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Arts Festivals as Cultural Heritage in a Copyright Saturated World

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Cultural Heritage in and out of International Law

While the concept of cultural heritage is arguably as old as recorded history,¹ it first became a recognised concept in international law at the time of the Vienna Treaty of 1815, which was imposed by the British victors after the conclusion of the Napoleonic wars. This treaty reflected the rise of a discourse that linked people, territory and cultural objects.² Such a discourse necessarily implicates questions about to whom cultural heritage belongs and, thus, carry with it debates about how history relates to, or is translated into, present day identity.³ This invests the concept with a highly contingent political nature, which is reflected in the trajectory of modern international law governing this question. When, after the first and second world wars, the newly remade international legal order turned again to this question, it initially expressed the object of its concern as being “cultural property”.⁴ The return to the use of the expression “cultural heritage” in international law instruments⁵ and its widespread use in cultural and political discourse has not, however, produced any clear definition of this concept. One effect of this is that, while rights in relation to cultural heritage/property are weakly protected in law, the concept of cultural heritage is a rhetorical moving feast that enjoys potency in cultural and political discourse.⁶

Attempts to define cultural heritage have a tendency to focus on an open-ended account of the objects of protection rather than the concept itself. Thus, for example, in the recent European Union *Heritage Plus* funding call, the first footnote observes that:

¹ See, eg, M M Miles, *Art as Plunder: The Ancient Origins of Debate About Cultural Property* (New York: Cambridge University Press, 2008).

² A F Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2008), 13, citing W G Grewe, *The Epochs of International Law* (trans & rev M Byers) (Berlin: 2000), xviii.

³ See, eg, T Flessas, “Cultural Property Defined, and Redefined as Nietzschean Aphorism” (2003) 24 *Cardozo Law Review* 1067-1097; R Handler, “Who Owns the Past? History, Cultural Property and the Logic of Possessive Individualism” in B Williams (ed), *The Politics of Culture*, (Washington: Smithsonian Institution Press, 1991).

⁴ UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), 1954; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property 1970.

⁵ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972; UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001; UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003.

⁶ F Macmillan, “The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural ‘Patrimony’ or Private Property?” (2013) 64 *Northern Ireland Legal Quarterly* 351-364.

Cultural heritage exists in tangible, intangible and digital forms. Tangible heritage includes artefacts (for example, objects, paintings, archaeological finds etc), buildings, structures, landscapes, cities, and towns including industrial, underwater and archaeological sites. It includes their location, relationship to the natural environment and the materials from which all these are made, from prehistoric rock to cutting edge plastics and electronic products. Intangible heritage includes the practices, representations, expressions, memories, knowledge and skills that communities, groups and individuals construct, use and transmit from generation to generation. Digital heritage includes texts, databases, still and moving images, audio, graphics, software and web pages. Some of this digital heritage is created from the scanning or converting of physical objects that already exist and some is created digitally, or ‘born digital’.⁷

Since it seems reasonably clear that not every instantiation of the contents of this list would be regarded as cultural heritage, there is a need for some overarching concept of cultural heritage that provides some basis for distinguishing between, for example, buildings and structures that constitute cultural heritage and those that do not. Strangely, such an overarching concept is difficult to pin down. Perhaps this is because we all think we know what we are talking about when we talk about cultural heritage. In order to give scope to our general sense that we know what we are talking about, this chapter proposes to use an overarching concept of cultural heritage as being those things (moveable and immovable, tangible and intangible) that a community or people considers worth handing on to the future.⁸

The task of reconciling this concept with legal notions of cultural heritage derived from international law instruments, needs to be undertaken with an eye on the fact that there is an obvious political element in identifying what is considered to be worth handing on to the future⁹ and this carries with it a degree of malleability and slipperiness. The sources of the legal concept of cultural heritage are the various international law instruments that have been generated under the auspices of UNESCO, where the politically determined, malleable and slippery concept of cultural heritage has gradually emerged from the earlier concern with cultural property. In this century, the UNESCO regime’s concern with tangible cultural heritage has given way to an increased focus on the intangible aspects of cultural heritage. In the festival context, where the cultural heritage aspects appear to be largely intangible, the two Conventions of particular importance are the Convention for the Safeguarding of Intangible Cultural Heritage and the Convention for the Protection and Promotion of the Diversity of Cultural Expressions.

According to Article 2.1 of the former Convention “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.

Article 2.2 provides:

⁷ *Cultural Heritage: A Challenge for Europe* (JPI Cultural Heritage and Global Change – Heritage Plus Call, 2014).

⁸ See J Blake, “On Defining the Cultural Heritage” (2000) 49 *International and Comparative Law Quarterly* 61-85, at 68-69.

⁹ Blake, *ibid.*, at 68.

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 the 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.

In the context of this definition there seems to be ample scope for an argument that arts festivals, or at least some arts festivals, fall within the concept of intangible cultural heritage. This is particularly the case given the strong identification that many (if not the overwhelming majority) of arts festivals have with a particular place.

The Cultural Diversity Convention employs the concept of cultural heritage in order to define the idea of cultural diversity, with which it is concerned. Article 4.1 provides:

“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

According to Art 4.3, “‘cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”, while Article 4.2 tells us that “‘cultural content’ refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities”. There is, of course, some circularity in these definitions.¹⁰ Nevertheless, it seems reasonable to suggest that arts festivals may act as a means of expressing, preserving and promoting cultural diversity. This is perhaps particularly so when festivals operate as a means of reinforcing a particular traditional culture or community identity, although it would not seem to be limited to this case.

