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Uncovering the cultural heritage discourse of copyright: opportunities and challenges for contemporary performances

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1. Introduction

With the introduction of the Convention for the Safeguarding of Intangible Cultural Heritage in 2003, (2003 Convention) the performing arts for the first time feature officially within the portfolio of protected expressions of cultural heritage under international conventions.¹ Yet it is a particular kind of performance that is targeted by the international instrument: performances ‘transmitted from generation to generation’.² The definition of intangible cultural heritage (ICH) given by the 2003 Convention remains faithful to traditional understandings of the word as it associates ‘heritage’ with the idea of past and/or longstanding existence within a community’s culture.³ This definition contrasts with the notion of *contemporary* ICH to the extent that the phrase would almost read as an oxymoron.⁴ This chapter defines contemporary ICH as recent forms of intangible creative expressions, so recent in some cases that they are yet to be recognised by their communities as being part of their heritage. Scholars have identified the punk culture,⁵ karaoke bars and Australian cricket as potential contenders for this category of ICH.⁶

Falling outside the scope of the 2003 Convention, there is little hope for contemporary performative expressions to find support for safeguarding within the international cultural

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¹ Convention for Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1 (CICH), Article 2(2)(b).

² CICH, Article 2 (1).

³ Laurajane Smith, *Uses of Heritage* (Routledge, 2006) 29. The Convention is itself concerned with transmission of intangible cultural heritage to younger generations. See, the preamble of the Convention reads: ‘*Considering the need to build greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding*’. See CICH, Preamble, page 2.

⁴ Introduction, this volume.

⁵ Megan Rae Blakely, ‘GLAMourising Intangible Cultural Heritage: When Technology, Copyright, and Cultural Institutions Meet’, *Display At Your Own Risk: An experimental exhibition of digital cultural heritage* (2016) <<http://displayatyourownrisk.org/blakely/>> accessed 03 August 2017.

⁶ Richard Kurin, ‘Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal Museum International’ (2004) 56 *Museum International* 66, 69.

heritage framework.⁷ John Schofield (this volume), would perhaps argue that these practices might be better off for it as he concludes in his thought-provoking chapter that not all expressions of contemporary intangible culture would benefit from being affixed the seal of ‘cultural heritage’.⁸ Nevertheless, the author adheres to the view that regards regulatory options to safeguard expressions of cultural heritage as desirable in principle. For this reason, this chapter envisages another legal model for the safeguarding of contemporary ICH: copyright law.⁹ Like the 2003 Convention, the performing arts are also the preserve of the intellectual property framework, namely copyright and performers’ rights, but unlike the former, it does not define the subject-matter eligible to its protection with reference to generational transmission or to the ‘special place’ creative items may hold within a community’s culture¹⁰ – or at least not in theory.

For many, however, putting forward copyright law as a safeguarding framework for ICH, contemporary or not, would be formulating a second oxymoron in lieu of the first one. Indeed, the rationale of copyright is often described as removed from concerns of heritage protection or from considerations of cultural heritage altogether. This is because the agenda underpinning copyright is primarily one of individual appropriation and commercialisation based on the commodification of cultural products,¹¹ concepts largely alien to the logic of cultural heritage protection. Interestingly, Smith holds the essence of heritage is not antinomic to the idea of commercialisation because heritage is performed through any use or re-use communities make of it, including commercial ones.¹² From this perspective, preserving or safeguarding heritage should allow, or at least should not prohibit, its commercialisation. Caught in such light, the notion of heritage is no longer antithetic to the commercial dimension of copyright.

This chapter builds on this argument and holds that copyright can play a significant role in safeguarding expressions of cultural heritage because it has the capacity to influence the production, safeguarding and preservation of contemporary cultural heritage – tangible as well as intangible. It holds that attributing copyright protection impacts on the production and use of creative outputs which form the tissue of our cultural heritage. For this reason, it is argued that the copyright framework is already acting as a mechanism for cultural gatekeeping. Going further, this chapter contends that copyright has developed its own cultural heritage discourse by impacting as well as entering into dialogue with concepts pertinent to ‘cultural heritage’. This interpretation is corroborated by the fact that the notion of ‘cultural heritage’ broadly

⁷ Macmillan, this volume.

⁸ Schofield, this volume.

⁹ This piece will extend its analysis to include performers’ rights in addition to copyright *stricto sensu*.

¹⁰ Unlike the CICH and cultural heritage framework more generally. Laurajane Smith, ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (2015) 40 *Revista d’Etnologia de Catalunya* 133, 137.

¹¹ Fiona Macmillan, this volume.

¹² Smith ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (n 10) 139-140.

understood¹³ has become a parameter of increasing importance within the copyright jurisprudence.¹⁴

Yet, unlike the discourse underpinning cultural heritage instruments such as the 2003 Convention,¹⁵ the heritage discourse of copyright has gone unchallenged, arguably unnoticed. This chapter aims to bridge this gap by uncovering such discourse as it is embodied in key statutory provisions and case law, building on the work done by heritage scholars in relation to heritage management practices and heritage regulation.¹⁶ This chapter evidences that challenging the existing cultural heritage discourse of copyright could lead to a number of practical changes in the application of the law, not least by modifying the way in which intellectual property rights are attributed, shifting in turn the revenues they secure.

This chapter adopts a comparative approach including the United Kingdom (UK), the United States (US),¹⁷ Australia and France, with a view to enrich its scrutiny with the nuances of different national perspectives on common-law or civilian traditions, northern or southern hemisphere; nuances that have survived the harmonisation of the field through international conventions.¹⁸ Most notably, it allows the discussion to engage with different national approaches to the protection of intangible subject-matter as the UK, the US, Australia and France follow slightly different rules on the questions of fixation and moral rights. The emergence of cultural heritage within the narrative of various national copyright laws would also confirm that this phenomenon is not an isolated incident pertinent to a single jurisdiction, but a transnational pattern.

The jurisdictions included in this chapter can arguably be classed as developed countries. This focus is deliberate. It aims to fill gaps in current intellectual property scholarship which tends

¹³ As including both tangible and intangible cultural heritage. At this point of the discussion, the analysis makes no distinction between tangible and intangible cultural heritage, or between the concept of ‘preservation’ and ‘safeguarding’ because the jurisprudence it reviews does not engage with the notion of cultural heritage protection with such nuance. This can be explained by the fact that copyright does not engage with concepts of cultural heritage with the level of technicity and expertise displayed by the cultural heritage framework under international law. In places where the author comments on cultural heritage regardless of its intangible or tangible nature, the term ‘protection’ will be preferred to ‘preservation’ or ‘safeguarding’. The terminology used in copyright cases will be retained when analysing them. Otherwise, the concept and use of the term ‘safeguarding’ will be preferred throughout, due to the focus of the chapter – and this volume – on intangible cultural heritage and the 2003 Convention.

¹⁴ See for example, Case C-283/01, *Opinion of Advocate General Ruiz-Jarabo Colomer*, I – 14315, ECLI:EU:C:2003:197 (Case C-283/01, *Opinion*) in Case C-283/01, Judgment of the Court (Sixth Chamber) of 27 November 2003, *Shield Mark BV v Joost Kist h.o.d.n. Memex*, I – 14329, ECLI:EU:C:2003:641 (Case C-283/01, *Shield*). See also, Case E-5/16 EFTA, *Municipality of Oslo*, 6 April 2017 (*Oslo* 2017) <http://www.eftacourt.int/uploads/tx_nvcases/5_16_Judgment_EN.pdf> accessed 16 July 2017. Mathilde Pavis, ‘Where Copyright Ends, Trade Mark May Begin: The EFTA Court Allows Relay Races of Intellectual Property Rights over Artworks’ (2017) 12(8) *JIPLP* 631.

¹⁵ Smith *Uses of Heritage* (n 3).

¹⁶ *ibid*, Smith ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (n 10).

¹⁷ The analysis focuses on the jurisprudence of the US Supreme Court together with that of Seventh and Ninth Circuit Courts. These two circuits are the chosen focus for their recent decisions in relation to the protection of performers by copyright law (see *Conrad v AM Community Credit Union*, 750 F3d 634 (7th Cir 2014), *Garcia v Google Inc*, 743 F 3d 1258 (9th Cir 2014), overturned in *Garcia v Google Inc*, 786 F3d 733 (9th Cir 2015).

¹⁸ Jane C Ginsburg, ‘International Copyright: From a Bundle of National Copyright Laws to a Supranational Code’ (2000) 47 *Journal of the Copyright Society of the USA* 265.

to focus on the impact of intellectual property and ICH in developing countries and/or indigenous cultures,¹⁹ offering little in relation to developed or western countries. This conveys the view that ICH is the ‘thing’ of non-western cultures, and conversely, *not* a concern for western communities. As with Smith,²⁰ Kirshenblatt-Gimblett,²¹ Harvey²² and many others,²³ the present analysis challenges this premise as well as the association of dichotomies (tangible/intangible, western/non-western, developed/developing countries) it supports. For this reason, the chapter centres on intangible creative expressions within the copyright framework of five developed countries to open a critical conversation on the relationships between intellectual property and ICH within western systems.

2. Copyright: a mechanism for intangible heritage safeguarding

This chapter begins this discussion by stressing that despite its commercial focus, copyright can act as a safeguarding mechanism for expressions of cultural heritage, tangible or intangible.²⁴ Put simply, copyright may be perceived as a cultural heritage tool for its capacity to influence the ways in which single units of creative expressions are produced and used; single units of creative expressions which taken together form our cultural landscapes and heritages. Copyright does so through the conferral of legal ownership²⁵ to individual creators, who are thereby able to decide where, when and how the work is shared with and used by the public.²⁶

Moreover, in bestowing legal ownership, copyright offers an avatar of cultural authorship. As such the award of copyright can be regarded as ‘markers of social acceptance of a practice as part of the creative arts in occidental society’.²⁷ In turn, it may encourage it being kept alive by communities, beginning a process of transmission from generation to generation. In addition to its socio-cultural dimension, copyright bears a significant economic impact upon creative practices. Most obviously, copyright can be a source of revenue, which alone may, in some cases, enable creative practices or expressions to remain within the cultural landscape by being

¹⁹ See for instance, Michael Blakeney, ‘Protecting the Knowledge and Cultural Expressions of Aboriginal People’ (2015) 39 *University of Western Australia Law Review* 180; Elizabeth Burns Coleman, *Aboriginal Art, Identity and Appropriation* (Ashgate 2005) 16-32; Joanna Gibson, ‘Justice of Precedent, Justness of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property’ (2001) 6 *Australian Indigenous Law Reporter* 1.

