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# **Intellectual Property and Intangible Cultural Heritage in Celtic-Derived Cultures**

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Submitted to School of Law, College of Social Sciences, University of Glasgow  
for consideration for the degree of Doctor of Philosophy in Law

Supervised by: Professor Martin Kretschmer and Dr. Kristofer Erickson

November 2017

“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: \_\_\_\_\_

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\* Including, but not limited to, possessory cat ‘marking’ from a 1420 document; four inky cat paw prints from a 1445 Italian manuscript in the Dubrovnik State Archives; and a cat co-author, added in justification of plural pronouns throughout an single-authored article. Wright, G., *Cats and Academia: A Short History*, TIMES HIGHER ED. (18 Dec. 2015), <https://www.timeshighereducation.com/blog/cats-and-academia-short-history>.

**Abstract:**

This dissertation examines the symbiotic relationship between intellectual property (“IP”) law and cultural heritage law, with an emphasis on intangible cultural heritage (“ICH”). These two fields of law have historically operated in relative isolation from each other, but the overlap of subject matter and practical effect of implementation is evident; the actual creative and traditional practices by individuals and communities are the subject matter of both fields. The central thrust of the research is to locate the effects of these two legal fields and to inform policy, research, and legislation when this previously under-considered effect and influence exists. This is accomplished through case studies of ICH and statutory intervention in three countries with diverse ICH: tartan in Scotland; cultural tourism and branding in Ireland, and the Welsh language and *eisteddfodau* in Wales. These countries were selected as they 1) are geographically proximate, 2) have shared cultural history, 3) are or were recently in a union legal structure with partially devolved governance powers, and 4) are ‘knowledge-based’ economies with strong IP laws. This selection facilitates the dissertation’s original contributions to research, which include highlighting the influence of ICH on IP law and how IP shapes ICH. This interaction challenges the domestic and international differential legal treatment between developed, Global North countries as IP- and knowledge-producing and developing and Global South countries as ICH- and culture-producing. Theoretical patterns emerged from the case studies: namely, first- and second-wave adoption, which is complementary to Hobsbawm and Ranger’s invented traditions; and ‘tangification’, which identifies the process through which ICH becomes IP in a modern legal framework and highlights the risks to ICH integrity as well as the over-extension of IP law. Each of these contributions support the assertion that properly managing risk to and safeguarding ICH, which provides social and economic benefits, can also help to ensure that IP law is functioning in a manner reflecting its jurisprudential underpinnings, facilitating longevity and enforceability of the law.

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## I. Dissertation Introduction

Living, evolving heritage – such as rituals, traditions, and oral histories – is the lifeblood of culture. It is handed down over generations, whilst constantly regenerating through reflection of collective current practices and is known as intangible cultural heritage (“ICH”). ICH creates a common sense of identity and provides all the social, economic, and personal benefits that come along with strong community, belonging, and expressive culture. This nebulous essence is, however, particularly ill-suited to modern legal frameworks that can conflate the creative outputs that copyright is meant to protect with shared cultural practices. Further, ICH can be ossified or reshaped by intellectual property (“IP”) law. In particular, this dissertation is primarily concerned with cultural expressions that are most likely to intermingle with copyright law but also examines the spill over into trade mark and IP-adjacent regulations.

Cultural heritage provides a unique identity with myriad enriching benefits for regions and peoples. In the face of increased cultural homogenisation in part due to globalisation, which is accelerated through technological development, cultural heritage preservation is an international and domestic concern. Cultural heritage is frequently divided into two categories: tangible and intangible. Tangible cultural heritage,<sup>1</sup> such as art and landmarks, is easier to define and thus easier to categorize and protect under existing legal systems or agencies. Whilst cultural and legal academic literature has recently begun to explore concepts and impacts of ICH,<sup>2</sup> a brief mention is often the extent of ICH coverage, which may be partially due to definitional vagaries as well as a great diversity in regional ICH.<sup>3</sup> According to the 2003

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<sup>1</sup> Tangible cultural heritage is further divided into movable and immovable cultural heritage. UNESCO Database of National Cultural Heritage Laws, UNESCO, <http://www.unesco.org/culture/natlaws/>, last visited 27 Nov. 2017.

<sup>2</sup> “Preoccupation with culture (in its high, mass, popular or anthropological meanings) across a range of disciplines is not at all new but a recognition of the ways in which culture is reified, asserted, claimed, defended, managed or preserved in and through legal institutions is both relatively novel and rather overdue.” Coombe, R., *Legal Claims to Culture in and Against the Market*, 1 L., CULT. & THE HUMANITIES 35, 37 (2005).

<sup>3</sup> The use of “heritage” rather than “property” is an intentional decision within the field. Even though IP and cultural heritage can overlap, a number of distinctions call for separate terminology. For instance, IP (or in this case, cultural

Convention for the Safeguarding of the Intangible Cultural Heritage (“the 2003 Convention”), ICH can consist of traditional knowledge, songs, craftsmanship, dance, and other practices, as well as the associated cultural artefacts and spaces.<sup>4</sup> These are simply illustrative of the concept; widely varying global living heritage, transmitted generationally, must be allowed to organically evolve, often defying the process of identification so desirable in the realm of legal protections.

When seeking protection under existing legal regimes, the nature of ICH may initially lend itself well to IP protection – especially copyright. Copyright is regulated both internationally and domestically through a combination of legal instruments. Internationally, the Berne Convention for the Protection of Artistic and Literary Works (“the Berne Convention”)<sup>5</sup> and the Agreement on Trade-Related Aspects of IP Rights (“TRIPs”) are two of the primary treaties that govern global IP.<sup>6</sup> At the European Union level, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (known as the ‘Copyright Directive’, ‘the Information Society Directive’, and colloquially as the ‘InfoSoc Directive’) govern both the United Kingdom and Ireland.<sup>7</sup> The InfoSoc Directive is broadly constructed to harmonise the EU internal market and to provide a high level of protection for IP.<sup>8</sup> As of November 2017, the United

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property) indicates monopolistic exclusionary rights which may be commercially exploited by a rights holder or be parsed into rights that may be lost through legal mechanisms. Particularly for cultural property, the state maintained the property for its own economic benefit. Cultural heritage is more representative of the concept of preserving and protecting expressions and traditions passed through generations, as well as ensuring potential public access. *See* Prott, L. and O’Keefe, P., ‘*Cultural Heritage’ or ‘Cultural Property’?*’, 1 INT’L J. OF CULT. PROP. 307-320 (1992).

<sup>4</sup> *The Convention for the Safeguarding of Intangible Cultural Heritage*, UNESCO (2003) (“the 2003 Convention”); during negotiations for and since the Convention’s adoption, scholars expressed concern that defining ICH in codified documents could further perpetuate existing cultural divisions. “The use of the terms ‘indigenous’ and ‘traditional’ help to perpetuate a historical distinction between (tangible) Western and (intangible) non-Western cultural heritage. We therefore support a definition of intangible heritage that does not limit instances to the ‘traditional’ or ‘indigenous’, or even to cultural forms that have already been passed on from ‘generation to generation’.” Deacon, H. *et. al.*, *The Subtle Power of Intangible Cultural Heritage* 33, HUMAN SCIENCES RESEARCH COUNCIL (2003).

<sup>5</sup> The Berne Convention for the Protection of Artistic and Literary Works (1896, as amended Paris 1971) (“the Berne Convention”).

<sup>6</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (1995) (“TRIPs”).

<sup>7</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001) (“InfoSoc Directive”).

<sup>8</sup> *Id.* at s. (1) and (4).

Kingdom is also governed under the InfoSoc Directive; however, with an impending Brexit, its legal weight in the United Kingdom is uncertain.

Given the real and perceived benefits of copyright protection in knowledge-based economies, legal representatives, professional associations, and governmental organisations may recommend that copyright or other IP be used as a means of protecting and enforcing exclusive use or exploitation rights for ICH.<sup>9</sup> Gaining this protection will often require alterations to the form to the ICH, either for economic or exclusionary rights, by fixing it in a tangible form. Once in fixed form, it is then suitable for use in trade as a commodity, whether or not trade or sale is planned or desired. In this context, “commodification can be defined as the conversion of intangible cultural property into items of economic worth that can be traded for commercial gain by such means as license, rental, or sale.”<sup>10</sup> The mere process of alteration due to outside economic factors raises concerns about the effect on the practicing community: “the process of transmogrifying songs and legends, chants and rituals, and collective heritage into products of trade has been seen by some as diminishing the inherent spirituality or dignity of native heritage.”<sup>11</sup> Some ICH will naturally result in a tangible, tradeable product as a part of the practice; the tangible form is not always the result of an external intervention. This fixation may also be made for entirely non-commercial reasons, such as safeguarding documentation or legal compliance, but copyright protection will still automatically attach in the event of statutory compliance, in accordance with the Berne Convention and the prohibition of formalities.<sup>12</sup> The creator of that specific complying work will be considered the legal author with the power to exclude others and exploit the work, even if there are elements and derivatives which might include community ICH. This scenario is problematic for the continued intergenerational

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<sup>9</sup> See, e.g., *Intellectual Property: Overview*, UK Intellectual Property Office, <https://www.gov.uk/government/organisations/intellectual-property-office>, last visited 21 Nov. 2017.

<sup>10</sup> Paterson, R. and Karjala, D., *Looking Beyond IP in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. OF INT’L & COMP. L. 633, 634 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> The enjoyment and exercise of these rights shall not be subject to any formality...” The Berne Convention, *supra* note 5, at Art. 5(2).

transmission of the ICH, for the practicing communities' access and identity, and for general societal enrichment. Reducing these expressions to a fixed form presents dangers of ossification and loss of meaning as a living practice for the relevant communities, leaving a historical piece of recorded data without the contemporaneous cultural meaning. Even well-meaning documentation has the potential to counteract the purpose of safeguarding efforts entirely.

A notable legal challenge is precisely defining 'ICH', due to its constantly evolving and subjective nature. This is compounded by the issue of measuring the value of ICH. Demonstrating value is crucial for legislative bodies or non-governmental organisations, for example, seeking new funding, allocating resources, or attempting to design effective ICH protection programmes, where quantifiable returns are persuasive, particularly when intersecting with the realm of IP protections.<sup>13</sup> More complex hurdles abound, ranging from obtaining free, prior, and informed consent to agreeing upon definitions of proper community representation.<sup>14</sup>

The central research question driving this dissertation asks: what is the interplay between IP laws and Celtic-derived ICH in economically developed countries with close geographic and sovereign ties, focussing on propertisation and commercialisation? In order to address this research question, the dissertation first provides a historical background of the expansion of global IP regimes and the various international heritage protection instruments. Second, three case studies of ICH and IP in Scotland, Ireland, and Wales demonstrate common themes in legal and community regulation. Specifically, the comparison explores: 1) how ICH can become propertised via exclusionary monopolies through automatic legal mechanisms of international and domestic IP law; and 2) whether this resulting effect is intended by IP law and other legal regulation. This dissertation focusses on the United Kingdom and Ireland as these countries demonstrate the compelling, symbiotic dynamics of ICH and IP, in addition to

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<sup>13</sup> Lixinski, L., *INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW* 210-28 (Oxford 2013).

<sup>14</sup> *Id.*

the challenges facing ICH in developed countries. Although under studied, these ICH challenges in developed countries have more common with parallel developing countries' issues than may appear initially.

There are important dynamics presented by the countries examined. The first is a present or recent limitation on sovereign autonomy via a union structure. Legal power over IP law is held at Westminster in England and not devolved to the other countries (Scotland, Wales, and Northern Ireland) in the United Kingdom. However, some rights over governing culture are devolved to the individual countries, which provides an opportunity for resourceful law-making or initiatives around ICH protection. For instance, Scotland possesses certain devolved right to govern culture, but not IP.<sup>15</sup> Therefore, innovative statutory interventions in cultural practice must serve as 'pseudo-IP' rights; some of these placeholder statutes, such as the Scottish Register of Tartans Act ("the Tartans Act"), are further explored *infra*, in Chapter IV.<sup>16</sup> Ireland gained its independence, and thus gained full legislative powers, nearly 100 years ago; therefore, the legacy of UK law is still influential. Thus, the shared cultural and legal history provide the opportunity to gain insight into a legislative path taken without reserved powers.

Second, the focus countries in this dissertation are economically developed in addition to having limited (or relatively recently unlimited, in the case of Ireland) sovereignty. The United Kingdom is not signed on to the 2003 Convention; however, several constituent countries, to varying degrees, have expressed intentions to join the 2003 Convention. Scotland has been the most proactive about urging the United Kingdom to join and has already produced its own ICH inventory in compliance with the requirements of the 2003 Convention.<sup>17</sup> Leading creative and political entities within Scotland have expressed the specific

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<sup>15</sup> *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".

<sup>16</sup> The Scottish Register of Tartans Act (2008) ("the Tartans Act").

<sup>17</sup> McCleery, A., *et al.*, *Scoping and Mapping Intangible Cultural Heritage in Scotland*, UNESCO/Museum Galleries Scotland (2008), available at <http://www.unesco.org.uk/uploads/ICHinScotlandFullReport-July08.pdf>.

desire to sign onto the 2003 Convention and have taken steps to align ICH practices with the international guidance. The galleries, libraries, archives, and museums sector (“the GLAM sector”) have been active in advocating for safeguarding ICH; Joanne Orr, CEO of Museums Galleries Scotland, appears on the UNESCO ICH website discussing the importance of ICH in the United Kingdom.<sup>18</sup>

Whilst developed countries in the Global North are traditionally seen as ‘knowledge-producing’, as opposed to the ‘culture-producing’ countries generally in the Global South, the United Kingdom is comprised of four countries with unique ICH.<sup>19</sup> Only Westminster in England, however, has the power to enter into international treaties for the United Kingdom, leaving the possibility of underrepresentation in the face of diverging cultural and creative interests of constituent countries. Under the current governmental structure, even if three constituent countries voted to join an international treaty like the 2003 Convention, without the England vote, no measure would be approved as joining international agreements is a reserved power.<sup>20</sup> Thus the union arrangement, as it stands, presents a danger for ICH in each country, as one state vote has ultimate power over the types of legal instruments that operate in all of the United Kingdom related to IP and international treaties.<sup>21</sup>

The dissertation draws from similarities in the diverse country-based ICH examples to further explore the particulars of the process by which ICH becomes sufficiently tangible to garner IP protection and will continue with how this change in form is both actively encouraged through financial reward and passively through automatic legal processes. The dissertation uses the term ‘tangification’ to describe this change in a form that allows ICH to fall under the scope of copyright law. This process begins with any type of ICH and occurs in four steps: 1) tangification, where the ICH takes on a corporeal form; 2) propertisation,

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<sup>18</sup> *United Kingdom of Great Britain and Northern Ireland and the 2003 Convention*, UNESCO, <https://ich.unesco.org/en/state/united-kingdom-of-great-britain-and-northern-ireland-GB>, last visited 20 Nov. 2017.

<sup>19</sup> See Chapter IV, *infra*.

<sup>20</sup> The Scotland Act, *supra* note 15, at Part 1, para. 7.

<sup>21</sup> *Id.*

where ICH is owned as IP; 3) commodification, the transfer of the ICH-cum-IP into a saleable form; and 4) commoditisation, where the item becomes a generic good for sale.<sup>22</sup> Tangification can be intrinsic to the ICH if the practice entails creating a tangible good or is associated with immovable heritage, or it can also develop naturally as a part of the evolution of community practice. However, some ICH tangification is made with the specific goal of gaining IP protection. Copyright law provides exclusive ownership monopolies over original literary and artistic works for limited periods of time, and although the exact criteria varies by jurisdiction, many require that the work be in a visible, stable form, known as fixation.<sup>23</sup> Once a work is fixed, the author (usually singular) gains all the protections of copyright with no additional action or registration requirements.<sup>24</sup> As the subject matter of ICH and IP overlap substantially, ICH can be encompassed by copyright law upon innate fixation or the form of expression can be incentivised towards a fixed form for the author to gain IP protection.

An inherent tension exists in IP-focussed economies and ICH safeguarding. From an IP law perspective, a work must be clearly defined – and ideally fixed – to provide protection, and the removal of registration requirements was meant to protect authors and artists. From an ICH perspective, this static ossification can prevent the natural evolution of a living practice and requires that an individual or singular entity create a singular description of something that is characteristically diverse.

This heightened ‘tangification’, fuelled by copyright incentivisation and automatic statutory attachment, can result in the practicing communities’ disenfranchisement from commercialised versions of ICH, homogenisation through globalisation, and stagnation through legal fixation. This is especially worthy of note as the process manifests as a subtler erosion of ICH in developed countries as opposed to the more urgent and obvious safeguarding issues in some developing countries. Identifying this phenomenon as

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<sup>22</sup> See Chap. V(c).

<sup>23</sup> CDPA, *supra* note **Error! Bookmark not defined.**, at Ch. 1(4).

<sup>24</sup> The Berne Convention, *supra* note 5, at Art. 5(2).



tangification is important to normalise the language in law and culture, which facilitates communication across disciplines and communities. Normalised language will enable dialogue and reduce ‘othering’, which negatively impacts both domestic and international efforts; therefore, it will best safeguard global ICH as well as strengthen IP laws by reinforcing the legislative intent.

Lastly, the dissertation recommends an evidence-based approach to determining whether IP law is not only suitably creating incentives through exclusive monopolies but also whether these enclosures are proper and beneficial to ICH. Moreover, ubiquitous global ICH recognition and safeguarding, rather than geopolitically divided foci – namely, disproportionate legal emphasis on culture or knowledge based on location and economic status – would benefit creative industries, intellectual production, and cultural practice.

This dissertation’s original contributions to research include highlighting the influence of ICH on IP law and how IP shapes ICH. This interaction challenges the domestic and international differential legal treatment between developed, Global North countries as IP- and knowledge-producing and developing, Global South countries as ICH- and culture-producing. Theoretical patterns emerged from the case studies: namely, first- and second-wave adoption, which is complementary to Hobsbawm and Ranger’s invented traditions; and ‘tangification’, which identifies the process through which ICH becomes IP in a modern legal framework and highlights the risks to ICH integrity as well as the over-extension of IP law. Each of these contributions support the assertion that properly managing risk to and safeguarding of ICH, which provides social and economic benefits, can also help to ensure that IP law is functioning in a manner reflecting its jurisprudential underpinnings, facilitating longevity and enforceability of the law.



## II. Methodology and Limitations

### a. Methodology

The primary approach taken in this dissertation is comparative socio-legal analysis, accompanied by multiple case studies and participant observation. A review of the impact of existing legal instruments, domestic and international, related to copyright and ICH is followed by the case studies, organised in a descriptive framework.<sup>25</sup> Each case study is prefaced with a chart that identifies the ICH subject to examination in the chapter, identifying the tangible, fixed elements and the intangible, unfixed elements addressed therein. Elements that cannot be concisely separated into tangible and intangible elements for purposes of the chart may appear in both columns, with the nuances explored more fully within the chapter. These case studies are key subjects of ‘inherent interest’ to the analysis<sup>26</sup> and are based on three Celtic-derived countries in, or recently in, a union-structured legal system: Wales, Ireland, and Scotland.<sup>27</sup> The object, or analytical frame is exploratory and theory-building, through the process of multiple, parallel case studies.<sup>28</sup> The multiple case studies set the structural framework for a closer examination of how the law shapes intangible cultural outputs. Utilising explanation building in multiple case studies, theoretical structures emerged based on case law, statutory regulation, legislative history, scholarly articles, and media outputs as representative sources.<sup>29</sup> Drawing from diverse ICH, each case study demonstrated a second wave of cultural adoption, following a legal intervention that sought to control or limit its practice.

For one case study, tartan in Scotland, a participant observation method was employed by designing and registering a tartan, followed by a mill visit. Next, tangification to varying degrees emerged from tracing

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<sup>25</sup> Yin, R., *CASE STUDY RESEARCH: DESIGN AND METHODS* 139-40 (Sage 2014).

<sup>26</sup> A case study will include two elements: “1. A ‘practical, historical unity,’ [subject]...and 2. An analytical or theoretical frame [object]”. Thomas, G., *A Typology for the Case study in Social Science following a Review of Definition, Discourse, and Structure*, 17(6) *QUALITATIVE INQUIRY* 511, 513 (2011).

<sup>27</sup> Northern Ireland and England are notable ICH players in the UK as well but will not be specifically examined in this work due to space constraints. Expanding the analysis to these countries is in the purview of future research.

<sup>28</sup> Thomas, *supra* note 26, at 514-15, 518.

<sup>29</sup> Yin, *supra* note 25, at 148-50; *infra* Chapter V.

the development and second-wave adoption of ICH. Some of the ICH was recorded in fixed form with little commercial activity whilst some ICH was openly leveraged for commercial gain, leading to increased homogenisation and separation from the original practice as community-identity centred.

The terminology related to copyright and ICH in this dissertation is drawn from linguistic conventions in the respective fields for purposes of identification. These conventions often imply dichotomies that are, upon investigation, false. A major underpinning of this dissertation is that these designations harm communities and creative production, especially in terms of ICH protections. ICH, as an embodiment of living communities, is particularly vulnerable to reflecting institutional reinforcement – financial, organisational, and otherwise. However, for purposes of clarity and consistency with international organisations’ criteria and historical structures, the following designations will be used with necessary, frequent caveats.

This dissertation will use the terminology ‘developing’ and ‘developed’, based on World Trade Organization (“WTO”) economic designations.<sup>30</sup> This has no relation to the subjective value or amount of perceptible ICH within that state. Under historical and existing conventions, developing countries will have more identifiable ICH and developed countries, more built heritage. However, this is partly due to infrastructure challenges and ongoing civil unrest in some developing countries, which can pose an immediate threat to the physical integrity of heritage sites and to the resources necessary for thriving IP industries.

One of the primary contemporary international heritage instruments, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (“the World Heritage Convention”), was aimed at

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<sup>30</sup> When used without the separate designation of ‘least developed,’ the ‘developing’ category will incorporate the ‘least developed’ category.

only protecting tangible, built heritage.<sup>31</sup> An oft unacknowledged pitfall of this system is that this does not necessarily reflect the amount of ICH in developing countries due to this very emphasis, which can result in categorical self-reinforcement.<sup>32</sup> Similarly, the designations of the Global North and Global South from the culture sector, which refer to socio-political and economic divisions, are also problematic.<sup>33</sup> The designations do not indicate geographic location, necessarily. As a country becomes ‘developed’, it then becomes a part of the Global North. This terminology is problematic due to the inadequacy of a two-category system for the entire global population and the highly politicised history of these designations, even within international IP and trade agreement negotiations.<sup>34</sup> Additionally, labelling countries can be self-fulfilling and obstructionist for developing nations attempting to transition into full participation in a truly global economy, either explicitly or implicitly due to the Global South classification. This linguistic divide is reflected also in laws, policies, and participation in cultural practices.

ICH offers many social and economic benefits to the originating culture as well as diverse cultures globally; ICH will integrate into and influence existing practices or inform new, evolved ICH.<sup>35</sup> However, domestic governments as well as international preservation organisations which assess economically developed countries designate ICH as lower priority for cultural heritage safeguarding on an international level if the domestic economy of a country is strong.<sup>36</sup> Thriving economic status seems to translate, legally, into an environment where it is less dangerous to brand and market cultural heritage; however, less international participation in ICH safeguarding and a highly commercialised market can put equally

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<sup>31</sup> Arts. 1-3, Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151, (1972) (“the World Heritage Convention”).

<sup>32</sup> See generally Schmitt, T., *The UNESCO Concept of Safeguarding Intangible Cultural Heritage: Its Background and Marrakechi Roots*, 14 Int’l J. of Heritage Studies 95 (2008).

<sup>33</sup> The Global North commonly refers to Western, industrialised nations; the Global South includes less developed and former Communist bloc countries. Whilst using this terminology creates the risk of perpetuating these conditions in a self-reinforcing manner, these statuses are important when considering how the divisions influence adoption of international and domestic instruments that more heavily benefit countries in the Global North which already have established economies and infrastructure.

<sup>34</sup> Arewa, O., *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks (TRIPs Symposium)* 10 MARQUETTE INTELL. PROP. L. REV. 156, 159-66 (2006).

<sup>35</sup> Comaroff, J. and Comaroff, J., *ETHNICITY INC.* (Chicago 2009).

<sup>36</sup> See, e.g., the 2003 Convention, *supra* note 4, at Art. 17.

valuable ICH at high risk. Whilst the risk may appear more pressing in developing countries where scarce resources are or should be prioritised for infrastructure and other foundational progress, developed countries are becoming increasingly homogenously Westernized. Further, these countries are devoting proportionately fewer resources to protecting ICH or are utilizing those resources to commodify ICH.

There is a heavy emphasis in academia and international protections on indigenous peoples as primary creators of ICH, and thus greater emphasis on safeguarding those populations' ICH. Yet ICH is a central feature of all cultures regardless of economic development or indigenous minority designation.

Consequently, many of the dangers of globalisation and cultural homogenisation related to ICH in developed countries have gone unnoticed or underestimated. The ICH erosion is far subtler still calls for international protection and recognition. Additionally, by following historical patterns of Western imperialist legal expansion,<sup>37</sup> this dissertation suggests that recognising domestic ICH is likely to be the most effective strategy to protect global ICH, rather than solely 'putting out fires' with urgent safeguarding measures. ICH practices do not exist as a dichotomy, contingent upon economic development of a state, and the prevalence does not negate or necessitate the existence of the other; *i.e.*, the developed country as knowledge-producing and the developing country as culture-producing is a false dichotomy, interspersed throughout legal and academic narratives.

Defining ICH can be equally challenging.<sup>38</sup> UNESCO provides a foundational definition of culture for the international stage:

Culture is (a) "the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs" (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) "in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate" (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) "covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of

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<sup>37</sup> Waterton, E., *POLITICS, POLICY, AND DISCOURSES OF HERITAGE IN BRITAIN* (Palgrave 2010), 70-74.

<sup>38</sup> See Blake, J., *On Defining the Cultural Heritage*, 49(1) INT'L & COMP. L. QUARTERLY 61 (2000).

life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development” (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions); (d) “the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life”. (Rodolfo Stavenhagen, “Cultural Rights: A social science perspective”, in H. Niec (ed.), *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights*, Paris and Leicester, UNESCO Publishing and Institute of Art and Law).<sup>39</sup>

Without using the particular, more modern terminology of ‘ICH’, these definitions represent much of the historical evolution of the attempts to encompass ICH in international legal documents. The concept of a living culture that cannot or should not be reduced to static tangible form has existed in cultural dialogue for some time, but international legal systems did not incorporate the concept adequately by adopting ICH as an accepted term for the intangible, dynamic aspects of culture that reflect the identity of a constantly evolving community until more recently.<sup>40</sup> This nomenclature was enshrined in the 2003 Convention through UNESCO negotiations.<sup>41</sup> The 2003 Convention is addressed in more depth *infra* throughout, but it is important to emphasise that there are public good challenges and difficulties in defining ICH in legal and cultural contexts, which do not always neatly align.

Under the 2003 Convention, ICH is defined as:

The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills –as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, 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, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, and complies with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.<sup>42</sup>

Article 2.2 of the 2003 Convention also lays out a non-exhaustive list of examples of how ICH might manifest: “oral traditions and expressions, including language as a vehicle of the intangible cultural

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<sup>39</sup> *General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, Committee on Economic, Social and Cultural Rights, 43<sup>rd</sup> Session, 2-20, Nov. 2009. E/C.12/GC/21 P. 3.

<sup>40</sup> Lenzerini, F., *Intangible Cultural Heritage: The Living Culture of Peoples*, 22(1) EJIL 101-120, 102(2011).

<sup>41</sup> The 2003 Convention, *supra* note 4, Part III.

<sup>42</sup> *Id.* at Art. 2.

heritage, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, traditional craftsmanship.”

Whilst this definition is accepted in the field, not all parties to the 2003 Convention find the definition adequate or appropriate. During discussions at the Quebec City, Canada conference *Intangible Cultural Heritage: 10 Years in Force*, delegates relayed concerns about the exclusivity, and equally, the inclusivity of the definition of ICH and how defining affects the adequacy of ICH safeguarding on an international stage.<sup>43</sup> Canada is not a party to the 2003 Convention, but delegates prepared a draft proposal during the conference. The general consensus was that, even though defining ICH for legal purposes can be problematic, it is beneficial for a country and its ICH to have a ‘seat at the table’ at an international level for negotiations and decisions about international instruments for safeguarding ICH. The conference culminated in the *Canadian Declaration for the Safeguarding of Intangible Cultural Heritage*, outlining the resolutions and recommending joining the 2003 Convention.<sup>44</sup>

This dissertation will focus on ICH in developed countries – particularly developed countries in a union system – as it is largely an unexplored research space.<sup>45</sup> The majority of existing literature on ICH and the interaction with IP laws has focused on developing countries or minority (often indigenous) populations in developed countries. This discrepancy is not without reason. Many indigenous minority groups have endured continual strife and persecution at the hands of majority groups, and their culture and community identity has been put into grave danger. The accompanying possibility of cultural homogeneity, without

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<sup>43</sup> *Canadian Declaration for the Safeguarding of Intangible Cultural Heritage, Adopted in Quebec City, Canada, International Conference on Intangible Cultural Heritage: 10 Years After the Entry into Force of the UNESCO Convention* (20 May 2016), available at <https://heritagesask.ca/pub/documents/living-heritage/Heritage%20Sask%20CEO/Canadian%20Declaration.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> With notable exceptions, many of whom are cited in this dissertation; the intersection of IP and ICH is a growing body of literature.



or without historical forcible colonisation, is an ever present influence that also presents an acute threat to ICH to minority cultures.

In developing countries, limited resources must be allocated to infrastructure and other fundamental frameworks before cultural protections or investment into IP protection and production, so the international interest and assistance is necessary. However, legal and cultural imperialism imposes majority domestic law, and accompanying international regulations, so it would follow that the most efficient and effective way to safeguard minority or developing country with weaker international bargaining power would be to treat domestic ICH in countries with stronger bargaining power equally.

Further, existing criteria for identifying at risk populations as indigenous populations may not be the best criteria for identifying at risk heritage although it is often used as a proxy identifier. Whilst these criteria may apply to indigenous populations, isolating, rather than including, indigenous populations for cultural acknowledgement and safeguarding as a primary criterion is inadequate and furthers the theoretical and concrete divide between indigenous and non-indigenous populations. There are unrecognized aspects of minority cultures in developed countries, at risk of imposed homogeneity. This same homogeneity impacts majority culture as well, and greater international recognition of cultural practices would attract higher acclaim and funding for majority population ICH, rather than streamlined popular culture.

This risk from cultural homogeneity and imperfect sovereignty is present in the countries that are the subject of this dissertation as they are geographically, historically, and politically linked developed countries with unique heritage issues and special devolved or recently fully sovereign legal conditions. Devolution has been implemented to varying degrees among these countries. Scotland holds more devolved legal powers than Wales, whereas Ireland is now a fully independent country, outside of the

United Kingdom.<sup>46</sup> The division of power within the United Kingdom has led to diverse legal mechanisms that must function within the scope of devolved rights. For instance, Scotland holds powers to legislate around culture, but not IP; any IP legislation must be made at Westminster.<sup>47</sup> Despite devolution, the constituent parties may not enter into international agreements individually, such as the 2003 Convention.<sup>48</sup> Further, constituent countries will never be able to outvote an opposed England; *i.e.*, Northern Ireland, Scotland and Wales could vote to enter an international treaty, and, if there is no majority support in England, then the measure will never pass as these rights are not devolved.<sup>49</sup> As individual countries with diverse interests – and in relation to this research, diverse ICH – the inability to participate on an international scale hampers ICH safeguarding efforts and is threatened by the lack of legislative power of IP. These legal tools impact ICH through forms such as trade mark-enforcing legislation, registries, and cultural branding. All cultures have valuable ICH that may be endangered by the spread of copyright maximisation and overvaluation of the tangible.

## **b. Limitations**

Whilst this dissertation aims to comprehensively analyse the symbiotic relationship of IP and ICH through examples in Ireland, Wales, and Scotland, it is limited by the use of primarily written sources and limited participant observation. Socio-legal empirical work in this area could build into the richness of the scholarship in the future. Anthropological or quantitative and qualitative analysis of semi-structured interview formats with practicing communities, policy makers, and other stakeholders would strengthen the argument and add desirable perspectives from outside the literature. Due to time, space, and resource restraints, these additional aspects are not included, but the dissertation points to opportunities for future research in the aforementioned complementary approaches.

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<sup>46</sup> See generally the Scotland Act, *supra* note 15; Articles of Agreement for a Treaty Between Great Britain and Ireland (1921); and the Government of Wales Act (2006).

<sup>47</sup> The Scotland Act, *supra* note 15.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Another prominent challenge for all research in the area of ICH and IP is measurement and inherent barriers to quantitative research. Increasingly, policy makers will look to numerical or economic evidence to support law-making and funding. Whilst this evidence might make for compelling policy arguments, reducing ICH and community participation to politically or legally influential numbers is unrepresentative of the true impact or scope of ICH practice and is exceedingly difficult to accurately quantify.<sup>50</sup>

‘High art’ and immovable, tangible cultural heritage is more suited to measurement. Visitor numbers to historic sites, willingness to pay for tickets, and individual and corporate financial sponsors are examples of tangible ways that are more amenable to numerical calculation and translate smoothly into data and measurement. Certain types of cultural economic analysis, such as welfare economics and contingent valuation, cater more appropriately to evaluating intangible cultural practices but still cannot properly numerically represent the scope and value of an evolving, nebulous intangible practice that is nonetheless central to the identity of communities.<sup>51</sup> Deriving countable value from evolving community practices, such as oral histories, is problematic for any comparative empirical framework.

To further complicate the issue, in the past ICH was considered to be irrelevant for the United Kingdom as indicated in interviews with culture and heritage professionals.<sup>52</sup> This misconception even amongst cultural heritage practitioners, may be due to the traditional focus on tangible heritage, the concept of a dichotomy between Western and non-Western cultures, the fairly nebulous definition of ICH, and the impact of IP law on cultural production (both direct and indirect). However, ICH is also gaining more

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<sup>50</sup> Schifferes, J., *Heritage, Place, and Identity: Seven Themes from the Heritage Index*, Royal Society for the Encouragement of the Arts, Manufactures and Commerce (Sep. 2015), available at <https://www.thersa.org/discover/publications-and-articles/reports/seven-themes-from-the-heritage-index> (“the RSA Report”) 22-23.

<sup>51</sup> Discussed at greater length *infra*, Chapter 3, sections (e) and (f).

<sup>52</sup> Smith, L. and Waterton, E., *The Envy of the World?*, in Smith, L. and Akagawa, N. (eds), *INTANGIBLE HERITAGE (KEY ISSUES IN INTANGIBLE HERITAGE)* 297 (Routledge 2008). For a more detailed treatment of this subject and interview content, see Chapter IV.

recognition as understanding of the definition and value of ICH advances. The Royal Society for the Encouragement of Arts, Manufactures and Commerce (“the RSA”) dedicated a section of their annual report in 2015 to ICH and attempted to include ICH in their Heritage Index by adding ‘Culture and Memories’ as one of the seven factors alongside more traditional categories, such as ‘Landmarks and Monuments.’ The RSA states:

Often, we tend to associate heritage with historic structures which have stood the test of time: castles and palaces, museums and country houses, as well as the legacy of industrial Britain. But the places where history comes alive are places where people have activated local history. Heritage doesn’t speak for itself – it involves people playing a role to interpret historic resources, so that they are meaningful in the present day. Therefore, we consider that heritage activities are just as important as heritage assets ... Most interestingly, digging further into the data, it is heritage activities rather than heritage assets which account for the strength of the link between heritage and wellbeing at a local scale.<sup>53</sup>

This RSA Report echoed concerns voiced by scholars and practitioners alike regarding the difficulty of documenting empirical data for ICH. However, other data sources in this area are either conceptually difficult to assemble or have not yet been compiled in anywhere near the same detail as exists with the long-established lists for protected buildings or natural sites, for example.<sup>54</sup> Other types of heritage defy being grounded to a single place.<sup>55</sup> The RSA Report further noted how difficult it is to measure the impact of ICH, considering the general absence of countable aspects of ICH as opposed to tangible or immovable heritage.<sup>56</sup> Factors used in the report to create a ranked index of heritage, such as number of sites, size, expansions, and ticket sales, are often useless or not applicable when dealing with ICH.<sup>57</sup>

Similar sentiments are echoed internationally. For instance, prominent writer and former editor of the *New Republic* Leon Wieseltier<sup>58</sup> highlighted how “the discussion of culture is being steadily absorbed into the discussion of business,” emphasizing the “overwhelming influence” of quantification and “the

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<sup>53</sup> Schifferes, *supra* note 50, at 5.

<sup>54</sup> *Id.* at 22.

<sup>55</sup> *Id.* at 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> The *New Republic* removed Wieseltier from his position on 27 October 2017 in light of numerous allegations of ongoing sexual harassment of female employees. This citation pertains to the content relevant to IP and ICH only, and the author condemns this harmful behaviour on the strongest terms.

idolatry of data.”<sup>59</sup> The innate resistance of ICH to empirical measurement runs against current law and economics zeitgeist, which creates difficulty ensuring that ICH plays an appropriate role in law and policy, particularly related to IP. Whilst all efforts have been made to address challenges with interdisciplinary understandings of terminology (*e.g.*, value), measuring and analysing culture in order to justify policy creates barriers for safeguarding ICH if it is to be reduced to numbers to count against IP, tracked by corporate reporting in pounds and units.

The strengths of this research, in a methodological sense, lie with the establishment of links amongst legal instruments that are traditionally treated as unrelated, the multiple comparative case studies, and socio-legal approach, drawing theory from the case studies. The dissertation will also function to address the limitations by highlighting future directions for research and by exploring this neglected interplay between ICH and IP law.

### **III. Historical Development of IP and Intangible Cultural Heritage in Parallel International Legal Frameworks**

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<sup>59</sup> Wieseltier, L., *Among the Disrupted*, The New York Times (7 Jan. 2015) [http://www.nytimes.com/2015/01/18/books/review/among-the-disrupted.html?\\_r=1](http://www.nytimes.com/2015/01/18/books/review/among-the-disrupted.html?_r=1). Wieseltier was subsequently interviewed by the National Endowment for the Arts in July 2016 in a piece entitled *On (not) Measuring Arts and Culture*. Iyengar, S., <https://www.arts.gov/NEARTS/2016v2-challenges-arts-21st-century/not-measuring-arts-and-culture-0>, last visited 20 Nov. 2017.

### **a. Introduction**

Although IP has been evolving within domestic law for hundreds of years, international regulation of cultural heritage and IP has accelerated in both volume and complexity over the past 50 years albeit in nearly entirely isolated spheres. Despite the crossover of practice and subject matter, the two fields have developed in relatively siloed legal frameworks and make very little interdisciplinary reference, both domestically and internationally. In the early years of IP treaties, this separate development could be attributed to myriad influences such as geographically accelerated industrialisation,<sup>60</sup> lobbying by the British publishing industry,<sup>61</sup> and an imbalance in negotiating power between developing and developed countries.<sup>62</sup> As technology exponentially evolved over the 20<sup>th</sup> century alongside the phenomenon of increased codification of international norms and customs, IP laws were often created or modified to reflect changes in technology or the influence of entertainment and technology lobbies. The modifications to IP law nearly always expanded the scope – such as subject matter or duration – of IP protection, resulting in new enclosures of IP.<sup>63</sup>

The two most prominent modern international treaties in the two primary fields of concern for this dissertation – the 2003 Convention and the 1995 TRIPs – make no reciprocal reference to IP or cultural heritage respectively, despite the massive crossover and overlap the effects the bodies of law have in practical implementation. One difficulty of reconciling the two approaches is that many scholars, delegates, and legislators do not consider the two fields sufficiently related to affect the development of the law.

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<sup>60</sup> Sherman, B. and Bentley, L., *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760 – 1911* (Cambridge 1999) 63-67.

<sup>61</sup> *Id*; see also Cooper, E. and Deazley, R., *Interrogating Copyright History*, 38(3) *EU. INT'L PROP. REV.* 467, 470 (2016).

<sup>62</sup> May, C., *THE GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES?* (Routledge 2000) 83-89.

<sup>63</sup> *Id* at 47-50.

## **b. International Development of Intellectual Property Law<sup>64</sup>**

The 1709 Statute of Anne in Great Britain is widely recognised as the first modern copyright law in Western legal systems.<sup>65</sup> Whilst many other jurisdictions and instruments had legal frameworks and documents related to literary and artistic works from as far back as the Renaissance era, the Statute of Anne most resembles the contemporary understanding of copyright in the United Kingdom and in modern international instruments like TRIPs.<sup>66</sup> TRIPs, however, is not the first relevant international IP treaty with nearly ubiquitous global state party signatories.

The Paris Convention for the Protection of Industrial Property (“the Paris Convention”), adopted in 1883, reflects the origins of contemporary IP in industrial design, patents, and trade marks.<sup>67</sup> In addition to establishing a number of common rules amongst the international parties, the Paris Convention established important substantive rules: the requirement of national treatment, where a state must treat any foreign nationals the same as citizens, and the right to priority, where, once an application is filed in one party state, the applicant has priority for a period of time to file in other states.<sup>68</sup> The application will be considered by the following party states to have been filed as of the date of the original filing.<sup>69</sup> The Paris Convention was followed just a few years later by another international legal instrument more focussed on copyright, rather than trade marks and patents.

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<sup>64</sup> This section is composed of a brief overview of the historical development of the major legal IP instruments relevant to the United Kingdom and Ireland. Whilst this section is not a comprehensive treatment, it is meant to provide a basic structural framework for the history of the most influential IP laws.

<sup>65</sup> The Statute of Anne (1709).

<sup>66</sup> *Primary Sources on Copyright (1450-1900)*, Bentley, L. and Kretschmer, M. (eds), <http://www.copyrighthistory.org/cam/index.php>, last visited 20 Nov. 2017.

<sup>67</sup> The Paris Convention for the Protection of Industrial Property, 1883 (as amended Sept. 1979).

<sup>68</sup> *Id.* at Art. 2 and 4.

<sup>69</sup> *Id.*

The Berne Convention came into force in 1886 and is based on minimum rights of authors and national treatment amongst parties.<sup>70</sup> Article 13 of the Berne Convention established a three-step test in an attempt to standardise parties' domestic laws related to exceptions and limitations and reads:

Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.<sup>71</sup>

Thus the three-step test is applied as 1) certain special cases; 2) not conflicting with normal exploitation; and 3) do not unreasonably prejudice rights holders' legitimate interests.<sup>72</sup> The test was set broadly in order to accommodate state parties' diverse international legal frameworks, and the domestic legal interpretation as to what constitutes an unreasonable prejudice can vary considerably. The adoption of the three-step test allowed for countries to craft their own limitations and exceptions to copyright law; however, exceptions and limitations tend to operate in a similar manner in order to comply with the Berne Convention. Rarely, some applications of exceptions and limitations to protection have been deemed to contravene the requirements. For instance, in 2000, the World Trade Organisation ("WTO") found the United States to have violated the treaty obligations under art. 13 of TRIPs with performance exceptions under 17 U.S. §110; the test is not so broad as to encompass all domestic law related to limitations and exceptions.<sup>73</sup>

The Berne Convention also removed the formalities of registration.<sup>74</sup> WTO members are subject to its substantive terms, excluding certain moral rights requirements, as TRIPs incorporated the majority of the Berne Convention.<sup>75</sup> Article *6bis*, incorporated in part under Articles 2.1 and 9.1, was seen as one of the

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<sup>70</sup> The Berne Convention, *supra* note 5.

<sup>71</sup> *Id.* at Art. 13.

<sup>72</sup> Ginsburg, J., *Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions*. *Revue Internationale du Droit d'Auteur* (Jan. 2001), available at <https://ssrn.com/abstract=253867>, 3-4.

<sup>73</sup> *Id.*

<sup>74</sup> The Berne Convention, *supra* note 4, at Art. 5(2).

<sup>75</sup> TRIPs, *supra* note 6, at Art. 9.



provisions that might be beneficial for developing countries or countries with less established IP markets, but the adaptations applied by two of the major players in TRIPs have affected this anticipated outcome. A further comprehensive treatment of the Berne Convention and surrounding contemporary issues in the United Kingdom and Ireland can be found *infra*.<sup>76</sup>

The United States and the United Kingdom produce significant portions of the world's IP, the United States was one of the last state parties to sign on to the Berne Convention.<sup>77</sup> The United Kingdom became a party in 1886, and the United States became a party in only in 1989 despite having attended drafting meetings as an observer.<sup>78</sup> The major sticking point in the negotiations was related to moral rights.<sup>79</sup> Both countries now have implemented variations of the moral rights section, *6bis*:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.<sup>80</sup>

As a condition of signing on as parties to the Berne Convention, countries without strong moral rights regimes were able to compromise the implementation, based on the language in *6bis* (2).<sup>81</sup> Therefore, the type and strength of moral rights for authors varies considerably amongst the parties.<sup>82</sup> Moral rights are

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<sup>76</sup> See *infra*, Chapter IV.

<sup>77</sup> *The Berne Convention Contracting Parties, WIPO-Administered Treaties*, WIPO, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15), last visited 20 Nov. 2017.

<sup>78</sup> *Id.*

<sup>79</sup> Ross, D., *The United States Joins the Berne Convention: New Obligations for Authors' Rights*, 69(3) *NOR. CAROLINA L. REV.* 364, 364-65 (1989-1990).

<sup>80</sup> TRIPs, *supra* note 5, at *6bis*.

<sup>81</sup> The language allows for considerable flexibility for new parties based on the domestic laws at the time of signing on and also provides flexibility related to term of moral rights protection. The Berne Convention, *supra* note 4, at Art. *6bis*.

<sup>82</sup> The specifics of domestic moral rights laws in the United Kingdom and Ireland are covered *infra*, Chapter IV.

just one area of contemporary international IP law where, even though 174 contracting parties were able to come agreement on the text, the state parties' underlying philosophies and domestic legal structures are diverse and at times contradictory. Thus the international body of law on this subject is far from universal and is continually developing.

In 1996, TRIPs came into force. TRIPs incorporated the majority of the Paris Convention and the Berne Convention and mandates national treatment (any person must be afforded at least the protection of a state's own citizens) and minimum rights (states may increase domestic IP protection not provide less than set out in the TRIPs Agreement).<sup>83</sup> Specifically, Article 9 of TRIPs incorporates sections 1 through 21 of the Berne Convention, with the exception of *6bis*, relating to moral rights.<sup>84</sup> TRIPs is unusual in the manner and force with which it protected IP interests internationally and included the enforcement mechanism through trade sanctions, absent in the majority of international agreements. International treaties are often considered 'toothless tigers' with no method of real enforcement in the event a party violates the terms; this is not the case with TRIPs.<sup>85</sup> The rapid global expansion of Western IP protection has fostered a culture of valuing tangible things and exclusionary personal property protections in unanticipated ways. Whilst it was clear that WTO members with strong existing IP portfolios would economically benefit from enforceable, global systems echoing their domestic systems, the actual costs of a global extension, including barriers to market entry and commercialisation of culture could not be projected. Likely, developing countries could not predict the impact of such measures or perhaps perceived that the technology transfer and balanced rights language might be more helpful than it is.

TRIPs internationally codified some of the most rigorous IP protections in the world and backed them with trade sanctions through the WTO. The trade-backed enforcement mechanism is fairly rare in

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<sup>83</sup> TRIPs, *supra* note 6, at Arts 3 and 4.

<sup>84</sup> *Id* at Art. 9.

<sup>85</sup> *Id* at Part V.

international treaties, which are known for enforcement problems. International treaties must be generally subject to state assent in order to respect state sovereignty and are known for not having ‘teeth’ to enforce these agreements, TRIPs imposes actual consequences for failing to implement and enforce IP rights, domestically and for other countries trading IP in the party state’s borders.

TRIPs is especially contentious considering the close relationship to the WTO, trade law, and enormous economic return. The trade sanctions available as a remedy to TRIPs violations make the treaty of special interest for compliance with domestic legislation, and countries with heavy investments in IP are known to actively police implementation. For instance, the United States produces an annual report, ranking each country’s enforcement of global IP rights, known as ‘the Special 301’.<sup>86</sup> The Special 301:

reflects the outcome of a Congressionally-mandated annual review of the global state of intellectual property rights (IPR) protection and enforcement. The review reflects the Administration's resolve to encourage and maintain enabling environments for innovation, including effective IPR protection and enforcement, in markets worldwide, which benefit not only U.S. exporters but the domestic IP-intensive industries in those markets as well. The Report identifies a wide range of concerns that limit innovation and investment, including: (a) the deterioration in the effectiveness of IPR protection and enforcement and overall market access for persons relying on IPR in a number of trading partner markets; (b) reported inadequacies in trade secret protection in countries around the world, as well as an increasing incidence of trade secret misappropriation; (c) troubling “indigenous innovation” policies that may unfairly disadvantage U.S. rights holders in foreign markets; (d) the continuing challenges of copyright piracy and the sale of counterfeit trademarked products on the Internet; (e) additional market access barriers, including nontransparent, discriminatory or otherwise trade-restrictive, measures that appear to impede access to healthcare and copyright-protected content; and (f) ongoing, systemic IPR enforcement issues at borders and in many trading partner markets around the world. The United States uses the review and resulting Report to focus our engagement on these issues, and looks forward to constructive cooperation with the trading partners identified in the Report to improve the environment for authors, brand owners, and inventors around the world.<sup>87</sup>

This report draws the ire of some other countries that claim the United States is overreaching and acting unilaterally to enforce international law, in contravention to WTO regulations.<sup>88</sup> Yet the stakes are high enough in international IP enforcement that the Special 301 continues to be published every year, and the

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<sup>86</sup> *Special 301 Report*, Office of the United States Trade Representative, <https://ustr.gov/issue-areas/intellectual-property/Special-301>, last accessed 11 Nov. 2017.

<sup>87</sup> *Id.*

<sup>88</sup> See generally Brewster, R., *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 (4) U. OF PENN. J. OF INT’L L. 17 (2004).

United States publishes it in the interest of ‘encouraging’ enforcement, rather than unilaterally enforcing and note their ‘constructive cooperation with the trading partners.’<sup>89</sup>

In each of these major legal instruments, cultural heritage is not specifically mentioned. The Berne Convention sets out to protect authors’ rights, but no official consideration is given to cultural heritage contributions to literary and artistic outputs of individual authors. On one hand, these international instruments may have left as much space as possible for domestic legislation to maintain international sovereignty and to reach agreement with such a large number of parties. On the other hand, cultural heritage is not and was not treated as within the realm of IP law; the bodies of knowledge are separately within the law, as will now be further examined in the overview of the historical development of law related to ICH. IP rights, enforced through TRIPs, vary in scope from patent, copyright, trade mark, and design rights, and cultural knowledge and practice can overlap with nearly all these areas.<sup>90</sup> Copyright includes literary and artistic works. Design rights and trade marks can reference or use traditional shapes, designs, and symbols. All of these resulting works encompass copious forms of ICH to create and transmit to new practitioners. Despite these overlaps, IP legislation does not generally address cultural impacts outside of the linguistic and structural framework of IP.<sup>91</sup>

At the European Union level, the InfoSoc Directive

Some areas of domestic IP law have been greatly affected by EU law, such as the introduction of the *sui generis* database right.<sup>92</sup> Conversely, some areas of existing common law were already so developed that EU law had little impact, such as with UK law regarding IP remedies.<sup>93</sup> Nonetheless, member states may

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<sup>89</sup> *Supra* note 86.

<sup>90</sup> Patents will not be addressed in this dissertation as they fall outside the scope of research.

<sup>91</sup> Issues such as collective ownership and removal from public use by one individual are implications not expressly considered in IP legislation language.