Arts Festivals as Cultural Heritage

Arts festivals are a pervasive, and flourishing, part of modern life. There is some unsurprising evidence that the economic crisis has had some constraining effect on the arts festival sector, but overall it appears to have withstood the worst effects of this crisis. One of the reasons for this may be the wide range of interests and functions served by arts festivals, many of which are clearly identifiable with the concept of cultural heritage described in the preceding section. In order to understand more precisely the cultural heritage functions served by arts festivals, and then to analyse their relationship with the private property relations imposed by copyright, it is necessary to put some flesh and bones on the concept of the arts festival. The following discussion first focuses what is meant by the term “festival” and then moves on to a more detailed assessment of the effects of the qualifier “arts”. As this discussion reveals, attempts to define the arts festival expose both its fundamental relationship with cultural heritage and the extent to which that relationship is permeated by the copyright system.

¹⁰ See F Macmillan, “The UNESCO Convention as a New Incentive to Protect Cultural Diversity” in H Schneider & P van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Mortsel: Intersentia, 2008) 163-192

In the literature the concept of the “festival” tends to be defined compositely in both positive and negative terms. In other words, it is defined by both what it is and what it is not. On the positive side of this coin, the overriding and perhaps most general characterization of the festival is that it is, in some sense, a suspension in time and space, during which life – or business – does not carry on as normal.¹¹ Developing this idea of the festival as a period of suspension, the festival has also been described by commentators as: a space of openness, de-territorialization and exchange;¹² part of the “public sphere”;¹³ a site of democratic debate and transnational identifications;¹⁴ an “interpretation of cosmopolitan community”;¹⁵ and, in the words of Jean Cocteau, an “apolitical no-man’s land”.¹⁶ As all of these characterizations suggest, the idea of the festival is closely tied in to the notion of being in a particular community, or being together, in a distinct place in time and space. In his description of the Cannes Film Festival, Cocteau also described the festival as “a microcosm of how the world would be if people could have direct contacts and speak the same language”.¹⁷ Thus, Sassatelli citing Durkheim’s work on festivals,¹⁸ describes them as an “intensification of the collective being” and, in Durkheim’s words, a “collective effervescence”.¹⁹ Along similar lines, Vrettos conceives festivals as a manifestation of the human need to gather, socialise and exchange ideas.²⁰ Developing this line of thought, O’Grady and Kill argue that in an age of digital and social media with its consequent personal isolation, the festival presents the chance to be with other people, and thus represents an opportunity for “[s]ociability, participation, togetherness and excitement”.²¹

Building on the idea of the festivals as distinct²² and sociable places in time and space, are conceptions of festivals that refer to their value as social, cultural, economic or political institutions and, thus, as expressing values associated with such institutions.²³ O’Grady and Kill write about the festival as a cultural artefact,²⁴ while Guerzoni refers to them as a way of filling “il vuoto

¹¹ See (amongst many possible citations for this proposition), eg, A Falassi, “Festival: Definition and Morphology” in A Falassi (ed), *Time Out of Time: Essays on the Festival* (Albuquerque: University of New Mexico Press, 1987) 1-10.

¹² S Nordmann, “A History of Cultural Festivals in Europe” in J Segal & L Giorgi (eds), *European Arts Festivals from a Historical Perspective* (EURO-FESTIVAL Project: European Arts Festivals and Public Culture, Deliverable 2.1, WP2 Main Report, July 2009; <http://www.euro-festival.org/publications.html>), 19-29, at 28.

¹³ L Giorgi, “Between Tradition, Vision and Imagination: Literature(s) in Search of a Festival” in Segal & Giorgi (eds), n 12 *supra*, 30-52; M Sassatelli, “Public Culture, Cosmopolitanism and Festivals” in M Sassatelli (ed), *European Public Culture & Aesthetic Cosmopolitanism* (EURO-FESTIVAL Project: European Arts Festivals and Public Culture, Deliverable 1.1, WP1 Main Report, October 2008; <http://www.euro-festival.org/publications.html>), 15-40.

¹⁴ Sassatelli, n 13 *supra*.

¹⁵ Sassatelli, n 13 *supra*, at 25.

¹⁶ Jean Cocteau quoted in J Segal & C Blumauer, “Cannes: A French International Festival” in Segal & Giorgi (eds), n 12 *supra*, 53-82, at 53.

¹⁷ Jean Cocteau quoted in Segal & Blumauer, n 16 *supra*, at 53.

¹⁸ E Durkheim, *The Elementary Forms of Religious Life* (1912, republished Glencoe: Free Press, 1954).

¹⁹ Sassatelli, n 13 *supra*, at 18-19.

²⁰ A Vrettos, “About the economic impacts studies of arts festivals” (2009) 3 *Economia della cultura* 341-350.

²¹ A O’Grady & R Kill, “Exploring Festival Performance as a State of Encounter” (Unpublished paper, May 2011; on file with author), at 2.

²² Albeit semi-permeable (Sassatelli, n 13 *supra*, at 22) and paradoxical (A O’Grady & R Kill, “Environments for Encounter and the Processes of Organizing for Interactivity and Performative Participation within the Festival Space” Conference on *Visuals and Performativity: Researching Beyond Text*, Segovia, Spain, May 2011 (copy on file with author), at 3).