²⁰ Smith ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (n 10) 140-141.

²¹ Barbara Kirshenblatt-Gimblett, *Destination Culture* (University of California Press 1998); Barbara Kirshenblatt-Gimblett, ‘Immaterial Heritage as Metacultural Production’ (2004) 56 *Museum International* 52.

²² David Harvey, ‘Heritage Pasts and Heritage Presents: Temporality, Meaning and the Scope of Heritage Studies’ (2001) 7 *International Journal of Heritage Studies* 319.

²³ See also, Sharon MacDonald, *Memorylands: Heritage and Identity in Europe Today* (Routledge 2013) or Bella Dicks, *Heritage, Place and Community* (University of Wales Press 2000).

²⁴ n 14.

²⁵ Known as ‘copyright’ or ‘authors’ rights’ (‘droit d’auteur’) in French language.

²⁶ Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 141-188.

²⁷ Fiona Macmillan, this volume.

financially sustainable.²⁸ Conversely, copyright litigation may also put an end to creative practices by denying their authors – broadly understood – a right to revenue stemming from copyright, by prohibiting the use of protected creative material,²⁹ or by straining the resources of the parties involved in legal disputes to defend their rights.³⁰ In these regards, both facets of copyright, socio-cultural and economic, contribute to shaping cultural landscapes and heritages.

This interpretation of copyright law is supported by the fact that copyright has become a forum for claims and overt considerations of cultural heritage protection. Indeed, the notion of ‘cultural heritage’ seems to have permeated the judicial narratives of copyright in the UK, the US, Australia and France, as well as that of European authorities. At least two modes of interaction or influence between copyright law and the concept of ‘cultural heritage’ can be identified. In some cases, ‘cultural heritage’ is referred to as an item to be protected *from* undue appropriation conferred by copyright or other intellectual property rights in the form of legal ownership.³¹ In others, cultural heritage is protected *by* intellectual property rights rather than *from* it. The following explores this second hypothesis further.

Two traditional aspects of copyright ownership allow its holders to control reuses of protected material in such way: the moral right of integrity and economic rights governing adaptations of protected works. The US introduced a third type of legal prerogative: the right against destruction of works of ‘recognized stature’.³² This legal right is perhaps the mechanism most closely aligned with considerations of cultural heritage protection, and was embedded at the heart of Federal American copyright law as akin to moral rights. However, as in many regards

²⁸ Paul K Longmore reports the unusual situation that revenues generated from the royalties of his book left him worse off financially as he became ineligible for disability benefits for earning ‘too much’, in Paul K Longmore, *Why I Burned My Book and Other Essays on Disability* (Temple University Press 2003).

²⁹ As in the case of Lallande’s compositions recorded by Sawkins’s modern notations (*Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565). See also, in the context of papercut craft: *Taylor v Maguire* [2013] EWHC 3804 (IPEC), or of making archives accessible: Ronan Deazley, Victoria Stobo and Kerry Patterson, ‘Digitising the Edwin Morgan Scrapbooks’ (2017) <<http://www.digitisingmorgan.org/>> accessed 16 July 2017.

³⁰ Theatre director Pamela Brighton declared bankruptcy following her loss in a legal dispute against Marie Jones over the copyright in the theatre production of *Stones in my pockets* (see, *Brighton v Jones* [2004] EMLR 26). See, Michael Coveney, ‘Pam Brighton Obituary’ *The Guardian* (25 February 2015) <<https://www.theguardian.com/stage/2015/feb/25/pam-brighton>> accessed 16 July 2017.

Similarly, the classical music record label Hyperion Records almost faced bankruptcy following a loss in court against Lionel Sawkins for the label had produced a record of Lallande’s compositions without seeking Sawkins’s permission to use his modern rendition of the score sheets (n 29). Ed Vulliamy, ‘£1m Legal Bill Rocks a Musical Institution’ *The Guardian* (23 December 2005) <<https://www.theguardian.com/uk/2005/dec/23/arts.artsnews>> accessed 16 July 2017.

³¹ See Oslo 2017 (n 14) and Case C-283/01, *Opinion* (n 14). Here, the notion of cultural heritage comes close to being synonymous to the concept of ‘public domain’, a term well-known in copyright rhetoric, though one that remains ill-defined. See for example, Jane C Ginsburg, ‘Une Chose Publique? The Author’s Domain and the Public Domain in Early British, French and US Copyright Law’ (2006) 65 *Cambridge Law Journal* 636. For an account of conflicting views on the concept see, Jessica Litman, ‘The Public Domain’ (1990) 39 *Emory Law Journal* 965; Christopher Buccafusco and Paul J Heald, ‘Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension’ (2013) 28 *Berkeley Technology Law Journal* 1.

³² US Code, Title 17, §106(A)(a).

the right against destruction goes beyond the traditional boundaries of authors' rights, it will be examined separately.³³

Moral rights allow artists to preserve the integrity of their work legally³⁴ – amongst other prerogatives.³⁵ What constitutes the integrity of a work has received varying definitions depending on the jurisdiction. In France, the integrity of the work observed by the court is largely defined according to the author's own sensitivities and subjective sense of respect of the work.³⁶ Interestingly, the legal protection of a work's integrity is imprescriptible, as long as records of the author's wishes on that point can be produced in court by his/her heirs.³⁷ On the other hand, the UK, Australia and the US have adopted a more restrictive approach to integrity by employing an objective test whereby what constitutes derogatory treatment of the work will be assessed by the court as supported by expert evidence and will not be solely based on the author's perception of the uses of his work by others.³⁸ Furthermore, in these jurisdictions, the moral right of integrity only lasts as long as economic rights do, that is for seventy years after the author's death in most cases.³⁹ Narrowing further the application of the doctrine, the US has only introduced moral rights in relation to works of visual art.⁴⁰

Famous iterations of the moral right doctrine often come from France where the law offers the most generous – aggressive, others would say⁴¹ – form of protection.⁴² The *Beckett* case is perhaps its best-known illustration,⁴³ and one of the most controversial of all decisions on this point of law. In the dispute, Beckett's estate had objected to the performance of *Waiting for Godot* by female comedians for it contradicted their ancestor's creative directions. The claim

³³ Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press 2006) 499.

³⁴ UK: CDPA 1988, ss. 80-83; France: IPC, Article L 121-1; Australia: 1968 Copyright Act, s. 195-AI-AL; US: US Code, Title 17, §106A(a)(3).

³⁵ The other moral rights include the right of paternity, i.e. to be attributed as the author of a work, or conferring protection against false attribution (UK: CDPA 1988, s. 77, 84; Australia: 1968 Copyright Act, s.193-195AB, 195AC-AH; US: US Code, Title 17, §106 (1) to (6) to which, in France is added the right of withdrawal (IPC, Article L 121-4) and of first publication (IPC, Article L 121-2).

³⁶ Unlike the moral right of integrity as enforced in the UK, Australia and the US, French only confers protection to the integrity of the work, but not its author's name and reputation, thereby limiting the reach of the doctrine in some cases. See, Cass, 1ère civ, 10 mars 1993, « affaire Association la Fraternité Blanche Universelle » n° 91-15.915 : D. 1994 p 78 note Françon.

³⁷ IPC, Article L 121-1.

³⁸ See for example in the UK, *Pasterfield v Denham* [1999] FSR 168; *Tidy v Trustees of the Natural history Museum* (1995) 39 IPR 501, *Confetti Records (a firm) v Warner Music UK Ltd* (trading as East West Records) [2003] EWCH 1274, to contrast with the French decision: Cour Cass, Civ 1, 28 May 1991, *Consorts Huston et autres v Ste Turner Entertainment Co et autres*.

³⁹ For a thorough review of copyright duration, see Ronan Deazley, 'Copyright and Digital Cultural Heritage: Duration of Protection', *Copyright Cortex: Copyright 101* (2017) <<https://copyrightcortex.org/copyright-101/chapter-6>> accessed 16 July 2017.

⁴⁰ US Code, Title 17, §106A(a). For a list of what 'works of visual art' include as per the meaning of US copyright law, see US Code, Title 17, §101, as amended by The Visual Artists Rights Act of 1990 Pub L No 101-650, 104 Stat 5089, 5128.

⁴¹ See for example, Amy Adler, 'Against Moral Rights' [2009] California Law Review 263.

⁴² TGI Paris 15 October 1992, *Lindon et Sacd c/ La Compagnie Brut de Béton et Boussagol* : inédit, RTD com. 1993. p 98 note Françon; RIDA janvier 1993 p. 225 (Beckett case); Cour Cass, Civ 1, 28 May 1991, *Consorts Huston et autres v Ste Turner Entertainment Co et autres* (n 49).

⁴³ Beckett case (n 42); Luke Mcdonagh, 'Plays, Performances and Power Struggles - Examining Copyright's "Integrity" in the Field of Theatre' (2014) 77 Modern Law Review 533, 534-539.

was accepted by the Paris Tribunal as the playwright's descendants were able to submit evidence documenting Beckett's objection to women playing Vladimir and Estragon.⁴⁴

Whilst reluctant to introduce moral rights,⁴⁵ US copyright law has been the most forward in making use of the doctrine for the purpose of cultural heritage safeguarding as they introduced a right against destruction of works of 'recognized stature' within federal copyright law. The protection of cultural heritage was at the heart of the implementation of the provision as evidenced by the House Report submitted in support of the provision,⁴⁶ in which the right against destruction was described as a 'safeguard' akin to the right of integrity, both destined to 'enhance the creative environment in which artists labour'⁴⁷ and 'enhance our cultural heritage'.⁴⁸ As discussed in subsequent developments, courts continue to enforce these rights in light of their 'safeguarding' rationale.⁴⁹

The above confirms that the copyright framework holds the potential to impact the state and safeguarding of cultural heritage, tangible or intangible. To an extent, this ability has been utilised and embedded within national statutory provisions as well as acknowledged in its jurisprudence.