<sup>92</sup> Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases (1996).

<sup>93</sup> Bainbridge, D., *INTELLECTUAL PROPERTY* 39-40 (Pearson 2018).

still call on the Court of the Justice of the European Union to hear legal questions on interpretation and validity through referral, and these rulings are binding on member state courts.<sup>94</sup> Whilst other member states' domestic law is not binding, it is seen as highly persuasive.<sup>95</sup>

The central IP legal instruments in the United Kingdom and Ireland have slightly varied language but similar effect.<sup>96</sup> Domestically, copyright is regulated by the Copyright, Designs and Patents Act ("the CDPA")<sup>97</sup> as well as through particular *sui generis* protections in the UK.<sup>98</sup> In Ireland, domestic copyright law is regulated under the Copyright and Related Rights Act 2000, as amended 2007 ("the CRAA").<sup>99</sup> The CDPA, for instance, provides copyright protection to an author or authors of original literary, dramatic, musical, or artistic works that are in fixed form, lasting for the author's life plus 70 years.<sup>100</sup> The author holds the exclusive economic rights in the work to make copies, distribute copies to the public, show or perform the work in public, communicate the work to the public, and make derivative adaptations.<sup>101</sup> The exclusivity of copyright is subject to certain statutory exceptions, such as parody or research and private study.<sup>102</sup> The moral rights of attribution and integrity are also granted to the author.<sup>103</sup>

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<sup>94</sup> Art. 267, Treaty on the Functioning of the European Union (1958).

<sup>95</sup> Bainbridge, *supra* note 93, at 38.

<sup>96</sup> See Chapter IV, *infra*, for a more detailed treatment on the variation in domestic IP legislation.

<sup>97</sup> Copyright, Designs and Patents Act (1988) (c. 48) ("CDPA").

<sup>98</sup> For instance, legislation such as the Harris Tweed Act (1993) (c. xi) performs much like a statutory trademark as well as protects certain designs that might otherwise be eligible for copyright design protection.

<sup>99</sup> Copyright and Related Rights Act 2000, as amended 2007 (Act No. 39/2007) (Ir.) ("the CRAA").

<sup>100</sup> CDPA, *supra* note **Error! Bookmark not defined.**, at s. 1(1).

<sup>101</sup> *Id.* at 16(1)(a)-(e).

<sup>102</sup> *Id.*; Chapter III, *infra*.

<sup>103</sup> TRIPs, *supra* note 6, at 6*bis*.

### c. International Development of Intangible Cultural Heritage Law<sup>104</sup>

The legal history of international law on ICH, specifically, is limited and recent. International law on cultural heritage closely reflects social conditions of the era in which cultural heritage treaties are enacted. In contemporary times, international law related to cultural heritage first emerged around the beginning of the 20<sup>th</sup> century and was drafted with the primary purpose of ensuring that ‘cultural property’ belonging to a state would not be trafficked beyond state boundaries. This issue of tracking cultural artefacts and preventing trafficking across borders during times of unrest, particularly during war time, led to some of the first international agreements on cultural heritage.

For instance, the Hague Regulations concerning the Law and Customs of War on Land (Historic monuments) (1907) prohibited pillage and deemed arts and sciences institutions as state property, the destruction of which was subject to legal proceedings.<sup>105</sup> The Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)<sup>106</sup> reflected the wartime concerns of the state parties and was the first instance of the term ‘cultural property’ entering into the international legal instruments.<sup>107</sup>

Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;  
Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;  
Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;  
Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April, 1935;  
Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;  
Being determined to take all possible steps to protect cultural property;

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<sup>104</sup> This section is composed of a brief overview of the historical development of the major legally oriented cultural heritage instruments relevant to the United Kingdom and Ireland. Whilst this section is not a comprehensive treatment, it is meant to provide a basic structural framework for the history of the most influential cultural heritage laws.

<sup>105</sup> “Pillage is formally forbidden”; “The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.” Arts 47 and 56, Hague Regulations concerning the Law and Customs of War on Land (Historic monuments) (1907).

<sup>106</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).

<sup>107</sup> Prott and O’Keefe, *supra* note 3, at 318.

Have agreed upon the following provisions:

Chapter I. General provisions regarding protection

Article 1. Definition of cultural property

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b) to be known as 'centers containing monuments'.<sup>108</sup>

UNESCO released various recommendations on landscapes, trafficking cultural property and natural heritage between 1950 and 1980, which referred to 'cultural property' and reflected a broad range of international issues.<sup>109</sup> Many UNESCO Recommendations and "the three [UNESCO] Conventions so far adopted by UNESCO reflect the political and/or intellectual concerns of the time at which they were developed."<sup>110</sup> Whilst modern scholarship uses the description and terminology of 'ICH', some of the legislation around what is now known as ICH was initially encompassed in cultural property and later in targeted treaties as 'folklore'.<sup>111</sup> Thus even though the terminology of 'ICH' might not be present in earlier international law, instruments still regulated and safeguarded the subject matter in a different, yet evolving, linguistic framework, with particularly heightened attention to folklore in the context of copyright protections in the 1970s.<sup>112</sup> However, much of the law-making still related to protection of

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<sup>108</sup> Preamble and Art. 1, Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).

<sup>109</sup> See, e.g., UNESCO Recommendation (regarding excavations, but established State obligation to protect cultural heritage for value to the common heritage of mankind) (1956).

<sup>110</sup> Blake, *supra* note 38, at 62; e.g., UNESCO Recommendation (regarding excavations, but established State obligation to protect cultural heritage for value to the common heritage of mankind) (1956).

<sup>111</sup> See generally Prott and O'Keefe, *supra* note 3.

<sup>112</sup> E.g., the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at WIPO.

antiquities and trafficking across state borders, as seen in the Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).<sup>113</sup>

The next significant international instrument on ICH was Convention concerning the Protection of the World Cultural and Natural Heritage (1972) ('the World Heritage Convention').<sup>114</sup> The primary focus of this treaty was to ensure that each state party took 'effective and active measures' to prevent the decay or destruction of monuments, groups of buildings, sites, or natural features or sites of outstanding universal value.<sup>115</sup> The scope and language, restricted to immovable or built heritage reflected the dominant Western view of heritage as 'high art' or monuments, omitting intangible heritage from the purview of world heritage.<sup>116</sup>

In 1989, one of the first instruments related solely to movable heritage or ICH, as it later came to be known, the Recommendation on the Safeguarding of Traditional Culture and Folklore, was adopted, bringing into the lexicon 'safeguarding' as opposed to 'protection', as is often seen in IP instruments.<sup>117</sup> It also carries on 'heritage' rather than 'cultural property'. However, this Recommendation was mired by divisions related to whether folklore should be protected under copyright and, if so, how and to what extent.<sup>118</sup>

In 1997, the Masterpieces of Oral and Intangible Heritage of Humanity came into force,<sup>119</sup> including the description of ICH as "the totality of tradition-based creations of a cultural community expressed by a

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<sup>113</sup> Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

<sup>114</sup> Convention concerning the Protection of the World Cultural and Natural Heritage (1972).

<sup>115</sup> *Id.* at Preamble, Arts (1), (2), and (5).

<sup>116</sup> For further discussion of the importance of linguistics and legal effect of excluding ICH from world heritage, see *infra*, Chapter 3(e).

<sup>117</sup> *Id.*

<sup>118</sup> Sherkin, S., A Historical Study on the Preparation of the 1989 *Recommendation on the Safeguarding of Traditional Culture and Folklore*, Smithsonian Center for Folklife and Cultural Heritage, available at <https://folklife.si.edu/resources/Unesco/sherkin.htm>, last accessed 11 Nov. 2017.

<sup>119</sup> Proclamation of the Masterpieces of Oral and Intangible Heritage of Humanity (1997), available at



group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity.”<sup>120</sup> This instrument was an important step forward in international legal systems with the following aims:

- raising awareness of the importance of the oral and intangible heritage and the need to safeguard it;
- evaluating and listing the world’s oral and intangible heritage;
- encouraging countries to establish national inventories and to take legal and administrative measures for the protection of their oral and intangible heritage;
- promoting the participation of traditional artists and local practitioners in identifying and revitalizing their ICH.<sup>121</sup>

The Masterpieces of Oral and Intangible Heritage of Humanity operates by recognising and valuing living expressions by drawing attention to and providing reward for outstanding intangible heritage. Whilst it functions well as an incentive system, ICH still suffered a lack of protection if it was practised without any connection immovable or tangible immovable heritage. In order to address this gap, and in response to the heightened international IP framework brought about with TRIPs, the 2003 Convention was drafted and brought into force through UNESCO.<sup>122</sup>

The 2003 Convention provides the contemporary definition of ICH:

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, 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, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.
2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:
  - (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
  - (b) performing arts;
  - (c) social practices, rituals and festive events;
  - (d) knowledge and practices concerning nature and the universe;
  - (e) traditional craftsmanship.

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<https://ich.unesco.org/en/proclamation-of-masterpieces-00103>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> The 2003 Convention, *supra* note 4.

3. “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.”<sup>123</sup>

The definition is intentionally broad in order to encompass a vast array of diverse ICH and to give space for evolution through practice, so long as the practicing community identifies with the ICH. Indeed, scholars have inquired as to whether the 2003 Convention definition be considered a legal definition at all.<sup>124</sup> However, it may be remiss to consider the definition in isolation as it was formulated and ratified in a largely reactive manner to the pervasive notion and treatment of heritage as built and immovable. This concept is reflected in the primary international heritage instrument preceding the 2003 Convention, the 1972 World Heritage Convention. Much of the controversy arose from the additional qualification in the World Heritage Convention that the built heritage inscribed in the treaty aimed to “encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity.”<sup>125</sup> The World Heritage Convention defines ‘cultural heritage’ as monuments, sites, and groups of building with universal value.<sup>126</sup>

Thus the cultural heritage of outstanding value to humanity was limited to built or immovable, largely Western-based cultural heritage, which excludes a large amount of heritage that might not fit into this category, including ICH. A number of member states expressed concern that the definition was too narrow and did not truly embody the scope of global heritage and definition heavily favours developed, European and Eurocentric manifestations of culture and heritage.<sup>127</sup> Even during the 2004 UNESCO Convention, the Greenland Minister of Culture, Education, Science, and the Church of Greenland, stated

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<sup>123</sup> *Id* at Art. 2.

<sup>124</sup> Prott, L., *Hunting as Intangible Heritage: Some Notes on Its Manifestation*, 14 Int’l J. of Cultural Prop 385 (2007).

<sup>125</sup> The World Heritage Convention, *supra* note 31.

<sup>126</sup> *Id.* at Art. I.

<sup>127</sup> *Declaration on Cultural Policies*, UNESCO World Conference on Cultural Policies (1982), available at <http://unesdoc.unesco.org/images/0005/000525/052505eo.pdf>; *Globalization and Intangible Cultural Heritage International Conference*, UNESCO, Tokyo, Japan, 24–26 August 2004, available at: <http://unesdoc.unesco.org/images/0014/001400/140090e.pdf> (last accessed 21 Nov. 2017), at 49, 51.

that “[g]lobalization is nothing but another form of colonization” and emphasized the importance of language in ICH and law as, in Greenland, they “have dozens of names for snow and ice because it is important to the hunters to differentiate them, but many children today know only a few of these names.”<sup>128</sup> In response, the 2003 Convention parties collaborate to maintain a representative list of the ICH of humanity, a list of ICH in need of urgent safeguarding, and programmes, projects, and awareness raising education with best practices dissemination on safeguarding ICH.<sup>129</sup> This type of listing can present a conundrum when two state parties apply to inscribe the same ICH and have it attributed to that state. The 2003 Convention deals with this situation by allowing both parties to provide the appropriate evidence, and if accepted, the ICH can be listed twice and attributed to two states.<sup>130</sup>

The 2003 Convention does contain heavy caveats to the safeguarding obligations, especially under Article 3:

Nothing in this Convention may be interpreted as:

- (a) altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage properties with which an item of the intangible cultural heritage is directly associated; or
- (b) affecting the rights and obligations of States Parties deriving from any international instrument relating to IP rights or to the use of biological and ecological resources to which they are parties.<sup>131</sup>

By Article 3, the 2003 Convention operates in deference to the World Heritage Convention and to any IP rights; this legal arrangement is revealing in terms of extant negotiation dynamics and disparate bargaining power, as state parties with strong interests in IP and built heritage are the more economically powerful parties, and thus more internationally influential, in general. UNESCO explicitly disclaims IP as a component of the 2003 Convention or of ICH in this context in their Questions and Answers, also noting that IP falls under the auspices of the World Intellectual Property Organisation (“WIPO”):

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<sup>128</sup> Lenzerini, *supra* note 40, at 102-03.

<sup>129</sup> The 2003 Convention, *supra* note 4, Arts. 16-18. Historically, the concept of the ‘common heritage of humanity (CHH)’ was referred to as the ‘common heritage of mankind (CHM)’. As gender equality has progressed, the former term is preferred generally and by the author.

<sup>130</sup> *Lists of Intangible Cultural Heritage*, UNESCO, available at <https://ich.unesco.org/en/lists>, last visited 20 Nov. 2017.

<sup>131</sup> The 2003 Convention, *supra* note 4, Art. 3.

Applying intellectual property rights with the current legislative framework is not satisfactory when dealing with intangible cultural heritage. Main difficulties are related to its evolving and shared nature as well as to the fact that it is often owned collectively. Indeed, as intangible cultural heritage evolves thanks to its continuous recreation by the communities and groups that bear and practise it, protecting a specific manifestation like the performance of a dance, the recorded interpretation of a song or the patented use of a medicinal plant may lead to freezing this intangible cultural heritage and hinder its natural evolution. Moreover, as the communities are the ones who create, maintain and transmit intangible cultural heritage, it is difficult to determine the collective owner of such heritage.<sup>132</sup>

Despite this, the very listing, safeguarding, and educational activities that are the backbone of the 2003 Convention create IP and may influence the shape and direction of ICH practices.<sup>133</sup> This circular interaction is an ongoing challenge for safeguarding ICH, which is complicated by IP laws. UNESCO did address how states might approach the influence of fixation by documentation; the solution offered appears in as a form of damage mitigation and does not directly address the IP that is created with such fixation:

States may also adopt legal, technical, administrative and financial measures aimed at ensuring access to the intangible cultural heritage whilst respecting customary practices governing access to specific aspects of such heritage, as well as measures aimed at creating or strengthening documentation institutions. Can documentation lead to freezing intangible cultural heritage? No, if it aims at showing the state of this heritage at the moment documentation is undertaken. If an element of intangible cultural heritage is threatened and becomes endangered, the record will have to reflect the risks it encounters. Keeping track of living heritage is therefore vital, as possible threats can be quickly detected, and corrective measures put in place.<sup>134</sup>

Even though the 2003 Convention may be limited in enforceability in relation to other international instruments, it still represents a growing shift in perspective on ensuring that the law is balanced in terms of safeguarding ICH and protecting IP. It is also a legacy of the World Heritage Convention, which is significant for the linguistic transition to ‘heritage’ from ‘property’. The drafters made a conscious departure and did not entitle the instrument the ‘World Cultural Property Convention’, as a hypothetical possibility, but as would follow from previous conventions.<sup>135</sup> Prott and O’Keefe argued in 1992 that the proper terminology should be ‘heritage’, not ‘property’ on the following basis:

...first, that the existing legal concept of ‘property’ does not, and should not try to, cover all that evidence of human life that we are trying to preserve: those things and traditions which express the way of life and

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<sup>132</sup> *Frequently Asked Questions, Intangible Cultural Heritage*, UNESCO, <https://ich.unesco.org/en/faq-00021>, last visited 20 Nov. 2017.

<sup>133</sup> *Kit of the Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESC, <https://ich.unesco.org/en/kit>, last visited 21 Nov. 2017.

<sup>134</sup> UNESCO, *supra* note 132.

<sup>135</sup> Prott and O’Keefe, *supra* note 3, at 318-19.

thought of a particular society; which are evidence of its intellectual and spiritual achievements. On the other hand, they can be encompassed by the term 'heritage' which also embodies the notion of inheritance and handing on. This is central to our second objection to the existing legal concept of property; that 'property' does not incorporate concepts of duty to preserve and protect.<sup>136</sup>

Further, the global trend in both the heritage and legal sectors was moving steadily towards using 'heritage' in these contexts, instead of 'property'. The legal instruments of the early 20<sup>th</sup> century were often aimed at cultural heritage that was, indeed, state property, such as protecting pieces of monuments or other tangible works of cultural significance from trafficking, as explored *supra*. Heading into the 21<sup>st</sup> century, this narrow definition no longer suited the nature of the cultural practices and a greater recognition of the intangible gained prominence. In 2000, Blake provided further scholarly support for the use of 'heritage' rather than 'property', and this terminological shift seems to be complete.<sup>137</sup>

The initial signatories to the 2003 Convention were primarily developing countries and countries that had strong cultural interests that were not being represented on the international stage, especially following the implementation of TRIPs.<sup>138</sup> Although TRIPs had built-in clauses to allow graduated implementation of domestic IP enforcement for international IP interests, many countries without the resources to enforce other countries' IP interests within their own borders struggled.<sup>139</sup> Additionally, the compulsory licensing clauses, for medicine or disability access, were widely unused.<sup>140</sup> In contrast, the original ratifying parties

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<sup>136</sup> *Id* at 307.

<sup>137</sup> Blake, *supra* note 38, at 65-67.

<sup>138</sup> The first required 30 signatories to ratify in chronological ascending order: Algeria, Mauritius, Japan, Gabon, Panama, China, Central African Republic, Latvia, Lithuania, Belarus, Republic of Korea, Seychelles, Syrian Arab Republic, United Arab Emirates, Mali, Mongolia, Croatia, Egypt, Oman, Dominica, India, Viet Nam, Peru, Pakistan, Bhutan, Nigeria, Iceland, Mexico, Senegal, Romania. *State Parties, Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E>, last visited 20 Nov. 2017.

<sup>139</sup> TRIPs, *supra* note 6, at Arts 65 and 66.

<sup>140</sup> Musungu, S. and Oh, C., *The Use of Flexibilities in TRIPs by Developing Countries: Can They Promote Access to Medicines*, Study 4C, Commission on Intellectual Property Rights, Innovation, and Public Health, the World Health Organization (Aug. 2005), available at <http://www.who.int/intellectualproperty/studies/TRIPSFLEXI.pdf>, 15-18.

to TRIPs included the major economic players dominating the IP market that were absent from the ratification of the 2003 Convention, including the United States and the United Kingdom.<sup>141</sup>

As the 2003 Convention picked up speed, developed countries continue to sign on as parties, including a state party subject of a case study *infra*. Ireland ratified the 2003 Convention in 2016, nominating hurling and uilleann piping for initial inscriptions.<sup>142</sup> Whilst past ICH safeguarding has focused primarily on and received support from developing countries, the social and economic impact of the subtle erosion or, conversely, the ossification of living heritages in developed countries seems to be coming to the forefront.

Few international legal instruments directly relevant to ICH have been passed since the 2003 Convention. The Faro Convention on the Value of Cultural Heritage for Society was adopted and *prima facie* has the same purview as the 2003 Convention, but the Council of Europe refers to the Faro Convention as a ‘framework convention’ that ‘suggests rather than imposes’.<sup>143</sup> Further legal instruments have affirmed the international community’s commitment to cultural heritage in more lateral ways, such as the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), which emphasises information sharing and engaging in sustainable development.<sup>144</sup> The inscription system and urgent safeguarding mechanisms of the 2003 Convention distinguish it from other similar instruments, and it remains the primary contemporary convention related to ICH.

International law on ICH has developed substantially over the past 50 years and reflects changing attitudes and priorities of society. On the one hand, exponential growth of globalisation and technological progress has highlighted the danger of ICH either slowly eroding through homogenisation and

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<sup>141</sup> *Signatories*, TRIPs, WIPO, [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22), last visited 20 Nov. 2017.

<sup>142</sup> See *infra* Chapter IV(c) for Case Study 2 on Ireland.

<sup>143</sup> Convention on the Value of Culture and Heritage for Society, Council of Europe (2005) (“the Faro Convention”).

<sup>144</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

commercialisation or being quickly lost through more drastic and violent circumstances such as war or extreme poverty. In either case, the 2003 Convention gives a space for parties to come together to discuss best practices or submit requests for assistance for urgent safeguarding. Nonetheless, the developing and developed; Global North and Global South; IP-producing and culture-producing divide persists, for instance, as seen with primary state parties to ICH- based conventions and IP-based conventions, in part due to self-reinforcing linguistics and circular influences. The practical overlap and merge of cultural heritage and IP persist and will need to be taken into more holistic account for safeguarding to achieve the aims and goals set out in the 2003 Convention.

#### **d. Extent of Convergence of Intellectual Property and Intangible Cultural Heritage**

Thus far, this dissertation has examined the historical development to two symbiotic yet largely isolated legal frameworks, IP and ICH. Legally, the two fields remain separate, despite that practical reality that the creation of artistic and literary works and practice of ICH intertwine, as will be explored through the lens of case studies and the theory emerging from these studies.<sup>145</sup> Before moving into the case study examples, it is important to parse out the legal and academic interactions that already occur and to identify some of the challenges that arise when the fields converge on intra- and interdisciplinary levels.

There are issues that automatically surface when ICH and copyright intersect due to intrinsic qualities of both subjects: namely, that copyright will attach without any positive action by the author as no registration is required; and that ICH is practiced and passed through generations as a part of community identity, consisting of subject matter that overlaps with copyrightable subject matter. Copyright is meant to incentivise artistic, literary, and dramatic creation, protect original expressions for limited times, and thereafter benefit the public by the work's dissemination.<sup>146</sup> However, ICH that becomes IP is likely, by

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<sup>145</sup> See *infra*, Chapter IV.

<sup>146</sup> Certain legal systems, such as under French law, bequeath certain unassignable perpetual moral rights. Moral rights include attribution, divulgation, withdrawal, and integrity. Such strong authors' rights, especially perpetual in nature, are atypical in most copyright systems. Section 6*bis* of the Berne Convention does mandate some level of moral rights

definition, to (1) not sufficiently original by copyright standards; (2) not be allocated to a single or limited number of creators; or (3) be too old to be copyrightable in accordance with the spirit and intention of the law. Nonetheless, if the ICH is newly expressed in a protectable form and has never been before eligible, copyright will commence and automatically enclose the expression when the statutory conditions are met.<sup>147</sup> This reserves derivative works to the author as well, giving monopolistic control to an individual, removing the ICH from community practice – under the purported goal of incentivizing creativity to return to public, an unnecessary, superfluous legal intervention in the case of ICH. Many of the safeguarding recommendations in the 2003 Convention will result in production of copyright protectable material, particularly relating to documentation and education.<sup>148</sup> If a written record is made of oral traditions or a sound recording of traditional music, for instance, new IP rights will attach. These conditions in the 2003 Convention can incentivise creating a tangible form for ICH that not only exists outside a tangible manifestation but resists fixation; dance is one type of ICH that practitioners may intend to be ephemeral.<sup>149</sup>

Despite this impact on IP, several economically powerful countries that have large IP producing industries are not parties to the 2003 Convention, including the United Kingdom and the United States.<sup>150</sup> This lack of interest in the 2003 Convention can be attributed, at least in part, to a lack of understanding of what ICH is and what ICH exists, particularly within countries that have not created an inventory. If existing IP structures are, indeed, not optimal for safeguarding ICH but the ICH will automatically enter into such protection when individual ‘authors’ put it into a statutorily compliant form, what might

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but in a limited manner. For instance, in the United Kingdom, only the moral rights of attribution and integrity exist and then only for the life of the author. However, Article 9.1 of The TRIPs Agreement expressly excludes the copyright moral rights found in article 6bis whilst incorporating the remaining entirety of the Berne Convention.

<sup>147</sup> Article 5(2) of the Berne Convention prohibits parties from requiring any type of formality or registration with the state in order to gain copyright over a work that complies with the statutory criteria and is fixed in a tangible medium: “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work...”

<sup>148</sup> The 2003 Convention, *supra* note 4, at Parts III-IV.

<sup>149</sup> Pavis, M, Waelde, C., and Whatley, S., *Who Can Profit from Dance? An Exploration of Copyright Ownership*, 35(1) DANCE RESEARCH 96, 100 (2017).

<sup>150</sup> *State Parties, Convention for the Safeguarding of the Intangible Cultural Heritage*, *supra* note 138.



communities, cultural institutions, or governmental entities do to counteract this? And in light of the unintended consequences that may occur when culture becomes property, might there be a more effective way of preventing the undesirable effects of IP whilst maintaining the benefits that were intended by the legal philosophy behind regulation of IP in the first place?

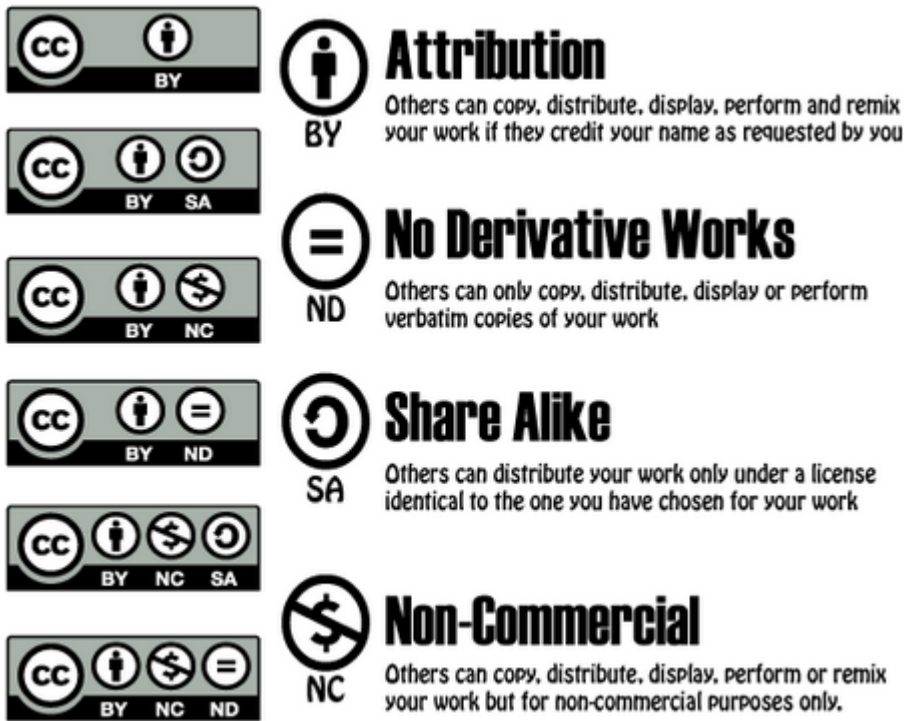
#### **i. Community-initiated solutions**

One example of a community intervention in unwanted IP restrictions is seen with Creative Commons, which a standardised licensing system with visual markers that allows authors to “easily change [their] copyright terms from the default of ‘all rights reserved’ to ‘some rights reserved’”.<sup>151</sup> The pictorial marks are easily recognisable and are designed to address common re-use issues that the original author may wish to restrict or allow, considering that full copyright is awarded to the author upon meeting the statutory requirements, a level of exclusionary protection that not all authors wish to retain for all qualifying works. For instance, an Attribution Licence is an option if the author doesn’t mind others reusing the work so long as authorial credit is included, which is an option that is not available within the bounds of existing copyright law.<sup>152</sup>

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<sup>151</sup> *About*, Creative Commons, <https://creativecommons.org/about/>, last visited 20 Nov. 2017.

<sup>152</sup> *About the Licenses*, Creative Commons, <https://creativecommons.org/licenses/>, last visited 20 Nov. 2017.



*Figure 3.1: Creative Commons Licences and Accompanying Visual Representations.*

*Source: Creative Commons Licenses Explained, MaconEastLibraryProject, CC BY-SA 3.0, <https://maconeastlibraryprojects.wikispaces.com/Creative+Commons+Licenses>, last visited 21 Nov. 2017.*

Thus it became a hugely popular option for authors who preferred to exercise specific rights over works whilst also reserving certain rights and uses as desired with a simple, easy-to-understand system. However, Creative Commons works, necessarily, within the existing IP system by contractually modifying the automatic legal protection that attaches upon satisfying the statutory criteria. Whilst this is appropriate for certain artistic and literary works, it is more appropriate for digital products and highly sophisticated authors and users. The success of Creative Commons demonstrates the power of communities to remedy legal shortcomings, but less sophisticated parties might interpret Creative Commons as a mechanism for garnering copyright protection, rather than modifying it; might not undertake the required research to fully understand the restrictions on use; or might have non-digital works and internet access restrictions. In all these circumstances, there a possible chilling or improper use of the IP. Attaching unilateral, non-time limited contractual terms to a piece of IP has also drawn criticism as to duration and irrevocability; Lawrence Lessig, the creator of Creative Commons, has responded to

these concerns in his personal blog and provides insight into the potential pitfalls and additional factors parties utilising a Creative Commons licence should take into consideration.<sup>153</sup>

Despite valid criticism, Creative Commons offers a strong social utility in the form of an alternative to expensive legal representation and is preferable for laypeople deciphering complicated and changing copyright law. Creative Commons is not required for copyright protection; these rights arise from meeting the statutory requirements without any further registration or formality, as mandated under the Berne Convention.<sup>154</sup> However, the withdrawal of formality requirements is a relatively recent phenomenon in some countries, including the United States, which joined the Berne Convention in 1988, coming into force in 1989.<sup>155</sup> Prior to joining, registration and marking protected works with a © was necessary for copyright protection, which may result in confusion what is copyright protected in the absence of a mark. Even now, copyright registration is required in the United States in order to recover statutory damages, a term which some state party convention members contend circumvents the registration prohibition in the Berne Convention.<sup>156</sup>

Taking into account the legal expense and complexities along with the fairly recent changes in requirements for protection, it is likely that authors could construe Creative Commons as a requirement for retaining control over works, rather than control over the IP rights retained and otherwise automatically held. Creative Commons, however, accomplishes the opposite of what would fully allow

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<sup>153</sup> Lessig, L., *Commons Misunderstandings: ASCAP on Creative Commons*, Lessig Blog (31 Dec. 2007), <http://www.lessig.org/2007/12/commons-misunderstandings-asca/>.

<sup>154</sup> The Berne Convention, *supra* note 74.

<sup>155</sup> The United States officially became a member of the Berne Convention on November 16, 1988. *See Treaties and Contracting Parties*, *supra* note 77.

<sup>156</sup> “This wording was designed to cover any provision in member-State law that, as distinct from making the recognition of an author's rights contingent upon compliance with some formality, made the bringing of proceedings to enforce these rights subject to a formality (perhaps even the same ones as required for the existence of protection). For example, the obligation the U.S. Copyright Act imposed on authors to register their works with the Copyright Office as a prerequisite to initiating an infringement action was deemed inconsistent with the article 5(2) prohibition on subjecting the exercise of rights to compliance with formalities... The 1988 Berne Convention Implementation Act accordingly lifted the requirement for non-U.S. Berne works, but retained it for U.S. works.” Ginsburg, J., *The U.S. Experience with Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J. L. & ARTS 311, 315 (2009).

organic evolution and practice of ICH with additional contractual restrictions on of already highly legally restricted use. An analogous system for protecting ICH would need to work with ICH that was already protected by law and then, by contract, allow a legal author to decide what types of restrictions should stay with the work.

The breadth of funding and significant scholarly work indicate a global interest in addressing these issues as ICH increasingly intertwines IP. Researchers have designed at least one system that attempts to address the parallel issues tackled by Creative Commons, but in ICH, with Local Contexts. The project is sponsored and funded by the WIPO Traditional Knowledge Division; IP Issues in Cultural Heritage; New York University Graduate School of Arts and Sciences; and the Arcadia Foundation.<sup>157</sup> Local Contexts created an image-based system that communicates information for culture and traditional knowledge Traditional Knowledge Labels (“TK Labels”).<sup>158</sup> TK Labels are visually similar to Creative Commons symbols in that they are small, black symbols meant to indicate to the user appropriate use and restrictions on the material.<sup>159</sup> Additionally, TK Labels identifies a ‘reciprocal curation workflow’ that involves mutual feedback loops when archiving or safeguarding projects are undertaken by an institution.<sup>160</sup>

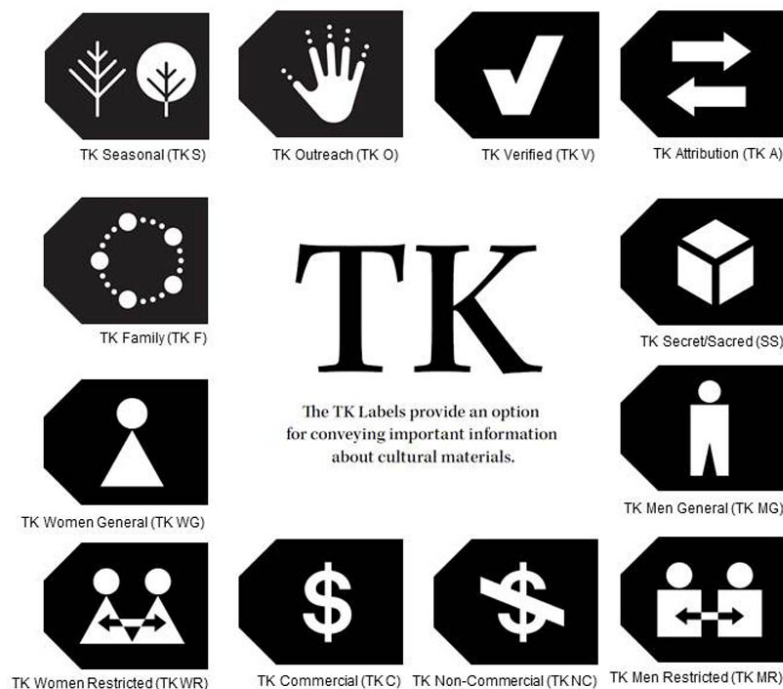
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<sup>157</sup> Local Contexts, <http://www.localcontexts.org/>, last visited 21 Nov. 2017.

<sup>158</sup> *Id.*

<sup>159</sup> *TK Labels*, Local Contexts, <http://www.localcontexts.org/tk-labels/>, last visited 21 Nov. 2017.

<sup>160</sup> *Traditional Digital Content Lifecycle*, Local Contexts, <http://www.localcontexts.org/project/reciprocal-curation-workflow-context/>, last visited 21 Nov. 2017.



*Figure 3.2: TK Labels Icons. Source: TK Labels, Local Contexts, <http://www.localcontexts.org/tk-labels/>, last visited 21 Nov. 2017.*

As with many of these types of regulatory measures or community guidance that stand in place of or supplement IP protection, TK Labels have no legal enforceability. However, this tool can be applied by the holder of a copyright in addition to existing IP right as usage guidance, or by communities of practice that do not hold the copyright.<sup>161</sup> Although the TK Labels have no inherent legal enforceability, there has been no precedential litigation as to whether they might be taken as evidence of knowledge of ownership, bad faith, or might serve in a similar evidentiary capacity. Currently, they are guidance points or standards of practice without legal force. Even though not legally binding, they are “are cultural and social guides for action and promote the recognition of inherent and ongoing Indigenous rights to determine the correct and appropriate ways of listening, viewing, experiences Native, First Nations, Aboriginal and Indigenous cultural heritage.”<sup>162</sup> The TK Labels project emphasises the need for “a practical method to deal with the range of IP issues that arise in relation to managing cultural heritage

<sup>161</sup> Anderson, J., *Options for the Future Protection of GRTKTCEs: The Traditional Knowledge Licence and Labels Initiative*, 4(1) J. OF THE WORLD INTELL. PROP. ORG. 66, 68-70 (2012).

<sup>162</sup> *Are TKs Legally Binding?*, Local Contexts, <http://www.localcontexts.org/are-tk-labels-legally-binding/>, last visited 21 Nov. 2017.

materials.”<sup>163</sup> This need is becoming near universal.<sup>164</sup> The limitation of assigning TK Labels to indigenous ethnic minority cultures further marginalizes the possibility of a more widespread adoption and excludes legitimate communities of practice characterised by features other than as a traditional ethnic minority.<sup>165</sup>

#### e. **Interdisciplinary Definitional Challenges and Value**<sup>166</sup>

The RSA Report – and many other heritage institutions, scholarly outputs, and international legal instruments – asserts that ICH holds a high value for humanity and the practicing communities.<sup>167</sup> All also agree that quantifying that value is difficult or impossible. Further, is it even desirable to quantify the value for sake of comparison against immovable heritage? Before approaching any type of comparable quantity, first, there must be a definition of what value is, in the context of ICH. Value holds specific meanings within narrow academic disciplinary foci in the disparate fields of law, economics, and culture – which can provide great benefits in the depth understanding of these fields – but can also cloud the true interdisciplinary nature of effects and application in practice. In the functioning world, the pertinent disciplinary theories of value do not operate in isolation. Terminology is of particular importance in every academic field, and specialists share insights through communications evolving from lengthy study. Digitisation and technological advances have only accelerated the infusion of international cultural and legal systems, a homogenisation leaning precariously towards uniformity, a loss of cultural diversity.<sup>168</sup> This increasing breadth of practical implications require policymakers, lawmakers, and academics to

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<sup>163</sup> *About, Local Contexts*, <http://www.localcontexts.org/about/>, last visited 21 Nov. 2017.

<sup>164</sup> *Id.*

<sup>165</sup> The need for a central decision maker may explain the limitation to indigenous communities; additionally, TK Labels are concerned primarily with TCEs, not ICH. Anderson, *supra* note 161, at 66-67.

<sup>166</sup> Portions of this section were published at: Blakely, M, *The Value Problem in Law and Intangible Heritage*, II(4) EDIN, STUDENT L. J. 76 (2015).

<sup>167</sup> *See, e.g.*, The RSA Report, *supra* note 50, at 18-23.

<sup>168</sup> “In synthesis, the rich cultural variety of humanity is progressively and dangerously tending towards uniformity. In cultural terms, uniformity means not only loss of cultural heritage – conceived as the totality of perceptible manifestations of the different human groups and communities that are exteriorized and put at the others’ disposal – but also standardization of the different peoples of the world and of their social and cultural identity into a few stereotyped ways of life, of thinking, and of perceiving the world.” Lenzerini, *supra* note 40, at 103.

expand interpretations and understandings of discipline-specific terminology; “[t]here is an obvious need for clarifying the generic tools and terminology of the social sciences across the disciplines, as academics argue past each other, using identical terms but attaching different meanings to them.”<sup>169</sup>

When policymakers design and enact law, especially in rapidly evolving areas of law, they are increasingly seeking evidence to justify funding for particular courses of action,<sup>170</sup> and often numerical values – in the form of direct economic income, participatory numbers, or other such calculable method – are seen as most persuasive.<sup>171</sup> However, assigning this type of value can be problematic for areas that do not lend themselves well to quantification, notably ICH. In contrast with a relatively fully developed, modern concept like IP, even the perfunctory exercise of applying a working legal definition to ICH poses challenges.

By nature, the law cannot protect what it cannot define; statutes must precisely define what falls under legal protection by way of consensus, and case law will flush out fact-specific applications in common law jurisdictions. Thus language is crucial to the law, and imprecise language leads to uncertainty and unenforceability. Due to the intrinsic ambiguity and social oscillation of ICH itself, law and economics is understandably difficult to apply but nonetheless is relevant and influential in practice. This does not negate the necessity of having a working definition and a demonstrable value to garner appropriate legal safeguarding, and so it is beneficial in an academic context to pursue a common ground on value surrounding ICH.

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<sup>169</sup> Grix, J., *Introducing Students to the Generic Terminology of Social Research*, 22(3) *POLITICS* 175–86, 175 (2002).

<sup>170</sup> Copyright and other fields related to IP are now beginning to seek evidence to justify policies and ensure that the law is implementing effective means to reach desired ends. *E.g.*, Hargreaves, I., *Digital Opportunity – A Review of IP & Growth*, U.K. IP OFFICE (May 2011).

<sup>171</sup> Whilst policymakers may consider using research as evidence upon which to base policy, many other factors influence decision-making. Thus even well researched and clearly communicated evidence is not determinative in policymaking. *Id.*

Academics have the opportunity to shape policymaking and socio-legal research approaches by identifying the role and value of ICH, a subject that often permeates legal cultural safeguarding but is infrequently named during accepted legal and heritage discourse. However, first, policymakers and researchers should explore interdisciplinary definitions of value to ensure that consistency and clarity of communication.<sup>172</sup> Three primary fields intersect ICH in practice: law, economics, and cultural heritage studies. Each discipline defines ‘value’ in a different manner contextual to the field.

The law interprets value often in context of consideration, or exchange of one thing for another. Common and civil law systems – and even legal scholarship, in fact – bother very little with the esoterica of value, focusing instead on precedent or practical codification. Black’s Law Dictionary defines value as “the utility of an object in satisfying, directly or indirectly, the needs or desires of human beings, called by economists ‘value in use;’ or its worth consisting in the power of purchasing other objects, called ‘value in exchange.’ Also the estimated or appraised worth of any object of property, calculated in money.”<sup>173</sup>

Despite the fact that Black’s Law Dictionary references economists’ definition of value, economics delves far more into nuanced structures of value that exceeds the concept of legal consideration and utility.<sup>174</sup> Culture ‘is not an object, not a performance, not a site; it may be embodied or given material form in any of these, but basically, it is an enactment of meanings embedded in the collective memory.’<sup>175</sup> When these enactments of collective memory are given a particular form, they can those expression can be ‘owned’ through a limited monopoly granted by IP, and then also produce quantitative data more easily.

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<sup>172</sup> “In order to produce good, clear scholarship, researchers need to fully understand the language with which they are working.” Grix, *supra* note 169, at 184.

<sup>173</sup> *What Is Value?*, Black’s Law Dictionary Online 2<sup>nd</sup> Ed., <https://thelawdictionary.org/value/>, last visited 17 Nov. 2017.

<sup>174</sup> It is worth noting that “[t]he debate on value in economics is an old one, called the “paradox of value” by Adam Smith in *The Wealth of Nations*; it hinges on the divergence of intrinsic value and price as a measure of value – value in use versus value in exchange – as illustrated in the case of water (high use value, low price) and diamonds (low use value, high price).” Towse, R., *ADVANCED INTRODUCTION TO CULTURAL ECONOMICS*, (Edward Elgar 2014) 4-5.

<sup>175</sup> Arizpe, L., *The Cultural Politics of Intangible Cultural Heritage*, 12 *ART, ANTIQUITY & LAW* 361-62 (2007) as cited in Forrest, C., *INT’L LAW & THE PROTECTION OF CULTURAL HERITAGE* 362 (Routledge 2010).



Nonetheless, this value is imposed by legal and economic frameworks. According to artist, writer, and producer Brian Eno “[s]aying that cultural objects have value is like saying that telephones have conversations.”<sup>176</sup>

From a legal perspective, value is inescapably dependent on how broadly or narrowly ICH is defined. For instance, the ‘outstanding universal value’ selection criteria in World Heritage Convention is found in the Operating Guidelines, not in the convention itself.<sup>177</sup> The World Heritage Convention safeguards immovable, tangible heritage like properties and monuments. However, the Operating Guidelines are telling in that the value itself comes from what would qualify as the attached ICH without ever being explicitly named, such as the Paragraph 77 (vi) criteria for a property that is “directly or tangibly associated with events or living traditions, with ideas, or with beliefs with artistic and literary works of outstanding universal significance.”<sup>178</sup>

Notably, “[t]he Committee considers that this criterion should preferably be used in conjunction with other criteria”, maintaining the separation between 2003 Convention and the focus of the World Heritage Convention on sites of cultural significance.<sup>179</sup> Nonetheless, this comment does indicate the recognition of the intangible role in the tangible; were there no intangible value to a site, then it ceases to hold outstanding universal value in a cultural heritage sense. This approach to heritage conservation, that “treats materiality as an end in itself similarly effects a deformation of place. The excision of the material past from its social context, past and present, hollows it out and deforms it. What you are left is things minus feeling.”<sup>180</sup>

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<sup>176</sup> Leslie, I., *Why the Mona Lisa Stands Out*, 1843 Magazine (May/Jun. 2014) <https://www.1843magazine.com/content/ideas/ian-leslie/overexposed-works-art>.

<sup>177</sup> *The Operational Guidelines for the Implementation of the World Heritage Convention*, 41 COM 11, UNESCO, para. 77. (2017), <http://whc.unesco.org/en/guidelines/>, last accessed 21 Nov. 2017,

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Byrne, D., *A Critique of Unfeeling Heritage*, in Smith, L. and Akagawa, N. (Eds.), *Intangible Heritage* (Routledge 2009) 231.

ICH, however, can hold its value independent of any tangible form, holding intrinsic value, at the least to the practicing community, by providing ‘a sense of identity and continuity.’<sup>181</sup> Whilst less prominently featured, the placement in the amended Operating Guidelines allows for easier updating and revision, which is crucial in safeguarding ICH or other intangible criteria that must attach to the property for inclusion.<sup>182</sup> Operational Guidelines are more akin to rules, as the nomination for inscription must possess at least one of the features of outstanding universal value:

77. The Committee considers a property as having Outstanding Universal Value (see paragraphs 49-53) if the property meets one or more of the following criteria. Nominated properties shall therefore:

- (i) represent a masterpiece of human creative genius;
- (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
- (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;
- (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
- (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria) ;
- (vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;
- (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation.

78. To be deemed of Outstanding Universal Value, a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding.<sup>183</sup>

These criteria are the result of international collaboration and consultation, but there are no review processes for ICH, which “implies that intangible values are fixed and immutable rather than fluid and socially determined.”<sup>184</sup> Assigning value to a tangible, immovable item cultural heritage is a far clearer

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<sup>181</sup> The 2003 Convention, *supra* 4, at Art. 2(1).

<sup>182</sup> Forrest, C., *INT’L LAW & THE PROTECTION OF CULTURAL HERITAGE* (Routledge 2010) 233.

<sup>183</sup> *Id* at para. 77-78.

<sup>184</sup> Byrne, *supra* note 180, at 230.

task than assigning value to ICH. Nonetheless, as demonstrated by these definitions and standards of outstanding cultural value, even pinning down value in fixed cultural heritage can require broad scope and flexibility to reflect the priorities of communities.

Even utilising the relatively new field of ‘law and economics’, originating from the Chicago School with Professor William Landes and Judge Richard Posner, to calculate the value of ICH may fail to satisfy both strict economists and doctrinal legal scholars due to the necessary compromises in practice, a fate often suffered by interdisciplinary approaches.<sup>185</sup> These interdisciplinary compromises, however, allow for a more holistic view and realistic insight into how research and academia interact with and facilitate change in practice and policy.

*The Wealth of Nations* is generally agreed to have established the field of classic economics, the foundation for value theory in economics.<sup>186</sup> Since Adam Smith, Karl Marx, and other influential scholars, the expansion of economics and value theory has become heavily contested amongst competing theories. Despite value as a core principle in the field, even primary introductory economics textbooks shy away from a succinct definition, instead exploring in depth ‘price’.<sup>187</sup>

Through a contemporary lens, modern economists have illustrated value as varying types of utility via an examination of unlawful file sharing behaviour.<sup>188</sup> Here, economists measured value by the types of categorical benefit the user gained through different aspects of utility: financial and legal, experiential, technical, social, and moral utility.<sup>189</sup> Whilst these aspects were applied to benefits or value of illegal file

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<sup>185</sup> Landes, W. and Posner, R. *An Economic Analysis of Copyright Law*, 18 J. OF L. STUDIES 325 (1989).

<sup>186</sup> Smith, A., *THE WEALTH OF NATIONS* (1776).

<sup>187</sup> Samuelson, P. and Nordhaus, W., *ECONOMICS* (McGraw-Hill 2010).

<sup>188</sup> Watson, S., Zizzo, D., and Fleming, P., *Determinants and Welfare of Unlawful Filesharing*, CREATE Scoping Report (2014), available at <http://www.create.ac.uk/publications/determinants-and-welfare-implications-of-unlawful-file-sharing-a-scoping-review/>.

<sup>189</sup> *Id.*

sharing, so too could these utilities be relevant in a broader sense to deriving an otherwise amorphous value in an interdisciplinary context.

Further still, albeit less specifically than utility categorisation, economic value could be communicated under a 'pluralist' theory of value, "to value something is to have a complex of positive attitudes toward it, governed by distinct standards for perception, emotion, deliberation, desire, and conduct."<sup>190</sup>

An initial delve into the 2013 New Palgrave Dictionary of New Economics, originally published in 1894, reveals over 1,900 articles in an eight-volume set, regarded as a "definitive scholarly reference work for a new generation of economists."<sup>191</sup> A quick search returns 120,109 results from the full text.<sup>192</sup> When tackling the Palgrave, "one expects to find an environmental impact statement and a request for a zoning variance."<sup>193</sup> Thus economics offers a plethora of theories on definitions and calculations of values, but these two areas of economics that might best lend to a greater understanding of value and ICH.

Professor Ruth Towse addresses the problem specifically of cultural goods and economics: "Needless to say, there has been considerable debate about the ubiquity of public goods in the cultural sector. How wide the net is cast for what to include in 'culture' – language, customs, social values, sense of civic and national pride and so on, adopting the anthropological use of the term – influences the extent to which the concept of public goods is appropriate and the case for public subsidy and the type of organization that would provide the good. Even though there are few cases of pure public goods, many cultural goods and services have public goods characteristics, sometimes called 'quasi-public goods'."<sup>194</sup>

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<sup>190</sup> Anderson, E., *VALUE IN ETHICS AND ECONOMICS* 2 (1996).

<sup>191</sup> Durlauf, S. and Blume, L. (eds), *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (Palgrave 2013); *About*, Palgrave MacMillan, <http://www.palgrave.com/page/about-us/> (last visited 22 Nov. 2017).

<sup>192</sup> *Id.*

<sup>193</sup> Solow, R., *The Wide, Wide World of Wealth*, *THE NEW YORK TIMES*, 20 Mar. 1988.

<sup>194</sup> Towse, *supra* note 174, at 17.

These quasi-public goods, which hold both public and cultural good characteristics, can be approached with two relevant areas of economics: welfare economics and contingent valuation. Welfare economics deals with market failure, which we might expect to see with ICH due to the problems with calculating value. Welfare economics also addresses achieving an overall net social benefit and is more concerned with resource allocation rather than individual equity, which can distort incentives and measurements of economic value. Contingent valuation measures willingness to pay for cultural heritage by participants/visitors and non-participants, such as funders acknowledging indirect values of ICH and paying for ‘option demand’ or the option to visit or practice the ICH in the future.

In some instances, governments have stepped in to address the market failure in the arts market, as value is not reflected in market prices. Welfare economics deals with this type of market failure – equality aside, welfare economics addresses achieving an overall net social benefit. However, this economics model is more concerned with resource allocation than individual equity, using incentives and measurements of economic value. Therefore, with cultural heritage and particularly ICH, there is a case for public subsidy: “When social benefit exceeds private benefit (demand) the gap can be filled by subsidy, the amount being determined by the difference between the two.”<sup>195</sup> Whilst the economic argument for public subsidy is a strong in making a case for funding, it still presumes that monetary value can be assigned to cultural benefits.

Both welfare economics and contingent valuation methods can stimulate willingness to support arts and culture through taxation and are important measures for legal policy makers. However, when considering the breath of ICH value, economic measurement falls short of encompassing creative and cultural value, “nor do they reflect the wider significance of creativity and culture to society, which is not amenable to that sort of measurement.”<sup>196</sup>

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<sup>195</sup> *Id* at 16.