²³ See also K Turan, *Sundance to Sarajevo: Film Festivals and the World They Made* (Los Angeles: University of California Press, 2002), who writes about three classes of festivals: *Festivals with Business Agendas*; *Festivals with Geopolitical Agendas*; and *Festivals with Aesthetic Agendas*.

²⁴ O’Grady & Kill, n 21 *supra*, at 20.

pneumatico della cultura televisiva”.²⁵ Values such as the promotion of cultural diversity,²⁶ internationalization²⁷ or alternative social identities²⁸ frequently form part and parcel of the festival concept. Festivals may also be understood as a form of asserting identity “in the face of a feeling of cultural dislocation brought about by rapid structural change, social mobility and globalisation processes”.²⁹ Other types of cultural values pave the way for understanding the festival as a type of socio-economic institution. For instance, festivals may play a role in legitimating new artistic forms or new genres within existing artistic forms.³⁰ At the same time, they function to commodify those new forms or genres.³¹ Importantly, they may also offer an alternative avenue for distribution,³² particularly in highly commodified cultural industries like the film industry, where one effect of commodification has been to suppress independent production and diversity.³³

Festivals can be distinguished from the regular programming of concerts, theatre, film and so on that occur in concert halls, auditoriums, theatres, cinemas and other such venues on the bases that: first, these are not generally a single cultural event containing a series of connected events;³⁴ secondly, the concept of the arts festival seems to imply some degree of audience participation, which might be considered to be linked to the idea, asserted above, of the festival as a period of being in community in a physical sense;³⁵ thirdly, and perhaps most significantly, regularly programmed arts events might be considered to be part of the ordinary course of life, precisely because they are regularly programmed in venues established for this purpose, and accordingly not occasions of suspension in time and space.

While some concept of what constitutes the “arts” is clearly present in the foregoing discussion, a more detailed consideration of this question provides a clear link between the cultural heritage role of festivals and their operation within the copyright system. This is because one of the open questions pervading the relationship between copyright law and the “arts” is that of constitution and authorization. In other words: is it some generally accepted definition of what amounts to the “arts” that constitutes and authorizes the subject matter of copyright or, on the other hand, does copyright law constitute and authorize concepts of what are the “arts”? In either case, it seems clear that there are recognised disciplines within the arts and, at the very least, copyright law has contributed to the compartmentalization of these disciplines.

²⁵ “the pneumatic vacuum of television culture” (my translation), G Guerzoni, “L’impatto economico dei festival: un’annosa prospettiva di ricerca” (2009) 19 *Economia della cultura*.

²⁶ J Segal, “Film Festivals” in Sassatelli (ed), n 13 *supra*, 111-117, at 115 & 117.

²⁷ L Giorgi, “Literature Festivals: Literature (Festivals) as a Subject of Sociological Inquiry in Search of Cosmopolitanism” in Sassatelli (ed), n 13 *supra*, 95-110, at 107; L Mazdon, “The Cannes Film Festival as Transnational Space” *Post Script*, 2006, Volume 25, No 2, 19-30.

²⁸ M Santoro, J Chalcraft & P Magaudda, “Music Festivals: An Interdisciplinary Literature Review” in Sassatelli (ed), n 13 *supra*, 77-93, at 83.

²⁹ D Picard & M Robinson, *Festivals, Tourism and Social Change: Remaking Worlds* (Clevedon: Channel View Publications, 2006), at 2, quoted in Sassatelli, n 13 *supra*, at 26.

³⁰ Santoro, Chalcraft & Magaudda, n 28 *supra*, at 82.

³¹ Santoro, Chalcraft & Magaudda, n 28 *supra*, at 83, where it is argued that this observation applies, in particular, to music festivals.

³² See Turan, n 23 *supra*, at 8.

³³ See F. Macmillan, “Copyright and Corporate Power” in R. Towse (ed), *Copyright and the Cultural Industries* (Edward Elgar Publishing, 2002), 99-118; & F. Macmillan, “The Cruel ©: Copyright and Film” [2002] *European Intellectual Property Review* 483-492.

³⁴ Falassi, n 11 *supra*, 2.

³⁵ O’Grady & Kill, n 21 *supra* & n 22 *supra*.

The historical association between the subject matter of copyright and the concept of the arts is somewhat ambiguous. There seems to be some general acceptance that copyright was born out of the device of printers' privileges, most probably originating in fifteenth century Venice³⁶ and then subsequently adopted with local variations in a range of other European countries.³⁷ Under the Venetian system, which was designed to stimulate foreign trade rather than to engage in aesthetic debates about forms of creative output, the important distinction drawn between various possible forms of the arts was whether they were reproducible through the new(ish) technique of printing or not. Consequently, nothing in the law turned on the general distinction between, for example, written works and images. Considerations of local market stability and foreign trade value were paramount in obtaining a printing privilege.³⁸ In this sense, the origins of the intellectual property system lie in market regulation and not in a particular aesthetic theory. Nevertheless, there is some evidence that in framing their arguments for privileges the petitioners came to reflect the predominant discourse or paradigm of creativity, which was based in theories of rhetoric. The rhetorical paradigm of creativity, which continues to retain considerable purchase in some quarters, focussed upon the labour or creativity of the artist in gathering together and arranging "ideas" into a particular and distinctive end product.³⁹

