of authors' rights' to justify their own demands. London-based publishers supported common law rights to justify their accusations of piracy, and provincial publishers supported statutory copyright to refute the accusations of piracy. What was concealed by the 'rhetoric of authors' rights' was publishers' demands for profit maximisation. In addition, *Donaldson v. Becket* held that the author of a literary work had 'the sole right of first printing and publishing the same for sale.'[562] This statement clarified that authors were the proprietors of books and further confirmed the proprietor author concept.[563]

3.3.1.4 After the proprietary author concept: the 'buyout' of copyright

The 1710 Act stated to protect 'books and other writings' without referring to music.[564] As discussed above, this is explained by music publishers' absence in lobbying for the Act. Even after the passage of the Act, most (professional) music publishers assumed that music was not a subject matter of copyright. The literature has presented several reasons. First, music publishers considered fourteen-year copyright unnecessary. The public's penchant

[561] 'Deazley, R. (2008) 'Commentary on Donaldson v. Becket (1774)', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org.' (n 88).
[562] Kretschmer and Kawohl (n 200).
[563] Rose (n 207) 6.
[564] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

for music changed fast, and most works went out of fashion in a short period. Thus, professional publishers made profits by taking a 'first-mover advantage' to publish new works rather than republishing unfashionable old works. [565]

Second, copyright was granted to authors-music composers. At least, in theory, it increased the bargaining power of composers. However, many music publishers profited by 'pirating' composers' works.[566] For example, John Walsh, a famous UK music publisher, started his publishing business in 1695,[567] after the end of the privileges and before the enforcement of copyright, so the market of printed music was left unregulated. Taking this time window, Walsh dominated the music market by republishing quick and cheap copies of music (previously published by other publishers).[568] In addition, Walsh was known as the publisher of the famous composer George Frideric Handel.[569] However, before establishing a collaborative relationship, Walsh republished Handel's continental publications in the UK without authorisation.[570] Publishers also hired skilled copyists to transcribe music performed in public concert halls or opera houses and published these transcribed editions.[571] Thus, copyright was not favoured by publishers like Walsh as it reimposed restrictions on their businesses.

As a result, music publishing did not change substantially after the emergence of the proprietary author concept. In a standard publishing contract, composers were required to assign their copyright to publishers with a single payment, which is described as 'a single fee buyout of the copyright' by Towse.[572] This situation lasted until the late 1920s when the royalty contracts were uniformly established in the UK, which ensured composers gained a certain percentage of copyright royalties.[573] Except for self-publishing, music turned into

[565] Hunter (n 219).
[566] ibid. Handel gained a printing privilege, which was renewed in 1739 by himself and in 1760 by Walsh. See 'Deazley, R. (2008) 'Commentary on Bach v. Longman (1777)', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org' (n 220).
[567] Carroll (n 59).
[568] Frederic M Scherer, 'The Emergence of Musical Copyright in Europe from 1709 to 1850' (2008) 5 Review of Economic Research on Copyright Issues 3.
[569] Carroll (n 59).
[570] ibid.
[571] Scherer (n 568).
[572] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[573] Towse, 'Economics of Music Publishing' (n 253).

profitable commodities only through the manipulation of music publishers, so music publishers remained controlling the publishing.

Therefore, although the proprietary author concept indicates the author as the sole proprietor of a work and the first owner of copyright,[574] the ultimate beneficiaries of copyright were music publishers and only a couple of self-publishing composers.

3.3.2 The concept of Romantic author

3.3.2.1 The view of writers before the Romantic author concept

The literature has shown that the Romantic author concept was developed by German professional writers and then introduced to the UK. Before the formation of the Romantic author concept, writers in the Renaissance and neoclassical periods were treated as craftsmen or inspired.[575] As craftsmen, writers were 'a skilled manipulator of predefined strategies for achieving goals dictated by his audience.'[576] As inspired, writers were dictated by 'a higher, external, agency', divine.[577] In any sense, writers were not seen as the sole originator or creator of works.[578]

This view of writers reflects the literary creation of the time, which was collective, collaborative, and cumulative.[579] For instance, poems in commonplace books and drama scripts of theatre companies were recomposed and refined by many indefinable writers.[580] Writings thus reconnected texts of different sources rather than from an individual, sole creator.[581]

[574] Rose (n 214).
[575] Woodmansee (n 268); ibid.
[576] Woodmansee (n 268).
[577] Ibid.
[578] James GH Griffin, 'The Need for a New Paradigm in IP Law: A Focus on Authorship' (2005) 14 Information & communications technology law 267.
[579] Martin Kretschmer, Lionel Bently and Ronan Deazley, 'The History of Copyright History: Notes From an Emerging Discipline' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds) (Open Book Publishers 2010).
[580] Max W Thomas, 'Reading and Writing the Renaissance Commonplace Book: A Question of Authorship?' (1992) 10 Cardozo arts & entertainment law journal 665.
[581] McCutcheon (n 197).

Therefore, in book-making, writers were equally treated as 'the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book-binder.'[582] These contributors shared equal credits of books, and writers had no exclusive ownership of books.

3.3.2.2 The formation of the Romantic author concept

Woodmansee presents a comprehensive analysis of how German theorists and writers formed the Romantic author concept when coping with economic and legal struggles. As a brief overview, in the late eighteenth century, professional writers tried to make a living by selling writings to the reading public. Thus, they needed to justify their ownership of writings and the legal recognition of the ownership.[583] For this purpose, they borrowed the ideas of English theorist Edward Young, which stated that an author's internal creative power was the sole source of writings, and thus the author was the sole owner of writings.[584]

Following this thread, as reported in the literature, Immanuel Kant proposed that works were the creative imagination of genius; Johann Wolfgang von Goethe argued that works were subjective expressions of authors rather than existing ideas; Johann Gottfried Herder stated that works were the imprints of the human soul rather than the products of mechanical processes.[585] As Rose clarified, these propositions mysticised the creative process, based on which works became seen as original intellectual creations.[586] Woodmansee also proposes that these propositions conceived the author as the sole

[582] Martha Woodmansee, 'On the Author Effect: Recovering Collectivity' (1992) 10 Cardozo arts & entertainment law journal 279.
[583] Woodmansee (n 268).
[584] Friedemann Kawohl and Martin Kretschmer, 'Johann Gottlieb Fichte, and the Trap of Inhalt (Content) and Form: An Information Perspective on Music Copyright' [2009] Information, communication & society 205.
[585] Lilian R Furst, 'Romanticism in Historical Perspective' (1968) 5 Comparative literature studies (Urbana) 115; Jim Samson, 'Romanticism' (*Grove Music Online*) <https://www-oxfordmusiconline-com.ezproxy.lib.gla.ac.uk/grovemusic/view/10.1093/gmo/9781561592630.001.0001/omo-9781561592630-e-0000023751> accessed 19 April 2022; Rosemary Ashton, 'England and Germany' in Duncan Wu (ed), *A Companion to Romanticism* (John Wiley & Sons, Ltd 2017).
[586] Rose (n 214).

originator and creator of works, and thus works were seen as 'solely and exclusively' owned by the author.[587]

Therefore, German writers came to be regarded as authors: the sole originator or creator of works. By the Romantic author concept, writers justified their exclusive ownership of works. As Kawohl and Kretschmer reported, German copyright legislation (i.e., the Prussian Act 1837) accepted these propositions and vested copyright to authors.[588]

3.3.2.3 The Romantic author concept and copyright extension

As discussed above, London-based publishers took the 'rhetoric of authors' rights' to justify perpetual copyright protection to works, which was refuted in *Donaldson v. Becket.* However, their demand for copyright extension was not extinct. After the Romantic author concept was introduced to the UK, it became a new ground for publishers to justify their demand. Publishers restarted their lobby to lawmakers, and they were joined by some star writers, such as English Romantic writers William Wordsworth and Samuel Coleridge.[589]

As a result, in UK Copyright Act 1814, the term of copyright protection was changed to twenty-eight years from the date of book publication, which would extend to the natural life of the author if the author was alive at the end of the twenty-eighth year.[590] It can be seen that the legal rights were bonded with the authors' personal attribute, the lifetime.

It could be argued that the Romantic author concept fulfilled publishers' demands for copyright extension. Further, as works were conceived as original intellectual creations of authors, the Romantic author concept disguised copyright law as a legal mechanism protecting creativity and concealed its function of protecting publishing profits.[591] Therefore, although the Romantic author concept envisages the author as the sole creator

[587] Woodmansee (n 268).
[588] Kawohl and Kretschmer (n 584).
[589] 'Deazley, R. (2008) 'Commentary on Copyright Act 1814', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org'.
[590] An Act to amend the several Acts for the Encouragement of Learning, by securing the Copies and Copyright of Printed Books, to the Authors of such Books or their Assigns, 1814, 54 Geo.III, c.156 (1814). See ibid.
[591] Anne Barron, 'Copyright Law and the Claims of Art' [2002] Intellectual property quarterly 368.

and thus the sole owner of works, the concept was utilised by UK publishers to justify their demands for copyright extension.

In addition, the notion of authorship influenced contemporaneous classical music practice. The following part examines the role of the authorship notion in shaping the view of classical music composers.

3.3.3 The notion of authorship and the view of classical music composers

3.3.3.1 The view of musicians before the authorship notion

An identifiable composer is a feature of classical or art music.[592] A composer is generally seen as the sole creator and proprietor of a musical composition.[593] However, it is noted that this view emerged not until the turn of the nineteenth century.[594]

First, before this timepoint, a composer was not seen as the sole creator of musical compositions. The most important practice of formal musical tradition was performance, and composition was subsumed in performance rather than a separate activity.[595] In performance, musicians commonly arranged others' music into new pieces, which was not seen as immoral or illegal.[596] For example, as Arewa reported, George Frideric Handel used the music of Dionigi Erba and Reinhard Keiser; Johann Sebastian Bach used the music of Georg Philipp Telemann and Girolamo Alessandro Frescobaldi; Wolfgang Amadeus Mozart used the music of Franz Joseph Haydn; Ludwig van Beethoven used the music of Luigi Cherubini and Muzio Saverio Clementi.[597]

Therefore, musicians earned credits as performers or arrangers, and the name attached to a music piece was likely a performer or arranger. For instance, Niccolò Paganini and Johann Nepomuk Hummel were known as accomplished performers; Bach and Beethoven were famous for arranging existing pieces into new variations; Tommaso Marchesi provided

[592] Kennedy, Kennedy and Rutherford-Johnson, 'Classical' (n 62).
[593] Szabolcsi (n 74).
[594] Alfred Schutz, 'Making Music Together: A Study in Social Relationship' (1951) 18 Social research 76; Moore (n 64); Talbot (n 64); Gelbart (n 17) 191–194; Butt (n 118).
[595] Goehr (n 447) 188.
[596] Moore (n 64); Talbot (n 64).
[597] Arewa, 'From JC Bach to Hip Hop' (n 219).

several different variants for an aria of Giuseppe Farinelli.[598] In any sense, a composer was not seen as the sole creator of the music.

Second, before this timepoint, a composer was not seen as the sole proprietor of musical compositions. Even those accomplished musicians, such as Handel, Bach, and Haydn, had little control over their music. Musical compositions and concomitant benefits were usually dedicated to patrons, such as aristocracies or churches.[599] For example, as late as 1761, Haydn and the Esterházy court signed a contract that dedicated his musical compositions to the court.[600] Haydn was not allowed to communicate his compositions to others or permit others to copy those compositions.[601] This means that musicians had no property rights in their compositions, the rights to print, publish, and distribute the compositions.

3.3.3.2 The role of the Romantic author concept in shaping the view of classical music composers

It could be argued that the authorship notion changed the view of musicians. Based on the Romantic author concept, the view of 'Romantic composers' formed around the 1810s.[602] Alexander Tytler proposed that a composer was neither a craftsman (or presenter) nor a channel of the divine but a person of an internal source of inspiration.[603] James Beattie asserted that music made by original genius was distinct from mechanical and spiritless music.[604] Jean-Jacques Rousseau proposed that music was an expressive aesthetic of elusive, suggestive powers.[605] Ernst Amadeus Hoffman applied the Romantic author concept to instrumental music (or absolute music).[606] Johann Herder praised Ludwig van

[598] Szabolcsi (n 74).
[599] Goehr (n 447) 180.
[600] The Esterhazy court was the leading Hungarian noble family in the Habsburg Monarchy in the eighteenth century. See David Wyn Jones, 'Joseph Haydn and the Esterházy Court' (1998) 3 Court historian (London, England) 3. Kathleen Lamkin, 'Haydn's Musicians at the Esterházy Court, 1796 - 1802' (2009) 50 The Choral journal 24.
[601] Ibid.
[602] Samson (n 585).
[603] Gelbart (n 17) 192.
[604] Butt (n 118).
[605] Julia Simon, 'Rousseau and Aesthetic Modernity: Music's Power of Redemption' (2005) 2 Eighteenth-Century Music 41.
[606] The two terms are used as interchangeable, although they were developed from their own historically and culturally specific discourse. See Cassedy (n 290); David Clarke, 'Musical Autonomy Revisited' in Martin Clayton, Trevor Herbert and Richard Middleton (eds), *The cultural study of music: a critical introduction* (2nd edn, Taylor & Francis Group 2012).

Beethoven, Franz Joseph Haydn, and Wolfgang Amadeus Mozart (known as First Viennese School composers) as original geniuses.[607] These propositions mystified these musicians as 'individual creative genius.'[608]

Simultaneously, the works of these musicians were conceived as 'self-contained', 'autonomous', and 'organically united',[609] manifesting their intentions and 'expressive spirit.'[610] Performers were required to strictly execute the works to preserve such original intentions.[611]

As a significant consequence, musicians of classical music came to be regarded as 'Romantic composers', the sole creators of their works, whereas performers became the executants of composers.[612] Thus, classical music composers gained a superior status over performers, and the relationship between the two groups changed to hierarchical rather than collaborative.[613] In a word, based on the Romantic author concept, classical music composers came to be regarded as the sole creators of musical compositions.

Furthermore, the view of composers sublimated classical or art music to high culture or high art. As discussed above, as an individual composer became regarded as an original genius of exclusive creative power, his compositions became regarded as works of autonomous aesthetic values.[614] In comparison, music not from such an origin, typically the music of 'folk collective', was believed could be 'aestheticised' by classical music composers.[615] As a result, 'high' and 'low' took on connotations based on the origins of

[607] Hans Lenneberg, 'Classic and Romantic: The First Usage of the Terms' (1994) 78 The Musical quarterly 610.
[608] Samson (n 585).
[609] ibid; Gramit (n 447) 231.
[610] Tomlinson (n 74).
[611] Talbot (n 64); Gelbart (n 17) 191–194; Butt (n 118); Floris Schuiling, 'Notation Cultures: Towards an Ethnomusicology of Notation' (2019) 144 Journal of the Royal Musical Association 429.
[612] Ibid.
[613] Talbot (n 64).
[614] Some classical music composers held this idea and participated in the 'aestheticising' process. For instance, Christian Friedrich Daniel Schubart stated that classical music should synthesise traditional music, and Johann Friedrich Reichardt promoted classical music to absorb traditional music. Scottish traditional music was 'aestheticised' and 'synthesised' in many classical music compositions. Franz Joseph Haydn's Folk Music from Scotland Op. 74 integrated Scottish folk tunes, Felix Mendelssohn's Symphony No. 3 Op. 56, Scottish used Scottish dance music, Niels Wilhelm Gade's Echoes of Ossian Op. 1 contained Scottish ballads, Max Bruch's Scottish Fantasy Op. 46 enclosed Scottish folk tunes. See Béla Bartók, 'The Relation of Folk Song to the Development of the Art Music of Our Time' (1921) 2 The Sackbut 5; Weber, *The Rise of Musical Classics in Eighteenth-Century England* (n 74); Gramit (n 447) 233.
[615] Ibid.

music.[616] The music of individual composers was regarded as 'high culture.'[617] In contrast, the music of 'folk collective' was regarded as 'low culture.' [618]

3.3.3.3 The role of the proprietary author concept in shaping the view of classical music composers

In addition to the Romantic author concept, the proprietary author concept added another dimension to the view of classical music composers: a composer as a sole proprietor and first copyright owner of musical compositions. When music publishers assumed that printed sheet music was not a subject matter of copyright (as analysed in 3.3.1), self-publishing composers (i.e., Johann Christian Bach, Thomas Arne) demanded copyright to protect their music from piracy conducted by music publishers.[619] They brought their demands to the courts and led to *Arne v. Roberts*,[620] *Bach v. Longman*,[621] and *Clementi v Golding*.[622] These cases are analysed in detail in the following chapter.

As a brief overview, in *Bach v. Longman*, composer Bach sued publisher Longman for the unauthorised publishing of his music. The court held that printed sheet music belonged to 'books and other writings' protected by copyright, and accordingly, Bach was the author and copyright owner of his music.[623] In other words, a classical music composer was legally recognised as the proprietor and copyright owner of his works.

As proprietors and first copyright owners, at least in theory, composers gained increased bargaining powers to share publishing profits with music publishers.[624] As reported by Towse, composers were gradually paid 'a percentage of receipts from sales' (although it was still not a uniform practice).[625] For example, half a million copies of Arthur Sullivan's

[616] Gramit (n 447) 65–66; Gelbart (n 17) 80–81.
[617] Weber, *The Rise of Musical Classics in Eighteenth-Century England* (n 74) 243–44; Gelbart (n 17) 191–97.
[618] Ibid.
[619] Hunter (n 219).
[620] See London, Public Record Office, C11/2260/7, ARNE'S BILL OF COMPLAINT (London, Public Record Office, C11/2260/7) and ROBERTS'S AND JOHNSON'S ANSWER (London, Public Record Office, C11/2260/7) in APPENDIX in Rabin and Zohn (n 220).
[621] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).
[622] *Clementi v Golding (1809) 2 Camp 25 | [1809] 2 WLUK 67*.
[623] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).
[624] Carroll (n 59).
[625] Towse, 'Copyright and Music Publishing in the UK' (n 35).

The Lost Chord were sold in the late nineteenth century, and Sullivan was paid per copy by the publisher.[626]

As a result, major classical music composers were gradually able to earn their livings by publishing revenues rather than performing revenues, so they transferred their work focus from performance to composition. The practice of formal musical tradition changed. Namely, composition no longer subsumed in performance but became a separate activity prior to the performance.[627] Composition and performance went to separation, and composers and performers went into labour division: the producers of works and the executors of works.[628] As McDonagh specified, 'the notion of the "composer" as the sole "author" of a piece of music naturally led to a "loss of status" for the "performer" who was now seen as a mere "executant".'[629]

In a word, based on the Romantic author concept, composers became the sole creators of musical compositions and gained a superior status over performers. Based on the proprietary author concept, composers became the sole proprietors and first copyright owners of musical compositions, and composers and performers went to labour division. The notion of authorship changed the view of musicians and shaped the view of classical music composers.

3.3.4 Summary: who were the chief beneficiaries of authors' rights

This section has shown that the notion of authorship took shape in specific philosophical (Lockean possessive individualism) and aesthetic (Romantic author) contexts around 1800.[630] The proprietary author concept conceives the author as the sole proprietor of works,[631] and the Romantic author concept envisaged the author as the sole creator and

[626] ibid.
[627] Weber, 'The Intellectual Origins of Musical Canon in Eighteenth-Century England' (n 96).
[628] This division has extended beyond classical music and influenced popular music. As Brennan propose, in popular music, authorship is understood as 'an opposition between the author-artist-composer on the one hand and an accompanist-craftsman-performer on the other', and the latter group are 'labourers who assisted the composer-author, but did not take part on song authorship themselves.' See Matt Brennan, *Kick It: A Social History of the Drum Kit* (Oxford University Press 2020) 259.
[629] McDonagh, 'Is the Creative Use of Musical Works without a Licence Acceptable under Copyright Law?' (n 182).
[630] Kawohl and Kretschmer (n 584).
[631] Rose (n 214).

owner of works.[632] It can be seen that the two concepts adopt an individualistic notion of authorship.[633] Nevertheless, despite the emphasis on 'author', the notion of authorship was manipulated by publishers to serve their own demands. In the debate over literary property, London-based publishers utilised the 'rhetoric of authors' rights' to justify their accusation of piracy, and provincial publishers used the rhetoric to defend the accusation of piracy. Then, publishers made use of the Romantic author concept to justify the extension of the term of copyright protection.

Therefore, although the author is recognised as the first owner of copyright in a work, the notion of authorship reflected and concealed publishers' demands for 'copyright-extending and profit-maximising.'[634] Further, the publishing practice before or after the formation of the authorship notion was consistent. Before, the manuscripts of authors (composers) were 'buyout' with a single payment; after, the copyright of authors (composers) was 'buyout' with a single payment. Either manuscript or copyright was transferred (or assigned) to publishers and used by them for their own profits. This practice has been standardised by music publishing contracts, by which publishers buy exclusive rights to exploit the output of music creators.[635]

In this sense, it could be said it is a logical (but not necessarily fair) result that the chief beneficiaries of music copyright were music publishers and a couple of self-publishing composers (investors) rather than most composers (creators). The historical development of the authorship notion verifies Kretschmer's proposition, 'the chief beneficiaries of copyright are a few creators at the top of their profession and investors in copyright.'[636] The development of the authorship notion provides a historical root for the lasting legal treatment of traditional music. The following part analyses the role of the authorship notion in the publishing of Scottish traditional music.

[632] Griffin (n 578).
[633] Woodmansee and Jaszi (n 53).
[634] Marshall (n 53) 89.
[635] Steve Greenfield and Guy Osborn, 'Copyright Law and Power in the Music Industry' in Lee Marshall and Simon Frith (eds), *Music and Copyright* (Taylor & Francis Group 2004) 96.
[636] Kretschmer (n 452).

3.4 The publishing of traditional music in the UK

This part analyses the publishing of traditional music in the UK. 3.4.1 presents the background and overview of music publishing, focusing on the collection process. 3.4.2 examines some influential publications and analyses how music collectors processed traditional music with these specific examples. From the perspective of authorship, 3.4.3 analyses the effects on traditional music of the compound of legal treatment and publishing practice. It argues that music collectors depersonalised traditional musicians, obliterated their individual identities, and fabricated an anonymous origin for Scottish traditional music.

3.4.1 The collection process

Two years before the passage of the 1710 Act, the Acts of Union 1707 united two separate nations, England and Scotland, into one kingdom, the United Kingdom of Great Britain.[637] This historical event provided a broader social basis for the publishing of Scottish traditional music. Either standing with dominant England or marginalised Scotland, music collectors published Scottish traditional music to serve their specific purposes.[638] On England's stand,[639] music collectors tried to establish an English-dominated British identity.[640] On Scotland's stand, music collectors intended to maintain the independent identity of Scotland.[641]

Music collectors solicited Scottish traditional music from traditional musicians and local populaces (hereafter traditional musicians).[642] In the collection process, a traditional musician sang or played a tune, and collectors transcribed the tune in a written musical notation. As 3.3.2 has shown, historically and contemporarily, many Scottish traditional

[637] See Act of Union 1707. UK Parliament, 1707. https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/act-of-union-1707/
[638] Henry F Gilbert, 'Folk Music in Art Music: A Discussion and a Theory' (1917) 3 The Musical Quarterly 577.
[639] Some music collectors were also Edinburgh-based, but they stood with England. See Harker (n 306) 11.
[640] Steve Sweeney-Turner, 'The Political Parlour: Identity and Ideology in Scottish National Song' in Harry White and Michael Murphy (eds), *Musical constructions of nationalism: essays on the history and ideology of European musical culture, 1800-1945* (Cork University Press 2001); Leith (n 69).
[641] Ibid.
[642] Cornish (n 3); McAulay, *Our Ancient National Airs* (n 3) 69.

tunes have traceable individual origins preserved in oral transmission.[643] Traditional musicians created many individual tunes and variations.[644] In addition, the roles of composers, arrangers, and performers are blurred.[645] In other words, there has been no labour division between composers and performers, or it can be said that traditional musicians are both composers and performers.