<sup>196</sup> *Id.*

The heritage sector has the luxury of defining value in a more holistic sense, sometimes referred to as ‘cultural significance’.<sup>197</sup> However, this definition maybe less luxurious and inclusive than it appears *prima facie*.<sup>198</sup> The societal and legal dialogue surrounding cultural significance is highly dependent upon historical definitions of cultural value, reflected in costly displays of ‘high’ culture, as are protected through the World Heritage Convention.<sup>199</sup> This translates to the longevity of *economic* standing of a country correlating to its legally and financially supported culturally significant heritage as it will be prioritised for safeguarding, protection, and public (and even private) funds.<sup>200</sup>

In 2008, Laurajane Smith identified this formative, institutional dialogue as Eurocentric authorised heritage discourse (“AHD”).<sup>201</sup> This AHD demonstrates how cultural establishments prioritise immovable, tangible heritage, such as monuments – which are better suited to economic evaluation and return – and is bereft of acknowledgement of diverse intangible cultural manifestations.

... Western Europe is imagined to have discovered heritage, almost as if there were no other cultures or groups already conceiving of the past and its role in the present. As a consequence, the dissemination of ‘best practice’ (often imagined as descending down from Europe – see Smith 2006: 111), well-intentioned though it may be, is perhaps better understood as a form of conceptual imperialism, through which a limited understanding of heritage has been used to provide the terms by which the rest of the world must come to identify and manage heritage.<sup>202</sup>

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<sup>197</sup> *Assessing Cultural Heritage*, The Getty Museum/The J. Paul Getty Trust (2002)

[http://www.getty.edu/conservation/publications\\_resources/pdf\\_publications/pdf/assessing.pdf](http://www.getty.edu/conservation/publications_resources/pdf_publications/pdf/assessing.pdf).

<sup>198</sup> “...policies ostensibly about social inclusion are effectively reducing ideals of participation, involvement and plurality to mere rhetoric, or empty words.” Waterton, *supra* note 37, at 74.

<sup>199</sup> The World Heritage Convention, *supra* note 31, at Art. I.

<sup>200</sup> “... aesthetically pleasing material objects, sites, places and/or landscapes that current generations ‘must’ care for, protect and revere so that they may be passed to nebulous future generations for their ‘education’, and to forge a sense of common identity based on the past. ... aesthetically pleasing material objects, sites, places and/or landscapes that current generations ‘must’ care for, protect and revere so that they may be passed to nebulous future generations for their ‘education’, and to forge a sense of common identity based on the past.” Smith, L., *Class, Heritage & Negotiation of Space*, Missing Out? English Heritage Conference 1 (2006), available at [https://www.english-heritage.org.uk/content/imported-docs/a-e/Smith\\_missing\\_out\\_conference.pdf](https://www.english-heritage.org.uk/content/imported-docs/a-e/Smith_missing_out_conference.pdf).

<sup>201</sup> *Id.* at 2.

<sup>202</sup> Waterton, *supra* note 198, at 70.

Rather than relying upon objects and obligations thereto, Crouch suggests that, if “... space can be encountered in a process of ‘spacing’ and nature in a process of ‘naturing’, so too can heritage be experienced and encountered in a process of ‘heritaging’ or as a social practice”.<sup>203</sup> These concepts of ‘spacing’ and ‘heritaging’ are concepts more prominently identified with ‘culture-producing’, as opposed to ‘knowledge-producing’ societies, but are omnipresent across cultural practice. The discrepancy is simply maintained by discordant discourse, the AHD.<sup>204</sup> The discourse and framing is a mechanism that forms and reinforces ICH practices, as all societies practice their own particular ICH. One approach to bridge this cultural gap is to increase the recognition of include notions such as ‘spacing’ or ‘heritaging’<sup>205</sup> as intrinsic to tangible or immovable cultural heritage, no matter the geographical origin. A gradual redirection of parts of the fully integrated cultural practices could help to correct misconceptions and othering regarding ICH and address concerns expressed by scholars WIPO consulted about the 2003 Convention, related to creating a separate legal instrument for ICH.<sup>206</sup> As sovereign states are typically tasked with education, awareness, and global participation on behalf of citizens, international consultation through conventions and organisations like UNESCO can facilitate safeguarding and emphasising the ubiquity of ICH, rather than classifying it as an irrelevant issue and perpetuating this false dichotomy related to ICH.

In the worst case, this resistance to inclusion of ICH becomes ‘othering’ in its most damaging form. One U.K. heritage practitioner interviewee expressed this sentiment in relation to ICH: “Do you want us to go out and collect, like stories from Gypsies or something? Who? Where? ... At that time it was just, it was like ... what is this? It was unfathomable to be talking about something like this, there was, kind of, no sense of relevance.”<sup>207</sup> This sentiment seems to validate Greenland’s Minister of Culture, when referring

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<sup>203</sup> Crouch, D., *Spacing, Performing, and Being*, 35 ENV’T & PLANNING 1945-60 (2003).

<sup>204</sup> Waterton, *supra* note 198, at 63-5; the 2003 Convention was partially spearheaded as a response to the World Heritage Convention, which is built-heritage focused. Deacon, *supra* note 4, at 2.

<sup>205</sup> Crouch, *supra* 203.

<sup>206</sup> Deacon, *supra* note 4, at 4.

<sup>207</sup> Waterton, *supra* note 198, at 68.

to globalisation as an alternative form of cultural colonization; surely there are British gypsies, as well as of other national origin, whose culture is relevant to global heritage.<sup>208</sup>

The power to sign the United Kingdom – England, Wales, Scotland, and Northern Ireland – onto international treaties remains with Westminster in England. Scotland recently held a vote to gain independence from the UK, which was defeated with 45% in favour. However, the election provided an unusual opportunity for the country to publicly present what Scottish national policies would be if governed from Holyrood and not Westminster. An independent Scottish government would have signed onto the 2003 Convention and specifically set out this intention.<sup>209</sup> Far from empty campaign promises, Scotland had previously evidenced its interest in the 2003 Convention by preparing its own ICH inventory in 2008, in accordance with the requirements to sign on to the international treaty.<sup>210</sup> In comparison, English Heritage reported in 2009 that “The UK looked at the convention and concluded that a) it would be very difficult to monitor and enforce, and b) it duplicated efforts that the UK was already undertaking.”<sup>211</sup>

Cultural heritage, tangible or intangible, can be suppressed if dictated and fostered through the majority. This type of dynamic further widens existing gaps recognised through mainstream cultural heritage preservation laws and agencies; however, these tend to focus on minority indigenous culture when addressing lack of representation. As evidenced in the case of Scotland, economically developed countries may also not have their interests fully represented in the realm of cultural heritage, putting the

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<sup>208</sup> Lenzerini, *supra* note 40.

<sup>209</sup> *Scotland's Referendum*, THE SCOTTISH GOV'T, available at <https://www.scotreferendum.com/questions/will-an-independent-scotland-honour-existing-international-treaties-agreements-and-conventions-around-culture-and-heritage/> (last visited 12 Mar. 2015).

<sup>210</sup> McCleery, *supra* note 17; The 2008 listing is available also as an online wiki. *ICH Scotland*, Museums Galleries Scotland, <http://ichscotland.org/>, last visited 21 Nov. 2017.

<sup>211</sup> McCleery, A., *et al.*, *Defining and Mapping Intangible Cultural Heritage*, D'Art Topics in Arts Policy, No. 36, International Federation of Arts Councils and Culture Agencies, Sydney 6 (2009), available at [www.ifacca.org/topic/heritage-defining-intangible-cultural-heritage](http://www.ifacca.org/topic/heritage-defining-intangible-cultural-heritage).



ICH at risk. The risk is likely a different type of risk in modern times (subtle erosion as opposed to intentional suppression), but nonetheless the risk is present and deserves consideration.

In addition to the problem of interdisciplinary definitions of value, ICH also must balance the problem of ‘value to whom’. Under myriad established legal theories, it is well recognised that IP has tangible and intangible aspects and that rightsholders hold interest and limited exclusionary rights in the intangible aspect.<sup>212</sup> Despite subject matter and practical overlaps, cultural items are presented as dichotomous – movable or immovable, tangible or intangible, societies as knowledge producing or culture producing.<sup>213</sup> This false dichotomous vernacular of cultural heritage shapes perception and practice – especially concerning a widening Global North/Global South – developing /developed approached, circularly reinforced by international treaties, legal protections, and cultural branding.<sup>214</sup> When it comes to creating a viable, working definition of ICH, this task is seen as ‘near impossible,’ but it must be contextualised the definition of value and for whom the ICH has value, thereby giving it significance.<sup>215</sup> There are two predominant approaches to this issue: the practising community approach and the common heritage of humanity (“CHH”).<sup>216</sup> Depending on which perspective is adopted, the result can vary greatly, not only very different methods of safeguarding, but also different aspects of ICH falling under protection.

From the CHH perspective, equal efforts should be put into salvaging all ICH that does not violate internationally mandated human rights protections.<sup>217</sup> Conversely, if ICH is based solely what an autonomous, practising community deems valuable, then presumably more developed countries would choose to enact more insular ICH legislation. However, the practising community approach may mean the

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<sup>212</sup> E.g., The Berne Convention, *supra* note 5.

<sup>213</sup> Deacon, *supra* note 4, at 2.

<sup>214</sup> *Id.*

<sup>215</sup> Forrest, C., *Int'l Law & the Protection of Cultural Heritage* 362 (Routledge 2010).

<sup>216</sup> This concept is also known as the ‘common heritage principle’ and was first mentioned in legal documents in 1954 in the Preamble to the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, as the ‘common heritage of mankind’.

<sup>217</sup> E.g., female genital mutilation.

death of important ICH through cultural evolution; then so be it – if the ICH no longer has value to the relevant community. As the intangible and tangible are inexorably intertwined, culture safeguarding efforts can face problematic results when preservationists and communities themselves do not account for the living heritage and evolving nature of the ICH attached to tangible or immovable heritage.

From a practicing community perspective, strong sense of identity and ICH practice can return multiplied dividends of community capital: wellbeing, citizenship, capacity, and economic dividends.<sup>218</sup>

Communities also see crime reduction through community building, with greater importance in wake of employment crisis, especially industrial fields like mining. “As Alan McLaren [‘a stalwart of Loanhead Children’s Gala Day and author of a history of Midlothian’s local festivals,’] sees it, the lack of social cohesion which contributed to the English city riots of 2011, and which is manifest in the drunken violence and lairiness apparent in many Scottish towns at weekends, can be mitigated, in part, by galas and fairs. ‘If people feel that they have a stake in their community then they’re not going to burn it down,’ he says. ‘In Loanhead, we certainly find – and the local community police officers tell us – that there is an actual benefit in terms of reducing crime, youth disorder and anti-social behaviour. That’s because of the strong community spirit and identity’”<sup>219</sup>

UNESCO also sets out the definition of value in relation to the practicing community, rather than the CHH:

The value of intangible cultural heritage is defined by the communities themselves – they are the ones who recognise these manifestations as part of their heritage and who find it valuable. The social value of intangible cultural heritage may, or may not, be translated into a commercial value. The economic value of the intangible cultural heritage for a specific community is twofold: the knowledge and skills that are transmitted within that community, as well as the product resulting from those knowledge and skills. Examples of its direct economic value may be the consumption by the community of traditional pharmacopeia, instead of patented medicines, the commercial use of its products, such as selling the tickets for a performance, trading in crafts or attracting tourists. However intangible cultural heritage does not only

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<sup>218</sup> Parsfield, M., *et al.* (eds) *Community Capital: The Value of Connected Communities*, Royal Society of the Arts (Oct 2015) 7-8, available at <https://www.thersa.org/discover/publications-and-articles/reports/community-capital-the-value-of-connected-communities>.

<sup>219</sup> Ross, P., *Scotland’s Community Galas: Queens for the Day*, The Scotsman, (30 Jun. 2014), available at <http://www.scotsman.com/lifestyle/heritage/scotland-s-community-galas-queens-for-the-day-1-3460420>.

have a direct economic value resulting from the consumption of its products by the community itself or by others through trade. By playing a major role in giving the community its sense of identity and continuity, it supports social cohesion, without which development is impossible. This indirect value of intangible cultural heritage results from the knowledge transmitted, often through informal channels, the impact it has in other economic sectors and from its capacity to prevent and resolve conflict, which is a principal burden for development. How much is lost if an annual festival that attracts people from outside the community does not take place this year? How much would be necessary to teach the community the knowledge and skills that allowed them to jointly organize the festival and perform in it? How much is lost if a traditional water or land management system for agriculture is distorted by short-term benefits-oriented market systems? The cost of depriving communities of their intangible cultural heritage is the economic damage produced when the direct or indirect economic values disappear, or the community's social cohesion and mutual understanding is under threat. The erosion or interruption of the transmission of the intangible cultural heritage might deprive the community of its social markers, lead to marginalization and misunderstanding, and cause identity fall back and conflict.<sup>220</sup>

This conception of value notes the possible direct economic value as well as the 'indirect' value to the practicing community. Whilst the indirect value and benefits of ICH are not easily quantifiable, UNESCO still notes the consequences of the erosion of ICH can lead direct economic damage as well as to the ICH itself.

Moving forward on the principle that ICH is enmeshed with, and yet categorically ignored in many developed countries' legal frameworks, conflicts between CHH and practising communities are surfacing.<sup>221</sup> Consider the development of Edinburgh's city centre. UNESCO has designed much of Edinburgh, Scotland, both New and Old Town as World Heritage sites in 1995.<sup>222</sup> This designation led to residential and commercial building modification restrictions, which some in the community deemed 'draconian'.<sup>223</sup> These development restrictions are aimed at preserving the historic structures and heritage environment in Edinburgh that arguably gives the city much of its appeal. However, there is an impact on evolving community needs versus CHH, and in these instances, the CHH appears to be prevailing, even when a community is 'blighted' by World Heritage status.<sup>224</sup> The prioritisation of historically unregulated

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<sup>220</sup> *Questions and Answers about Intangible Cultural Heritage*, UNESCO, available at <https://ich.unesco.org/doc/src/01855-EN.pdf>, 4, last accessed 11 Nov. 2017.

<sup>221</sup> Smith and Waterton, *supra* note 52.

<sup>222</sup> *Highlights of the World Heritage Site*, EDINBURGH WORLD HERITAGE, <http://www.ewht.org.uk/highlights-of-the-world-heritage-site> (last visited 12 Mar. 2015).

<sup>223</sup> Bradley, J., *Edinburgh 'Blighted' by World Heritage Status*, THE SCOTSMAN (16 Feb. 2015), <http://www.scotsman.com/lifestyle/heritage/edinburgh-blighted-by-world-heritage-status-1-3691241>.

<sup>224</sup> *Id.*

community building, reflecting the ways of life and tastes of the day are preserved at the expense of modern evolution of the city and inconsistently applied, at that.

Also in the United Kingdom, the tradition of the Eisteddfod has been practised for centuries in Wales.<sup>225</sup> The Eisteddfod is a festival which showcases Welsh song and dance as well as the language. However, during the early 1900s, Welsh interest in continuing the traditional singing waned.<sup>226</sup> In efforts to attract young Welsh to the event, the Eisteddfod organisers added modern music and dancing categories, including hop hip alongside pop music alongside traditional Welsh throat singing.<sup>227</sup> This evolution, not without its critics, allowed the Eisteddfod to again thrive.<sup>228</sup> Proponents of the category expansions emphasize that, whilst the modern additions may provide an initial draw, attendees and participants also are exposed to the traditional Welsh arts and language, an opportunity that may have otherwise been lost.<sup>229</sup> In this case, the category expansion reflects needs of the community, but the CHH may be upheld, rather than eroded by the inclusion of non-traditional music and dance. And still, events such as the Eisteddfod may garner widespread recognition whilst maintaining value to the practising community and persist in the CHH. Not all ICH that has high value to practitioners is recognised as high value in the context of CHH. In other words, not all ICH is created equal from a macro perspective; "...in comparison with the Common Ridings or the Highland Games, fairs and galas are paid little mind by both media and academia. They are regarded, somehow, as trivial".<sup>230</sup>

This returns to the argument of to whom does ICH have value? From the CHH perspective, equal efforts should be put into salvaging all ICH that does not violate internationally mandated human rights

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<sup>225</sup> Howell, D., *The Intangible Cultural Heritage of Wales: A Need for Safeguarding*, 8 INT'L J. OF CULT. HERITAGE 104, 107 (2013).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 108.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Ross, *supra* note 219.

protections, regardless of the status of the ICH to the practicing community.<sup>231</sup> However, there is an “inherent contradiction” in safeguarding ICH as the CHH “whilst at the same time noting its power in asserting the cultural identity of the community which produced it,” particularly when the ICH has evolved, no longer represents the identity of the practicing community, or has fallen out of practice.<sup>232</sup> In some instances, safeguarding by the state for the CHH runs directly counter to the ICH.<sup>233</sup> If the value is solely based on what an autonomous community deems valuable, then it will maintain its identity function, but the ICH might run counter to legally imposed standards of ICH safeguarding. Although written broadly, the ICH might not be safeguarded in certain instances, such as practices that run counter to human rights protections or practices that have not been yet inter-generationally transmitted.

Barring those caveats, from a purely practicing community approach, if ICH falling out of practice means the death of ICH considered of high value to the rest of humanity, then so be it if it has lost value to the relevant community. That does not seem to be an option that society is willing to accept.<sup>234</sup> Conversely, relying solely on CHH would be severely short-changing the intergenerational transmission aspect of the ICH as well as discounting the prospect of illusory autonomy among practicing communities and among states in a union, which are not universally and equally culturally autonomous. ICH must maintain the element of representing the identity of a community, and states charged with safeguarding ICH can encounter the issues cited in the UNESCO value definition, related to marginalisation and misunderstandings. Commercialisation of ICH and even moving ICH into mainstream venue for the benefit of CHH can negatively impact the direct and indirect benefits to the practicing community. Even if a state is considered developed due to its overall economic power, this does nothing to address the individuals and communities, particularly when dealing with states in unions without fully devolved governing powers, such as in structure of the United Kingdom.

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<sup>231</sup> E.g., female genital mutilation.

<sup>232</sup> Blake, *supra* note 38.

<sup>233</sup> See *infra*, Chapter V on punk culture and Punk London.

<sup>234</sup> *Id.*

Using these parameters as a working definition of ICH and value, it is clear that ICH subject matter can overlap with IP protection due to the subject matter that copyright covers: original literary and artistic works. In developed countries with prominent IP regimes, ICH can be purposefully as well as inadvertently propertised through automatic copyright protection.<sup>235</sup> Some ICH will fit squarely into these categories, such as ICH practices that results in visual art, but even the ICH that may seem ill-suited to copyright, can be altered to garner protection. For instance, oral histories recorded for posterity then gain one ‘author’. Folk tales written down can exclude others from transcription and derivative works as well as create a definitive version for the community. Traditional music never written down could be performed and recorded by a third party. These are just a few examples of ICH that might otherwise organically evolve with the practicing community becoming propertised through intersections with IP law.

One of the challenges for the safeguarding of ICH is to document current and evolving practice. It would therefore be a mistake to focus exclusively, as much previous research has done, on ICH from a rural context. The latter has its own set of problems – cultural practices may be frozen in time and dying out due to an aging population on the one hand and rural outmigration on the other. Urban-based ICH is also subject to pressure: the concept of the ‘urban village’ is in decline; the pressures of youth cultures and globalisation have increased dramatically; and rates of change in cultures and lifestyles are rapid, influenced by transient populations.<sup>236</sup>

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<sup>235</sup> The Berne Convention, Article 5(2) states “The enjoyment and the exercise of these rights shall not be subject to any formality”, *supra* note 5. Many jurisdictions previously required a fee and formal registration to gain copyright protection, which is not allowable under Article 5(2). *Supra* note 5.

<sup>236</sup> McCleery, *supra* note 210, at 14.

## **f. Conclusion**

Interdisciplinary work requires a certain level of comfort with ambiguity, and this state can make researchers, particularly in well-defined fields such as economics and law, hesitant to expand beyond existing subject matter boundaries. However, the reality of the impact of globalisation and social technologies on cultural practices defy academic compartmentalisation. Thus, legal researchers also must gain flexibility and greater knowledge of intersecting fields, especially economics and heritage fields in relation to IP and culture. Acknowledging the conflicts and commonalities related to interdisciplinary definitions and collaboration on how to reconcile and communicate value is essential to moving forward with proper legal safeguarding for ICH around the globe.

In addition to the lack of prominence of ICH in cultural and legal circles, there is a hesitancy to implement any legal instruments that may interfere with IP law. IP is not only strong economic and social power driver, the trade sanctions backing the enforceability of TRIPs could influence and drive this reluctance. This is compounded, in general, by high bargaining power states' resistance to potentially ceding state sovereignty to international agreements unless necessary or clearly advantageous.

Definitional challenges are directly related to the legal challenges in protecting ICH. By nature, the law cannot protect what it cannot define. Statutes must precisely define what falls under legal protection, and case law will flush out fact-specific applications. Language is crucial to the law, and imprecise language leads to uncertainty and unenforceability.

Broadly tracing the historical development of legal instruments governing ICH and IP domestically and internationally tells a story of two fundamentally linked bodies of law, with one emerging as dominant in contemporary times: IP law. The reasons are myriad: economic return, lobbying, creative incentivisation to further public knowledge.<sup>237</sup> However, IP law created new legal boundaries in the name of this

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<sup>237</sup> See *infra*, Chapter IV(a) for more comprehensive domestic legal history.

incentivisation of product fuelled by cultural heritage, and “the battle over the ownership of cultural heritage has always been an ongoing battle over history and how it relates to, or is translated into present day identity.”<sup>238</sup>

The issue of treating tangible or immovable cultural heritage and ICH as separate does not persist only with Eurocentric authorised heritage discourse but also extends to undervaluation of diverse ICH in union frameworks with partially devolved powers, such as the United Kingdom, and the interests of its constituent states. The intangible is central to any value we assign to cultural heritage; “[i]n cultural terms, the significance of the distinction between tangible and intangible heritage can be easily exaggerated. This is because what makes a tangible item heritage is precisely its symbolic value. In other words, even tangible items are only heritage because of an intangible connection.”<sup>239</sup> Whilst urgent safeguarding for countries lacking basic infrastructure and losing valuable ICH is crucial, developed countries without representation are exposed to erosion of ICH through commodification and even championing of tangible, immovable cultural heritage. Developed countries with less political power but distinctive ICH experience a similar funnel towards Westernised, homogenised globalisation through legal and social discourse and practice, a circular reinforcement of recognition and reward of built heritage and formalised legal structure, leading to subtle erosion of living ICH.

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<sup>238</sup> MacMillan, F., *The Protection of Cultural Heritage: Common Heritage of Humankind, Natural Cultural ‘Patrimony’, or Private Property?*, 64(3) NORTHERN IRELAND LEGAL QUARTERLY 351, 357 (2013).

<sup>239</sup> *Id* at 361.



#### IV. Case Studies in Celtic-derived Countries

##### a. Introduction to the Modern Domestic Copyright Law Development and Culture in the United Kingdom and Ireland

The influence of traditional culture and social practice on IP law-making is rarely specifically referenced in legal instruments. More often, justifications for making and upholding laws – especially in copyright – are phrased in terms of stakeholder interests, economic benefits, creative incentive, and market optimisation. However, IP laws are preceded by social and cultural practice, which inevitably influence IP production through creation and financing, which often behave in ways unexpected by a particular industry<sup>240</sup>. Despite this lack of formal recognition of formidable influences, ICH as social and cultural practice, ritual, and tradition is an important undercurrent to the boundaries and enforceability of copyright laws. This intertwined history is rich and complicated. Thus this section aims to briefly identify just a few important developments in U.K. copyright law history alongside the subject concurrent ICH. This method revealed a pattern in legal evolution of ICH that acts in symbiosis with IP law rather than evolving under regulation or operating entirely in isolation.

Early precursors to modern copyright law, in the 16<sup>th</sup> and 17<sup>th</sup> century, were known as ‘printing privileges’ or ‘monopolies’, terminology that accurately portrayed the true functionality of these laws, which controlled import and utilised property regimes to control information flow, domestically and abroad.<sup>241</sup> Additionally, the reproductions were printed in English, severely restricting access and distribution of literature in Welsh or Gaelic.<sup>242</sup> The right to print copies was limited to the Stationers Company under agreement of the stationers’ charter in efforts to control heresy and sedition against the

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<sup>240</sup> Pogue, D., *Use It Better: 10 Worst Tech Predictions of All Time*, Scientific American (18 Jan. 2012) <https://www.scientificamerican.com/article/pogue-all-time-worst-tech-predictions/>.

<sup>241</sup> Cooper, E. and Burrow, S., *Photographic Copyright and the IP Enterprise Court in Historical Perspective*, CREATE PhD Developmental Workshop (7 Dec. 2016), available at <http://www.create.ac.uk/blog/2016/11/28/research-seminar-photography-copyright-and-the-ip-enterprise-court-in-historical-perspective/>.

<sup>242</sup> *Id.*

Crown and the church. The Stationers Company did not act entirely as a government administrator but rather as “a relationship of property, albeit one which derived from the feudal relationship of Crown and subject where the Crown bestowed economic benefit in return for a subject’s loyalty”.<sup>243</sup>

In 1709, publishers and booksellers, rather than authors themselves, acted together and initiated the incorporation of writers’ interests and impact on public knowledge and learning through a submission to the House of Commons, citing that “diverse Persons have of late invaded the Properties of others, by reprinting several Books, without the Consent, and to the great Injury, of the Proprietors, even to their utter Ruin, and the Discouragement of all Writers in any useful Part of Learning”.<sup>244</sup> Although these were presented these as authors’ rights, publishers and booksellers were acting to protect their monopolies on printing and distributing copies.<sup>245</sup> Nonetheless, bringing in the interests of writers and the public interest in knowledge into the scope and aims of IP in U.K. law is an important progression from the previous primary focus on information and knowledge control.

The United Kingdom’s first statutory copyright was enacted in 1709 with the Statute of Anne, which followed the framework of copyright pre-history by facilitating Crown information control and also protecting publishers’ interests; yet the rationale of encouraging learning and production for non-economic purposes is reflected in the full title: *the Statute of Anne: An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies*.<sup>246</sup> Notably, any author – not just members of the Stationers’ Company – was entitled to sell and hold propriety rights in books.<sup>247</sup> The Statute of Anne also created term protections related to the lifespan of the author.<sup>248</sup>

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<sup>243</sup> Clegg, C., *PRESS CENSORSHIP IN ELIZABETHAN ENGLAND* 20 (Cambridge 2004).

<sup>244</sup> The Statute of Anne: An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, 8 Ann. c. 19 (1709).

<sup>245</sup> Cooper, E. and Burrow, *supra* note 241.

<sup>246</sup> Statute of Ann, *supra* note 244.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

Specifically, authors of any book or books already composed and not printed and published or that shall hereafter be composed' with 'the sole liberty of printing and reprinting such book and books for the term of fourteen years to commence from the first publishing the same and no longer'.<sup>249</sup> The statute provides an additional 14-year term if author is still living when the first term expires and a 21-year term for works published prior to enactment.

Following the Statute of Anne, piecemeal efforts by booksellers and publishers began to take legal form through judicial decisions and legislative acts; these regulations and precedents better reflected the social and cultural practices of artists, authors, and social consumption rather than Crown decree related to social and political control. Thus the book trade continued to feature prominently in early copyright law. Especially as the statutory protections granted by the Statute of Anne began to expire in 1731, booksellers began to actively seek ways to protect their industry through legal action.<sup>250</sup> The judicial effect proceeded with few but prominent cases on the on the book trade.<sup>251</sup> Despite the fact that the booksellers were acting to protect their business model and economic interests, the successful arguments hinged on authorial protection for creative labour, a major tenet of present day copyright law.<sup>252</sup> Thus the popularity of literary works and status of authors in society was sufficient to provoke legal reaction.

Subsequent legislation addressed protection of other specialised works of central importance to the cultural atmosphere of the time: for instance, the Engravers' Acts (1735, 1766, 1777) and the Calico Printers' Act (1787).<sup>253</sup> The Engravers' Acts were lobbied for by artists and were the first acts to protect a

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<sup>249</sup> *Id.*

<sup>250</sup> Also known as the 'Battle of the Booksellers.' Deazley, R., *RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE* (Edward Elgar 2006) 14.

<sup>251</sup> *Id.* at 29.

<sup>252</sup> "...because it is just that an Author should reap the pecuniary Profits of his own Ingenuity and Labour." *Millar v Taylor*, 4 Burr. 2303 (1769), *id.* at 15.

<sup>253</sup> See Engravers' Copyright Act. *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org); An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Callicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time, 1787, 27 Geo.III, (c.38).

piece of IP other than books.<sup>254</sup> Further, they were a part of the burgeoning concept of the separation of the tangible and the intangible in IP ownership.<sup>255</sup> The Calico Printers' Act was, in fact, preceded by a ban. Around 1700, the ban was placed on import of dyed and printed fabrics, primarily in response to a growing domestic female affinity for calico prints; violations were subject to a £200 fine.<sup>256</sup> The objections ranged from domestic industry protection to general anxiety about feminine consumption and desire.<sup>257</sup> Imported calico also possessed a 'disruptive potential' since the affordability of the imported fabric made it accessible to all classes of women, making it difficult to distinguish the economic and social class of a woman based on appearance.<sup>258</sup> Nonetheless, over nearly 100 years, the popularity and demand for calico remained, leading to improved domestic production and eventually a specialised copyright law to protect designs, the Calico Printers' Act.<sup>259</sup>

The beginnings of international cohesion on copyright law were seen with the Berne Convention for the Protection of Literary and Artistic Works in 1886; the original signatories were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom.<sup>260</sup> The Berne Convention ensured national treatment and minimum rights standards amongst parties.<sup>261</sup> Additionally, it notably extended copyright protection to unpublished works – the concept of 'fixation' prevalent in modern IP law, the legal mechanism that provides automatic copyright protection to an original artistic or literary work as soon as it is in fixed form.<sup>262</sup>

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<sup>254</sup> Engravers' Copyright Act, London (1735), *Primary Sources on Copyright (1450-1900)*, Bently, L. and Kretschmer, M., [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>255</sup> *Id.*

<sup>256</sup> Kriegel, L., *Culture and the Copy: Calico, Capitalism, and Design Copyright in Early Victorian Britain*, 43(2) J. OF BRITISH STUDIES 233, 237-38 (Apr. 2004).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 238.

<sup>259</sup> *Id.* at 233-265, 239.

<sup>260</sup> The Berne Convention, *supra* note 5.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*; for a more detailed account of the legal effects of the Berne Convention, *see* Chapter II *supra*.

The true flush of contemporary IP law began in the early 1900s with the technical ability to copy quickly in large amounts. This widespread ability to create high volumes of copies affordably made copyright an important financial and managerial tool for publishers and authors. However, modern IP law can likely be situated from 1911 forward for the United Kingdom.<sup>263</sup> The Copyright Act of 1911 either repealed or incorporated most of the existing disparate copyright legislation.<sup>264</sup> From this, the U.K. modern IP framework evolved in several major steps, all in step with contemporary ICH related to artistic practice and, often, the technological facilitation thereof.<sup>265</sup>

Even leaders in industry, let alone legislators and policy makers, are not always adept at predicting how cultural practices will evolve in relation to creative production, technology, and tradition. For instance, in 1946, a 20<sup>th</sup> Century Fox executive claimed, "Television won't be able to hold on to any market it captures after the first six months. People will soon get tired of staring at a plywood box every night."<sup>266</sup> However, widespread distribution and access to television and broadcasting became technologically possible, more affordable, and highly popular. Not only did this generate a new source of revenue and creative communication, but it was the beginning of the home visual entertainment revolution. Following suit, in 1956 a subject matter extension was enacted to cover television and broadcasting and was not made independently of social practice nor initially led by lobby and industry.

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<sup>263</sup> Sherman, B. and Bentley, L., *THE MAKING OF MODERN IP LAW: THE BRITISH EXPERIENCE 1760-1911* (Cambridge 2003).

<sup>264</sup> Copyright Act of 1911, Geo.6 5(1911) c.46; The history of copyright law in Ireland deviated from the United Kingdom as the country formally 1912-1913, spurred on by the bill proposed for Home Rule and the resulting radicalised nationalism. The Anglo-Irish Treaty of 6 December 1921, cemented the foundation of the Irish Free State, which shortly became the Republic of Ireland and operated under a British constitutional monarchy from 1922 to 1937. However, the first Irish copyright law was passed in 1927, following a five-year lapse after the founding of the Republic of Ireland. The next major development came in 1964 with the introduction of the Copyright Act, 1963. In 2000, the Copyright and Related Rights Act ("CRRA") came into effect, repealing much of earlier Irish copyright law but not all. The CRRA regulates term to 70 years after death of the author and includes a permissive reuse policy for government copyrights as well as a fair dealing provision. The current system reflects European and international standards for copyright.

<sup>265</sup> As well as some minor steps, outside of the scope of this concise summary. More comprehensive coverage of U.K. copyright law from 1911 forward can be found in *Shifting Empire: 100 years of the Copyright Act 1911*, eds. Suthersanen, U. and Genreau, Y., (Cheltenham 2013).

<sup>266</sup> Pogue, *supra* note 240.

The next major overhaul of copyright law occurred in 1988 and constructed the CDPA, which is still in effect today. The CDPA provides IP protection for computer programmes, which can be tied to another instance of industry miscalculation of cultural adoption.<sup>267</sup> Previously, leaders in the computing industry had predicted no one would want a personal computer in homes.<sup>268</sup> If this had been the case, it is unlikely the CDPA would include the new provisions in the current form.<sup>269</sup> Instead, the rising ubiquity of household personal computers and the associated culture and practice influenced debate about the role of copyright law and computer programmes. This broad market led to lobbying by industry for a form of IP protection for software, and as a result, the CDPA included database rights and protection for computer programmes.<sup>270</sup> Music is another clear instance of these key intersections of law and ICH. Digitising, file sharing, and remixing are all examples of cultural and technological shifts that were then followed by efforts at adapting copyright law to fit, limit, or direct the social practice.<sup>271</sup>

It is possible that, as copyright law has become more complicated and legally technical over the past century, the authors, their artistic and literary practices, and the public, enjoying such outputs, have become increasingly divorced from copyright law. Taking into consideration the pattern of widely adopted disruptive technologies, copyright law may need to renavigate to maintain its foundational principles relating to incentivising distribution of original creative works to the public through a grant of limited monopoly. Whilst copyright law attempts to anticipate future technologies, this is a futile effort unless the social and cultural practices over time – the ICH – surrounding technology use in literary and artistic works is also considered.<sup>272</sup> The law may strive to operate in an objective and neutral capacity;

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<sup>267</sup> CDPA, *supra* note **Error! Bookmark not defined.**, ch. 1, s. 3.

<sup>268</sup> Pogue, *supra* note 240.

<sup>269</sup> CDPA, *supra* note **Error! Bookmark not defined.**

<sup>270</sup> *Id.*

<sup>271</sup> See generally Kretschmer, M., *Digital Copyright: the End of an Era*, 25(8) EUROPEAN INTELL. PROP. REV. 333 (2003).

<sup>272</sup> Kurin, R., *Museums and Intangible Heritage: Dead or Alive?*, ICOM News (2004), [http://icom.museum/fileadmin/user\\_upload/pdf/ICOM\\_News/2004-4/ENG/p7\\_2004-4.pdf](http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-4/ENG/p7_2004-4.pdf)

however, as summarized above, copyright law is highly responsive to culture, in particular ICH surrounding copyrightable subject matter. Utilising a framework of cultural analysis of legal systems is one tool to explore the influence of culture on law; “... law and culture should not be viewed as two distinct entities but rather as embodiments of one another.”<sup>273</sup>

ICH is not an explicit consideration in law-making, but the following case studies will cover in greater detail specific types of ICH and interaction with the law. Acknowledging and exploring these instances sheds light on the impact of copyright laws on cultural practices and can provide a better context for creating appropriate and effective copyright law that protects individual creativity whilst allowing for living cultures to flourish unimpeded by unintended collateral legal enclosures.

#### **b. Case Study 1: Scotland: Tartan, Statutory Intervention, and Community Participation**<sup>274</sup>

<b>Work:</b>	<b>Tangible elements</b>	<b>Intangible Elements</b>
<i>Tartan cloth</i>	<ul style="list-style-type: none"> <li>- <i>Looms</i></li> <li>- <i>Yarns</i></li> <li>- <i>Finished Garment</i></li> <li>- <i>Pattern</i></li> </ul>	<ul style="list-style-type: none"> <li>- <i>Colour representations</i></li> <li>- <i>Weaving tech</i></li> <li>- <i>Historical affiliation</i></li> <li>- <i>Registration</i></li> <li>- <i>Any IP</i></li> <li>- <i>Technique/knowledge</i></li> <li>- <i>Cultural affiliations</i></li> </ul>

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#### **i. Introduction**

Scotland is a small country in a union, with a distinct, rich – yet still traceable – ICH history with recent governmental intervention into community regulations. This presents the opportunity to examine the understudied role of ICH in developed countries through the lens of tartan. This chapter will begin with exploration of the historical development and influence of tartan. Next, the structure and effectiveness of community tartan regulation will be reviewed, followed by the nature and impact of governmental

<sup>273</sup> Kwall, R., *THE MYTH OF THE CULTURAL JEW: CULTURE AND LAW IN JEWISH TRADITION* (Oxford 2015) 1.

<sup>274</sup> Portions of this chapter were published at: Blakely, M., *Pattern Recognition: Governmental Regulation of Tartan and Commodification of Culture*, 22(4) INT’L J. OF CULT. PROP. 487 (Nov. 2015).

<sup>275</sup> Case Study 1 Chart.

intervention in community-regulated ICH. Finally, this chapter will consider alternative methods for preserving ICH.

Not all ICH will undergo any drastic transmogrification to be commodified; for instance, one piece of ICH which has come to define Scotland – and needed little modification to be a marketable article – is the tartan.<sup>276</sup> The tartan sett, or pattern, instantly creates association with Scottish culture, history, and genealogy. Tartan combines the intangible design element with the frequent manifestation into a tangible article, allowing for an easier transition into a saleable form. Thus this type of ICH that is already manifest in a tangible good, as opposed to ICH such as oral histories or rituals, is more frequently used in cultural branding and marketing as no additional derivative product is needed for commodification. Interested community groups have historically documented and registered tartan designs for reference and posterity, especially following the widespread clan adoptions in the early 1800s. However, in 2008, the Scottish Government passed the Scottish Register of Tartans Act, which came into force on 5 February 2009. This established a records division within the National Records of Scotland, to register, preserve, and maintain tartan designs for a fee. The registration does not purport to establish new or affect existing IP rights in the designs; most tartan designs are ineligible for copyright protection already due to unknown authorship or expiration.

In relation to the research question, Scotland is an economically developed country with limited devolved powers, in close geographic proximity to the other case studies of Celtic-derived ICH. This chapter will highlight the interplay between IP laws and ICH in Scotland by focussing on how Scottish legislative powers been used to maintain association with the ICH surrounding tartan in absence of any devolved

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<sup>276</sup> “For the purposes of the Register, the definition of ‘tartan’ is that contained within the Scottish Register of Tartans Act 2008, Section 2: ‘A tartan is a design which is capable of being woven consisting of two or more alternating coloured stripes which combine vertically and horizontally to form a repeated chequered pattern.’” *Guidance*, THE SCOTTISH REGISTER OF TARTANS, <http://www.tartanregister.gov.uk/Guidance.aspx>; the tartan kilt in its modern form has a fascinating history, enmeshed in the politics and power, influenced by both cultural mythmaking and commercial endeavours. See Trevor-Roper, H., *The Invention of Tradition: The Highland Tradition of Scotland*, in THE INVENTION OF TRADITION, eds. Hobsbawm, E. & Ranger, T. (Cambridge 1983).



powers over IP. Although registering a tartan does not confer any IP rights, the official nature of the registry can be perceived as a pseudo-IP right in practice, affecting cultural uses of tartan fabric and of the associated ICH, relating to the actual or perceived propertisation of tartan. Additionally, by shifting the central database resource to government, rather than community, likely will affect activities and networks built around maintaining these records, which may impact the identity association aspect of the ICH, especially in light of heightened commercialisation.

## **ii. Historical Legal Intervention with Tartan and ICH**

Whilst tartan is now inexorably linked with Scotland, widespread early Celtic use dates back to around the 6<sup>th</sup> to 8<sup>th</sup> century.<sup>277</sup> Until the 19<sup>th</sup> century, none of the designs were heraldic, or associated with clans, and were associated only with regions throughout early Celtic migration. Colour variances were due to the availability of dyes and personal preferences. The National Records of Scotland (“NRS”) holds the first known written mention of a Scottish Highland tartan. Dated from 1538, Exchequer records for King James V list chequered pattern tights as ‘Heland tartane.’<sup>278</sup> Records are sparse following this first mention until the 1700s, and the Dean Orphanage and Cauvin's Trust of Edinburgh maintain one of the earliest tartan production and pattern records.<sup>279</sup> This spinning book holds records of wool spun and distributed by the Orphan Hospital Manufactory and Paul's Work from 1734 to 1737.<sup>280</sup> The spinning book also contains a shorter records of tartans supplied from 1751 to 1752.<sup>281</sup>

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<sup>277</sup> *Id.*; one of the earliest manifestations of tartan, a simple check form, inside a jar filled with Roman coins, was found in Falkirk, Scotland and dated to the 3<sup>rd</sup> century, AD. *Record 000-100-036-743-C*, NAT'L MUSEUMS SCOTLAND, <http://nms.scran.ac.uk/database/record.php?usi=000-100-036-743-C> (last visited 6 Aug. 2015).

<sup>278</sup> *Records of the Exchequer, 1538*, NRS reference: E21/34 available at <http://www.tartanregister.gov.uk/history.aspx> (last visited 5 Aug. 2015).

<sup>279</sup> *Spinning Book of the Orphan Hospital Manufactory and Paul's Work, Edinburgh (part of the records of the Dean Orphanage and Cauvin's Trust)*, NRS reference: GD417/262 <http://www.tartanregister.gov.uk/history.aspx>, last visited 5 Aug. 2015.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

The Dress Act of 1746 attempted to exert social control over Highland clans by banning tartan as well as Gaelic culture and language.<sup>282</sup> The Dress Act was repealed in 1786, and by that point, tartan had already become integrated into mainstream Scottish culture, including the Lowlands. For example, Edinburgh military uniforms displayed tartan patterns, and Bonnie Prince Charlie donned tartan in 1746.<sup>283</sup> The tradition of royalty and tartan continued, and King George V also wore tartan on a Scottish excursion in 1822.<sup>284</sup>

### iii. Rebranding the Tartan and ICH Readoption

Despite a historically verified royal and public use, Highland tartan was associated with crime or poverty for centuries.<sup>285</sup> For instance, the NRS holds a letter from a Scottish jailer, Hugh Forbes, stating his prisoners have committed only the crimes of poverty and tartan.<sup>286</sup> Around the turn of the century, the image and association of tartan deliberately shifted through royal and Lowland use as well as the

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<sup>282</sup> *Tartan and the Dress Act of 1746*, SCOTTISH TARTANS AUTH., <http://www.tartansauthority.com/resources/archives/the-archives/scobie/tartan-and-the-dress-act-of-1746/>, last visited 5 Aug. 2015.

<sup>283</sup> *Swatch of Cloth for a Military Uniform*, NRS reference: GD128/Box 38/Bundle 4, THE SCOTTISH REGISTER OF TARTANS, <https://www.tartanregister.gov.uk/nrsSources>, last visited 28 Nov. 2017; *Bonnie Prince Charlie's Plaid (1946)*; NRS reference: RH19/36/2, THE SCOTTISH REGISTER OF TARTANS, <https://www.tartanregister.gov.uk/nrsSources>, last visited 28 Nov. 2017.

<sup>284</sup> *King George IV Visited Scotland*, NRS reference: GD157/2548/3 (1822), <https://www.tartanregister.gov.uk/nrsSources>, last visited 23 Nov. 2017.

<sup>285</sup> *Poverty and Tartan*, NRS reference: RH15/38/105 (1 Aug. 1747), <https://www.tartanregister.gov.uk/nrsSources>, last visited 23 Nov. 2017.

<sup>286</sup> "On 1 August 1747, Hugh Forbes wrote a letter concerning the plight of three shearers, imprisoned by the magistrates of Musselburgh: 'by all the information I could procure their only Crimes (are) Poverty and Tartan, which too often Appear coupled'. He urges his correspondent not to allow the shearers to die of hunger now that their 3d (pence) a day allowance has been withdrawn." *Id.*

Victorian-era romanticisation of the Highlands and invention of clan association. As tartan became fashionable and a national symbol of Scotland, national branding, marketing, and clan identifications normalized. The first registry to request clan associations was the Highland Society of London in 1778,

which sent requests to clan leaders to "be respectfully solicited to



*Figure 4.1: 1920s postcard of boy in Highland dress, used in tourism promotion. Source: Sources in the National Records of Scotland, The Scottish Register of Tartans, NRS Reference: GD1/1295/5, <https://www.tartanregister.gov.uk/nrsSources#Comic>, last visited 21 Nov. 2017.*

furnish the Society with as Much of the Tartan of his Lordship's Clan as will serve to Show the Pattern and to Authenticate the Same by Attaching Thereunto a Card bearing

the Impression of his Lordship's Arms."<sup>287</sup> However, many of the clan leaders were unaware of what their official tartan might be but

were pleased with the official recognition. For instance, Baron MacDonald responded thusly: "Being really ignorant of what is exactly The Macdonald Tartan, I request you will have the goodness to exert every Means in your power to Obtain a perfectly genuine Pattern, Such as Will Warrant me in Authenticating it with my Arms."<sup>288</sup> The tartan moved so far from its warring Highland clan and criminal associations that it was incorporated into advertising and tourism promotion in the 19<sup>th</sup> century, with animated traditional Highland dress even found on postcards as early as 1920.<sup>289</sup>

Even the present day modern, ancient, and muted colour configurations of official tartans are simply due to the intensity of the dyes available, with the older dyes offering a less intense palate due to transport over long distances and are meant to mimic naturally faded fabrics as chemical dyes were not available.

<sup>287</sup> Urquhart, B., IDENTIFYING TARTANS 18 (London 1994).

<sup>288</sup> *Id.*

<sup>289</sup> *Sources in the National Records of Scotland, The Scottish Register of Tartans, NRS Reference: GD1/1295/5, <https://www.tartanregister.gov.uk/nrsSources#Comic>, last visited 21 Nov. 2017.*

There is no distinct clan identification difference between new and old; this is a clear example of branding and classification formed by modern registries.

Taking into account the ingrained historical and cultural influence of tartan, the Scottish Government considers it to be “one of Scotland's most iconic and valuable assets.”<sup>290</sup> An analysis commissioned by the Scottish Parliament, executed by ECOTEC, concluded that “the tartan industry is a significant contributor to the overall Scottish economy; and larger in economic terms than suggested by previous industry estimates.”<sup>291</sup> Economic benefit is frequently used as a benchmark of cultural value, including when justifying cultural regulation, promotion, or protection; scholars or policymakers may calculate a numeric value through measurement of financial profitability, participant attendance, or production volume.<sup>292</sup>

Whilst this economic measurement approach provides a tangible, concrete value, this approach poses a serious danger of oversimplifying the social impact of cultural value to the point of reductionism. This reductionist approach to assessing value of intangible cultural heritage may allow for more successful lobbying for preservation, but economic benefit does not encompass the true present cultural value of ICH. Basing cultural value on economic return skews value heavily towards Western structures of ICH regulation and production. Further, if policymakers and stewards of ICH too frequently lean on economic benefits of ICH, ICH with less apparent or indirect economic benefits may dwindle by means of recognition and preservation exclusion.

“Tartan's importance to Scotland cannot be overestimated. It is deeply embedded in Scottish culture and is an internationally recognised symbol of Scotland.”<sup>293</sup> This symbol serves to maintain identity and local

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<sup>290</sup> *National Tartan Register to be Set Up*, THE SCOTTISH GOV'T, 09 Jun. 2007, <http://www.scotland.gov.uk/News/Releases/2007/07/09113114>.

<sup>291</sup> *Id.*

<sup>292</sup> Contingent valuation is an alternative economic measurement method used for calculating nonmarket values and may be a more useful economic tool in the cultural value context.

<sup>293</sup> *National Tartan Register to be Set Up*, *supra* note 290.

solidarity and also directs positive attention towards Scotland through heritage and genealogical tourism as well as private and public scholarship. This attention to maintaining and preserving Scottish tartans crosses over to preserving and practising other Scottish ICH, such as Highland dance, song, attractions, and historical contributions. The tartan's powerful Scottish identity reaches globally, serving as a symbol of Scottish pride and nationalism at festivals such as New York Tartan Week and an official Tartan Day in Arkansas.<sup>294</sup> In this way, using tartan to brand Scottish culture demonstrates a softer, less political national branding, still seeking to emphasize positive, shared features of the community through an intangible piece of property which can be displayed in a tangible fashion.

Despite all efforts, placing a calculable value on cultural diversity may not be possible through traditional means, and scholars have explored cultural diversity and value through the lens of biodiversity and value.<sup>295</sup> UNESCO has further extended the connections between the development of cultural diversity and biodiversity in ecosystem development and sustainability.<sup>296</sup> These connections demonstrate a precedent for protection even in the absence of calculable value. For instance, biodiversity preservation is based on the 'precautionary principle,' a theory that mandates protection in the event of suspected harm to the environment or public good, even in the absence of scientific consensus of such harm.<sup>297</sup> Scientists still make discoveries about intricate interdependencies and new uses and functions for animals and plants previously thought 'useless' or 'unimportant.' These unforeseen or clandestine functions of existing and evolving diversity should provide sufficient rationale for biodiversity protection as well as ICH preservation whether the true value of the ICH is known, yet unknown, or cannot be calculated at all.

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<sup>294</sup> *Arkansas Tartan*, THE ENCYCLOPEDIA OF AK HIST. & CULT., <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=2342>, last visited 5 Aug. 2015.

<sup>295</sup> See generally Throsby, D., *Cultural Capital*, in A HANDBOOK OF CULTURAL ECONOMICS, ed. Towse, R. 144 (Edward Elgar 2011) and Grant, C., *Analogies and Links between Cultural and Biological Diversity*, 2(2) J. OF CULT. HERITAGE MANAGEMENT AND SUSTAINABLE DEV. 153 (2012).

<sup>296</sup> UNESCO (2008), *Links between Biological and Cultural Diversity: Report of the International Workshop* (26-28 September 2007) UNESCO, Paris.

<sup>297</sup> "Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation." RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT UNCED (1992), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=116>.

Under these theories, a lack of precise value should not hinder or diminish protection of cultural diversity, especially considering the soft or indirect impacts of preserving ICH.

#### **iv. Community Regulation and Transition to a National Register**

Until recent years, tartan producers and community-led organisations governed tartan documentation and regulation to the exclusion of any government intervention.<sup>298</sup> The Scottish Tartans World Register (“STWR”) catalogued tartans centrally in a registry that contained nearly 3,000 designs. The STWR would make note of a design for free and charge £50 to officially register a design.<sup>299</sup> Whilst a fairly comprehensive registry, the STWR did not hold a monopoly on records and registration. The Scottish Tartans Society (“STS”) operated as another independent registry for tartan design.<sup>300</sup> Although now defunct as a registry, the STS remains as a web resource.<sup>301</sup> In addition to documenting tartans and other Scottish history, the STS also opened a tartan museum in the United States in order to bridge international interest. The museum still stands in the state of North Carolina, which holds a large population of Scottish descendants.<sup>302</sup> Thus the activities of community-led registries extended beyond design documentation and registration to acting as cultural liaisons and networking hubs.