Despite the tortuous and twisting path from the Venetian system to the modern systems of copyright protection, this early history resonates through modern copyright protection of the "arts" in a number of ways. In particular, the fact that creativity is protected under copyright law only where its product falls within one of the categories of "copyright work" has various implications for the relationship between copyright and the creative arts, two of which might be usefully emphasized in the present context. First, to the extent that any concept holds the list of copyright protected works together, however loosely, it is one derived from the rhetorical discourse of the Renaissance period. In the hands of modern copyright law, this is reduced to a focus on the production of the discrete "work" by a recognisable creator (or creators). Secondly, while copyright recognises that more than one of its protected subject matters can exist simultaneously in one creative work, there is no evidence that it applies to hybrid works that cross the boundaries between the different categories of protected works. In this way, copyright law, and its pervasive influence on the concept of the arts, tends to harden the divisions between different types of creative works.

Overall, it might be said that while, at certain points in its history, copyright law reacted to developments in the creative arts by drawing them into its scheme of protection,⁴⁰ it seems that this scheme of protection has now become relatively rigid. One of the results of this is that there is relatively little space for the copyright protection of innovation in form in the arts. Another important result is that it increasingly appears that copyright law defines, controls or affects the meaning of "arts" in the broader social and cultural spheres. This very effect is evident in the way in which many arts festivals brand themselves as being literary festivals, film festivals, music festivals, theatre festivals, dance festivals and so on.

³⁶ See J Stapleton, *Art, Intellectual Property & the Knowledge Economy* (Doctoral Thesis, Goldsmiths College, University of London, 2002), <http://www.jaimestapleton.info/download.htm>, ch 2.

³⁷ See further E Armstrong, *Before Copyright: The French Book Privilege System 1498-1526* (Cambridge: Cambridge University Press, 1990, republished 2002).

³⁸ Stapleton, n 36 *supra*.

³⁹ Between the Medieval and the Renaissance periods an important alteration had taken place in relation to the origins of the "ideas", which resulted in an emphasis on the creator's contribution to the ensuing artistic work: Stapleton, n 36 *supra*, 70-71, citing E Panofsky, *Idea: A Concept in Art Theory* (trans J J S Peake) (London: Harper & Row, 1968), 35-40 & 51; & U Eco, *Art & Beauty in the Middle Ages* (London: Yale University Press, 1986).

⁴⁰ L Bently & B Sherman, *Intellectual Property Law* (Oxford & New York: Oxford University Press, 2009, 3rd ed), 33-34.

Copyright and Arts Festivals

The role of copyright in defining what constitutes the arts, and the way in which this impacts on how we understand arts festivals, constitutes the foundation upon which copyright interests have saturated the arts festival environment. In fact, a great deal of what happens in the course of the arts festival as event seems to have copyright implications of one type or another. The following discussion seeks to illustrate this in relation to various types of arts festivals, including film festivals, music festivals and what are described, generically, as culture festivals.

So far as film festivals are concerned, the copyright interests in the films that are shown arise at the time of the making of the film and, depending on the jurisdiction, usually belong either solely to the producer or jointly to the producer and director. There are other creative contributions to films that are recognised by copyright law, such as the copyright in the screenplay and in the sound track, but almost invariably these copyright interests are acquired by the copyright owner of the film. At film festivals, the more interesting copyright questions are posed by the “live” events, such as interviews, workshops and other public encounters with directors and actors, which while being apparently supplementary to the main event of showing the films are, in reality, what makes the festival as event distinct from daily life. As with all live and unscripted events, there is a question about whether the event has satisfied the copyright requirement of fixation in a material form.⁴¹ Slightly strangely (at least to anyone who is not a copyright lawyer), a recording of the event, whether it is authorised or unauthorised,⁴² has the effect of achieving fixation in a material form and conferring copyright on the participants – usually, in the context of film festivals, in their words. Authorised recorders, such as the festival organisers, acquire, subject to the terms of the authorization, a copyright in the recording that they have made.

Despite the high degree of commodification of the relevant cultural product that prevails in both the film and music industries,⁴³ the copyright aspects of music festivals are different to those of film festivals because music festivals are (usually, if not always) primarily concerned with live musical performances. This adds certain complications to the copyright picture, which means that it is necessary to consider a number of different situations in which music is performed at a festival. From a copyright point of view, the simplest of these situations is where the music performed is no longer protected by copyright, as is generally the case at early music festivals. Recordings of such music, the copyright in which resides in the producer of the recording, may be available to purchase at the festival. While this type of marketing is part of the festival environment it is not clear that it should be regarded as forming part of the network of copyright relations at the festival itself since it is based on creative relations occurring prior to the festival and has no necessary relationship with the creative relations taking place at the festival as event.

On the other hand, the copyright interests that are clearly implicated in the music festival environment relate to the performances occurring during the festival as event where the works

⁴¹ See, eg, UK Copyright Designs and Patents Act 1988 (CDPA), s 3(2).

⁴² See, eg, CDPA, s 3(3).