3. Copyright: a cultural heritage discourse

This chapter puts forward that, much like other heritage regulatory frameworks,⁵⁰ copyright formulated its own cultural heritage discourse. This is not only because copyright impacts the formation and use of creative practices but also because its enforcement in practice is informed by considerations of cultural heritage. The subsequent developments evidence the extent to which the jurisprudence relies on notions of cultural heritage and cultural 'weight' when applying copyright law to individual cases, and so despite judges' pledge not to engage in debates of aesthetics, artistic quality or cultural stature when assessing copyright infringement or subsistence.⁵¹ This practice moves copyright from being a mere tool of cultural heritage

⁴⁴ In Italy and the Netherlands, the exact same facts received a different treatment by the court who litigated in favour of the performers' freedom of expression, or simply rejected the claim. See, Barbara McMahon, 'Beckett Estate Fails to Stop Women Waiting for Godot' *The Guardian* (Rome, 2006) <<http://www.theguardian.com/world/2006/feb/04/arts.italy>> accessed 9 October 2017 ; Alice Jones, 'Waiting for Godot: Samuel Beckett in Baseball Caps' *The Independent* (7 May 2014) <<http://www.independent.co.uk/arts-entertainment/comedy/waiting-for-godot-samuel-beckett-with-baseball-caps-9334277.html>> accessed 10 March 2016.

⁴⁵ Moral rights were only introduced at the Federal level in 1990 by the Visual Artists Rights Act of 1990 (VARA) Pub L No 101-650, 104 Stat. 5089. On the legislative history leading up to the introduction of VARA, see Adeney *The Moral Rights of Authors and Performers* (n 33) 441-72.

⁴⁶ *inter alia*.

⁴⁷ House Report 101-154 HR Rep No 101-514 (1990)14, reprinted in 1990 USCAN 6915, 6924.

⁴⁸ *ibid*.

⁴⁹ See for example, *Carter v Helmsley-Spear Inc* (1995) 71 F 3d 77 (Court of Appeals, 2nd Circuit) 80, 81-2.

⁵⁰ Smith 'Intangible Heritage: A Challenge to the Authorised Heritage Discourse?' (n 10).

⁵¹ Rejecting aesthetic merits, Australia: *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 (22 April 2009) para 33; US: *Feist Publications Inc v Rural Telephone Service Co* (1991) 499 US 340, 345; France: IPC, Art L 112-1, Paris, 4th ch, 20 September 1993: PIBD1993, 556, III, 713.

protection to being a regulatory framework underpinned by its own cultural heritage discourse, which seem to relay aspects of dominant views on cultural heritage.

3.1. Defining copyright as a cultural heritage discourse

As this study aligns copyright narratives with discourses of cultural heritage, it pays to define the meaning of the phrase ‘cultural heritage discourse’. This analysis relies on the definition of ‘discourse’ proposed by heritage scholars such as Smith and Waterton who apply the tools provided by the Critical Analysis Discourse method.⁵² They hold that discourse can be generally understood as ‘something that makes the world meaningful’⁵³ and endorse Fairclough’s view that a discourse is ‘a practice not just of representing the world, but of signifying the world, constituting and constructing the world in meaning’.⁵⁴ Their discourse analysis works on the premise that ‘what goes on *textually*, or within any act of communication, can tell us something about what is going on *socially*’,⁵⁵ how ‘the negotiation of social relationships and relations of power’ take place.⁵⁶ This chapter contends that the same principle applies to the narratives emerging from the legal system of copyright. In other words, what goes on *legally* – which is largely expressed through the medium of text in most western civilizations – tells us something about what goes on *culturally*, and indeed *socially*.

Building on the above definition of ‘discourse’, Smith and Waterton have explored the socio-cultural foundations of heritage management practices, including regulations dedicated to cultural heritage protection. Taken as a whole, Smith argues that such practices have formed consistent discourses on what ‘cultural heritage’ is and how it should be used by their communities. Such discourses are now referred to using the shorthand ‘cultural heritage discourses’. In Smith’s words, cultural heritage discourses are what ‘constitute[s] and reflect[s] a range of social practices that, amongst other things, are used to give meaning to group identity, historical narratives and collective and individual memories, and these in turn organize social relations and identities around nation, class, culture and ethnicity’.⁵⁷ It is argued that copyright law has become a cultural heritage discourse because of its ability to impact our cultural heritage through the attribution of rights which in turn organise social relations, and arguably identities around nation, class, culture and ethnicity – to parallel Smith’s definition.⁵⁸

⁵² Laurajane Smith and Emma Waterton, ‘Constrained by Commonsense: The Authorized Heritage Discourse in Contemporary Debates’ in Robin Skeates, Carol McDavid and John Carman (eds), *The Oxford Handbook of Public Archaeology* (2012); Emma Waterton, *Politics, Policy and the Discourses of Heritage in Britain* (Palgrave MacMillan 2010) 18-35.

⁵³ Smith and Waterton (n 52) 154.

⁵⁴ *ibid.*

⁵⁵ Smith and Waterton (n 52) 154.

⁵⁶ *ibid.*

⁵⁷ Laurajane Smith, ‘Discourses of Heritage: Implications for Archaeological Community Practice’ [2012] *Nuevo Mundo*, para 6 <<http://nuevomundo.revues.org/64148>> accessed 30 August 2017.

⁵⁸ Coombe’s work corroborates this contention. See, Rosemary Coombe, *The Cultural Life of Intellectual Properties - Authorship, Appropriation, and the Law* (Duke University Press 1998).

This trait of the copyright framework is all the more evident when notions of cultural heritage, cultural weight or when references to emblematic cultural figures become parameters used to make sense of copyright and shape the way copyright law is applied. It is held that such practice enshrines dominant views of heritage in the cultural heritage discourse of copyright. The analysis stresses that in praising a select few ‘author-geniuses’ in the body of its jurisprudence, the judiciary elevates particular types of cultural expression, or profiles of artists, to the level of reference standards against which others are measured for the purpose of intellectual property.⁵⁹ This chapter identifies these instances as places where the cultural heritage discourse of copyright reveals itself implicitly.

This analysis thus observes two essential points. First, that it is the jurisprudence, primarily, which lends itself as a forum for cultural heritage discourse as statutory provisions were drawn by legislators without thoughts of cultural heritage protection in mind. Second, that courts have engaged with considerations of cultural heritage on two modes: explicitly and implicitly. When discussions on the cultural stature of a work or author have been made an explicit part of courts’ legal reasoning, judges have handled the risk of acting as cultural gatekeepers with care. However, when considerations of cultural heritage invited themselves into judicial discourses in a more subtle and implicit manner, the jurisprudence does not convey the same level of reserve. This leaves references to well-known cultural figures such as Beethoven for musical works, Dickens or Hugo for literary works, to settle as reference points within the copyright jurisprudence without consideration for the cultural bias this choice of references may carry.

Besides being unconstrained, implicit references can be particularly damaging in the context of safeguarding contemporary performances because they often affect the core of copyright law, that is, the interpretation of copyright’s conditions of subsistence. Consequently, copyright law offers no guarantee that contemporary performances will not be assessed against more ‘traditional’, ‘accepted’ or simply ‘less contemporary’ forms of creative expressions. This practice would inevitably defeat the aim of utilising copyright as a replacement for the 2003 Convention since both legal instruments would exclude them for the same reason: their contemporary nature. Each ‘mode’ of dialogue, explicit and implicit, are envisaged in turn in the following sections.

3.2. Explicit and constrained references to cultural heritage

As mentioned in previous comments, a number of provisions present within statutory copyright law allow authors to preserve what they believe to be core to the integrity of their work. Such

⁵⁹ Much of this discussion resonates with the criticism of the ‘author-worship’, legal scholars have formed building on postmodern challenges to authorship. See, Roland Barthes, ‘The Death of the Author’, *Image - Music - Text* (Fontana Press 1977); Michel Foucault, ‘What Is an Author?’ in James Faubion (ed), *Aesthetics, Method, and Epistemology* (Essential, The New Press 1998). The neologism was notably used, if not coined, by Peter Jaszi in Peter Jaszi, ‘Is There Such a Thing as Postmodern Copyright?’ (2009) 12 *Tulane Journal of Technology and Intellectual Property* 105, 116; Martha Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of The “author”’ (1984) 17 *Eighteenth Century Studies* 425. Criticising the historic accuracy of the author-genius critique found in the legal scholarship see, Andreas Rahmatian, *Copyright and Creativity The Making of Property Rights in Creative Works* (Edward Elgar 2011) 156-9.

provisions include the moral right of integrity, limitations which have been placed on the right to adapt the work, and in the US, the right against the destruction of works of ‘recognized stature’.⁶⁰ This section reveals the protection conferred by each of these provisions have been increased by judges when confronted with work they regard to be of greater cultural weight or standing than others, despite the fact that copyright law is designed to ignore such subjective characteristics.

The moral right of integrity

Whilst both cultural heritage protection and the moral right of integrity *stricto sensu* are animated by the same rationale of preservation of creative works, the latter does not rely on considerations of cultural heritage *per se* – unlike the examples envisaged in preceding comments. Rather it operates with reference to the author’s wishes in France, and to objectivised standards of derogatory treatment in the UK, Australia and the US.⁶¹ As such, the moral right of integrity in its traditional understanding is indifferent to considerations of cultural heritage or of the cultural status of the work, or so it should be. Yet, in some instances, copyright law muddles this autonomy by inviting notions of cultural stature.

This was notably the case in the *Victor Hugo* decision.⁶² The heirs of the famous French novelist sought to prevent a writer, François Cérésa, from publishing his sequel of Hugo’s *Les Misérables*. The first instance decision was entirely consumed by the question of the heir’s legal title to Hugo’s rights who appeared to have distributed them to a number of parties before his death.⁶³ It was only on appeal of the first instance decision that further attention was paid to the claim of moral protection made against the act of producing a sequel to another writer’s work, now belonging to the public domain.⁶⁴ In their decision, the Paris Court of the Appeal first confirmed the right of Hugo’s grandson to exercise his ancestor’s moral rights in principle, before examining the content of his request.⁶⁵ Hugo’s Estate regarded Cérésa’s work as a desecration of *Les Misérables* for a number of reasons, including the fact that characters that had passed away in the original ending of the novel were brought back to life in its sequel. This was read as a suggestion that Hugo’s work was incomplete or worthy of different finale. In response, Cérésa and Plon, his publisher, advocated for their freedom of expression and

⁶⁰ US Code, Title 17, §106(A)(a), text to n 79.