In the collection process, many music collectors erased the names of traditional musicians who presented and performed their tunes. For music collectors on the England side, this process disguised Scots (primarily Highlanders) as barbarous folks, signifying their inferior status compared to the civilised English.[646] For music collectors on the Scotland side, this process portrayed Scots as an impersonal and unified nation, sharing a common cultural identity.[647] Although for different purposes, the convergent result is that they depersonalised traditional musicians and fabricated a collective, anonymous origin for Scottish traditional music. At the same time, music collectors attached their own names or fabricated authors' names to the published versions of Scottish traditional music.[648]

3.4.2 Influential publications

There were many instances where eighteenth- and nineteenth-century music collectors depersonalised Scottish traditional musicians. This part analyses and enumerates some influential publications in chronological order.

3.4.2.1 The fabrication of a 'false attribution': David Rizzio

As 3.3.1 has shown, before *Bach v. Longman* (1777),[649] the market of printed music in the UK was regulated by the system of printing privileges, which is seen as 'proto-

[643] Collinson (n 18).
[644] Karpeles (n 16); Nicolaisen (n 165).
[645] McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 130.
[646] Sweeney-Turner (n 640); Leith (n 69); Cornish (n 3).
[647] Ibid.
[648] Edward P Thompson, 'Rough Music Reconsidered' (1992) 103 Folklore 3.
[649] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).

copyright.'[650] In this period, music collectors sometimes petitioned for privileges, by which they secured their ownership of the collected versions of Scottish traditional music.

In 1725, William Thomson published *Orpheus Caledonius, a Collection of the Best Scotch Songs*. The book included transcribed versions of orally expressed Scottish folk songs, but it did not acknowledge Scottish singers who sang the songs.[651] When the book was published in England, Thomson gained a fourteen-year privilege, which granted him the exclusive rights to print and publish the collected versions of traditional music.[652]

In 1742, James Oswald published the *Collection of Curious Scots Tunes*. The book enclosed folk songs collected from traditional musicians living in the Scottish Lowlands and the Highlands. Oswald erased the names of traditional musicians who presented their songs. Instead, he credited some songs to David Rizzio, a sixteenth-century musician in the court of Queen Mary of Scots. It is reported that Oswald made this 'false attribution' because the book was published at a time when Italian music was popular in the UK music market.[653] The Italian name Rizzio was utilised to increase the sales of the book.[654] After the penchant for Italian music faded in the 1770s, music theorists (i.e., William Tytler, John Hawkins) claimed the songs ascribed to Rizzio were made by James I of Scotland (the King of fifteenth-century Scotland), and they did so to promote of an independent cultural identity of Scotland.[655]

In these publications, music collectors Thomson and Oswald depersonalised Scottish traditional musicians. Oswald fabricated a 'false attribution' for Scottish traditional music: David Rizzio. This 'false attribution' freed Oswald from acknowledging traditional musicians whose tunes were enclosed in the book. Thus, the publishing process depersonalised individual traditional musicians and portrayed them as anonymous folks.[656]

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[650] Kretschmer and Kawohl (n 200).
[651] McKerrell (n 3) 12.
[652] Gelbart (n 17) 35.
[653] McAulay, *Our Ancient National Airs* (n 3) 163.
[654] Ibid.
[655] McKerrell (n 3) 55–56.
[656] Kirsteen McCue and Marjorie Rycroft, 'The Reception of Robert Burns in Music' in Murray Pittock (ed) (Bloomsbury Academic 2014) 267.

Ultimately, it was the music collectors Thomson and Oswald who gained the exclusive rights to profit from the collected versions of traditional music.

3.4.2.2 The fabrication of a 'symbolic author': the hiding and revealing of the name of Robert Burns

As 3.3.1 has shown, from *Bach v. Longman* (1777),[657] printed sheet music became protected by copyright, and authors were the first owners of copyright in works. Only two years after *Bach v. Longman*, James Johnson published the first volume of *The Scots Musical Museum*. The series included six volumes in total, published between 1780 and 1803. Johnson collected Scottish folk songs from traditional musicians, and Robert Burns participated in the mediation and compilation of the songs.[658] The greatest fame of Burns as the national poet of Scotland, while he was also a fiddler of musical capabilities.[659] The book erased the names of traditional musicians who presented their tunes, but it marked them as a girl, a country lass, or an old man.[660]

When Burns participated in mediating songs, he requested Johnson to hide his name because his purpose was to build an impersonal and unified national music culture of Scotland.[661] Under his request, the first five volumes of *The Museum* hid his name.[662] The sixth volume was published after Burns's death, in which Johnson revealed Burns's name. It is reported that Johnson did so partially to promote the sales of the book by Burns's fame.[663]

Although Burns did not mean to establish authorship on those published folk songs, he (and other participating music arrangers such as Franz Joseph Haydn and Ludwig van Beethoven[664]) was left as the only known author of *The Museum*, since the names of

[657] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).
[658] Leith (n 69).
[659] McCue and Rycroft (n 656) 267.
[660] Ibid.
[661] Ibid.
[662] Leith (n 69).
[663] McKerrell (n 3) 59–62.
[664] Will (n 69).

traditional musicians were erased. Nevertheless, some studies reveal that many songs credited to Burns 'have little or no evidence connecting him.'[665]

In this publication, the music collector Johnson fabricated a 'symbolic author' for Scottish traditional music: Robert Burns. This 'symbolic author' freed Johnson from acknowledging traditional musicians whose tunes were included in the book. The publishing process depersonalised individual traditional musicians and disguised them as anonymous folks.[666] Finally, it was the music collector Johnson who gained the rights attached to authorship (copyright) in the collected versions of traditional music.

3.4.2.3 The fabrication of a romanticised and mythologised origin: minstrels and bards

In 1794, Joseph Ritson published two volumes of *Scotish Songs*. The books included songs gathered from unpublished manuscripts and songs transcribed from oral singing. As the literature emphasised, some songs transcribed from oral singing indeed had known authors, who were individual traditional musicians.[667] However, Ritson erased the names of the known authors due to his belief that Scottish traditional music was produced by all minstrels and bards.[668]

In 1802-03, Walter Scott published *Minstrelsy of the Scottish Border*. The book included ballads excerpted from unpublished manuscripts and ballads transcribed from oral singing of Scottish traditional musicians. Like Ritson, Scott regarded traditional ballads as impersonal achievements. Under this belief, he erased the names of traditional musicians but marked them as an old man, a lady, old persons. The book also included ballads composed by Scott and his collaborators, categorised in the section 'Imitations of the Ancient Ballad.'[669] This time, Scott credited every contributor.[670] Scott described the book as 'a romanticisation and mythologising of Scotland.'[671] It can be seen that the

[665] Murray Pittock, 'Who Wrote the Scots Musical Museum? Challenging Editorial Practice in the Presence of Authorial Absence' (2016) 42 Studies in Scottish literature 3.
[666] McCue and Rycroft (n 656) 267.
[667] Harker (n 306) 31.
[668] Gelbart (n 17) 85.
[669] Millgate (n 308).
[670] Otto Erich Deutsch and A. H. F. S, 'The Walter Scott Songs' (1928) IX Music & letters 330.
[671] McKerrell (n 3) 63.

depersonalising process gave a mythical quality to Scottish traditional music, contributing to the 'romanticisation and mythologising' attribute.

In these publications, music collectors Ritson and Scott fabricated a romanticised and mythologised origin for Scottish traditional music: bards and minstrels. This origin freed them from acknowledging traditional musicians whose songs and ballads were enclosed in the books. The publishing process depersonalised individual traditional musicians and disguised them as anonymous people. Further, it fabricated a collective, anonymous origin for Scottish traditional music.[672] As music collectors, Ritson and Scott gained the rights attached to authorship (copyright) of the collected versions of traditional music. [673]

3.4.2.4 The fabrication of the 'Romantic composer': the authorship puzzle about Beethoven

From 1802 to 1841, George Thomson published six volumes of *A Select Collection of Original Scottish Airs*. This series will be analysed in detail in the following chapter. As a brief overview to serve the current analysis, Thomson collected Scottish folk songs from traditional musicians and commissioned many famous classical music composers to arrange the collected songs, including Ludwig van Beethoven.[674]

As Gelbart reported, Thomson believed that Scottish traditional music had a collective origin, articulated in his *Dissertation Concerning the National Melodies of Scotland* (1822). Holding this idea, Thomson erased every known name of Scottish traditional musicians whose tunes were enclosed in the series.[675] Meanwhile, Thomson credited classical music composers as authors.[676] Thus, Thomson fabricated fake authorship to the published folk songs: 'Romantic composers' such as Beethoven.

The series included sixty-two songs arranged by Beethoven, and twenty-five of them were published separately under the title *25 Scottish Songs Op. 108* in Germany in 1822.[677] The

[672] McCue and Rycroft (n 656) 267.
[673] Scott sold the copyright to publishers Cadell and Davies (the first edition) and Longman and Rees (the second edition). See Millgate (n 308).
[674] Barry Cooper, *Beethoven's Folksong Settings: Chronology, Sources, Style* (Clarendon Press 1994) 8.
[675] Gelbart (n 17) 110.
[676] McCue (n 69).
[677] Gelbart (n 17) 211–216.

German version had an ambiguous, misleading title page read as 'Scottish songs composed by Beethoven.'[678] Thus, Beethoven was known as the creator of the songs, although he merely arranged the folk tunes provided by Thomson rather than composed them.

At first, German music critics did not know that Beethoven did not compose the tunes. They praised the tunes as 'true romantic spirit' and 'purely from the eternal fount [Born] of his original genius.'[679] They especially singled out the 'melodic elements' to support their comments. Therefore, what they praised were the folk tunes created by traditional musicians rather than the arrangements made by Beethoven. Ironically, these critics asserted that these tunes were irrelevant to Scotland, but it was Beethoven's own genius that 'dreams up a fantasyland land and called it Scotland.'[680]

Later, one critic noted the ambiguous, misleading title page and questioned whether Beethoven only 'harmonised pre-existing Scottish melodies, as they were in the "mouth of the folk".' Hereafter, critics turned to praise Beethoven's arrangements as 'full of his own deeply felt emotion and essence', while the folk tunes - the melodic elements - were no longer appreciated. The changed attitudes reveal that even German music critics failed to clearly disassociate Beethoven's arrangements and the original traditional tunes. Thus, it could be argued that traditional musicians should at least share authorship with Beethoven, if they were not the sole authors. Nevertheless, the names of traditional musicians were erased by Thomson, whereas Beethoven was credited as the author of the published music.

In *A Select Collection of Original Scottish Airs*, Thomson fabricated a 'Romantic composer' for Scottish traditional music: Beethoven. This 'Romantic composer' freed Thomson from acknowledging traditional musicians whose tunes were included in the series. The publishing process depersonalised individual traditional musicians and portrayed them as anonymous folks. Ultimately, it was the music collector Thomson who gained the rights attached to authorship (copyright) of the collected versions.

[678] Ibid.
[679] Gelbart (n 129) 212-213.
[680] Ibid.

3.4.2.5 Other publications

James Hogg's *The Jacobite Relics of Scotland* (1819-21) collected traditional tunes from country fiddlers and singers, and the book emphasised that the tunes were in their most original status. Nevertheless, most fiddlers and singers were not acknowledged in the publication.[681] Alan Cunningham's *The Songs of Scotland, Ancient and Modern* (1825) gathered traditional tunes from local Scottish singers, but they were depersonalised as a young girl, an old man, or old people.[682] William Motherwell's *Minstrelsy Ancient and Modern* (1827) collected traditional tunes from local Scottish singers, and the book stated that the tunes were precisely kept in the form of oral singing. The singers' names were recorded in footnotes in draft versions of the book. However, when the book was published, the singers were depersonalised as a lady, old women, old people.[683] Peter Buchan's *Ancient Ballads and Songs of the North of Scotland* (1828) collected traditional tunes from local Scottish singers. The book emphasised that the tunes were in the accurate and faithful status of oral singing. Nevertheless, singers gained no acknowledgements.[684]

It can be seen that these publications emphasised the authenticity of the collected versions by emphasising their traditional origin. However, music collectors depersonalised traditional musicians and obliterated their individual identities. Around the 1840s, music collectors found the timepoint of collecting songs from oral tradition had passed, so they turned to seldomly printed songbooks to gather songs that were assumed unfamiliar to the future songbook buyers.[685]

3.4.3 Analysis: depersonalising traditional musicians and constructing anonymous origin for traditional music

It is evident that the published songs were not composed by music collectors (and arrangers) but were collected from traditional musicians. Nevertheless, music collectors treated traditional musicians as informants and passive receivers of traditional tunes rather

[681] Karen E McAulay, 'Minstrels of the Celtic Nations: Metaphors in Early Nineteenth-Century Celtic Song Collections' (2011) 59 Fontes artis musicae 25.
[682] Harker (n 306) 38–78; McAulay, *Our Ancient National Airs* (n 3) 131–169.
[683] Ibid.
[684] Ibid.
[685] Harker (n 306) 88.

than creators and authors. As a common practice, music collectors erased every known name of traditional musicians, obliterated their individual identities, and fabricated false attributions for Scottish traditional music. Cornish notes that they did this partly for recognition and 'partly for copyright purposes.'[686] This is reasonable considering that music publishers registered the collected songs at the Stationers' Company for legitimate printing and publishing. Under the copyright regime, the fabricated attributions became legally recognised authors of the published songs, and music collectors ultimately gained the rights attached to authorship.

Due to their social, economic, and cultural status, traditional musicians generally had no awareness of copyright and thus did not initiate any dispute about authorship. However, although there was no dispute at that time, the publishing practice was an early instance of a repeated practice continuing to the present (as analysed in 3.6.3). Thus, its legal consequence deserves close examination.

As demonstrated above, on the one hand, traditional musicians were deprived of authorship. As 3.3.2 analysed, when a traditional musician performs a tune, in most cases, she or he adds some new elements or arrangements to existing tunes. In this situation, the musician can qualify as the author of the new elements and arrangements. However, in music publishing, they were treated as informants or performers rather than acknowledged as creators and authors. Even though performers' rights were introduced into UK copyright law in CDPA, the rights provide fewer rewards than copyright. More significantly, as analysed in 3.2.1, performers do not have ownership of musical expressions. In this sense, when traditional musicians were deprived of authorship and relegated to performers, they lost ownership of their music.

On the other hand, music collectors gained the rights attached to authorship in published versions of traditional music. As analysed in the above chapter, music collectors (and arrangers) imparted trivial, minimal (or no) originality to the published versions. Some versions were verbatim transcriptions of orally expressed tunes, and some were trivial arrangements of tunes, which could be described as the 'natural outgrowth' of basic tunes

[686] Cornish (n 3).

and ‘straight application’ of music rules.’[687] Nevertheless, by depersonalising traditional musicians, music publishing constructed a collective, anonymous origin for Scottish traditional music. This origin straightforwardly conflicts with the authorship notion in the copyright system, which regards the author as the sole creator and proprietor of works. In this sense, this collective, anonymous origin indicated that traditional music was unowned musical materials. Based on this, by attaching names of fabricated attributions to the published versions, music collectors gained the rights attached to authorship.

As a compounded effect of music publishing and copyright law, a named author of published traditional music was a music collector. This is partly because music collectors abused copyright law and the legal unawareness of traditional musicians, but also partly because of the law’s internal features. As 3.2.1 has shown, under international copyright law and UK copyright law, the author is identified by ‘whoever says she is.’[688]

Therefore, in music publishing, copyright law facilitated the exploitation of traditional music. By the rights attached to authorship, music collectors made profits from traditional music by reproducing, distributing, and selling copies of the collected versions of traditional music. In contrast, traditional musicians had no share of any profits. Music publishers (investors) rather than traditional musicians (creators) became the chief beneficiaries of copyright.

In summary, in the publishing of Scottish traditional music, copyright law facilitated the exploitation of traditional music under the notion of authorship. Furthermore, the collective, anonymous origin influenced the cultural perception of Scottish traditional music. This point is analysed in 3.7. The following part analyses the effects of copyright law in the Chinese context.[689]

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[687] Bartók (n 70); Smith (n 70).
[688] Ginsburg (n 451).
[689] Similar music collection practices existed in the US context. That is, music collectors recorded African American folk songs and attached their names to the recorded songs, while they did not acknowledge and compensate folk singers who provided the songs. The representative collectors are John Lomax (1867-1948) and Alan Lomax (1915-2002), who collected thousands of African American songs in the 1930s and 1940s. Recorded songs in Lomax’s collection were not group singing but polyphony and polyrhythm originating from individual creativity. However, John and Alan Lomax did not record the names and identities of folk singers. In the US, sound recordings made before February 15, 1972, were not protected by federal copyright

3.5 The requirement of authorship in Chinese copyright law and its relation to Chinese traditional folk music

This part focuses on the Chinese context and questions whether the requirement of authorship is an obstacle for Chinese traditional musicians to gain copyright. To answer this question, 3.5.1 explains the authorship requirement in Chinese legislation and cases. Based on this, 3.5.2 examines whether Chinese traditional musicians can qualify as authors and joint authors under formal legal terms.

3.5.1 Works of authorship and joint authorship

It is noted that the authorship requirement in Chinese copyright law is transplanted from the Berne Convention.[690] As discussed in 3.2.1, the Berne Convention prescribes that authorship shall be identified according to the 'name to appear on the work in the usual manner.[691] Similarly, CLPRC stipulates, 'whose name is affixed to a work shall, without contrary proof, be the author of the work and have corresponding rights in the work.'[692] CLPRC also prescribes that 'the author of a work is the natural person who has created the

law but only by various state laws. As John and Alan Lomax recorded the songs before 1972, no copyright existed in the recordings. Lomax registered the recorded songs as musical compositions and gained copyrights conferred to musical works. Multiple results arose. First, John and Alan Lomax seized the copyright and ownership of the recorded songs. Meanwhile, they depersonalised folk singers and fabricated 'a false public persona' of folk singers. For example, Leadbelly (or Huddie Ledbetter, 1888-1949) was a representative folk singer. John and Alan Lomax publicised Leadbelly as a spokesman of the mass, although they had the awareness that Leadbelly had added his own personal style and adaptions to the songs. Second, Lomax exclusively profited from the recorded songs, whereas folk singers gained no compensation. In Leadbelly's case, Lomax took most revenues from Leadbelly's songs. Leadbelly asked Lomax for control of the revenues but was refused. Leadbelly's songs were widely covered by subsequent pop and rock musicians. John Lomax, rather than folk singers, was credited as a songwriter in cover and sampling versions. It can be seen that John and Alan Lomax only collected the songs but made no compositional or even arrangement contribution to the songs, but they gained copyrights and relevant benefits from the recorded songs (as musical works). In contrast, folk singers did not gain authorship or copyright royalties. Although John and Alan Lomax insisted they intended to preserve the songs, the result was they made massive profits from the recordings. See Benjamin Filene, '"Our Singing Country": John and Alan Lomax, Leadbelly, and the Construction of an American Past' (1991) 43 American quarterly 602; Gia Velasquez, 'No Credit Where Credit Is Due: Exploitation in Copyright' (2017) 99 Journal of the Patent and Trademark Office Society 693; Whitney E Laemmli, 'The Living Record: Alan Lomax and the World Archive of Movement' (2018) 31 History of the human sciences 23.

[690] Wang (n 92) 167.

[691] The Berne Convention Paris Act 1971, Article 15 (1). See Ricketson and Ginsburg (n 23) 359.

[692] CLPRC 1990, 2001, 2010, Article 11. CLPRC 2020, Article 12.

work',[693] but the manner of identifying authorship makes the author become 'whoever says she is.'[694]

Chinese copyright law protects works of joint authorship. CLPRC prescribes that 'where a work is created jointly by two or more co-authors, the copyright in work shall be enjoyed jointly by those co-authors. Co-authorship may not be claimed by anyone who has not participated in the creation of the work.'[695] 'Created jointly' indicates 'collaboration' and 'participated in the creation' suggests 'contribution', but the law has no further clarifications about these elements. Thus, it could be said that the prescription of joint authorship is very vague.

Chinese courts and academic opinions usually borrow doctrines from the Western legal system to interpret joint authorship. Collaboration is usually explained as the common design of a work or the common intention to integrate individual contributions into a whole.[696] Contribution is usually required to be 'original', under the same standard applied to works in general,[697] which is not high-to-attained.[698]

Further, the author of a work is the first owner of copyright in the work. CLPRC prescribes that 'the copyright in a work shall belong to its author.'[699] The author can control and benefit from the reproduction, distribution, performance, and adaptation of a musical work. Accordingly, the author can prevent others from imitating the work. In comparison, a performer does not have ownership of a musical expression that she or he presents. By utilising performers' rights, a performer can permit the fixation of a live performance and may share some profits arising from selling copies of the fixation form. However, a performer cannot prevent others from imitating the performance.

[693] CLPRC 1990, 2001, 2010, 2020, Article 11.
[694] Ginsburg (n 451).
[695] CLPRC 1990, 2001, 2010. Article 13. CLPRC 2020, Article 14.
[696] Guobin Cui, 'The Myth of Collective Authorship in Folklore Works' [2009] SSRN Electronic Journal 1; Wang (n 92) 175–178.
[697] Ibid.
[698] Zheng (n 92) 184; Wang (n 92) 28–38; Jiang (n 353).
[699] CLPRC 1990, 2001, 2010, 2020, Article 11.

3.5.2 Works of unknown authorship

Chinese copyright law protects works of unknown authorship. RICLPRC stipulated that 'in the case of a work of unknown authorship, the copyright thereof shall be exercised by the holder of the original copy of the work.'[700] The term of copyright protection for such works is fifty years from the first publication of the work,[701] the same as the term for works of known authorship.

It could be argued that this provision may cause an unfair consequence against the benefits of traditional musicians. As analysed in 3.2.1, if a traditional tune is identified as a work of unknown authorship, the musician who presents the tune would be identified as a performer rather than an author. Thus, the musician cannot gain copyright in the tune. Meanwhile, if a music collector makes a fixation form (i.e., a transcription, a sound recording) of the tune, the fixation form can constitute an 'original copy.' Thus, the music collector can exercise the copyright conferred to the 'original copy.' In this situation, the music collector (by copyright) may profit from traditional music more than the traditional musician (by performers' rights). This point is further discussed in the following chapter.

3.5.3 The relation between the requirement of authorship and Chinese traditional musicians

3.5.3.1 Individual creation and collective sharing

It is reported that Chinese traditional folk music features individual creation and collective sharing. Regarding individual creation, initially, a traditional tune is created by an individual by adding new changes to basic patterns.[702] Subsequently, every revision or refinement of the tune is made by an individual.[703] As a result, traditional folk music has

[700] RICLPRC 1991, Article 16. RICLPRC 2002, Article 13. RICLPRC 2011, Article 13.
[701] RICLPRC 1991, Article 24. RICLPRC 2002, 2011, 2013, Article 18.
[702] Cui (n 696); Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 25,47.
[703] Cui (n 696).

many co-existing variations produced by different individual musicians.[704] In any sense, it is not that a community collectively and directly produces traditional tunes.[705]

Like Scottish traditional music, Chinese traditional folk music may come from the extempore performance of a group of musicians. Amateur extempore performance is essential for Chinese traditional musicians to socialise and entertain.[706] For example, traditional musicians perform together during traditional festivals and weddings.[707] They also meet regularly and perform spontaneously in public parks, similar to pub sessions of Scottish traditional musicians. In amateur extempore performance, musicians improvise new tunes.[708]

Regarding collective sharing, Chinese traditional folk music is communicated in a community.[709] Individual musicians share their tunes with other members of a collective.[710] For example, tunes may be transmitted among family members or between masters and learners.[711] Therefore, traditional musicians are not concerned with authorship and ownership of music within the community context.