⁴³ See n 33 *supra*.

performed are subject to copyright protection. Where the copyright in the music and, in the case of songs, the literary works comprised in the lyrics, belongs to the festival performers, as often might be the case in rock music festivals, then the copyright situation is relatively straightforward. The interesting questions in this situation relate to variations from the original copyright work made in the course of the festival performance, and to recordings of the performances. Variations in the course of the performance will be protected by copyright where they are reduced to material form. The obvious way of achieving such a reduction to material form is through recording, either authorised or unauthorised. As anyone who has ever spent any time on You Tube knows, the Internet is swamped by unauthorised recordings of performances, usually made on mobile phones. While making such recordings and disseminating them on the Internet is a breach of copyright (and, in some jurisdictions, may also be a breach of performers' rights),⁴⁴ they do have the advantage of reducing a live performance to material form and thus satisfying this requirement for establishing the subsistence of the copyright interest. As in relation to any other performance or public event, authorised recordings generate a copyright interest in the recording that belongs to its producer.

The final lot of copyright interests that might be relevant in a music festival are those copyright interests in music and lyrics, performed during the festival, which might belong to people other than the performers. The most obvious circumstance where this situation will occur is where the composers/lyricists and the performers are different people. This might be because the composer and/or lyricist never intended to be involved in the performance of the work, or because performers are covering the copyright work of another performer. The default position in both these cases is that the consent of the copyright owner must be sought in order to avoid infringement. However, it is worth noting that covers, which are a particular feature of rock/folk/blues music festivals, are capable of raising questions in what might be considered the grey zone of copyright. Straightforward covers of songs that differ little from their original versions are not particularly problematic from a copyright point of view, but covers that differ substantially from the original copyright work – for example, because they make minimal reference to the original lyrics or music, or because they use a different musical style or genre – raise questions about whether there has been sufficient substantial taking from the original to constitute an infringement⁴⁵ and/or whether the use of the material might be justified under the fair use/fair dealing exception in jurisdictions where such defences exist.⁴⁶ Covers that incorporate enough of the original to make reference to it, but very little of the actual expression of the work, may not be infringing.⁴⁷ If such works are considered to be infringing they may also be saved by the fair use/fair dealing defences. Similarly, covers that employ a completely different musical style or genre may be considered to fall within the fair use/fair dealing defences in some jurisdictions.⁴⁸ Added to these complications are the fact that any new work, whether it is infringing or not, is potentially capable of creating a new copyright

⁴⁴ Eg, CDPA, ss 182.

⁴⁵ See, eg, CDPA, s 16(3), which requires the taking of a “substantial part” of the protected work in order to constitute an infringement.

⁴⁶ These exceptions tend to be found in common law copyright jurisdictions, rather than in jurisdictions based on the civil law tradition of *droit d'auteur*. Eg, US Copyright Law 1976, s 10, which contains the fair use defence; & CDPA, s 30, which contains the relevant fair dealing defence.

⁴⁷ See, eg, *Joy Music v Sunday Pictorial Newspapers* [1960] 2 WLR 615; *Williamson Music v Pearson Partnership* [1987] FSR 97.

⁴⁸ See, eg, *Campbell (2 Live Crew) v Acuff-Rose Music Inc*, 114 S Ct 1164(1994).

interest in the person performing it if shows sufficient creativity or sufficient investment of skill and labour.⁴⁹ Another very grey zone relates to genres of music that depend on a tradition of reworking what has gone before. This applies, for example to jazz and blues music,⁵⁰ where the creative culture of re-working and riffing creates numerous questions relating to: who, if anyone, can be considered the owner of the original work, if one can be identified, or of any subsequent re-working; and whether, in the context of the usual traditions applying to this music, such activities can (or should) ever be considered infringing.

Many of these same issues arise in relation to what are here described as culture festivals, which are extremely diverse and might very well comprehend elements of film/video and music amongst their rich diet of cultural activities. These sorts of festivals also tend to encompass – variously - activities such as poetry and prose readings, dance, theatre, story-telling, circus acts, puppetry, busking, blogging, visual art installations, exhibitions of various sorts (photographic, comics, videoart, digital art), interviews and public discussions. Four copyright issues that are of particular importance to a number of these types of festivals are: first, the relationship of performances, or performative elements, to texts (if any); secondly, the question of subsistence of copyright in ephemeral performances; thirdly, the impact of interactive works on questions of copyright ownership; and, fourthly, the question of what constitutes a copyright work.

The question of the relationship of performance to text, and the copyright issues that consequently arise with respect to ownership and infringement are not, in substance, different from those that arise in relation to performances of existing musical works. Where the performer is not the owner of the copyright interest in any text upon which a performance is based then there will be questions about whether there has been substantial taking from the text and, if so, whether fair use or fair dealing defences might apply. The law and its practitioners are generally better at understanding these questions in relation to text, where it is clear that the protected subject matter of copyright is the way in which the author of the text has expressed their ideas, and not the ideas themselves. Thus performances that make reference to a text, as a type of jumping-off point, rather than using the expression from the text itself are generally unproblematic in this respect. Further, it should be noted that a number of the types of performances that take place in the context of culture festivals involving texts are more likely than not to be performances by the author, who is likely to be the copyright owner.⁵¹ For example, it is generally the case at poetry festivals that poets read their own work. Similarly, at literary festivals authors often read their own prose works. This is obviously, of course, often not the case, in relation to theatrical texts unless they are texts written especially for the festival, as is frequently the in relation to interactive theatrical pieces.⁵²

Although the same principles apply in theory, the situation can be more complicated in relation to non-textual works. A good example of this, which often arises in the festival context, is dance, which is characterised by a generally problematic relation to copyright law. While dance is

⁴⁹ The question of the degree of input necessary to establish the preconditions for the creation of a copyright interest varies between jurisdictions. See, further, Bently & Sherman, n 40 *supra*, at 93-111.