⁶¹ Text to note 34.

⁶² Paris Tribunal de Grande Instance, 1st chamber, 1st section. 12 September 2001: *Hugo v Plon* No 01/08438 (*Hugo v Plon* No 01/08438); Court of Appeal, Paris 4th chamber, 31 March 2004, *Hugo v Plon*, No XP310304X (*Hugo v Plon* No XP310304X); Cour Cass Civ 1, 30 January 2007, *Hugo v Plon* No 04-15.543 (*Hugo v Plon* No 04-15.543).

⁶³ *Hugo v Plon* No 01/08438.

⁶⁴ *Hugo v Plon*, No XP310304X.

⁶⁵ The Court of Appeal also recognised the ‘collective interest’ vested in the dispute and defended by the French authors’ society (‘Société Des gens de Lettres’) who came in support of Hugo’s estate. The Association is not a collecting society but dedicates its work to the defence of authors’ legal rights as they extend to intellectual property law (see, SDG, ‘Société Des Gens de Lettres’ (Official website) <<https://www.sgd.org/sgdl>> accessed 16 July 2017).

creation which extended to the free and unfettered re-use of works in the public domain such as *Les Misérables*.

The Court reviewed with care Victor Hugo's position on the concept of authorship, and authors' legal economic and moral rights. Indeed, as authors' rights were being reformed in French law, the writer had delivered a public speech before the French Parliament in 1848 reporting a moderate enthusiasm for the concept of legal ownership he regarded as limiting readers and writers' use of published creative material.⁶⁶ Hugo's public position on the question was used by Cérésa and Plon in support of their creative re-use of *Les Misérables*. However, the Court discarded these general remarks made by the writer as deprived of legal standing in relation to the matter at hand since various versions of Hugo's will documented his intention to place his published and unpublished works under the trusted custodianship of various friends and relatives. These would suggest that Hugo intended to exercise his legal rights as author, or so his Estate contended. To further support their opposition to Cérésa's sequel, Hugo's heirs also brought to the attention of the judges the writer's declaration of the novel's 'completeness', including the conclusion he had chosen for it.

After examining the contentions of both parties, the Court of Appeal concluded that there had been a breach of Hugo's moral rights, siding with his Estate's arguments. The reasoning of the Court is of particular relevance to the present discussion as it reads:

Considering that, outlawing sequels of *Les Misérables* does not, as the parties contend, breach the principle of free creation since, in the facts presented before us, this work, a real monument of world literature [...] is not a mere novel for it presents a philosophical and political angle⁶⁷

Considering that, it follows that no sequel shall ever be given to a piece such as *Les Misérables*, forever complete, and that, the company Plon has, by editing and publishing *Cosette ou Le Temps Des Illusions* and *Marius ou le Fugitif*, by presenting the works as sequels of *Les Misérables*, infringed Victor Hugo's moral right vested in the latter literary work⁶⁸

In this case, the lack of clear evidence with regard to the author's wishes seems to have been overcome by the cultural status of the work within 'world literature' according to the Court.

It appears, reading the arguments of the parties as reported in the Court of Appeal decision itself, that the argument based on the position of the piece as a 'monument of world literature' came from the appeal judges' own reasoning, as no similar grounds are presented in the body of the decision as counsels' submissions. The decision confirms the contention that uninvited

⁶⁶ Victor Hugo, 'Victor Hugo - Discours À l'Assemblée Nationale (1848-1871)' <http://www.assemblee-nationale.fr/histoire/victor_hugo/discours_fichiers/seance_11novembre1848.asp> accessed 16 July 2017.

⁶⁷ *Hugo v Plon* No XP310304X. Author's translation.

⁶⁸ *ibid.* See also the report under Paris, 4ème Ch, A, 31 mars 2004, « Les Misérables »: D. 2004, jurispr. P2028 note Edelman; JCP E 2005 N 1216 § 1. Author's translation.

considerations of cultural heritage do lurk in the background of judges' decision-making in copyright case law.⁶⁹

Yet the dispute did not end with the Court of Appeal's decision. The case was subsequently heard by the French Supreme Court who sanctioned the Court of Appeal decision for letting the quality and reputation of Hugo's work colour their application of the law.⁷⁰ The Court of Cassation quashed the decision declaring that the references it made to the status of the work, its merit and its completeness as a work, were irrelevant for the purpose of copyright, including moral rights. The highest civil court declared that the right to write sequels of a work fell within the scope of the right of adaptation, which had expired with every other economic right seventy years after Hugo's death. This response from the Court of Cassation evidences the nuances with which the judiciary have handled claims of 'preservation' of cultural works or heritage expressed in copyright jurisprudence, and possibly implies a reluctance towards associating copyright and cultural heritage protection.

Protection against 'debasement'

The conclusions of the Australian Federal Court in the 1997 *Schott Musik* case convey a similar level of caution towards analogous claims made in connection to a musical work.⁷¹ In Australia, the General Division of the Federal Court settled a complaint made by music publisher Schott Musik against the alleged 'debasement' of one of Carl Orff's classical music compositions, *O Fortuna*.⁷² The claim was based on the limits framing the right to compulsory licenses in the context of recordings by the former Section 55(2) of the Australian Copyright Act 1968. As moral rights had not been introduced in Australia at the time of the dispute,⁷³ this provision was the only legal recourse available to the publisher on the grounds of intellectual property law. Section 55(2) provided that compulsory licenses would be excluded in cases where the 'record of an adaptation of a musical work debases the work'.⁷⁴ The crux of the case put before the Australian Court lay in the meaning and interpretation of the word 'debase'.

A band known as FCB had released a cover of *O Fortuna* in a techno-music record titled *Excalibur*. Schott Musik regarded the re-use as debasing Orff's work, and asked for the compulsory licence to be revoked. In their discussions, the judges of the Federal Court envisaged the legislative history of the Copyright Act and the intent of the legislators at length, and stressed the difficulty in defining the concept of debasement in isolation from subjective

⁶⁹ The image picked by the judge to describe Victor's work as 'monument' of literature is interesting in itself for it draws on a metaphor of tangible cultural heritage with an architectural undertone (the 'monument'), which can be read as echoing views held in the context of 'authorised heritage discourse' as outlined by Smith (n 10). This point is further discussed below, see text to n 192.

⁷⁰ *Hugo v Plon* No 04-15.543.

⁷¹ *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483, 498.

⁷² *O Fortuna* is the chorus of Orff's longer piece titled *Carmina Burana*.

⁷³ Moral rights were introduced by the Copyright Amendment (Moral Rights) Act 2000 (Cth) in December 2000.

⁷⁴ Copyright Act 1968, Former s. 55(2). This condition to the making of adaptations was removed upon the introduction of moral rights in Australian intellectual property law in 2000. See, Copyright Amendment (Moral Rights) Act 2000 (Cth), s. 1A.

assessments of the work at stake.⁷⁵ Comments with regard to the place of Orff's culture emerged as a pertinent factor in the decision. On this point, Lindgren J writes: '[i]t seems to me to be significant that the question posed relates to music composed by Carl Orff in 1936, but must be answered by an application of Section 55(2) in the context of the musical technology, societal phenomena and musical genres of the 1990s'.⁷⁶ The Australian judge then describes the re-use of the Orff's work as follows:

The adaptation of the work is recorded on a compact disc known as 'Excalibur' which contains four remixed tracks of the 'O Fortuna' chorus. ... The evidence indicates that the 'techno' genre is a form of music particularly favoured at 'raves' which have been described in evidence as all-night dance sessions where loud pulsating music is played. It is said that the techno genre embodies a 'slavish' devotion to the use of rhythm as a hypnotic tool that is, largely, if not primarily, interpreted by electronic means.⁷⁷

Lingren J continues:

In my view, an arrangement will be less likely to be a debasement where, as here, it is an arrangement which 'makes available' the original musical work to the musical tastes of a different period of time or of a different subculture, or (as here) of both, and which thereby acquires its own integrity.⁷⁸

The decision captures tensions pertinent to questions of cultural heritage protection in the light of creative re-use of protected material by new or sub-cultures.

The legal notion of 'debasement' falls close to the concept of integrity explored above. Both terms are underpinned by a rationale of preservation or safeguarding. Both terms have been applied with reference to the greater cultural context in which the works exists whether it be 'world literature' for the Paris Court of Appeal or 'techno-music' for the Australian Bench. In the Australian case, Lingren J found it relevant to place the work within the cultural context of its contemporary re-use including techno-music, in new places of performance (raves), involving a new generation with a 'new taste' to assess the need for safeguarding, before concluding that there was none. In this regard, the decision acknowledges the cultural complexities in which intellectual property laws operate. It confirms the fact that cultural heritage, the need for its protection and for allowing creative uses of it, are considerations underpinning the intellectual property framework, insofar as case law is concerned.

⁷⁵ Whilst the Court agreed that the notion of debasement should be understood as objectively as possible, they failed to reach a consensus on the form such test or definition should take in this context, see *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483, 493-494. Further questioning the objectiveness of this test, see also, Matthew Rimmer, 'Every Artist Is A Cannibal, Every Poet Is A Thief': Copyright Law And Post-Modernism' (Australian National University, October 1997) 34-5.

⁷⁶ *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483, 498.

⁷⁷ *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483, 498 citation omitted.

⁷⁸ *ibid*, 498-9.

The protection against destruction of works ‘recognized stature’

Section 106, Title 17 of the US Copyright Code provides that ‘the author of a work of visual art shall have the right to ... prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.’⁷⁹ As no definition of ‘recognized stature’ features in the Visual Artists’ Rights Acts of 1990 which introduced the prerogative, this task was left for the courts to perform.⁸⁰ Precedent was set by the New York District Court in *Carter v Helmsley-Spear Inc.*⁸¹ *Carter* was subsequently applied in the jurisdictions of the Ninth and Seventh Circuit Courts,⁸² whose respective jurisprudence form the primary focus of this comparative study of the American copyright framework.