In 2008, Scottish lawmakers moved to create an official government register of tartans, modelled largely after the existing community-based registers, with aims to promote the Scottish tie to international tartans and fuel the domestic economy.<sup>303</sup> During legislative debate, representatives presented arguments which supported official register with legal authority. In addition to improving tartan image and giving

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<sup>298</sup> IP law protection regarding rights to relevant aspects of tartan as IP still apply. “Inclusion of a tartan in the Register indicates that the tartan and its name are unique to the Register and meet the registration criteria of the Scottish Register of Tartans Act 2008. No other rights are conferred. For further information on UK design right or to register your design, please visit the UK IP Office at [www.ipo.gov.uk](http://www.ipo.gov.uk).” Guidance, THE SCOTTISH REGISTER OF TARTANS, *supra* note 276.

<sup>299</sup> *Recording Tartan*, SCOTTISH TARTANS WORLD REGISTER, (site archived, [www.scottish-tartans-world-register.com](http://www.scottish-tartans-world-register.com), retrieved Jul. 2008).

<sup>300</sup> *FAQ*, SCOTTISH TARTANS MUSEUM, <http://www.scottishtartans.org/faq.html> (last visited 5 Aug. 2015).

<sup>301</sup> *Tartans of Scotland*, <http://www.tartans.scotland.net/>, last visited 5 Aug. 2015.

<sup>302</sup> *FAQ*, SCOTTISH TARTANS MUSEUM, *supra* note 300.

<sup>303</sup> Additionally, in 2008 Scotland completed an inventory of ICH in Scotland. McCleery, *supra* note 210.

confidence to users, lawmakers cited benefits to tourism and related activities, such as genealogical tourism.<sup>304</sup> Further, government registration tends to offer commercial neutrality with no exposure to private commercial risk.<sup>305</sup> However, much of the basis for co-opting this organizational system can be attributed to a cultural branding which would create indirect benefits for Scotland through assuring continued association with the tartan.

Strong arguments against establishing a government-run tartan register were also put forth, many of which pointed to the lack of a measurable, significant benefit to establishing a state-run register. The most direct query asks: “Is there any damage being done to the Scottish economy by ‘unregulated tartans’? If the answer is ‘No,’ then Parliament has no business debating this at public expense.”<sup>306</sup> Of particular relevance to the IP system is the critique that the tartan register is “a toothless tiger,” conveying no additional legal rights and “reinvents the wheel,” as community registers were widely accepted and respected as effective and reliable.<sup>307</sup> The government register further depends on existing register cooperation (which did occur) but nonetheless can create confusion among the existing registers. On the side of public administration, this type of redundant register may open floodgates for similarly burdensome administrative public bodies, stressing financial and manpower resources.<sup>308</sup> Finally, a government-run register might make registered tartans more available to the public but does not guarantee consistency or reliability, as such initiatives are subject to administrative changes and budget constraints.<sup>309</sup>

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<sup>304</sup> Herbert, S., *Scottish Parliament Information Centre (SPICe) Briefing* (24 Apr. 2008) 7 <http://www.scottish.parliament.uk/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB08-22.pdf>, citing Burnside, R., *Scottish Register of Tartans Act. SPICe Briefing No 06/103 (2006)* Edinburgh: Scottish Parliament.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 13.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 7.

<sup>309</sup> *Id.* at 13.

On 9 October 2008, the Scottish Register of Tartans Act 2008 (“the Tartans Act”) was passed, receiving royal assent on 8 November 2008.<sup>310</sup> The Tartans Act took effect on launched on 5 February 2009. The new government-run registry received official support from these community-run registries, and incorporated their existing databases into the NRS registry.<sup>311</sup> Further, many of the structural and procedural elements of tartan registration were adopted from the existing community regulators.

Whilst the Tartans Bill stated its purpose as promoting and preserving cultural heritage, the cost to register is £20 higher than the STA registration, at £70. “Total costs could reach £75,000 a year for the project, which MSPs were told could run at a loss.”<sup>312</sup> Further, an independent briefing concluded that a “full recovery of costs is not possible.”<sup>313</sup>

Enterprise Minister Jim Mather released the following statement on the Tartans Act: “I hope the work on a register will continue to be backed by industry and political consensus. And I hope the register will become a focus for authenticating all the superb varieties of tartan ~~we~~ design and produce [emphasis added].”<sup>314</sup> Whilst Mather stated that part of the goal of passing tartan legislation includes authentication of tartan designed and produced in Scotland, the Tartans Act contains no requirement for association in any way with Scotland. As domestic legislature has limited international powers to restrict international design and production of IP, accomplishing the benefit of Scotland-centred design and production of tartan without creating an internationally recognized right, such as a certification mark or protected designation of origin.<sup>315</sup> Further, many tartans may be registered with no Scottish company holding a licence to sell or produce a copyrighted tartan held by a commercial entity which is actively economically

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<sup>310</sup> *Id.*

<sup>311</sup> *Search the Register*, Scottish Register of Tartans, <http://www.tartanregister.gov.uk/search.aspx>, *supra* note 276.

<sup>312</sup> *Holyrood Supports the Tartan Register*, BBC NEWS (19 Jun. 2008) <http://news.bbc.co.uk/1/hi/scotland/7461981.stm>.

<sup>313</sup> Herbert, *supra* note 304, at 14.

<sup>314</sup> *National Tartan Register to be Set Up*, THE SCOTTISH GOV’T, *supra* note 290.

<sup>315</sup> *See generally*, *Types of Protection*, INT’L TM ASSOC.

<http://www.inta.org/TrademarkBasics/FactSheets/Pages/GeographicalIndicationsFactSheet.aspx> (last visited 5 Aug. 2015).



exploiting the tartan. Notably, lawmakers did bring into legislation debate that the official association with Scotland will maintain the link and provide indirect benefits.<sup>316</sup>

To more fully compare the motivation and aims of the Tartans Act with the stated aims, an examination of the text of the Act will indicate the breadth of influence and reveals the indirect benefits to be primary and the direct purported benefits correlational, not causal, only – if occurring at all. Only the following criteria must be met to officially register a tartan with the NRS:

- that the tartan meets the definition contained in the Act and is sufficiently different to all other tartans already recorded in the Register
- that the name of the tartan is unique, acceptable and suitably authorised
- that the application fee of £70 is paid.”<sup>317</sup>

The Keeper of the Scottish Register of Tartans<sup>318</sup> has discretion to refuse any application which does not meet the criteria.<sup>319</sup> In addition to thread count and colour information, registrees must provide “a description of the tartan including your reasons for designing it and explaining your choice of colours; the name of the tartan and evidence of your association with that name.”<sup>320</sup> If the tartan includes a proper name, the registree must include disclaimer that anyone sharing the proper name may wear the tartan design. However, the registration affects no IP rights and offers no enforcement mechanism other than removal from the registry.<sup>321</sup> So whilst a disclaimer must be made, a registree could not utilize the Tartans Act to exclude others from wearing a tartan with a proper name identifier.

The primary criteria for acceptance onto the register centres around the design of the tartan and whether it is ‘sufficiently different’ from designs currently on the register.

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<sup>316</sup> Herbert, *supra* note 304, at 14.

<sup>317</sup> Guidance, THE SCOTTISH REGISTER OF TARTANS, *supra* note 276.

<sup>318</sup> *Id.* at s. 3.

<sup>319</sup> *Id.* at s. 7.

<sup>320</sup> *Id.*

<sup>321</sup> “Some tartans are for the use of certain groups of people only, e.g., a clan or family tartan, a personal or a corporate tartan. You may record here any restrictions you wish to impose on the wearing, the use and re-use or production of your tartan, however the Keeper is not responsible for enforcing any such restrictions and has no authority to do so. For further information on designs or to register a design in the UK, please visit the UK IP Office at [www.ipo.gov.uk](http://www.ipo.gov.uk).” *Id.*

“Sufficiently different means that it must be possible to clearly differentiate your tartan from all the other thousands of tartans already recorded, distinguishable by eye at a distance of approximately 2m (6ft). In practice this means that

- i. the geometry of a design must be sufficiently different, ie. the blocks of solid colours and the mixtures used in a design must be arranged in a different pattern to all other designs already recorded.
- ii. a new tartan will use different colours in substantially different proportions and ordered differently to all tartans already recorded. Changing the shades of the colours used is insufficient to differentiate a new design since tartans are traditionally recorded in the base colours of red, yellow, green, blue, brown, grey, black and white. Any shade of blue will still be recorded as blue, likewise green etc.
- iii. over-check(s) or additional stripe(s) in contrasting colour(s) can be added to create a new tartan, providing the over-check or stripe is clearly visible when woven.”<sup>322</sup>

The Tartans Act additionally identifies qualities which will not be counted as sufficiently different. For instance, increasing or decreasing the size of the sett will not create sufficient difference nor will varying a shade of the colour; “Therefore, for example, light blue, navy blue and purple are all considered to be blue and changing the shade from light to dark blue will not change the basic pattern.”<sup>323</sup>

Certain tartan designs are eligible for protection already under international and domestic IP law, and equally important to establishing what the Tartans Act does do is establishing what it does not. The Tartans Act does not affect any other IP rights available to a rightsholder or preclude others from using or producing a design independently of other IP rights. The majority of countries around the globe are governed under the Berne Convention for the Protection of Literary and Artistic Rights (“the Berne Convention”), an international treaty setting minimum regulatory standards and national treatment provisions related to copyright.<sup>324</sup> The Berne Convention mandates the protection of literary and artistic works, which may include patterned designs, like a tartan, subject to no formal registration, as long as the design meets the basic copyright requirements such as authorship and duration.<sup>325</sup> As the Berne Convention sets minimum standards, domestic lawmakers may set enhanced protections as well, so additional or longer protection may be offered for registrations.

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> The Berne Convention, *supra* note 5.

<sup>325</sup> *Id.*

Under the CDPA, IP rightsholders have the exclusive right to copy, make, sell, create derivatives, and pursue infringers for the protected time period, generally 70 years following the death of the author.<sup>326</sup> In the United Kingdom, tartans also might be protected as registered designs under the Registered Designs Act of 1949 for five years from the date of first registration, renewable up to 25 years.<sup>327</sup> Power to change UK IP law is not devolved to the Scottish Parliament, so the Tartans Act was unable to make provisions to introduce new IP rights or change existing IP law in the United Kingdom.<sup>328</sup>

However, most tartan will be ineligible for any type of conventional IP protection unless it is newly created.<sup>329</sup> Likely due to this lack of eligibility for IP protection, litigation surrounding use and misuse of tartan designs is sparse. Thus the IP system as it stands provides little recourse for individuals or clans with cultural associations or ownership in a tartan design in the event of exploitation or commercialisation. However, one recent case, *Abraham Moon & Sons Ltd. v. Thornber & Others*, found infringement of the copyright in a new tartan design and in the ‘ticket stamp,’ the written instructions for expert weavers.<sup>330</sup> Despite defendants’ cites to numerous cases holding that instructions cannot be copyrighted, the judge was persuaded that the complexity and information held in a ticket stamp communicated a visual image to expert weavers and had ‘real visual significance’; thus it was a graphic work, protected by copyright.<sup>331</sup> There has yet to be any further case law on tartan, so it is uncertain whether this decision offers any certainty for new designers as previous case law has discounted similar constructs as uncopyrightable instructions.<sup>332</sup>

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<sup>326</sup> CDPA, *supra* note **Error! Bookmark not defined.**

<sup>327</sup> Registered Designs Act (1949); *Do I Need to Register My Design?*, INTELL. PROP. OFFICE, <http://www.ipo.gov.uk/types/design/d-applying/d-before/d-needreg.htm>, last visited Aug. 2015.

<sup>328</sup> The Scotland Act, *supra* note 15, at Sched. 5, Part 2, para. (3)(C4).

<sup>329</sup> CDPA, *supra* note **Error! Bookmark not defined.**, at Part I.

<sup>330</sup> [2012] EWPCC 37 (05 October 2012).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

As existing IP protection seems insufficient to ubiquitously protect tartan, two alternatives might be well suited: geographical indications or a type of *sui generis* protection through legislation. Both types of protection are already used around the globe, to various extent, to protect regionally specific design and thereby the surrounding ICH. Interestingly, the UK protects another type of pattern and textile production, Harris Tweed, through special legislation and trade mark. The Harris Tweed Act of 1993 created the Harris Tweed Authority for the following purpose: “To promote and maintain the authenticity, standard and reputation of Harris Tweed; for preventing the sale as Harris Tweed of material which does not fall within the definition...”<sup>333</sup> The legislation defines Harris Tweed as “a tweed which has been hand woven by the islanders at their homes in the Outer Hebrides, finished in the islands of Harris, Lewis, North Uist, Benbecula, South Uist and Barra and their several purtenances (The Outer Hebrides) and made from pure virgin wool dyed and spun in the Outer Hebrides.”<sup>334</sup> Passing *sui generis* style legislation in accompaniment to a trade mark is a unique solution but is highly customized. Harris Tweed is essentially a localized commercial operation, with three mills and self-employed resident weavers, which lent very well to legislative protection. With such a high commercial demand for the tweed, trade marking the product and supporting the local industry with legislation secured the residents’ livelihoods, maintained the association with the geographical origin, and provided the economic means for islanders to continue the tradition.

Obtaining clan approval to register a clan tartan is an interesting adaptation which appears to grant a form community or collective right. Whilst the right does not extend as far as an enforceable IP collective copyright, the structure presents the ability to exercise a form of collective control over an official recognition to ICH.<sup>335</sup> Whilst older tartans with an unknown designer will fall into the public domain, this

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<sup>333</sup> Harris Tweed Act, *supra* note **Error! Bookmark not defined.**, at Preamble.

<sup>334</sup> *Id* at Part I, para. 2.

<sup>335</sup> “The applicant must be the head or chief of the family or clan, or have the written authority of the head or chief. Where there is no chief or head, the authority of the Clan Society will be acceptable to register a Clan Society tartan.” Scottish Register of Tartans, <https://www.tartanregister.gov.uk/name>, *supra* note 276.

official register is offering a form of ancillary IP rights in practice, whether foreseen or not. Consumers, designers, and producers will recognize governmental authority, and the mere listing may deter use of a tartan that is truly in the public domain, especially as the register grants no IP rights, potentially chilling creative contribution to the general public good.

Whilst generally the registration will grant no rights to enforce the restrictions listed with the tartan, the Register does contain a curious exception. One set of tartan restrictions listed by the Register does have additional force of law: the royal Balmoral tartan:

This is the original Balmoral as designed by Queen Victoria's husband, Prince Albert in 1853. Whilst predominantly grey with overchecks of red and black the background contains threads of black and white yarns twisted together to achieve the appearance of the rough hewn granite so familiar in Royal Deeside. It is worn by HM Queen herself as a skirt and several members of the Royal Family but only with the Queen's permission. The only other approved wearer of the Balmoral Tartan is the Queen's personal piper (the Estate workers and Ghillies wear the Balmoral Tweed). D W Stewart wrote in 'Old and Rare Scottish Tartans' (1893), 'Her Majesty the Queen has not only granted permission for its publication here, but has also graciously afforded information concerning its inception in the early years of the reign, when the sett was designed by the Prince Consort.' There is also a smaller sett that was woven for the children's clothes. Checked against original cloth sample woven by Kinloch Anderson, holders of the Royal Warrant. The Balmoral was originally woven only by Romanes & Paterson of Edinburgh.<sup>336</sup>

In 2016, the National Archives displayed documents from 1937 that banned any person outside of the above-mentioned persons from wearing, buying, or manufacturing the tartan without the approval from Buckingham Palace. This stance was confirmed recently by a Palace spokeswoman, who confirmed that “The reigning monarch and other members of the royal family may wear the Balmoral tartan in accordance with the wishes of the sovereign.”<sup>337</sup>

One further issue surrounding a registration system is appointing a single individual or entity to hold registration title. In contrast to much IP regulation, the Tartans Act does allow an applicant to register a tartan with an unknown designer. Given the age and unknown origin of many of these designs, this is a

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<sup>336</sup> *Royal Balmoral Tartan*, The Scottish Register of Tartans, <https://www.tartanregister.gov.uk/tartanDetails?ref=182>, last visited 28 Nov. 2017.

<sup>337</sup> *Royals 'Banned' Public from Wearing Official Balmoral Tartan*, THE SCOTSMAN (15 Aug. 2016), <http://www.scotsman.com/news/royals-banned-public-from-wearing-official-balmoral-tartan-1-4203624/>.

necessary allowance. However, in an IP context, what rights are conferred to registrees who are not the original designer? As the register guidelines disclaim conferring any IP rights,<sup>338</sup> much of the expectations and indirect rights associated with a tartan register are due to piggybacking on already effective, accepted community self-regulation. Further, if two individuals hold copyrights to tartans that are deemed too sufficiently similar for both to meet the register eligibility requirements, the register operates on a first to file basis. Most removal requests that are approved are related to a brand name trade mark infringement.<sup>339</sup>

#### **v. ICH Practices, IP, and Commercialisation**

If a government does choose to step in and intervene in community-regulated ICH, typically it will operate for cultural preservation only, *ie*, not a fee charging registrar but in a museum-like function. Charging an official fee to register ICH without conveying additional rights appears to be an unusual governmental action, atypical of safeguarding movements that have primarily indirect social and economic benefits. For instance, in contrast to a fee-based Tartan Register, Scotland also has created a free listing register and online wiki for ICH free of charge and serving a similar function.<sup>340</sup>

If the government register does continue, in order to fully accomplish the goals of the Tartan Act, specifically to fuel Scottish design and production, the Act could be altered to reflect the political rhetoric surrounding its passage.<sup>341</sup> Limiting production and licensing to Scottish businesses or mandating a certain amount of compulsory licensing to Scottish businesses could create more of the economic and social benefit sought by the Act. Alternatively, a direct tie to Scotland in the description and function may better meet the goals of the Act. The current climate of Scottish nationalism following the recent referendum may present an interesting context to discuss this further.

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<sup>338</sup> Guidance, THE SCOTTISH REGISTER OF TARTANS, *supra* note 276.

<sup>339</sup> *Id.*

<sup>340</sup> *Documenting Intangible Cultural Heritage in Scotland*, United Kingdom National Comm. for UNESCO, [http://www.unesco.org.uk/documenting\\_intangible\\_cultural\\_heritage\\_ich\\_in\\_scotland](http://www.unesco.org.uk/documenting_intangible_cultural_heritage_ich_in_scotland), last visited 5 Aug. 2015.

<sup>341</sup> BBC News, *supra* note 312.

The 2003 Convention includes an article regarding the role of community participation in ICH management: “Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.”<sup>342</sup>

Whilst recognising the value of community management and input into ICH management, the ‘widest possible participation’ is vague in definition and application. Additionally, community participation itself is wrought with practical implementation difficulties, such as self-selecting representative community members, unequal bargaining power, and paternalistic impact on the ICH itself.<sup>343</sup>

The Scottish Government sought the cooperation and input of representatives from existing clan and community tartan registers, and no law prohibits alternative registers should the community find the government structure unsatisfying. However, the motivation and return for operating a duplicate register is greatly diminished in the face of officially sanctioned registration, and no further community participation is incorporated formally into the register operations. This practical discouragement of community organisation may impact the external benefits which already arose from community regulation of ICH, such as festival sponsorship, web resources, and community-run museums, as well as unknown future events or organizations with social and economic benefits through collective action.<sup>344</sup>

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<sup>342</sup> The 2003 Convention, *supra* note 4, at *Participation of Communities, Groups, and Individuals*, Part III, Art. 15.

<sup>343</sup> Botes, L. and van Rensburg, D., *Community Participation in Development: Nine Plagues and Twelve Commandments*, 35(1) COMMUNITY DEV J. 41, 42-56 (2000).

<sup>344</sup> As the Act has now been in effect for over five years, a comprehensive qualitative and quantitative sociological study to measure impact would be valuable.

**vi. Geographical Indications as a Possible ‘Intellectual-Property Adjacent’ Alternative**

Geographical indication (GI), or appellation of origin, is an IP protection which seems to fit nicely into the stated goals of the Tartan Act. GIs are indications of origin from a region or locality and also indicate a geographically attributable quality or characteristic, which may include the geographical name (as with Scotch whisky) or may simply have acquired a strong association with the designated regions (as with Basmati rice).<sup>345</sup> Many GIs might appear to overlap with trade mark rights; however, they are distinguishable as “trade marks as a private monopoly right and geographical indications as a collective public right.”<sup>346</sup> This distinction would seem to indicate a GI rather than a trade mark is more appropriate for ICH. However, the desirability of GI protection is lessened by a lack of international legal cohesion and tartan’s non-agricultural – and thus, non-terroir dependent – nature.

First, GI protection has been granted primarily to food and wine in the EU, and certain countries may use different legal mechanisms, such as *sui generis* protection or trade mark law, to protect origin designations.<sup>347</sup> From a practical perspective, pushing for expanding GI protection in a global forum at WIPO may not be a worthwhile path, politically or economically, despite the rising implementation of GIs in the EU. Second, whilst the tartan register does delineate quality and originality standards for registration, it is unclear whether consumers would associate a higher quality tartan with Scottish production origin. Historical origin is distinct from production origin, and if the purpose of a GI is to ensure quality and prevent consumer deception as to origin, tartan may not garner such protection. Practically speaking, the manufacture, design, and distribution is already geographically widespread and attempts to reign in and claw back these elements to Scotland would likely prove futile. Third, based on

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<sup>345</sup> Nair, L. and Kumar, R., GEOGRAPHICAL INDICATIONS (LexisNexis 2005) 12.

<sup>346</sup> *Id.* at 6.

<sup>347</sup> Thual, D., et al., *Study on the Protection of Geographical Indications for Products other than Wines, Spirits, Agricultural Products or Foodstuffs*, Insight Consulting, 5-6 (Nov. 2009), available at [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147926.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147926.pdf); Dutfield, G. and Suthersanen, U., GLOBAL INTEL. PROP. LAW (Edward Elgar 2008) 192.



the goals stated for passing legislation, maintaining global *association* between Scotland and tartan seems to be paramount. Foreign registrations are allowed and encouraged; the Tartan Act has no requirement for involving Scottish industry or even listing a Scottish connection in the description. A voluntary official register thus serves as a positive reinforcement measure rather than offering negative punitive consequences for not registering. By preserving this association, more indirect benefits through tourism and branding may occur rather than direct, local benefits through defending limited and highly monitored production, as with the Harris Tweed Act.<sup>348</sup>

Despite the apparently suitability of GIs for protecting ICH in general, the system is not widely utilized across the globe. In 1958, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration came into effect but, to date, has secured only 27 total parties.<sup>349</sup> The possible expansion and international harmonization of GIs has been contested by some WIPO negotiation members, citing issues ranging from impact on innovation to global fair trade.<sup>350</sup> Nonetheless, developing countries with primarily agricultural or geographically dependent quality measures, *e.g.*, Antigua coffee or Darjeeling tea, rely upon GIs for economic and associated traditional craftsmanship protection.<sup>351</sup> Whilst GIs are often promoted as a ‘pro-development IP right’,<sup>352</sup> trade marks and GIs are dangerous to use when protecting ICH and ICH-related goods as the protection is exposed to the risk of ‘genericide.’<sup>353</sup> Genericide occurs when the trade marked name becomes so widely associated with the good that there is no longer a consumer identification function, such as with aspirin or elevator.<sup>354</sup> These terms were previously brand names but, over time, became the overarching term for the product. Thus trade mark may not be the best protection on its own if, within a given market, there is a high risk of genericide. This

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<sup>348</sup> Harris Tweed Act, *supra* note 15.

<sup>349</sup> *Assembly Lisbon Union*, WIPO,

[http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search\\_what=B&bo\\_id=11](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=B&bo_id=11), last visited 21 Nov. 2017.

<sup>350</sup> Josling, T., *The War on Terrior: Geographical Indications as a Transatlantic Trade Conflict*, 57 J. OF AG. ECON. 337 (2006).

<sup>351</sup> Nair and Kumar, *supra* note 345, 8-9.

<sup>352</sup> Dutfield and Suthersanen, *supra* note 347, 197.

<sup>353</sup> Nair and Kumar, *supra* note 345, 205.

<sup>354</sup> *Id.*

may already be the case with tartan; a consumer may not refer to a non-Scottish checked pattern as ‘plaid’ and the Scottish counterpart as ‘tartan.’ This makes trade mark too thin a protection for important ICH and was a likely catalyst for the additional legislative protection for Harris Tweed.

From a legal standpoint, ICH overlaps at some points with IP law and, in some cases, inclusion under the IP regime may be the best legal avenue for safeguarding. However, ICH does not easily meet subject matter, authorship, or duration requirements in copyright law. For instance, oral or intangible folk traditions are not ‘fixed,’ a requirement for copyright in most jurisdictions.<sup>355</sup> They may be of collective or uncertain authorship or simply be too old to be protected under copyright law and are considered to be public domain material.<sup>356</sup> This lack of appropriateness for existing IP protection does not mean that the ICH, by default, then should be given no form of legal protection; it simply means that the current framework is unfit for ICH.

Nonetheless, the danger of misuse and propertisation – or re-propertisation – for economic, commercial exploitation remains, and ICH can be fundamentally altered to gain protection under the IP framework, such as the recording of oral histories to obtain fixation. Some communities may alter the ICH to retain control over the cultural practices, to prevent outside entities or persons from co-opting the ICH, which also can have the effect of shutting off or narrowing access to the community and public. Additionally, the evolving nature of living histories can be stagnated by such fixation, unnaturally ossifying the ICH.<sup>357</sup>

The existing penumbra between IP and ICH has resulted in unique legal compromises. For instance, in 2008, Scottish lawmakers tackled an ICH-laden issue, legislating on national regulation of tartan encompasses many direct and indirect ICH practices. Tartan has a rich history in Scotland, reflecting

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<sup>355</sup> *E.g.*, CDPA, *supra* note **Error! Bookmark not defined.**

<sup>356</sup> *Id.*

<sup>357</sup> Lixinski, *supra* note 13, at 3-4.

British royal and political influences in the Highlands, but also ICH elements such as generational weaving traditions, regional and subsequent clan associations, and the community and artistic practices that encircle and bloom from long-standing societal traditions.<sup>358</sup> One of these modern traditions has been community regulation of tartan registration, especially that of clans. However, from the debate on national regulation emerged the Tartan Act,<sup>359</sup> which created a government-run register of tartans under the National Records Service, subsuming community-run registers.<sup>360</sup> Other fabrics from the same country are regulated differently. The UK government regulates Harris Tweed through its own act, which essentially codifies the production qualities and legal trade mark protections for Harris Tweed, including a certification mark.<sup>361</sup> Further, paisley seems to have garnered no additional protections at this point, despite a Paisley Museum in Scotland, commemorating the weaving traditions and the historical furtherance of the craft.<sup>362</sup> Thus even within a single country, cultural materials from a similar genre, such as fabrics, can spur creative legal solutions or be left to the sparse or inutile IP protections, seemingly without credence to the value of the attached ICH.<sup>363</sup>

Whether ICH is altered in form to meet the IP criteria for protection or exploitation or whether a creative legal compromise is rendered, IP law will impact cultural practices and outputs to conform, to achieve exclusionary, inclusionary, or exploitative ends. The question how to best protect ICH within such a legal framework remains open to debate, but so long as IP laws are utilised in conjunction with ICH, ICH will be moulded and ossified within IP structures.

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<sup>358</sup> Roper, H., *The Highland Tradition of Scotland*, in Hobsbawm, E. and Ranger, T., *THE INVENTION OF TRADITION* (Cambridge 2012).

<sup>359</sup> The Scottish Register of Tartans Act, *supra* note 16.

<sup>360</sup> The Scotland Act, *supra* note 15.

<sup>361</sup> Harris Tweed Act, *supra* note **Error! Bookmark not defined.**

<sup>362</sup> Whilst paisley patterns originated in Iran, weavers in Scotland expanded the colour palette from two to fifteen colours and built up an entire industry around the quality of the weaving. This production lead to the Westernised name for the pattern, 'paisley', but the fabric has no additional legal protections in Scotland or the United Kingdom, outside what is already offered from IP laws. Rostami, S., *A Study on Symbols Roles in Shaping Appearances and Forms in Hand-Wovens of Kurdistan Province, Iran*, 2(3) INT'L J. OF HUMANITIES AND CULT. STUDIES 1086, 1092 (Dec. 2015).

<sup>363</sup> See *infra* Chapter IV(b) for an in-depth treatment of Scotland, tartan-related ICH, and contemporary legislation by a government with no independent power to make IP law.

## **vii. Conclusion**

This recent conversion from community to government regulation of ICH presents many opportunities for data collection which could indicate the cultural social and economic effects in just such an under-investigated instance. Such subtle erosion is a challenge to measure, but one indicator of domestic social investment and return is the rate at which new tartans are registered before and after government intervention; the rate of new applications should be measured by both quality and quantity.

At most recent count, twelve fictional characters held registered tartans.<sup>364</sup> However, the effect of associated traditional Scottish Highland garb and culture with fictional characters, corporate entities, and commercial ventures has not been fully investigated; nonetheless, over-commercialisation of culture through branding and marketing presents a danger of loss of cultural value to the community of origin.<sup>365</sup> Whilst measuring commercialisation, the confounding factor of the tartan's previous commercialization during the Victorian era must be considered. The previous commercialisation into a tangible, saleable good may mitigate the effect of more recent governmental intervention into community-regulated ICH as the ICH may already be viewed as a marketable product and less a culturally valuable piece of ICH. Further, social effects of this intervention can be indicators of proper ICH preservation and safeguarding. For instance, whether modern social traditions, such as clan and celebratory utilization, increased or decreased or changed in nature.

Cultural heritage which contains tangible and intangible elements, like tartan, offers the opportunity for community groups to leverage the existing knowledge of that heritage for further social and cultural protection. Whilst many Scottish people still carry on their historical tartans, the commercial exploitation

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<sup>364</sup> Suehle, R., *Twelve Fictional Characters with Officially Registered Tartans*, WIRED (21 Sept. 2012) <http://www.wired.com/geekmom/2012/09/registered-fictional-tartans/>.

<sup>365</sup> See generally Comaroff and Comaroff, *supra* note 35.

of the tartan threatens to lessen the value of this ICH,<sup>366</sup> thus removing the social and economic benefits that many international organisations seek to preserve in developing countries. Further, the global benefit to preserving unique ICH is incalculable and fundamentally enriches cultural diversity.

Further research may indicate whether additional legislative action to preserve cultural heritage in a developed economy would offer sufficient protection to outweigh the administrative implementation and enforcement burden of such law-making to ensure a majority ethnic population in a Westernized country can preserve and maintain unique ICH. However, heavy government involvement in the registration and oversight of ICH could ossify the culture in its present state, contradicting the social transmission and evolving nature of ICH. A positive first step in the protection of UK cultural heritage would be to ratify the 2003 Convention as well as to adopt community cultural oversight into governmental structures. This ratification would provide the international acknowledgement and resources to best promote and protect UK ICH and allow participation in a global forum as well as communicate a vote of governmental confidence to the unique cultural communities within the country.

#### **viii. PhD in Practice: Designing, Registering, and Weaving a New Tartan**

In order to fully investigate the process of tartan design, NRS registration, and tartan production and weaving, I designed and registered a tartan for the CREATE research centre, entitled ‘CREATEGlasgow’.<sup>367</sup> To begin, I considered aspects of CREATE that could be represented in a complementary colour pattern, in accordance with the traditional tartan pattern now codified by the Tartan Act. Initially, I looked at existing colour branding, which might include up to 12 colours. However, a typical loom operates with six colours. It is not impossible to include more, but the cost will

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<sup>366</sup> *But see* Scafidi, S., *IP and Cultural Products*, 81 B.U. L. REV. 793, 828-30 (2001).

<sup>367</sup> CREATEGlasgow Tartan, The Scottish Register of Tartans, 11 Apr. 2015, <https://www.tartanregister.gov.uk/tartanDetails.aspx?ref=11327>.

increase and the visual appearance may suffer. With this in mind, I designed a new colour palette, based on important aspects of CREATE and represented by colour psychology.<sup>368</sup>

The CREATEGlasgow tartan colours are black, yellow, green, purple, red, and blue. In the tartan, black represents the project's monochrome branding; red represents the UK partner universities; light purple represents creativity and diversity of project themes; dark blue represents regulation and law; green represents enterprise and inventiveness; light yellow represents technology and intellect.<sup>369</sup>

The NRS tartan register application was completed entirely online, including the £70 fee. There was an option to receive your hard copy certificate with a frame, although I did not select this option. The NRS sent an email receipt confirmation, and within several months, I received a registration acceptance from the NRS. The official registration certificate arrived by mail shortly after.

As a person with no previous design training, I found programmes online that created a tartan design for the user with certain parameters entered, such as sett and colour.<sup>370</sup> These online design programmes are generally offered by tartan weavers, who will also provide weaving services. Additionally, user designers have an option of uploading their designs to a member community gallery and as well as rating other designs and participating in discussion forums.<sup>371</sup>

After selecting colours and adjusting the sett, I began to contact Scottish weaving mills. After speaking with consultants and comparing prices, I selected Bute Fabrics on Isle of Bute. For the mill to execute a custom design, I had to match the colours with the Pantone colour palette. Following this consultation, the

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<sup>368</sup> See generally O'Connor, Z., *Colour Psychology and Colour Therapy: Caveat emptor*. 36 COLOR RES. APPL. 229 (2011).

<sup>369</sup> CREATEGlasgow Tartan, The Scottish Register of Tartans, 11 Apr. 2015, <https://www.tartanregister.gov.uk/tartanDetails.aspx?ref=11327>.

<sup>370</sup> E.g., <https://www.scotweb.co.uk/tartandesign/>


<sup>371</sup> *Id.*

mill sent samples of hand-dyed yarn and a high resolution digital print of the design. I met in person with my design consultant for final approval before going ahead with the weaving.

I performed a mill visit in June 2016. Whilst Bute Fabrics is not generally open to the public for tours, customers who are having fabrics woven can attend a tour. The mill itself performs the weaving, finishing, and by-hand quality checks on site; bulk custom dyes and labels are made off site.

It was important to this process to have the tartan design woven in Scotland to comport with the spirit of the Tartan Act as well as with the history and ICH associated with tartan, but I did encounter challenges in accomplishing this goal. Many mills are quite small, so there was difficulty with: 1) weaving a custom design, rather than a stock design; 2) ordering scarf fabric rather than kilt fabric; and 3) consistent communication. Bute Fabrics handled all of these challenges efficiently and professionally, but locating a mill that was equipped to perform this job took more time and effort than expected.

*Figure 4.2: CREATEGlasgow Tartan Registration. Source: CREATEGlasgow Tartan, The Scottish Register of Tartans, <https://www.tartanregister.gov.uk/tartanDetails?ref=11327>, last visited 21 Nov. 2017.*



# The Scottish Register of Tartans

Home | What's New | Search the Register | Compare Designs | Register a Tartan | Fees | Amendments | Scottish designers | History | About Us

3 August 2015

you are in: **CREATEGlasgow**

quick tartan search:

**Sign Up to the Register**

While you can search the Register without having to register and login, you will need to create an account to:

- Register new tartan designs
- Request threadcount information
- Receive notification of all new registered tartan designs and other news updates
- Manage your account details
- Request official amendments

**Tartan Details - CREATEGlasgow**

The information held within The Scottish Register of Tartans for the "CREATEGlasgow" tartan is shown below.

Reference: 11327

Designer: Blakely, Megan Rae

Tartan date: 11/04/2015

Registration date: 28 July 2015

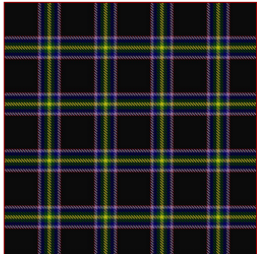
Category: Corporate

Restrictions: Yes. Anyone wishing to wear/use/weave this tartan should seek permission from CREATEGlasgow.


Registration notes: CREATE is the Research Councils UK Centre for copyright and New Business Models based at the University of Glasgow. CREATE investigates the future of creative production in the digital age, in particular the role of copyright. This tartan represents CREATE's research and brand identity. Colours: black; for the project's monochrome branding; red; for UK partner universities; light purple represents creativity and diversity of project themes; dark blue represents regulation and law, green represents enterprise and inventiveness; light yellow represents technology and intellect.

Registrant details: Mr Andrew Mchugh, 10 Professors Square, University Of Glasgow, Glasgow, Scotland, G12 8QQ  
andrew.mchugh@glasgow.ac.uk

Note: This tartan was registered in the official Scottish Register of Tartans.




Click on the image above to see a more detailed version.  
Would you like to request threadcount information for this tartan?[click here to find out how](#)



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National Records of Scotland, H.M. General Register House, 2 Princes Street, Edinburgh, EH1 3YY  
tel +44 (0) 131 535 1375 or email: [enquiries@tartanregister.gov.uk](mailto:enquiries@tartanregister.gov.uk)



Additionally, the NRS registration for CREATEGlasgow is as a ‘corporate’ tartan. This category does not accurately represent the nature of the tartan, but no other categories were appropriate.<sup>372</sup>

A further point of interest during the registration process occurred when an NRS representative recommended including a standard restriction since I did not submit any restriction in the application:

**Restrictions:** Yes. Anyone wishing to wear/use/weave this tartan should seek permission from CREATEGlasgow.

This process informed the dissertation, not only on the motivations and emotional investment that attaches to such a project, but also the practicalities of tartan production and the significance of preserving cultural practices such as requiring the registree to submit the design with a culturally representative story. In the spirit of ‘ICH in Scotland’ rather than ‘Scottish ICH’, the colour and pattern symbolism recorded with the NRS is incredibly varied and is not restricted to the second-wave clan associations. This maintenance of a symbolic storytelling tradition manifest in traditional design patterns, reflecting international and modern practices and associations is emblematic of an evolving community of practice.

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Clan/Family	A tartan to be worn by members of a <b>Scottish</b> clan or family as recognised by the Court of the Lord Lyon.
Name	A tartan named for an individual or family.
District	A tartan associated with a particular geographical area, including towns, parishes, counties or countries.
Corporate	A tartan for a company, organisation or an informal group of individuals.
Commemorative	A tartan created to commemorate a specific public event.
Military	A tartan associated with any branch of the armed forces, including volunteer regiments.
Royal	A tartan with a direct connection to British royalty.
Fashion	A tartan created for fashion or retail, usually without any particular personal association.
Other	For tartans which do not meet the criteria for any of the other categories.

<https://www.tartanregister.gov.uk/Category.aspx>



### c. Case Study 2: Ireland: Cultural Tourism, Identity, Branding, and Copyright

Work:	Tangible elements	Intangible Elements
<i>'Irishness' as represented in The Gathering 2013</i>	<ul style="list-style-type: none"> <li>- <i>Digital and printed photographs</i></li> <li>- <i>Written documentation</i></li> <li>- <i>Brochures</i></li> <li>- <i>Signage</i></li> <li>- <i>Representative clothing</i></li> <li>- <i>Parades/festivals/culture centred-events</i></li> <li>- <i>Databases</i></li> <li>- <i>Literature</i></li> <li>- <i>Websites</i></li> </ul>	<ul style="list-style-type: none"> <li>- <i>Oral histories and storytelling</i></li> <li>- <i>Dance</i></li> <li>- <i>Familial associations</i></li> <li>- <i>Location or trait-oriented cultural practice</i></li> <li>- <i>Personal and community identity</i></li> </ul>

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#### i. Introduction

Ireland is a land of rich storytelling and music, intertwined with the culture's history and ICH. From the Celtic fairy tales, mythology connected to multitudes of landmarks, dance, and practices of socializing through and around musical performance, Ireland has a plethora of culturally valuable artistic and literary works. In the context of modern law, these works are often eligible for copyright protection, depending on the age and identifiable authorship. Even if the ICH is quite old, new adaptations evolve frequently, as is intrinsic to ICH. These new adaptations may well acquire copyright protections especially if the previous iterations of the ICH were not recorded or practiced in a fixed form.

As discussed *supra*, this fixation and modern copyright protection could result in several effects, including exclusion of practicing communities from the ICH, ossifying the ICH into a form it might not otherwise consistently hold, superseding the non-fixed form of the ICH and influencing future iterations to be fixed, or allowing external monetisation of the ICH away from the existing practising communities, either by an individual community member or outside party. Many countries have passed laws to protect

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<sup>373</sup> Case Study 2 Chart.

practising communities from having an external person or entity monetising their ICH by utilising protections offered through IP law.<sup>374</sup> Often, this cultural legislation relates to protecting minority indigenous populations.<sup>375</sup> Some countries do not have official legislation but do have different trade organisations, certification marks, or advocacy organisations that make efforts to protect the integrity of these indigenous populations' ICH.<sup>376</sup> Thus legal systems and institutional structures in modern society support the autonomy and self-determination related to the ICH indigenous populations.

As demonstrated in this dissertation, not all ICH is generated by minority indigenous populations, and there is no bright line between a majority non-indigenous, majority indigenous, minority, and a minority indigenous populations.<sup>377</sup> However, one trait that can define an indigenous population is speaking a different mother tongue.<sup>378</sup> Whilst the Irish in Ireland are not a minority population, their language categorised as 'Definitely Endangered' by the UNESCO's Atlas of the World's Languages in Danger.<sup>379</sup> This status indicates that children no longer learn the language as a mother tongue in the home.<sup>380</sup> According to a 2007 report by the "Department of Community, Rural and Gaeltacht affairs of Ireland, 44,000 people were living in ... primarily Irish-speaking areas: two [areas] in Donegal County, one each in Galway and Kerry counties, plus eight small pockets, also in Mayo, Cork, Meath and Waterford counties. [Irish is] extinct as a first language in Northern Ireland but widely studied as a second language.

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<sup>374</sup> E.g., Aboriginal Cultural Heritage Act, Queensland Act No. 79 (2003).

<sup>375</sup> *Id.*

<sup>376</sup> See discussion of geographical indications *supra* Chap. IV(b)(vi).

<sup>377</sup> As with the present case, populations that do not constitute a minority currently may have, in recent times, constituted a minority population, as when Ireland was a part of the United Kingdom. As far as indigenous minorities, considerable politics and differential treatment under international law attach to populations labelled as 'indigenous', and these definitional and political complexities will not be addressed in this dissertation. See generally Auckerman, M., *Definitions and Justifications: Minority and Indigenous Rights in a Central/Eastern European Context*, 22(4) HUMAN RIGHTS QUARTERLY 1101-50 (2000).

<sup>378</sup> This chapter is focussed on Irish cultural tourism and branding, but it is worth noting the status of Irish language. Language is central to cultural identity and can function as social cohesion and ICH in its own right. See *infra*, Chapter IV(d) on the Welsh language and statutory regulation.

<sup>379</sup> Moseley, C. (ed.), *Atlas of the World's Languages in Danger* (UNESCO Publishing 2010) available at <http://www.unesco.org/new/en/culture/themes/endangered-languages/atlas-of-languages-in-danger/>.

<sup>380</sup> *Id.*

According to 2011 Irish Census, there are 77,185 daily speakers outside of educational system”.<sup>381</sup> Whilst this Chapter focusses on cultural branding of Irishness and IP, language is a bedrock of many forms of ICH and tradition and is also relevant to fixation. The Irish linguistic erosion can serve as proxy indicator as to the overall status of ICH and the need for safeguarding measures.

There is no legal test that will identify ICH that might be compromised through the mechanisms put in place through IP law. ICH may be equally exploited in more subtle manners, either due to the overall economic condition, geographic location, or minority status of the practicing community. Each of these features is malleable and shaped by factors that do not definitively indicate the value or vulnerability of the ICH. For instance, Ireland’s modern economic development and geographic borders (which also define which populations will be considered minorities) has been drastically reshaped within the past 100 years. Despite the upheavals within Ireland, which have led to significant portions of the population emigrating for employment or safety, Irish ICH has persisted as cherished shared practices within the communities both domestic and internationally, especially in areas with descendants of diaspora.

Given this strong connection, Ireland has consistently enjoyed an international interest in tourism based on heritage and culture.<sup>382</sup> The basis for this type of tourism is, at its core ICH, and is subject to all of the possible entrapments of IP law, notably, trade mark and copyright. For the year 2013, Ireland launched The Gathering, a campaign to stimulate tourism to Ireland, particularly targeting diaspora and utilising traditional Irish ICH as the focus of touring and will be the primary example for the ICH and IP synergy in Ireland. The Gathering provides a useful example as it is recent, country-wide, and generated IP as well as developed ICH in Ireland. Additionally, reports have been generated by researchers and event producers, providing a wealth of data for analysis. The primary reports are:

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<sup>381</sup> *Id.*

<sup>382</sup> *About*, Discover Ireland, [discoverireland.ie](http://discoverireland.ie), last visited 21 Nov. 2017.

- The Gathering Ireland Final Report (December 2013): the first report released on the preliminary results and recommendations from the organisers (“Final Report”)<sup>383</sup>
- Tourism Ireland Annual Report (2013): the annual report by Tourism Ireland Limited (founded by Fáilte Ireland and the Northern Ireland Tourist Board), issued on major tourism initiatives and finances in Ireland and Northern Ireland (“Tourism Report”)<sup>384</sup>
- Social and Community Impacts of the Gathering in Counties Kerry and Westmeath (March 2014): a Fáilte Ireland-funded study from the Dublin Institute of Technology School of Hospitality Management and Tourism, completed in two participating counties, using surveys, interviews, and focus groups (“Community Study”)<sup>385</sup>

In relation to the research question, Ireland is an economically developed country with relatively recently fully sovereign powers, in close geographic proximity to the other case studies of Celtic-derived ICH. This chapter will explore in more detail the implications of a domestic government holding IP rights to ICH of this nature, what the impact on ICH is and may be in the future, and how this unconventional interaction might translate in environments where ICH is more actively protected from proprietisation through the Gathering as a case study, highlighting the interplay between IP laws and ICH in Ireland. This analysis is accomplished by determining the contractual obligations binding participants in the Gathering, focussing on the signed over IP rights and the new IP created to promote and document the events. Government-funded organisers created large amounts of new, branded IP for Irishness which were to be used at cultural events and also retained most rights to any submissions such as photographs and other records, or

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<sup>383</sup> *The Gathering Ireland Final Report*, The Gathering (Dec. 2013), available at [http://www.failteireland.ie/FailteIreland/media/WebsiteStructure/Documents/eZine/TheGathering\\_FinalReport\\_JimMiley\\_December2013.pdf](http://www.failteireland.ie/FailteIreland/media/WebsiteStructure/Documents/eZine/TheGathering_FinalReport_JimMiley_December2013.pdf) (“Final Report”).

<sup>384</sup> “Tourism Ireland Limited was formed by the Government of Ireland and the Northern Ireland Executive, under the auspices of the North/South Ministerial Council (NSMC), to be the overseas marketing arm of tourism for the island of Ireland and was incorporated on 11 December 2000 as a Company Limited by Guarantee not having a Share Capital. It takes policy direction from the NSMC and maintains a close working relationship with its founders, Fáilte Ireland and the Northern Ireland Tourist Board. The principal objectives of the company are to increase tourism to the island of Ireland and to support Northern Ireland in achieving its tourism potential. It is governed by its Memorandum and Articles of Association and by the Financial Memorandum approved by the NSMC and prepares detailed three-year corporate and one-year operating plans to guide its activities. The company receives its funding from both jurisdictions. A board of directors is appointed by the NSMC for a period of four years.... Aer Lingus is regarded as a related party, as it is 25.11% owned by the Government of Ireland and, as set out in note 22, Mr. Christoph Mueller is a director of both Tourism Ireland and Aer Lingus. In common with many other entities, Tourism Ireland deals in the normal course of business with other bodies which are wholly or partially owned or controlled by either the Government of Ireland or the Government of the United Kingdom of Great Britain and Northern Ireland. Tourism Ireland Annual Report (2013) (“Tourism Report”) <https://www.tourismireland.com/TourismIreland/media/Tourism-Ireland/About%20Us/Corporate%20Publications/Tourism-Ireland-ANNUAL-REPORT-2013.pdf?ext=.pdf>. 1, 61.

<sup>385</sup> Mottiar, Z., Quinn, B. and Ryan, T. *A study of the social and community impacts of the Gathering in counties Kerry and Westmeath*, SCHOOL OF HOSPITALITY MANAGEMENT AND TOURISM, DIT, (2014).

Irish cultural activities. This new as well as transferred propertisation, alongside the homogenisation and branding of the cultural identity of a country, may impact the identity association aspect of the ICH, especially in light of heightened commercialisation, as well as exclude specific uses of the resulting IP. Each of these effects could impact the development of ICH and cultural memory and the integrity of the IP framework.

## ii. ICH Practices, IP, and Commercialisation

As Ireland is renowned for its mythology and storytelling traditions, it is fitting that Irish copyright law comes with its own historical legends; Ireland may have been the location of the first copyright litigation in the 6<sup>th</sup> century. The dispute was a factor in a bloody battle, the Battle of *Cúl Dreimne*. Differing scholarly theories abound as clear documentation from the 6<sup>th</sup> century is scarce and challenging to substantiate. Additionally, the battle had become “highly fictionalized, indeed, mythologized.”<sup>386</sup> However, the Royal Irish Academy, amongst other historical sources, has documented that a dispute arose regarding unauthorised copying between two monks, St. Columba (Columcille) and his mentor, Finnian. The dispute was brought before the Diarmuid Mac Cearbhaill, king of Tara.<sup>387</sup> The dispute originated from Columcille’s clandestine copying of a monastic text, *Vulgate*,

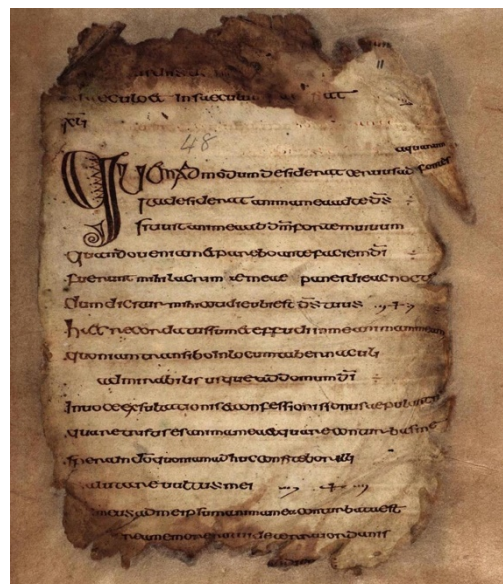


Figure 4.3: The Cathach of St. Columba, the late 6th century Irish Psalter, copied by Finnian. Source: The Royal Irish Academy, <https://www.ria.ie/cathach-psalter-st-columba>, A.D. 560-600.

<sup>386</sup> Lacey, B., *The battle of Cúl Dreimne – a reassessment*, 133 THE J. OF THE ROYAL SOC. OF ANTIQUARIES OF IRELAND 78, 78 (1 Jan. 2003).

<sup>387</sup> Irish Royal Academy, MS 24 p 25; Corrigan, R., Colmcille and the Battle of the Book: Technology, Law and Access to Knowledge in 6th Century Ireland, GIKII Conference (2007), available at [http://oro.open.ac.uk/10332/1/GIKII\\_Colmcille\\_final.pdf](http://oro.open.ac.uk/10332/1/GIKII_Colmcille_final.pdf).

which Finnian had brought back from Rome, and it was the first such copy in Ireland.<sup>388</sup> Finnian expected many visitors to come see the text and was protective of the copy.<sup>389</sup> Columcille, however, was “enraged that an old man [Finnian] should presume to act as such a reluctant gatekeeper to a book, the sharing of which was crucially important to the future of the church in Ireland.<sup>390</sup> Finnian discovered Columcille copying the text, claimed the unauthorised copying constituted theft, and brought forward the dispute.<sup>391</sup>

Finnen first told the king his story and he said “Colmcille hath copied my book without my knowing,” saith he “and I contend that the son of the book belongs to me.”