⁵⁰ See eg, S Vaidhynathan, *Copyrights & Copywrongs: The Rise of Intellectual Property & How it Threatens Creativity* (New York, New York University Press, 2001).

⁵¹ See, eg, CDPA, s 11(1), subject to the first owner not having transferred the copyright interest to another person.

⁵² See eg, O'Grady & Kill, n 21 *supra*; & O'Grady & Kill, n 22 *supra*.

technically a protected work under copyright law in most jurisdictions,⁵³ what Yeoh has described as “the ontological instability”⁵⁴ of dance not only means that questions of the relationship between the work of a choreographer⁵⁵ and a dance performance can be fraught with difficulties. The basic problem here is that the material form to which a protected dance work is reduced is frequently a form of notation.⁵⁶ In the copyright context, understanding the relationship between this notation and a performance is challenging. A dance work tends, even when performed with the involvement of the choreographer, to mutate with each performance, with the result that significant differences between the notation and the dance as performed are likely to develop over time. A dance work, of course, can also be recorded on film. While this might overcome some of the limitations of traditional notation in capturing particular movements of the dancers, it is also subject to the problem that a film of one performance is unable to capture evolutions of the work over time. All this means that the dance community has traditionally tended to operate, in a certain sense, outside the copyright regime and according to its own norms on questions of authorship and ownership of works.⁵⁷ However, these norms are increasingly likely to become entangled with copyright law.⁵⁸

Different problems are posed by works that are ephemeral in the sense that they are not based on a text or are not otherwise reduced to what copyright law considers a material form. This problem might arise in relation to dance works that have not been recorded in some form. Other performances at culture festivals that might raise this type of issue are things like story-telling, circus acts, puppetry and busking. At first blush it might seem strange to include, for example, story-telling because it might be assumed that a text exists somewhere. However, the point of these festivals is (usually) that there is no strict relation between any text and the performance, rather the performances are interactive and “free-form”. They are, by nature, unstable in the sense that one such performance or work by the performers or artists will not be the same as the next due to differences in the way that the public interacts with the basic structure of the work. Busking is also a classic example of the same style of performance, as are many interactive theatrical performances. Absent, for example, a recording these ephemeral works cannot be protected by copyright.

If a recording exists, with the result that the work is reduced to material form and the basis for copyright protection in the work is established, there will often be questions about who is the author of an interactive work. According to copyright law, the author of a work is its generator or creator.⁵⁹ Given that copyright law does not seem to recognise the concept of an interactive work, it is probably not surprising that there is no general principle according to which the authorship of

⁵³ See, eg, CDPA, s 3(1), which protects dance as a “dramatic work”. Cf, eg, the US Copyright Act 1976, which protects dance works as such; & the Canadian Copyright Amendment Act 1988, which protects “any work of choreography, whether or not it has any storyline”.

⁵⁴ See F Yeoh, *Copyright Does Not Adequately Accommodate the Artform of Dance*, Ph D Thesis, Birkbeck, University of London, 2012ch 1 & ff.

⁵⁵ Who is considered to be the author, and therefore the first owner, of the copyright work: see, CDPA, ss 9 & 11.

⁵⁶ For an excellent account of the various forms of dance notation, see Yeoh, n 54 *supra*, ch 2.

⁵⁷ Yeoh, n 54 *supra*.

⁵⁸ See, eg, the recent controversy concerning Beyoncé’s alleged infringement of De Keersmaeker’s *Rosas danst rosas* (1983): R Sulcas, “Has Beyoncé stepped over the line?”, *The Times*, 26 October 2011, at 11, & the discussion in Yeoh, n 54 *supra*, ch 5. See further, F Yeoh, “The copyright implications of Beyoncé’s ‘borrowings’” (2013) 4(1) *Choreographic Practices* 95-117.

⁵⁹ See, eg, CDPA, s 9(1).

such works is conferred on the person who makes the arrangements, or invests the necessary resources, for its coming into being.⁶⁰ Under these circumstances, to resolve the question of who is the author, and thus first owner, of works that are interactively produced by performers and members of the public, it would seem necessary to fall back on copyright's concept of joint authorship. The UK legislation, for example, describes a work of joint authorship as being "a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors".⁶¹ The room for manoeuvre around the question of whether contributions from the public would be regarded as distinct,⁶² does nothing to resolve the practical difficulties could flow from the idea that members of the public were joint authors/first owners of interactive works in circumstances in which the works were commercially exploited outside the festival environment. Inside the essentially participative environment of the festival, however, it is not clear that any particular problems would arise from this legal uncertainty. Questions of authorship also arise in relation to performances which are not typically text-based and involve a degree of interaction, sometimes improvised between the performers.⁶³ The classic example of this is circus and variety acts, in relation to which problems around the question of authorship are part of a larger issue concerned with the question of whether these types of performances are even copyright works.