3.5.3.2 Can Chinese traditional musicians qualify as authors and joint authors?

It is argued in some literature that Chinese traditional musicians cannot qualify as authors and joint authors under copyright law. According to this opinion, first, traditional folk music is the product of collective efforts, so any traditional musician is ineligible for authorship of the music.[712] Second, traditional folk music is not 'created jointly by two or more co-authors.' Specifically, there is no collaboration between musicians because they are of different generations, so they are ineligible for joint authorship of the music.[713] These opinions are arguably correct with regard to those old musical materials (i.e., basic patterns) and old tunes. As explained in 2.5.2, they have merged collective efforts and have

[704] Jones (n 326); Jones (n 386).
[705] Cui (n 696).
[706] Thrasher (n 89); Mu (n 392).
[707] Jones (n 326); Jia (n 329); Rees (n 400).
[708] Thrasher (n 89); Mu (n 392).
[709] Schimmelpennynck and Kouwenhoven (n 101); Jones (n 326); Jones (n 386).
[710] Ibid.
[711] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 30.
[712] ibid 53.
[713] Ibid.

been refined by many generations of musicians.[714] Therefore, traditional musicians cannot qualify as authors and joint authors. However, this opinion is not tenable with regard to all traditional music.

As explained above, a traditional tune is initially created and subsequently refined by an individual. Based on the analysis in 2.5.2, if the tune incorporates some new changes, it is very likely to meet the originality requirement and attract copyright protection, the same as a subsequent revision (like an arrangement of an old tune). Accordingly, the individual can qualify as the author of the tune or revision, and the rights attached to authorship only cover her or his original contributions. Regarding those tunes extempore performed by a group of traditional musicians, under the general prescription of joint authorship and the lowered standard of originality, it could be said that traditional musicians who directly participate in performance and make some kind of contribution are very likely to qualify as joint authors of the resulting works.

To summarise this section, Chinese traditional musicians can qualify as authors and joint authors under copyright law. In any sense, traditional musicians are not merely performers. The following part analyses the role of the authorship requirement in the publishing of Chinese traditional folk music.

3.6 The publishing of traditional music in China

This part analyses the publishing of traditional music in China. 3.6.1 presents the background and overview of music publishing, focusing on the collection process. 3.6.2 examines some influential lawsuits. With these specific examples, this section reveals how Chinese copyright law treated music collectors and traditional musicians. From the perspective of authorship, 3.6.3 analyses the effects on traditional music of the compound of legal treatment and publishing practice.

[714] ibid 35-36.

3.6.1 The collection process

As introduced in 2.6.1, a nationwide collection of Chinese traditional folk music was conducted in the 1950s in China.[715] There were two main processes in publishing: collection and arrangement.[716] The above chapter has examined the arrangement process. This chapter examines the collection process, focusing on how traditional musicians and music collectors were credited and acknowledged.

The collection process was fieldwork, described as 'caifeng' in Chinese. As Li explained, 'cai' means collect and 'feng' means folk songs, so caifeng means 'collecting folk songs.'[717] In this process, a traditional musician sang or played a tune, and music collectors transcribed the tune on a written musical notation.[718] In the 1950s, this was the primary method to record music because videotape was not available.

Music collectors involved in this process usually had very elementary musical knowledge, so they produced standard notations of orally expressed traditional folk tunes. As described in the literature, 'oral song may have different editions, such as different or unclear lyrics, and different or unclear tunes. Therefore, this person need proofread the tunes or lyrics to replace those unclear parts.'[719] Rees proposes that the transcribed versions are more like verbatim transcriptions of traditional tunes.[720] Li argues that they were 'stenographic typewritten words.'[721]

When a transcribed version was published in songbooks or journals, the music collector was usually credited as an adapter or arranger.[722] As explained in 2.6.1, in the 1950s, China did not have copyright law, and the society had no conception of authorship, so this credit indicated that the music collector recorded the tune rather than authorship. In other words, Chinese society of the time did not see music collectors as authors of the transcribed versions.

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[715] Schimmelpennynck and Kouwenhoven (n 101); Jones (n 326); Mu (n 392).
[716] Schimmelpennynck and Kouwenhoven (n 101).
[717] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 130.
[718] Mu (n 392).
[719] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 131.
[720] Rees (n 400).
[721] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 130.
[722] Rees (n 28).

In addition, as music was not seen as intellectual property of economic values, the authorship issue was of no concern.

After the first Chinese copyright law took effect in 1991, music collectors and traditional musicians gradually knew about copyright and authorship.[723] Therefore, disputes about authorship began to appear. The following part examines three representative lawsuits.

3.6.2 Influential lawsuits

3.6.2.1 Manas: Gusev Mamay v. Xinjiang People's Publishing House

Manas is a repertoire of epic poems orally transmitted by the Kyrgyz ethnic minority in northwest China.[724] Under the classification of Chinese traditional folk music, it belongs to the sub-category 'singing and telling art'.[725] It is reported that in the Kyrgyz ethnic minority community, only a few singers can sing a relatively complete version of *Manas*, and every singer has individual variations and paragraphs.[726] Different versions of *Manas* have been found, all based on the same framework but varying in details and lengths.[727] Gusev Mamay (1918-2014) was the most prestigious singer and the only one who could sing all eight volumes of *Manas*.[728] Chinese and German folklorists (Zhong Jingwen, Karl Reichl) praised him as 'Living Homer', the legendary author of two epic poems of ancient Greece.[729]

According to the facts revealed in the current lawsuit,[730] Mamay's oral singing of *Manas* has been recorded three times. In 1961, the local government of Kizilsu Kyrgyz

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[723] ibid.
[724] *Gusev Mamay v Xinjiang People's Publishing House and others (2000) Shenzhen Intermediate People's Court No 32 Gusev Mamay v Xinjiang People's Publishing House and others (2001) Guangdong Higher People's Court No 123*.
[725] Ho (n 326).
[726] Nienke Van der Heide, *Spirited Performance: The Manas Epic and Society in Kyrgyzstan* (BoD–Books on Demand 2015) 3.
[727] Heping Dang and Fuying Jing, 'From Oral Legends to Novel Texts—The Personal Re-Narrative of the Novel "King Gesar"' (2008) 4 Law Science Journal 123.
[728] Xiaobing Han, 'Study for Protection of Minority Traditional Culture in Copyright Law' (2004) 6 Hebei Law Science 45.
[729] Ibid.
[730] *Gusev Mamay v. Xinjiang People's Publishing House and others (2000) Shenzhen Intermediate People's Court No 32. Gusev Mamay v. Xinjiang People's Publishing House and others (2001) Guangdong Higher People's Court No 123* (n 724).

Autonomous Prefecture and Minzu University of China launched a project to collect *Manas*, in which Mamay sang the first five volumes of *Manas* in six months. In 1965, the Chinese Folk Literature and Art Association and Xinjiang Federation of Literary and Artistic Circles started another project to collect *Manas*, in which Mamay sang the sixth volume of *Manas*. From 1978 to 1983, in the third project conducted by the Chinese Translation Working Committee of Manas (the Committee), Mamay sang all eight volumes of *Manas*.[731]

In the third project, Mamay's oral singing of eight volumes of *Manas* was completely notated by music collectors working for the Committee. The transcribed version was published in 1995 by Xinjiang People's Publishing House (the House), which became the most complete printed version of *Manas* in history. The transcribed version was in Kirgiz, the language of the Kyrgyz ethnic minority.[732] In other words, music collectors only transcribed and collated Mamay's oral singing but did not translate the singing. The transcribed version was published without Mamay's consent, so he filed a lawsuit and claimed that the Committee and the House infringed his copyright.[733]

According to Chinese copyright law, the right of publication (the right to decide whether to make a work available to the public) belongs to the author,[734] so the first core dispute of the lawsuit was whether Mamay was the author of the transcribed version. Mamay claimed authorship based on the proposition that his oral singing was his own work. As he argued, he learned *Manas* from his family, and that specific version was only inherited within his family. In addition, he also arranged some new variations and paragraphs. Therefore, his singing was a unique work. The transcribed version was no more than a verbatim record of his oral singing, so he should own the authorship of the transcribed version.

On the opposing side, the Committee and the House argued that *Manas* was an intangible cultural heritage of the Kyrgyz ethnic minority rather than an original work of Mamay. There were many other *Manas* singers, and their oral singings were close to each other,

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[731] Van der Heide (n 726) 3.
[732] Yinliang Liu, 'Legal Protection for Folk Epics' (2006) 1 116.
[733] *Gusev Mamay v. Xinjiang People's Publishing House and others (2000) Shenzhen Intermediate People's Court No 32. Gusev Mamay v. Xinjiang People's Publishing House and others (2001) Guangdong Higher People's Court No 123* (n 724).
[734] CLPRC 1990. Article 10.

although containing some differences. Mamay was only one of these singers, so he could not claim authorship of the transcribed version. In addition, the transcribed version had credited Mamay as the singer. In other words, the defendants were arguing that Mamay was only a performer, rather than the author of the transcribed version.

Shenzhen Intermediate People's Court held that Mamay's authorship would be recognised if he had made some original contributions to the transcribed version, and the court disturbed the burden of proof on Mamay. In other words, Mamay was required to single out his original contributions in the transcribed version. However, as explained above, the version was largely a transcription and collation of his oral singing. Thus, it was almost impossible for Mamay to separate his oral singing from the transcribed version. It was not surprising that Mamay failed to fulfil the burden of proof.

As a result, the court held that *Manas* was a folklore work collectively created by the Kyrgyz ethnic minority, rather than an original work created by Mamay. *Manas* was in the public domain, available for use by any person. The defendants produced the transcribed version based on a public domain work and owned the copyright of the transcribed version. Thus, the court refused Mamay's claim. [735]

In this case, the court conflated *Manas* which was collectively created by the Kyrgyz ethnic minority and Mamay's version of *Manas*. Therefore, on the one hand, the court treated Mamay as the performer of *Manas* rather than as the author of his version, regardless the fact that the version never existed before. On the other hand, the court treated the transcribed version as a derivative work of a public domain work and thus recognised the authorship of the music collector. As a result, the traditional musician was deprived of authorship of his individual version of traditional folk music. In contrast, the music collector gained private intellectual property based on the musician's version.

3.6.2.2 Epic of King Gesar: Kimba Zamsu v. Chinese Academy of Social Sciences

Epic of King Gesar (*Epic*) is an epic poem containing one million verses in twenty-nine chapters. It belongs to the sub-category 'singing and telling art' under the classification of

[735] Kaiyuan Tao, *Selected Intellectual Property Cases of Guangdong Province* (Law Press 2004).

Chinese traditional folk music.[736] The *Epic* has been orally transmitted in Tibet Autonomous Region and Inner Mongolia Autonomous Region of China since the twelfth century.[737] Traditional musicians have created many versions of the *Epic*, based on the same storyline but varying in details and lengths. As an old Tibet proverb says, everyone has a unique version of the *Epic* in his mouth. Around three hundred different versions have been founded.[738]

In 2001, the Chinese Academy of Social Sciences (the Academy) initiated a project to collect the *Epic*. The Academy signed a labour contract with Kimba Zamsu, a traditional singer living in Inner Mongolia Autonomous Region. By the contract, Zamsu sang and recorded his version of the *Epic* in cassettes and transcribed his oral singing on paper. The Academy paid him a single fee for his singing and transcription. In 2007, the Academy and Zamsu signed a publishing contract. By the contract, the Academy published a book entitled *The Complete Book of Gesar*, based on Zamsu's oral singing and transcription. The publishing contract assigned the book's copyright to the Academy, and no remuneration to Zamsu was prescribed.[739]

In 2009, Zamsu initiated a lawsuit and claimed authorship and copyright of the book (the transcribed version). First, Zamsu argued that there existed no standard and definitive version of the *Epic*, and his oral singing was a unique version. Because the book was a collation of his singing and transcription, he should be a joint author of the book and share copyright with the Academy. Second, Zamsu admitted that the Academy had paid him for his singing and transcription by the labour contract, but he claimed that the remuneration should not displace copyright royalises.[740]

In the opposite position, the Academy argued, firstly, that Zamsu's oral singing was a verbatim re-narration of the *Epic*, which was orally transmitted in the local area. The *Epic* was the intangible cultural heritage of all Chinese people, so any individual traditional singer like Zamsu could not claim authorship of the *Epic*. Secondly, the Academy had

[736] Ho (n 326).
[737] Dang and Jing (n 727).
[738] Liu (n 732).
[739] *Kimba Zamsu v Chinese Academy of Social Sciences (2009) Beijing Second Intermediate People's Court No 22122*.
[740] ibid.

authorship of the book because it had imparted original inputs in the book, manifesting as the editing and collation of Zamsu's singing. In addition, the publishing contract had assigned the copyright in the book to the Academy. Thirdly, the Academy had acknowledged Zamsu as a performer. The book enclosed Zamsu's portraits with a footnote: 'traditional singer Zamusu is singing the *Epic of King Gesar*.'[741]

The case involved two disputes: copyright infringement and the breach of the publishing contract.[742] According to the Civil Procedure Law of the People's Republic of China (Civil Procedure Law),[743] the first-instance court requested the plaintiff Zamsu to choose one of them as the cause of action. Had Zamsu chosen copyright infringement, the court would analyse the authorship issue. However, Zamsu chose the breach of contract as the cause for unreported reasons. Thus, the court only analysed the rights and obligations prescribed in the contract. As the contract had assigned the copyright to the Academy and prescribed no remuneration to Zamsu, the court dismissed Zamsu's claim.

The second-instance court was only allowed to review judgements of the first instance in line with the Civil Procedure Law. After re-examining the contract, the second-instance court upheld the judgement. [744]

In this case, the courts mechanically complied with the formal legal terms. It could be said that the judgements only achieved formal justice because the courts did not touch the substantial dispute of the case: who was the author of the transcribed version. As a result, on the one hand, the traditional singer was not recognised as the author of his individual version, although the version was not available before. On the other hand, the music collector gained authorship of the transcribed version based on the original input: the editing and collation of oral singing of the traditional musician.

It could be said that the so-called original input was trivial and minimal compared to the input of the traditional musician. In addition, it was an essential process in book

[741] ibid.
[742] Contract Law of the People's Republic of China (adopted 15 March 1999), Article 122.
[743] Civil Procedure Law of the People's Republic of China (adopted 9 April 1991, revised 28 October 2007). Article 108.
[744] *Kimba Zamsu v. Chinese Academy of Social Sciences (2009) Beijing Second Intermediate People's Court No 22122* (n 739).

publishing. Nevertheless, due to the courts' mechanical obedience to formal legal terms, the rights attached to authorship were distributed to the music collector rather than the traditional musician. The music collector gained private intellectual property based on traditional folk music.

3.6.2.3 Hequ folk song: Wang Hua v. Hongji Century Beijing Cultural Media Company

Hequ folk song has been orally transmitted in Shanxi Province of China since the seventeenth century. As the current lawsuit revealed, in 1952, Wang Hua collected one Hequ folk song *Going to the West Gate*. The namesake transcribed version was published in *Shanxi Folk Song* (1952) and credited as 'Hequ folk song, adapted by Wang Hua.' The transcribed version was also published in the *Chinese Folk Song Collection* (1959) and credited as 'Hequ folk song' without mentioning Wang. The traditional musician who sang the song for Wang became unknown as Wang did not record her or his name.

Despite the inconsistent credits in the two books, in 2003, Wang managed to register the transcribed version at the copyright office of Shanxi Province. In registration, Wang provided a copy of *Shanxi Folk Song* (1952), which credited him as the adaptar. In addition, he submitted some testimonies, which stated that he collected the Hequ folk song in the 1950s.[745] Registration is not a precondition of copyright protection under Chinese copyright law, but it serves as proof of Wang's authorship.

In 2005, Shanxi Radio and Television Station produced a TV series *Brother Going to the West Gate*. *Going to the West Gate* was further adapted (either understood as the folk song or the transcribed version as they were found indistinguishable, as discussed soon). Wang accused that the Station unauthorised adapted his song and did not acknowledge his authorship. The two parties reconciled, and the Station paid Wang a small fee to end the dispute.

[745] Geng Xi, 'The Construction of the Intellectual Property Rights Benefit Distribution Mechanism of Ethnic Folk Music' (2020) 24 Journal of Law Application 25.

In 2009, Hongji Century Beijing Cultural Media Company (the Company) produced another TV series named *Going to the West Gate*. The Company made some new adaptations of *Going to the West Gate* (again, either understood as the folk song or the transcribed version). The newly adapted music was used in the TV series, credited as 'arranged from Hequ folk song.' Wang thus started a lawsuit against the Company. Wang claimed that the Company had unauthorised adapted his song and failed to acknowledge his authorship, and he requested a vast sum of copyright fees.[746] The Company argued that the newly adapted music was based on the original folk song published in the *Chinese Folk Song Collection.* As explained above, this book credited the song as a 'Hequ folk song' without mentioning Wang.[747]

The court found that the transcribed version and a folk song orally transmitted in the local area were indistinguishable, and the newly adapted music was of the same tune. This is understandable. Considering the publishing process explained in 3.6.1, Wang only made a transcription of the orally expressed folk song. However, because copyright registration provided a kind of proof of Wang's authorship, the court gave an opinion that the Company infringed Wang's copyright. The lawsuit did not reach the stage of substantial judgement. Instead, the court organised a court mediation, in which Wang and the Company signed an agreement. By the agreement, the Company paid one-fifth of the fees that Wang had requested.

In the current case, Wang was a music collector and transcribed an orally expressed folk song. The traditional musician who sang the song for Wang became unknown. The court's failure to distinguish the folk song and the transcribed version verified that the transcribed version was no more than a verbatim record of the folk song. However, according to the court's opinion (the Company infringed Wang's copyright), Wang was recognised as the author of the transcribed version.

As a result, the unknown singer was depersonalised and deprived of authorship of the folk song. Meanwhile, the music collector gained authorship of the transcribed version. As the two disputes show, the music collector's copyright practically prohibited others from using

[746] *Wang Hua v Hongji Century Beijing Cultural Media Company (2011) Beijing Chaoyang District People's Court*. The case ended with court mediation, so there is no case number.
[747] Xi (n 745).

the original folk song. The law thus distributed the rights attached to authorship to the music collector.

3.6.3 Analysis: traditional musicians as performers

In these cases, the Chinese Translation Working Committee of Manas and Xinjiang People's Publishing House, the Chinese Academy of Social Sciences, and Wang were music collectors, while Mamay, Zamsu, and the unknown singer were traditional musicians. Music collectors did not compose the published music but produced the transcribed versions of oral singings of traditional musicians. In music publishing, music collectors credited themselves as the authors of the transcribed versions while treating traditional musicians as performers of public domain music. In juridical practice, the courts recognised the authorship of music collectors while refuting the authorship claim of traditional musicians.

As a result, on the one hand, traditional musicians were deprived of authorship. As discussed in 3.5.2, when a traditional musician performs a tune, in most cases, she or he adds some new changes or arrangements to existing tunes. Further, as explained in 3.6.1, the transcribed versions were no more than the verbatim record of traditional tunes. Therefore, traditional musicians should be recognised as authors of the transcribed versions. At least, they should be recognised as joint authors and share copyright with music collectors. In any sense, traditional musicians were not merely performers of public domain music. However, they were relegated as performers in music publishing and juridical practice. Although they may gain performers' rights, as discussed in 3.5.1, the rights are much more restrictive than copyright, and performers do not have ownership of musical expressions.

On the other hand, music collectors gained authorship of the transcribed versions. Music collectors imparted some editorial efforts in the versions. Nevertheless, as shown in these lawsuits, the versions were hard to be distinguished from the oral singings. Therefore, it is doubtful whether their efforts could meet the originality requirement and earn them authorship of the versions.

The Chinese context echoes the UK context. In both contexts, as a compounded effect of publishing practice and legal treatment, a named author of published traditional music was a music collector. In China, traditional musicians had legal awareness and claimed authorship, but their claims were refuted in lawsuits. Therefore, Chinese copyright law also facilitated the exploitation of traditional music. The rights attached to authorship were distributed to music collectors, whereas traditional musicians had no share of the rights. Music collectors, rather than traditional musicians, became the ultimate beneficiaries of traditional folk music.

Furthermore, when traditional musicians were relegated as performers rather than authors, traditional tunes were simultaneously identified as anonymous works in the public domain. Therefore, these judgements had the same effects as UK music publishing: they attributed Chinese traditional folk music to a collective, anonymous origin.

In summary, in the publishing of Chinese traditional folk music, copyright law facilitated the exploitation of traditional music. Furthermore, the collective, anonymous origin influenced the cultural status of Chinese traditional folk music, as analysed in 3.7.

3.7 Conclusion: the effects of copyright law on traditional music under the requirement of authorship

3.7.1 The exploitation of traditional music

Authorship is an important issue because the author of a work is usually the first owner of copyright in the work.[748] UK copyright law protects musical works of individual authorship and joint authorship. The law defines the author as the person who creates a work,[749] but it determines authorship by the name appeared on the work. [750] Chinese copyright law also protects musical works of individual authorship and joint authorship. The law defines the author as the person who has created the work,[751] but it also identifies authorship by the

[748] Ginsburg (n 451).
[749] CDPA 1988, s 9(1). CDPA 1988 S 154 (1).
[750] CDPA 1988, s 104.
[751] CLPRC 1990, 2001, 2010, 2020, Article 11.

name affixed to the work.[752] Thus, in both jurisdictions, the author practically becomes the person 'whoever says she is.'[753]

It is argued in some literature that traditional musicians cannot qualify as authors and joint authors of their music, based on the stereotyped understanding that traditional music is the collective effort of a community, which merges many individual efforts.[754] As any individual effort is untraceable, traditional music lacks an identifiable author to whom the copyright is conferred.[755] This chapter has shown that this argument is only tenable with regard to those traditional musicians who perform old tunes, which are the collective efforts.

However, as a 'living tradition,'[756] traditional musicians constantly created new tunes, either created by the individual arrangement or collective performance. These traditional musicians are very likely to qualify as authors and joint authors of their original creations. Therefore, in theory, it could be said that traditional musicians can gain copyright - the rights attached to authorship, and traditional music should be protected from the exploitation conducted by outside entities - music collectors.

In practice, however, this chapter shows that these traditional musicians did not gain copyright. In both UK and Chinese contexts, music publishing had similar processes. Traditional musicians presented their own tunes, while music collectors erased their names in the transcribed versions of the tunes. Instead, music collectors attached their own names or fabricated names to the transcribed versions. They might impart some editorial efforts in the transcribed versions for the publication purpose, but it is very doubtful whether these efforts could meet the originality standard and earn them authorship. Furthermore, copyright law also had the same reaction: music collectors were recognised as the authors of the transcribed versions. In contrast, traditional musicians were relegated as informants

[752] CLPRC 1990, 2001, 2010, Article 11. CLPRC 2020, Article 12.
[753] Ginsburg (n 451).
[754] Farley (n 175); Bachner (n 175).
[755] Ibid.
[756] Carugno (n 6).

or performers of anonymous old tunes, indicating they were passive receivers rather than music creators. Thus, they were deprived of authorship of their tunes.

As a result, music collectors gained the rights attached to authorship and could profit from the reproduction, distribution, adaptation, and performance of the transcribed versions. In contrast, traditional musicians did not gain the rights attached to authorship.[757] Due to the disparate treatments of music collectors and traditional musicians, music publishing conducted an 'IP-style exploitation'[758] of traditional music. That is, a named author of published traditional music was a music collector, whereas traditional musicians who created the music would not have any share of the copyright.[759] Copyright law 'facilitates and ultimately legitimates'[760] the exploitation by treating traditional musicians as informants or performers when recognising music collectors as authors and copyright owners.

This legal treatment of traditional music has a historical root. As analysed in 3.3, in its historical development, the 'rhetoric of authors' rights'[761] was used by music publishers for their demands of copyright extension and profit maximisation. From the very beginning of copyright law, under the notion of authorship, music publishers, rather than music creators, were the chief beneficiaries of music creativity,[762] who were music collectors in traditional music publishing.