I contend,” saith Colmcille, “that the book of Finnen is none the worse for my copying it, and it is not right that the divine words in that book should perish, or that I or any other should be hindered from writing them or reading them or spreading them among the tribes. And further I declare that it was right for me to copy it, seeing the was profit to me from doing in this wise, and seeing it was my desire to give the profit thereof to all peoples, with no harm therefore to Finnen or his book.”

Then it was that Diarmaid gave the famous judgement: “To every cow her young cow, that is, her calf, and to every book its transcript. And therefore to Finnen belongeth the book thou hast written, O Colmcille.”<sup>392</sup>

The Battle of *Cúl Dreimne*, in which 3,000 people lost their lives, was also known as ‘the Battle of the Book’ as the copying arbitration decision was an impetus for the violence.<sup>393</sup>

Two reasons for the battle are given in the later sources: the killing of Curnan [son of Aed, king of nearby Connacht] and Diarmait's famous judgement about a book copied by Columba: ‘*le gach boin a boinin*’ .i. *a laogh & ‘le gach lebhur a leabhran*’ - ‘To every cow her young cow, that is, her calf, and to every book its transcript’ (O’Kelleher and Schoepperle 1918, 178-9). Columba’s kin are then said to have decided to make war on Diarmait. The story about the copy, however, is not found in any source earlier than Manus O’Donnell’s *Betha Colaim Chille* composed in 1532; indeed, neither of the stated reasons for the battle can be said to be compellingly believable in terms of mid sixth-century realpolitik.<sup>394</sup>

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<sup>388</sup> *Id* at 5.

<sup>389</sup> *Id*.

<sup>390</sup> *Id*.

<sup>391</sup> *Id*.

<sup>392</sup> “Mine [Corrigan] is something of a clumsy translation of the original argument recorded in Manus O’Donnell, *Betha Colaim Chille* (1532) and it relies heavily on versions in Manus O’Donnell, *Betha Colaim Chille* (1532) Edited and translated by A. O’ Kelleher and G. Schoepperle as *Betha Colaim Chille/ Life of Columcille* (University of Illinois Press, 1918), p178-179, Lucy Menzies, *Saint Columba of Iona* (J.F.M. Books, 1992, originally published in 1920), p.25 and Padraic Colum, *The Legend of Saint Columba* (Sheed and Ward, London, 1936), p76-81, but it’s [sic] meaning remains fairly clear. Colmcille was an accomplished and impressive public speaker, much more so than my efforts at getting his meaning across would make it appear. O’Donnell’s account: *Do inneis Finden a sceila art us don righ, ass ed adubhairt ris: “Do srib C.C. mo leabhur gan fhis damh fen,” ar se, “aderim corub lim fen mac mo leabhur.” “Aderim-se,” ar C.C., “nach mesde lebhur Findein ar srib me ass, nach coir na neiche diadha do bi sa lebhur ud do muchadh no a bacudh dim fein no do duine eli a scribhadh no a leghadh no a siludh fan a cinedachaib; fos aderim ma do bi tarba dam-sa ina scribhadh, corb ail lium a chur a tarba do no poiplechaibh, gan dighbail Fhindein no a lebhair do techt ass, cor cedaigthe dam a scribudh.” Is ansin ruc Diarmaid an breth oirrdearc .i. “le gach boin a boinin” .i. laugh “le gach lebhur a leabhrán.”* 13 A. O’ Kelleher and G. Schoepperle translation: *Id*. at 12-13.

<sup>393</sup> *Id*.

<sup>394</sup> Lacey, *supra* note 386, at 78.

In the modern day, it may seem extreme that a key factor of a battle with heavy casualties, certain historical underlying factors were key to instigating violence:

- Colmcille's anger at Diarmaid's decision on the book;
- Colmcille's devotion to spread of learning and the growth of the church through the copying and making available of the holy scriptures as widely as possible was undermined at a stroke
- Colmcille's anger at violation of his and the church's sanctuary for Curnan (remember church sanctuary was absolutely sacred and it was not the first time Diarmaid had crossed the line on it);
- Increasing tensions between Diarmaid and northern O'Neills, Colmcille's clan;
- The battle for religious dominance between Christianity and paganism – Colmcille and the majority of his brotherhood were insulted at the open and possibly increasing support Diarmaid continued to display towards his druids and they found the pageantry and hedonism of the pagan festival offensive to the church and to their God.
- Colmcille's pride and reputation had taken a serious battering something he felt deeply. (It's possible this was the beginning of a midlife crisis which eventually contributed to his decision to emigrate to Iona). Used to being revered, Diarmaid's court had treated him as selfish and small minded.
- MacDe's Machiavellian political machinations on behalf of the druids. Colmcille, though sorry so many men had to die for it, still felt after the battle that his cause had been just.<sup>395</sup>

Whether or not the Battle of the Book truly was fought in part over the earliest notions of copyright, the arbitration, even highly mythologised, provided modern copyright jurisprudence with an oft cited judgement and foundational concept: "To every cow her young cow, that is, her calf, and to every book its transcript."<sup>396</sup> Even weighing the varying translations and records of the arbitration, the issues and debates surrounding contemporary IP persist into modern times, even as technology, access, and statutory intervention have exponentially progressed.

Ireland shares much of its modern copyright law history with the United Kingdom from when the country was a part of the United Kingdom. Following the Irish War for Independence, which commenced in 1919 and culminated in Ireland gaining independence in 1921 under the Articles of Agreement between Great Britain and Ireland, the country has developed its own body of IP law.<sup>397</sup> Prior to 1921, contemporary IP was governed by U.K. IP laws. As Ireland was restructuring the country's fundamental administrative and legislative laws and other infrastructure, IP laws were delayed for several years after independence. The

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<sup>395</sup> Corrigan, *supra* note 387, at 8.

<sup>396</sup> *Id.* at 13.

<sup>397</sup> Northern Ireland is still governed by IP law of the United Kingdom; the Articles of Agreement between Great Britain and Ireland (1921).

Irish Patent Office was established with the first domestic statutory instrument for IP, the Copyright Act 1927.<sup>398</sup> The next notable development in Irish copyright law occurred with the Copyright Act 1963.<sup>399</sup>

Irish IP is currently regulated under the Copyright and Related Rights Act 2000, most recently amended 2007, as well as under the auspices of European Union IP law and the InfoSoc Directive.<sup>400</sup> The Irish Patents Office also includes a few sentences on the legal philosophy and justification for awarding copyright to literary and artistic works, which is recognised as a ‘property right’ by Irish courts:

First, persons who create works of the intellect or who invest in their creation and dissemination are entitled as a matter of human right to secure a fair return for their creativity and investment. Secondly, unless the rights of creators and investors to a fair return are supported, the community as a whole would be impoverished by the fact that, in many cases, these works would not be created or developed.<sup>401</sup>

Here, the Irish Patents Office recognises copyright as a human right. Very few scholars have made this connection explicit, and the concept is considered controversial.<sup>402</sup> Laurence Helfer and Graeme Austin have argued that, as globalisation and technology accelerate, human rights will ‘inevitably’ intersect increasingly frequently with IP rights; further, they have constructed a framework for understanding this interface between human rights and IP.<sup>403</sup>

Cultural rights are more widely recognised in a human rights context than is IP, particularly in international treaties and EU legislation. The 1948 Universal Declaration of Human Rights (“UDHR”), and the 1966 International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) are both prominent examples of international treaties that enshrine cultural rights as human rights; Ireland is a

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<sup>398</sup> Copyright Act (1927).

<sup>399</sup> Copyright Act (1963).

<sup>400</sup> Copyright and Related Rights Act 2000, amended 2007. The InfoSoc Directive is more fully explored *supra* in Chapter III.

<sup>401</sup> *Copyright: A Brief History*, Irish Patents Office, <https://www.patentsoffice.ie/en/Student-Zone/Copyright-a-brief-history/>, last visited 28 Nov. 2017.

<sup>402</sup> Helfer, L. and Austin, G., *HUMAN RIGHTS AND IP: MAPPING THE GLOBAL INTERFACE*, (Cambridge 2011) 504.

<sup>403</sup> *Id.* at 512-13. This framework provides an approach to human rights and IP that is compelling, but outside the scope of this dissertation. Triangulating ICH into this framework is a matter for the dissertation author’s future research.



party to both treaties.<sup>404</sup> Article 27 of the UDHR states that “everyone has the right freely to participate in the cultural life of the community.”<sup>405</sup> Whilst the UDHR outlines a human right to general cultural participation, the ICESCR more specifically addresses some of the theoretical underpinning of copyright, “proclaim[ing] the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations”.<sup>406</sup>

As discussed *infra*, in some instances, copyright will enclose ICH when it evolves into tangible products (and sometimes even when in intangible form in jurisdictions without a fixation requirement).<sup>407</sup> The Irish Patent Office’s second point emphasises that copyright is meant to incentivise dissemination of these artistic and literary works to the community, and without a fair return, the works would not be created. However, this is not the case with ICH. Communities practice ICH as a collective group of varying sizes and pass these practices down through generations. So in the case of manifestations of ICH that come under the umbrella of IP protection, whether intentionally or not, the theoretical foundation of awarding limited exclusive rights or fair return are not present or are weak. In fact, the opposite may be achieved by awarding control over manifestations of ICH to an individual or corporation, which may prevent the practice of the ICH by the community. Commercial exploitation in order to obtain a financial return may also affect the authenticity of and access to the ICH.

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<sup>404</sup> Universal Declaration of Human Rights (1948) (“UDHR”); International Convention on Economic, Social, and Cultural Rights (1966) (“ICESCR”).

<sup>405</sup> Art. 27, UDHR.

<sup>406</sup> *General Comment 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, Committee on Economic, Social and Cultural Rights, 43<sup>rd</sup> Session, 2-20, Nov. 2009. E/C.12/GC/21.

<sup>407</sup> *Infra*, Chapter V.

### iii. The 2013 Gathering: Irishness as ICH and Tourism

The Gathering 2013 was a major tourism initiative in Ireland, spearheaded by Fáilte Ireland. Citizens were financially and socially incentivised to contribute to The Gathering events. Promotional materials, and archiving of existing ICH such as family gatherings, existing musical and dance events, festivals, and



Figure 4.4: The Gathering 2013 Logo. Source: The Gathering Ireland Final Report (2013).

other events that epitomised ‘what it means to be Irish.’<sup>408</sup> The *Chairman’s Statement* in the *Tourism Ireland Annual Report*

promoted the Gathering throughout the year to the 70 million people across the world who feel linked by family, friends or otherwise with Ireland, with a particular focus on engaging with the diaspora.<sup>409</sup>

Further informational advertising presented the Gathering as “a unique chance for everyone to join a countrywide, citizen-led

initiative reaching out to Ireland’s global diaspora and bring them home for an unprecedented yearlong celebration. It also offers an opportunity for each and every one of us to play our part in Ireland’s renewal; to make a significant contribution to our journey of recovery.”<sup>410</sup>

Participants were to use the Gathering branded colours, promotional materials, and to sign over the copyright of photographic and data regarding visitors.<sup>411</sup> The propertising and identifying of ‘Irishness’ through branding brings to the fore many of the issues that can arise when ICH and IP meet. The Gathering brings additional confounding factors: the IP belongs to the Irish government and the practicing community, for the most part, are members of the majority population in the modern Ireland.

“Though understandable – as ICH can represent a formidable tool to foster economic income (especially through tourism) as well as to improve the international visibility of the state – such an approach may conflict with the main values attached to ICH...”<sup>412</sup>

<sup>408</sup> The Gathering Ireland Local Community Fund Application Form (2013), Appendix 1.

<sup>409</sup> *Supra* note 383, at 4.

<sup>410</sup> *Longford County FAQs*, The Gathering 2013, 3

[http://www.longfordcoco.ie/uploadedFiles/LongfordCoCo/Our\\_Departments/Community\\_Enterprise/Documents/The\\_Gathering/The%20Gathering%20FAQs.pdf](http://www.longfordcoco.ie/uploadedFiles/LongfordCoCo/Our_Departments/Community_Enterprise/Documents/The_Gathering/The%20Gathering%20FAQs.pdf), last visited 27 Nov. 2017.

<sup>411</sup> *The Gathering Ireland 2013 Magazine*, The Gathering, 6  
<http://viewer.zmags.com/publication/7afcf26c#/7afcf26c/1>, last visited 21 Nov. 2017.

<sup>412</sup> Lenzerini, *supra* note 168, at 119.

Irish diaspora was a primary target for the Gathering's substantially funded marketing campaign, which included:

- Campaigns placed on Irish diaspora media, both print and online;
- Mass media campaigns such as the sponsorship of the Navy v Notre Dame football game on the CBS sports network in the US;
- Bespoke social media campaigns such as 'How Irish are You?' See Appendix E for more detail;
- PR activity across all media and markets throughout the lifetime of the project. This included the high profile story on Hollywood actor, Tom Cruise, discovering the full story of his Irish ancestral roots which received massive international media coverage;
- Special promotions at the top Irish festivals in the US, some with attendances in excess of 100,000 people. One of the campaigns used to communicate with the diaspora was that of the Ireland Family History Facebook page which was developed as a dedicated platform to encourage and facilitate engagement around the interest areas of ancestry and family heritage. It enabled focused communication with the Irish Diaspora worldwide without alienating the wider tourism audience for the Gathering Ireland project.<sup>413</sup>

The Gathering heavily relied on social media, and a "key element of the digital strategy was to create a constant stream of interesting and relevant content to engage online audiences".<sup>414</sup> This stream included web articles, blogs on individual events, personal accounts of Gatherings, and user-generated photos of gatherings on a special Facebook App".<sup>415</sup> The marketing and social media budget composed 67 percent of the entire project budget.<sup>416</sup>

ICH documentation through a tourism initiative can serve the function of material preservation for cultural activities but can also alienate a practicing community from its own ICH.<sup>417</sup> As the newly formed IP then became the property of Fáilte Ireland to exploit for marketing purposes, the commoditisation of the ICH indicates a higher potential for separation from authentic expression.<sup>418</sup> This type of mass commoditisation of ICH through IP in order to generate revenue is utilised in many types of tourist

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<sup>413</sup> Final Report, *supra* note 383, at 41.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* Contains photo of the Cronin Family Gathering, around 25 people with children. Labelled as "Fig 6.8: Example of image submitted to The Gathering Facebook Gallery App."

<sup>416</sup> Final Report, *supra* note 383, at 48-49.

<sup>417</sup> Comaroff and Comaroff, *supra* note 35, at 3.

<sup>418</sup> See *infra* for Terms and Conditions for Submissions to the Gathering website.

initiatives. However, the manner and extent of the enclosure of the ICH-cum-IP is of significance for analysing the risk level of this intrinsic interaction.

A similar type of enclosure, based on IP rights and of perhaps the largest scale, is undertaken during the Olympic Games.<sup>419</sup> This use of IP for marketing ICH is distinguishable in that the IP is restricted through special legislation and parties are highly sophisticated.<sup>420</sup> The special legislation related to the 2012 Olympic games related primarily to trade marks and extended protection beyond what could have been protected by trade mark registration.<sup>421</sup> The first category (List A) of the legislation reinforced through statute what would have been protected by trade mark: the name, symbols, and confusingly similar variations of ‘the London Olympics 2012’.<sup>422</sup> The second category (List B) included additional words and symbols associated with the Olympic games, preventing local residential communities and businesses from using common phrases related to the Olympic and “prohibited the commercial use of any combination of two words from Lists A [Games, Two Thousand and Twelve, 2012, Twenty Twelve] and B [Gold, Bronze, London, medals, sponsor, summer], or any two words from List A. The use of these words or symbols would not normally be protected under existing trade mark law in any of the jurisdictions concerned”.<sup>423</sup>

This type of governmental intervention “arguably extends the definition and role of trade mark to dissuade not only efforts to confuse or deceive consumers, but any effort to associate one’s product or service with the public goodwill surrounding the events.”<sup>424</sup> The framework of IP has been used as a sword, rather than a shield, by a developed country’s government. This legislation was enforced against

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<sup>419</sup> Erickson, K. and Wei, L., *Intellectual Property Enclosure and Economic Disclosure in the 2012 Olympic Games*, 37(3) MEDIA, CULT. & SOC. 409 (2015).

<sup>420</sup> London Games Act 2006.

<sup>421</sup> Erickson and Wei, *supra* note 419, at 416.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 417.

<sup>424</sup> *Id.*

non-sponsor citizens who likely participated in the Olympics as observers, celebrants, or volunteers, pushing the boundaries and distorting the theoretical underpinning of IP law through statutory modification in support of commercial exploitation. Whilst this example pertains to trade mark and commercial activity, much of the justification for bringing a resource-intensive event of that scale to a city is to enrich the local community; this type of special legislation has a chilling effect on community activity outside of the commercial realm as well.<sup>425</sup> Thus the justification can be along the same lines, and similar restrictions are put on the community events with the Gathering trade mark. Depending on scale and potential financial profitability, the higher likelihood a legislative intervention in similar fashion. Additionally, this special legislation can negatively impact on the participating community ICH and the integrity of IP law.<sup>426</sup>

#### **iv. Joining the Gathering**

Potential Irish volunteers and participants, foreign and domestic, were recruited through a variety of media and live events and were directed to the Gathering website for more information, to upload photos or details of events, and to apply for funding. As of September 2017, the Gathering website is no longer online and redirects to a legacy page on Discover Ireland.<sup>427</sup> However, the original pages from the Gathering website are accessible through internet archives, such as the Wayback Machine.<sup>428</sup>

Fáilte Ireland described the Gathering as a ‘People’s Project’ and strongly relied on volunteerism

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<sup>425</sup> “The IOC issued guidelines discouraging use of the protected phrases by journalists, conference organisers, charities, and not-for-profit groups. Enforceable or implied restrictions upon non-commercial or quasi-commercial users could have the effect of dampening criticism of the Olympics or preventing wider engagement by minority groups in media conversations.” *Id.* at 419.

<sup>426</sup> See ‘Submissions Clause’ *infra*.

<sup>427</sup> *The Gathering*, [www.thegatheringireland.com](http://www.thegatheringireland.com), now redirecting to The Gathering Discovery Ireland <http://www.discoverireland.ie/The-Gathering-Ireland>, last visited 22 Nov. 2017.

<sup>428</sup> The Wayback Machine, <https://archive.org/web/>, last visited 27 Nov. 2017.



of Irish residents.<sup>429</sup> In order to gain sufficient domestic momentum and participation, the Gathering utilised traditional marketing through television and the internet but also direct community outreach. Notably, all Irish school children were given free postcards to send to their relatives overseas to invite them to Ireland to for the Gathering.<sup>430</sup>

*Figure 4.5: The Gathering Invitation Postcard from the 'Write and Invite' Campaign. Source: The Gathering Final Report (2013) 25.*

As an additional incentive and to facilitate hosting overseas visitors, participants could apply for funding for their events from a €1 million pot provided by IPB Insurance, based on the number of overseas visitors that were recruited specifically for the Gathering and who would have not visited Ireland otherwise.<sup>431</sup> This chart provides the amount of funding that is available based on the number of overseas visitors:

<sup>429</sup> Final Report, *supra* note 383, at 2.

<sup>430</sup> *Id* at 25.

<sup>431</sup> Final Report, *supra* note 383, at 4.

<b>Fund Amount €</b>	<b>Minimum Number of Overseas Visitors Required</b>
€500	10
€1000	20
€1500	30
€2000	40
€2500	50

*Figure 4.6: Overseas Visitors Required for Funding, The Gathering. Source: Community Funding Toolkit, The Gathering 4, Appendix 1.*

Various types of gatherings could be considered for funding and could include school reunions, sports clubs hosting overseas teams, music, cultural or business gatherings involving overseas visitors. This list is by no means exhaustive. The key criterion is the ability of the proposed Gathering to attract overseas visitors to the county or locality.<sup>432</sup>

Applications for the micro-funding and nearly all other transactions that would relate to gatherings and submission of related IP were made via the Gathering website. Users were required to agree to the following terms to participate:

Entering into this Site indicates that the user (either "user" or "you" in this document) has reviewed the Terms of Use and has agreed to be bound by them as well as our [Privacy Policy](#). If you do not agree to these terms you must leave the Site immediately.  
The Site is operated by The Gathering Project 2013 Limited (either "COMPANY" or "we"). The COMPANY is a private limited company, incorporated under the laws of Ireland under registered number

<sup>432</sup> The following items and expenses are excluded from the fund: "Infrastructural / tourism development projects / capital costs for the county; Festivals which have already received funding under the Fáilte Ireland National or Regional Festivals Fund; Spend on alcoholic beverages, fines, penalty payments, legal cost, audit fees, financial consultancy fees and wages and salaries of consultants; In general the cost of items for resale are ineligible." *Community Funding Toolkit, The Gathering, 4, available at [http://www.failteireland.ie/FailteIreland/media/WebsiteStructure/Documents/2\\_Develop\\_Your\\_Business/Key%20Pr ojects/Funding\\_Toolkit\\_FINAL.pdf?ext=.pdf](http://www.failteireland.ie/FailteIreland/media/WebsiteStructure/Documents/2_Develop_Your_Business/Key%20Pr ojects/Funding_Toolkit_FINAL.pdf?ext=.pdf)*, last visited 27 Nov. 2017; Appendix 1.

21207, and having its registered office at 88 – 95 Amiens Street, Dublin 1 and operating as a special purpose vehicle as a subsidiary of Fáilte Ireland.<sup>433</sup>

The Community Toolkit provides an Application Form.<sup>434</sup> On the Application Form, applicants agree to:

- Deliver a minimum of 10 incremental overseas visitors per €500 Fund awarded to the individual Gathering (where incremental overseas visitors are those additional visitors over and beyond those which would normally visit the county).
- Demonstrate a capacity to deliver i.e. the Gathering Organiser(s) must provide evidence of and have a clear plan for tapping into international networks
- Promote the event and provide a potential for media coverage (including the use of the co-branded IPB Insurance / Gathering Ireland logo). All logos and brand guidelines can be downloaded from the website [www.ipb.ie/ipbgathering.html](http://www.ipb.ie/ipbgathering.html).
- Contribute at a local level to the city's / county's calendar of Gathering events in relation to attracting overseas visitors and complement the national Gathering Ireland 2013 programme
- Upload the event on the Gathering Ireland website: [www.thegatheringireland.com](http://www.thegatheringireland.com)
- Be either a new Gathering / event which will take place in 2013 or an addition to an existing event which is being expanded to specifically deliver incremental overseas visitors<sup>435</sup>

The payment is made in two instalments, the first half on return of an acceptance letter and the second half on return of the Gathering Post Event Report Form:

In order to receive this final payment, the successful fund recipient must complete the Gathering Post Event Report Form which will be supplied by [name of Local Authority] and provide the following:

- 1) Firm evidence that the gathering event has taken place
- 2) Receipts for the costs which were covered by the Fund
- 3) Listing of overseas visitors who attended the event.<sup>436</sup>

If applicants accept the community micro-funding, they agree to the following funding criteria:

#### 2.3. Adherence to Fund Criteria

In accepting this letter of offer you hereby undertake to:

- Deliver a minimum of 10 incremental overseas visitors per €500 Fund awarded to the individual Gathering (where incremental overseas visitors are those additional visitors over and beyond those which would normally visit the county).
- Demonstrate a capacity to deliver i.e. the Gathering Organiser(s) must provide evidence of and have a clear plan for tapping into international networks
- Promote the event and provide a potential for media coverage (including the use of the cobranded IPB Insurance / Gathering Ireland logo). All logos and brand guidelines can be downloaded from the website [www.ipb.ie/ipbgathering.html](http://www.ipb.ie/ipbgathering.html).<sup>437</sup>

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<sup>433</sup> [Thegatheringireland.com](http://Thegatheringireland.com), *supra* note 427.

<sup>434</sup> Community Funding Toolkit, *supra* note 432.

<sup>435</sup> *Id* at 10-11.

<sup>436</sup> *Id.* at 5.

<sup>437</sup> This page is no longer live but can be accessed at: *Guide to Using the IPB Gathering Ireland Fund 2013 Logo*, IPB Marketing and Communications,



- Contribute at a local level to the city's / county's calendar of Gathering events in relation to attracting overseas visitors and complement the national Gathering Ireland 2013 programme
- Upload the event on the Gathering Ireland website: [www.thegatheringireland.com](http://www.thegatheringireland.com)
- Be either a new Gathering / event which will take place in 2013 or an addition to an existing event which is being expanded to specifically deliver incremental overseas visitors.<sup>438</sup>

The material that is uploaded to the Gathering Ireland website will be subject to the IP Terms and

Conditions, as will the data that is supplied regarding proof of overseas attendees. The data provided on the third-party attendees is:

- Total number of overseas visitors you estimated would attend your Gathering event (as per the application form).
- Total number of overseas visitors who actually attended your event.
- Please indicate from what countries they visited from and the number associated with each. e.g. 10 from Australia, 30 from the United States etc
- What evidence can you provide of the actual number of overseas visitors who attended the event? (e.g. photograph; registration form; visitor book records; copy of flight boarding cards etc)<sup>439</sup>

Following the Gathering, IPB put out a Press Release, detailing the outputs and future plans for its sponsorship of the event:

Following on from the huge success of IPB's partnership with The Gathering 2013, IPB has established a tripartite initiative with Fáilte Ireland & the local authorities in mobilising local communities to harness diaspora links for the benefit of local tourism.

The objectives of the initiative are:

- To provide support in the form of small-scale funding incentives for community-based tourism events that have the capacity to carry through the legacy of The Gathering in 2014 and beyond;
- To create a national network of local events with the capacity to deepen diaspora linkages and networks that have been developed or re-activated during The Gathering year;
- To foster the growth of strong county diaspora networks on the basis that diaspora relationships are rooted in 'people and place'.<sup>440</sup>

In sum, citizen participants in the Gathering, but especially those who had received funding, were required to make submissions of records of their events, including photographs and personal data of tourists, subject to the terms and conditions on the Gathering website. In addition to those records, participants agreed to promotion and recruitment for this tourism initiative. The government's

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[https://web.archive.org/web/20130824052851/http://www.ipb.ie:80/pdf\\_download\\_new.php](https://web.archive.org/web/20130824052851/http://www.ipb.ie:80/pdf_download_new.php), last accessed 21 Nov. 2017.

<sup>438</sup> Community Funding Toolkit, *supra* note 432, at 10-11.

<sup>439</sup> *Id* at 16-17.

<sup>440</sup> *New Community Tourism Initiative, News and Events*, IPB (17 Apr. 2014)

[https://web.archive.org/web/20160107011958/http://www.ipb.ie/cse/news\\_and\\_events.34.html](https://web.archive.org/web/20160107011958/http://www.ipb.ie/cse/news_and_events.34.html).

(company's) ownership of IP is a central issue for this dissertation, and whether or not the event received funding through the IPB fund, any intangible submissions to the Gathering site give all rights to Fáilte Ireland.

The IP clause in the Terms and Conditions on the Gathering website is fairly standard. It reads:

This Site may contain trade marks and service marks. All marks are the property of the proprietors of such marks as indicated unless otherwise provided. All rights in the IP contained in this Site including copyright, trade marks, trade secret and patent rights are reserved. The editorial content of the site and all text, graphics, logos, icons, images, audio clips and software is copyright of the Company and/or the authors, photographers and illustrators who contribute material to the Site, and the user shall not alter or remove any copyright symbol, or any other identification or information, concerning the authorship or ownership of any of the content of the Site. Access to this Site does not constitute a right to copy or use any of the IP of the COMPANY or its suppliers and users are not permitted to copy, market, resell, distribute, retransmit, publish, upload, download, store, display in public, alter, or modify the content contained on this Site or otherwise transfer or commercially exploit, in any form, any of the content of the Site.

The Gathering Ireland 2013 brand and logo

The Gathering Ireland 2013 brand and logo is permitted for use only in relation to authorised Gathering events. The brand and logo is not authorised in any circumstances for use for commercial purposes or in association with other brands or marks without the prior written consent of the Gathering Ireland 2013. Any unauthorised use of the brand or logo will be regarded as an infringement of IP rights and subject to legal proceedings.

Fáilte Ireland logos

The user will not use or display the name or logo of The Gathering, Fáilte Ireland, Discover Ireland or any similar name or logo, or act in any way that would imply that the user is an agent of the Company and / or Fáilte Ireland.<sup>441</sup>

The IP Clause contains boilerplate language which would be found on most sites on the internet. Because the website interface is a fixed form and contains original elements that are copyrighted or are trade marked, the IP Clause contains expected terms. The restrictions on the Gathering Ireland 2013 brand and logo, insofar that it can be used only in relation to authorised Gathering events, is consistent with the overall message. However, the Submissions Clause presents language that create IP enclosures around ICH submissions, which is not otherwise flagged to the lay user:

Submissions

All remarks, suggestions, ideas, graphics or other information communicated to the COMPANY through this Site will forever be the property of the COMPANY and at the free disposal and use

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<sup>441</sup> *Terms and Conditions*, Thegatheringireland.com, *supra* note 427.

of the COMPANY. Unless otherwise specified in writing, all material submitted to the COMPANY will be presumed to be public and the COMPANY will not be required to treat the information as confidential. The COMPANY shall have exclusive ownership of all present and future existing rights in the information, without compensation to the person sending the information. If any information is confidential do not submit it.<sup>442</sup>

The Submissions Clause does not refer directly to IP but to ‘remarks, suggestions, ideas, graphics, or other information’ submitted. These submissions will be exclusively owned property of the company, along with any and all rights, without compensation. The legal mechanism here will be IP. However, the drafters attempt to avoid pitfalls of copyright law, wherein a participant might submit a photo and have authorial rights. The Submission Clause classes this as ‘information’, for which all exclusive rights transfer to the Company. Also subject matter that rightly would fall under ‘information’ and not copyright, like ideas, are similarly owned by the Company once submitted. It is worth noting that the Company also disclaims any liability for the confidential maintenance of this information; some of the information that could be provided as proof of attendance of overseas visitors included copies of boarding passes and other personal information of individuals who were not party to this agreement.<sup>443</sup>

The precedent of requiring IP submission and ownership transfer to a government in exchange of monetary support has myriad future implications. Further, it is not a subject covered by the Community Study and was likely not contemplated by the Gathering participants nor the researchers as a potential issue of concern.

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<sup>442</sup> *Id.* The Fáilte Ireland website, however, is still active. The ‘Submissions’ section of their Terms and Conditions reads similarly: Submissions: All remarks, suggestions, ideas, graphics or other information communicated to the Authority through this Website will forever be the property of the Authority and at the free disposal and use of the Authority. Unless otherwise specified in writing, all material submitted to the Authority will be presumed to be public and the Authority will not be required to treat the information as confidential. The Authority shall have exclusive ownership of all present and future existing rights in the information, without compensation to the person sending the information. If any information is confidential do not submit it.” *Legal Terms*, Fáilte Ireland, <http://www.failteireland.ie/Footer/Legal-Terms.aspx>, last visited 21 Nov. 2017.

<sup>443</sup> Community Funding Toolkit, *supra* note 432, at 10-11.

The presentation of the Gathering as a celebration and benefit for Irish residents, throughout the event and in the *IPB Press Release*, is marred by the underlying reality that can be found in the contractual terms. The purpose is to generate income from overseas visitors, particularly diaspora, a large number of whom left due out of necessity, not desire. The micro-funding availability turns on the number of verifiable overseas tourists that could be attracted to an event or activity that was already practiced as a part of the community's ICH, now leveraged for tourism income. This conversion to marketing Irishness itself presents the concerning probable loss of authenticity. As noted throughout this dissertation, authenticity and community identity association are crucial for ICH and the benefits that come along with it. Participants not only volunteered, unpaid, for this effort but also submitted their IP related to their personal ICH – along with the personal data of tourists for events that obtained micro-funding – to the Gathering website. According to the *Submissions Clause* of the *Terms and Conditions*, all submissions become the exclusive property of the Company.<sup>444</sup>

Thus, when the ownership of this ICH-cum-IP transfers to a government agency, particularly as it is related to the essence of 'what it means to Irish', the authenticity and identity-reflecting function of ICH is threatened. Although no nefarious use is noted, the participants signed over all present and future rights to their photos and personal data of third-party participants. This combination of ICH and IP terms embodies the subtler erosion of ICH and over-extension of IP rights that exists in developed countries with a strong legal emphasis on IP enforcement.

## **v. Community Consultation and Results**

The 2003 Convention specifies that safeguarding activities shall include consultation with communities, groups, and individuals:

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and,

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<sup>444</sup> Thegatheringireland.com, *supra* note 427.

where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.<sup>445</sup>

Even though Ireland was not a party to the 2003 Convention during the Gathering, community involvement and consultation featured prominently. During the year, “[t]he Board met eight times in 2013, and the meetings, which took place at various locations around the island including Dublin, Ballyfin, Belfast, Coleraine and Killarney, offered the opportunity for Board members to engage with local industry representatives.”<sup>446</sup> Whilst focus groups were also utilised, with one participant emphasising that “[the Gathering] gave people an acute awareness of local history and culture”, the Gathering was clear that the purpose was income generation: “From a tourism perspective, this can be capitalized on.”<sup>447</sup>

In order to leverage the engagement in ancestral connections, local history, and culture and stimulate domestic participation, the Gathering engaged citizens as ‘Enablers’. These Enablers were encouraged to directly reach out to family members and business associates:

Starting in the period around St. Patrick's Day 2012, a concerted campaign was undertaken to canvass the support of key members of the Irish diaspora with a particular focus on the US and Canada which accounts for over 50% of the global Irish diaspora. The UK as well as Australia and New Zealand were also strongly targeted and there was also a push in certain key European markets. With the support of Irish embassies abroad, a total of 40 Gathering launch events were staged in 27 cities with an estimated attendance of 17,000 people of Irish ancestry or Irish affinity. Many of these ‘road-shows’ were led by the Minister for Transport & Tourism or the Minister of State for Tourism & Sport. The Ministerial-led promotions provided significant media opportunities abroad with a resultant increase in awareness about The Gathering and about Ireland as a tourism destination in general. The events provided an opportunity to directly brief key influencers and leaders in Irish communities abroad and to seek their active support to spread the word about The Gathering or to engage directly by bringing a group back to Ireland in 2013. Some responded directly to the call. Some 500 or so, or 10% of the total number of Gatherings organised in 2013, were organised or assisted by overseas ‘enablers’. These ranged from family and friends Gatherings to business-type events with some business leaders of Irish origin or

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<sup>445</sup> The 2003 Convention, *supra* note 4, Art. 15.

<sup>446</sup> Tourism Ireland Annual Report (2013). Available at <https://www.tourismireland.com/TourismIreland/media/Tourism-Ireland/About%20Us/Corporate%20Publications/Tourism-Ireland-ANNUAL-REPORT-2013.pdf?ext=.pdf> 5.

<sup>447</sup> Community Study, *supra* note 385, at 7.

ancestry diverting key meetings and conferences to Ireland in support of The Gathering. Whilst some of those ‘enablers’ who responded positively to the invitation to support The Gathering had previous active links with Ireland, others were activated for the first time. Tourism Ireland will continue to develop those relationships as part of their diaspora programme in the future and in line with the wider government strategy on diaspora engagement.

Messaging the Diaspora: A targeted approach was adopted by Tourism Ireland to promote The Gathering to diaspora audiences in priority markets. A range of promotional and communications tools were used including:

- Campaigns placed on Irish diaspora media, both print and online;
- Mass media campaigns such as the sponsorship of the Navy v Notre Dame football game on the CBS sports network in the US;
- Bespoke social media campaigns such as ‘How Irish are You?’ See Appendix E for more detail;
- PR activity across all media and markets throughout the lifetime of the project. This included the high profile story on Hollywood actor, Tom Cruise, discovering the full story of his Irish ancestral roots which received massive international media coverage;
- Special promotions at the top Irish festivals in the US, some with attendances in excess of 100,000 people. One of the campaigns used to communicate with the diaspora was that of the Ireland Family History Facebook page which was developed as a dedicated platform to encourage and facilitate engagement around the interest areas of ancestry and family heritage. It enabled focused communication with the Irish Diaspora worldwide without alienating the wider tourism audience for the Gathering Ireland project.<sup>448</sup>

To encourage participation and engagement and event planning that can be resource intensive, engagement with Enablers emphasised nationals and cultural pride as well as purported local economic benefits. A *Frequently Asked Questions* document provided by Longford County included a section on who will benefit from the Gathering:

Everyone will benefit from The Gathering Ireland 2013. One of the objectives is to revive the sense of pride in our country and give a platform and opportunity to the people of Ireland and their diaspora to show their friends, family and loved ones what they are proud of. It offers Irish people and the Irish diaspora the chance to develop long lasting relationships and a deeper connection with the landscape, culture and country. It will contribute to restoring Ireland's image internationally as a welcoming country where visitors will receive the 100,000 welcomes that the people of Ireland are renowned for, delivering an authentic experience which differentiates Ireland from other destinations. The Gathering Ireland 2013 will aim to build a relationship between Ireland, its Diaspora and other business sectors, creating a foundation that Tourism Ireland and Fáilte Ireland can build on and exploit in the coming years. Nationally success is an additional 325,000 overseas visitors to Ireland which will generate an additional €170 million in revenue to the Irish economy in 2013 and create 2720 new jobs. Locally, success can be different between communities. There are so many facets to this initiative and therefore various stages of success from buy-in at national and local levels to the number of e-invites issued, number of events pledged and the number of Diaspora motivated to travel.<sup>449</sup>

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<sup>448</sup> Final Report, *supra* not at 38-40.

<sup>449</sup> Longford County FAQs, *supra* note 410, at 4.

The primary purpose of the Gathering was to generate income through tourism geared towards diaspora.<sup>450</sup> However, the Final Report also took care to note the positive social impact on participating communities.<sup>451</sup> The Community Study similarly presented an overall rosy picture of the outcome of the Gathering.<sup>452</sup> Ronan Foley, Chief Executive of IPB Insurance said:

Last year, an estimated 7% uplift in tourism numbers injected somewhere between €170-€220 million into the Irish economy. These results are remarkable. What is even more heartening is that tourism figures in the first quarter of this year are ahead of last year, suggesting that not only was the Gathering a success, it continues to grow in momentum. The public private partnership model adopted for The IPB Gathering Ireland Fund has proven very successful. IPB Gathering Fund regional flagship events accounted for at least €50 million in additional income for regional economies from additional overseas visitors. This figure is so important. Because it proves that every cent invested in Ireland is money well spent. It shows us that the Gathering works. It shows us that the model of social engagement through public private partnership also works.<sup>453</sup>

Putting forth another highly positive message about the Gathering, speaking at the launch on the 15 April the Minister of State for Tourism and Sport, Michael Ring said:

The Gathering was a great success all round. It brought people back to Ireland, and it got us all working together. But the real reason it worked so well was because of the passion and drive of thousands of volunteers and communities around the country. People often ask me what the legacy of The Gathering should be. I believe The Gathering has brought communities together, near and far. Today's initiative means we can support that legacy and build on the new relationships, and the many new projects that came out of 2013. This jointly funded initiative will provide €1m over the next three years and will be administered at city and county level, supporting up to 700 local community-based events and festivals each year.<sup>454</sup>

The Gathering did importantly highlight that residents are receiving and acknowledging 'non-monetary' benefits, and the event and concept indicates a positive direction in that a developed government is championing ICH even though it cannot be neatly quantified.<sup>455</sup> In calculating the impact of the Gathering in ways that can be quantified, the Final Report offered the following conclusions and recommendations:

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<sup>450</sup> See Tourism Report, *supra* note 384, at 4.

<sup>451</sup> See Final Report, *supra* note 383.

<sup>452</sup> See Community Study, *supra* 385.

<sup>453</sup> IPB Insurance Press Release, *supra* note 440.

<sup>454</sup> *Id.*

<sup>455</sup> Community Study, *supra* 385, at 11.

## Conclusions

- a) The Gathering was delivered within its approved budget of €13m from the Department for Transport, Tourism & Sport.
- b) The project succeeded in leveraging substantial third-party cash and in-kind supports from both the public and private sectors. While a precise value of these supports is not available, it is estimated that they were worth in the region of €8m.
- c) Preliminary estimates by independent consultants show that the project delivered at least 250,000 to 275,000 incremental tourists in 2013 that would not have visited Ireland but for The Gathering. The additional revenue generated by these tourists is estimated conservatively to be €170 million. The final Economic Impact Report will be published in April 2014.<sup>456</sup>
- d) In addition to the economic value, The Gathering has delivered a social dividend with a very positive impact on communities in every part of Ireland and has helped to bring about a renewed sense of community spirit. An independent Social & Community Impact Report will be published when finalised in March/April 2014.

## Recommendations

- a) The Gathering should not be staged more frequently than on a five-year cycle as it would not be feasible to mobilise the national and international effort to stage it on a more frequent basis. A decision on when/if to stage another Gathering should only be taken following consideration of the final Economic Impact and Social and Community Impact Reports due for publication in April 2014.
- b) Consideration should also be given to not repeating The Gathering at all and to focus instead on the sustained and on-going development of the legacies of the 2013 Gathering based on some of the earlier recommendations in this report including:
  - Support for sustainable events with good potential for attracting more overseas visitors;
  - Development of the engagement with diaspora networks as an intrinsic part of the promotion of tourism in key target markets;
  - Sustaining the collaborative approach to the development of local and community-based tourism under the leadership of local authorities.

The Final Report also indicates that the structure to support such an undertaking was inadequate, the time frame for preparation was too short, and that the event should not be repeated any sooner than in five-year intervals.<sup>457</sup> Additionally, the heavy cost versus return for the smaller events would need to be reviewed.<sup>458</sup> Thus the Gathering did increase tourism, but the question is not considered regarding the long term effect on commercialising and homogenising Irishness nor are IP rights discussed in any of the reports.

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<sup>456</sup> The author of this dissertation has not been able to locate this report.

<sup>457</sup> Final Report, *supra* note 383, at 3-7.

<sup>458</sup> *Id.*



Although the Final Report notes the strength of citizen participation and that especially rural uptake had exceeded expectations, not all Irish citizens, domestic and abroad, took such a strongly positive view of the Gathering.<sup>459</sup> The Community Study reported on the ‘intercultural and intergenerational links’ that were fostered during the event.<sup>460</sup>

Strongly informing this sense of ‘knowing your place’ was a strong sense of remembering. Another important finding of the study is that the Gathering prompted people to remember elements of their shared past that had been forgotten, overlooked or even deliberately set aside. Numerous events were premised on remembering and recovering elements of the past. This came through very strongly in the focus groups where event organizers explained how they had set about trying to commemorate significant people (e.g. Hugh O’Flaherty in Killarney), remember and acknowledge momentous events (e.g. the assisted emigration to New York of the impoverished population on Lord Lansdowne estates in Kenmare in the late 1840s; the evacuation of the Blasket islands in the 1950s); ancient history (the early Christian landscape in Fore); traditional skills (lace-making in Kenmare, boatbuilding in Dingle) and working practices. This process of remembering was profoundly important in fostering emotional connections with place for both the descendants of those who had been affected by the historic events and for those who live in the place.<sup>461</sup>

The Community Study refers to ‘assisted emigration’ to New York’, and targeting diaspora needs to be considered in the light of the forced displacement of many Irish people.<sup>462</sup> This involuntary exile, or more modern lack of opportunity, puts a darker shade over the emotional connections to place, as the Gathering was targeted largely at North America as a primary tourism market. Given the vast numbers of Irish who were forced to emigrate return to spend money as “North American tourists, who tend to holiday longer in Ireland, thereby spending more money here”.<sup>463</sup>

Tourism is essential for economies and provided a valuable boost to Ireland, monetarily to the government and socially to many respondents. It is not the tourism that is a questionable or potentially harmful activity, but it is, in the case, what is offered to tour.<sup>464</sup> This monetisation and marketing focus of

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<sup>459</sup> Community Study, *supra* 385, at 31-35.

<sup>460</sup> *Id* at 15

<sup>461</sup> *Id* at 8.

<sup>462</sup> *Id*.

<sup>463</sup> Final Report, *supra* note 383, at 51.

<sup>464</sup> *Id* at 38-39.

the entire effort, and especially targeting diaspora in areas where Irish had been forced to emigrate but now were likely to return just to spend money, earned the Gathering a fair share of criticism in the media.

One vocal critic who, at the time of the Gatherings, served as Irish Ambassador to the United States, is Gabriel Byrne. Byrne considered the Gathering a government fleecing its own citizens for money, whilst the majority of emigrants had fled involuntarily due to violence or seeking work that could not be found in Ireland; he stated that Taoiseach Enda Kenny's speech launching The Gathering was "slightly offensive" and that "most people didn't give a shit about the diaspora except to shake them down for a few quid."<sup>465</sup> As a cultural ambassador for Ireland, he had the opportunity to discuss the Gathering with many Irish people, and he reported that "[p]eople are sick to death of being asked to help out in what they regard as a scam."<sup>466</sup>

'The Last Word', an Irish radio programme, interviewed Byrne regarding his comments, and he clarified that "The only time the diaspora, or Irish Americans are ever mentioned, is as tourists and 'how can we get these people here to boost our tourism and how can we get people back here so that we can shake them down for a few quid?...I wouldn't take back anything that I said. I have lived in America since 1987, I understand how complex that group of people [Irish diaspora] is. What I was saying was, 'This is the reaction that I have received about The Gathering''".<sup>467</sup>

Continuing about the emigrants he had the opportunity to speak with, he qualified them as "...an incredibly complex group. Emigrants have a tremendous spiritual connection to this country. If you're going to have a relationship with the diaspora, you have to nurture it, you have to take care of it, you have

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<sup>465</sup> Byrne, G., *Radio Interview*, Today's FM, The Last Word, available at [http://audioserver.todayfm.com/audio/mediamanager/todayfm/audio/gabriel\\_byrne\\_05-11-12.mp3](http://audioserver.todayfm.com/audio/mediamanager/todayfm/audio/gabriel_byrne_05-11-12.mp3), last visited 27 Nov. 2017.

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

to tend it, you have to pay attention to it."<sup>468</sup> The actor said he had spoken to young Irish emigrants, some of whom blamed the "incompetence" and "gangsterism" of the Irish government for the state's current economic situation, and for the fact that they felt "forced out" of their homeland.<sup>469</sup>

Particularly as the Gathering is a government-sponsored initiative, in addition to the corporate and third party support, the taxpayer, in addition to being an Irish citizen with ICH being marketed, should be considered. 100 percent of taxpaying Irish residents are supporting this initiative, but 45 percent surveyed do not feel it benefits them.<sup>470</sup> Additionally, as 40 percent of the entire Gathering budget was allocated to marketing, 100 percent of Irish people were actively depicted globally with this initiative. Leveraging 'Irishness' as a product, including existing activities surrounding community and family, threaten the authenticity of the ICH. The UNESCO Committee members expressed concerns during the drafting of the 2003 Convention regarding 'cultural standardization' and 'the harmful consequences of mass tourism' threatening ICH.<sup>471</sup>

There were few expressions of doubt about the success of the Gathering in the official, named reports although the extremely tight timeline and turnaround was noted in multiple documents and cited as a possible justification to not repeat the event annually.<sup>472</sup> The Community Study did include two pages on 'Learning from the negatives':

The study findings revealed very little negative commentary on the Gathering and there are few discernible negative impacts at any level of analysis. In focus groups, many participants did mention that the lead in time was not long enough and that if the Gathering was to happen again it would be beneficial for organizers and communities to have much more notice as this would make planning and organizing easier. When asked if the Gathering caused any tension among the community 90% of event organizers and 88% of community respondents either disagreed or

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<sup>468</sup> O'Sullivan, M., *Gabriel Byrne Admits His Gathering Attack Was 'Too Strong'*, The Independent (21 Jan. 2013) <http://www.independent.ie/woman/celeb-news/gabriel-byrne-admits-his-gathering-attack-was-too-strong-29020890.html>

<sup>469</sup> *Gabriel Byrne: The Gathering Ireland 'seen as scam' by Irish Americans*, BBC (6 Nov. 2012), <http://www.bbc.co.uk/news/world-europe-20218856>.

<sup>470</sup> Community Study, *supra* 385, at *Executive Summary*.

<sup>471</sup> Lenzerini, *supra* note 40, at 106.

<sup>472</sup> Final Report, *supra* note 383, at 5.

strongly disagreed that it had caused any tension. Similarly, when statements about whether Gathering events had had negative impacts such as litter, overcrowding, social problems or disruption, less than 3% believed this to be the case. Financial pressures were mentioned by 18% of event organizers as a difficulty and in one case they stated that a previously successful event was now in debt. In the focus groups too, some mentioned the financial pressures whereby individuals, for example, paid for brochures to be printed in the hope that they would recoup their money as the project progressed. It seems that in some cases the Gathering created pressure on groups to organize events and this created financial pressure.<sup>473</sup>

Notably, the Community was limited geographically and by response rate; additionally, the issues surrounding use of ICH and IP did not feature in the surveys. Despite the sunny publicity and positive reports on impact, in late 2014, young people founded the *We're Not Leaving Campaign*.<sup>474</sup> One student and member of the campaign summed up economic impact: "The positivity is localised in the media and in wealthy communities in Dublin. For everyone else, especially young people, work conditions are precarious: they are low paid or unemployed and thinking about emigrating."<sup>475</sup> On a similar note in the United States, Byrne also mentioned a young, Irish illegal immigrant who had been unable to return to Ireland: "His father died, he couldn't get home. He feels abandoned by the Irish Government. He feels an alien. He can't go back. Then I talked to two kids, a girl and a boy who were forced to emigrate because there are no jobs".<sup>476</sup>

Sally Mulready, a Council of State member, explained "the concept of supporting Ireland financially during challenging economic times is not an unfamiliar one for older Irish emigrants, many of whom would send home cash to family during previous recessions".<sup>477</sup> This justification is problematic for at least two reasons, from inward- and outward-facing perspectives, respectively. Facing inward to citizens

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<sup>473</sup> Community Study, *supra* 385, at 32.

<sup>474</sup> Kenny, C., *Forced to Leave, Forced to Stay Away*, The Irish Times (25 Oct. 2014) <http://www.irishtimes.com/blogs/generationemigration/2014/10/25/forced-to-leave-ireland-forced-to-stay-away/>.

<sup>475</sup> "The 8 per cent fall in the numbers leaving the country last year has been heralded as a turning point after a decade of consecutive increases in emigration. But among 15- to 24-year-olds, the generation most affected by economically driven migration, the decrease was much less pronounced, at less than 4 per cent. More than 33,000 people in that age group left in 2013." *Id.*

<sup>476</sup> Byrne, *supra* note 465.

<sup>477</sup> Kenny, C., *Gathering Momentum: Forget the Shakedown, Here's the Breakdown*, The Irish Times (11 Jan. 2013) <http://www.irishtimes.com/blogs/generationemigration/2013/01/11/gathering-momentum-forget-the-shakedown-heres-the-breakdown/>.

and volunteers, the Gathering was not presented as fundraising for a struggling government to practicing communities who are sharing their ICH and integrating IP, such as the Gathering logo and branded colours. Facing outwards, it was not presented to diaspora as an opportunity to send money home to their family during trying times, but rather an invitation to visit as a tourist and enjoy Irish ICH with others.

In sum, the corporate presentation, commercialisation, and representation of the event was that it had been extremely successful and was supported as a ‘People’s Project’ by Irish citizens and diaspora. The reality of the implementation and reaction was much more complicated, and the impact on ICH and IP went unexplored.

#### **vi. The Gathering and the 2003 Convention**

Reviewing how the Gathering was designed, the entire event *prima facie* complies with the standards that the 2003 Convention put forth. The Community Study strongly supported the practice in ICH safeguarding of utilising local community involvement in conjunction with the coordination and support of outside experts, a principle enshrined in the 2003 Convention.<sup>478</sup>

This example demonstrates exactly how challenging implementing legal protection for something as nebulous and idiosyncratic as ICH can be. The Gathering complies with the 2003 Convention functionally. However, the substance of the ICH here is problematic for the crucial element of authenticity, which is not featured in the treaty specifically but is an implicit requirement reflected in the value to communities.