The great diversity of what have been described here as culture festivals, tends to raise some questions about how much of what occurs in such festivals involve copyright works or other works protected by intellectual property rights. In most (if not all) jurisdictions there are limits on what can be considered a copyright work, even if there is a general lack of clarity at the relevant borders. Things like poetry and prose readings, dance and theatre present less problems in this respect. On the other hand, circus acts, general variety acts and puppetry give some pause for thought. There seems to be a lack of consensus on whether circus and general variety acts can be considered to be copyright works.⁶⁴ Similar doubts also exist with respect to the protection of things like busking and blogging, as such. With slight variations on the theme, all of these activities essentially raise questions about what amount to "dramatic work" in copyright law.⁶⁵ In addition to lack of clarity around the word "dramatic", it also seems likely that the use of "work" in conjunction with it

⁶⁰ Despite the fact that this idea arguably underlies the conferral of the status of author on producers of sound recordings, broadcasters, publishers and film producers (see, eg, CDPA, s 9(2)) as well on persons who make the arrangements necessary for the creation of computer-generated works (see, eg, CDPA, 9(3)).

⁶¹ CDPA, s 10(1).

⁶² See Bently & Sherman, n 40 *supra*, at 125-127.

⁶³ See R Arnold, "Are Performers Authors?" (1999) 21 *European Intellectual Property Review* 464-469.

⁶⁴ In the UK, eg, there is a line of cases on the questions of protection and authorship of variety acts, which predates the current legislation & which focuses on the question of whether they can be considered "dramatic works": see *Clark v Bishop*, *The Law Times*, 17 February 1872; *Fuller v The Blackpool Winter Gardens and Pavilion Company, Limited* [1895] 2 QB 429; *Karno v Pathé Frères*, *The Law Times*, 26 September 1908 & 17 April 1909; *Tate v Fullbrook* [1908] 1 KB 821; *Tate v Thomas* [1921] 1 Ch 503. It seems that the lack of clarity on these questions persists under the current legislation: see *Hadley v Kemp* [1999] EMLR 589.

⁶⁵ CDPA, s 3(1), defines "dramatic work" as including "a work of dance and mime". At the international level, the Berne Convention for the Protection of Literary and Artistic Works 1886 is not much more helpful. Its Art 2(1) provides: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever maybe the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show ...".

imports a concept of something that is able to be separately identified. Consequently, vaguely limited or indeterminate activities, which might be a characterization applicable to things like storytelling, busking and blogging, always run the risk of not being considered a “work”. This requirement of determinacy, which of course is an aspect of copyright’s focus on product rather than process, also manifests itself with respect to visual art. Installations are, for this reason, at particular risk of falling outside the definition of works of visual art, as might be some types of digital art, particularly those that involve interactivity with the viewer.

However, it is important to note that the conclusion that copyright does not - or may not - exist, does not mean that there are not other relevant intellectual property rights to take into account. The consensus of opinion in the United Kingdom, for example, is that “a performance of a variety act or any similar presentation”⁶⁶ gives rise to performers’ rights irrespective of the existence of an underlying copyright work.⁶⁷ That is, in order to gain rights in the performance, it is not necessary for the performer to be performing a copyright work. (Obviously, performers performing copyright works – something that happens a lot at festivals, as the foregoing discussion illustrates – would also have performers’ rights.) There may also be some types of performances or activities that take place at culture festivals that implicate other types of copyright works. For example, a puppetry festival, which involves the making of traditional puppets from around the world, is likely to involve the production of copyright protected artistic works.

Rereading Cultural Heritage as Property?

So, while it seems generally safe to assert that arts festivals have cultural heritage credentials, the more difficult problem is to try and understand exactly where they lie on an imaginary festival map and how they relate to the intellectual property rights that also seem to be an obvious part of the festival topography. Would cultural heritage be represented as the container or border on the basis that the festival, as event, is vehicle of the cultural heritage? Such a representation might be based on the notion of the “cultural space” provided by the festival within the meaning of Article 2.1 of the Convention on Intangible Cultural Heritage or on the reference to “festive events” in Article 2.2(c). Or is the cultural heritage element of the festival more pervasive? Does it appear somewhere between the lines of what is already protected by copyright or other intellectual property interests? Or does it, in fact, overlap with what is already protected by intellectual property? Such a reading could easily be justified according to paragraphs (a) and (b) of Article 2.2 of the Convention on Intangible Cultural Heritage. Similarly, as already noted, many elements of festivals seem to offer expressions of the sort of cultural diversity with which the Convention on the Protection of Cultural Diversity is concerned. The most likely answer to all these questions is that the cultural heritage nature of festivals is evident in all these festival spaces. In other words, arts festivals are saturated by cultural heritage. It is also evidently the case that arts festivals are saturated with copyright interests, which means that some accommodation between cultural heritage

⁶⁶ CDPA, s 180(2)(d). It appears to be the case, particularly as a consequence of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961, Art 9, that circus acts fall within the definition of “variety or any similar presentation”.

⁶⁷ See the Whitford Committee *Report on the Reform of Copyright Law* (Cmnd 6732) and the UK Government (Department of Trade and Industry), *White Paper on Copyright* (Cmnd 9712, paragraph 14.5).

and copyright needs to be reached. Bearing in mind that cultural heritage belongs to a community, while intellectual property rights are private, there are substantial difficulties, in theory and in practice, in arriving at such an accommodation. A failure, however, to find such an accommodation runs the risk of allowing private intellectual property rights to constrain the creative synergistic interactions that seem so essential to the festival as event.