In *Carter*, the District Court, following a literal interpretation⁸³ of the phrase, concluded that the provision required the fulfilment of two conditions for the protection to apply: ‘(1) that the visual art in question had “stature”, i.e. is viewed as meritorious, and (2) that this stature is “recognized” by art experts, other members of the artistic community, or by some cross-section of society’.⁸⁴ The Court then stressed that their judgment would usually be supported by the submissions of expert evidence, although the latter were not compulsory.⁸⁵ Whilst parties argued before the Seventh Circuit that the ‘Carter test’ was more ‘rigorous than Congress intended’ no judges challenged its validity.⁸⁶ ‘Shunning’ the role of art critic themselves, judges have thus replaced their subjective assessment of the work of art itself by their evaluation of the experts testifying for or against it.⁸⁷ Courts have thus dissected the views of scholars of art history, art critics, and directors of community art centres or galleries,⁸⁸ to name only a few, on considerations of cultural stature. This invited disputes between parties on the type of ‘evidence’ legally entitled to weigh on the recognition of a work’s stature by the Court, and their experts. This was notably the case in *Martin v City of Indianapolis*, where the claimant submitted evidence in the form of newspaper articles and letters commenting on the sculpture involved in the dispute, in lieu of standard expert evidence, because the piece had already been destroyed by the time legal proceedings were introduced.⁸⁹ Although the Court acceded to the artist’s request in this case, Circuit Judge Manion dissented in part with the conclusion reached

⁷⁹ Subject to the caveats outlined by §107 and §106. See US Code, Title 17, §106A(a).

⁸⁰ *Martin v City of Indiana* (1999) 192 F 3d 608 (Court of Appeals, 7th Circuit) 612; *Carter v Helmsley-Spear Inc* (1995) 71 F 3d 77 (Court of Appeals, 2nd Circuit) 325.

⁸¹ *Carter v Helmsley-Spear Inc* (1994) 861 F Supp 303 (US District Court, SD New York). Although the conclusions of the New York District Court decision were overturned on appeal, the latter did not correct the district’s court interpretation of the VARA provision, which was subsequently followed by other authorities.

⁸² *Martin v City of Indiana* (1999) 192 F 3d 608 (Court of Appeal, 7th Circuit); *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit).

⁸³ *Carter v Helmsley-Spear Inc* (1994) 861 F Supp 303 (US District Court, SD New York) 323-4.

⁸⁴ *ibid* 325.

⁸⁵ *ibid*.

⁸⁶ *Martin v City of Indiana* (1999) 192 F 3d 608 (Court of Appeal, 7th Circuit) 612. See also, *Pollara v Seymour* (2002) 206 F Supp 2d 333 (District Court, ND New York); *Scott v Dixon* (2004) 309 F Supp 2d 395 (District Court, ED New York); *Cohen v G & M REALTY LP* (2013) 988 F Supp 2d 212 (District Court, ED New York); *Phillips v Pembroke Real Estate* (2006) 459 F 3d 128 (Court of Appeals, 1st Circuit).

⁸⁷ *Carter v Helmsley-Spear Inc* (1994) 861 F Supp 303 (US District Court, SD New York) 323.

⁸⁸ *ibid*.

⁸⁹ *Martin v City of Indiana* (1999) 192 F 3d 608 (Court of Appeal, 7th Circuit) 612-613.

by his peers on the case. Acknowledging the subjective backdrop against which the legal assessment of the right against destruction rests, Manion J writes:

Like my colleagues, I am not an art critic. So I begin with the well-known adage that one man's junk is another man's treasure. No doubt that Han Martin [the claimant] treasured what the city's [the defendant] bulldozers treated as junk. ... For the Martin sculpture to receive protection ... it has to rise to the statutory level of 'recognized stature'. Because ... it has clearly not merited the protection that goes with that description, I respectfully dissent. ... A plaintiff cannot satisfy his burden of demonstrating recognized stature through old newspaper articles and unverified letters, some of which do not even address the artwork in question.⁹⁰

Issues surrounding the treatment of expert evidence in their assessment of a work's 'recognized stature' would only occur in instances where the point is disputed. This point is well illustrated by the 2016 decision of the Ninth Circuit Court of Appeal *Cheffins v Stewart*.⁹¹ This case concerned the destruction of a school bus which had been converted by the claimant into 'a replica of a 16th-century Spanish galleon' known as the La Contessa. Both parties reached a consensus on the fact that the bus thus transformed enjoyed a 'recognized status' within the local community since it appeared in the 2002, 2003 and 2005 editions of a local festival, in which it had been used as part of the performance of a marching band and as 'the centerpiece of a children's treasure hunt, among other things'.⁹² Although the 'school-bus-turned-galleon'⁹³ was intentionally burnt by the defendant 'so that a scrap dealer could remove the underlying school bus from his property', the Court denied protection to the claimant, co-maker of the ship, not for lack of recognised stature but on the grounds that the piece was a work of applied art, not a work of 'visual art' to which the right against destruction applies exclusively. The pitfall of the replica lay in its utilitarian function, which made it a work of 'applied art' not of 'visual art' in the eyes of the Court.⁹⁴ Again, the complexity and subjectivity involved in such an interpretation is conveyed by Circuit Judge McKeown's dissenting opinion in which he outlines a different interpretation of the same statutory provisions. McKeown calls for a more nuanced approach to the concept of applied and visual arts, where works would be seen as a 'whole' and not reduced to their 'utilitarian functions'.⁹⁵ The dissenting judge explains that [d]efining the term 'applied art' is no easy task⁹⁶, '[t]o be sure, judicial attempts to

⁹⁰ *Martin v City of Indiana* (1999) 192 F 3d 608 (Court of Appeal, 7th Circuit), 616.

⁹¹ *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit).

⁹² *ibid*, 591.

⁹³ *ibid*, 603.

⁹⁴ The majority decision discussed the legislative history of moral rights and the intention of the legislator in limiting their scope to works of visual arts, together with the definition of the category, or lack thereof, before reaching this conclusion. See, *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit) 591, 593-596.

⁹⁵ *ibid*, 597-8.

⁹⁶ *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit) 591, 599-600. Citation omitted. This passage quotes the words of Supreme Court Justice Holmes (in *Bleistein v Donaldson Lithographing Co* (1903) 188 US 239, 251) and references the Judicial Improvements Act of 1990 Pub. L. No. 101-650. Interestingly, McKeown continues: 'The difficulty of our job is compounded because VARA provides no definition of applied art. [...] [t]he House Report accompanying the bill unhelpfully states that the definition of applied art is "self-

categorize artistic creations are fraught with difficulties. As Justice Holmes observed long ago, judges make terrible art critics'.⁹⁷ McKeown continues and states that '[a]lthough VARA does not ask us to assess the beauty or value of art, attempting to discern whether a unique creation is visual or utilitarian art poses similar challenges.'⁹⁸

These cases reflect the extent to which copyright law can be meshed with rationales of cultural heritage protection, blending together logics of preservation and safeguarding. It is important to note that as judges are handling copyright claims analogous to claims of cultural heritage preservation or safeguarding, they do so with the awareness that their jurisprudence creates a discourse based on subjective assessment of a work's quality. This leads the courts to build safeguards to limit the reach of subjective assessment where possible. In the context of the moral right doctrine, the French Court of cassation removed considerations of cultural weight from their legal reasoning, and so did the Australia judges. In the US, where the 'stature' of work is at the core of the protection conferred by law, judges shifted its evaluation onto expert evidence submitted by individuals they believed to be skilled to form such judgement.

3.3. Implicit and unconstrained references to cultural heritage

This section highlights that when cultural references are implied within legal judgments, no such safeguards are put in place. This is particularly true of the jurisprudence framing the conditions of copyright subsistence. In such cases, culturally loaded references are thus granted a powerful platform to control the entry within the scope of copyright of new, contemporary, forms of expression – including contemporary performances. In support of this argument, this chapter reviews the three main conditions of copyright subsistence in turn: fixation, categorisation or subject matter, and originality. The analysis concludes that in theory little should prevent copyright protection being awarded to the most contemporary forms of performative practices, apart from the unnecessary cultural bias which have made their way into copyright jurisprudence.

Fixation

Initially introduced to cover printed works, copyright was progressively extended to a range of creative expressions but remained focused on tangible embodiments such as calicos, paintings, sculptures and photographs.⁹⁹ This focus on the material continues to prevail within current national copyright laws as most countries require the 'work' to be fixed – in writing or

explanatory" and instructs courts construing the statute to use "common sense" as well as the "generally accepted standards of the artistic community." H.R. Rep. No. 101-514, at 11, 13' at 600. Citations omitted.

⁹⁷ *ibid*, 591, 599-600.

⁹⁸ *ibid*. Citation omitted.

⁹⁹ Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org> accessed 17 July 2017. See also, Ronan Deazley, 'Re-Reading Donaldson (1774) in the Twenty-First Century and Why It Matters' (2003) 25 *European Intellectual Property Review* 270.

otherwise – to be protected. This includes the UK, the US and Australia¹⁰⁰ and France to an extent.¹⁰¹

Performative works, on the other hand, do not necessarily materialise in the form of artefacts, and their aesthetics often resist this outcome.¹⁰² As such, performances are often perceived as unsuited for copyright protection.¹⁰³ This is a trait of copyright which has been most criticised, for it could encourage the reification of creative practices that are purposefully immaterial.¹⁰⁴

This unease towards intangible matter is somewhat paradoxical as a careful study of the copyright framework reveals that, in many regards, legal authorship and ownership are conferred upon a highly intangible subject matter. Copyright specialists have uncovered increasing patterns of dematerialisation of the subject-matter protected by contemporary copyright law, regarded as unhelpful as being too abstract to make for sound law.¹⁰⁵ Griffiths cites as an example the shift in the focus of copyright protection from concrete ‘books’ to the more abstract ‘literary works’.¹⁰⁶ Therefore, it is argued that the subject-matter of copyright is already highly dematerialised, as pointed out by Griffiths, and that performances would offer no greater difficulty than other highly immaterial forms of creative expressions already covered by copyright.

In practice, much of these concerns on performative work’s lack of fixation can be mitigated by the fact that the fixation condition is not one of perfect identical record, but a more modest requirement of materiality, which photographic records and audio-recording technologies can

¹⁰⁰ UK: CDPA 1988, s. 3; Australia: 1968 Copyright Act, s. 22(1)-(2), s. 32; US: US Code, Title 17 §101. See also, See Elizabeth Adeney, ‘Authorship and Fixation in Copyright Law: A Comparative Comment’ (2011) 35 Melbourne Law Review 677.