As a far-reaching effect, copyright law has exacerbated broader socio-cultural inequality between the dominant group and the marginalised communities. In judicial practice, on the one hand, music collectors from the dominant group gained private property based on traditional cultural products of the marginalised communities. On the other hand, traditional musicians from the marginalised communities had no share of the benefits

[757] They may gain performers' rights, but this right provides much fewer rewards than copyright, as analysed below.
[758] 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (n 11).
[759] Cornish (n 3).
[760] Gibson (n 57) 7.
[761] Kretschmer (n 452).
[762] ibid.

arising from private property. The law serves the interests of the dominant group at the expense of the welfare of the marginalised communities.

3.7.2 The construction of the 'hierarchy of culture'

As reported in the literature, a 'hierarchy of culture' was formed in the music sphere by nineteenth-century music theorists in the UK (and Europe).[763] Classical (or art) music of the dominant group was regarded as the 'high culture', whereas traditional (or folk) music of the marginalised communities was regarded as the 'low culture.'[764] The 'low culture' was believed to improve along with the linear evolution towards the 'high culture' only by learning and imitating the 'high culture.'[765] Furthermore, as discussed in 3.3.3, 'high culture' and 'low culture' in the music sphere took on connotations partially based on the origin of music.[766] The music of individual composers was regarded as 'high culture', works of autonomous aesthetic values.[767] In contrast, the music of anonymous folks was regarded as 'low cultural' that could be 'aestheticised' by individual composers.[768]

This chapter argues that with the authorship requirement, copyright law has implemented a 'hierarchy of protection', reflecting and reinforcing the 'hierarchy of culture' in the music sphere. Copyright law and musicology provide each other with a comparator.

In terms of reflection, 3.3.3 has shown that the authorship notion participated in shaping the view of classical music composers. Thus, it could be said that it is not accidental that there are resonances or correspondences between the authorship requirement and the classical music practice. In the music sphere, 'a clearly established authorship' is a feature of classical music compositions.[769] Composers and performers are of clear labour division, and composers occupy a superior status over performers. In the legal sphere, an identifiable author is a feature of protected musical works. Authors and performers are

[763] Szabolcsi (n 74); Brofsky (n 74); Becker (n 74); Weber, *The Rise of Musical Classics in Eighteenth-Century England* (n 74); Tomlinson (n 74).
[764] Ibid.
[765] Gilchrist (n 74).
[766] Gramit (n 447) 65–66; Gelbart (n 17) 80–81.
[767] Weber, *The Rise of Musical Classics in Eighteenth-Century England* (n 74) 243–44; Gelbart (n 17) 191–97.
[768] Ibid.
[769] Gelbart (n 17) 1.

strictly separated by the law, and authors' rights (copyright) are more extensive than performers' rights. In this sense, it could be argued that the authorship notion is not culturally neutral, but it reflects the practice of classical music.

In terms of reinforcement, the compound of music publishing and copyright law depersonalised traditional musicians, obliterated their individual identities, and fabricated a collective, anonymous origin for traditional music. This origin influences the cultural perception or status of traditional music, namely, how traditional music is aesthetically evaluated in the music sphere. Since the music of anonymous folks was regarded as 'low culture', it could be argued that copyright law shaped the cultural perception of traditional music: it downgraded traditional music as 'low culture.'

Furthermore, this chapter has shown that copyright law has divided two groups of musical expressions with the authorship requirement: the music of identifiable authorship and the music of anonymous origin. Accordingly, the law has implemented a 'hierarchy of protection': the more protected and the less protected. On the one hand, classical music of the dominant group was more protected. Classical music usually has a clearly established authorship,[770] so works of classical music can be protected as musical works. Classical music composers (and more often their publishers) gain the rights attached to authorship (copyright or authors' rights).

On the other hand, traditional music of the marginalised communities was less protected. Traditional music was attributed to a fabricated anonymous origin, indicating that traditional music was unowned musical materials. Traditional musicians lost the rights attached to authorship. Although they may gain performers' rights, the rights provide much fewer rewards than copyright. This point is elaborated on in detail in the following chapter.

In conclusion, with the authorship requirement, copyright law facilitated the exploitation of traditional music. Further, the law contributed to the high cultural status of classical music and relegated traditional music as 'low culture', thus contributing to the 'hierarchy of culture' in the music sphere.

[770] ibid.

The above chapter has proven that copyright law facilitated the exploitation of traditional music and reinforced the ‘hierarchy of culture’ with the originality requirement. This chapter echoes the above chapter and has proven that copyright law has the same effects on traditional music when implementing the authorship requirement. The following chapter examines the effects of copyright law, focusing on the fixation requirement.

4. 'Textualising' oral tradition into notated versions: traditional music under the requirement of fixation

4.1 Introduction

Traditional tunes in oral tradition have been 'textualised' into notated versions and then in printed volumes, as reported in the literature.[771] This 'textualisation' or 'transcription' process has legal consequences. In common law copyright tradition, musical works must be reduced to material forms or tangible mediums in order to attract copyright.[772] This requirement is usually referred to as fixation.[773] Musical expressions initially made in oral form cannot fulfil this requirement before being 'textualised' into notated versions (or other fixation forms) by musicians or 'third-party fixers.'[774] This chapter explores 1) under formal legal terms, whether orally expressed traditional tunes can be recognised as musical works upon third-party fixation; 2) how the notion of fixation took shape in its historical development, and how it interacted with classical (or art) music; 3) in music publishing, how orally expressed traditional tunes were 'textualised' into notated versions and what were the relative legal consequences; 4) under the fixation requirement, what are the effects of copyright law on the traditional music of the marginalised communities.

4.2 examines the requirement of fixation in UK copyright law and its relation with Scottish traditional music. It argues that the law privileges musical notation as the fixation form of musical works, which is described as 'notation privilege' by this chapter. 4.3 analyses how the notion of fixation and the 'notation privilege' took shape in the historical development of the copyright system. It focuses on music self-publishers' demands to protect printed sheet music- 'musical notation printed on sheets of paper.'[775] This section also analyses the role of 'notation privilege' in shaping the 'notation culture'[776] in classical music. This analysis provides a historical explanation for the law's treatment of traditional music. 4.4

[771] Atkinson (n 68).
[772] Bently and others (n 52) 92.
[773] Eugene C Lim, 'Spontaneous Oral Communications, Impromptu Speeches and Fixation in Copyright Law: A Comparative Analysis' (2018) 13 Journal of intellectual property law & practice 806.
[774] Bachner (n 175).
[775] Calvin Elliker, 'Toward a Definition of Sheet Music' (1999) 55 Notes (Music Library Association) 835.
[776] Middleton (n 109) 104–106; Schuiling (n 611).

analyses the role of copyright law in the publishing of Scottish traditional music. 4.5 echoes 4.2. It argues that Chinese copyright law has imposed an implicit fixation 'preference' (if not a requirement) on musical works due to the contradictory provisions of work concept and work category. 4.6 echoes 4.4 and analyses the role of copyright law in the publishing of Chinese traditional folk music. 4.7 compares the UK and China contexts and reveals the effects of copyright law in two aspects: the exploitation of traditional music and the cultural perception or status of traditional music.

4.2 The requirement of fixation in UK copyright law and its relation to Scottish traditional music

This part focuses on the UK context and analyses the relation between the fixation requirement and Scottish traditional music. 4.2.1 examines the fixation requirement in UK legislation and cases. 4.2.2 analyses the conflict between the practice of Scottish traditional music and the fixation requirement. It argues that UK copyright law privileges musical notation as the fixation form of musical works. This 'notation privilege' and the provision about 'third-party fixation' can cause a potential unfair consequence against the benefits of traditional musicians.

4.2.1 The requirement of fixation in formal legal terms

4.2.1.1 Fixation in the international copyright law

Fixation[777] in the copyright sense indicates that a work subsists in a material form or a tangible medium.[778] At the international level, the Berne Convention allows national copyright laws to decide whether fixation is a condition for the protection of authorial works, including musical works.[779] However, in historical texts of the Convention, fixation was a rigid requirement for the protection of all categories of works. The Berne

[777] Fixation is different from formality. Formality was abolished by the Berne Convention. The Berne Convention Berlin Text 1908 first prescribed that the rights granted under the Convention should not depend on national formalities, so formalities such as registration is not a precondition for copyright protection. Therefore, copyright automatically attaches to works that fit other qualificative standards prescribed in national copyright law. See Ricketson and Ginsburg (n 23) 415.
[778] Bently and others (n 52) 92.
[779] The Berne Convention Paris Act 1971, Article 2. See Ricketson and Ginsburg (n 23) 415.

Convention (1886) prescribes that works in general or any specified categories shall not be protected unless they have been fixed in some material form.[780]

Then, the Rome Act (1928), Brussels Act (1948), and Stockholm Act (1967) of the Berne Convention loosened this requirement and allowed national legislation to determine the issue of fixation on specific categories of works, including lectures, addresses, sermons and other works of the same nature.[781] These enumerations are oral-form literary expressions, so it was unclear whether this provision also applied to musical works. It was not until the Paris Act (1971) that national legislation could determine the issue of fixation on 'works in general.'[782] Hereafter, national copyright laws can decide whether fixation is a condition for the protection of musical works. At the national level,[783] in common law copyright tradition, musical works must be reduced to material forms in order to attract copyright protection.[784] In comparison, in civil law copyright tradition, musical works subsisting in perceptible forms (i.e., sounds) can gain copyright.[785]

This brief historical review shows that fixation is entrenched in the copyright regime. Indeed, fixation serves several functions for the operation of copyright. First, it helps to delineate the boundaries of works, so copyright is granted to some objects with clear boundaries.[786] As Sherman points out, 'the most consistent and widespread approach that has been used to determine the ambit of the work has been to equate it with the parameters of the material object in which it coexists.'[787] Second, works in material forms are easier to be reproduced and distributed than works without material forms.[788] Therefore, fixation

[780] The Berne Convention 1886, Article 2 (2).
[781] The Berne Convention Rome Act 1928, Article 2bis (2); The Berne Convention Brussels Act 1948, Article 2bis (2) ; The Berne Convention Stockholm Act 1967, Article 2bis (2).
[782] The Berne Convention Paris Act 1971, Article 2 (2).
[783] Paul Goldstein and PB Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, Oxford University Press 2013) 232.
[784] Bently and others (n 52) 92.
[785] Elizabeth Adeney, 'Authorship and Fixation in Copyright Law : A Comparative Comment' (2011) 35 Melbourne University law review 677.
[786] Lim (n 773).
[787] Brad Sherman, 'What Is a Copyright Work?' (2011) 12 Theoretical inquiries in law 99.
[788] Evan Brown, 'Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law' (2014) 10 Wash. JL Tech. & Arts 17.

helps to accomplish the economic values of works. Third, a material form serves an evidentiary purpose, which helps to prove whether a work has been infringed.[789]

4.2.1.2 Fixation in UK copyright law

Following the common law tradition, UK Copyright Law has an explicit fixation requirement on musical works.[790] CDPA stipulates that 'copyright does not subsist in a…musical work unless and until it is recorded, in writing or otherwise.' 'Writing' has a broader sense as 'any form of notation or code.'[791]

UK copyright law differentiates three manifestations of music and grants differing levels of protection to them. First, musical compositions are protected as musical works. For example, in *Hadley v. Kemp*, the court held 'there is a vital distinction between *composition or creation of a musical work* on the one hand...'[792] In *Coffey v. Warner/Chappell Music Ltd*., the court held that '…performance characteristics by the performer, which is not the legitimate subject of copyright protection in the case of *a musical work, rather than to a composition, which is*.'[793] It is noted that musical compositions are the product of 'writing down music'[794] and 'musical abstraction embodied in a score.'[795] In addition, a score or notation is 'the traditional and convenient form of fixation of the music.'[796]

Musical compositions gain the most extensive protection.[797] Right owners, who are conventionally composers and music publishers, can profit from the reproduction and distribution of printed works (earliest copyright, from the 1710 Act), public performance of works (the performing right, from Copyright Act 1842), and mechanical reproduction of

[789] Larisa Mann, 'If It Ain't Broke . Copyright's Fixation Requirement and Cultural Citizenship' (2011) 34 The Columbia journal of law & the arts 201.
[790] Bently and others (n 52) 49.
[791] CDPA 1988, S 178
[792] *Hadley v Kemp [1999] E.M.L.R. 589* (n 470).
[793] *Coffey v. Warner/Chappell Music Ltd [2005] ECDR (21) 312.*
[794] Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson, 'Notation' in Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson (eds), *The Oxford Dictionary of Music* (Oxford University Press 2013) <http://www.oxfordreference.com/view/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-6533> accessed 18 January 2022.
[795] Bently (n 284).
[796] *Sawkins v. Hyperion Records Ltd. [2005] EWCA Civ 565; [2005] 1 WLR 3281* (n 153).
[797] Kur, Dreier and Luginbühl (n 38) 242.

works, usually conducted by record companies and broadcasters (the mechanical right, from Copyright Act 1911).[798]

Second, sound recordings are mechanical or electronic storages of music.[799] Sound recordings is a statutory work category since the Copyright Act 1911, and they exist in material forms by nature. Right owners, conventionally record labels, can only profit from the reproduction and distribution of sound recordings.[800] Third, performance is an unfixed musical manifestation, and it is protected through performers' rights. For a specific performance, performers can benefit from authorising the fixation of unfixed performance and may gain some profits arising from the reproduction and distribution of the fixation form.

Therefore, in a recording (i.e., a disc), there may exist three layers of rights: the copyright in a musical work, the copyright in a sound recording, and the performers' rights in a specific performance. For the music embedded in a recording, others may unauthorised use it in the way of transcription, remaking (known as cover versions), performing, and recording (known as sound-alike versions). In this situation, the copyright in the sound recording and performers' rights are not infringed, but the copyright in the musical work may be infringed.[801] In other words, musical works are protected against imitation, while sound recordings and specific performances are not. In addition, musical works generally have a longer term of protection than sound recordings and performances.

The differing protection of music manifestations has been noticed in the literature. Arnold proposes a binary of 'content copyright' and 'signal copyright.'[802] 'Content copyright' protects musical works, the creativity of authors, whereas 'signal copyright' protects sound recordings, 'the investment in producing a signal.'[803] The latter merits a more limited

[798] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[799] Examples include vinyl records, tapes, compact discs, digital audiotapes, and mp3s. Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson, 'Recording' in Joyce Kennedy, Michael Kennedy and Tim Rutherford-Johnson (eds), *The Oxford Dictionary of Music* (Oxford University Press 2013) <http://www.oxfordreference.com/view/10.1093/acref/9780199578108.001.0001/acref-9780199578108-e-10310> accessed 18 January 2022.
[800] Bently and Sherman (n 36) 148.
[801] ibid.
[802] Richard Arnold, 'Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection' (2011) 1 Queen Mary journal of intellectual property 272.
[803] ibid.

degree of protection than the former.[804] Similarly, Bently argues that 'performances and sound recordings do seem to be valued less in British intellectual property law than musical and literary works.'[805] Therefore, a musical expression can gain more protection under copyright law if it is recognised as a musical work.

4.2.1.3 The 'notation privilege': privileging musical notation as the fixation form of musical works

It has been noted that copyright law favours musical notation as the fixation form of musical works. As Barron reported, copyright law is criticised for it 'tends to equate music with a score, or at least only protects what can be easily notated in the form of a score.'[806] Similarly, Bently proposes that copyright law seems to conceive musical works as 'musical abstraction embodied in a score', so 'certain forms of sound are regularly notated renders them more readily regarded as musical.'[807] Arewa argues that 'visual, written aspects of music' are easily recognised as musical works, whereas orally expressed music may be treated as performance.[808]

Following this thread, the law regards performances as deriving from underlying musical works and secondary to musical works in originality.[809] In Toynbee's words, 'a first stage of score production, followed by a second of pure performance.'[810] These propositions show that musical notation provides an advantage for musicians to claim copyright in musical works.

These propositions can be verified when comparing two cases. Although these cases were not judged recently, they are continuously discussed in analysing music copyright. In *Godfrey v. Lees*,[811] Lees owned the copyright in a musical work (*Galadriel*), and Godfrey claimed the copyright. Godfrey provided an orchestral arrangement to the song based on

[804] ibid.
[805] Bently (n 284).
[806] Barron, 'Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice' (n 4).
[807] Bently (n 284).
[808] Arewa, 'Creativity, Improvisation, and Risk' (n 467).
[809] ibid.
[810] Toynbee (n 453).
[811] *Godfrey v. Lees [1995] EMLR 307* (n 470).

the pre-existing 'basic melodic and harmonic lines' made by Lees.[812] It has been noted that orchestral arrangements are 'the sort of material that could readily be placed on a score',[813] and Godfrey indeed wrote the arrangement in notations. As the court affirmed, Godfrey was 'responsible for compiling the orchestral scores (the other members of the band being incapable of doing so at the time).'[814] The orchestral arrangement was recognised as a significant contribution to the musical work, so Godfrey succeeded in claiming the copyright as a joint author.[815]

In *Hadley v. Kemp*,[816] Kemp owned the copyright in a musical work (*True*), and Norman claimed the copyright. Norman contributed a saxophone solo to the work based on the pre-existing melodies, chords, and rhythms made by Kemp.[817] The court found that Norman made the solo 'aurally, and without music sheets setting it all out in musical notation.'[818] The saxophone solo was not recognised as a significant contribution to the musical work. Instead, the court treated the solo as a performance. The court stated,

> however significant and skilful, to the performance of the musical works are not the right kind of contributions to give them shares in the copyrights. The contributions need to be to the creation of the musical works, not to the performance or interpretation of them […] there is a vital distinction between composition or creation of a musical work on the one hand and performance or interpretation of it on the other.[819]

In the two cases, both the plaintiffs claimed copyright of a musical work to which they made contributions, both their contributions were based on a tune made by the defendants, both their contributions accounted for almost the same amount of the whole work (the orchestral arrangements accounted for ten per cent, and the saxophone solo accounted for nine per cent), and both their contributions were subsequently fixed in recordings. A clear disparity between the two lies in that the orchestral arrangement was made in notation

[812] *Godfrey v Lees [1995] EMLR 307*, 328.
[813] Bently (n 284).
[814] This is stated in a letter sent from the plaintiff's solicitor to the defendants, and the court quoted and affirmed the letter. See *Godfrey v. Lees [1995] EMLR 307* 320.
[815] *Godfrey v. Lees [1995] EMLR 307* 308.
[816] *Hadley v Kemp [1999] E.M.L.R. 589* (n 470).
[817] *Hadley v Kemp [1999] E.M.L.R. 589* 590-592.
[818] *Hadley v Kemp [1999] E.M.L.R. 589* 640.
[819] *Hadley v Kemp [1999] E.M.L.R. 589* 643-646.

form, while the saxophone solo was made in aural form. As it turns out, the orchestral arrangement was recognised as a part of a musical work, while the saxophone solo was treated as a performance of a pre-existing musical work.

The cases show that musical expressions initially made in the notation form are easily recognised as musical works. In contrast, musical expressions initially made in the oral form have been treated as performances, despite subsequently being fixed in sound recordings.[820] This disparity suggests that the law privileges musical notation as the fixation form when identifying musical works, which can be described as a 'notation privilege.'

In addition, the decision in *Hadley v. Kemp* is premised on the understanding that a performance derives from an underlying musical work. The court stated that 'when Kemp presented a song to the band the melody was complete, the chord structure was complete, the rhythm or groove was apparent in the song as presented.'[821] It has been argued that even if the saxophone solo cannot be recognised as a contribution to the musical work, it amounts to an original arrangement of the work, and copyright exists in the original arrangement.[822] Thus, it is problematic to treat the saxophone solo as a performance.

Toynbee argues that the distinction between composition and performance does not consider 'the renewed convergence of the functions of writing and performance through techniques like improvisation, repetition-variation and sampling' in the twentieth century and after.[823] While this argument and the above two cases reflect the 'notation privilege' in the field of popular music, the following part shows that the 'notation privilege' also has effects on traditional music created in similar forms (i.e., improvisation and repetition-variation), far before the twentieth century.

[820] Arewa, 'Creativity, Improvisation, and Risk' (n 467).
[821] *Hadley v Kemp [1999] E.M.L.R. 589* 645.
[822] Arnold (n 479); Arewa, 'Creativity, Improvisation, and Risk' (n 467).
[823] Toynbee (n 453).

4.2.2 The relation between the requirement of fixation and Scottish traditional music

4.2.2.1 The oral tradition of Scottish traditional music

It has been emphasised that 'oral tradition has been at the heart of Scottish traditional music.'[824] The music subsists 'solely in the memories and on the lips' of common populaces and traditional musicians (hereafter traditional musicians).[825] For instance, folk songs did not reach printing but existed in oral transmission until the end of the nineteenth century.[826] Pipe music was 'completely unavailable in published form' until the nineteenth century.[827] Pipers learned their music by direct communication with masters.[828] Even in the nineteenth and twentieth centuries, many pipers remained reliant on oral communication because they could not read notations.[829] An exception is fiddle music. Fiddlers used staff notations and gained their music from tune books.[830] However, overall, Scottish traditional music is created and transmitted in oral form.

Improvisation is a feature of oral expression. Improvisation is explained as 'creating music in the moment' and 'composition in real time', which means the acts of performance and composition happen simultaneously.[831] It is noted that improvisation is essential for niche cultural communities to develop new creativity.[832] Especially in non-classical music genres, 'the music is created directly by the performers', and 'the distinction between the role of the composer and that of the performer is much less clear.'[833] Specific to Scottish traditional music, traditional musicians perform together in sessions when extempore developing reels, jigs, and arias from 'a memorised communal repertoire.'[834]

The oral tradition makes Scottish traditional music innately lack a notation form and initially does not meet the fixation requirement. In this sense, it can be said that the fixation

[824] McKerrell (n 3) 14, 37, 58.
[825] Collinson (n 18).
[826] ibid.
[827] ibid.
[828] McKerrell (n 3) 64.
[829] Ibid.
[830] Collinson (n 18).
[831] Mann (n 789).
[832] Arewa, 'Creativity, Improvisation, and Risk' (n 467).
[833] Arnold (n 479).
[834] Sanderson (n 524).

requirement is an obstacle in protecting Scottish traditional music as musical works under UK law.

4.2.2.2 Two possible rights arising upon third-party fixation

Traditional musicians conventionally produce tunes in oral form,[835] while music collectors usually record the tunes in musical notations.[836] Two questions appear after an orally expressed traditional tune is reduced to a notation. Firstly, whether copyright will arise in the traditional tune, and secondly, whether copyright will arise in the notated version.

In UK copyright law, fixation of an 'initially unfixed expression' can be completed by a third-party fixer.[837] CDPA prescribes that 'whether the work is recorded by or with the permission of the author; and where it is not recorded by the author, nothing...affects the question whether copyright subsists in the record as distinct from the work recorded.'[838] According to this provision, copyright will arise in the work belonging to the author, and a separate copyright will arise in the fixation form belonging to the fixer.[839] However, if the work is in the public domain, a fixation form will not bring copyright to it, and it remains in the public domain.

Regarding the first question, if a traditional tune can be recognised as a musical work, a fixation form will bring copyright to it belonging to the traditional musician. However, as 4.2.1 analysed, musical expressions initially made in oral form have been treated as performance, despite subsequently being fixed in sound recordings. Further, traditional music is often regarded as being in the public domain. Following this thread, if a traditional tune is treated as a performance or in the public domain, third-party fixation will not bring copyright to it.

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[835] Contemporarily, some traditional musicians may reduce their music in musical notations or sound recordings, which makes their music satisfy the fixation requirement. As explained in Chapter 1, this dissertation limits to analyse traditional music produced in the conventional manner in marginalised communities, that is, in oral form.
[836] Cornish (n 3).
[837] Lim (n 773).
[838] CDPA 1988. S 3.
[839] Lim (n 773).