One approach would be to regard the festival, and the activities that occur within its spatial and temporal boundaries as being a rupture in legal space that flows from its inherent nature as a rupture in space and time. Scholars have drawn on Turner's distinction⁶⁸ between "liminal (obligatory, highly formalized) and liminoid (optional, free flowing) social events" to try and explain the space of the festival.⁶⁹ Lawrence, for example, conceives the festival as a state of "ritual disorder".⁷⁰ A similar notion of disorder in relation to festivals is also used by Abrahams, who however contrasts it with ritual:

While ritual underscores the harmonies and continuities in the expressive resources of a culture, emphasizing the wholeness of the world's fabric, festivals work (at least at their inception) by apparently tearing the fabric to pieces, by displaying it upside-down, inside-out, wearing it as motley rags and tatters ... Festivals thus draw their own boundaries for the occasion and redraw the boundaries of the host community, ironically establishing themselves in areas that, in the everyday world, have their own boundaries....[179] Openness, central to our experience of festival, is temporal as well as spatial.⁷¹

Festivals, on this argument, fit badly within the highly institutionalized and legally regulated world of private intellectual property law.⁷² As Abrahams goes on to observe:

Festivals are ultimately community affairs. Indeed, they provide *the* occasion whereby a community may call attention to itself and, perhaps more important in our time, its willingness to display itself openly. It is the ultimate public activity, given its need for preparation and coordination of effort, and its topsy-turvyness, in which many of the basic notions of community are put to test.⁷³

What festivals thus represent is a public (in the sense of not being private), communal and bounded space of openness. This idea of the festival should be reflected in the law's treatment of the creative and synergistic reactions that occur within the rupture or suspension created by the festival space.

The problem here is how to pit the vague, poorly defined idea of cultural heritage against the strong private rights inherent in law's construction of intellectual property rights. One solution might lie in a carefully articulated and constructed idea of the public domain in intellectual space. Such a solution would require a legal architecture in this public domain, which is strong enough to pull material out of the domain of private rights and into the domain of community rights in order to

⁶⁸ See, eg, V Turner, "Liminal to Liminoid, in Play, Flow and Ritual", *Rice University Studies* 60 (1974).

⁶⁹ In the introductory notes to R D Abrahams, "An American Vocabulary of Celebrations" in Falassi (ed), n 4 *supra*, 173-183, at 173.

⁷⁰ D Lawrence, "Rules of Misrule: Notes on the Doo Dah Parade in Pasadena" in Falassi, n 11 *supra*, 123-136, at 134.

⁷¹ Abrahams, n 69 *supra*, at 178.

⁷² This argument might also be regarded as consistent with the observation of Lawrence, n 66 *supra*, that "[i]nstitutionalizing inherently unstable socio-cultural forms, such as ritual disorder [into which category he places festivals] and spontaneity, is theoretically as well as pragmatically problematic".

⁷³ Abrahams, n 70 *supra*, at 181.

defend particular values such the communal interests in cultural heritage. As I have argued elsewhere, a substantial revision of how we think about the concept of the public domain, which has been greatly devalued in recent times, is required in order to achieve such a result. In particular, bearing in mind that the concept of the public domain has its roots in Roman law, it would be necessary to reinvigorate the public domain by giving full scope to the much more sophisticated version that existed under Roman law.⁷⁴ But, perhaps there is also another way of going back to the future, that would involve a temporally shorter diversion, and might also provide a way of giving cultural heritage rights greater strength in resisting the power of law's private property paradigm. This would involve a return to the concept of cultural property, abandoned by the UNESCO Conventions in the 1970s. Blake notes that the use of the expression was considered problematic on the basis that "property" is a legal term of art implicating ownership rights over a particular subject matter.⁷⁵ Perhaps, however, that is exactly what is required here. While Blake's account explains the advantages of the use of "heritage" rather than "property" in terms of the width of its application, this change in language also obscures the dimensions of the systemic conflict between cultural property/heritage and intellectual property. Writers who are specifically concerned with this conflict, tend to face it front-on and use the expression cultural property, rather than cultural heritage.⁷⁶ Such a conceptual confrontation should be viewed in the light of the compelling arguments made for the theoretical importance and practical utility of the property paradigm in relation to the protection of community interests in what this chapter started off by describing as cultural heritage.⁷⁷ In the end, re-reading or re-conceptualising cultural heritage as property compels us to face up to the conflict, to decide when community property rights are more important than private property rights, and to put in place workable legal mechanisms to defend those rights. Considering the cultural property–intellectual property overlap in the context of arts festivals provides us with a focus for this task and an instance in which, exploiting the suspended nature of the festival as event, we might start moving towards a real level of legal protection for the legally invisible communities to whom cultural property belongs.

⁷⁴ See F Macmillan, "Many Analogies, Some Metaphors, Little Imagination: The Public Domain in Intellectual Space" [2010] 2 *Pòlemos* 25-44; & F Macmillan, "Arts Festivals: Property, Heritage or More?" in K Bowrey & M Handler (eds), *Law and Creativity in the Age of the Entertainment Franchise* (Cambridge: Cambridge University Press, 2014).

⁷⁵ Note 8 *supra*, 65-67.

⁷⁶ See, eg, J R Slaughter, "Form & Informality: An Unliterary Look at World Literature" in R Warhol, *The Work of Genre: Selected Essays from the English Institute* (English Institute in Collaboration with the American Council of Learned Societies, 2011), <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=acls;idno=heb90055>, 177-240.

⁷⁷ See Flessas, n 3 *supra*; & K A Carpenter, S Katyal & A Riley, "In Defense of Property" (2009) *Yale Journal of Law* 100-204.