Therefore, loss of authenticity can lead to the creation of an artificial ICH, which is no longer connected to the cultural idiosyncrasy of the communities, groups, and/or individuals to which it culturally belongs, hence lacking its main distinctive element. When this process takes place, the heritage concerned can no longer be considered ‘intangible cultural heritage’ according to the meaning of this expression as representing a value safeguarded by international law. Loss of authenticity is particularly likely to occur when ICH is managed by state authorities through

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<sup>478</sup> 2003 Convention, *supra* note 4, at Art 11.

according priority to interests which are external to its creators and bearers. For example, states may tend to accommodate the characteristics of ICH to the expectations of the dominant sectors of the society, which can be different from the interests of the specific communities especially concerned by the heritage in point. Or it is possible that the driving force of ICH management is economic interests, for example when the competent authorities try to make the heritage concerned a tourist attraction, which makes it necessary for such heritage to be adapted to the needs and expectations of tourists. ... These (and other) approaches irremediably corrupt the authenticity and, a fortiori, the cultural and legal value of ICH.<sup>479</sup>

By focussing the Gathering on the meaning of Irishness and leveraging existing traditional cultural celebrations, generating income and creating a massive digital marketing campaign puts the authenticity of Irish ICH at risk. Tourism can provide an opportunity to allow communities to practice and naturally evolve their ICH sustainably. However, if a country avails itself of a well-demonstrated source of income and cultural recognition with ICH tourism, commercialisation and influencing the ICH with promotion can risk authenticity intrinsically and disenfranchise practicing communities from the ICH.

#### **vii. Bringing ICH in Ireland to the International Stage**

Ireland's substantial and valuable ICH was not included in the 2003 Convention listing as Ireland was not a party in 2013. However, Ireland is, and was at the time, a member of many other international cultural heritage-focussed organisations, including the International Council on Monuments and Sites (ICOMOS). ICOMOS is an international non-governmental organisation, with 110 National Committees tasked with "improving the preservation of heritage, the standards and the techniques for each type of cultural heritage property: buildings, historic cities, cultural landscapes and archaeological sites."<sup>480</sup> The ICOMOS Irish National Committee was established in 1984 and, given the strong interest in ICH from members,

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<sup>479</sup> Lenzirini, *supra* note 40, at 113.

<sup>480</sup> *Mission and Vision*, ICOMOS, <http://www.icomos.org/en/about-icomos/mission-and-vision/mission-and-vision>, last visited 27 Nov. 2017.

decided to establish the National Scientific Committee on Intangible Cultural Heritage (“NSCICH”) in 2010.<sup>481</sup> NSCICH’s long term goals and objectives, with reference to the 2003 Convention, were:

Acquiring recognition at international level for the Irish uilleann pipes as an important element of the ICH of Ireland and Europe.

Acknowledgement of the significance of the holdings of the National Folklore Collection as a unique source of information on folklore and ethnology, and as an aesthetic and artistic resource of international importance.<sup>482</sup>

NSCICH accomplished this goal by sufficiently raising the profile of ICH to earn Ireland’s Minister for Arts and Heritage Heather Humphreys’ recommendation to join the 2003 Convention, which was then approved by the Cabinet.<sup>483</sup> Ireland ratified the 2003 Convention on 22 December 2015; it is scheduled for full implementation on 15 December 2021.<sup>484</sup> Ireland has proposed only two inscriptions for the listing as of November 2017: uilleann piping and hurling.<sup>485</sup>

Although ICH in and of itself is not often the focus of media attention, Ireland’s joining the 2003 Convention did generate a few news stories – under the sports pages. Whilst the NSCICH agenda featured uilleann pipes and Irish folklore and mythology, the media highlighted hurling as a potential inscription for the 2003 Convention listing.<sup>486</sup> A strong push to sign on to came from Ireland’s largest sporting

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<sup>481</sup> *Intangible Cultural Heritage*, ICOMOS, <http://www.icomos.ie/index.php/committees/intangible-cultural-heritage> last visited 27 Nov. 2017.

<sup>482</sup> *Rules and Objectives*, ICOMOS, <http://www.icomos.ie/index.php/committees/intangible-cultural-heritage/rules-and-objectives>, last visited 27 Nov. 2017.

<sup>483</sup> *Hurling Set to Join Tango on World Heritage List*, The Irish World (5 Jan. 2016) <http://www.theirishworld.com/hurling-set-to-join-tango-on-unesco-global-heritage-list/>.

<sup>484</sup> *Ireland and the 2003 Convention*, UNESCO Intangible Cultural Heritage, <https://ich.unesco.org/en/state/ireland-IE>, last visited 27 Nov. 2017.

<sup>485</sup> *Id.*

<sup>486</sup> The Irish World, *supra* note 483; “Few of the other items on the list of the world’s intangible cultural heritage are as well organised or as popular as hurling. . . For instance, the most recent addition is the ‘coaxing ritual for camels’ practiced in Mongolia. Another 2015 addition is the manufacture of cowbells in Portugal. It is hard to see either of these cultural manifestations packing out a stadium the size of Croke Park.” Collins, S., *Cabinet Aims to Get Ireland on UNESCO List*, Irish Times (16 Dec. 2015) <http://www.irishtimes.com/sport/gaelic-games/hurling/cabinet-aims-to-get-hurling-on-unesco-list-1.2467795>.

association, the Gaelic Athletic Association or *Cumann Lúthchleas Gael* (the GAA).<sup>487</sup> Hurling is an Irish team field sport, played 15 to a side with a stick (a ‘hurley’) and a ball (a ‘slioter’).<sup>488</sup>

However, this focus on sport and majority popularity is emblematic of misconceptions of what is indicative of cultural value, especially as the original push for signing on to the 2003 Convention came from ICOMOS with inscriptions for uilleann piping and Irish folklore. What can be dangerous about weight on majority popularity is the nature of the self-reinforcing cycle: what is popular is good and worth protecting; what is not popular is not as good and not as worth protecting. Or that at least, if less popular things are protectable ICH, then popular things should also be similarly protected. This may be true so long as there is awareness that this is not a criterion for protection or for being ICH. Not all popular things are ICH, and neither are all cultural practices ICH.

Nonetheless, hurling is an important ICH practice for Ireland. The current president of the GAA, Aogán O Fergháil, welcomed the proposed inscription for hurling: “The GAA is unique amongst world sporting bodies in that it upholds within its constitution a cultural mandate and much social capital will accrue as a result of this in terms of sporting, tourism, curricular and community benefits.”<sup>489</sup> Regardless of cultural mandates, justification is based on economic return: “It also provides an excellent opportunity to integrate our unique traditional sports into Ireland’s heritage tourism, which is worth approximately €1.5 billion in total to the economy and directly supports 25,000 jobs according to the Economic Value of Ireland’s Historic Environment: Final Report to the Heritage Council, 2011.”<sup>490</sup> However, this estimate conflates

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<sup>487</sup> “The GAA is a volunteer led, community-based organisation that promotes Gaelic games such as Hurling, Football, Handball and Rounders and works with sister organisations to promote Ladies Football and Camogie. It is part of the Irish consciousness and plays an influential role in Irish society that extends far beyond the basic aim of promoting Gaelic games.” *About*, GAA, <http://www.gaa.ie/the-gaa/about-the-gaa/>, last visited 11 Nov. 2017.

<sup>488</sup> Hurling, GAA, <http://www.gaa.ie/my-gaa/getting-involved/hurling>, last visited 11 Nov. 2017; *Hurling, Its Ancient History*, Irish Archaeology, available at <http://irisharchaeology.ie/2011/09/hurling-its-ancient-history/>, last visited 28 Nov. 2017.

<sup>489</sup> The Irish World, *supra* note 483.

<sup>490</sup> *Id.*



the economic report on heritage as being inclusive of ICH – whereas ‘heritage tourism’ was only measured by built heritage in the written report.<sup>491</sup> A report on historic environments should rightly include ICH, but this report did not factor in ICH. It does include reference to the social and cultural benefits, in addition to the economic, associated with the development and preservation of built heritage. Nonetheless, ICH practices resulting in or contributing to similar benefits were not addressed as a part of the heritage environment in this report. With the signing of the 2003 Convention, perception may evolve so that ‘heritage environment’ does and *has* included ICH.

Whilst it may be necessary leverage for developed countries to have strong economic incentives to take part in international activities related to ICH safeguarding, it is crucial that parties do not lose sight of the purpose of safeguarding ICH. Overreliance on income generation and tourism presents the risk that the 2003 Convention will become ‘just another list’ and that the very ICH the 2003 Convention aims to safeguard becomes exploited.

### **viii. Conclusion**

The Gathering was one of the most ambitious tourism initiatives seen in Ireland. Participants from across the country actively reached out across the globe, with a special focus on those of Irish descent. By inviting the diaspora to ‘return home’, the tourism initiative tapped an innate attachment based on ICH, not only to the geographic location of home but of all the authentic activities, festivals, traditions, and general ‘Irishness’. Leveraging such closely held ICH for economic return, especially on the backs of volunteerism and conditioning micro-funding chiefly on evidence of overseas visitor attendance,

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<sup>491</sup> “Ireland’s historic environment has been defined for the purposes of impact assessment as comprising the following sets of built heritage assets – those which are statutorily protected, together with components of the broader built heritage: World Heritage Sites Recorded Monuments, as defined by the Department of Arts, Heritage and the Gaeltacht Protected Structures included in planning authorities’ development plans Architectural Conservation Areas included in planning authorities’ development plans Designed landscapes surveyed by the Inventory of Architectural Heritage, and Other structures erected pre-1919.” *Id*; *Economic Value of Ireland’s Historic Environment: Final Report to the Heritage Council*, Fitzpatrick Associates (2011), available at [http://www.heritagecouncil.ie/content/files/ecorys\\_economic\\_evaluation\\_historic\\_environment\\_final\\_report\\_1mb.pdf](http://www.heritagecouncil.ie/content/files/ecorys_economic_evaluation_historic_environment_final_report_1mb.pdf).

including photographic materials and rights, runs a high risk of disenfranchising and marginalising the practitioners of ICH as it becomes a saleable product.

This tactic runs also along a very sensitive historical line as many Irish citizens felt forced to emigrate. Irish actor and former cultural ambassador for Ireland in the United States Gabriel Byrne said many who left Ireland for the United States feel abandoned by the Government and that the bridge between Ireland and its diaspora is broken.<sup>492</sup> Byrne continued that, over his two-tenure as cultural ambassador “[he] was really disappointed the way all those contacts, all that hard work was just dropped and it really made me disillusioned and disappointed with this Government who go on about their love for culture for arts and actually really don’t give a toss about it.”<sup>493</sup> Thus the arts and culture are indeed an asset for Ireland and a strength that has the potential to economically carry the country. It is the lack of consideration of authenticity and identity attachment that is problematic.

To reiterate, economic exploitation through tourism is a crucial source of income for many culturally rich communities and can be deployed in a manner that preserves local authenticity, rather than jeopardises it. Cultural tourism that turns solely on selling a homogenised intangible essence of culture and, particularly to its own removed citizens, situates Ireland and Irishness as an ouroboros. In this case, it is the Celtic dragon eating its own tail. Initiatives of this nature that then generate government-owned IP on the subject of Irishness epitomises the subtle erosion ICH that can occur in developed, technology-heavy countries.

The ICH is generated, fixed, centrally owned, re-circulated out into the market as ‘Irishness’ to generate more income. The risk of disenfranchising citizens practicing the ICH that runs through such a cycle, considering the reinforced homogenisation and building lack of authenticity, is high. Some reports touted

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<sup>492</sup> *Gabriel Byrnes Slams the Gathering*, Irish Times, (5 Nov. 2012) <https://www.irishtimes.com/news/gabriel-byrne-slams-the-gathering-1.746675>

<sup>493</sup> *Id.*

the Gathering as a great success; some were more cautious and expressed concern about funding and tight turnaround times.<sup>494</sup> Under the Community Study, the reception from the Irish people seemed mixed as well.<sup>495</sup> Some found it an inspirational opportunity to reach out whilst others were unaffected, with 45 percent stating it did not benefit the average person.<sup>496</sup> The Gathering also had its vocal critics, who, in addition to taking issue with the disingenuous representation of Irishness, claimed the entire initiative was a ‘shake down’ of the Irish diaspora.<sup>497</sup>

In reviewing the aims and marketing strategy released by the Fáilte Ireland, aggressively targeting wealthy areas where people with Irish roots are more likely to reside, and in light of the corporate sponsorship of IPB, these claims hold ground. However, the aspirational message of the Gathering also reached participants and visitors. Despite the branding and cultural homogenisation of existing events, new events also sprung up, and the Gathering engaged in active community consultation.<sup>498</sup> Tourism did increase but fell short of projected targets, with some participants reporting added pressure regarding the funding reporting.<sup>499</sup> The Final Report recommended against repeating the event any sooner than 2018, rather than pursuing the original goal of annual events.<sup>500</sup>

From a legal standpoint, the contractual terms on IP ownership and financial rewards of participating could be precedential. The risk to ICH is especially high as the propertisation is of ICH fundamental to national identity; IP ownership and marketing greatly impacts the ability of the ICH to reflect the identity of the community authentically. Government ownership of propertised ICH in the form of IP will certainly affect intergenerational transmission and also leave a disproportionate historical footprint for

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<sup>494</sup> Final Report, *supra* note 383, at 3-5.

<sup>495</sup> Community Study *supra* 385, at *Executive Summary*.

<sup>496</sup> Byrne, *supra* note 465.

<sup>497</sup> *Id.*

<sup>498</sup> Final Report, *supra* note 383, at 15-23.

<sup>499</sup> *Id.* at 3-5.

<sup>500</sup> *Id.*

future generations looking back to discern Irish cultural traditions. This precedent of government obtaining all property rights to ideas, comments, photographs, and traditional rituals could be extremely detrimental if misused. It is precisely because it is not being used in an outwardly adverse manner that little notice is taken of these contractual obligations. Adverse action by governments related to IP use when there are high financial and reputational stakes has been taken in the past as seen with the special legislation surround the 2012 Olympics; this legislation prevented communities, aside from wealthy sponsor companies, from using terminology and imagery related to the Olympics.<sup>501</sup>

This is precisely the type of subtle erosion that occurs within developed countries in non-minority populations. It is notable that the Terms and Conditions address ownership and property but contain no clauses related to cultural heritage safeguarding or access rights. In addition to the potential to control existing ICH through IP, there remains the issue of the visitor data provided, which the Submissions Clause specifically disclaims any liability regarding confidentiality.<sup>502</sup>

Since the Gathering, Ireland has made national strides towards a more ICH-centric approach and joined the 2003 Convention.<sup>503</sup> This ratification reflects the changing politics and priorities surrounding cultural heritage, both tangible and intangible. Whilst spearheaded by several invested individuals and groups, Ireland now has secured a ‘position at the table.’<sup>504</sup> Time will tell how the 2003 Convention obligations influence any future manifestations of The Gathering or other projects which might incorporate aspects of IP claims in cultural branding and standardisation.

With the 2003 Convention, the international recognition and participation in global ICH conversations will formally bring in indexing systems, a heightened awareness of the value of the intangible aspects of

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<sup>501</sup> Erickson and Wei, *supra* note 419, at 416.

<sup>502</sup> Thegatheringireland.com, *supra* note 427.

<sup>503</sup> Ireland and the 2003 Convention, *supra* note 484.

<sup>504</sup> Canadian Declaration for the Safeguarding of Intangible Cultural Heritage, *supra* note 43.

heritage, and a more formidable basis for attracting funding for new and sustainable efforts at safeguarding ICH. Ireland, as the only fully independent state case study in this dissertation, demonstrates how full agency to enter into international treaties can more flexibly respond to and represent practicing communities' interests, but also how sovereign nations may not always be the best independent stewards of practicing communities and their ICH.

**d. Case Study 3: Wales: Language, Authority, Community Organisation, and Legislative Influence**

<b>Work:</b>	Tangible elements	Intangible Elements
<i>Welsh language and related community practices</i>	<ul style="list-style-type: none"> <li>- <i>Written histories</i></li> <li>- <i>Legislation</i></li> <li>- <i>Festivals/events</i></li> <li>- <i>Signage</i></li> <li>- <i>Protests</i></li> </ul>	<ul style="list-style-type: none"> <li>- <i>Language</i></li> <li>- <i>Oral histories</i></li> <li>- <i>Festivals/events</i></li> <li>- <i>Protests</i></li> </ul>

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**i. Introduction**

Authority has many faces but emblematically holds enforceable power that shapes the structure of the world we live in. In particular, recognised legal authority can authorise or prohibit behaviours and practices from an individual level all the way through a nebulous corporate body; higher level recognised authorities can act as a sovereign on the international stage. Despite these lofty functions, authority ultimately reflects the society which it governs and can only fulfil its functions to the extent that communities recognise it.<sup>506</sup> Communities are sources of identity and belong within similarly diverse and complex levels of grouping and relationships, which are passed down through generations but also continuously evolve through symbiotic interaction; because authority reflects society composed of communities and requires social recognition and respect to fully enforce laws and regulations, ICH is highly influential in authority structures although it is not often recognised as such, particularly under the law. The law manifests as sum of regulations, statutory law, and judicial decisions, enforced by authoritative bodies through punitive or remedial measures for violations.

ICH appears occasionally within human rights or environmental law contexts, but less frequently reveals itself within mainstream law and literature rationale.<sup>507</sup> And yet, legal-rational authority, when regulating

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<sup>505</sup> Case Study 3 Chart.

<sup>506</sup> See generally Graham Dutfield, 'Prior Informed Consent and Traditional Knowledge in a Multicultural World', in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Intersentia 2009); Helen Sullivan, 'Modernisation, Democratisation, and Community Governance' (2001) 24:3 *Local Gov't Studies* 1, 14-5.

<sup>507</sup> Lixinski, *supra* note 13, at 1-5.

cultural and social activity, is implicitly driven by ICH and traditional authority. Cultural heritage and practices represent the very fabric of identity of individuals, communities, and even countries. ICH is particularly reflective of identity and empowerment as it is constantly recreated within communities and evolves according to generational knowledge and practice.<sup>508</sup> It is no surprise, then, that a frequent and effective mechanism for controlling behaviour is accomplished – overtly or covertly – by exercising legal and cultural authority over ICH.

All societies generate unique ICH and are subject to varying sources and levels of authority; however, this chapter will focus on Wales in order to explore the symbiotic relationship between these two forces. Wales provides an interesting case study for examining the interplay between ICH and authority for several reasons. In economically developed countries, and in unions, cultural groups experience subtler cultural erosion: a slower, consistent deterioration over time which can be just as detrimental but less noticeable.<sup>509</sup> A review of the legislative history over the past several hundred years in Wales presents a clear statutory reflection of the impact of ICH in a compact and defined geographical area, and historically, Wales has developed a strong culture surrounding oral traditions such as bardistry, throat singing, and festivals centred on language and song whilst many Western countries developed a strong written tradition, placing a high value on fixed documentation and cultural objects.<sup>510</sup> A society or community's preference for communication format is also a form of ICH and is reinforced through legal and cultural authority. Modern social frameworks that value written word above oral traditions impact

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<sup>508</sup> This chapter addresses ICH, not traditional cultural expressions (TCEs) specifically. Some misunderstandings of ICH stem from its conflation with TCEs, which is instead a subtype of ICH. Whilst both forms of cultural expression have overlapping manifestations (e.g., dance, oral history, song) and are generationally transmitted, traditional cultural expressions are practiced by a recognised indigenous population and must express traditional culture. By contrast, ICH also encompasses modern expressions of cultural identity and can be practiced by any community.

<sup>509</sup> Deacon, *supra* note 4.

<sup>510</sup> Bardistry, or *barddas*, is practice of bardcraft, performance of poetry and legends through song. Bards had also served as heralds and historians amongst others functions for communities. Morgan, P., *From a Death to a View: The Hunt for the Welsh Past in the Romantic Period* in Hobsbawm, E. and Ranger, T. (eds), *THE INVENTION OF TRADITION* (Cambridge 1983) 49; Pitchford, S., *IDENTITY TOURISM: IMAGING AND IMAGINING THE NATION* (Tourism Social Sciences 2007) 21.

how ICH is preserved and communicated; thus the documentation preference is highly influential in determining legitimacy in culture and history. Wales provides an excellent example of the effect that an authority's preference for communication formats can have on the practice of a community's ICH. Additionally, Wales, forming part of a union arrangement with the United Kingdom, has confronted particular challenges with sovereignty which permits a narrow study of the impact of ICH on authority and law-making. Many investigations of ICH are concerned with indigenous populations, which are subject to the effects of various other historical, racial, and power issues when attempting to isolate how ICH operated as a tool for legal change and interacting with authority. Whilst the Welsh population experienced similar cultural and identity exclusions, the elements present with a visibly racially distinct indigenous population are absent. This natural exclusion of a confounding variable can lead to clearer conditions for isolating the interaction between ICH and authority. UNESCO maintains the *Atlas of the World's Languages in Danger*, ranking 2,464 languages, relying heavily on effectiveness of intergenerational transmission, as safe, vulnerable; definitely, severely, or critically endangered; and extinct.<sup>511</sup> The *Atlas* is 'intended to raise awareness about language endangerment and the need to safeguard the world's linguistic diversity among policy-makers, speaker communities and the general public, and to be a tool to monitor the status of endangered languages and the trends in linguistic diversity at the global level.'<sup>512</sup> UNESCO lists Welsh as 'vulnerable' on the Endangered Languages database, indicating that 'most children speak the language, but it may be restricted to certain domains (*e.g.*, home)'.<sup>513</sup> The present vulnerability of the Welsh language merits further study of how valuable ICH is impacted by legislation and communities.

This chapter will examine Wales in the context of legal and community authority and ICH, providing a narrower framework for communicating the value of ICH to communities without straying into the

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<sup>511</sup> Moseley, *supra* note 379.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*



minefield of quantitative measurement. Rather, the dynamic between authority and ICH will be examined through the lens of statutory sanctions upon ICH and how communities of practice have influenced authority and law-making. With this in mind, the chapter will advance the argument that the legal changes are a result of a ‘ground-up’ phenomenon, championed by community organisations and active practice of ICH.

In relation to the research question, Wales is an economically developed country with limited devolved powers, in close geographic proximity to the other case studies of Celtic-derived ICH. This chapter will highlight the interplay between IP laws and ICH in Wales by focussing on how ground-up ICH revolving around the Welsh language instigated statutory change. Further, Welsh ICH was historically rich in oral histories; the prioritisation of a fixed or written form of expression impacted Welsh ICH and literary and artistic outputs, and this preference for fixed form persists with the modern day IP framework. With the revival of language-centred cultural practices such as the Eisteddfod, new IP is being created, but the participants’ contractual terms are less arduous than in the previous case study of Ireland. However, the propertisation may still impact the identity association aspect of the ICH, especially in light of heightened commercialisation; however, there seem to be some mediating factors, including a marked re-uptake of language and a conscientious approach to commercialisation. IP law as authority also influences the form of ICH expression and frequency by which the cultural practice rewarded, practiced, and safeguarded. In this way, the authority is exercised through the inclusion, exclusion, and reward for cultural practice.

## **ii. ICH Practices, IP, and Commercialisation**

The practice of some form of ICH is universal throughout human societies. Nonetheless, modern scholarly literature and legal instruments tend to present developed Western countries as ‘knowledge

producing’ and developing countries as ‘culture producing’.<sup>514</sup> This divide is accentuated by emphasizing ‘high culture’ – such as theatre and art museums – as Western, and other cultural practices, such as those associated with ICH or folk tradition, as central in the East or Global South.<sup>515</sup> These social and legal constructs exist despite the fact that, in cultural practice, ICH is alive and well in developed countries but is not necessarily or consistently represented as culture. Consider celebrations such as May Day, the songs and dances in ceilidhs, birthday cakes with candles, and drinking tea. The tendency of ICH to be primarily associated with developing countries has led to an ‘othering’ of valuable cultural practice in Western countries; on the other side of the coin, these same developed countries are then faced with the possibility of losing their valuable cultural practices, as well as interfering, intentionally or not, with the natural evolution of the practices. In some cases, a misunderstanding or lack of understanding of precisely what ICH is might exist even within the heritage sector. As Smith and Waterton uncovered, UK heritage representatives rejected the contention that the United Kingdom had any ICH and that participation in international treaties and other law-making related to ICH was beneficial to the United Kingdom.<sup>516</sup> ICH is notoriously difficult to measure, which affects valuation; additionally, this quantifiable difficulty can compound the misunderstanding of – or even aversion to – ICH. Legal authority, through legislating funding and policy, tends to reward quantifiable returns, and offer more funding and protection for types of cultural practices that generate quantifiable results.<sup>517</sup> ICH – such as oral histories, craftsmanship, or ritual – does not always provide opportunities to count visitors, ticket sales or paintings on walls which can offer empirical results for reports and measurement. Thus, its importance and value can be overlooked by those responsible for its safeguarding; however, this is changing.<sup>518</sup> Several recent reports have attempted to include ICH in recognised measures like the Heritage Index in the RSA Report.<sup>519</sup> Whilst the report attempted to include ICH under a ‘Culture and Memories’ theme, the author

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<sup>514</sup> Lixinski, *supra* note 13, at 22-23.

<sup>515</sup> *Id.*

<sup>516</sup> *See generally* Smith and Waterton, *supra* note 52.

<sup>517</sup> *Id.* at 294-96.

<sup>518</sup> The 2003 Convention, *supra* note 4.

<sup>519</sup> Schifferes, *supra* note 50.

acknowledges that ‘construction of the Index has inevitably been subject to the limitations imposed by what people have, throughout history, decided is worth recording and providing with protective status and resources. And some heritage is just more difficult to list, or to map to a specific location.’<sup>520</sup> This challenge is echoed amongst authors attempting to include ICH in calculations of value alongside other types of artistic and cultural heritage and emphasising the value of qualitative as well as quantitative evidence.<sup>521</sup>

Further, what is the worth to communities for bureaucratic and legal authorities to assign quantitative systems of valuation to ICH for the purposes of measuring its significance against other types of cultural or economic activities? Unless measurement is appropriately calibrated to the distinct forms of expression, particularly the element of intangibility, and does not interfere with the practice of the ICH, there is questionable value and possibly harm. However, if ICH is to be safeguarded and publicly acknowledged as a cultural practice, and is to survive within practicing communities, some form of documentation or external funding (*i.e.*, grants for events or purchase of goods created through generational craft knowledge) might be necessary and inevitable. Herein lies the paradox of ICH in a contemporary setting.

In order to meaningfully compare ICH with other types of cultural and economic activities, authorities and scholars must convert ICH to some type of fixed form for measurement in a specific system. Adopting such systems, which are often arbitrarily designed for the sake of uniformity or cohesion, can inadvertently incentivize malleable ICH to manifest in ways in which it can be recorded or rewarded. For instance, purely oral traditions might now include written versions and records of numbers and names of participants. Further, the documentation and authorisation of certain types of ICH can bring about an

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<sup>520</sup> *Id* at 22.

<sup>521</sup> Crossick, G. and Kaszynska, P., *Understanding the Value of Arts and Culture: The AHRC Cultural Value Project*, AHRC 9, <<http://www.ahrc.ac.uk/documents/publications/cultural-value-project-final-report/>>, last accessed 28 Aug. 2017.

official sanctioning of that practice, heavily influencing how the ICH evolves with tangible elements appropriate for measurement, which may have otherwise not been included in the ICH.<sup>522</sup>

How, then, has the law in Wales evolved with myriad regulatory configurations related to Welsh speakers and in light of the additional challenges of safeguarding ICH in the modern world? The legal history of Wales is strongly intertwined with language, and this chapter will argue that the repeal of punitive statutes related to Welsh speaking in Wales was largely stimulated by community-led efforts with daily use of Welsh in street signs and businesses, through festivals celebrating Welsh culture and history, and by community groups' activism.

### **iii. Welsh Language as ICH**

Language is itself a diverse and vibrant cultural expression that is vital to other forms of ICH such as dance, craftsmanship, and stories. Nonetheless, a system of communication, passed down through generations, is one of the most fundamental manifestations of ICH and has a wide scope of impact on practicing communities for/comprised of both native and non-native speakers. Studies have shown that bilingual children develop more numerous neural connections<sup>523</sup>; adults have reported that their personalities adjust to reflect the language they speak.<sup>524</sup> Even descriptive words – both the number and type – in linguistic vocabularies vary by geographic locations and historical traditions.<sup>525</sup>

Language can evoke emotion, a sense of identity, and foster feelings of belonging. Due to this cultural identity aspect of language, restrictions on language have been used in the past as forms of social control (integration or separation/exclusion) as well as to dictate participation in public administration and justice. Restrictions on the place a specific language can be spoken and how it is spoken (such as in dominant dialects and accents) can take the form of social mores, but also the form of legislation. Some legal

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<sup>522</sup> Smith, L., *The Uses of Heritage* (Routledge 2006).

<sup>523</sup> Norton, B., *IDENTITY AND LANGUAGE LEARNING* (Pearson 2000).

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

restrictions on language mandate an official language of the state; some prohibit discrimination based on language; and yet, others require equal treatment of different languages by public bodies and courts. No matter the specific legal approach, the practical impact on cultural and social issues span far beyond basic oral communication, especially in view of asymmetrical power dynamics in the present case, between the governments of England and Wales.

The use of language for cultural and social control is not limited to external colonisation; it also can be used internally with domestic minority groups. For hundreds of years, use of the Welsh language was legally banned from public government and punished in schooling in favour of English.<sup>526</sup> This type of cultural and societal restriction dramatically and negatively impacted the amount of Welsh speakers – and thus those engaging in living practices performed in Welsh, during holiday rituals, festivals, and informal gatherings. These state-enforced legal restrictions took their toll ‘[w]ith the loss of a tongue of a nation goes an entire culture...Music and language are at the heart of Wales’ unique identity.’<sup>527</sup>

Taking into account the effect the loss of a tongue could have on a nation, especially a nation with a plethora of cultural practices that focus on oral traditions, one of the most effective ways to ensure integration and authority over such a nation is through legislating in relation to language and exercising authority in the prevailing language.<sup>528</sup> Legal authorities in England and Wales have recognised the potential to control social groups through ICH sanctioning and implemented a series of such measures regulating Welsh language use for over the past 500 years in Wales. Whilst some in the Welsh upper social classes welcomed the regulations, a strong active and passive resistance existed, opposing the use of authority to dictate the ICH related to language and integration. Nonetheless, the statutes have been

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<sup>526</sup> The Laws in Wales Acts 1535 and 1542.

<sup>527</sup> Hamnett, K., *THE PLIGHT OF THREE CELTIC LANGUAGES – WELSH, IRISH, AND GAELIC: WHAT CAN BE DONE TO RESCUE THEM?* (Mellen 2011) 178.

<sup>528</sup> May, S., *Rearticulating the Case for Minority Language Rights*, 4(2) *CURRENT ISSUES IN LANGUAGE PLANNING* 95 (2003).

largely successful; the number of Welsh speakers has drastically and steadily declined. As of the date of the last census in 2011, the current number of Welsh speakers Wales is at 19 percent, with only two areas in the country, Gwynedd and Anglesey, reporting more than 50 percent of the population able to speak Welsh.<sup>529</sup>

Many factors have led to the decline of the Welsh language, but very early in the history of the union of England and Wales, the language – and other Welsh cultural traditions – was stigmatized socially and legally. From the 11<sup>th</sup> century Anglo-Norman invasion to the Edwardian conquest of Wales, ‘Welsh became a badge of isolation, rejection, and social inferiority.’<sup>530</sup> In order to enforce the establishment of the Union, the Crown exerted strong downward pressure to speak English in the form of legal regulation and proscribed Welsh culture and customs.<sup>531</sup> The proscription was achieved through legislation expressly prohibiting use of the Welsh language in schools and public administration, rather than specific laws regulating Welsh cultural practices or other varieties of laws requiring cultural integration. However, given that much of Welsh culture centred on oral musical traditions in the Welsh language, the effect of legislation prohibiting and shaming the use of Welsh was also to have an impact on culture and custom. In the early 1500s, the English crown passed a series of measures to eradicate Welsh language and culture. This was driven by forbidding ‘all and singular the sinister uses of the customs of Wales.’<sup>532</sup> By using the word ‘sinister’ even in language, the government participated in, and sanctioned demonization of Welsh speakers. Known as ‘the Laws in Wales Acts’, consisting of a series of legislative measures between 1535 and 1542 (enacted in 1536 and 1543), not only made English the official language of the Union, but barred Welsh speakers from holding public office.<sup>533</sup> One exception was for Welsh speakers to

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<sup>529</sup> 562,016 were able to speak Welsh and 2,393,825 were not. *2011 Census Aggregate Data*, Office for National Statistics; National Records of Scotland; Northern Ireland Statistics and Research Agency; UK Data Service (Jun. 2016).

<sup>530</sup> Hamnett, *supra* note 527, at 113.

<sup>531</sup> The Laws in Wales Acts 1535 and 1542.

<sup>532</sup> Williams, G., *WHEN WAS WALES?* (London 1985) 121.

<sup>533</sup> The Laws in Wales Acts 1535 and 1542.

hold religious appointments in the Nonconformist church; thus, religion was pushed forward in the mid-1800s by Welsh nationalists in order to maximize Welsh presence in governance as far as was possible.<sup>534</sup>

Many Welsh speakers lived and congregated in geographically isolated areas that were not easily accessible, thus further ‘isolation from the mainstream has generally meant that the Celts have been regarded as outsiders, strangers, even foreigners: as such they have been at best ignored, at worst, mistrusted, disliked or in extremes treated with active hostility.’<sup>535</sup> Further, in 1688, Thomas Jones noted that the English had ‘. . . almost blotted us out of the Books of Records. The last phrase is crucial for central to the loss of self-confidence was the loss of a sense of history.’<sup>536</sup> Jones’ observations provide historical context and evidence for the ability of authority to dictate and control communities through the loss of sense of history, namely their shared ICH. Regulating language in public spheres had a particularly detrimental effect on Welsh culture as so many activities were song and poetry related and a wealth of history was communicated orally. This compounded impact on historical records and loss of community identity and cohesion led to Wales as a country “...whose people had plenty of ancestry but no national history”.<sup>537</sup>

In addition to highlighting the impact that a loss of shared ICH has on a community, incorporated within this observation is a valuation judgement on what constitutes national history. Because much of Welsh history was in a form that was not written nor had no central scholarly institution, the culture was seen as inferior. This sense enabled English authority figures to cause a loss of confidence by ‘establishing’ that this lack of written record indicated a lack of national history. The instruments of authority, such as legislation as well as official and unofficial reporting reinforced the Westernised countries’ concept of what should be considered to be national history. Especially considering that there were rich existing oral

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<sup>534</sup> Williams, *supra* note 532, at 30.

<sup>535</sup> Hamnett, *supra* note 527, at 1.

<sup>536</sup> Jones, M., in Morgan, *supra* note, 510, at 45.

<sup>537</sup> *Id.*

traditions and the Welsh had a canonical (unwritten) knowledge of genealogy, large amounts of knowledge and tradition were devalued and lost through this systematic imposition of English language and cultural frameworks on Welsh society; this is the fate of oral history traditions in a society that prioritises the written record. As a result, ‘. . . in the 1690s [the Welsh] were already aware that a dull uniformity was beginning to creep over Welsh life.’<sup>538</sup> British leadership portrayed the resistance to replacing or supplementing oral traditions with written records as a disdain or discouragement; Thomas Hearne found it impossible to persuade Welshmen to put old Welsh manuscript chronicles into print: ‘they are all averse and are utterly for the discouraging of their own history.’<sup>539</sup> Thus authorities portrayed Welsh resistance as disparagement of their own people and culture, rather than as pride in the community’s historical ICH practices.

#### **iv. Authority and Sanctioning Welsh as a Means to an End**

In 1847, three English commissioners prepared a *Report of the Commissioners of Enquiry into the State of Education in Wales* ‘The Welsh language is a vast drawback to Wales and a manifold barrier to the moral progress and commercial prosperity of the people.’<sup>540</sup> The report became commonly referred to as the *Treachery of the Blue Books*, not entirely for the comments on the state of the educational system, but for the derogatory reporting on the moral state of the Welsh and the use of Welsh language.<sup>541</sup>

One of the inevitable results of the report was its effect on the nation's mind and psyche. It was at this time that ordinary Welsh people began to believe that they could only improve themselves socially through education and the ability to speak and communicate in English.<sup>542</sup>

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<sup>538</sup> *Id* at 52.

<sup>539</sup> *Id* at 47.

<sup>540</sup> 1847 Blue Books, The National Library of Wales, <https://www.llgc.org.uk/en/discover/digital-gallery/printed-material/the-blue-books-of-1847/>, last accessed 28 August 2017.

<sup>541</sup> *Id*.

<sup>542</sup> *Id*.



Conversely, authorities have recognised and harnessed the power of language, bardistry, and oral traditions in Welsh society. Long before the Blue Books, the prophetic tradition in Wales was ‘manipulated cleverly by Henry Tudor to drum up Welsh support by posing as the messianic figure of the ‘Second Owain’ and his descent from Cadwaladar was used to legitimise Tudor claims to the overlordship of Britain.’<sup>543</sup> These could be considered early signs of appropriation of bardistry; ‘the consequence is, Wales, which was formerly one of the merriest, and happiest countries in the World, is now become the dullest.’<sup>544</sup> English and Protestant viewpoints came to dominate through the prominence of the written word in English. This linguistic shift caused various forms of cultural change, including in the bardic professions and traditional celebrations as language is fundamental to structure and expression in poetry, song, and the festivals based around these practices.<sup>545</sup>

Whilst the harmonisation between Wales and England was viewed by some, particularly in the ruling classes, as a privilege, modern scholars such as A. O. H. Jarman, have noted the intrinsic trade-off for Welsh society at large: ‘that the privileges of citizenship were only given to the Welsh on condition that they forgot their own particular past and personality, denied their Welshness, and merged with England.’<sup>546</sup> In addition, economically motivated emigration to English-speaking, urban areas caused a substantial decrease in the remaining Welsh-speaking population, amplifying the effects of the government’s efforts to extinguish Celtic languages in favour of English.

Legal authority also dictated how education facilitated the practice of ICH. Schools enforced English-only laws and shamed children who spoke Welsh instead of English in school by forcing them to bear a *Welsh Not* card.<sup>547</sup> The *Welsh Not* was a piece of wood bearing the initials *WN* and was hung around the neck of

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<sup>543</sup> Morgan, *supra* note 510, at 46.

<sup>544</sup> *Id* at 44.

<sup>545</sup> *Id* at 50.

<sup>546</sup> Jarman, A., *Wales as a Part of England, 1485-1800*, in David Myrddin Lloyd (ed), *The Historical Basis of Welsh Nationalism* (Cardiff 1950).

<sup>547</sup> Hamnett, *supra* note 527, at 3.

a child. The care could be passed off to another child overheard speaking Welsh, and the child left with the sign at the end of the day incurred a punishment.

As the dominance of English in spoken and written word increased, Welsh was further maligned, referred to as the ‘gibberish of Taphydom, spoken now only by the lower orders.’<sup>548</sup> The Welsh were forced to learn English as well as take the most difficult, low wage jobs.<sup>549</sup> Michael Jones, a minister of the Welsh Congregationalists and leader of Welsh immigration and resettlement, stated in 1863, ‘It is not possible for a Welshman as a Welshman to hope for any form of upward mobility in the public sector, and he must be satisfied on personal and religious achievement.’<sup>550</sup> Considering the close ties of language to cultural practice and the heavy downward pressure from British authorities to use English, and not Welsh, in activities tied to livelihood, education, justice, and public participation, these measures presented a true threat to the continuity of Welsh ICH.

## **v. Readopting Welshness**

Even in face of this threat, Welsh language and culture was reclaimed in altered forms through subversive continued practice; language, as well as other forms of ICH, became a form of political resistance. In particular, the industrial revolution in the nineteenth century kept the Welsh language alive through the coal mining valleys that resulted, ‘on one hand the decay or demise of an ancient way of life, and on the other an unprecedented outburst of interest in things Welsh and highly self-conscious activity to preserve or develop them.’<sup>551</sup>

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<sup>548</sup> *Id* at 48.

<sup>549</sup> Williams, *supra* note 532, at 29-30.

<sup>550</sup> Jones, M., *Gwalydychfa Gymreig* (Liverpool 1863).

<sup>551</sup> Lewis, S., *Tynged yr Iaith (Fate of a Language)*, G. Aled Williams (tr.), BBC Radio (1962), <https://morris.cymru/testun/saunders-lewis-fate-of-the-language.html>, last visited 28 August 2017.

The early Welsh political resistance and second-wave cultural re-adoption<sup>552</sup> included a unique intentional immigrant settlement in Patagonia, Argentina, first established in 1865 by 160 Welsh settlers.<sup>553</sup> The arrangement was initiated through Welsh immigrant settlements in the United States and negotiated with Argentine government, primarily between Minister of the Interior Guillermo Rawson and Michael Jones.<sup>554</sup> The Welsh settlement was offered local administrative autonomy with an Argentine-appointed overseer. When the Welsh population exceeded 20,000, the settlement would be granted provincial status with full federal power.<sup>555</sup> However, the population never reached this bar. The immigrants found the land was difficult to farm, and the settlement never gained provincial status.<sup>556</sup> Nevertheless, there is still a Welsh-speaking population in Argentina that has developed a unique culture of Welsh tea houses and a variation of the Welsh language.<sup>557</sup>

In Wales, in 1925, Saunders Lewis participated in the founding of the *Plaid Genedlaethol Cymru*, the National Party of Wales, based on Welsh-speaking as a primary party activity and aimed for a fully Welsh-speaking Wales.<sup>558</sup> Due to his political involvement, Lewis was dismissed from his university post and, following this, even engaged in violent protest by setting fire to an English military school in Wales.<sup>559</sup>

Lewis broadcast a radio lecture, *Tynged Yr Iaith*, (Fate of a Language) in 1962, which famously addressed the fate of the language and reflected the movement into the mainstream of re-establishing Welsh

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<sup>552</sup> In contrast to Hobsbawm and Ranger's 'invented traditions', which are relatively recently created nationalistic innovations claiming 'authenticity', a second-wave cultural re-adoption can be seen after a tradition (invented or otherwise) fell into disfavour or disuse and has been recently taken up again within a practicing community, developing with the momentum common to ICH. See *infra* Chap. V; Hobsbawm, E., *Introduction: Inventing Traditions*, Hobsbawm, E. and Ranger, T. (eds) *THE INVENTION OF TRADITION* (Cambridge 1983).

<sup>553</sup> Coupland, N. and Garrett, P., *Linguistic Landscapes, Discursive Frames, and Metacultural Performance: the Case of Welsh Patagonia*, 205 *INT'L J. SOC. LANG.* 1, 8 (2010).

<sup>554</sup> Williams, *supra* note 532, at 30-33.

<sup>555</sup> *Id* at 32.

<sup>556</sup> *Id* at 30-33.

<sup>557</sup> See generally Coupland and Garrett, *supra* note 553.

<sup>558</sup> Hamnett, *supra* note 527, at 115.

<sup>559</sup> *Id* at 116-17.

language in legal and community circles.<sup>560</sup> *Tynged Yr Iaith* catalysed the formation of the Welsh Language Society (*Cymdeithas yr Iaith Gymraeg*) in 1962 – which still exists in 2017 – based on the principle of ‘non-violent direct action.’<sup>561</sup> Lewis ‘argued there had to be radical change in order to save the Welsh language; thousands of young people responded to the call. For over 50 years, the Welsh Language Society has been leading the way to promote and protect the Welsh language.’<sup>562</sup>

Creating a space for ICH through these means is not easily accomplished, especially in a legal climate that has, in recent history, oppressed the Welsh ICH in the interest of perpetuating the prevailing culture and government’s own authority. Forces other than the Welsh Language Society influenced the legal changes and reclamation of Welsh identity, including social programmes, other types of ground-roots ICH practices not structured into formal organisations, and greater social and educational mobility. However, the Welsh Language Society has fostered confidence and provided leadership for many of these changes, basing many of their activities around language as a foundation for enhancing Welsh culture and identity. Their use of ICH to affect legal and cultural authority includes the following:

- 1960's - Bilingual Road Signs
- 1970's - Welsh language TV channel campaign
- 1982 – S4C established, the world's only Welsh Language TV channel
- 1980's - Campaign for a Property Act to help sustain Welsh speaking communities
- 1993 - Welsh Language Act 1993, public bodies required to offer limited Welsh language services
- 2000's - Campaign for New Welsh Language Act; Campaign to keep local schools
- 2010 - Official Status for the Language under the Welsh Language Measure
- 2011 - Welsh-medium higher education college *Y Coleg Cymraeg Cenedlaethol* established”<sup>563</sup>

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<sup>560</sup> *Id* at 118.

<sup>561</sup> Welsh Language Society (*Cymdeithas yr Iaith Gymraeg*), <http://cymdeithas.cymru/node/2123>, last visited 28 August 2017.

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

The Welsh Language Society played an important role in legislation that repealed the historical prohibitions on Welsh by working with authorities; they proposed that both Welsh and English should be official languages, culminating in the Welsh Language Act 1967.<sup>564</sup> This Act established that ‘it is proper that the Welsh language should be freely used by those who so desire in the hearing of legal proceedings in Wales and Monmouthshire’ and that, in the official and public business, provision should be made for use of Welsh ‘with like effect as English.’<sup>565</sup>

Although it may seem, on the face of it, to be a positive development in language and culture, the reaction was largely negative. The Welsh Language Society organised rallies, and the National Language Forum objected.<sup>566</sup> The legal language ‘of like effect’ or ‘equal validity’ conveys a less stringent legal standard than treatment on the basis of equality’, and the provisions of the Act reflect that lower standard of treatment. For example, the Welsh Language Act of 1967 provided that advance notice had to be supplied to a court for the use of Welsh, and an appropriate Minister was allowed to prescribe a Welsh, or partially Welsh, version of statutory or official documents, depending on the circumstances.<sup>567</sup> Although the Act indicted progress, Welsh was still not treated equally to English in the public sector or education. By the mid-1980s, two bills were introduced in Parliament regarding the Welsh Language. The first was the 1986 Welsh Language Bill, which was not approved in a sufficiently timely manner. In 1987, an advisory group was created, and this advisory group ushered in the legislation, resulting in the Welsh Language Act 1993.

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<sup>564</sup> Welsh Language Act 1967.

<sup>565</sup> *Id* at Preamble.

<sup>566</sup> Basosi, D., *New or Larger? JFK’s Diverging Visions of Europe*, in Kosci, G., et al. (eds.), *The Transatlantic Sixties* (GHI 2013) 23.

<sup>567</sup> *Welsh Language Act*, *supra* note 564, at §§ 2(1) and (2).

The Welsh Language Act 1993 stated the English and Welsh languages should be ‘treated on the basis of equality’ rather than equal validity with optional implementation, as in the Welsh Language Act 1967.<sup>568</sup>

The Introduction of the 1993 Act reads in full:

An Act to establish a Board having the function of promoting and facilitating the use of the Welsh language, to provide for the preparation by public bodies of schemes giving effect to the principle that in the conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on a basis of equality, to make further provision relating to the Welsh language, to repeal certain spent enactments relating to Wales, and for connected purposes.<sup>569</sup>

Thus it was not until 1993 that the Law in Wales 1535 Acts were fully repealed. This modest Introduction could easily disguise the importance of repealing hundreds of years of statutory obstructions to full participation in civic and daily life for many Welsh people in Wales. This change was achieved through communities’ persistence. The influence of ICH is drastically underestimated by entities with legal authority, but following the statutory history and development of Welsh language legislation demonstrates how effective and powerful ICH can be in relation to legal and cultural authority. Despite this proof of importance and influence, the domestic statutory progression has not translated to action in the international arena. The United Kingdom has to date not made any indication that it will be joining the 2003 Convention.

## **vi. Eisteddfod as ICH**

Many traditions do not appear outwardly political, nor do practitioners consistently make any such claim; nonetheless, practicing ICH impacts political and more general authority structures. One now well-known manifestation of the celebration of the Welsh language and culture is the Eisteddfod. Although there is no direct English translation of ‘Eisteddfod,’ it can be closely approximated as a ‘session’, combining ‘sit’ and ‘to be.’<sup>570</sup> It is a travelling, annual competitive festival of Welsh traditional literature, music, and

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<sup>568</sup> Hamnett, *supra* note 527, at 126-28.

<sup>569</sup> *Welsh Language Act*, *supra* note at 564, at Introduction.

<sup>570</sup> *Eisteddfod*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=Eisteddfod> (Douglas Harper 2017).

dance. Scholars debate the date of the very first event, where loose gatherings of bards would meet and participate in friendly competitions at Lord Rhys' Cardigan Castle in 1176.<sup>571</sup>

The modern precursor of the National Eisteddfod was recorded in 1789, although similar events in 1451

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and 1567 have been documented.<sup>572</sup> The first officially recognised National Eisteddfod was held in 1861 and focussed on domestic history, arts, and culture. The event now regularly attracts about

*Figure 4.7: Llaldudno Eisteddfod, 5 July 1946. Source: Wales History, BBC, [http://www.bbc.co.uk/wales/history/archive/?theme\\_group=society\\_and\\_culture&theme=events&set=eisteddfod](http://www.bbc.co.uk/wales/history/archive/?theme_group=society_and_culture&theme=events&set=eisteddfod).*

150,000 visitors per year and offers over 250 trade stalls; Welsh is the official language of the festival.<sup>573</sup> Visitors report that the festival provides an opportunity for 'sharing a commonality and strengthening [my] sense of identity' in addition to discovering new Welsh music and literature'.<sup>574</sup> It

even serves as an 'unofficial marriage bureau'.<sup>575</sup> Many consider it 'part of being Welsh' and look forward to future generations carrying on the festival.<sup>576</sup> Many different *eisteddfodau* are now held on a smaller scale within Wales as well as internationally, including Welsh diaspora as well as international participants.

<sup>571</sup> *History of the Welsh Eisteddfodau*, NATIONAL MUSEUM WALES, <https://museum.wales/collections/eisteddfodau/>.

<sup>572</sup> John Davies, *A History of Wales* (Penguin Books 1994).

<sup>573</sup> *National Eisteddfod*, <https://eisteddfod.wales/visitor-figures-2016>, last accessed 28 June 2017.

<sup>574</sup> Cresci, E., *The National Eisteddfod of Wales: What it Means to Me*, THE GUARDIAN (8 Aug. 2014) <https://www.theguardian.com/theguardian/guardianwitness-blog/2014/aug/08/the-national-eisteddfod-of-wales-what-it-means-to-me>.

<sup>575</sup> *Id.*

<sup>576</sup> *Id.*

Notably, the festival revival has occurred within the past hundred years; the statutory changes in the form of the Welsh Language Act followed the ICH uptake within the past 30 years. The statutory reform is a remarkably modern legal reconstruction and was fuelled by community organisation and events like the National Eisteddfod that strengthen identity. Festivals that champion and support ICH – like language and musical traditions – provide venues for collaboration and present ICH in a positive light, encouraging

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practices that form community cohesion around ICH that has been historically denigrated. The National Eisteddfod in Wales has been called the country's 'leading mobile regeneration project,' resulting in positive economic benefits as well as driving legislative change through preserving and

*Figure 4.8: Contemporary Eisteddfod Stage Performance. Source: Customs and Traditions, The Captain's Guide, <http://www.thecaptainsguide.co.uk/the-national-eisteddfod-c627.html>, last visited 21 Nov. 2017.*

promoting language and culture.<sup>577</sup> The reclamation of the ICH in the form of languages and community-led festivals and traditions instigated legal and regulatory action.<sup>578</sup> The Eisteddfod '... is not an official, legal, or administrative institution. It is the creation of Welsh-speaking Wales, the only remaining symbol of the historical unity of the Welsh nation, the only Welsh mythos.'<sup>579</sup>

## vii. Conclusion

ICH in the form of language and rituals can be powerful tools for social and legal change; this power may explain why they can be appealing targets for legal regulation by authorities and why advocates for ICH promote safeguarding passionately. The 1535 and 1542 Acts set out, in a frank manner, the purpose for

<sup>577</sup> *About*, NATIONAL EISTEDDFOD, <https://eisteddfod.wales/about-us>, last accessed 28 June 2017.