¹⁰¹ France does not require the work to be fixed to obtain copyright protection (see IPC, Article L 111-2 and L 112-1). An exception is made however for choreographic works which must be fixed in writing or otherwise to be protected (see IPC, Article L 112-2-4). Moreover, procedural rules of evidence will require proof of the existence of the work in a tangible medium to allow enforcement proceedings, thus implementing a *de facto* fixation condition in many cases. See, French Civil Code, Article L 1341 and Décret No 2004-836 du 20 août 2004. This lack of uniformity between countries on the question of fixation is a result of the Berne Convention authorising national governments to opt for it or not (Article 1.2). The Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Paris on July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 UNTS 3.

¹⁰² Erika Fischer-Lichte, *The Transformative Power of Performance - A New Aesthetics* (Routledge 2008) 75; Erika Fischer-Lichte, *The Routledge Introduction to Theatre and Performance Studies* (Routledge 2014) 25-6.

¹⁰³ This argument underpinned the dissenting opinion in *Garcia v Google Inc*, 766 F 3d 929 (9th Cir 2013) 1273-5 per Smith J. This emphasis on fixation has led the jurisprudence to draw an artificial line between ‘authorial’ and ‘performative’ inputs. The Australian case *Prior v Sheldon* [2000] FCA 0438, (2000) 48 IPR 301, 316-7 which does not seem to perfectly match the reasoning of the British court in *Hadley v Kemp* [1999] All ER (D) 450, text to n 166.

¹⁰⁴ Fisher-Lichter *The Transformative Power of Performance* (n 102) 75; Gregory Donat, ‘Fixing Fixation: A Copyright with Teeth for Improvisational Performers’ (1997) 97 Columbia Law Review 1363; Judy Kim, ‘The Performers’ Plight in Sound Recordings - Unique to the US: A Comparative Study of the Development of Performers’ Rights in the United States, England, and France’ (1986) 10 Columbia VLA Journal of Law and the Arts 453, 470-1.

¹⁰⁵ Jonathan Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33 Oxford J Legal Studies 767. This phenomenon of dematerialisation can be linked to the modernisation of copyright law operated by the 1911 Copyright Act, uncovered by Lionel Bently and Brad Sherman in *The Making of Modern Intellectual Property - The British Experience 1760-1911* (Cambridge University Press 1999).

¹⁰⁶ Griffiths (n 105) 767-8.

provide at low costs.¹⁰⁷ Therefore, what may be portrayed as the main obstacle to framing copyright as an alternative tool for the safeguarding of contemporary ICH, i.e. its unease towards the intangible, can be removed without difficulty in practice.

The ‘right’ subject matter

Copyright only applies to a specific type of creative subject-matter which has been defined in a relatively abstract and open-ended manner in statutory provisions in the UK, the US, Australia and France.¹⁰⁸ This apparent open-endedness towards the subject matter eligible for protection is precisely what motivated this chapter to envisage copyright as a tool complementing the safeguarding rationales embodied by the 2003 Convention which fell short in the place of contemporary performances.

The French Intellectual Property Code is a good example of this breadth of scope as it defines the type of subject matter covered by authors’ rights as anything which may be regarded as a ‘work of the mind’, as per the wording of its Article L 112-1.¹⁰⁹ As such, it offers the largest scope of protection among the jurisdictions included in this comparative study – at first glance. Article L 112-1 is accompanied by an illustrative list of what are recognised types of protected subject-matter, written as a mere guide for courts to consult without constraining.¹¹⁰ The list includes notably ‘dramatic or dramatico-musical works, choreographic works, circus acts and feats and dumb-show works, musical compositions with or without words’ which may be directly relevant to a number of performative practices.¹¹¹

National laws in the UK, Australia, and to an extent the US,¹¹² follow a slightly different approach in defining eligible subject-matter as they operate on a closed-list basis. They too provide a list of protected subject matter, but unlike France the latter is exhaustive.¹¹³ Creators would thus have to frame their claim to copyright protection with reference to the list of

¹⁰⁷ In the UK, the court admitted replicas of an engraving which had been lost as evidence of the copyright work in *Lucas v Williams & Sons* [1892] 2 QB 113, 114. In France, copyright proceedings based on the rendering of a musical work accounted for by the memories of the audience and the composer’s diary were accepted as suitable evidence in Cass, 1ère civ, 14 novembre 1973, « affaire du Prince Igor et opéra de Borodine » n° 71-14.709: Bull civ I, p 390, RIDA avril 1974, p 66.

¹⁰⁸ As criticised by Griffiths (n 105) 767-8; CDPA 1988, ss. 3 to 8; France: IPC, Article L 112-1 and L 112-2; US: US Code, Title 17, §102; Australia: 1968 Copyright Act, ss 10 and 32.

¹⁰⁹ IPC, Article L 112-1.

¹¹⁰ IPC, Article L 112-2.

¹¹¹ *ibid.* This is consistent with the type of works recognised by the Berne Convention as eligible to copyright protection. Berne Convention, Article 2 and 2bis.

¹¹² The list of works enclosed in under the US copyright Act is non-exhaustive, but in practice the courts never deviated from it. US Code, Title 17, §102. See also, Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on the Law of Intellectual Property* (2nd edn, The Foundation Press 1981) 688.

¹¹³ The ECJ attempted to harmonise the copyright laws of Member States on this point, by stressing that any form of creative work that is their ‘author’s own intellectual creation’ would be regarded as eligible for copyright protection without further need to conform to a predetermined form, in the landmark case *Infopaq (C-5/08 Infopaq International A S v Danske Dagblades Forening* [2009] EUECJ C-5/08_O). This approach does away with the categorisation condition but the ECJ’s jurisprudence has had little effect on UK law to this date, so much so that courts continue to refer to set categories of work in their decisions. See, *The Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 or in *Taylor v Maguire* [2013] EWHC 3804 (IPEC).

accepted copyright-subject matter outlined by statutory provisions. The latter being a range of works including dramatic works, pantomimes and choreographic works, which is not dissimilar to the provisions of the French Intellectual Property Code.

The question is whether performance-based practices would qualify as ‘works of the mind’ or ‘copyright works’ in the meaning of intellectual property law. Despite the broadness with which the protected subject-matter is defined,¹¹⁴ the jurisprudence has tended to exclude performances from the scope of copyright, by opposing them to ‘works of authorship’. This distinction is supported by the existence of a distinct set of intellectual property rights dedicated to performances: performers’ rights. In turn, this has made performance artists’ claims to copyright more difficult for another form of rights, seemingly more suited to their work, exists. Yet, as copyright remains a more advantageous form of protection as it is broader and lasts longer,¹¹⁵ copyright claims for performative works and performances remain relevant. Furthermore, performers’ rights are, to a degree, conditioned by the subsistence of copyright because national laws tend to define protectable performances as interpretations of works themselves eligible to copyright protection.¹¹⁶

This begs the question of what differentiates the ‘copyright work’ and the ‘performance’ under intellectual property law. Very little it appears.¹¹⁷ Whilst case law has defined ‘dramatic works’ with reference to their ability to be performed,¹¹⁸ performances on the other hand appears to be defined as the interpretation of an existing work, whether it is dramatic, musical, literary or choreographic.¹¹⁹ To put it simply, a dramatic work is a work that can be performed, whereas a performance would be the interpretation of what can be a dramatic work. Couched in such

¹¹⁴ Statutory law provides a few, rather hazy, pointers as to what may or may not be regarded as a dramatic work for copyright purpose. UK statutory provisions include ‘work of dance or mime’ (CDPA 1988, s. 3(1)(d)) and US statutory provisions expressly states that ‘accompanying music’ is to belong to the same category (US Code, Title 17, US Code, Title 17, §102(a)(3)). The Australian Copyright Act specifies that ‘dramatic work’ encompasses ‘a choreographic show or other dumb show’ as well as ‘a scenario or script for a cinematograph film’ but not ‘cinematograph film as distinct from the scenario or script for a cinematograph film’ (Australia: 1968 Copyright Act, s 10(1)). In France, Article L 112-2 mentions ‘dramatic’ and ‘dramatico-musical’ works without further definition.

¹¹⁵ Mathilde Pavis, ‘Is there any-body on stage? A legal (mis)understanding of performances’ (2016) 9(3-4) *Journal of World Intellectual Property* 99.

¹¹⁶ Although national and international legal provisions make no express mention of the fact that the interpreted work ought to be eligible for copyright protection for the performance itself to be protected, performances are often described as the interpretation of a *work*, whether oral, dramatic, musical or choreographic. The use to the word ‘work’ could be interpreted as presupposing it’s the eligibility to copyright protection of the work performed. See, Rome Convention of 1961, Article 3; UK: CDPA 1988, s 180 (2) (a) to (d); France: IPC, Article L 121-1; Australia: 1968 Copyright Act, s 189.

¹¹⁷ Insofar as UK law is concerned.

¹¹⁸ See in the UK for example, *Norowzian v Arks Ltd* (No 2) [2000] ECHR 205 (CA), *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056. See also, McDonagh (n 43) 533, 536. See also n 123, n 124 and n 125.

¹¹⁹ n 116. This is not the interpretation followed by Richard Arnold with respect to UK statutory law. Indeed, whilst the question is uncertain in the place of ‘literary works’ as the expression features expressly under Section 180(2) of the CDPA 1988, Arnold considers that ‘dramatic performances’ need not be of ‘dramatic works’ in the meaning of given in Part I of the statute. In his view, the ‘dramatic performance’ enjoys its own, independent, meaning, one that is of a broader scope than suggested here by the author. Arnold’s literal interpretation is yet to receive judicial confirmation, and is limited to UK law. See, Richard Arnold, *Performers’ rights* (3rd edn, Sweet & Maxwell, 2016) 62-70.

terms, both concepts would thus be mutually-defining, and refer back to each other in an almost perfect, yet unhelpful, definitional loop.¹²⁰ It is tautological.