Regarding the second question, it is clear that copyright will arise in a sound recording of a traditional tune, which is a work category and can be copyrighted without originality.[840] However, it worthy of discussion whether copyright will arise in a notated version of the tune, a written transcription.

Walter v Lane set the precedent that reporters' handwritten transcriptions of oral speeches can be protected as copyright works. The House of Lords held, 'A speech and the report of it are two different things, and the author of the one and the author of the other are presumably two different persons.'[841] Derclaye argues that *Walter v. Lane* has been absorbed in CDPA Section 5,[842] which defines sound recordings as 'a recording of sounds…regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.' Derclaye proposes that this definition is broad, so a handwritten transcription is 'properly classed as a sound recording.'[843] Following this interpretation, copyright will arise in a notated version without fulfilling the originality requirement.[844]

Sawkins v. Hyperion Records Ltd,[845] the 'most authoritative decision on the nature of the musical work in the UK',[846] cited *Walter v Lane* as a good law. The Court of Appeal held that 'mere servile copying…does not amount to originality, there are clearly forms of "copying" which do — the shorthand writer's copyright is a paradigm example.'[847] According to the court, *Walter v Lane* protected handwritten transcriptions because reporters had exercised skill and effort in making the transcriptions. In other words, the transcriptions satisfied the originality requirement. Following this interpretation, notated versions gain copyright only if fixers 'impart originality to the transcription.'[848] Based on *Sawkins*, Laddie proposes that 'a person who takes down a *folk song*…acquires a copyright

[840] Bently and others (n 52) 86–87.
[841] *Walter v. Lane [1899] 2 Ch 749, [1900] AC 539* (n 136) 557.
[842] Estelle Derclaye 1974, 'Debunking Some of UK Copyright Law's Longstanding Myths and Misunderstandings' [2013] Intellectual property quarterly 1.
[843] ibid.
[844] In the opposite position, Gravells argues that handwritten transcriptions are not sound recordings because sound recordings must store auditory sounds. See NP Gravells, 'Reporter's Copyright and Sound Recordings: A Reply to Professor Derclaye' [2013] Intellectual property quarterly 91.'
[845] *Sawkins v. Hyperion Records Ltd. [2005] EWCA Civ 565; [2005] 1 WLR 3281* (n 153).
[846] McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' (n 14).
[847] *Sawkins v. Hyperion Records Ltd. [2005] EWCA Civ 565; [2005] 1 WLR 3281* (n 153) [77].
[848] Gravells (n 844).

in his transcription, always provided the amount of useful work or skill involved is not negligible.'[849]

The above case laws and opinions show divergency about whether originality is necessary for a notated version to attract copyright. Originality in UK copyright law is a lowered standard, so it could be argued that copyright is very likely to arise in a notated version, but the right does not cover the underlying traditional tune.[850]

4.2.2.3 A potential unfair consequence of third-party fixation

The preliminary analysis of the two questions raises a concern. That is, music collectors may benefit from traditional music to a more extensive extent than traditional musicians. Specifically, if a music collector imparts minimal originality in the notated version, copyright law will protect the original additions to the same extent as protecting musical works. If so, the music collector can profit from selling printed copies of the notated versions, licensing public performance of the versions, licensing mechanical reproduction of the versions, and licensing the production of cover versions and sound-alike versions.[851]

Meanwhile, if a traditional tune is treated as performance or in the public domain, copyright will not arise upon third-party fixation. By performers' rights, traditional musicians can benefit from a specific performance rather than the underlying tune. In theory, they may share some profits arising from selling copies of fixation forms with music collectors. However, in practice, performers are usually only paid 'a one off performance fee.'[852]

Thus, it could be argued that third-party fixation may cause an unfair consequence against the benefits of traditional musicians. This point has been noted in the field of literary works. As Lim argued,

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[849] HIL Laddie and others, *The Modern Law of Copyright* (Fifth / Adrian Speck [and twelve others], 2018). Chapter 3 Literary, dramatic and musical works; films regarded as original works/1 Original literary, dramatic and musical works/Original musical works/Folk tunes.
[850] Lim (n 773).
[851] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[852] McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry' (n 71).

If the law does not confer copyright on speakers in respect of their original oral works, but allows transcribers to assert claims of those recorded oral works, it runs the risk of creating a situation where an amanuensis is treated as the 'default first author' of expressions originating from another party.[853]

This potential unfair consequence will be further analysed in the following sections. To summarise this section, in UK copyright law, musical works must be reduced to fixation forms to attract copyright, such as musical notations and sound recordings. In juridical practice, musical expressions made in notation form are easily recognised as musical works. In comparison, musical expressions initially made in oral form risk being treated as performance even after third-party fixation.[854] The fixation requirement and the 'notation privilege' may exclude orally expressed traditional tunes from being protected as musical works, and the third-party fixation may cause an unfair consequence against the benefits of traditional musicians. The next part explains how the fixation requirement took its connotations.

4.3 To protect 'musical notation printed on sheets of paper': the historical development of the notion of fixation

This part analyses the historical development of the notion of fixation and the 'notation privilege.' Printed sheet music is defined as 'musical notation printed on sheets of paper.'[855] This definition clearly indicates the relation between 'musical notation' and 'printed sheet music.' Following this thread, this part examines the role of musical notation in the legal regulation of one of the most important music products: printed sheet music. 4.3.1 analyses the role of musical notation in copyright law's extending protection of musical expressions, focusing on music (self-) publishers' demand for protecting printed sheet music. 4.3.2 examines the role of musical notation in forming the abstract work concept. 4.3.3 analyses the influence of copyright law on one change in classical music: 'the rise of a culture of notation.'[856]

[853] Lim (n 773).
[854] Arewa, 'Creativity, Improvisation, and Risk' (n 467).
[855] Elliker (n 775).
[856] Arewa, 'A Musical Work Is a Set of Instructions' (n 241).

4.3.1 The role of musical notation in protecting printed sheet music

4.3.1.1 The propertisation of music

As explained in 2.4.1, in the mid-eighteenth-century UK, the middle class became a group of people with surplus incomes and leisure time to devote to musical activities.[857] As a result, classical or art music, which was previously performed in aristocratic courts and churches, came to be performed in public concert halls and opera houses.[858] Besides attending the public performance, the middle class also needed music products for home entertainment. However, home music consumption was unfeasible before the invention of recording and broadcasting.[859]

As Rahmatian articulates, different art forms have different constituents of existence.[860] Visual arts exist in spatial and static objects, such as painting on canvas.[861] Thus, visual arts can be possessed, controlled, and owned, so they are innately property.[862] In contrast, aural arts exist in temporal, transitory objects, such as music in sounds.[863] This amorphous essence means that music cannot be possessed, controlled, and owned, so music was not property. In Theberge's words, music lacks 'a means of fixation and reproduction, did not lend itself to the evolving economic system based on fixed commodities and exclusive property rights.'[864] For the propertisation of music, some spatial, static objects are needed.

Due to the technological restrictions in history,[865] the objects turned out as musical notations. Notations reify temporal, transitory sounds into tangible, spatial objects[866] that can be possessed, controlled, and owned.[867] Thus, notations convert music into intellectual

[857] Hunter (n 219); Holman (n 304).
[858] Hunter (n 219); Rabin and Zohn (n 220); Towse, 'Copyright and Music Publishing in the UK' (n 35); Towse, 'Economics of Music Publishing' (n 253).
[859] Ibid.
[860] Rahmatian, 'Music and Creativity as Perceived by Copyright Law' (n 109).
[861] ibid.
[862] ibid.
[863] Jane M Gaines, *Contested Culture: The Image, the Voice, and the Law* (University of North Carolina Press 1991) 106.
[864] Theberge (n 516).
[865] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[866] Kennedy, Kennedy and Rutherford-Johnson, 'Notation' (n 794); Schutz (n 594).
[867] Kennedy, Kennedy and Rutherford-Johnson, 'Notation' (n 11 above); Alfred Schutz, 'Making Music Together: A Study in Social Relationship' (1951) 18 Social research 76.

property and achieve the propertisation of music.[868] When notations are printed on sheets of paper, the product is printed sheet music,[869] which can be bought and sold away from performance in distance and time. Thus, printed sheet music transfers music into a saleable form and thus achieves the commodification of music.[870] Following the propertisation of music, owners demanded legal protection of the property.

4.3.1.2 The 'battle' between 'self-publishers' and 'professional publishers'

As explained in 3.3.1, when the 1710 Act was enforced,[871] music was not a copyright subject matter. This is primarily because professional music publishers did not join book publishers in lobbying the Act.[872] After the passage of the Act, they assumed that copyright did not protect music because they made profits by pirating composers' works.[873]

Copyright law enclosed music-printed sheet music as its subject matter in some landmark cases, which were initiated by some 'self-publishers' or self-publishing composers.[874] They participated in music publishing because they found it hard to share publishing profits with professional publishers.[875] As a standard practice of the time, composers sold their manuscripts to professional publishers in exchange for a single payment. However, they could not share profits arising from selling copies of their works.[876] This payment was insufficient for composers to make a living.[877] Thus, those composers who had established their reputation and accumulated fortunes launched their own publishing businesses.[878]

[868] Blakely (n 54) 14–15.
[869] Elliker (n 775).
[870] Blakely (n 54) 14–15.
[871] Statute of Anne, 1710. See Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[872] Carroll (n 59).
[873] Towse, 'Economics of Music Publishing' (n 253).
[874] Hunter (n 219).
[875] Michael Saffle, 'Self-Publishing and Musicology: Historical Perspectives, Problems, and Possibilities' (2010) 66 Notes (Music Library Association) 726.
[876] As explained in 3.3.1, the contracts that gave composers a percentage of copyright royalties were not uniformly established in the UK until the late 1920s. See Towse, 'Economics of Music Publishing' (n 253).
[877] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[878] Scherer (n 568). Nancy A Mace, 'The Preston Copyright Records and the Market for Music in Late Eighteenth- and Early Nineteenth-Century England' (2019) 113 The Papers of the Bibliographical Society of America 1.

Self-publishers were in the transit position from relying on performing revenues to earning publishing revenues.[879] They self-published their music, and their publishing business, in turn, influenced their music composition. They composed music that was playable and popular with music buyers, which guaranteed the sales of their music. [880] They also held concerts to promote their music. As Towse reported, '…the performance of published sheet music for promoting sales.'[881]

Self-publishing helped these composers become economic independent of professional publishers,[882] but it could not prevent piracy. To counter piracy, self-publishers turned to the courts.[883] As the 1710 Act conferred copyright to authors, theoretically, composers would gain exclusive rights to print and publish their works.[884] The demand to protect printed sheet music against piracy is evident in the following case laws.

4.3.1.3 Arne v. Roberts and Johnson

Arne v. Roberts and Johnson was reported as the first case in which the court was required to protect printed sheet music.[885] Thomas Arne was a theatrical composer and gained a printing privilege in 1741, which covered his 'several Works, Consisting of Vocal and Instrumental Musick.'[886] The privilege granted Arne the exclusive rights to print and publish these works.[887] Henry Roberts and John Johnson published eight of these works without authorisation. The copies were printed before the issue of the privilege and sold after the issue of the privilege. Arne therefore filed a bill of complaint in Chancery.

Arne justified his claim by privilege and copyright. Regarding the privilege, Roberts and Johnson argued that it only protected copies *printed* after its issue, so there was no infringement as their copies were printed before the issue.[888] Regarding copyright, Roberts

[879] Weber, 'The Intellectual Origins of Musical Canon in Eighteenth-Century England' (n 96).
[880] Small (n 220).
[881] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[882] Saffle (n 875).
[883] Arewa, 'From JC Bach to Hip Hop' (n 219).
[884] Towse, 'Economics of Music Publishing' (n 253).
[885] Rabin and Zohn (n 220).
[886] See London, Public Record Office, C11/2260/7, ARNE'S BILL OF COMPLAINT (London, Public Record Office, C11/2260/7) and ROBERTS'S AND JOHNSON'S ANSWER (London, Public Record Office, C11/2260/7) in APPENDIX of ibid.
[887] Kretschmer, Bently and Deazley (n 579).
[888] Rabin and Zohn (n 220).

and Johnson argued that the 1710 Act did not protect printed sheet music. As they said, 'the Musick and Songs published by the Complainant are not such Books as are by the said Act intended to be preserved to the Author.'[889]

The case did not go beyond the pleadings stage of bill and answer, and it was solved out of the court, so there is no reported judgement. Nevertheless, the case reflects that music publishers of the time were uncertain about the subsistence of copyright in music, so Arne justified his claim based on both the privilege and copyright, and Roberts defended by arguing that music was not a copyright subject matter.

Moreover, the case reflects self-publishers' growing demands for the protection of printed sheet music. After this case, another composer Isaac Bickerstaff initiated three lawsuits against the unauthorised publishing of his opera. However, it was not until *Bach v. Longman*[890] that the law clarified the uncertainty and enclosed music as its subject matter.[891]

4.3.1.4 Bach v. Longman

In *Bach v. Longman,* Johann Christian Bach owned a privilege covering some of his works. Longman unauthorised published the works. Bach started a lawsuit in 1773, seeking an injunction against Longman. Bach initially justified his claim by the privilege, which was underpinned by common law rights. As explained in 3.3.1, in 1774, *Donaldson v. Becket* [892] determined that common law right was displaced by statutory copyright when works were published. Therefore, Bach turned to copyright to justify his claim.[893]

This case straightforwardly questioned whether music was a copyright subject matter. The court gave an affirmative answer. Lord Mansfield stated:

[889] See London, Public Record Office, C11/2260/7, ARNE'S BILL OF COMPLAINT (London, Public Record Office, C11/2260/7) and ROBERTS'S AND JOHNSON'S ANSWER (London, Public Record Office, C11/2260/7) in APPENDIX of ibid.
[890] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).
[891] Barron, 'Copyright Law's Musical Work' (n 281).
[892] *Donaldson v. Becket (1774) 4 Burr 2408* (n 560).
[893] Carroll (n 59).

The words of the Act of Parliament are very large: 'books and other writings'. It is not confined to language or letters. Music is a science: it may be written; and the mode of conveying the ideas is by signs and marks.[894]

'Books and other writings' in the 1710 Act were interpreted in a broader sense, including literary writings but also music writings-notations.[895] The case formally enclosed music as a copyright subject matter by this analogy. As Arewa commented, copyright protection expanded from literary expression to musical expression, from word to note.[896] Literary expressions are by nature 'visual and textual.' This essence imprinted a 'visual-textual bias' in the legal conception of works.[897] As a result, the law carried this 'visual-textual bias' and conceived musical works with musical notations.

The judgement of *Bach v. Longman* fulfilled self-publishers' demands for protecting printed sheet music. Then, their demands went further, and copyright law extended its protection scope more broadly in *Clementi v Golding*,[898]

4.3.1.5 Clementi v Golding

Before analysing *Clementi v Golding*, the case *Hime v Dale*[899] deserves discussion. Both cases questioned whether a work printed on a single sheet of paper could be protected as a book under the 1710 Act. The confusion came from the fact that a book, in the ordinary sense, was 'a volume made up of several sheets bound together.'[900]

In *Hime v Dale* (1803),[901] Humphrey Hime published a verse on a single sheet, while Joseph Dale unauthorised republished the verse.[902] Him thus sued Dale for copyright

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[894] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).
[895] 'Deazley, R. (2008) 'Commentary on Bach v. Longman (1777)', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org' (n 220).
[896] Arewa, 'A Musical Work Is a Set of Instructions' (n 241).
[897] ibid.
[898] *Clementi v Golding (1809) 2 Camp. 25 | [1809] 2 WLUK 67* (n 622).
[899] *Hime v Dale [1803] 170 E R 1070n*.
[900] Richard Godson, *A Practical Treatise on the Law of Patents for Inventions and of Copyright: With an Introductory Book on Monopolies ; Illustrated with Notes of the Principal Cases* (Printed for Joseph Butterworth and Son 1823) 322–326. Accessed through https://books.google.co.uk/books?id=EGRMAQAAMAAJ&printsec=frontcover&hl=zh-CN&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.
[901] *Hime v Dale [1803] 170 E. R. 1070n* (n 899).
[902] Michael Kassler, *The Music Trade in Georgian England* (Ashgate 2011) 417–418.

infringement.[903] The core dispute of the case was whether *words* printed on a single sheet could be protected as a book. The court first stated that a single sheet was not a book, which should be 'a plurality of sheets.'[904] And thus, the court non-suited the plaintiff. Then, in a new trial, the plaintiff argued:

> the legislature could never have intended to make the operation of the statute depend on the type in which any composition was printed, or the form in which it was bound up [...] there is nothing in the word book, to require that it shall consist of several sheets bound in leather.[905]

The court did not make a substantial judgement,[906] so the case did not solve the puzzle about a single sheet. This ambiguity remained in *Clementi v Golding*. In *Clementi v Golding*, Schield composed an opera, *Two Faces Under a Hood*, including an aria *Heigh Ho*. Clementi bought and published the full-length opera. Because the aria was popular, Clementi printed it separately in the form of a single sheet. Golding unauthorised printed the aria.[907] Clementi thus started a lawsuit against Golding.

Clementi v Golding questioned whether a single sheet of *music* could be protected by copyright.[908] The court gave an affirmative answer. *Clementi v Golding* thus extended copyright protection to a single sheet of music. As Godson reported in 1832, the case clarified that 'books need not be…a volume made up of several sheets bound together. It may be printed only on one sheet, as the words of a song, (a) or the music accompanying it.'[909]

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[903] Ibid.
[904] John Campbell, *Reports of Cases, Determined at Nisi Prius, in the Courts of King's Bench and Common Pleas, and on the Circuit: From the Sittings after Hilary Term, 49 Geo. III. 1809. to the Sittings before Easter Term, 51 Geo. III. 1811. Both Inclusive*, vol 2 (Joseph Butterworth and Son 1818) 27–32. Accessed through https://books.google.co.uk/books?id=pLo2AQAAMAAJ&pg=PA29&lpg=PA29&dq=Hime+v+Dale&source=bl&ots=v5vloUrbyQ&sig=ACfU3U0xJseZ6PwyM3d0ojBNDZMajR6q7Q&hl=zh-CN&sa=X&ved=2ahUKEwjh6M-mqNf2AhXLbsAKHQpkAGkQ6AF6BAgYEAM#v=onepage&q=Hime%20v%20Dale&f=false
[905] Ibid.
[906] Kassler (n 902) 417–418.
[907] Ginsburg (n 266).
[908] Additionally, it also questioned whether a music piece, which was taken from a full-length work and published separately, could constitute an infringement of the full-length work.
[909] Godson (n 900) 322–326.

Clementi v Golding was also informed by music publishing. As explained in 2.3.2, when the case happened, legitimate publishers printed full-length large works (i.e., opera, symphony, or concerto) in *a volume of sheets*. This needed a vast sum of investment, so publishers set the price at a comparatively high level above which many music buyers could afford.[910] Publishers also produced keyboard arrangements (i.e., piano reductions) of large works and sold them at a comparatively lower price, by which publishers made price discrimination.[911]

At the same time, pirates printed short excerpts of large works in the form of *a single sheet*.[912] This needed less investment, so the products were sold at a comparatively low price affordable for music buyers.[913] As a result, the single sheet of music became more saleable and lucrative,[914] and the profits of legitimate publishers were outflanked and carved up by pirates.[915] These legitimate publishers thus demanded to protect a single sheet of music. In *Clementi v Golding*, the law responded to this demand and extended copyright protection to a single sheet of music.

4.3.2 The role of musical notation in forming the abstract work concept

The literature reflects that work became an abstract concept around the 1800s, indicating that its existence exceeds physical forms.[916] The abstract work concept was first formed based on literary expressions and then extended to musical expressions. This part argues that musical notation enabled musical works to approach the concept.

4.3.2.1 The abstract work concept of literary expression

The abstract work concept was conceived in UK cases and formed in German idealism. As reported in the literature, in *Tonson v. Collins*, Blackstone separated literary expressions

[910] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[911] ibid.
[912] Rabin and Zohn (n 220).
[913] ibid.
[914] Szendy, Nancy and Mandell (n 264) 45.
[915] Lockhart (n 158).
[916] Barron, 'Copyright Law's Musical Work' (n 281).

(styles and sentiments) from physical forms (papers and prints).[917] Similarly, in *Millar v. Taylor*, Mansfield separated literary creations (words, sentences, modes of expression) from physical forms (manuscripts).[918] These propositions emphasised the abstract aspect of the objects regulated by copyright.[919]

Then, German idealism formed the abstract work concept. As reported by Kawohl and Kretschmer, Johann Gottlieb Fichte identified three aspects of books and three types of property assigned.[920]The physical aspect (the printed paper) was the property of the buyer after the book was sold; the form aspect (ideas, contents, and thoughts) became the common property of the author and the buyer when the book was published; the formation aspect (phrasings and wordings) was the inalienable, permanent, and exclusive property of the author.[921] Similarly, Georg Friedrich Hegel distinguished the form and formation of books. The form was the objective aspect and disposable, which became the property of buyers after the book was sold. The formation was the subjective aspect and inalienable, which remained the author's property after the book was sold. By these propositions, Fichte and Hegel separated the abstract and physical aspects of books.[922]

4.3.2.2 The significance of 'notated music': the abstract work concept of musical expression

Then, the abstract work concept was applied to musical expressions. In *Bach v. Longman*, Mansfield defined musical expressions in the same way as he defined literary expressions: 'the mode of conveying the ideas is by signs and marks.'[923] In German idealism, the abstract work concept was projected on absolute music (or instrumental music). As Tomlinson reported, Johann Herder described absolute music as 'a self-sufficient art, sui-

[917] *Tonson v Collins (1762) 1 Black W 321*. Blackstone stated that 'the style in which a literary composition was written and sentiment (ideas) it expressed, constituted it as the thing of value, whereas the paper and print are merely accidents.' See Jaszi (n 270); Barron, 'Copyright Law's Musical Work' (n 281); Martin Kretschmer and Andy C Pratt, 'Legal Form and Cultural Symbol: Music, Copyright, and Information and Communications Studies' (2009) 12 Information, communication & society 165.
[918] *Millar v. Taylor (1769) 4 Burr 2303* (n 559). As Mansfield stated, 'a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression…detached from the manuscript or any other physical existence whatsoever.' See ibid.
[919] Jaszi (n 270).
[920] Kawohl and Kretschmer (n 584).
[921] Ibid.
[922] Kretschmer and Kawohl (n 200).
[923] *Bach v. Longman (1777) 2 Cowp. 623* (n 220).

generis', and Immanuel Kant praised absolute music as the most valuable beauty because it conveyed meanings by music per se rather than drew meanings from its contexts, words, and performances.[924] Moreover, Friedrich Schlegel proposed that absolute music attained autonomous status by creating 'a text of its own', say, musical notation.[925] Tomlinson's reflection on this point deserves a long quotation:

> The *notated music* came to be viewed less as a preliminary script for the performance than as the locus of the composer's intent, the unique and full inscription of the composer's expressive spirit, which was elsewhere-in any one performance-only partially revealed. *Music writing* itself seemed an inscriptive means endowed with nonsemantic and mysterious significance […] the work as embodied in music writing, divorced from its contexts of production, performance, and reception, could become the avatar of the transcendent spaces absolute music could attain and inhabit. The *notated work* took on almost magical characteristics. [926]

Here, 'composer's intent' and 'the unique and full inscription of the composer's expressive spirit' signify the abstract nature of absolute music. Further, the nature was achieved by 'notated music', 'music writing', 'notated work. Thus, musical notation helped to convert musical works to an abstract concept, detaching from their phenomenal renditions-performance.[927]

In a word, work became an abstract concept around the 1800s, and musical notation enabled musical works to approach the concept. Thus, it could be argued that notation was embedded in the abstract concept of musical works.

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[924] Tomlinson (n 74).
[925] See Carl Dahlhaus, 'The Metaphysic of Instrumental Music' in J Bradford Robinson (tr), *Nineteenth-century music* (University of California Press 1989).
[926] Tomlinson (n 74).
[927] ibid.