<sup>578</sup> MacMillan, F., *Arts Festivals as Cultural Heritage in a Copyright Saturated World*, in Porsdam, H., (ed.), COPYRIGHT AND CREATIVE INDUSTRIES (2016).

<sup>579</sup> Lewis, *supra* note 551.



regulating language for unifying England and Wales, citing ‘some rude and ignorant People’ dividing the countries, a language-focussed derisive narrative that was perpetuated through the 1847 Blue Books and beyond.<sup>580</sup> However, ICH is rarely specifically mentioned in modern statutes as a means to achieve other ends as it was in the Laws in Wales Acts. Modern law tends to present more straightforward language, with some goals or explanation occupying the preamble, depending on the nature of the document. Even though the Welsh Language Act 1993 reads functionally and lacks the colourful language of the Law in Wales Acts, the practical effect of the repeal reaches far beyond the stated equal treatment of languages. In economically developed countries, and in unions, cultural groups experience subtler cultural erosion: a slower, consistent deterioration over time which can be just as detrimental but less noticeable.<sup>581</sup>

The Welsh speaking population decreased steadily after statutory limitations were imposed in 1535 and 1542 but now is holding steady at around 19% in Wales, largely due to grassroots cultural and language revival.<sup>582</sup> Additionally, the levelling may reflect factors such as technology and globalization; there is also a strong movement to have major software platforms incorporate a Welsh language option.<sup>583</sup> It is important to note that technology, which facilitates communication and connection with others in the community as well as accelerates the vehicles of political and legal change globally, contributes to driving these cultural adaptations of the law through community building, resource access, and linguistic equality.

The National Library of Wales has put forth a concerted effort to digitise many tangible representations of ICH practice for wider access, including manuscripts, journals, and other archives and has also received funding to preserve rare recordings of Welsh interviews, song, and speeches.<sup>584</sup> Other digital efforts provide the opportunity for community members to actively participate in story creation; for example, the

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<sup>580</sup> 1535 Acts; 1847 Blue Books.

<sup>581</sup> Deacon, *supra* note 4.

<sup>582</sup> *Id.*

<sup>583</sup> Welsh Language Technology and Digital Action Plan, Welsh Government (27 May 2013) <http://wales.gov.uk/topics/welshlanguage/publications/welsh-language-technology-and-digital-media/?lang=en>.

<sup>584</sup> National Library of Wales, <https://www.llgc.org.uk/index.php?id=1>, accessed 28 June 2017; National Library of Wales to Digitise Sound Recordings, BBC News (15 April 2017) <http://www.bbc.co.uk/news/uk-wales-39609953>.

‘People’s Collection Wales’ allows community members to upload and browse through historical pictures and maps.<sup>585</sup> Whilst there is always a conundrum related to ossifying ICH in a static form and therefore affecting its expression and evolution, by heavily involving community practitioners and local institutions in the administration of the programmes, the ICH may be able to best preserve its intangible elements in a modern, technologically-oriented forum.

The instruments of change, such as language, are reinforced differently through law and remain tied synergistically to ICH manifestation. The legal changes in Wales, brought about by community led and implemented will, has strongly affected the modern Welsh ICH; the challenges Welsh speakers faced in protecting their language brought the community together in new ways, such as with the Welsh Language Society and the immigration to Patagonia, Argentina. In these instances, external legal authority and internal community authority shaped new ICH as well.

Whilst it is tempting to align the levelling off of Welsh speakers with coordinating change in ICH, numbers of Welsh speakers do not sufficiently constitute a quantitative measurement of Welsh language as cultural heritage. Even if people are not speaking Welsh on a regular basis, they may be participating in language festivals, enjoying Welsh celebrations and traditions, and practicing related ICH without being regular speakers. Speaker census is indicative but not definitive in demonstrating the full extent to which the language operates as a community practice that might influence authority.<sup>586</sup>

Due to the historical perception that the oral histories and traditions had less value than if there were fixed literary works and the associated stigma with the Welsh language, practitioners of this ICH were underrecognised as opposed to the literary works that could attract copyright and the associated acclaim of the romantic author. The reinforcement of the written work through IP law contributed to the decline of these types of Welsh ICH. Welsh communities have initiated and sustained active involvement in

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<sup>585</sup> Wales Digital Library; People’s Collection Wales, <https://www.peoplescollection.wales/>, accessed 28 June 2017.

<sup>586</sup> Hamnett, *supra* note n 527.

legislative and practical evolution of the law through the equality of the Welsh language, its integration into technology, and social and cultural Welsh language events. Statutory change in no small feat for ground-up community movements, especially one based on historically sanctioned ICH. Now that Welsh language can be used to fully participate in public life and education and is, even further, championed events that celebrate ICH like Eisteddfodau, the Welsh language gains a wider public legitimacy, and stand a higher chance of continuing to evolve by attracting new audiences and practitioners, reflecting the identity and expressions of evolving communities. In this sense, the practice of ICH, as a ‘living expression’ strongly influences authority as it can foster a strong sense of identity as well as enrich and improve quality of life, and authority can function as a support rather than as a restriction on ICH expression

#### **e. Conclusion on Case Studies**

ICH in Scotland, Ireland, and Wales grew from shared cultural and linguistic roots. As ICH is wont to do, the languages, culture, and practices have evolved to reflect the identity of the various practicing communities over time. All of these countries, however, have experienced external force – in the form of law and otherwise – that disrupted cultural transmission. In the past, the law was wielded as a much blunter instrument, which achieved cultural cohesion with laws that outright criminalized ‘subversive’ cultural practices.<sup>587</sup> In more modern times, copyright has the potential to create similar effects, intentionally or not, through exclusionary monopolies over artistic and literary works for increasingly extended limited period of time. Whilst copyright may function well for incentivising individual or joint authors to produce original work, ICH practices can be caught up in this legal framework, especially in the absence of a registration system, prohibited by the Berne Convention.<sup>588</sup>

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<sup>587</sup> *E.g.*, The Laws in Wales Acts 1535 and 1542.

<sup>588</sup> The Berne Convention, *supra* note 5, at Art. 5(2).

As demonstrated by the case studies, ICH plays a valuable role in social and cultural life. Without community access to these resources, true original creative output and shared cultural practice suffer. In Scotland, the re-adoption of the tartan still brings together clans and communities, so much so that the National Records Service now runs the register in order to ensure continued global association between tartan and Scotland, but at the cost of Scottish citizens participating actively in the management of a register, affecting associated ICH. Ireland capitalised on its rich heritage by leveraging its citizens' ICH, with mixed feedback on the benefits and costs, but now owns related IP rights to 'Irishness' via submissions and branding during the Gathering. Wales has now legally welcomed Welsh back into public fora and has adapted the Eisteddfod to reflect more modern, globalised art forms alongside traditional Welsh arts.

Each of these demonstrate a recognition of the value of the ICH in a developed country, in or recently in a union, thus not possessing entirely autonomous legislative and international powers (or are have recently acquired them). It is no small point that Ireland, nearing 100 years of independent rule, has now signed on to the 2003 Convention. The subtle erosion and incursion on ICH by IP in developed countries is less dramatic than the destruction of historic, spiritually important monuments or the decimation of the majority of entire populations of practicing communities through colonisation or war. However, the imperialist sweep of law over the globe indicates that international treaties will have a profound effect on cultural outputs when the regulated subject matter is or overlaps with ICH. Given this pattern, acknowledgement and protection of ICH domestically in countries that are considered to be 'knowledge producing' or are strong enforcers of IP laws should equally be the origin of strong ICH safeguarding. Rather than solely attempting urgent safeguarding of endangered ICH, emphasis on ICH in developed countries will trickle down, ideally creating fewer fires to put out and more precisely honed, effective laws. Additionally, championing domestic ICH can bring communities closer in developed countries, creating a ripple of positive effects.

Taking into account the evidence provided by the three case studies related to the influence of ICH on IP law and how IP can shape ICH, this dissertation will now proceed with how can this information be applied and synthesised in modern contexts. ICH is evolution of a practice of authentic identity by communities, and IP laws are a part of how our society interacts and incentivises culture, how can commercialisation function alongside these two forces? Considering that the GLAM sector is charged with the stewardship of much of Western culture, awareness and safeguarding of ICH will often fall within their realm. The following chapter will look at the phenomenon of second-wave adoption of ICH, which justifies safeguarding, examine tangification and how IP law can impact ICH, and apply these concepts with the example of Fair Isle knitting through a lens of regionally specific media. The chapter will then recommend the use of abstraction for detecting ICH within potential IP or other cultural works; abstraction is an existing legal analytical technique for determining substantial similarity in non-literal copyright infringement and will finally conclude on the importance of these frameworks.

## V. Cultural Adoption and Tangification: the process of Intangible Cultural Heritage Becoming Intellectual Property<sup>589</sup>

Theoretical themes emerged from the three examples of ICH in geographically, culturally, and politically tied countries. The ICH had been fully readopted by the practicing communities, following a legal intervention, along with the knowledge that the elements that were modern additions. Nonetheless, the ICH is authentic to the contemporary community and reflects its identity. From this apparent paradox came the concept of second-wave adoption of ICH, allowing for the deserved validity of the cultural practice whilst acknowledging the break in continuous practice. This second-wave adoption along with the process through which ICH becomes IP – thereby exposing it to the risk of losing the qualities that maintain authenticity – is elucidated in this chapter. Further, the justification for ensuring that this process and the proper rights in each legal system are emphasised through this examination; “we need heritage rights to fend off the new imperialism of private appropriation of culture, especially as it operates through the global system of intellectual property rights ushered in through the WTO TRIPs Agreement.”<sup>590</sup>

The impact of social and legal systems that disproportionately reward tangible manifestations of cultural heritage, such as built heritage or fixed works suitable to copyright protections. When ICH is altered to a static form, the ‘tangification’ process converts ICH and other intangibles into a form that can be owned. This process ossifies the living heritage and may evolve into a generic saleable good as opposed to a persisting as a living cultural practice. This is a necessary, although not sufficient, precursor to proprietisation, which can stagnate or devalue ICH. Certain types of ICH can encounter complex problems interacting with the IP regime, such as dance. Not only are there legal uncertainties regarding authorship

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<sup>589</sup> Portions of this chapter were published at: Blakely, M., *GLAMourising Intangible Cultural Heritage: When Technology, Copyright, and Cultural Institutions Meet*, in Wallace, A. and Deazley, R., eds, *Display At Your Own Risk: An experimental exhibition of digital cultural heritage* (2016), available at <http://displayatyourownrisk.org/blakely/>.

<sup>590</sup> MacMillan, *supra* note 238, at 364.

and ownership, many dancers do not see copyright as relevant to their practice,<sup>591</sup> raising questions about incentivisation related to ICH as IP.

By using terminology like tangification, the focus shifts to the precondition for IP, as most copyright regimes require fixation. The tangification process identifies how ICH and other intangibles convert into a form that can be owned, a process that ossifies the living heritage and may evolve into a generic saleable good as opposed to a cultural practice. This is a prerequisite – necessary but not sufficient – for propertisation and shapes the ICH in a (often) nondeliberate way through rewarding tangible manifestations with legal protections and social reinforcement. Once culture is owned as IP, it is subject to commodification and further to commoditisation, which is a generic saleable form. This commoditised form is bereft of the intangible traits that enrich and create value for creative and cultural ICH.

In developed countries, the stewards of culture are often GLAM institutions. They act as the historical keepers for many aspects of humanity's shared artistic and literary works and are some of our staunchest advocates in the preservation and advancement of culture. In the face of rapid technological development and exponentially spreading globalisation, culture is in dire need of such stewards. However, this stewardship in the Western world, through practice, demand, and even necessity, has taken primarily the role of preserving and protecting objects. As Richard Kurin noted:

Museums are adept at dealing with objects. Objects are accessioned, numbered, measured, catalogued, stored, preserved, conserved, exhibited, repatriated and de-accessioned. Whilst museum curators and professionals fully understand that each object tells a larger story, it is the object itself that is fetishised.<sup>592</sup>

These material objects, including spaces such as landmarks and monuments, would not be considered worthy of such preservation and protection efforts unless the tangible object itself reflected or symbolized

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<sup>591</sup> Pavis, *et al.*, *supra* note 149, at 101.

<sup>592</sup> Kurin, *supra* note 272, at 1.

intangible cultural heritage. To put it colloquially, ‘there is a lot of intangible stuff underneath the tangible stuff.’<sup>593</sup>

Defining these immaterial and intangible heritage practices can be difficult, yet is necessary from a legal perspective. To review, the 2003 Convention defines ICH as:

[T]he practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, 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, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.<sup>594</sup>

ICH can consist of traditional knowledge, songs, craftsmanship, dance, and other practices, as well as the associated cultural artefacts and spaces.<sup>595</sup> These examples are simply illustrative of the overarching concept of cultural memory and useful for contextualizing why widely varying global living heritage passed generationally must be allowed to organically evolve. Such evolution, however, often defies the process of identification so desirable in the realm of legal protections.

National legal measures protect ICH like cultural memory once it becomes fixated in a material form. In the United Kingdom, the CDPA bestows copyright upon authors in the form of time-limited exclusive rights in relation to fixed, original literary or artistic works. In some cases, ICH naturally lends itself to

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<sup>593</sup> McCleery, *supra* note 210, at 28.

<sup>594</sup> The 2003 Convention, *supra* note 4, at Art. 2(1).

<sup>595</sup> During negotiations for and since the Convention’s adoption, scholars expressed concern that defining ICH in codified documents could further perpetuate existing cultural divisions. ‘The use of the terms ‘indigenous’ and ‘traditional’ help to perpetuate a historical distinction between (tangible) Western and (intangible) non-Western cultural heritage. We therefore support a definition of intangible heritage that does not limit instances to the ‘traditional’ or ‘indigenous’, or even to cultural forms that have already been passed on from ‘generation to generation’. Deacon, *supra* note 4, at 33).



manifestation in these forms, such as a transcribed oral history or recorded dance. New ICH can also develop from and around these tangible objects. However, rendering intangible expressions in tangible form for copyright or other preservation and protection purposes can lead to a loss of meaning as a living practice for the relevant communities. Indeed, the very process of this materialization counteracts the purpose of protection efforts. In these cases, ossification can prevent access to the authentic intangible expression by privileging a single moment in which the ICH has been captured and then represented to the public. Safeguarding access to genuine manifestations of ICH is key to enhancing public knowledge and providing the opportunity for practicing communities to influence the direction of cultural practices.

‘Access’ to ICH, in the context of artistic and literary works, will be shaped by relevant national laws, like the CDPA.<sup>596</sup> When fixation occurs, qualifying works are protected by copyright law for a time-limited (albeit lengthy) period of time. After copyright expires, the work enters the public domain, and in theory is free to be used by all. However, when cultural institutions digitize works in the public domain, a new copyright may arise in the digital surrogate that has been created. Moreover, once these digital surrogates are made available online, additional restrictions to access and use can be applied by the cultural institution through its website terms of use. Essentially, a *new* type of heritage is arising in these new traditions and professional practices in dealing with digital surrogates of these public domain works of art.

Even with many new initiatives to make artistic and literary cultural heritage material accessible online, “[t]his digitally available 10% represents an astonishing 300 million objects, reflecting the many facets of European culture captured in books, paintings, letters, photographs, sound and moving image. Only one third of that (34%) is currently available online, and barely 3% of that works for real creative re-use (for example in social media, via APIs, for mash-ups, etc.). We believe that if we can make this material

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<sup>596</sup> CDPA, *supra* note **Error! Bookmark not defined.**

available online, and preferably in open formats, we'll start to see the benefits for society and the economy.”<sup>597</sup> No matter the technological and legal hurdles, it is important they are addressed and overcome as there is a high social and economic value return from making digital materials sharable.<sup>598</sup> Beyond current value, future cultural heritage, both tangible and intangible, depends on the ability to learn from and develop shared cultural heritage.

This chapter will proceed by putting forth the phenomenon of first- and second-wave adoption of ICH, built upon ‘invented tradition’; then examining more carefully the role of ICH in the GLAM sector and how it is viewed and processed by heritage practitioners. Next, it will propose ‘tangification’ as an approach to conceptualising ICH in an IP and cultural heritage framework. Last, it will review some recent developments in ICH in the United Kingdom. The chapter concludes by arguing that a greater understanding and acknowledgement of ICH within the GLAM sector would empower cultural institutions to enhance the public experience of our shared cultural heritage.

#### **a. First- and Second-Wave ICH Adoption and Governmental Intervention**

In each of the case studies *supra*, the ICH and related IP is connected by shared characteristics that were sufficiently obvious at the outset to merit inclusion into this dissertation: geographic proximity, economic status, shared governance and cultural history. Following the research, additional theoretical commonalities arose; this section will deal with the second-wave adoption of ICH. This concept grew from the observation that the legal interventions enclosing ICH – of an IP nature and otherwise – were clustered around a particular time frame, a constraint that was not a limitation of the initial dissertation

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<sup>597</sup> *Strategy Plan 2020*, Europeana (2015) 9, available at [http://pro.europeana.eu/files/Europeana\\_Professional/Publications/Europeana%20Strategy%202020.pdf](http://pro.europeana.eu/files/Europeana_Professional/Publications/Europeana%20Strategy%202020.pdf), last accessed 27 Nov. 2017.

<sup>598</sup> See generally Tanner, S., *Measuring the Impact of Digital Resources: The Balanced Value Impact Model* (King's College 2012), available at [https://www.kdl.kcl.ac.uk/fileadmin/documents/pubs/BalancedValueImpactModel\\_SimonTanner\\_October2012.pdf](https://www.kdl.kcl.ac.uk/fileadmin/documents/pubs/BalancedValueImpactModel_SimonTanner_October2012.pdf).

topic. Around the late 1800s and early 1900s, new participating communities were especially active, and whilst this dissertation is restricted by time and length, many other types of ICH could be analysed that would have been taken back up around that period of time, following a legal intervention.

The observation of heightened cultural practice is not novel for disciplines outside of law: for instance, historians Eric Hobsbawm and Terence Ranger published and edited a collection entitled *The Invention of Tradition* dealing with the cultural aspects that were reintroduced into Welsh, Scottish, and British society. When discerning how these invented traditions came about, they highlighted disruption of social patterns and expected more frequent occurrence:

... when a rapid transformation of society weakens or destroys the social patterns for which ‘old’ traditions had been designed, producing new ones to which they were not applicable, or when such old traditions and their institutional carriers and promulgators no longer prove sufficiently adaptable and flexible, or are otherwise eliminated: in short, when they are sufficiently large and rapid changes on the demand or the supply side. Such changes have been particularly significant in the past 200 years, and it is therefore reasonable to expect these instant formalizations of new traditions to cluster during this period.”<sup>599</sup>

Narrowing the focus into the geographical and topical elements relevant to this dissertation, this rapid transformation during the past 200 years was accompanied by legal interventions, regulating both culture and IP; these laws were shaped by and in response to ICH, as explored *supra*.<sup>600</sup> In parsing out an invented tradition, the authors claim that the revival of traditions must become invented and not genuine and are defined by a ‘break’, calling for such revival:

Indeed, the very appearance of movements for the defence or revival of traditions, ‘traditionalist’ or otherwise, indicates such a break. Such movements, common among intellectuals since the Romantics, can never develop or even preserve a living past (except conceivably by setting up human natural sanctuaries for isolated corners of archaic life), but must become ‘invented

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<sup>599</sup> Hobsbawm, *supra* note 552, at 4-5.

<sup>600</sup> Chapter IV.

tradition'. On the other hand, the strength and adaptability of genuine traditions is not to be confused with the 'invention of tradition.' Where the old ways are alive, traditions need be neither revived nor invented.<sup>601</sup>

In light of this, what effect does an invented tradition have on ICH, and what does this mean for practicing communities? When approaching this phenomenon in plain language, inherent contradictions arise. Tradition, in a lay context, is defined as "a long-established custom or belief that has been passed on from one generation to another; an artistic or literary method or style established by an artist, writer, or movement, and subsequently followed by others".<sup>602</sup> Further, 'invent' is defined as to "create or design (something that has not existed before); be the originator of; make up (an idea, name, story, etc.) especially as to deceive someone".<sup>603</sup>

Taking the definition of 'invented tradition' *prima facie*, much of the present ICH considered in this dissertation may not have the continuity and authenticity as called for in the 2003 Convention if the basis of an invented tradition is applied. Based on these definitions, it is fair to conclude that the attachment of 'invented' to any tradition or ICH has the potential to imperil its authenticity for non-practicing and practicing communities. Whether or not ICH is 'invented' or not is crucial to its practice, taking the term 'invented' as 'fake' or 'inauthentic':

Therefore, loss of authenticity can lead to the creation of an artificial ICH, which is no longer connected to the cultural idiosyncrasy of the communities, groups, and/or individuals to which it culturally belongs, hence lacking its main distinctive element. When this process takes place, the heritage concerned can no longer be considered 'intangible cultural heritage' according to the meaning of this expression as representing a value safeguarded by international law. Loss of authenticity is particularly likely to occur when ICH is managed by state authorities through according priority to interests which are external to its creators and bearers. For example, states may tend to accommodate the characteristics of ICH to the expectations of the dominant sectors of the society, which can be different from the interests of the specific communities especially concerned by the heritage in point. Or it is possible that the driving force of ICH management is economic interests, for example when the competent authorities try to make the heritage concerned a tourist attraction, which makes it necessary for such heritage to be adapted to the

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<sup>601</sup> Hobsbawm, *supra* note 552, at 7-8.

<sup>602</sup> *Tradition*, Oxford Dictionary, <https://en.oxforddictionaries.com/definition/tradition>, last accessed 27 Nov. 2017.

<sup>603</sup> *Invent*, Oxford Dictionary, <https://en.oxforddictionaries.com/definition/invent>, last accessed 27 Nov. 2017.

needs and expectations of tourists. ... These (and other) approaches irremediably corrupt the authenticity and, a fortiori, the cultural and legal value of ICH.<sup>604</sup>

Hobsbawm and Ranger put forth that a ‘genuine tradition’ has strength and adaptability and ‘where the old ways are alive, traditions need be neither revived nor invented.’<sup>605</sup> On this basis, there is acknowledgement that traditional practice is not static. However, the evolution within the framework of invented tradition is limited to an uninterrupted, isolated pocket of human life, so the flexibility and development in that context is narrow. Thus nearly all of the ICH now present in developed countries does not exist in an isolated pocket and, then, is invented.

Traditions are created, by individuals, communities, or institutions but draw upon or reference historical roots; in some cases, the invented tradition is made to deceive or manipulate social behaviour.<sup>606</sup> This type of institution-led invented tradition relied on the authenticity and identity-shaping nature of ICH to fuel nationalism; “[e]xisting customary traditional practices – folksong, physical contests, marksmanship – were modified, ritualized, and institutionalized for new national purposes.”<sup>607</sup> Whilst the benefits of ICH in practicing communities has been proved, ICH can be used to manipulate practicing communities, the consequences of which can be seen, for example, in right-wing extreme nationalists.<sup>608</sup> The invented tradition, encompassing values and social behaviours, has the potential to promote patriotism and solidifying nation-based social groups but also can be a nefarious influence as well.

One marked difference between the old and invented practices may be observed. The former were specific and strongly binding social practices, the latter tended to be quite unspecific and vague as to the nature of the values, rights, and obligations of the group membership they inculcate: ‘patriotism, ‘loyalty’, ‘duty’, ‘playing the game’. ‘the school spirit’, and the like.<sup>609</sup> The invented

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<sup>604</sup> Lenzirini, *supra* note 40, at 113.

<sup>605</sup> Hobsbawm, *supra* note 552, at 7-8.

<sup>606</sup> *Id.*

<sup>607</sup> *Id.* at 6.

<sup>608</sup> MacMillan, *supra* note 238, at 353-33.

<sup>609</sup> Hobsbawm, *supra* note 552, at 10.

practices were ‘ill-defined’, but the practices were ‘virtually compulsory’; “[t]heir significance lay precisely in their undefined universality.”<sup>610</sup>

Hobsbawm and Ranger add a theoretical sophistication to the combined terms, and clarify that

“[i]nventing traditions, it is assumed here, is essentially the process of formalization and ritualization, characterized by reference to the past, if only by imposing repetition.”<sup>611</sup>

Under this system, invented traditions can be further divided:

“[Invented traditions] seem to belong to three overlapping types: a) those establishing or symbolizing social cohesion or the membership of groups, real or artificial communities, b) those establishing or legitimizing institutions, status or relations of authority, and c) those whose main purpose was socialization, the inculcation of beliefs, value systems, and conventions of behaviour.”<sup>612</sup>

Neither of these instances, Type B and C invented traditions, would qualify as a second-wave adoption; institution-led or functional ritual falls outside the purview of the 2003 Convention, which is focussed on intangible cultural expression. Type A invented traditions closely align with ICH as a distinct type of tradition and cultural heritage. If second-wave adoption of ICH pertains to Type A of the invented traditions, then the ICH is community and identity based. Whilst ICH might also include socialisation and inculcation of beliefs, value systems, and behaviour, rarely is this the main purpose. Indeed, this second-wave adoption includes the awareness of the practicing community that there has been a conscious re-adoption, and the ICH has been fully integrated in its evolved form as authentic and identity forming.

First- and second-wave adoption can be understood as subsidiary to invented traditions, contextualised by geographical location, specific to intangibles, and as interrupted by legal intervention. The first-wave adoption is the original, historical practice, what an invented tradition framework would consider the ‘genuine tradition’; the second-wave adoption occurs when the practicing community, interrupted by an

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<sup>610</sup> *Id.* at 11.

<sup>611</sup> *Id.* at 4.

<sup>612</sup> *Id.* at 9.

external force, fully re-integrates the evolved ICH into the new community. This framework relates specifically to the ICH due to the central feature of an identity function and the *subjective* authenticity to the practicing community. Further, it is intertwined with the legal interventions in the geographical area, during the time period relevant to this dissertation and to Hobsbawm and Ranger. They specify that the break in continuity signifies the invented tradition:

Nor should we overlook the break in continuity which is sometimes clear even in traditional *topoi* of genuine antiquity... such a break is visible even in movements deliberately describing themselves as 'traditionalist' and appealing to groups which were, by common consent, regarded as the repositories of historic continuity and tradition, such as peasants."<sup>613</sup>

Within the subject ICH, practitioners – or the repositories of historic continuity and tradition – are often aware of the 'invented' elements, even if those outside the practicing community are not.<sup>614</sup> This social and historical self-awareness of a 'break' in the strictly historically adherent traditional practice may, indeed, be the – or at least a – source of the sentiment that the United Kingdom has no ICH. If the United Kingdom and Ireland are considered to have predominantly invented traditional culture, then it follows that the ICH exists in a penumbra in regard to safeguarding and the socio-legal and cultural dialogue.

The potential imperilment of ICH, in the shadow of this penumbra, is the basis for this dissertation's introduction of the concept of first- and second-wave adoptions of ICH. In the theoretical context, inventing traditions embodies both the lay definitions and the interpretive framework; a second-wave adoption repositions agency with a practicing community that it would have retained if not intervened upon by an external influence. Continuing to operate within the limits of the geographic and temporal limits of this dissertation and of an invented tradition framework, the reintroduction of ICH to a practicing community was facilitated by many social and economic factors, including technology, globalisation,

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<sup>613</sup> *Id.* at 7.

<sup>614</sup> *E.g.*, common knowledge of the history of the legal intervention in the ICH related to and subsequent reintroduction of tartan.

poverty, forced emigration, and legal intervention. However, in considering the quantity of newly invented traditions, the authors do not locate many:

...it seems clear that, in spite of much invention, new traditions have not filled more than a small part of the space left by the secular decline of both old tradition and custom; as might indeed be expected in societies in which the past becomes increasingly less relevant as a model or precedent of or most forms of human behaviour.<sup>615</sup>

However, this dissertation demonstrates a wealth of ICH practiced in Ireland and the United Kingdom, a phenomenon only in recent years being recognised fully by some heritage institutions.<sup>616</sup> This perception that cultural heritage cannot be genuine or authentic if it has evolved or has been interrupted does not reflect the value of ICH to practicing communities, for whom the past is still relevant, and to society at large and, in fact, more closely defines TCEs, rather than ICH. This contradiction in comparing ICH to TCEs may exemplify some of the challenges in identifying domestic practices as culture producing. Contemporary culture is not static or archaic but can still qualify as tradition and culture. Discounting this fundamental aspect puts ICH at risk and has the potential to weaken IP law by overextending protections beyond its scope.

Each of the three case studies in this dissertation fall broadly within the time period outlined for invented traditions.<sup>617</sup> Each type of ICH has also garnered shares of criticism surrounding authenticity or as a criticised as a ‘fake’ tradition. Tartan is purported to have been reintroduced to lowlands Scotland by the charlatan ‘Sobieski Stuart’ brothers, who claimed to be princes, and foisted all manner of romantic apocrypha regarding tartan and clans upon the Scottish and British people.<sup>618</sup> The National Eisteddfod, facing financial shortcomings, added contemporary alongside traditional dance, social activities such as bowling and go-karts, and a fibreglass, reusable *Gorsedd* circle of ‘stones’ was introduced in place of the

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<sup>615</sup> Hobsbawm, *supra* note 552, at 11.

<sup>616</sup> E.g., the RSA Report, *supra* note 50, and the AHRC Cultural Value Report, *supra* note 521.

<sup>617</sup> The time period outlined for ‘invented traditions’ falls possibly not before 1789, but primarily between 1870 and 1914. Hobsbawm, E., *Mass-Producing Traditions: Europe, 1870-1914*, in Hobsbawm, E. and Ranger, T. (eds), *THE INVENTION OF TRADITION* (Cambridge 1983) 272.

<sup>618</sup> Trevor-Roper, H., *THE INVENTION OF SCOTLAND* (Yale Uni. Press 2008) 216-36.



traditional stones left to commemorate the event to save costs.<sup>619</sup> Ireland's internal struggles with authenticity and reluctant emigration have re-materialised under a tourist gaze with cultural displays and IP ownership of Irishness, with an internal institutional intervention.<sup>620</sup> Nonetheless, the ICH aspects of these practices still reflect the identity of the contemporary, intergenerational communities and have been fully readopted, following this period of social upheaval and transition, with an awareness of the temporal 'break' in tradition.<sup>621</sup>

Specifically, as related to ICH and invented traditions, ICH has the benefit of identity formation following intergenerational transmission that grant authenticity to the practice. Rather than tradition existing as a static practice, ICH develops and evolves along with the community of practice. In many types of ICH, and particularly those in the case studies, the 'break' or interruption in practice of the ICH was caused by external legal interventions, not an internal development moving away from the practice. Thus any new uptake in a modern context, under Hobsbawm and Ranger, would then be an invented tradition. However, ICH can be carved out in that space as an exception, by its definition.<sup>622</sup>

Therefore, in the case of ICH, a second-wave adoption during the past 200 years in the British Isles appropriately identifies the phenomenon within practicing communities; if it is invented tradition, then it is a subset that can maintain its authenticity through reflective recreation. ICH does not break in the same way as the institution-led traditions, or Types B and C of invented tradition. A Type A invented tradition can include ICH. Where that ICH still possesses the relevant traits to the practicing community and has been fully re-adopted, then the more contemporary version of the ICH is a part of its natural evolution and should not be counted as a decline in tradition and custom.

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<sup>619</sup> Howell, *supra* note 225, at 108-09.

<sup>620</sup> Graham, C., '...*Maybe That's Just Blarney*': *Irish Culture and the Persistence of Authenticity*, in Graham, C. and Kirkland, R. (eds) *IRELAND AND CULTURAL THEORY: THE MECHANICS OF CULTURAL THEORY* (1999 MacMillan).

<sup>621</sup> *E.g.*, Scottish clan governance with the knowledge of the history of the legal restrictions and reintroduction through spurious means.

<sup>622</sup> The 2003 Convention, *supra* note 4.

ICH is as valid and worth safeguarding as TCEs. It also has a high potential to highlight the intersection with IP law, which, in the midst of this period of social transformation and upheaval, rapidly escalated the systemic award of exclusive monopolies for creative product that might also encapsulating cultural product. The medium of cultural expression can change as quickly as the ICH itself. In this framework, it is worth considering at what point traditions become invented and at what point they were first-wave adoptions or TCEs flexibly adapting. This dissertation would argue it is at the point that the tradition persists as second-wave adopted ICH, which can include the intergenerationally transmitted knowledge of externally imposed breaks in practice and the invented aspects or mythology surrounding the historical practice.

Particularly when a legal or authoritative external influence initiates the break, no matter how assimilated the minority culture becomes with the mainstream, this is a step in the ICH. This intervention should not deprive the participating community of authentic practice of ICH, as this presents a different course of evolution than the deviation or abandonment of the ICH.

There are cultural practices that can be clearly qualified as 19<sup>th</sup> century invented traditions.<sup>623</sup> A large portion of social ritual presented as tradition practiced from time immemorial is, indeed, an invented tradition from the past 200 years.<sup>624</sup> These can be distinguished from ICH in second-wave adoption.

Continuing with the example of tartan, there is a legitimate first wave adoption in the Scottish Highlands, although related traditions are modified; clans may have been identifiable by their tartan but primarily because of the available dyes in the geographic location.<sup>625</sup> Legal and military intervention disrupted the clan system and caused social stigmatisation of tartan until it was taken back up by royalty, and thus over time regained popularity across Scotland and the globe.<sup>626</sup> As practicing communities identified with their

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<sup>623</sup> *E.g.*, Hobsbawm and Ranger, *supra* note 552.

<sup>624</sup> Whilst this dissertation is limited to the United Kingdom and Ireland, this is especially true in young nations, like the United States, as national traditions could only be created within approximately the past 200 years.

<sup>625</sup> *Supra* Chapter IV(b).

<sup>626</sup> Hobsbawm and Ranger, *supra* note 552, at 7.

clan networks and Scottish identity, the association with the tartan pattern and clan emerged.<sup>627</sup> Further, as technology and globalisation escalated, even communities that were not clans learned of the tartan symbolism and sought out tartans to represent their ‘clan’.<sup>628</sup>

Does this evolution discount the value of tartan as ICH? Would it be more valuable were it limited only to Scottish people living in the Highlands in the geographically appropriate areas? The Tartan Register seems not to take this stance, although the administration transfer of the Register to governmental control can be problematic, as discussed *supra*.<sup>629</sup> Clan representatives who were involved in the community registrars also seem also to agree that communities outside of clans can be represented by a tartan.<sup>630</sup> To count ICH as invented or not genuine tradition in these circumstances leaves practicing communities with little recourse; returning agency to that practicing community is option most in line with community behaviour and avoids artificial distinctions that may not take into account the realities of cultural practice.

Considering these factors, the ‘break’ described by Hobsbawm and Ranger that then may lead to the classification as an inauthentic invented tradition, justified by a historical practice (accurately or less so) should be mitigated, at least, in the case of the legal or military intervention of an external force if a practicing community has fully re-adopted the ICH and considers it to reflect the identity of the community. This scenario would represent a second-wave adoption of ICH rather than an invented tradition.

Treating ICH as second-wave rather than invented is important for the institutional definitions, as it can affect curation and safeguarding decisions. Also cultural institutions like the RSA can bring awareness of these cultural practices with the inclusion of ICH in a Heritage Index. Including ICH can broaden cultural horizons, spilling over to cross the knowledge-producing and culture-producing divide. Finally,

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<sup>627</sup> *Id.*

<sup>628</sup> *Id.*

<sup>629</sup> *Id.*

<sup>630</sup> *Id.*

recognising second-wave adoption can provide validity for the practicing community, decreasing the possibility of marginalisation or disenfranchisement with their own ICH.

### **b. Intangible Cultural Heritage in the GLAM Sector**

Proceeding into present day IP and ICH, at the tail end of second-wave adoption in the United Kingdom and Ireland, information about cultural and creative practices now are accessible in largely centralised banks of knowledge. Alongside academia and community record-keepers, curation and documentation fall heavily on GLAM. The GLAM sector is extremely adept at preserving as well as generating funding for the preservation of tangible heritage and immovable heritage, like monuments. Many of these modern heritage notions were furthered by the 1972 World Heritage Convention, which described cultural heritage as:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; – groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; – sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.<sup>631</sup>

Research has indicated several compounding scenarios that might explain why the safeguarding and celebration of intangible heritage is not so well served by Eurocentric conceptions of world heritage: 1) the institution believes country has no ICH;<sup>632</sup> 2) the institution is unclear what ICH is;<sup>633</sup> 3) the institution is not equipped or suited to safeguard ICH;<sup>634</sup> or 4) the institution does not wish to pursue additional measures to safeguard ICH.<sup>635</sup>

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<sup>631</sup> The World Heritage Convention, *supra* note 31, at Art.1(1).

<sup>632</sup> Smith and Waterton, *supra* note 52.

<sup>633</sup> Stefano, M., *Safeguarding Intangible Cultural Heritage: five key issues facing museums in the North East of England*, 4 INT'L J. OF INTANGIBLE HERITAGE 112, 117 (2009).

<sup>634</sup> Kurin, *supra* note 272, at 1.

<sup>635</sup> McCleery, *supra* note 211, at 4-8.

In the first instance, nations may not perceive their rich history and heritage as qualifying as ICH, which might trickle down to institutional attitudes. This atmosphere is indicative of or has also fostered an AHD surrounding artistic and literary works as well as ICH and could determine what is considered an acceptable and valuable form of heritage within the profession, whilst discounting others.<sup>636</sup> An English Heritage representative interviewed by Smith and Waterton stated ‘What are the obvious examples you could come up with? Morris Dancing? As intangible heritage and so on? The U.K. has no intangible heritage’.<sup>637</sup> Thus, even cultural institutions that do believe the country has ICH to protect may be swimming upstream against prevailing notions of ‘worthy’ heritage.

In the second instance, these responses might reveal that institutions are simply unclear on exactly *what* constitutes ICH; its nebulous nature is fundamental to ICH, and precise definitions have eluded the drafters of both legal definitions and the 2003 Convention. These uncertainties in formal definitions impact how the sector shapes informal practices when engaging with ICH. One practitioner reported he preferred to call the ICH associated with his tangible objects ‘living history’ as he was unsure how to define ICH.<sup>638</sup> Despite linguistic vagary, ICH does have established practices and guidance available in order to allow free evolution as a living heritage; using common terminology increases the likelihood that the cultural institution can implement the best available safeguarding practices.

Third, even if an institution recognizes ICH as important to protect, internal structures might impede the institution’s efforts. This is especially true, considering most traditional Western GLAM institutions are designed to preserve and protect tangible objects as a static representation of an idea or a moment in history, rather than fluid representations of concepts both intangible and immaterial. In addition to the

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<sup>636</sup> Smith, *supra* note

<sup>637</sup> Smith and Waterton, *supra* note 52, at 297.

<sup>638</sup> Stefano *supra* note 633, at 117.

methodological and sociological difficulties in preserving ICH associated with these objects, limited financial and human resources might curb efforts and prevent an institution from expanding or shifting its focus to encapsulate ICH.<sup>639</sup>

Finally, an institution might choose not to undertake any ICH protection efforts at all; in this respect, the influence of the fact that the UK is not a party to the 2003 Convention should not be overlooked. English Heritage reported in 2009 that “[t]he UK looked at the convention and concluded that a) it would be very difficult to monitor and enforce, and b) it duplicated efforts that the UK was already undertaking”.<sup>640</sup> If cultural institutions adopt this perspective, they may choose to make no additional efforts to safeguard ICH or to explore the surrounding issues.

ICH and the institutions that document it have a strong influence over how history is remembered and in shaping future ICH. Hobsbawm emphasises how the study and recording of traditions, invented and otherwise, “throws considerable light on the human relation to the past, and therefore on the historian’s own subject and craft. For all invented traditions, so far as possible use history as a legitimator of action and cement of group cohesion.”<sup>641</sup> Whilst Hobsbawm is addressing fellow historians in this passage, the GLAM sector performs similar functions with documentation and transmission of cultural history. Using James Connolly’s *Labour in Irish History* as an example, he notes how “the history which became part of the fund of knowledge or the ideology of nation, state, or movement is not what has actually been preserved in popular memory, but what has selected, written, pictured, popularized, and institutionalized by those whose function it is to do so.”<sup>642</sup> Thus awareness and safeguarding of ICH plays a prominent and crucial role in GLAM institutions.

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<sup>639</sup> Kurin *supra* note 272, at 1.

<sup>640</sup> McCleery, *supra* note 211, at 6.

<sup>641</sup> Hobsbawm, *supra* note 611, at 12.

<sup>642</sup> *Id* at 13. Hobsbawm references Connolly as exemplifying revolutionary movements supported by reference to a ‘people’s past’ and heroes and martyrs, based more on invented struggle than historical accuracy.

When ICH is not taken into account by GLAM, unforeseen issues can arise surrounding even large and well vetted cultural heritage projects. ICH is traditionally seen as encapsulating historical cultural memory, but it is equally important to recognize that instances of contemporary cultural memory also qualify as ICH. Take the recent example of Punk London, a large-scale collaboration amongst major UK cultural institutions celebrating the 40<sup>th</sup> anniversary of punk culture in London.<sup>643</sup> Billed as a celebration of punk, it features include live music shows, exhibitions, digital materials, and temporary tattooing at museums and music venues across London.

This collaborative institutional effort prompted a strong backlash from some of those closest to the movement, including Joe Corr , son of Sex Pistols manager, the late Malcom McLaren, who stated: ‘The Queen giving 2016, the year of punk, her official blessing is the most frightening thing I’ve ever heard. Talk about alternative and punk culture being appropriated by the mainstream.’<sup>644</sup> Whilst the Queen has not officially backed 2016 as the year of punk, the effort is supported by London Mayor Boris Johnson and the Heritage Lottery Fund. Outraged by this conformist commodification of the genre, Corr  has claimed he would burn  5 million of Sex Pistols and other punk memorabilia in protest, which he went ahead with on 26 November 2016.<sup>645</sup> In an interview, Corr  explained his actions:

It’s not about me. It’s about whether punk rock actually meant anything on one level... It’s about trying to get people to get their head around the difference between price and value. It’s about drawing attention to the hypocrisy of these establishment institutions now making money out of these pastiche versions. How long’s it going to be before they put a Queen’s jubilee mug with a safety pin through her nose in the palace gift shop? It’s not long is it? Forty years to go from public enemy number one to everyone seeing the UK as the birth of punk, so that’s now a valued tourist attraction item that we can use. Well go ahead, but people like me will have something to say about it.<sup>646</sup>

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<sup>643</sup> *Punk London*, punk.london (no longer live), available at

<https://web.archive.org/web/20171128211533/http://punk.london/>, last visited 28 Nov. 2017.

<sup>644</sup> Jonze, T., *Malcolm McLaren’s Son to Burn  5m of Punk Memorabilia*, THE GUARDIAN (16 Mar. 2016), available at <http://www.theguardian.com/music/2016/mar/16/malcolm-mclaren-son-joe-corre-burn-punk-memorabilia-punk-london-queen>.

<sup>645</sup> Maine, S., *Joe Corr  on Burn Punk London Extinction: It’s About Whether Punk Rock Actually Meant Anything*, NME (26 Nov. 2016), <http://www.nme.com/news/music/joe-corre-burn-punk-london-punk-rock-1875106>; *Burn Punk London*, <https://burnpunklondon.com/>, last visited 28 Nov. 2017.

<sup>646</sup> *Id.*

Punk, as a social movement and cultural practice defined by anarchy, may be in danger of becoming a tourist attraction as it is ‘proving to be a lucrative marketing opportunity.’<sup>647</sup> One headline asks: ‘Has it come to this? Punk as cultural heritage?’<sup>648</sup> Punk London provides a compelling example of an unfortunate disconnect between GLAM and communities, one that will not be bridged until ICH and phenomena like tangification are taken into greater account and are similarly valued; further, as Corr  pointed out, when the distinction between ‘price’ and ‘value’ is understood in the context of ICH.<sup>649</sup>

This disconnect presents another dilemma: what is to come of ICH that evolves within the practicing community as well as any ICH of that community that is deemed antithetical to the GLAM sector’s conception of ICH? This dilemma has revealed the tension between the more general common heritage of humankind and that of the specific practicing community.<sup>650</sup> On the one hand, common heritage of humankind takes the position that heritage belongs to humanity as a global culture; thus, preserving and protecting records of cultural practices is of utmost importance, regardless of any continuity of practice in the community. On the other hand, a practicing community approach would enable ICH to evolve organically and continue (or discontinue) to exist so long as the practice in question benefits those in that particular community. It remains an unanswered question as to whether one approach should take precedence over the other.

Technology has only complicated these issues further. Digitization and online access have provided faster and easier ways to share and grow new communities. However, access and recourse to collections have *de*

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<sup>647</sup> Hunter-Tilney, L., *Anarchy Gives Way to Tourism as Punk Turns 40*, FINANCIAL TIMES (22 Jan. 2016), available at <https://www.ft.com/content/f77c673e-c0f7-11e5-9fdb-87b8d15baec2>.

<sup>648</sup> O’Hagan, S., *Has it Really Come to This? Punk as Heritage Culture*, THE GUARDIAN (20 Mar. 2016), <http://www.theguardian.com/commentisfree/2016/mar/20/punk-london-spirit-joe-corre-burn-clothes-sex-pistols>.

<sup>649</sup> Maine, *supra* note 645.

<sup>650</sup> White explores shared heritage through the lens of historical development of international treaties; many modern authors now use ‘humankind’ rather than ‘mankind’ White, M., *The Common Heritage of Mankind: An Assessment*, 14 CASE W. RES. J. INT’L L. 509 (1982).



*facto* made GLAM the arbitrator of digital availability of culturally valuable works already in the public domain. This access arbitration could take many forms, such as limitation of cultural practice through terms and conditions imposed on the material objects, which might increase if ICH associated with the material object is not explicitly considered.

No matter the care GLAM institutions might take in order to preserve the nature of ICH under their stewardship, the question remains: “Is the institutionalism of culture as intangible heritage a hegemonic and universalising project?”<sup>651</sup> Scholars have explored the concept of ‘thingification’<sup>652</sup> in relation to the overvaluation of tangible aspects of culture and this “is particularly problematic for the area of oral culture, as it hints at processes of cultural stagnation and ossification.”<sup>653</sup> This societally imbedded disposition towards the tangible emphasises the need for participation on an international level for raising awareness of the value – rather than price – of ICH and for exchanging information and safeguarding methods with other representatives.

Although the United Kingdom is not a party to the 2003 Convention, Scotland has specifically indicated an interest in joining. During the Scottish independence campaign in 2015, the independence included a commitment to signing onto the 2003 Convention, in a rare political mention. Whilst the campaign did not succeed, there have been several recent efforts to mirror the 2003 Convention and to emphasise the importance of ICH in Scotland. Scotland has created its own Scottish ICH Index, which is also a Wiki resource. This listing is in compliance with the 2003 Convention. ICH also garners diverse types of legal protection, even just within the borders of the Scotland. The Harris Tweed Act provides a *sui generis* type trade mark or geographical indication protection for the tweed, even in the absence of consumer confusion or commercial use. It is worth noting that this legislation was passed prior to devolution, so it is

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<sup>651</sup> Alivizatou, M., *INTANGIBLE HERITAGE AND THE MUSEUM* (Left Coast Press 2012) 15.

<sup>652</sup> Halliday, M., and Martin, J., *WRITING SCIENCE. LITERACY AND DISCURSIVE POWER* (1993 Falmer).

<sup>653</sup> Alivizatou, *supra* note 651.

related to IP law. Conversely, the Tartan Register, created by the 2008 Tartan Register Act, specifically states that no IP rights are granted or affected by registration.<sup>654</sup> Despite not having the right to legislate on IP, Scotland has found creative solutions in cultural law to safeguard ICH.

Scotland has specifically indicated interest in joining the 2003 Convention but lacks the power to unilaterally enter into international treaties due to its limited devolved powers in the United Kingdom. During the Scottish independence campaign of 2015, those advocating for independence expressed a commitment to signing the Convention – an issue rarely addressed by other political movements.<sup>655</sup> Whilst the campaign for independence failed, there have been efforts in recent years for Scotland's domestic law to mirror the requirements of the Convention and to emphasize the importance of ICH in Scotland.

Historically, the GLAM sector has supported these efforts, and the proactiveness of the sector in increasing awareness of ICH is also growing. For instance, in 2008, Museums Galleries Scotland produced an inventory of the ICH in Scotland, which later evolved into a Scottish ICH Wiki resource; more recently it hosted a highly successful symposium specifically on ICH, bringing together prominent members of this international research community.<sup>656</sup>

In the absence of international treaty force, diverse types of legal protection have arisen intended to protect ICH. For instance, the 1993 Harris Tweed Act created a *sui generis* protection resembling trade mark law (including regulating noncommercial use) as well as a regulatory body, the Harris Tweed Authority. The Act dictates that the fabric must be woven on the Scottish islands of the Outer Hebrides with traditional weaving methods to bear its mark. Similar in nature is the 2008

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<sup>654</sup> Scottish Register of Tartans, *supra* note 276.

<sup>655</sup> (Scottish Government 2013).

<sup>656</sup> ICH Scotland, *supra* note 210.

Scottish Register of Tartans Act, which created a nationally managed Tartan Register, although this Act specifically states that no IP rights are granted or affected by registration. Nonetheless, the purpose of the Tartans Act is ‘(a) to be a repository for the preservation of tartans, and (b) to be a source of information about tartans.’<sup>657</sup>

ICH is also gaining more recognition in England. The Royal Society for the Encouragement of Arts, Manufactures and Commerce (the RSA) dedicated a section of their annual report in 2015 to ICH and attempted to include ICH in their heritage index by adding ‘culture and memories’ as one of the seven factors alongside more traditional categories, such as ‘landmarks and monuments.’ The RSA states:

Often, we tend to associate heritage with historic structures which have stood the test of time: castles and palaces, museums and country houses, as well as the legacy of industrial Britain. But the places where history comes alive are places where people have activated local history. Heritage doesn’t speak for itself – it involves people playing a role to interpret historic resources, so that they are meaningful in the present day. Therefore, we consider that heritage activities are just as important as heritage assets ... Most interestingly, digging further into the data, it is heritage activities rather than heritage assets which account for the strength of the link between heritage and wellbeing at a local scale.<sup>658</sup>

This RSA report echoed concerns voiced by scholars and practitioners alike regarding the difficulty of documenting empirical data for ICH, which can be crucial within the GLAM sector for financial justification and record-keeping:

However, other data sources in this area are either conceptually difficult to assemble or have not yet been compiled in anywhere near the same detail as exists with the long-established lists for protected buildings or nature sites, for example ... Other types of heritage defy being grounded to a single place.<sup>659</sup>

The report noted how difficult it is to measure the impact of ICH, considering the general absence of countable aspects of ICH as opposed to tangible or immovable heritage. Factors used in the report to

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<sup>657</sup> Art. 1(2); see detailed treatment of Scotland and statutory treatment of tartan in Case Study 1, *infra*.