To escape this loop, judges will rely on a number of techniques to assist in drawing a line between creative expressions qualifying as ‘copyright works’ (here dramatic works) or those qualifying as ‘performance’. One such technique seeks to ascertain and follow the ‘ordinary meaning’ of either term.¹²¹ In the UK this led to the abstract definition outlined above, whereby dramatic works are understood to be works ‘of actions’, capable of performance.¹²² In the US however, judges found that the essence of dramatic works lay in the ‘thread of consecutively related events either narrated or presented by dialogue or action or both’.¹²³ In Australia, dramatic works have been defined in relation to their ability to be performed, but such performance need not be by human beings.¹²⁴ Concurring with US authorities, the Australian jurisprudence also considers that the existence of an ‘apparent plot ... choreography, script, characterisation or interaction between characters’ in their views would add to the ‘dramatic’ nature of a work.¹²⁵ This is because elements of choreography, script or characterisation would limit the eventuality of ‘unpredictability and randomness’ which Australian judges regard as antithetic to the nature of dramatic works.¹²⁶ Alongside the ‘ordinary meanings’ of what a ‘work’ or a ‘performance’ entails, judges may also take the intent of legislators as recorded in parliamentary debates in their assessment of what ought to be, or not to be, protected by copyright or performers’ rights. Finally, judges, notably in the UK, may also resort to the infamous ‘elephant test’ to determine whether they are presented with either a dramatic work or a ‘mere’ performance.¹²⁷ The elephant test, also known as the test of ‘you know it when you see it’ replaces the adoption of definitions difficult to express intelligibly, but which in practice are recognisable when they materialise. Although this test has been formally criticised by the UK Supreme Court specifically in its application to copyright law, it has been used in the past to identify the types of creative works protected by law.¹²⁸

¹²⁰ It could be argued that such a predicament is symptomatic of the difficulty with which intellectual property law engages with intangible creative expression. These comments should be mitigated in relation to UK if one is to follow Arnold’s interpretation of Section 180(2), see n 119. See also text to n 99.

¹²¹ See for example, Hill J’s comments in *Nine Network Australia Pty Ltd v Australian Broadcasting Corp* [1999] FCA 1864, para 22. See also, in relation to the rights conferred by VARA, *Phillips v Pembroke Real Estate* (2006) 459 F 3d 128 (Court of Appeals, 1st Circuit) 143-4; *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit).

¹²² n 118.

¹²³ *Universal Pictures Co v Harold Lloyd Corporation*, 162 F 2d 354 - Circuit Court of Appeals, 9th Circuit 1947, 365, citing *Seltzer v Sunbrock*, 22 F Supp 621 - Dist Court, SD California 1938, 69. See also, Paul Goldstein, *International copyright: principles, law, and practice* (Oxford University Press 2001) 205.

¹²⁴ Allowing cartoon characters to satisfy the condition of performance *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* [2000] FCA 1273, para 61 per Tamberlin J.

¹²⁵ *ibid*, para 62 per Tamberlin J.

¹²⁶ *ibid*. In this decision, Tamberlin J stressed that these elements were not cumulative, but taken as a whole influenced the identification of dramatic works in the sense of copyright law.

¹²⁷ *IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2004] All ER (D) 342 (Dec), para 14, Laddie J citing LJ Hoffman in *Designers Guild Ltd. v Russell Williams (Textiles) Ltd. (trading as Washington DC)* [2000] 1 WLR 2416, 2423.

¹²⁸ *Lucasfilm Ltd v Ainsworth* [2012] 1 A.C. 208, 228 para 47, per Lord Walker Of Gestingthorpe JSC and Lord Collins of Mapesbury with whom Lord Phillips of Worth Matravers PSC and Baroness Hale of Richmond JSC agreed.

It is submitted that assessments based on legislators' inferred intent, the 'ordinary meanings' of recognised copyright works or the elephant test inevitably calls for consideration of cultural conventions and heritage vis-à-vis creative expression. This is because this process puts on hold the fiction according to which copyright narratives, as formulated through statutory law and jurisprudence, are autonomous in their operation and interpretation from the views held by experts in other fields, or by the layperson. On this occasion, the 'copyright work' ceases to be an autonomous concept, unique to the copyright paradigm, to be informed by the meaning an ordinary person would give it. This 'ordinary meaning' is also influenced by the same values as the same ordinary person, in their current socio-cultural and economic contexts, would associate with this type of work. Right there, a door stands open for considerations of cultural stature or heritage to enter into the copyright narrative and be crystallised as precedent within its jurisprudence. This process is perhaps one of the main avenues through which preconceptions of cultural heritage or stature can condition the subject-matter protected by copyright, and how in this context contemporary and/or intangible forms of expression may evoke prejudice.

This potential of influence is heightened in the context of the elephant test where courts enjoy a significant level of discretion in shaping the cultural heritage discourse of copyright. The test invites an intuitive reaction to the material as a starting point of rational legal reasoning, walking backwards from this intuition-based starting point. Such intuition is anticipated to be informed by the law itself as well as by what can be interpreted of the legislative intent in relation to the types of material intended to be protected by copyright or performers' rights respectively. Because this starting point is intuition based it is also at risk of being informed by other aspects stemming from judges' own experience and subjective understanding of culture, aspects unrelated to the law.

The uncertainties caused by the categorisation condition in the place of 'works' and 'performances' is no less sensitive in civil jurisdictions like France, even though the condition does not apply. The ways French courts understand, and have defined, the notion of performance eligible to performers' rights and authorship eligible to copyright, seems to have been equally influenced by the notions of 'ordinary' or 'traditional' meanings attributed to either term. This is apparent in the jurisprudence pertinent to Reality TV participation,¹²⁹ where French courts have repeatedly refused to confer the status of either authors or performers to Reality TV participants. According to existing authorities, the absence of contribution in the form of scripted or fictitious work, or in the interpretation of a role in the traditional sense of the term, prevents Reality TV participants from claiming the status of co-authors of the film or any dramatic work embedded in it, or the status of performers. This position is reminiscent of the conclusions reached by US and Australian authorities in relation to 'dramatic works'.¹³⁰

In a decision involving seventy-seven participants as claimants, the French Supreme Court stated in 2013:

¹²⁹ This notion of author-performer divide is a theme which is relevant in the context of the categorisation and subject matter conditions that will also re-emerge in relation to the originality condition discussed in subsequent paragraphs, see text to n 166.

¹³⁰ Text to note 123.

[T]he Court of Appeal duly noted that the participants of the show were not given any part to play or text to recite, that they were only required to be themselves and express their own reactions when confronted to various situations and considering that the artificial element of those situations of their chronology does not amount to grant them the status of actors; the Court of Appeal was legally justified in denying them the quality of performers on the basis of such evidence.¹³¹

The same conclusion was reached in the case of a teacher filmed in his classroom in the context of a film-documentary, noting that

‘the school teacher appeared in the documentary exclusively in the context of the reality of his profession, without acting out a part for the purpose of the creative work being made other than his own, the Court of Appeal was legally justified in denying him the quality of performer, given that the production of a documentary excludes, per se, any interpretation’¹³²

In these cases, the judges further stipulated the essence of the concept of performance beyond what the provisions of Intellectual Property Code specify. French statutory law merely refers to performances as the work of individuals ‘who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts.’¹³³ Here, the French Supreme Court concluded that dispositions should be interpreted as excluding acting as oneself on screen.¹³⁴

The interpretation of the Court appears to have been influenced by the absence of ‘literary’ or ‘artistic works’ in the production of Reality TV shows, for there are no scripts,¹³⁵ but there is no such indication in the body of the judgments reported above. Although this hypothesis would be consistent with a literal reading of the definition of ‘performers’ subject to performer’s rights given by the Code, it would be inconsistent with the logic of the French doctrine of authors’ rights which applies without regard to the categories of works.

It is contended that this interpretation of the law may have been prejudiced by the fact that Reality TV participation lacks the cultural recognition other forms of performances enjoy. No other explicit or objective justification can be found for the French courts’ decision that ‘acting as oneself’ is incompatible with the definition of performers given by the Intellectual Property Code, where such antinomy is not mentioned. Traditional understandings of ‘performances’ seem to have prevailed, which lead to the exclusion of Reality TV performances as recognised types of performances, worthy of intellectual property protection. This example confirms that

¹³¹ Cour Cass, Civ 1, 24 April 2013, n° 11-19.901: Bull. 2013, I, No 83. This decision joined 77 claims of appeal. Author’s translation.

¹³² Cour Cass, Civ 1, 13 November 2008, No 06-16.278, « *Etre et avoir* »: JCP 2009, N 25, 30 §3 obs. Caron. Author’s translation.

¹³³ IPC, Article L121-1. Official translation.

¹³⁴ Nonetheless, not all was lost for the Reality TV participants in this case. Whilst the authorities refused to see in the amount of ‘directions’ participants received from producers during the making of the show as equivalent to stage directions received by performers in traditional settings, such directions were nevertheless enough for the Court to grant participants the status of employees triggering the enforcement of employment law.

¹³⁵ text to n 116.

even in jurisdictions where there is no categorisation condition, the latter can be an obstacle for the protection of non-traditional or contemporary performances or performative practices by copyright.

Originality

Finally, creative works must be original to be covered by copyright. Originality for the purpose of copyright has little to do with common definitions of the term.¹³⁶ Originality has been defined in copyright-specific terms to be the embodiment of ‘skill and labour’ or ‘effort, skill and time’ by UK courts,¹³⁷ ‘some minimal degree of creativity’ by US courts,¹³⁸ ‘skill and labour’ manifesting ‘intellectual effort’ in Australia,¹³⁹ and as ‘the imprint of authors’ personality’ in France.¹⁴⁰ Although each definition uses a different terminology, they all refer to a relatively low level of originality¹⁴¹ that should not be confused with novelty¹⁴² or aesthetic quality.¹⁴³ The courts also clarified that to reassert that the timeframe during which creative products are made is irrelevant to their eligibility to copyright protection.¹⁴⁴ In the *Rockford Map*¹⁴⁵ decision, the US Seventh Circuit Court of Appeal did so with reference to Mozart’s, Bach’s and Dickens’s creative practices, as guiding examples.¹⁴⁶ The Court writes:

In 14 hours Mozart could write a piano concerto, J.S. Bach a cantata, or Dickens a week's instalment of Bleak House. ... All of these are copyrightable. Dickens did not need to complete Bleak House before receiving a copyright; every chapter-indeed every sentence-could be protected standing alone. ... [The plaintiff], like Dickens, loses none of its rights by publishing copyrightable matter in smaller units.¹⁴⁷

¹³⁶ See CDPA 1988, s. 1(1)(a); US Code, Title 17, §102(a); 1968 Copyright Act, Section 10(1), 32.