4.3.3 The notion of fixation and the 'notation culture' in classical music

4.3.3.1 The 'notation culture' in classical music

Musical notation exists in different musical cultures, but it is central to classical music of the formal musical tradition of the Western world.[928] This manifests as that musicology, foregrounded within classical or art music, equates notation with music.[929] Accordingly, musicological terminology is rich in easily notated musical parameters, including melodies (i.e., pitch sequences), harmony (i.e., chord types), tonality, and form (i.e., motive, episode).[930] In contrast, it is poor in music elements out of the diatonic, chromatic system, such as non-discrete pitch movements (i.e., slides), irregular rhythms, vocal inflection, and performer idiolect.[931]

Even though in formal musical tradition, notation is not always centralised. Notation developed from neume used in the ninth century to staff used in the seventeenth century, responding to the evolution of the fundamental elements of formal musical tradition.[932] However, notation became centralised in the formal musical tradition around the 1800s, during its classical period (approximately between 1750 and 1830, post-Baroque and pre-Romantic).[933] In line with the 'notational centricity' or 'notation culture',[934] musical works should be accurately and completely recorded in notations, and notations should be strictly operated in performance.[935]

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[928] Kennedy, Kennedy and Rutherford-Johnson, 'Notation' (n 794).
[929] Philip Tagg, 'Analysing Popular Music: Theory, Method and Practice' (1982) 2 Popular music 37; Middleton (n 109) 104–106.
[930] Ibid.
[931] Middleton (n 109) 104–106.
[932] In the formal music tradition, symbols constitute musical notation were developed in different periods: symbols for pitch in the tenth century, symbols for durations in the thirteenth century, symbols for loudness in the seventeenth century, and the symbols for tone colour in the eighteenth century. See Alfred Blatter, *Revisiting Music Theory: Basic Principles* (2nd edn, Routledge 2016) 1–2; Charles Cronin, 'Seeing Is Believing: The Ongoing Significance of Symbolic Representations of Musical Works in Copyright Infringement Disputes' (2018) 16 Colorado technology law journal 225.
[933] Kennedy, Kennedy and Rutherford-Johnson, 'Classical' (n 62).
[934] Tagg (n 929).
[935] Schuiling (n 611).

4.3.3.2 Before the rise of the 'notation culture'

The literature has shown that before the 1800s, the most important practice of formal musical tradition was performance, whereas composition was subsumed in performance.[936] Pre-composed, incomplete notation was carried to performance and fulfilled in performance.[937] Incomplete notations only record the backbones of music, such as melodic outlines and figured basses.[938] Other music components essential for performance were improvised by performers, such as embellishments, ornamentations, preludes, recapitulations, and cadenzas.[939] In other words, notations needed to be supplemented by performance.

For example, as Talbot reported, in *Dido and Aeneas* premiered around 1689, the composer Henry Purcell did not compose two sections but left them improvised by the performing guitarist (the *Dance Gittars Chacony* in act one the *Gittar Ground a Dance* in act two).[940] Mangsen also notes that many works entitled 'apt for voices or instruments' left 'the performers to fill the notations by additions suited to their instruments.'[941] Johann Sebastian Bach was good at improvising fugues based on given themes, and Wolfgang Amadeus Mozart's performances were even designed to display his improvising skills.[942]

4.3.3.3 The significance of copyright in the rise of the 'notation culture'

At the turn of the nineteenth century, notation became more complete. This was partly because the increasing complexity and length of classical music (i.e., symphony, concerto) required notations to record full details of works. In other words, notations provided composers with a tool to create complex and long works.[943] In addition to the internal

[936] Talbot (n 64).
[937] Laurence Libin, 'The Instruments' in Robert Marshall (ed), *Eighteenth-Century Keyboard Music* (Taylor & Francis Group 2003) 2.
[938] Strayer (n 64). The incomplete notation is similar to the notation system of jazz music, 'where the elements of composition are often little more than the outlines of a melodic and harmonic structure that is to be fully realised in performance.' See Theberge (n 516).
[939] Moore (n 64).
[940] Talbot (n 64).
[941] Mangsen (n 263) 3.
[942] Arewa, 'A Musical Work Is a Set of Instructions' (n 241).
[943] Strayer (n 64).

change in classical music, this section argues that copyright protection for printed sheet music contributed to 'the rise of a culture of notation.'[944]

First, copyright law safeguarded publishing profits and stimulated the production of printed sheet music, while the production of printed sheet music required completely recorded notations. From *Bach v. Longman*, the publishing profits were legally safeguarded by law. As an immediate result, the number of registered printed sheet music at the Stationers' Company surged from very few every decade well before the case to thousands every decade just after the case.[945] This data reflects the surging production of printed sheet music.

As explained above, the middle class constituted the mainstream buyers of printed sheet music. However, it is noted that they lacked the knowledge and skills to play music in the way of improvisation.[946] In other words, they were incapable of filling incomplete notations with improvised music components. Composers had to record works in notations with full details to make printed sheet music playable and saleable for these buyers. They filled incomplete notations (i.e., melodic outlines and figured basses) with improvised music components (i.e., embellishments, ornamentations, preludes, recapitulations, and cadenzas).[947] For example, Domenico Corri's works published in the 1780s were the first ones with full details.[948] With the increasing production of printed sheet music, notations became increasingly fulfilled and completed, while the space of the improvised music components was occupied and closed. Notation became centralised, whereas improvised performance declined.[949]

Second, as discussed above, from *Bach v. Longman*, composers were recognised as authors and first copyright owners of musical works. Although they still had to sell their copyright to publishers, they gained more barging power or leverage in the face of publishers. They were gradually able to earn their livings by publishing revenues rather than performing

[944] Arewa, 'A Musical Work Is a Set of Instructions' (n 241).
[945] 'Deazley, R. (2008) 'Commentary on Bach v. Longman (1777)', in Primary Sources on Copyright (1450-1900), Eds L. Bently & M. Kretschmer, Www.Copyrighthistory.Org' (n 220).
[946] Moore (n 64); Strayer (n 64); Schuiling (n 611).
[947] Ibid.
[948] Moore (n 64).
[949] Ibid.

revenues. Thus, they transferred their work focus from performance to composition. In composition, those previously improvised music components were fully recorded in notations, so notations became increasingly fulfilled and completed.[950]

Third and relatively, composers developed an authorial attitude to their works. As McDonagh points out, 'the ability to enforce copyright over musical works had a tangible effect on the attitudes and practices of major classical composers, who began to take a more authorial view of their compositions.'[951] With the authorial attitude and copyright in musical works, composers enhanced control over musical notations. Performers were required to operate notations strictly, and improvisation became restricted.[952] In other words, copyright law strengthened the fidelity to notations and restricted improvised performance. This further contributed to the centrality of musical notations. [953]

In a word, in the production of printed sheet music, copyright law facilitated the centrality of musical notations in the formal musical tradition of the Western world. A 'notation culture' was constructed in classical music: musical works are required to be accurately and completely recorded in musical notations, and notations are required to be strictly executed in performance.[954]

4.3.3.4 The 'notation culture' and the 'museum tradition'

This part argues that musical notations helped to sublimate formal musical tradition as high culture or high art. As explained above, before the 1800s, the essential practice of formal musical tradition was performance.[955] Because of the temporal, ephemeral nature of performance, the formal musical tradition was a 'living tradition', lacking stable objects compared to other fine arts (i.e., paintings and sculptures).[956] Following the centralisation

[950] Weber, 'The Intellectual Origins of Musical Canon in Eighteenth-Century England' (n 96); William Weber, 'The History of Musical Canon' in Nicholas Cook and Mark Everist (eds), *Rethinking Music* (Oxford University Press 2001) 336–55.
[951] McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' (n 14) 156.
[952] Schuiling (n 611).
[953] Arewa, 'Creativity, Improvisation, and Risk' (n 467).
[954] Schuiling (n 611).
[955] Talbot (n 64).
[956] Fine arts in eighteenth-century cultural tradition included poetry, paintings, sculptures, music, and sometimes architecture and dance. They were identified as valuable for their beauty rather than utility. Therefore, fine arts were distinguished from craft and entertainment, which were regarded as the products of manual labour. See Goehr (n 447) 151.

of musical notations, musical works became accurately and completely recorded in musical notations.[957] Musical notations transferred formal musical tradition from temporal, ephemeral performance to stable objects.[958]

The formal musical tradition thus transferred from a 'living tradition' to a 'museum tradition.'[959] As Goehr proposed, works of mastery composers in a metaphor museum are exhibited, preserved, and kept unchanged.[960] Elliott also argues that musical notation is a 'theoretical equivalent to the tangible and highly valued objects of painting and sculpture', which 'served to conceal music's social and performative aspects by diverting attention away from musical processes to musical outcomes conceived as autonomous objects.[961]

As a result, the works of mastery composers became sacralised as classics and canons of formal music.[962] In other words, musical notations constructed classics for formal music, which paralleled classical music with other fine arts, and sublimated classical music to a high cultural status.[963]

4.3.4 Summary: the production of printed sheet music and the abstract work concept

As the legal system regulating cultural production, copyright law was closely intertwined with music publishing, which relied on the transaction of printed sheet music. When responding to self-publishers' demands of protecting printed sheet music, the courts extended copyright protection to musical expressions. *Bach v. Longman* enclosed 'music in notated form' as copyright subject matter, and *Clementi v Golding* extended copyright protection to 'individual sheets of notated music.'[964] These cases were absorbed in formal

[957] Samson (n 446) 49.
[958] Clarke (n 606).
[959] Goehr (n 447) 139.
[960] Ibid.
[961] David James Elliott, 'Music Matters a New Philosophy of Music Education' 25.
[962] In 1816, George Graham coined the term 'classical music', referring to compositions of these German composers, including Johann Sebastian Bach, Wolfgang Amadeus Mozart, and Ludwig van Beethoven. See Gramit (n 447) 231.
[963] Becker (n 74). Goehr (n 447) 239.
[964] Barron, 'Copyright Law's Musical Work' (n 281).

legislation. In the Copyright Act 1842, 'sheet of music' was given protection as a subcategory of books.[965]

The process that copyright law enclosed music verified the statement of Kretschmer and Pratt: 'copyright law constructs the artefacts it seeks to regulate as objects that can be bought and sold.'[966] In turn, cultural artefacts regulated by law influence the legal conception of works associated with the artefacts.[967] In the case of music, printed sheet music was the earliest cultural artefact regulated by law, so it influenced the legal conception of musical works. In other words, copyright law conceived musical works with printed sheet music as the archetype. As printed sheet music is the 'musical notation printed on sheets of paper,'[968] musical notation has been deeply entrenched in the legal concept of musical works. As a legacy of nineteenth-century cultural production, the law imposed the fixation requirement on musical works and has an implicit 'notation privilege' when identifying musical works.

Although musical works became an abstract concept, the concept was projected on notated music. Further, as Sherman articulated, copyright law maintained a 'cultural memory' before the formation of the abstract work concept. Thus, it purportedly protects works of abstract definitions but identifies works by the material parameters.[969] When the object is music, the material parameters are naturally musical notations.

In a word, copyright extended to musical expressions when responding to self-publishers' demands of protecting printed sheet music. Printed sheet music was the cultural artefacts firstly protected by law, which is 'musical notation printed on sheets of paper.'[970] As a legacy of nineteenth-century cultural production, musical notation has been deeply entrenched in the legal concept of musical works. The law imposed the fixation

[965] Copyright Act 1842. See Copyright Act, London (1842), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.
[966] Kretschmer and Pratt (n 917).
[967] Ibid.
[968] Elliker (n 775).
[969] Sherman (n 787).
[970] Elliker (n 775).

requirement on musical works and privileged musical notation when identifying musical works.

Further, copyright law facilitated the rise of 'notation culture' in classical music, so the music is predefined to meet the fixation requirement. The historical development of the fixation notion and the 'notation privilege' provides a historical root for the lasting legal treatment of traditional music. The following part analyses the effects of copyright law on Scottish traditional music.

4.4 The publishing of traditional music in the UK

This part analyses the publishing of traditional music in the UK. 4.4.1 presents the background and overview of music publishing, focusing on both the collection and arrangement processes. 4.4.2 examines one of the most influential publications: George Thomson's *A Select Collection of Original Scottish Airs*. With this specific example, this section analyses how music collectors processed traditional music. From the perspective of fixation, 4.4.3 analyses the effects on traditional music of the compound of legal treatment and publishing practice.

4.4.1 The background

A significant amount of Scottish traditional music, typically Scottish songs, was published during the 1770s and the 1840s. Cultural stereotypes and economic motivations interactively influenced how the music was processed in publishing.[971] Regarding cultural stereotypes, the publishing of Scottish traditional music was deeply influenced by the stratification of culture caused by cultural nationalism, urbanisation, and class.[972] First, as explained in the above chapters, historically, Scots, especially Gaelic Scots of Highland,

[971] Chris McDonald and Heather Sparling, 'Interpretations of Tradition: From Gaelic Song to Celtic Pop: Interpretations of Tradition' (2010) 22 Journal of popular music studies 309.
[972] David Johnson, *Music and Society in Lowland Scotland in the Eighteenth Century* (Second, Mercat Press 2003) 99; Leith (n 69); McAulay, *Our Ancient National Airs* (n 3) 203; Pittock (n 665).

were regarded as a barbarous nation compared to Anglo-Saxon English, and Scottish culture was seen as a primitive and uncivilised otherness.[973]

Second, the fast urbanisation facilitated an urban-rural division. Under the division, Scottish culture was identified (or self-identified) as rural, pastoral, and plain, in opposition to urban, rich, and sophisticated.[974] The oral tradition of Scottish culture was regarded as 'vanished under the weight of urban and industrial progress.'[975]

Third, the imbalanced economic development led to the class divide. In the music sphere, there came a 'classed division between middle-upper class literati and the vernacular performing Scottish communities.'[976] For the middle-upper class music collectors and buyers,[977] Scottish culture represented vernacular and ordinariness, in opposition to literate and formal.[978]

The cultural stereotypes made Scottish traditional music appealing to music collectors and buyers.[979] Music collectors published traditional music to preserve the 'last leaves' of oral tradition (although their publishing might further deteriorate the oral tradition).[980] Music buyers, primarily the middle class living in urban areas in the UK, were interested in the freshness and exoticism of Scottish music.[981] Most publications were primarily aimed at this consumer group.[982]

Regarding economic motivations, printed sheet music became a lucrative product from the 1750s, and copyright law protected the publishing profits from the 1780s. These factors incentivised the publishing of Scottish traditional music.

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[973] For example, in *A General History of Music* (1789), Charles Burney proposed that the music of Scotland was primitive and uncivilised. See Brofsky (n 74).
[974] Pittock (n 665).
[975] McKerrell (n 3) 87.
[976] ibid 128.
[977] Ibid. Music collectors were based in England, and sometimes in Scottish Lowlands.
[978] McKerrell (n 3) 57.
[979] Roger Fiske, *Scotland in Music: A European Enthusiasm* (Cambridge University Press 1983) 2–3. Leith (n 69).
[980] McKerrell (n 3) 87.
[981] Fiske (n 979) 2–3.
[982] Kathryn Mann, 'Improvisation and Vernacular Traditions in Historical Performance' (2016) 2 Journal of the Vernacular Music Center.

Many influential publications have been analysed in the above two chapters from the perspectives of originality and authorship. This chapter focuses on one of the most influential publications, George Thomson's *A Select Collection of Original Scottish Airs*.[983] With this publication as the illustration, this part analyses the effects of copyright law on Scottish traditional music.

4.4.2 Influential publications

George Thomson's six volumes of *A Select Collection of Original Scottish Airs* were published between 1793 and 1841. The publishing had collection and arrangement processes. In the collection process, a traditional musician or local populace (hereafter traditional musicians) sang or played a traditional tune, and collectors transcribed the tune in a musical notation.[984] As explained in 2.2.2, traditional musicians created many individual tunes and variations in the oral tradition, and there was no definitive version.[985] Thomson selected one (or two) tunes. The selection was primarily based on whether the tunes were playable and singable for printed sheet music buyers - the middle class living in urban areas in the UK.[986] Thomson tried to secure the sales of printed sheet music through this selection.

In the arrangement process, Thomson sent transcribed music to classical music composers. Many famous composers participated in the arrangement, including Franz Joseph Haydn (volume 3, 1802; volume 4, 1805; volume 5, 1818), Ludwig van Beethoven (volume 5, 1818), Johann Nepomuk Hummel (volume 6, 1841), and Carl Maria von Weber (volume 6, 1841).[987] Thomson also sent detailed instructions to guide the arrangement to ensure the popularity and thus saleability of the arranged music.[988]

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[983] Other publications include Allan Ramsay's The Tea Table Miscellany (1723-1737, indications for tunes), William Thomson's Orpheus Caledoniensus (1725, melodies and accompaniments), and James Oswald's Caledonian Pocket Companion (1745-1760, melodies). See Mary Hunter and Richard Will, *Engaging Haydn: Culture, Context, and Criticism* (Cambridge University Press 2012) 48.
[984] Cornish (n 3).
[985] Baugh (n 118).
[986] Towse (n 60).
[987] McCue (n 69).
[988] Towse, 'Economics of Music Publishing' (n 253).

First, Thomson requested composers to arrange the music in the simplest form. This was because music buyers were amateur at singing and playing, so they lacked the skills to perform overembellished music.[989] As mentioned in 2.4.1, Thomson had asked Beethoven to rewrite some accompaniments that were too complex.[990]

Second, Thomson requested that composers add instrumental accompaniments to vocal lines of traditional tunes, although the tunes were conventionally sung without instrumental accompaniments. The accompaniments were composed for non-traditional instruments, typically piano, the favoured instrument of music buyers. In addition to accompaniments, composers were also required to add preludes (introductions), interludes (ritornellos), and postludes (codes or endings) to vocal lines.[991]

Third, sometimes composers were required to write additional string parts (i.e., violin and violoncello) to accompany vocal lines. These string parts changed vocal lines in 'fuller textures', although they could be deleted without diluting any musical messages. [992] Additional string parts were sold as separate music products and made extra profits for music collectors.[993]

4.4.3 Analysis

It could be argued that copyright law played a significant role in the publishing of Scottish traditional music. First, copyright law safeguarded publishing profits, which provided economic motivations for the publishing.[994] Second, as analysed in 4.3.4, copyright law protected printed sheet music, 'musical notation printed on sheets of paper.'[995] Therefore, in the collection process, orally expressed traditional tunes were 'textualised' into notated versions. Third, music collectors' focus on publishing profits directed the whole publishing process. As shown above, the selection of tunes was based on whether the tunes were playable and singable for music buyers.[996] The arrangements were made for the amateur

[989] ibid.
[990] MacArdle (n 310).
[991] ibid; McCue (n 69); Will (n 69).
[992] Will (n 69).
[993] ibid.
[994] McDonald and Sparling (n 971).
[995] Elliker (n 775).
[996] Towse, 'Economics of Music Publishing' (n 253).

playing skills of music buyers, the accompaniments were composed for the instruments favoured by music buyers, and the additional string parts were added and sold as separate music products.[997]

Music publishing was a process of 'textualising' oral tradition into notated versions. It might preserve Scottish traditional music to some extent, but its adverse impacts on traditional music also deserve exploration.

First, it could be argued that copyright law enabled the exploitation of Scottish traditional music. As the above two chapters have shown, as a conventional industry practice, music collectors registered the notated versions at the Stationers' Company for (legitimate) printing and publishing, and they also became copyright owners of the notated versions. Music collectors could not claim copyright on the underlying traditional music, which was supposed to exist in the public domain, but they established copyright on the notated versions. Music collectors thus profited from selling copies of the versions.[998] Traditional music was exploited by music collectors.

Second, it could be argued that copyright protection for the notated versions might have disrupted the natural development of the oral tradition of Scottish traditional music.[999] Music publishing produced a singular notated version,[1000] and copyright protected such a version as the authoritative and definitive version. This was because any use of the notated versions required the authorisation of music collectors. Specifically, the reproduction was restricted, the accuracy of the versions was secured, and the alteration required licences. As Atkinson argued, copyright protection gave tunes in the notated versions 'a strong sense of textual stability and authority.'[1001]

[997] Ibid.
[998] For those versions still in the term of protection after the enforcement of the Copyright Act 1842, music collectors could also profit from licensing the public performance of the versions. For those versions still in the term of protection after the enforcement of the Copyright Act 1911, music collectors could profit from licensing the mechanical reproduction of the notated versions. See Towse, 'Copyright and Music Publishing in the UK' (n 35).
[999] Trevor Reed, 'Creative Sovereignties: Should Copyright Apply on Tribal Lands?' (2020) 67 Journal for the Copyright Society USA 313.
[1000] Blakely (n 54) 69.
[1001] Atkinson (n 68).

To what extent these notated versions impacted oral tradition is not unanimously agreed. On the one side, some argue that printed versions crystallised and fossilised the oral tradition.[1002] To be specific, the oral tradition maintained the variety of music.[1003] If traditional music was not written down, it developed in a multitude of forms as musicians 'add lines or leave out verses over time.'[1004] In contrast, 'print-generated standardisation' replaced the variety with 'song as canonical text.'[1005] In other words, the notated versions enforced uniformity of oral tradition.[1006]

It is noted that eighteenth-century scholars firstly put forward this proposition. They believed that the notated versions printed from the sixteenth century onwards threatened and displaced oral tradition. For example, as McDowell reported, music collector Joseph Ritson declared that 'the art of printing was fatal to the Minstrels who sung.'[1007] Thus, music collectors like Ritson published traditional music to preserve the 'last leaves' of oral tradition (as mentioned above, this might further deteriorate the oral tradition).[1008] From a broader perspective, Trevor-Roper argues that 'writing of folklore' made the oral tradition of Scotland extinct.[1009] Stewart holds the same opinion that the 'writing of folklore' in the eighteenth century had eradicated oral genres.[1010]

On the other side, some argue that the oral tradition remained prosperous after the music was textualised into print.[1011] The notated versions only provided one 'model' for oral tradition, while the oral tradition survived through re-composing 'improvised elements,

[1002] Collinson (n 18).
[1003] Pittock (n 665).
[1004] Marshall (n 53) 89.
[1005] Pittock (n 665).
[1006] Leith (n 69).
[1007] Paula McDowell, '"The Art of Printing Was Fatal": Print Commerce and the Idea of Oral Tradition in Long Eighteenth-Century Ballad Discourse', *Ballads and Broadsides in Britain, 1500–1800* (Routledge 2017).
[1008] McKerrell (n 3) 87.
[1009] Hugh Trevor-Roper, 'The Invention of Tradition: The Highland Tradition Of Scotland' in Eric Hobsbawm and Terence Ranger (eds), *The Invention Of Tradition* (Cambridge University Press 2012) 15–41.
[1010] Susan Stewart, *Crimes of Writing: Problems in the Containment of Representation* (Oxford University Press 1991) 104.
[1011] Hana F Khasawneh, 'The Irish Oral Tradition and Print Culture' (2014) 103 Studies (Dublin) 81.

changes, abbreviates or expands, adds or subtracts.'[1012] In fact, by saying 'model', this proposition also recognises that the notated versions influenced the oral tradition. [1013]

It can be seen that the two propositions converge in that the notated versions had a substantial influence on the oral tradition. First, many songs known as 'traditional' and transmitted among Scottish people for centuries are from printed collections, which had been processed by music collectors.[1014] The most famous examples include *Ae fond kiss* and *A Red, Red Rose*, which were mediated by the 'national poet' of Scotland, Robert Burns.[1015]

Second, the style of the notated versions also impacted oral tradition. The style of notated versions is described as 'Celtic-Germanic primitivism' or 'hybrid of folksiness and classicism.'[1016] 'Celtic' and 'folksiness' refer to Scottish music tradition, and 'Germanic' and 'classicism' indicate German or Viennese classical tradition. Classical music usually features delicate melodic ornamentations.[1017] It is found that after the widespread of the notated versions, ornamentations also became common in Scottish songs, which cannot be explained simply as accidental.[1018]

Therefore, it could be said that the notated versions, which were protected as authoritative and definitive versions by copyright, had disrupted the natural development of oral tradition. Even though they did not crystallise and fossilise the oral tradition,[1019] they influenced how traditional music was perceived: the music was regarded as ossified, old musical materials. In other words, the compound of music publishing and copyright law reshaped the cultural perception of traditional music.