<sup>658</sup> RSA Report, *supra* note 50, at 5, 15.

<sup>659</sup> *Id.* at 23.

create a ranked index of heritage, such as number of sites, size, expansions, and ticket sales, are often useless or not applicable when dealing with ICH.

Even though these developments are promising in heritage and arts communities, the impact is limited on the law and especially on IP. Whilst this section is by no means an exhaustive recount of the institutional and community-led UK developments towards greater recognition of ICH as a living, evolving heritage, resistant to traditional metrics, the uptake of the terminology and inclusion in GLAM reports and activities is encouraging.

### **c. Tangification: Creating New IP from Intangible Cultural Heritage**

Since the late 1980s, IP protection has increased in scope and duration domestically through schedules and statutory instruments as well as in global international agreements backed by trade sanctions, namely TRIPs. Cultural activity and production reflect the impact of social and legal systems that disproportionately reward tangible manifestations of cultural heritage, such as built heritage or fixed works suitable for copyright protection; however, there are always intangible facets to the tangible. When ICH is altered to a static form, this ‘tangification’ process converts ICH and other intangibles into a form that can then be owned. This process ossifies living heritage into a material embodiment, which may be developed into a generic saleable good as opposed to an existing cultural practice. Tangification is a necessary, though not sufficient, precursor to propertisation, an additional alteration which can stagnate or devalue ICH. This progression or transformation shapes the ICH in an (often) nondeliberate way through rewarding tangible manifestations with legal protections and social reinforcement.

Using terminology like ‘tangification’ shifts the focus from copyright protection to the precondition for IP, as most copyright regimes require fixation. Once culture is formalised and owned as IP, it may be converted to a form suitable for sale on the economic market, known as commodification. Products on the

market are exposed further to possible commoditisation, and risk becoming a generic saleable form. This commoditised form is bereft of the intangible traits that enrich and generate value for creative and cultural ICH.

Naturally, community participation is one way to safeguard ICH and secure its continuation for future appreciation. Yet, even when community participation is strong and the driving factor of a safeguarding effort, participation alone is an insufficient protective measure and is subject to the same risks of tangification. Participation may have a counterbalance as well:

At the other end of the ‘participation’ scale, the possible repercussions on ICH practices ‘safeguarded’ to the point of distortion through commodification is something which should be considered. ‘Edinburgh’s Hogmanay’ is a commercially driven ‘festival’ or collection of events taking place over the New Year period.<sup>660</sup>

#### i. The Propertisation Chain

Colloquially speaking, there are many ‘intangible aspects to the tangible’ and ‘a lot of intangible stuff underneath the tangible stuff’.<sup>661</sup> However, the intangible aspects with some ICH can exist entirely independently of any tangible manifestation whereas any tangible cultural heritage must have ICH attached. The question remains open about the effect on the ICH either 1) when it is embodied in tangible form, either by natural practice of the ICH or by documentation or fixation for safeguarding or IP; and 2) how should the tangible manifestation of ICH be treated in order to allow the ICH to continue to function as an authentic identifier to the practicing community? In order to approach these challenges, first a more

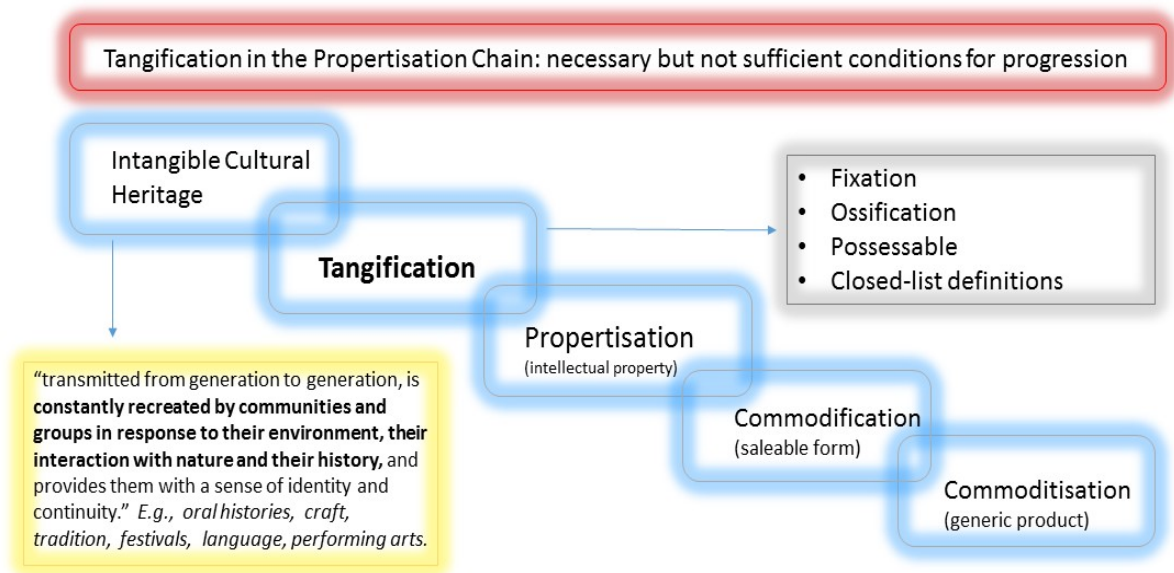
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<sup>660</sup> McCleery, *supra* note 210, at 11.

<sup>661</sup> *Id* at 28; Smith and Akagawa *supra* note , at 297.

explicit model must be formed to trace the impact on the ICH. The figure below illustrates the process through the concept of ‘tangification’ and its relationship to economic commercial market through IP.<sup>662</sup>

*Figure 5.1: Tangification in the Propertisation Chain. Source: Original to dissertation.*



### 1. Stage One: Tangification

Tangification is the natural result of immaterial aspects of culture taking a material form. Whilst set in a context for ICH moving through the chain, the full process is a fairly mundane occurrence for items that are already tangible pieces of property. Importantly, none of these steps in the tangification chain are inevitable. Certain objects are exposed to the same phenomenon but would enter and move forward from the stage of propertisation, rather than from the stage of ICH. That is, these items do not undergo any tangification: whilst they have both intangible and tangible forms in an IP sense, they are intended at

<sup>662</sup> These are necessary, but not sufficient steps. Not all ICH will be tangified; not tangified ICH will be propertised; not all property will become commodified; not all commodified property will become a commodity. However, each step is a necessary prerequisite to the next.

conception to exist as tangible products. No change in their nature conforms to the demands of IP protection, nor was it the maker's intention to create a tangible, individually possessable object that defines or incorporates the cultural identity of a group.

However, ICH must undergo a transformation, however subtle, to become protectable as IP. This 'tangification' transmutes ICH from a collective, evolving practice in response to a community and environment passed through generations into something that is sufficiently fixed such that it can be owned. This process results in the loss of essential qualities of ICH, intentionally or unintentionally.

Intentional alteration in form could be motivated by the desire to gain IP protection. By contrast, a natural evolution of ICH might automatically gain copyright protection upon meeting the subject matter and fixation requirements. For instance, an oral history could be recorded for either safeguarding or copyright purposes, or its community members might decide the written record is important as a part of the storytelling process. Each act results in a fixation through tangible forms.

## *2. Stage Two: Propertisation*

Prior to propertisation, the ICH must take a tangible form for fixation as required by copyright. ICH does not shed all intangible aspects; it is intangible IP that is owned by an author and not its physical manifestations. Thus, the ICH can *still* become tangible in the sense that it transitions into fixed form. This fixation is a prerequisite for IP protection under the CDPA.

## *3. Stage Three: Commodification*

What follows is the more commonly known process of commodification: a transformation of non-commercial goods, services, activities, ideas, or even a person,<sup>663</sup> into a product with economic value, intended for exchange. This transformation allows the property to be sold on the commercial market.

#### 4. *Stage Four: Commoditisation*

At this stage of the chain, commercial popularity and market forces might dictate the commodified ICH evolves into a generic commodity. All of the benefits that come along with cultural richness and identity are removed when generic products emerge. Rather than emerge as discrete phenomena, commoditisation must be a successor of commodification, even if the commodification is subtle and momentary. As such, the subject item, ICH, or person must first become commercial before becoming generic in trade.

#### **d. GLAM and Tangification**

Alerting the GLAM sector to how and when ICH becomes tangified – as well as its effects on cultural heritage – could raise awareness of the importance of ICH within the sector. The sector's professional goals and standards often protect works of cultural importance from private ownership and from commodification and commoditisation in order to preserve shared access and guarantee preservation for future generations. Tangification is a useful concept for describing how these preservation practices might lead to ossification, rendering a stagnant echo of the evolving community heritage and identity. Similar processes can be traced in *Display At Your Own Risk* as digital surrogates come to be viewed as new assets independent of their material object, which then themselves continue down the propertisation chain toward commodification and commoditisation.<sup>664</sup>

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<sup>663</sup> Commodification of a person might be more accurately defined as commodification of a persona, as in the instance of celebrity. This conceptual framework does not consider human slavery as a part of the argument.

<sup>664</sup> Wallace, A. and Deazley, R. (eds), *Display at Your Own Risk*, (26 Apr. 2016)  
<http://displayatyourownrisk.org/publications/>.



New ICH can develop within the sector surrounding or integrating cultural objects into existing GLAM practices, so the impact on shared heritage can be great. Where these practices limit access to cultural heritage, the social and economic benefits that might develop surrounding the material objects and their digital surrogates go unrealised. Whilst this section is set in a context with ICH moving through the chain, this process is a fairly mundane occurrence of items that are already tangible pieces of property. For instance, the same phenomenon could be identified with anything entering the market, from curved television screens to uniquely designed sunglasses. However, these items do not have to undergo tangification – whilst they have an intangible and tangible form in an IP sense, there is not a change in their nature to conform to IP protection. The intention was to create a tangible, individually possessable object. In order for propertisation to occur, the work must be in tangible form; this form can be intangible IP owned by an author and *still* be tangible in an ICH sense, as it is fixed. This is a prerequisite for most IP protection.

The tangification of ICH is propelled by forces, direct and indirect. For instance, copyright education is an excellent tool for artistic and educational advancement. Informed artists can better protect their creative work and avoid legal pitfalls. Educators and students can better access and share resources armed with a strong knowledge of the limits of copyright and fair dealing. For ICH, copyright education, manifesting as misinformation or misunderstanding of complicated legal concepts, can be a double-edged sword. Social expectations that exclusionary ownership is optimal is furthered through copyright education although this may not always be the case; it may stifle collaboration or inspiration in some cases. Additionally, a widening perception that anything of value must be owned and lend itself to utility maximisation, a concept bled over from economics. However, formulaic value maximisation does not translate well to ICH. Technological innovations provide greater access to cultural materials as well as easier and newer ways to digitise. With these excellent opportunities come concerns about stagnating ICH through fixation, commercial exploitation or misrepresentation, and propertising ICH.

Some cultural groups have already turned to trade mark law to protect existing ICH and have sought to enforce those rights in court.<sup>665</sup> In order to maintain this protection, the mark must be used in connection with commerce, and in addition to having an appointed owner individual or organisation, the owner must pay renewal fees at intervals. If the trade mark is, in fact, ICH, this protection contingent on commercial use and fee payment gives very different weight and meaning to the ICH. Additionally, trade mark becomes a customary consideration in setting up new ventures related to ICH, funnelling ICH into IP which might not otherwise fit the purpose of copyright or trade mark law.

#### **e. Fair Isle Fabrics: Tangification in Action**

One recent example in Scotland demonstrates how some form of ICH notification or identification may be called for within practicing communities, regardless of official minority status or a country's economic development. Fair Isle forms part of the Shetland Islands and the knitting technique associated with it is widely recognised for its complex, repeating patterns. Fair Isle fabric has no special *sui generis* legislation like Harris Tweed nor official register like tartan. However, the name and pattern are widely recognised. Shetland's Scottish Parliament representative, Tavish Scott, shared concerns about the use and dissociation from location and ICH as "Fair Isle has been used as a generic brand to sell retail products that have nothing to do with the island."<sup>666</sup> Hand-spun, hand-knitted sweaters can be sold for around £900 and take approximately 100 hours to knit.<sup>667</sup> The demand is still high for the authentic garments from Fair Isle with not enough knitters to fill demand; some designers have a waiting list of 18 months.<sup>668</sup>

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<sup>665</sup> Westney, A., *Navajo Nation, Urban Outfitters Settle Trademark Dispute*, Law 360 (3 Oct. 2016), <https://www.law360.com/articles/847696/navajo-nation-urban-outfitters-settle-trademark-dispute>.

<sup>666</sup> Mesure, S., *Fair Isle Boom Leaves Designers Out in the Cold*, The Independent (12 Dec. 2010), <http://www.independent.co.uk/life-style/fashion/news/fair-isle-boom-leaves-islanders-out-in-the-cold-2158110.html>.

<sup>667</sup> *Id.*; McKenna, K., *On Tiny Fair Isle, A Cottage Industry Enjoys the Sweet Smell of Success*, The Guardian (13 Dec. 2015) <http://www.theguardian.com/uk-news/2015/dec/13/fair-isle-knitwear-chanel-triumph>.

<sup>668</sup> Smith, S., *Chanel Apologies for Copying Fair Isle Designs*, The Scotsman (9 Dec. 2015), <http://www.scotsman.com/lifestyle/chanel-apologises-for-copying-scots-fair-isle-designs-1-3971109>.

Two Chanel staff members contacted Fair Isle designer and knitter, Mati Ventrillon, in early 2015 and bought some garments for “with the understanding they were for research”.<sup>669</sup> Ventrillon then saw jumpers almost identical to her design on the catwalk, as part of Chanel’s latest *Métiers d’Art* collection. After the collection debuted in Rome, Ventrillon took to social media to point out blatant similarities between her designs and those of Karl Lagerfeld, head of the Chanel fashion house.<sup>670</sup> The designer, who has been knitting the traditional jumpers on the remote Fair Isle for eight years after training for four, accused Chanel of undermining the history and value of her trade by copying the designs: “Earlier this summer two Chanel staff visited Fair Isle and bought some of my stock garments with the understanding that the garments were for research... specifically said that I was going to sell it to them for the reputation of Chanel house and because I would not expect them to copy my design... little [did] I know.”<sup>671</sup>

Media outlets took notice of her post regarding the infringement with notably different spins. The nature of the coverage varied greatly from the United Kingdom, Scotland, and the Shetlands, ordered from the broadest national publication to very local. The contrast of coverage on various domestic levels in conveying the incident and its repercussions was vast, especially upon direct comparison:

- “On tiny Fair Isle, a cottage industry enjoys the sweet smell of success: The Shetland Island’s knitwear designers are quietly pleased at the attention they won when Chanel was obliged to say sorry for copying their designs.”<sup>672</sup> (*The Guardian*; United Kingdom publication)
- “Chanel apologises for copying Scots Fair Isle designs: Fashion house Chanel has issued an apology to a Scottish designer after admitting that they copied one of her designs for their latest collection.”<sup>673</sup> (*The Scotsman*; national publication)
- “Chanel says sorry for ripping off Fair Isle design: Fashion giant Chanel has been forced into apologising to a Fair Isle knitwear designer after copying her design without giving any credit”<sup>674</sup> (*Shetland News*, local publication)

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<sup>669</sup> *Id.*

<sup>670</sup> *Id.*

<sup>671</sup> *Id.*

<sup>672</sup> McKenna, *supra* note 667.

<sup>673</sup> Smith, *supra* note 668.

<sup>674</sup> *Id.*

This hierarchy of headlines is representative of the nature and tone of the remainder of the articles, and each paint a vastly different picture of not only the nature of Chanel's use of the Fair Isle design but also of the residents' and designers' reaction.

Image redacted due to copyright requirements for online deposit

*Figure 5.2: Karl Lagerfeld debuting the Métiers d'Art collection in Rome.*  
*Source:* Smith, S., *Chanel Apologies for Copying Fair Isle Designs*, The Scotsman (9 Dec. 2015),  
<http://www.scotsman.com/lifestyle/chanel-apologises-for-copying-scots-fair-isle-designs-1-3971109>.

Ventrillon has expressed concern at the undervaluing of traditional craftsmanship. All other products are made-to-order, made from organic Shetland wool and supports the historic trade of Fair Isle.

She said: "All your knowledge, all your skills, all your understanding, all your history, all your heritage has no value when it comes to business, so what are we craft people going to do? How are skills and heritage going to be valued in the future if we want tradition and craftsmanship to survive?"<sup>675</sup>

Chanel have now admitted that they made a mistake in copying her work, saying "Further to discussions that have allowed the parties to clarify this issue, Chanel will credit Mati Ventrillon by including the words 'Mati Ventrillon design' in its communication tools to recognise her as the source of inspiration for the knitwear models in question".<sup>676</sup> In addition to offering to credit Ventrillon for her designs, Chanel made a

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<sup>675</sup> Riddell, N., *Chanel Says Sorry for Ripping Off Fair Isle Design*, Shetland News (8 Dec. 2015)  
<http://www.shetnews.co.uk/news/11881-chanel-says-sorry-for-ripping-off-fair-isle-design>.

<sup>676</sup> *Id.*

wider recognition of ICH: “Chanel recognises that this situation resulted from a dysfunctionality within its teams and has presented its apologies. Chanel also recognises the heritage and know-how of Fair Isle. Chanel wishes to emphasise that the House is extremely vigilant in terms of its respect for creativity, whether its own or that of others.”<sup>677</sup> There is no indication that Ventrillon received any financial compensation for Chanel’s jumpers that were already created.

The coverage in *The Guardian* emphasized how pleased the designer was with the outcome receiving just an apology from a large fashion house and attention to the heritage of Scotland. The tone of the following passage additionally idealizes a perceived quaintness of heritage or craft:

On Fair Isle, the 10th-largest of Shetland’s 15 inhabited islands, the locals don’t permit themselves to gloat even when occasion gives them reason to. So, this weekend, there may simply be a quiet nod here and there and some little tugs of acknowledgement that might say “well done”. But there is no doubt that the island, home to fewer than 60 souls, has just scored a remarkable victory, and one that may yet have huge and beneficial consequences.<sup>678</sup>

*The Guardian* further calls attention to an excerpt from Ventrillon in a large block quote: “I don’t buy into the concept that big global fashion house equals bad, and small traditional craft-making equals good. There are many opportunities for mutual beneficial partnerships between the big houses and small community-based enterprises.”<sup>679</sup>

What they do not mention is how *The Scotsman* leads: “Fair Isle designer Mati Ventrillon was visited by two Chanel staff earlier this year who bought some garments for “research”. The designer, who knits the traditional jumpers on the remote Fair Isle, accused Chanel of undermining the history and value of her trade by copying the designs.”<sup>680</sup> This research allowance is not mentioned in *The Guardian* article. She said: “All your knowledge, all your skills, all your understanding, all your history, all your heritage has no value when it comes to business so what are we craft people going to do? How are skills and

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<sup>677</sup> Smith, *supra* note 668.

<sup>678</sup> McKenna, *supra* note 667.

<sup>679</sup> *Id.*

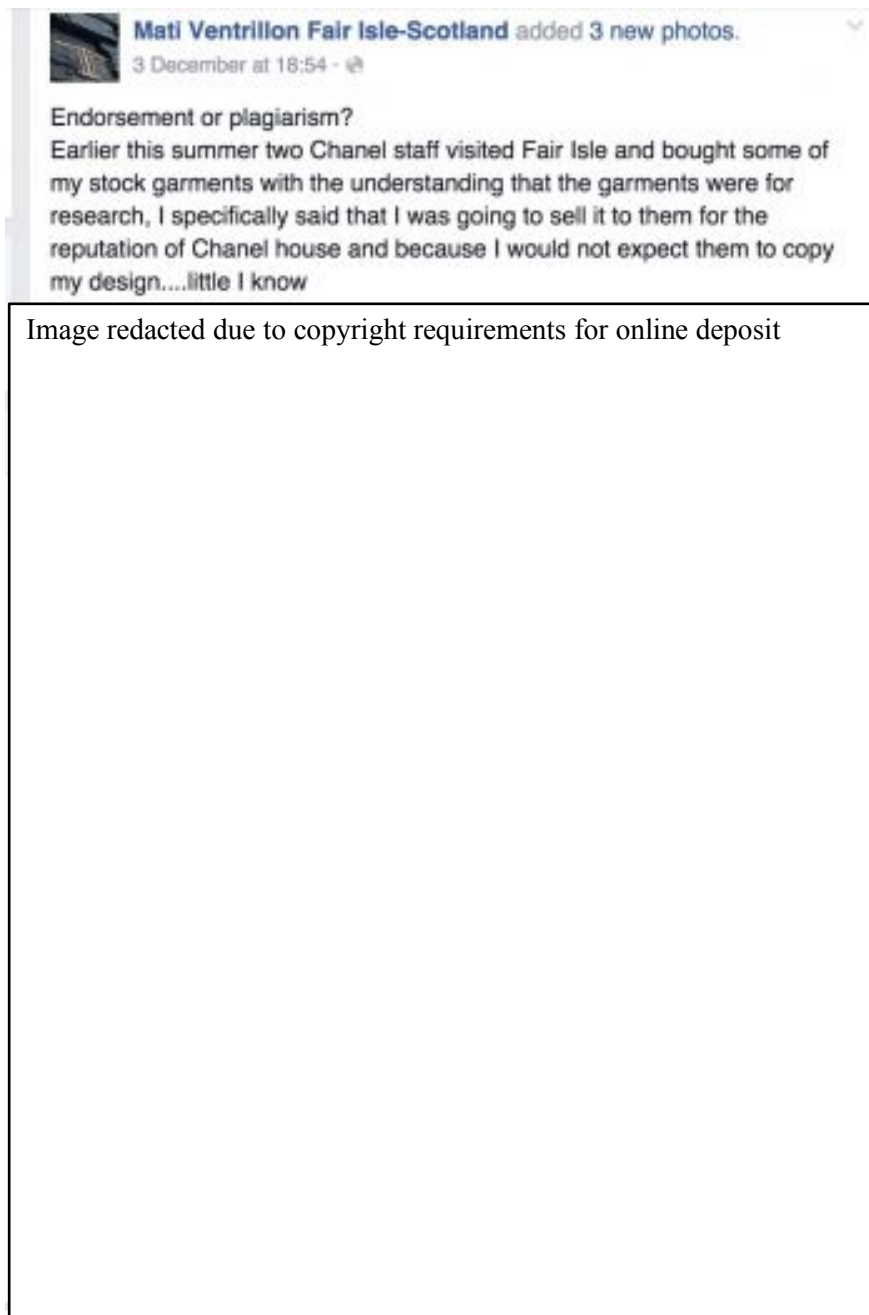
<sup>680</sup> Smith, *supra* note 668.

heritage going to be valued in the future if we want tradition and craftsmanship to survive?”<sup>681</sup> Whilst these are only single publications representing three relatively arbitrary geographic designations, how the varying interests in the story are reflected is telling. This case illustrates how ICH can be in need of safeguarding in developed countries even in the absence of a minority population, especially when overlapping with IP, commercialisation, and commodification.

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<sup>681</sup> *Id.*

The Shetland News is the only outlet to publish this screenshot of designer Mati Ventrillion's Facebook posting, which brought attention to the incident in the first place:



*Figure 5.3: Mati Ventrillion's Fair Isle Scotland Facebook Page Post: 'Endorsement or Plagiarism?' Source: Shetland News.*

It is worth noting the use of the terminology 'craft' as opposed to 'IP' (if it can be considered such in either instance) or 'fashion' for Chanel and considering what the effect on use and esteem is for works labelled as craft. Approached purely from a dictionary definition and lay persons' perspective, 'craft' is

something that is ‘works or objects made by hand’ as opposed to the more loftily named ‘IP’, which is ‘intangible property that is the result of creativity, such as patents, copyrights, etc.’<sup>682</sup> Even scholarly literature working to integrate traditional knowledge or ‘craft’ into modern IP frameworks is heavily loaded, such as *Poor People's Knowledge: Promoting IP in Developing Countries*.<sup>683</sup> This one example contains chapters strategically approaching this intersection of what is considered ‘craft’ and IP, but it is also emblematic of the treatment of the otherness of cultural product and the discounting of the value of work falling outside of the IP framework and especially in developing countries. The volume itself claims to ‘bring an economic dimension to traditional knowledge.’<sup>684</sup> Certainly, this would explain how such a prevailing view might result in perception that cultural materials have little or no protection and being free to imitate or commercialise. However, this is fuelled by the circular reinforcement of IP and personal ownership as the most important limitation to use of cultural, artistic, and literary materials.

*The Guardian* posits this question:

Chanel acknowledged that it had erred and issued a full apology, crediting the designs as the creation of Fair Isle textiles specialists. What chance did a French fashion house have when pitted against several centuries of Scottish heritage and tradition on an island whose very name signifies the highest quality of designer knitwear?<sup>685</sup>

The phrasing of the question is rhetorical. However, the answer, whether in a legal, or financial context, which is not clarified in the article, is the opposite of what the language suggests: that somehow a Scottish island’s heritage and tradition of quality would prevail against a French fashion powerhouse with innumerable resources. The ‘chance’ is entirely in favour of Chanel; only in the age of digital media and reputational damage control was there any recourse. Further, had Chanel preformed the same actions with a company of comparable resources, an apology would not be sufficient or acceptable. Extensive litigation resulting in financial damages or an injunction would be more likely. The asymmetry in the

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<sup>682</sup> ‘Craft’, Oxford Dictionary, <https://en.oxforddictionaries.com/definition/craft>; ‘intellectual property’, Oxford Dictionary, [https://en.oxforddictionaries.com/definition/intellectual\\_property](https://en.oxforddictionaries.com/definition/intellectual_property), last visited 22 Nov. 2017.

<sup>683</sup> Finger, J. and Schuler, P., POOR PEOPLE'S KNOWLEDGE: PROMOTING IP IN DEVELOPING COUNTRIES. TRADE AND DEVELOPMENT (World Bank 2003), available at <https://openknowledge.worldbank.org/handle/10986/15049>.

<sup>684</sup> *Id.*

<sup>685</sup> McKenna, *supra* note 667.



media coverage, related to geographical coverage area, between Fair Isle on Shetland and Chanel is indicative of the unequal bargaining and social power that a smaller ICH practitioner has opposed to a large fashion house; however, social media has broadened the platform. Still the article championing an apology as opposed to the injunction or damages that might have come from a lawsuit, as well as the resource sink for both parties, is telling about societal perceptions of this type of ICH.

Further working from this Chanel example, what might have deterred this plagiarism or ‘dysfunction’? One approach may examine this question from three perspectives: the practitioner, the cultural institution, and the business. All humans, at some point or another, are ICH practitioners. Those who work in the creative or cultural fields would benefit from an enhanced spotlight on ICH by greater recognition of value. Cultural institutions are already, intentionally or unintentionally, safeguarding ICH in addition to the more traditional collection of tangible objects. However, increasing intentionality in regard to ICH stewardship can better safeguard ICH and also bring a new richness and depth into cultural institutions’ collections and exhibitions as well as heighten visitors’ and communities’ understanding and experience.

Businesses might be most interested in identifying and understanding ICH as a resource and reputation saving measure to avoid negative exposure as with Chanel and Fair Isle. In the end, this plagiarism cost Chanel very little, and no legal action resulted. However, this will not always be the case, especially as practitioners gain greater understanding of IP and ICH; access to a large audience through social media has also proved to be a strong tool to use public pressure to prevent such ICH misuse. In addition to avoiding negative consequences, Chanel here also responded by representing its interests as in support of heritage, know-how, and creativity. Thus using a tool to ensure that, when working with inspired or transformed materials, the ICH is acknowledged and properly safeguarded. This might also constitute dedicating part of what might otherwise be swept up into automatic copyright protection or working with the community either by using a system similar to TK Labels or by a commercial version of reciprocal curation, for instance.

#### **f. Abstraction for Intangible Cultural Heritage**

A primary issue in safeguarding ICH in the face of expanding IP rights protection is identifying the ICH. Particularly as covered *supra*, pinning down a definition for a practice that requires flexibility to evolve constantly and reflect the identity of a community at any given time is a challenge even for ICH specialists. When ICH crosses over into another discipline, such as IP law, the complexity is compounded. Nonetheless, the real-world functionality demands this interdisciplinary consideration as the subject matter is separated theoretically but not in practice. Of the two fields, IP has greater clout as far as enforcement and economic power. So how can ICH co-exist under the law? Rather than creating a new system or statutory framework, existing analytical techniques in IP law can be used to identify ICH and to ensure appropriate safeguarding is in place. The contemporary IP and ICH interaction, demonstrated in the previous section between Chanel and Shetland designer, Mati Ventrillon, has a high potential to interfere with ICH safeguarding efforts through tangification, especially as the balance of resources is frequently unequal.

The first step is recognizing that there is an ICH element to the work in question. As discussed, this is not always a straightforward proposition, but by reviewing some key words from international work that has been done by ICH professionals, large parts of the ICH can be identified. After identifying the ICH, the next step might be to review which parts of the entire works fall under copyright protection and which parts should be safeguarded. As illustrated in chart form here, that will then flag ICH for intentional decision-making about the treatment of the ICH aspects of a work. Part of the issue is that it is not even on the table outside of the direct IP; this, again, is not outside the purview of legal work in IP. Due diligence in trade mark law is standard practice.<sup>686</sup>

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<sup>686</sup> *Searching for Similar Marks*, UK IPO, <https://www.gov.uk/government/publications/searching-for-similar-trade-mark-goodsservices-in-other-classes>, last visited 21 Nov. 2017.

Work:	Tangible elements	Intangible Elements
<i>Tartan cloth</i>	<ul style="list-style-type: none"> <li>- <i>Garment</i></li> <li>- <i>Pattern</i></li> </ul>	<ul style="list-style-type: none"> <li>- <i>Weaving tech</i></li> <li>- <i>Historical affiliation</i></li> <li>- <i>Registration</i></li> <li>- <i>Any IP</i></li> <li>- <i>Technique/knowledge</i></li> <li>- <i>Cultural affiliations</i></li> </ul>

*Figure 5.4: Sample Checklist of Tangible and Intangible Elements. Source: Original to dissertation.*

In some cases, this process might be too extensive. The artistic work might be a new, single, sufficiently original painting; the identified entire work would gain copyright protection for the author's life plus up to 70 years.<sup>687</sup> This work is the IP of the author. Whilst the author might have utilized techniques that would qualify as ICH, as he or she likely acquired these skills from learning from a mentor or may incorporate special knowledge about a particular type of art, it does not automatically follow that there is an ICH issue to flag. Whilst ICH is a living practice passed down from generations, it also must reflect the identity of a community. A case may exist where ICH is less of a concern because 1) the technique is not subject to propertisation; 2) there is no ICH imagery; and 3) the artists' community is not – even if there might be an argument that there is a 'community identity' for modern artists, for example – suffering any adverse effects nor has tangification of the ICH occurred.

This type of a checklist could easily be handled and flagged by IP legal interns or junior counsel, with a basic knowledge of ICH and minimal training before passing to more experienced lawyers. Certainly, the representatives from Chanel who visited Shetland and Ventrillon at her studio were fully aware of the ICH attached to the Fair Isle designs. Once existing ICH is identified in a project or product, then a more

<sup>687</sup> CDPA, *supra* note **Error! Bookmark not defined.**

advanced examination can be performed, just as would be done for analysing the potential for copyright infringement against existing works protected by copyright.

Despite the nebulous and flexible definition of ICH as explored herein, IP lawyers, policymakers, and legislators are not unfamiliar with creating an operable legal structure whilst allowing for flexibility, evolution, and new fact patterns. This type of flexibility is seen when making a determination regarding substantial similarity in a case of alleged nonliteral copyright infringement.<sup>688</sup> This method of determining copyright infringement analysis embraces a fact-dependent, amorphous technique already when determining substantial similarity in nonliteral infringement:, which varies by jurisdiction. Courts will filter out the elements that are not protected and compare the protectable elements between the two works to determine if they are substantially similar. *Designers Guild v Russell Williams Textiles Ltd* set out the contemporary consideration in order to assist with an abstraction analysis for substantial similarity in non-literal infringement in authorial works:

Once the judge has found that the defendants' design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part is taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendants' work... The pirated part is considered on its own... and its importance to the copyright work assessed. There is no need to look at the infringing work for this purpose.<sup>689</sup>

The consideration of when to exclude a certain amount of similarity as infringement emphasises the principle that ideas are free from exclusive monopolies as well as that copyright holder's expression is awarded protection under the law.

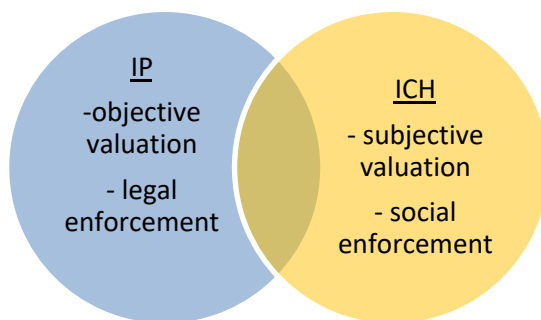
A similar analytical structure can be applied to ICH, particularly as the 'line' for applying safeguarding measures is similarly difficult boundary to define, as with the boundary between idea and expression.

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<sup>688</sup> Literal copyright infringement is an exact duplicate of the copyrighted work and causes no confusion as to infringement. Non-literal copyright infringement is more difficult to determine as it may infringe the protected expression without exactly copying the first work.

<sup>689</sup> 1 WLR 2416, 2431 (2000). The European Union addresses the issue of substantial similarity in a more expansive fashion through *Infopaq Int'l v Danske Dagblades Forening*, Case C-508 (2009).

Determining if an artistic, literary, or dramatic work is protected by copyright is an *objective* exercise. The CDPA sets out statutory criteria that inform the IP status of the work and is enforceable by injunction, monetary damages, and sometimes criminal liability.<sup>690</sup> Whether or not a practice constitutes ICH is a *subjective* valuation by the practicing community, measured by authenticity, identity reflection, and intergenerational transmission. The enforcement mechanism is often social in nature; often no legal framework prevents others outside of the practicing community from adopting and even commercialising ICH. However, each construct framework overlaps; some IP is also ICH, but not all; some ICH is IP, but not all. With alterations or over time, the area that overlaps has the potential to increase.

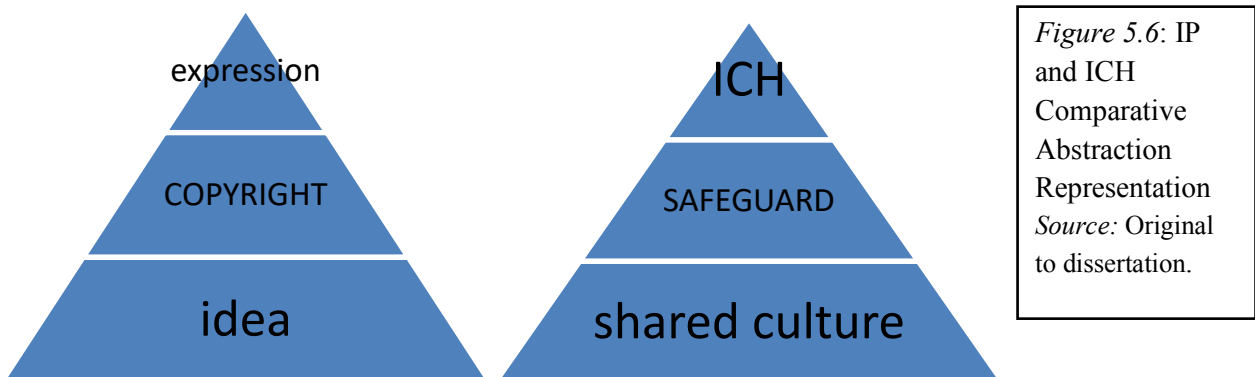


*Figure 5.5: Overlap of IP and ICH in Abstraction. Source: Original to dissertation.*

It is this area of overlap with which this dissertation is primarily concerned. When a practice is composed, in whole or in part, of both IP and ICH, the possibility for competing claims to arise is heightened; however, IP holds an advantage in that it is easier to legally determine objectively, with identifiable authors or owners, and is legally enforceable. ICH has no such advantage, and yet, if IP encloses ICH that is not in the ‘overlap’ area, then it is overreaching its authority, against the intention of the legislature. By using abstraction with ICH criteria, the same logic can be used to determine which aspects of ICH are safeguarded. For ICH, the first step, abstraction, would entail identifying all the ICH that might be considered ‘substantially similar’ to the IP.

<sup>690</sup> Chapter IV, *Remedies for Infringement*, CDPA (1988).

As depicted above, the enforcement is different; but modern-day companies care more about corporate social responsibility and reputational damage than ever, as social media holds huge sway.<sup>691</sup> If those elements are to be copied into a new work outside of the community, special care should be taken to either modify the output to avoid commercialisation and commodification. Because this intellectual process is established within the IP field, approaching ICH through abstraction may assist clear some confusion surrounding definitions and value. This approach is not meant to layer on top of copyright abstraction; rather it is meant as a comparative tool to understanding the implications and possible impacts of creating works which incorporate ICH, even if the ICH is not under copyright, due to age, uncertain authorship, or previous lack of fixation.



The left triangle is a typical way that abstraction can be visually represented. The pool of ideas is very large and is unprotectable as it's meant to be available for all to draw on to create and to generally enrich society. This justification can be said also of shared culture. The boundary for defining the protectable elements is similarly vague; however, the determination must be made objectively for copyright and subjectively for safeguarding. Nonetheless, the analytical process can be applied to make a more useful decision with cultural material.

<sup>691</sup> Aula, P., *Social Media, Reputation Risk, and Ambient Publicity Management*, 38(6) STRATEGY AND LEADERSHIP 43, 48-9 (2010).

### **g. Conclusion**

In the past, an IP-based company might have safely gone forward on the basis that, if creative or cultural material is not protected by copyright, it may be freely used and propertised for sale. However, companies are now under increased scrutiny and exposed to greater risk of reputational damage as well as law suits for misusing ICH or IP-protected works.

It is unlikely that IP lawyers for large, commercial clients, like Chanel, will expand their repertoire into international cultural heritage law theory. However, given the impact of social media and growing importance of good corporate citizenship, it is likely that these lawyers (and in-house public relations teams) are looking for ways to ensure their clients are not running afoul of cultural misappropriations as well as copyright and trade mark infringements. The types of incidents are costly economically, temporally, and reputationally. One additional ICH checkbox for companies or flag for IP-heavy industries could improve efficiency and prevent ‘borrowing’ ICH and IP. Litigation is common for infringement, and had Chanel infringed on a more litigious designer or on a well-represented cultural group, this may well have turned into a costly lawsuit.<sup>692</sup>

Looking back to the case of Fair Isle designs and Chanel, amongst other similar situations, companies may be receptive to implementing better internal controls with in-house counsel when designing or producing items that incorporate concepts related to cultural heritage, even if a licensing agreement is not in place. Using an existing legal analytical tool to sift through a similarly dense and nebulous subject matter has several advantages, including minimal resource commitment and limited additional training. Presenting ICH in a framework where the critical analysis used for substantial similarity in copyright could be applied would be reasonable and easy for lawyers to understand and implement. The result of

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<sup>692</sup> See, e.g., Westney, *supra* note 665.

such an application would enhance safeguarding by flagging potential misuse of ICH, rather than finding infringement like with copyright, and this abstraction for ICH could be a guideline for companies looking to prevent reputational damage and possible (if unlikely) lawsuits. Like TK Labels, ICH abstraction could be used to make culturally appropriate and ethical decisions.<sup>693</sup>

## **VI. Dissertation Conclusion**

ICH forms the very fabric of society by reflecting the identity of communities; ICH has myriad manifestations, including dance, song, stories, craft, and traditional knowledge. The natural evolution of these practices occurs through creative expressions of the practicing communities and is perpetuated through intergenerational transmission. Intangible expressions are also intertwined with the tangible products created during the practice of the ICH and with the meaning and history behind immovable heritage, such as monuments. Due to the nebulous and constantly evolving nature of ICH, legal statutory intervention is challenging, and various legal attempts have been made to safeguard ICH. One major international treaty has been accepted as a central instrument to govern ICH: the 2003 Convention. Like many international treaties, enforcement of its terms is limited due to national sovereignty considerations. Even though the statutory construction of the 2003 Convention is designed to encompass the defining ICH traits, ICH inevitably is snared by another body of very structured law due to the overlap of subject matter: IP law, one body of international law enforced through trade sanctions.

This dissertation has explored the symbiotic relationship between IP law and ICH, which generally operate as siloed fields; researchers and practitioners have limited interdisciplinary interaction, whereas actual creative and traditional practices by individuals and communities are the subject matter of both fields. The central thrust of the research is to locate the effects of these two legal fields and to inform policy and legislation where and when this previously under-considered effect and influence exists.

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<sup>693</sup> Anderson, *supra* note 161, at 73.



This IP and ICH relationship was examined through a treatment of recent legal history and the lens of three country case studies: Scotland, Ireland, and Wales. The three countries were selected based on certain commonalities which allow for a more relevant comparison of the effects of ICH and IP law by excluding factors that might confound the comparison. The countries are geographically close. They share cultural, political, legal, and social history as well as have limited or recently limited sovereignty in these areas. Whilst all three countries are governed under the auspices of the European Union at the present time, IP law in Scotland and Wales is governed centrally from Westminster under UK law. Ireland was governed under UK law until 1921, so the legal history and influence is similar and still present. Due to these factors, much of the ICH is also shared or of similar origin. Additionally, these countries have developed economies, whereas ICH is frequently associated with countries that have a developing economy and IP production is seen as a feature of developed countries. Further, ICH is not often considered significant to IP law as a field of research and practice.

This dissertation demonstrates that, contrary to this perception, ICH has a strong symbiotic relationship with IP law – through an examination of IP law and ICH in these countries. Specifically, tartan in Scotland is used as an example of domestic statutory intervention, with consideration given to the role of community participation in government-initiated regulation, acting as a pseudo-IP right. The Welsh language case study shows how ICH influences legislation through grassroots community organisation and ICH practice. The Gathering cultural tourism initiative in Ireland demonstrate how identity, branding, and copyright interact with ICH.

Additional themes were revealed through this research, including definitional challenges in the legal field; first- and second-wave ICH adoption in relation to ‘invented traditions’, and governmental intervention; and importantly, identifying ‘tangification’. Tangification emerged as a phenomenon in each case study, and on investigation, can be traced with many forms of ICH in diverse economies. This process begins a

type of ICH and occurs in four steps: 1) tangification, where the ICH takes on a corporeal form; 2) propertisation; 3) commodification; and 4) commoditisation.

In an increasingly globalised economy and the exponential growth of technology and digitisation, tangification is frequently driven by the circuitous impact IP law and ICH have on each other: namely that IP law has the potential to encourage ICH transformation into a fixed form, causing copyright protection to automatically attach. At this point, propertisation occurs and allows for IP rights to arise. When any item, tangible or intangible, can be property, then it can usually be saleable; saleable goods run the risk of becoming generic. Each step in the tangification process is necessary, but not sufficient, and thus is not an inevitable process. If ICH is propertised, these IP protections can exclude a community from the practice or even allow an individual, whether a member of the practicing community or not, to economically exploit the ICH through commodification, risking commoditisation. At this stage, ICH is stripped of a key defining feature: identity.

If copyright mechanisms will inevitably propertise some manifestations of ICH, then it is important to parse out how the ownership and tangible aspects will influence the ICH. Importantly, is this the intent and purpose of copyright? Copyright is designed to serve authors through limited exclusionary rights and incentivise original creation of artistic and literary works – ultimately to contribute to the public good. If ICH is typified by manifesting cultural identity that evolves through collective practice and memory, removing it from the public sphere if the creative step in is insufficient just to return it to benefit the public after a period of time seems unsound.

Tangification highlights the possible dangers to ICH once fixed, including stagnation and ossification of the practice. When examining three different types of ICH in relation to IP, the tension between safeguarding ICH in a form that allows the community of practice to naturally develop the ICH and the fixation and commercialisation in a modern global economy. Even though the ICH and communities were

diverse, each form of ICH continued down an identifiable path as IP and the tangible form came into play. The use of abstraction as a technique of legal analysis can assist in identifying when there is ICH that should be safeguarded or when more care should be taken in creating marketable IP including the ICH.

This dissertation offers the original contributions to research field research fields of IP law and cultural heritage law by highlighting the impact cultural practices have on law and conversely how IP law can affect ICH. Whilst digitisation and financial incentives offered in the global economy can accelerate the tangification, acknowledging the implications of IP rights attaching to ICH and the value of safeguarding in the absence of other protections is even more crucial when the process is inevitable. Further, this dissertation encourages the incorporation of the effects of ICH into IP legislation and policy-making, working towards bridging the divide between the two fields by contributing to the budding discourse regarding subject matter similarities and causative repercussions of ICH and IP.

Due to the underexamined nature of ICH and the role it plays in cultural life, particularly in economically developed countries, it has been swept up in the IP movement fairly smoothly and with little resistance. ICH is conceptually difficult to grapple with and defies form and structure. This antithesis to legal frameworks results in exclusion from the conversation altogether. Whilst this may be the easy route in the short run, in the long run, this subtler erosion of ICH in countries that place a high value on ‘knowledge production’ and personal property ownership can also erode community and identity expression.

At the time of writing, 175 countries have ratified the 2003 Convention.<sup>694</sup> In contrast to the World Heritage Convention, which focuses on tangible cultural locations,<sup>695</sup> the 2003 Convention focuses on

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<sup>694</sup> The 2003 Convention, *supra* note 4.

<sup>695</sup> The 2003 Convention was partially motivated as a “corrective” to the World Heritage List exclusion of valuable cultures without maintained cultural locations, which disproportionately affected southern hemisphere countries.

“Oral traditions and expressions, Performing arts, Knowledge and practices concerning nature and the universe, Social practises, rituals and festive events, Traditional craftsmanship.”<sup>696</sup> Notably absent from the signatories are the United States and the United Kingdom. Whilst speculation regarding this absence may point to concerns about the integrity of domestic IP systems and sovereignty, a UK representative simply stated that the United Kingdom had no intangible culture to protect.<sup>697</sup> This claim, whilst wholly erroneous, is not uncommon in certain developed countries and is one driver of the acceptability of commercialization of ICH, which may diminish its cultural value. At minimum, identification and recognition through joining this international treaty would help to protect the diverse ICH within the United Kingdom.

On the legislation-heavy side, separate law regarding protection of ICH might be implemented. However, this approach is often implemented with minority indigenous populations, who were previously and currently marginalized in representation.<sup>698</sup> Whilst entire bodies of law meant to protect minority cultures may not be relevant or efficient for domestic ICH legislation, the argument that a majority population needs no legal protection for ICH falls short in the face of globalization and rampant commercialization. Thus some type of legal recognition of ICH and not only of IP or of tangible cultural heritage is necessary.

Should ongoing legislative action to register tartans discontinue due to funding or administration change, a more informal partnership through the NRS could be formed to support UK community organisations and to ensure continuity as well as the nature of ICH without stifling evolution of the ICH. For instance, Welsh community organizations continue to run the *Eisteddfod Genedlaethol Cymru*, a traditional festival

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Kurin, R., *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a Critical Appraisal*, 56 MUSEUM INT'L 66, 69 (2004).

<sup>696</sup> The 2003 Convention, *supra* note 4.

<sup>697</sup> Howell, *supra* note 225, at 106.

<sup>698</sup> E.g., *Aboriginal Cultural Heritage Reform*, NSW ENVIRONMENT & HERITAGE, available at <http://www.environment.nsw.gov.au/achreform/> (last visited 5 Aug. 2015).

celebrating Welsh language and traditional culture as well as contemporary manifestations, consistent with the spirit and community benefit that ICH offers.<sup>699</sup>

Joining the 2003 Convention would provide the opportunity to share these types of cultural management techniques internationally and gain feedback for domestic cultural branding and tourism projects in order to achieve the optimum best practice sooner and more efficiently. Whilst signing onto the 2003 Convention is not the final answer, it allows a country to participate in a global conversation about culture and improve through sharing and learning by “being at the table.”<sup>700</sup> It is also an acknowledgement and awareness of culture that functions outside of IP and monuments, moving towards a more globally harmonized approach to cultural and IP. This perspective shift alone has the potential to enact great amounts of change in cultural heritage and IP law and policy.

With those considerations in mind, the 2003 Convention risks the same dangers as other legal tool utilizing listings as a prominent feature. However, the listing does enable ICH to continue to evolve and reflect the identity of the community whilst still raising awareness and bringing the practice to an international forum. The symbiotic interaction with IP systems, given the economic and social significance of these laws, calls for more attention. Tangification terminology links ICH to IP law and hopefully can bring that awareness into the legal sphere and the impact of propertising culture. However, in light of the very few footholds to move forward with in safeguarding ICH, it is likely that much ICH will be propertised and confidence in IP law will decrease.

ICH permeates our cultural heritage institutions, social practices, and history. Cultural institutions are unique keepers of ICH separately and alongside tangible cultural objects, whether intentionally or not. Greater understanding and acknowledgement of ICH in the GLAM sector would enhance the cultural

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<sup>699</sup> Howell, *supra* note 225, at 107.

<sup>700</sup> *Canadian Declaration for the Safeguarding of Intangible Cultural Heritage*, *supra* note 43.

experience. It would also empower cultural institutions to make more nuanced decisions when balancing the rapid growth of technology and expansion of copyright laws with stewardship as well as managing unexpected outcomes that may result from practices such as digitization and the reuse of digital surrogates. *Display at Your Own Risk* demonstrates vividly how copyright law and the GLAM sector's terms and conditions affect not only the tangible objects, but also the ICH surrounding the public's interaction with works in forms created by cultural institutions' practices.

An examination of legal and cultural imperialism indicates that the most efficient and effective way to safeguard minority populations or developing countries with weaker international bargaining power would be to treat domestic ICH in countries with stronger bargaining power equally. Currently, and particularly growing following TRIPs coming into force, many state parties to TRIPs have created a circular reinforcement of IP: sanctioning non-enforcement of existing IP, rewarding production of IP through exclusionary and economic rights, thus encouraging generation of more IP, including alteration of cultural practice to conform with IP statutory standards.

The unifying power of ICH as opposed to furthering the gap between cultures perceived to be 'knowledge producing' or 'culture producing', as well as highlighting the challenges of reconciling the domestic regulation of diverse ICH in countries typically less geared at ICH safeguarding. This is certainly not to say a single benchmark standard for all ICH regulation, rather that a more encompassing definition with flexible criteria would better suit safeguarding ICH in a global economy. Thus an awareness and greater consideration of tangification and how IP can encompass unintended culture, such as ICH, is called for in law and policymaking.

It is too simplistic an approach to set up a false dichotomy wherein developed countries are knowledge producing and developing countries are culture producing, wherein IP is bad and ICH is good. This dissertation takes no position on either legal system's merits in relation to the other. Each serves a distinct

and useful purpose. Yet in the process of bolstering one's favoured field, the unintended consequences go un- or under-investigated for fear that the solid legal foundation and hard-won enclosures may be weakened. To the contrary, a robust and comprehensive treatment of how and where a legal instrument best functions can strengthen the pillars. From an IP perspective, there is value in taking a hard look at the intention and goals of contemporary IP law. Is IP facilitating original creative production and dissemination to the public after rewarding the author in the form of a limited monopoly for a limited period of time? Revisiting these fundamentals, especially in the face of rapidly progressing globalisation and evolving technology adoption will ensure that copyright and other IP laws will best suit the public good. ICH is just one area that introduces additional complexities to how the legal framework that regulates artistic, literary, and dramatic works functions.

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## **Appendix 1: The Gathering Community Funding Toolkit**

[Contact the author for appendix.]



























## **Appendix 2: The Gathering Master Brand Guidelines**

[Contact the author for appendix.]