[1012] Dave Harker, 'Francis James Child and the'ballad Consensus'' (1981) 4 Folk Music Journal 146.
[1013] Atkinson (n 68).
[1014] Leith (n 69).
[1015] Pittock (n 665).
[1016] Will (n 69).
[1017] Becker (n 74).
[1018] Atkinson (n 68); Pittock (n 665); McDowell (n 1007).
[1019] Reed (n 999).

In a word, UK copyright law facilitated the exploitation of Scottish traditional music and influenced the cultural perception of the music. The next part analyses the effects of copyright law in the Chinese context.

4.5 The implicit fixation 'preference' in Chinese copyright law and its relation to Chinese traditional folk music

This part focuses on the Chinese context and analyses the relation between a 'preference' of fixation in Chinese copyright law and Chinese traditional folk music. 4.5.1 examines the formal provisions in CLPRC and two new revisions in CLPRC 2020 Amendment.[1020] Based on this, it argues that Chinese copyright law has imposed an implicit fixation 'preference' (if not a requirement) on musical works until its 2020 Amendment. 4.5.2 analyses the conflict between orally expressed traditional folk music and the fixation 'preference.'

4.5.1 The implicit 'preference' of fixation in formal legal terms

4.5.1.1 The contradictory provisions of work concept and work category

Chinese copyright law does not have an explicit fixation requirement in formal legal terms. The law has no literal rhetoric such as 'tangible medium' or 'material form.' Nevertheless, to attract copyright, works should fit both the work concept and work category stipulated in CLPRC and RICLPRC.[1021] It has been argued that due to the prescriptions of work concept and work category, the law has implemented an implicit preference for fixation when identifying musical works. In other words, the law has arguably imposed an implicit fixation requirement on musical works.[1022]

First, the work concept indicates that protectable musical works should subsist in some fixation form. CLPRC does not define the concept of works, while RICLPRC defines works as 'original intellectual creations…are capable of being reproduced in a certain

[1020] Copyright Law of the People's Republic of China 2020 Amendment.
[1021] Qian Wang, 'Copyright Law Amendment: Interpretation and Analysis of Key Provisions (Part 1)' (2021) 1 Intellectual Property Law 20.
[1022] CLPRC 2020, Article 3.

tangible form.'[1023] It is argued that 'capable of being reproduced in a certain tangible form' implies the prior subsistence of a fixation form, only by which the subsequent reproduction is possible.[1024] This point is evident and sound compared to the work concept prescribed in the 2020 Amendment, as analysed in 4.5.2.

Further, RICLPRC defines musical works as 'songs, symphonies, and other works, with or without lyrics, that can be sung, played, or performed.'[1025] Chinese copyright system has the dichotomous construction of copyright and neighbouring (or related) rights. Musical works are protected by copyright, and the performance of musical works is protected by the performer's rights (belonging to neighbouring rights). 'Can be sung or performed' implies the prior subsistence of musical works, which is the precondition of subsequent performance.[1026]

Second, the work category indicates that protectable musical works should subsist in some fixation form. The Berne Convention stipulated that 'literary and artistic works shall include every production in the literary, scientific and artistic domain',[1027] but Ricketson and Ginsburg have noted that the possibility is scarce that an unenumerated work falls within the scope of literary and artistic works.[1028] CLPRC prescribes nine work categories: written works, oral works, musical, dramatic, quyi, choreographic and acrobatic art works…other works as provided in laws and administrative regulations.[1029] So far, no laws and administrative regulations have stipulated any new work category, so protectable works must fall into the enumerated eight work categories.[1030]

The category of oral works is arrayed right after written works and well before musical works. RICLPRC defines oral works as 'impromptu speeches, lectures, and court debates

[1023] RICLPRC 1991, 2002, 2011, 2013, Article 3.
[1024] Weimin Li, 'Theoretical Reconstruction of the Concept and Category of Works- Comments on Article 1 and 5 of the Draft of Copyright Law Amendment' (2015) 10 Intellectual Property 55; Song Jin, 'On the "Reproducibility" of Work—the Relationship between the Concept Clause and the Category Clause of Work' (2019) 1 Intellectual Property 59; Yuanyuan Zheng, 'The Theoretical and Practical Problems Caused by the Unclear Work Concept-Comments on Article 3 of the Third Draft of the Copyright Law Amendment' (2014) 2 Intellectual Property 46.
[1025] RICLPRC 1991, 2002, 2011, 2013, Article 3.
[1026] Jin (n 1024).
[1027] The Berne Convention Paris Act 1971, Article 2.
[1028] Ricketson and Ginsburg (n 23) 409.
[1029] CLPRC 1990, 2001, 2010, Article 3.
[1030] Wang (n 1021).

expressed in the form of spoken language.'[1031] Thus, oral works are oral-form literary expressions, paralleling written-form literary expressions (written works). Music is not literary expression,[1032] and thus, oral works and musical works are mutual-independent and mutual-exclusive.[1033] The vagueness lies in whether oral-form musical expressions can be protected as musical works or oral works. Juridical cases examined in 4.5.1.3 prove that oral-form musical expressions, at least orally expressed traditional folk music, are usually treated as performance, neither as musical works nor oral works.

It has been widely criticised that work categories prescribed in law are internally inconsistent. The categories of written works and oral works are classified by the form of works: fixed or unfixed. In contrast, other work categories are delimited by art genres. In addition, work concept and work category are also contradictory in terms of oral works. Oral works have no fixation forms, so they are not complicit with the work concept 'capable of being reproduced in a certain tangible form.'[1034] However, it is a legally prescribed work category.[1035]

In a word, work concept and work category indicate that protectable musical works should subsist in some fixation form. Thus, it could be said that Chinese copyright law has arguably imposed an implicit fixation requirement on musical works.

4.5.1.2 Two new revisions in the 2020 Amendment of Chinese copyright law

CLPRC 2020 Amendment came into enforcement in June 2021. It revises the provisions of the work concept and work category. First, regarding the work concept, the 2020 Amendment defines works as 'ingenious intellectual achievements…can be presented in a certain form.'[1036] In the third draft of the Amendment, which was not passed, the work concept was once revised as 'original intellectual creations …can be fixed in some form'.

[1031] RICLPRC 1991, 2002 2011, 2013, Article 4.
[1032] Li, 'Theoretical Reconstruction of the Concept and Category of Works- Comments on Article 1 and 5 of the Draft of Copyright Law Amendment' (n 1024).
[1033] Shuxing Yang, 'Oral Works after Fixation' (2009) 4 Electronic Intellectual Property 87.
[1034] RICLPRC 1991, 2002 2011, 2013, Article 2.
[1035] Zheng (n 1024).
[1036] CPLRC 2020, Article 3.

This draft proved that the previous work concept implicitly requires protectable works to exist in fixation forms.

The enforced 2020 Amendment revises 'can be reproduced in a tangible form' as 'can be presented in a certain form.' 'Can be presented in a certain form' means that works are expressed by authors and are perceptible to others. Unfixed forms (i.e., sounds, lights) can make works perceptible. Thus, the new revision clarifies that fixation forms are not required for works to attract copyright. The 2020 Amendment does not define musical works. According to legislative conventions, the concept of musical works will be prescribed in a new RICLPRC. Nevertheless, before the possible new regulation, the concept of musical works remains as the old one.

Second, regarding the work category, the 2020 amendment changed a closed list to an open list. It revised 'other works as provided in laws and administrative regulations'[1037] to 'other intellectual achievements that meet the characteristics of works.'[1038] Before this revision, protectable works must fall into the eight categories prescribed in law. After this revision, any intellectual achievements that meet the characteristics of works are possible to attract copyright.[1039]

In a word, it could be said that Chinese copyright law has arguably imposed an implicit fixation requirement on musical works until its 2020 Amendment. Or, to take a step back, the law has imposed an implicit fixation 'preference' (if not a requirement) on musical works. The 2020 Amendment revises the provisions of work concept and work category, thus clarifying that fixation forms are not necessary for works to attract copyright. The new revisions also reflexively prove the previous existence of the implicit fixation 'preference' or requirement.[1040]

[1037] RICLPRC 1991, 2002 2011, 2013, Article 2.
[1038] CPLRC 2020, Article 1.
[1039] Wang (n 1021).
[1040] ibid.

4.5.1.3 The 'notation privilege' in Chinese copyright law

Since Chinese copyright law has no explicit fixation requirement, it does not prescribe whether third-party fixation can bring copyright to orally expressed musical expressions (as CDPA 3(3)). This section examines two representative cases to explain the legal reaction to third-party fixation of traditional folk music. It argues that Chinese copyright law also privileges musical notation as the fixation form of musical works.

In *Shehuo village v. Qiaojia Audio-visual Publishing House*,[1041] Shehuo is a repertory of folk songs orally transmitted in Datong Autonomous County of Hui and Tu People.[1042] Local populaces spontaneously create and perform Shehuo, and there is no division between composers and performers. Organised by villages, local populaces gather and perform in festival parades. In 2002, Qinghai Qiaojia Audio-visual Co. Ltd. (the Company) unauthorised recorded a village parade and published it in an album entitled *Shehuo in Qinghai Province*. In 2003, the villagers sued the Company for copyright infringement of musical works.[1043]

The court refuted the claim. For the court, Shehuo folk songs recorded in the album were not musical works but performance. Therefore, the court advised the villagers to initiate another lawsuit to claim the infringement of performers' rights, and the villager did so. The new case was solved in court mediation, where the two parties signed an agreement. The company paid some compensation to the villagers, but this amounted to less than one-tenth of the amount requested based on the copyright infringement claim.[1044] Had the villagers succeeded in claiming copyright either in courts or out of courts, they would gain more benefits such as copyright royalties, the acknoledgement as authors, and the control of those Shehuo folk songs.[1045]

[1041] *Shehuo village v Qiaojia Audio-visual Publishing House (2003) Qinghai Xining Intermediate People's Court No 3*.
[1042] Yang Mu, 'Music Loss among Ethnic Minorities in China–A Comparison of the Li and Hui Peoples' (1995) 27 Asian music 103.
[1043] *Shehuo village v. Qiaojia Audio-visual Publishing House (2003) Qinghai Xining Intermediate People's Court No. 3* (n 1041).
[1044] ibid.
[1045] There is a case in South Africa where a traditional musician's heirs succeeded in claiming copyright. In Griesel NO v Walt Disney Enterprises Inc and others (case withdrawn), Solomon Linda was a herder in

In *Tunbu Community v. Zhang Yimou and Beijing New Picture Company*,[1046] Anshun opera is orally transmitted in Tunbu Community (the community), Anshun City.[1047] Each village in the community develops some unique repertories, and villagers perform together during traditional festivals. In 2005, Zhang Yimou and New Picture Company (the Company) produced the movie *Riding Alone for Thousands of Miles.* They employed six villagers to perform two pieces of Anshun opera, and the pieces were recorded and incorporated into the movie. The movie credited the six villagers as performers. On behalf of the community, the Anshun Culture and Sports Bureau (the Bureau, a department of the local government) started a lawsuit in 2010.[1048] The Bureau claimed that the Company infringed copyright in two musical works (the two pieces recorded and incorporated in the movie) owned by the community.

The first-instance court refused the claim. For the court, the two pieces were performance of traditional folk music. In addition, the movie had credited the performers, so the Company did not infringe the performers' rights. In appeal, the court also denied the claim based on the same ground. Thus, Tunbu Community lost the case.

Zululand, South Africa. In 1939, he recorded a song and named it Mbube (Zulu for lion), and he assigned the song's copyright to a record company. In the 1950s, an American musicologist Alan Lomax got a recording copy of Mbube and passed it to a singer Pete Seeger, who transcribed the song from the recording and produced a song entitled Wimoweh (Zulu for He is the Lion). In the 1960s, some other songwriters remade Wimoweh to a song entitled The Lion Sleeps Tonight, and the record company Abilene Music owned the copyright of this song. Then, Abilene Music licensed Walt Disney Enterprises Inc. to use The Lion Sleeps Tonight in the 1994 movie The Lion King. Both Wimoweh and The Lion Sleeps Tonight have an identical tune to Mbube, but Linda was not credited and paid. Linda's heirs sued Walt Disney Enterprises Inc. at the Pretoria High Court, South Africa, as Disney had business and assets in South Africa while Abilene Music did not. They claim that Disney unauthorised reproduced and publicly performed a substantial part of Mbube and infringed copyright. The legal basis was Section 5(2) of the 1911 Imperial Copyright Act, a British statute in effect in South Africa. The section prescribes where an author assigned his copyright during his lifetime, 25 years after his death the copyright reverted to the Executor of his estate. According to this section, the copyright in Mbube returned to Linda's heirs in 1987, 25 years after Linda's death. The lawsuit was settled out of court with an agreement reached. Linda's heirs received payment for the past use of The Lion Sleeps Tonight. More significantly, the heirs would share royalties for future use of the song. Linda was acknowledged as a co-composer (author) of The Lion Sleeps Tonight, and Mbube was recognised as the source of the song. See Christelle De Jager, '"Lion" Heirs Put Bite on Disney over Song Rights' (2004) 284 Daily Variety 2; DH Kerby, 'Africa: The Sleeping Lion Rises' [2005] New Internationalist 23; Matome Melford Ratiba, '"The Sleeping Lion Needed Protection" - Lessons from the Mbube (Lion King) Debacle' (2012) 7 Journal of international commercial law and technology 1.

[1046] *Anshun Culture and Sports Bureau v Beijing New Picture Company and Zhang Yimou (2011) Beijing First Intermediate People's Court No 13010*.

[1047] Jones (n 326).

[1048] *Anshun Culture and Sports Bureau v. Beijing New Picture Company and Zhang Yimou (2011) Beijing First Intermediate People's Court No. 13010.* (n 1046).

In these two cases, orally expressed traditional tunes were reduced to sound recordings and cinematographic films by third-party fixers. As analysed in the above two chapters, traditional musicians created tunes in improvisational performance by adding new changes to existing musical materials, and there was no division between composers and performers. The new changes are very likely to meet the originality requirement and be protected as musical works, and traditional musicians can qualify as authors.

However, after third-party fixation, the courts treated orally expressed traditional tunes as performance rather than musical works. If traditional musicians in the two cases had reduced their tunes in musical notations prior to their performance, the courts may have recognised those tunes as copyright musical works. Thus, it could be said that Chinese copyright law also implicitly privileges musical notation as the fixation form of musical works. In other words, the law also has an implicit 'notation privilege' when identifying musical works.

4.5.2 The relation between the 'preference' of fixation and Chinese traditional folk music

Chinese traditional folk music is described as a living oral tradition.[1049] The music is created by singing and instrumental playing, and it is transmitted by word of mouth.[1050] Traditional musicians and local populaces (hereafter traditional musicians) could not, or chose not to, make musical notations[1051] Further, traditional folk music is the spontaneous creation based on given themes and occasions, so improvisation is an essential feature of the music.[1052] Because the music is constantly changing in improvisation, it is usually not recorded in musical notations. Thus, Chinese traditional folk music subsists in oral tradition rather than fixation forms.[1053]

[1049] Thrasher (n 89); Schimmelpennynck and Kouwenhoven (n 101); Jones (n 326); Mu (n 392); Belinda Li, 'Folk Songs and Popular Music in China: An Examination of Min'ge and Its Significance within Nationalist Frameworks'.
[1050] Ibid.
[1051] Chen (n 18).
[1052] ibid.
[1053] Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 33) 41.

As Chinese copyright law has implemented an implicit fixation 'preference' for musical works, orally expressed traditional folk music may not be recognised as musical works, as verified in the above two cases.

To summarise this section, Chinese copyright law has no explicit fixation requirement, but it has imposed an implicit fixation 'preference' on musical works. In addition, the law also has a 'notation privilege' when identifying musical works. After third-party fixation, the courts treated orally expressed traditional folk music as performance, rather than musical works. The following part analyses the role of copyright law in the publishing of Chinese traditional folk music.

4.6 The publishing of traditional music in China

This part analyses the publishing of traditional music in China. 4.6.1 presents the background and overview of music publishing, focusing on both the collection and the arrangement processes. 4.6.2 examines some influential lawsuits, which involved traditional folk music collected by the most influential Chinese music collector, Wang Luobin. The section reveals how copyright law reacted to music publishing with these specific examples. From the perspective of fixation, 4.6.3 analyses the effects on traditional music of the compound of legal treatment and publishing practice.

4.6.1 The publishing process

As explained in the above chapters, there were two main processes in the publishing of Chinese traditional folk music: collection and arrangement. In the collection process, a traditional musician sang or played a traditional tune, and music collectors transcribed the tune in a written musical notation.[1054] The resulting versions were more like transcriptions of the tunes, which were found hard to be distinguished from underlying traditional tunes.[1055] In the arrangement process, music collectors added simple chordal accompaniments to vocal or instrument lines, largely dictated by music rules.[1056]

[1054] Mu (n 392).
[1055] Rees (n 400).
[1056] Ching-chih and Jingzhi (n 69) 243.

From the view of music collectors, improvisation was unscientific, and traditional musicians' inability to write notations signified the primitiveness of the music.[1057] In addition, they believed that the arrangements improved traditional folk music.[1058]

In music publishing, the collection process changed the improvised oral expressions to musical notations, and the arrangement process changed traditional tunes into 'fuller textures'[1059] with the accompaniments. The following part analyses some influential lawsuits concerning traditional folk music collected by the most influential music collector.

4.6.2 Influential lawsuits

Wang Luobin (1913-1996) was the most influential music collector in China. Wang collected and arranged thousands of folk songs orally transmitted in northwest China.[1060] In 1986, Xinjiang People's Press published an anthology of folk songs collected by Wang, entitled the *Folk song King of the Northwest.*[1061] Since then, Wang was known as the 'Folk Song King of the Northwest.'[1062]

4.6.2.1 Wang Luobin v. Luo Dayou

In *Wang Luobin v. Luo Dayou*, *Qambarxan* is an Uyghur folk song. Wang Luobin collected the song in the 1930s and named the notated version *Dabancheng Girl. Qambarxan* has a melancholy melody to commemorate a tragic love story, while *Dabancheng Girl* has a cheerful melody to tell a happy love story. The latter became a big hit among Han Chinese living in urban areas in China. In 1993, a pop musician, Luo Dayou, published *Dabancheng Song of Horse-drawn Cart Driver*, which had the same melody as *Dabancheng Girl.* Luo's

[1057] Rees (n 400).
[1058] Thrasher (n 89).
[1059] Will (n 69).
[1060] Wanli Zhang, 'Wang Luobin's Dispute over the Copyright of Western Folk Songs' (2017) 5 Contemporary Music 78.
[1061] Rachel Harris, 'Wang Luobin: Folk Song King of the Northwest or Song Thief? Copyright, Representation, and Chinese Folk Songs' (2005) 31 Modern China 381.
[1062] Chuen-Fung Wong, 'The Value of Missing Tunes: Scholarship on Uyghur Minority Music in Northwest China' (2009) 56 Fontes artis musicae 241.

song mixed music elements of rock, metal, and pop. Wang thought that Luo unauthorised adapted his song and distorted his song. Thus, Wang sued Luo for copyright infringement.[1063]

Luo admitted that Wang collected the folk song but argued that Wang was not the author because he did not compose the song. Luo argued that local populaces created the song, so they should own the copyright in the song. Then, Luo claimed that his song was directly arranged from *Qambarxan* rather than Wang's *Dabancheng Girl.* Based on this, Luo argued that he did not infringe Wang's copyright. In 1994, the two parties reconciled out of court, and Wang withdrew the litigation.

4.6.2.2 Wang Haicheng v. Tan Weiwei

A similar lawsuit was initiated in 2020. In *Wang Haicheng v. Tan Weiwei* (2020),[1064] a pop musician, Tan Weiwei, issued three traditional folk songs that Wang previously collected: *Love Song of Kangding*, *Youth Dance*, and *In That Distant Place*. The three songs had the same melodies as Wang's notated versions. Wang Haicheng, the heir of Wang Luobin, sued Tan for copyright infringement. Wang Haicheng claimed that Tan unauthorised arranged Wang's songs and distorted the songs.[1065] As of the time of writing, the case is still under trial.

4.6.2.3 Other lawsuits of substantial judgements

When Wang was alive, the only copyright lawsuit that he initiated was against Luo. After Wang died in 1996, his heirs launched over two hundred copyright litigations.[1066] Some defendants were record labels that produced sound recordings of the folk songs collected by Wang. Other defendants were musicians who arranged the folk songs collected by Wang. Both record labels and musicians were accused of infringing the copyright in

[1063] *Wang Luobin v Luo Dayou (1994) Nanjing Intermediate People's Court*. Citation of judgements before 2004 is unrecorded.
[1064] *Wang Haicheng v Tan Weiwei (2020) Nanyang Intermediate People's Court No 54-1; Wang Haicheng v Tan Weiwei (2020) Nanyang Intermediate People's Court No 23-1*.
[1065] ibid.
[1066] The data is from http://www.pkulaw.cn/.

musical works. These defendants commonly argued that the disputed songs were traditional folk music rather than Wang's musical works.

These cases questioned whether Wang Luobin owned copyright regarding the notated versions of traditional folk music. In these cases, Wang Haicheng presented old songbooks and music journals in which the notated versions were published. As a legal judgement revealed, some books and journals credited the songs as 'Uyghur folk song, transcribed by Wang Luobin', and some credited the songs as 'Uyghur folk song, arranged by Wang Luobin.'[1067]

In most cases, based on these proofs, the courts recognised the notated versions as copyright musical works of Wang. These judgements conformed to the formal legal provisions of Chinese copyright law. As explained in 2.5.2, CLPRC prescribes that 'where a *work* is created by adaptation… or arrangement of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adapter…or arranger.'[1068] Thus, in theory, Wang could own copyright of the notated versions.

4.6.3 Analysis

In music publishing, orally expressed traditional folk music was fixed in musical notations. In Chinese copyright law, formality (i.e., registration) is not a precondition for copyright protection, so the notated versions could be automatically protected as musical works when they met the requirements of originality and authorship. As clarified in the above two chapters, originality is a lowered standard, [1069] and authorship is identified by the name affixed to works in a usual manner.[1070] Therefore, most notated versions met the two requirements. Further, the notated versions met the implicit fixation 'preference.' As the above cases show, the notated versions have been protected as musical works.

[1067] *Wang Hicheng v Wang Haiyan (2020) Xinjiang Higher People's Court No 86*. As explained in 3.6.1, these credits indicated that the music collector recorded the tunes rather than authorship.
[1068] CLPRC 1990, Article 12.
[1069] Chengsi Zheng, *Copyright Law* (2nd edn, China Renmin University Press 1997) 184; Yufeng Li, 'Copyright Protection in China' in Rohan Kariyawasam (ed), Chinese intellectual property and technology laws (Edward Elgar Publishing 2011) 86. Qian Wang, *Intellectual Property Law* (4th edn, China Renmin University Press 2015) 28–38.
[1070] Wang (n 92) 176.

It could be argued that Chinese copyright law facilitated the exploitation of Chinese traditional folk music. On the one hand, the notated versions were protected as musical works, so music collectors could benefit from traditional folk music by copyright. They could profit from the reproduction and distribution of printed notated versions, public performance of the versions, and mechanical reproduction of the versions. [1071]

On the one hand, orally expressed traditional folk music was treated as performance, so traditional musicians could only benefit from performers' rights. They could only profit from authorising the fixation of performance and may share some profits arising from selling copies of the fixation form.[1072] Thus, music collectors benefited more from traditional folk music than traditional musicians.

This kind of exploitation had triggered criticism of Wang. In 1994 and 1995, two leading Chinese music journals (*Chinese music* and *People's music*) published many articles discussing Wang's copyright dispute. Some musicians blamed Wang for depriving music of the local people.[1073] An Uyghur scholar published an article entitled '*Song Thief Wang Luobin, Stop Stealing!*'[1074] In addition, an authoritative music institution, Xinjiang Autonomous Region Arts Research Centre, gave a report analysing some notated versions.[1075] According to the report, some notated versions showed 'minimal artistic input and change' of Wang.[1076] Further, some tunes even had 'known named creators', who were local traditional musicians.[1077] Indeed, Wang himself was uncertain about his copyright in the notated versions. As he declared, he never created the traditional tunes but only 'artistically processed' them.[1078]

[1071] CLPRC, Article 21, 38, 42.
[1072] CLPRC, Article 38.
[1073] Rees (n 28).
[1074] Harris (n 1061).
[1075] Ibid.
[1076] Ibid.
[1077] Rees (n 28).
[1078] Harris (n 1061).

Despite these debates, the notated versions have been protected as musical works under copyright law. Thus, Chinese copyright law facilitated the exploitation of traditional folk music.[1079]

4.7 Conclusion: the effects of copyright law on traditional music under the requirement of fixation

4.7.1 The exploitation of traditional music

In common law copyright tradition, fixation is a requirement that works of traditional music must satisfy to attract copyright. UK copyright law has an explicit fixation requirement.[1080] This chapter has proven that Chinese copyright law has imposed an implicit fixation 'preference' (if not a requirement) on musical works until its 2020 Amendment.

Further, in both jurisdictions, copyright law privileges musical notation as the fixation form of musical works, which is described as 'notation privilege' in this chapter. In the UK, musical expressions initially made in notation form can easily be recognised as musical works. In contrast, musical expressions initially made in oral form risk being treated as performance, even though the expressions are subsequently fixed in sound recordings. In China, orally expressed traditional tunes have been judged as performance, even though the tunes were subsequently fixed in sound recordings. The fixation requirement (or the fixation 'preference') and 'the notation privilege' have caused difficulties in protecting traditional music, which conventionally subsists in improvised oral practice.[1081]

A fixation form of an oral musical expression made by a third-party fixer usually can bring about two rights: copyright in the musical expression (as a musical work) and copyright (in

[1079] Whether the printed versions influenced the natural development of the oral tradition of Chinese traditional folk music has not yet been paid much attention. This is an example. In the 1950s, Yangge, a folk song category in North Shaanxi, were performed by local peasants. Yangge was used by the 'Red Army' in the group performing for political propaganda. In printed versions, the melodies of Yangge were 'substantially altered and simplified' and then spread in the local area. See Schimmelpennynck and Kouwenhoven (n 101).
[1080] Lim (n 773).
[1081] Bachner (n 175).

UK copyright law) or neighbouring rights (in Chinese copyright law) in the fixation form. Therefore, in theory, it could be said that an orally expressed traditional tune can gain copyright protection as a musical work upon third-party fixation.

In practice, this chapter has shown that orally expressed traditional tunes did not gain copyright as musical works upon third-party fixation. In both UK and Chinese contexts, music publishing had similar processes: music collectors transcribed orally expressed traditional tunes into notated versions. In addition, copyright law had the same reaction: the notated versions were protected as musical works, even though they were essentially transcriptions of traditional tunes with minimal (or no) original inputs from music collectors. In contrast, orally expressed traditional tunes were treated as performance of music being in the public domain.

As a result, music collectors gained copyright in the notated versions, whereas traditional musicians gained no copyright in their tunes.[1082] Due to the disparate treatments of the notated versions and orally expressed traditional tunes, music publishing conducted an 'IP-style exploitation.'[1083] An unfair consequence appeared against the benefits of traditional musicians. Music collectors benefited from traditional music to a more extensive extent (by copyright) than traditional musicians (by performers' rights). Thus, copyright law 'facilitates and ultimately legitimates'[1084] the exploitation by judging notated versions as musical works when treating orally expressed traditional tunes as performance.

This legal treatment of traditional music has a historical root. As analysed in 4.3, when the fixation notion and the 'notation privilege' took shape in their historical developments, they were utilised by music publishers for the protection of printed sheet music. From the very beginning of copyright law, the fixation requirement and the 'notation privilege' served the demands of music publishers, who were music collectors in the publishing of traditional music.

[1082] As analysed above, although traditional musicians may gain performers' rights, the rights provide much fewer rewards than copyright.
[1083] 'The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis' (n 11).
[1084] Gibson (n 57) 7.

As a far-reaching effect, copyright law has exacerbated broader socio-cultural inequality between the dominant group and the marginalised communities. In judicial practice, on the one hand, music collectors from the dominant group profited from traditional cultural products of the marginalised communities by making fixation forms of the products. On the other hand, traditional musicians from the marginalised communities had no share of the benefits arising from the fixation forms. The law serves the interests of the dominant group at the expense of the benefits of the marginalised communities.

4.7.2 The construction of the 'hierarchy of culture'

As reported in the literature, a 'hierarchy of culture' was formed in the music sphere by nineteenth-century music theorists in the UK (and Europe).[1085] Classical (or art) music of the dominant group was regarded as the 'high culture', whereas traditional (or folk) music of the marginalised communities was regarded as the 'low culture.'[1086] This chapter argues that with the fixation requirement (or 'preference') and the 'notation privilege', copyright law has implemented a 'hierarchy of protection', reflecting and reinforcing the 'hierarchy of culture' in the music sphere. Copyright law and musicology provide each other with a comparator.

This chapter has shown that copyright law has divided two groups of musical expressions by the fixation requirement and the 'notation privilege': music initially made in notation form and music initially made in oral form. The former group can easily be recognised as musical works, whereas the latter group risks being treated as performance even after third-party fixation. Accordingly, the law has implemented a 'hierarchy of protection': the more protected and the less protected. On the one hand, classical music of the dominant groups was more protected. Classical music compositions are conventionally made in musical notation, and thus, they are likely to gain extensive protection as musical works. Classical music composers (more often music publishers) can profit from selling copies of the

[1085] Szabolcsi (n 74); Brofsky (n 74); Becker (n 74); Weber, *The Rise of Musical Classics in Eighteenth-Century England* (n 74); Tomlinson (n 74).
[1086] Ibid.

printed works, licensing the public performance of the works, and licensing the mechanical reproduction of the works.[1087]

On the other hand, traditional music of the marginalised communities was less protected. Traditional tunes are conventionally made in improvised oral form. Thus, they only gain narrow protection by performers' rights. Traditional musicians may profit from authorising the fixation of their music (which is regarded as performance, rather than musical works) and share some profits arising from selling copies of the fixation forms (i.e., sound recordings).[1088] However, they cannot profit from their music by copyright. In addition, they cannot prevent the imitation and 'copying' of the tunes in the way of making transcriptions, cover versions, and sound-alike versions. The powerlessness to prevent this kind of 'copying' reveals that traditional musicians have no effective mechanisms to safeguard their music creativity.

Further, as explained in 4.3.3, copyright law contributed to the 'notation culture' and 'museum tradition' in classical music, which sublimated classical music to high culture.[1089] In contrast, as explained in 4.4.3, copyright protected the published versions of traditional music as authoritative and definitive versions, thus influencing the cultural perception of traditional music: traditional music was regarded as ossified, old musical materials.

In conclusion, with the fixation requirement and 'the notation privilege', copyright law facilitated the exploitation of traditional music. Further, by differing levels of protection, the law reflects and reinforces the 'hierarchy of culture' in the music sphere. The above chapters have proven that copyright law facilitated the exploitation of traditional music and reinforced the 'hierarchy of culture' with the originality and authorship requirements. This chapter echoes the findings of the above two chapters and has proven that copyright law has the same effects on traditional music with the fixation requirement. Putting all of puzzles together, the effects of copyright law on traditional music become clear.

[1087] Towse, 'Copyright and Music Publishing in the UK' (n 35).
[1088] Bently and Sherman (n 36) 148.
[1089] Becker (n 74). Goehr (n 447) 239.

5. Conclusion

Traditional music is orally created and transmitted in a local community through generations. It has significant social and cultural values to the community and presents commercial values to music collectors from outside groups.[1090] Historically and contemporarily, traditional music of the marginalised communities has been exploited by music collectors from the dominant groups. Such exploitation is often conducted without compensation and acknowledgement to the traditional musicians and their communities. Copyright is considered to be one possible option to control such exploitation or provide some remedies. This dissertation has explored the main research question: what are the effects of copyright law on traditional music of the marginalised communities.

5.1 Main findings and arguments

The dissertation has examined four sub-questions to answer the main research question. The first sub-question is whether traditional music can be protected as musical works under formal legal terms of copyright. To be protected as musical works, musical expressions must meet the requirements of originality, authorship, and fixation (in common law copyright tradition).[1091] As the dissertation has proven: traditional tunes incorporating pre-existing musical materials and new changes can meet the originality requirement, the same as the new arrangements of old tunes; traditional musicians who make such tunes and arrangements can qualify as authors and joint authors; theoretically, orally expressed traditional tunes can be protected as musical works upon third-party fixation, provided they are not identified as in the public domain. Thus, the answer to the first sub-question is: in theory, 'there is nothing about the traditional music of itself that makes it unprotectable under copyright.'[1092]

The second sub-question is whether the copyright requirements are socio-cultural neutral or informed by broader industrial and cultural contexts. The dissertation has examined the historical developments of the requirements to answer this question. The following

[1090] Kuruk (n 2) 14–16.
[1091] Bently and others (n 52) 91–121.
[1092] McDonagh, 'Protecting Traditional Music under Copyright (and Choosing Not to Enforce It)' (n 14).

findings have been obtained. Regarding the industrial context, originality was interpreted flexibly when responding to music publishers' demands of profiting from trivially arranged old tunes; the rights attached to authorship ultimately benefited music publishers rather than music creators; copyright law privileged musical notation as the fixation form of musical works when serving music publishers' demands of profiting from printed sheet music - 'musical notation printed on sheets of paper.'[1093] Regarding the cultural context, the originality notion protected classical music from alternation; the authorship notion participated in shaping the view of classical music composers; the fixation notion contributed to the 'notation culture'[1094] and 'museum tradition'[1095] in classical music. Therefore, the answer to the second sub-question is: copyright requirements are not socio-cultural neutral, but they served the interests of music publishers and were innately complicit with classical music. The historical developments of the copyright requirements anticipate and explain the legal treatment of traditional music.

The third sub-question is: how traditional music was processed in music publishing and what were the relative legal consequences. The following findings have been obtained. In music publishing, music collectors transcribed orally expressed traditional tunes into musical notations, made trivial arrangements of the tunes (which are described as 'natural outgrowth' of the tunes[1096]), and attached their own names or fabricated authors' names to the published versions. Under copyright law, on the one hand, the published versions were protected as musical works, and music collectors were recognised as copyright owners. On the other hand, traditional tunes incorporating new changes and arrangements of old tunes were determined as performance or unoriginal, unowned, ossified music, and traditional musicians were relegated as informants or performers rather than authors of their tunes.

These findings answer the third sub-question: copyright law has facilitated and legitimated the exploitation of traditional music. Music collectors established copyright on the published versions of traditional music and profited from the published versions. In contrast, traditional musicians were deprived of copyright in their music, gained no

[1093] Elliker (n 775).
[1094] Middleton (n 109) 104–106; Schuiling (n 611).
[1095] Samson (n 446); Arewa, 'From JC Bach to Hip Hop' (n 219); Goehr (n 447).
[1096] Bartók (n 70); Smith (n 70).

compensation from music publishing, and shared no profits arising from the published versions.

The fourth sub-question is: whether and how the compound of music publishing and copyright law influences the cultural perception or status of traditional music. The dissertation has made a cross analysis of publishing processes and legal treatments of traditional music. The following findings have been obtained. The music sphere had a 'hierarchy of culture': classical music was regarded as high culture, featuring identifiable composers and fixed notations, whereas traditional music was relegated to low culture and regarded as anonymous folks' oral expressions. Copyright law has implemented a 'hierarchy of protection': the more protected music is of identifiable authorship and initially made in notation form, whereas the less (or not) protected music is of 'anonymous' origin and initially made in oral form.

These findings answer the fourth sub-question. On the one hand, the 'hierarchy of protection' has reflected the 'hierarchy of culture', manifesting as the resonances between more protected music and classical music and the resonances between less protected music and traditional music. On the other hand, the 'hierarchy of protection' has reinforced the 'hierarchy of culture.' First, classical music was protected from alteration and thus safeguarded as sacred, inviolable high culture, whereas traditional music was left for arbitrary reinterpretation. Second, classical music was attributed to Romantic authors, whereas traditional music was attributed to a fabricated anonymous origin and thus relegated to low culture. Third, classical music was sublimated to high culture based on the 'notation culture' and 'museum tradition', whereas traditional music was shaped as ossified, old musical materials.

The overall conclusion to the main research question is: copyright law has facilitated and legitimated the exploitation of traditional music of the marginalised communities. Further, copyright law has influenced the cultural perception or status of traditional music: traditional music of the marginalised communities was regarded as inferior to classical music of the dominant group.

5.2 Original contributions

The dissertation provides original contributions to the research field by emphasising the dynamic interaction between the 'hierarchy of protection' and the 'hierarchy of culture.' Arewa proposes that a 'hierarchy of culture' is a factor in determining what to be protected under intellectual property structures.[1097] Tehranian argues that US copyright law privileges certain literature and thus creates a 'hierarchy of protection.'[1098] This dissertation has elaborated Arewa's theory in the copyright system, and it has applied Tehranian's theory to music and UK and Chinese copyright law. More significantly, this dissertation has combined the two formulas and explored the relation between the 'hierarchy of protection' and the 'hierarchy of culture.'

By the cross analysis of publishing processes and legal treatments of traditional music, the dissertation reveals the cultural biases in the copyright system: the 'hierarchy of protection' in the legal sphere reflects the 'hierarchy of culture' in the music sphere. Furthermore, the dissertation particularly emphasises that the 'hierarchy of protection' has constructed and reinforced the 'hierarchy of culture.' That is, copyright law reshaped the cultural perception or status of traditional music.

In addition, the dissertation challenges an existing argument. Some literature argues that traditional music cannot be protected as 'regular' musical works, which is justified by the proposition that traditional music does not meet the requirements of originality, authorship, and fixation. In other words, there are incompatibilities between traditional music and copyright requirements. This argument merely focuses on the formalist perspective of copyright law while overlooking the law's historical, industrial, and cultural contexts. As a result, the argument reifies a stereotyped understanding of traditional music in the dominant legal discourse: traditional music is unoriginal, unowned, and ossified materials in the public domain.[1099]

[1097] Arewa, 'Piracy, Biopiracy and Borrowing' (n 80).
[1098] Tehranian (n 80).
[1099] Gibson (n 57) 8; Okediji (n 57).

This dissertation has critically re-examined the alleged incompatibilities. It has demonstrated that this argument is only tenable with regard to those old traditional tunes rather than traditional tunes incorporating new changes and new arrangements of old tunes. As a 'living tradition',[1100] traditional music practically subsists in such kinds of tunes and arrangements. Therefore, in theory, a considerable number of traditional tunes and arrangements can be protected as 'regular' musical works.

More significantly, the dissertation has analysed the historical, industrial, and cultural contexts of copyright law. Based on these analyses, the dissertation challenges the stereotyped understanding of traditional music on which the above argument is based. As the dissertation has shown, the understanding was constructed in the compound of music publishing and copyright law, responding to the interests of music publishers and the practices of classical music.

The effects of copyright law on traditional music reveal inconsistencies between the theoretical level and the practical level. At the theoretical level, a considerable number of traditional tunes and arrangements can be protected as 'regular' musical works. At the practical level, traditional tunes and arrangements were not protected from exploitation. The analysis of the law's historical, industrial, and cultural contexts explains the inconsistencies: copyright law itself shaped the stereotyped, biased understanding of traditional music.

If the hierarchy can be redressed, copyright can be an effective legal mechanism for traditional musicians to claim their benefits. For example, suppose a hypothetical scenario where a traditional folk song is maintained by a local community in a remote area of Scotland from an unknown time, and the song has never been documented. A local traditional musician creates a version of this song by adding an additional final verse with her or his own creativity. Based on the analysis in the above chapters, in this case, the version can be recognised as an original arrangement of the underlying folk song, rather than old musical materials in the public domain. Meanwhile, the traditional musician can be recognised as the author and copyright owner of the arrangement rather than a performer of the underlying folk song, and fixation would not influence its

[1100] Jones (n 326); Carugno (n 6).

copyrightability. Thus, the traditional musician can gain copyright in the arrangement, which covers only the original additions (i.e., the additional final verse) but not the underlying folk song.

Suppose a music collector first transcribes the traditional musician's performance of the version, based on the analysis in the above chapters, the musician still owns the copyright in her or his original arrangement because the arrangement is recognised as a musical work rather than simply a performance. If the transcribed version does not contain original contributions from the music collector, the collector will not gain rights under the copyright system. If the transcribed version contains original contributions from the collector, the collector will own copyright, covering these original contributions but not the musician's arrangement or the underlying folk song. In addition, the collector is required by copyright law to seek authorisation from the musician before adding original contributions to the musician's arrangement. The collector should also share some benefits with the musician arising from the collector's new version. Therefore, when the collector transcribes the version without authorisation, the musician can use copyright to claim acknowledgement and compensation.

In addition, if the music collector records the musician's version in a recording, the collector gains copyright (or related rights under the Berne Convention) in the sound recording, but such right does not cover the musician's arrangement or the underlying folk song. In this situation, the traditional musician still owns the copyright in her or his arrangement (as a musical work). In addition, by performers' rights, the musician can claim recognition as a performer and share benefits arising from the recording. In a word, copyright can be a useful tool for traditional musicians to control and benefit from their creativity.

Regarding the folk song maintained by the traditional musician's community, under copyright law, it is in the public domain. Specifically, the folk song has no traceable creation time and creator, so it lacks an author to whom copyright is conferred and can expire the term of copyright protection. However, this does not mean the community cannot gain any rewards. Once the traditional musician is recognised as the author of her or his arrangement, the arrangement's origin becomes clear-the musician's community. In

this case, the community can use alternative solutions to safeguard its benefits. For example, a solution called benefit sharing has been used by some traditional communities, by which revenues arising from traditional materials are shared between traditional communities and third-party users,[1101] although third-party users are not bound by any 'hard laws.' For example, Bangarra Dance Theatre produced contemporary works with traditional music maintained by the Munyarrun clan in Australia. The theatre sought authorisation from the clan for the use of traditional music, acknowledged the clan as the origin and owner of traditional music, and shared copyright royalties arising from contemporary works with the clan.[1102]

5.3 Significance and implications

The dissertation has implications for further understanding of copyright regulation of cultural production, especially considering the socio-cultural inequality between the dominant group and the marginalised communities.

First, the dissertation has proven that copyright regulation has constantly exacerbated the broader socio-cultural inequality. This finding may also apply to other music genres in addition to traditional music. For example, the law's privilege of musical notation as the fixation form of musical works is not justifiable. Instead, it is prejudicial to musicians who cannot, or choose not to, create music in notation form. The law does not sufficiently reward these musicians, who are usually from marginalised backgrounds, such as black musicians who make blues and jazz. Their music creativity has long been exploited by entities (i.e., record labels) from the dominant group. The research inspires legal scholars and policymakers to rethink the role of copyright law in cultural production.

[1101] Biswajit Dhar and RV Anuradha, 'Access, Benefit-Sharing and Intellectual Property Rights' (2004) 7 The Journal of world intellectual property 597; 'Note on Updating of WIPO's Online Database of Biodiversity-Related Access and Benefit-Sharing Agreements <https://Www.Wipo.Int/Meetings/En/Doc_details.Jsp?Doc_id=146436 > Accessed 28 Oct 2022.'; McDonagh, 'Does the Law of Copyright in the UK and Ireland Conflict with the Creative Practices of Irish Traditional Musicians?' (n 29) 203–206; Elsa Tsioumani, 'Beyond Access and Benefit-sharing: Lessons from the Law and Governance of Agricultural Biodiversity' (2018) 21 The Journal of world intellectual property 106.

[1102] Matthew Rimmer, 'Bangarra Dance Theatre: Copyright Law and Indigenous Culture' (2000) 9 Griffith law review 274.

Second, the dissertation helps legal practitioners to analyse copyright debates about traditional music in the contemporary context. The effects of 'hierarchy' exist in not only the historical context but also the contemporary context. Historically, traditional musicians and their communities might lack the legal awareness of copyright or the ability to claim the right. Contemporarily, in the face of the unconsented, uncompensated, and unacknowledged exploitation, they are increasingly aware of the significance of copyright protection.[1103] This dissertation has presented many lawsuits in which traditional musicians claimed copyright for their music, but their claims were refuted in most cases. This dissertation has clarified that a considerable number of traditional tunes can be protected as copyright musical works, which makes conceptual preparation to stop more traditional musicians from failing in courts.

Third, the dissertation inspires copyright studies to rethink the problematic dichotomy between traditional-modern cultural products.[1104] Are the contradictions between the two superficial and exaggerated? Are the cultural products labelled 'traditional' excluded from copyright protection for their essences? Or are they essentially not different from the modern ones? If it is the latter case, are they excluded from copyright protection because of the cultural biases in the law? Does copyright law constantly implement the stereotyped, biased understanding of traditional cultural products? If so, the sui generis legal protection for traditional cultural products promoted in some studies may not be necessary, especially considering legislative costs and resistance from conflicting interests.

Fourth, for music studies, the dissertation presents another dimension to understanding the changes in music practice and the cultural perception of music. For example, in terms of classical music, copyright law contributed to the 'notation centrality' and 'museum tradition', which sublimated classical music to high culture. In terms of traditional music, copyright law participated in depersonalising traditional musicians and fabricating the anonymous origin, which downgraded traditional music as low culture. Although the dissertation is not arguing that copyright regulation is the sole determinate factor, the

[1103] Rees (n 29); Li, *Intellectual Property Protection of Traditional Cultural Expressions* (n 34) 86.
[1104] Vats and Keller (n 80).

research helps music studies to understand the changes in music practice and the cultural status of music in a more comprehensive manner.

5.4 Limitations and further enquires

To promote socio-cultural equality in the whole society, some legal measures, or even reforms, are necessary to redress the effects of 'hierarchy.' The dissertation, however, focuses on revealing the effects, while exploring suitable measures (or reforms) is beyond the scope of the current research, but it may inspire future studies.

In general, music creators can benefit if the law abandons the stereotyped understanding of music in favouring a more inclusive conception of musical works. For example, jazz musicians may gain more bargaining powers in the face of record labels if the law abandons the 'notation privilege' but recognises their improvisational performance as musical works. The question of what are suitable measures (or reforms) is beyond the scope of the current research, but it may inspire future studies.

In addition, the dissertation takes the musical form of TCEs to examine the effects of copyright law on traditional cultural products. The overall findings of the dissertation may also apply to other forms of TCEs, especially the action form (i.e., dance) and the verbal form (i.e., ballad) that are often practised simultaneously with the musical form. Future studies may explore the effects of copyright law on TCEs with the theoretical patterns (the interaction between the 'hierarchy of culture' and the 'hierarchy of protection') established in the current dissertation.

Ultimately, traditional musicians and their communities have 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'[1105] The exploitation of traditional music has undermined such rights, while the wide range of rights under the bundle of 'copyright' can be used to

[1105] The Universal Declaration of Human Rights (adopted 10 December 1948). Article 27 (2). The International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966). Article 15 (c).

provide some remedies.[1106] As a first step, the 'hierarchy of protection' and 'hierarchy of culture' in law should be eliminated.

[1106] Kuruk (n 2) 1.

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