¹³⁷ *Walter v Lane* [1900] AC 539; *Sawkins v Hyperion Records Ltd* [2005] 1 WLR 3281.

¹³⁸ *Feist Publications Inc v Rural Telephone Service Co* (1991) 499 US 340, 345 para 10.

¹³⁹ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14; *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149.

¹⁴⁰ Cour Cass, ass plen, 7 March 1986, *Babolat v Pachot*, JCP E 1986, II, 14713 and 14737 *bis* note Mousseron, Teyssie and Vivant.

¹⁴¹ Whilst the French originality test may appear to be of higher standard, case law reveals that it is not necessarily the case. See on this, Andreas Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure’ (2013) 44 *International Review of Intellectual Property and Competition Law* 4, 17-22.

¹⁴² Rejecting novelty, UK: *Walter v Lane* [1900] AC 539, 541; France: Cour Cass, civ 1, 16 April 1991, Bull civ I, No 139, JCP G 1991, II, 21770 and E, II, 267, note Croze, JCP E 1991, I, 141, No 2 obs. Vivant and Lucas; Australia: *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, para 33; US ; *Feist Publications Inc v Rural Telephone Service Co* (1991) 499 US 340, para 41.

¹⁴³ n 51.

¹⁴⁴ *Rockford Map Publishers Inc v Directory Service Co of Colorado Inc* (1985) 768 F 2d 145 (Court of Appeals, 7th Circuit) 148-9.

¹⁴⁵ *Rockford Map Publishers Inc v Directory Service Co of Colorado Inc* (1985) 768 F 2d 145 (Court of Appeals, 7th Circuit) 148-9.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*, references and citation omitted.

Displaying control over the creative process appears to be the common denominator to all of these national tests.¹⁴⁸ How this translates into practice and on a case-by-case basis is highly fact sensitive,¹⁴⁹ rendering court decisions rarely predictable.¹⁵⁰ It partly depends on the parties' ability to evidence their input during the making process, in concrete and tangible terms.¹⁵¹

Contributing to the originality of the work thus defined determines the attribution of authorship and joint-authorship (co-authorship) in the context of collaborative works by more than one creator. In practices involving both artist-conceivers and artist-performers, courts have to identify who offered the right type of input into the work that is the type that directly contributes to the material form of the work as defined above.¹⁵² Copyright's traditional difficulty to engage with the intangible and the performative has led courts to find contributions by performers towards the 'work' not to be of the 'right' kind, dismissing thereby their claims to joint-authorship. This was notably the question of law at stake in the case of *Hadley v Kemp*.¹⁵³

In *Hadley v Kemp*, the High Court adopted a similar approach drawing on cultural canons to settle a legal dispute which arose between the members of the pop-music band Spandau Ballet.¹⁵⁴ Following a fall-out over Gary Kemp's contractual agreement to share revenues generated by the band's songs with the rest of the group, Tony Hadley, lead singer of Spandau Ballet, sought recognition of his legal authorship over a number of titles, which had until then been solely credited to Gary Kemp. In its decision, the High Court resolved the dispute by comparing the methods of musical composition and writing of the pop musicians to Beethoven's.¹⁵⁵ Park J, judge in the case, writes:

After all, when Mr Kemp devised the song he devised it for performance, not by himself as a solo artist, but by Mr Hadley and the whole band. A composer can 'hear' the sound of his composition in his mind before he ever hears it played. Beethoven could hear his music in this sense even when he was deaf. When Mr Kemp was devising his songs the sound which he had in his musical consciousness must surely have been the sound they would have when performed by Spandau Ballet, not the sound they would have when sung by Mr Kemp alone to the accompaniment just of his own guitar.¹⁵⁶

¹⁴⁸ Mark Davison, Ann Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press 2012) 236.

¹⁴⁹ As evidenced by the conflict these two UK decisions concerning the same category of works of *Macmillan v. Cooper* (1924) 40 TLR 186 and *Walter v Lane* [1900] AC 539.

¹⁵⁰ See for a case where the first instance judge analyses the photographic works involved in the dispute one at the time, TGI Paris, 27 November 2007, n° 07/10531. See for an equivalent position being enforced in the UK, *Stuart v Barrett and Others* [1994] EMLR 448, 463; *Hadley v Kemp* [1999] EMLR 589,642. See also Lionel Bently, 'Authorship in Popular Music in UK Copyright Law' (2009) 12 Information Communication and Society 179, 192.

¹⁵¹ It should be noted that the condition of originality is simplified in relation to works regarded as 'entrepreneurial' works such as films or sound recordings. For such works, it suffices that the recording is not copied from another to be regarded as original. See, CDPA 1988, ss 5A(2), 5B(4), 8(2). See also, provision on the infringement of broadcasts through the making of a film, CDPA 1988, Section 6(6).

¹⁵² *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14, para 49, 50, 52; *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149, para 101 per Perram J.

¹⁵³ *Hadley v Kemp* [1999] EMLR 589.

¹⁵⁴ *ibid.*

¹⁵⁵ *Hadley v Kemp* [1999] EMLR 589, 646.

¹⁵⁶ *ibid.*, 645-6.

The Court proceeded to explore technical questions of copyright law, that is, examining where joint-authorship lies in a given collaborative musical creative process working on the premise that composers can anticipate the sound of their work before it is performed, holding Beethoven's experience as primary evidence to that effect. Nothing in the law necessitates referring to Beethoven's compositional techniques and experience of disability to interpret its meaning in relation to musical works. Yet the judge freely leaned on this cultural reference to inform his judicial decision. The absence of justification for employing such an analogy in the body of the decision suggests that the Court either did not grasp the cultural weight of this technique, or find its legitimacy self-explanatory in this context. Neither proposition appears entirely satisfactory.

Park J's approach is all the more interesting given that, earlier in the same decision, he acknowledged that one should be wary of mythical representations one may have of the creative process. He explains:

We have all seen imaginative sketches of the great classical composers of the past sitting at their desks in what one imagines might be an attic, quill pens in hand and sheafs of musical paper before them, writing out their compositions by hand. Popular music is not usually created that way, and Gary Kemp did not create his music that way.¹⁵⁷

The above comment denotes an intention to avoid perpetuating cultural stereotypes around creativity and authorship. Yet, these efforts were undercut by the subsequent invocation of Beethoven as the archetypical composer. Such a comparison also seems to dilute the nuances drawn between cultures, sub-cultures and genres captured by the Australian court in *Schott Musik*. Such interpretation of authorship and performership, identifying the latter type of creative contribution as unsuited for the purpose of copyright would also defeat any success in framing contemporary performances within recognised categories of works, may these be dramatic works, choreographic works, films or else.

By contrast to the *Hadley* case is the Seventh Circuit Judge Kozinski's reference to more contemporary repertoires in the *Garcia v Google* dispute.¹⁵⁸ In the last *Garcia v Google* decision, Kozinski J illustrates his arguments with reference to more recent cultural works such as *Ben-Hur*, *Lords of the Rings* and Jimi Hendrix's live performances.¹⁵⁹ It is interesting to note that in this instance, referring to more recent repertoire coincided with an innovative interpretation of copyright law in relation to performers. On two occasions in the *Garcia* dispute,¹⁶⁰ Kozinski J proposed to allow the award of copyright to a performer – going against

¹⁵⁷ *Hadley v Kemp* [1999] EMLR 589, 639-40.

¹⁵⁸ *Garcia v Google Inc* (2015) 786 F 3d 733 (Court of Appeals, 9th Circuit); *Garcia v Google Inc* (2014) 743 F 3d 1258 (Court of Appeals, 9th Circuit).

¹⁵⁹ *Garcia v Google Inc* (2015) 786 F 3d 733 (Court of Appeals, 9th Circuit) 750-751.

¹⁶⁰ *Garcia v Google Inc* (2014) 743 F 3d 1258 (Court of Appeals, 9th Circuit).

a well-established jurisprudence stance against such an application of the law.¹⁶¹ However it should be noted that, unlike Park J in *Hadley v Kemp*, Kozinski J did not rely on these cultural references to justify his proposed distribution of rights. Rather, they were used as mere illustrations of the concrete implications that his proposed interpretation of the law would trigger.¹⁶²

The originality condition in France plays a critical part for it is the main if not sole condition to satisfy to secure author's rights. An individual's contribution to the originality of a work will not only govern his/her claim of authorship or joint-authorship, like in the UK, US and Australia, but it also decides whether the contribution that of a performer, an auxiliary performer or that of a mere model. French courts developed their own tests and conditions to draw lines between the categories of performers, auxiliary performers and models.¹⁶³ In doing so, they created a confusing condition of 'originality', cousin to what is known in the context of authors' rights.¹⁶⁴ Although each category of artist is deemed distinct, they all are differentiated on the basis of the same test: the artist's imprint of his/her personality on the disputed work (performance). Reading the jurisprudence, the presence of the same input is what makes an artist, author but not performer, performer but not auxiliary performer, auxiliary performer but not model. As a result, this test blurs all the categories situated between authors and models into one, securing only one firm distinction: the test between models and authors. Indeed, authors always print their creation with the mark of their personality, whilst the work of a model never does. This chapter argues that the haziness of the test may offer fertile grounds for the cultural context of the performative work to influence judges' assessment of its originality.

The decision handed down by the Paris Court of Appeal in relation to the work of performance artist Alberto Sorbelli, illustrates this point well. In many regards, Sorbelli's creative expression consists of posing as a model, and yet he was conferred joint-authorship over the photographs capturing his modelling performance by decision of the Paris Appeal Court dated 3 December 2004. It is argued that the cultural context in which Sorbelli's performance took place influenced the Court to view Sorbelli's input as an act of joint-authorship, and not 'mere' modelling.

Arguably, Sorbelli does not pose as any other ordinary model would. Indeed, Alberto Sorbelli is most commonly known for his controversial performative works known as *Whore Art* and *Attempted Rapport With a Masterpiece*.¹⁶⁵ In these works, dating back to 1994 and 1997, Sorbelli attended the exhibitions of a number of museums and galleries in Paris, the Louvre notably, dressed as a prostitute. Every time, his outfit involved wearing 'a mini-skirt made of

¹⁶¹ In the majority decision of 2014, and his dissenting opinion in the 2015 ruling (n 168).

¹⁶² *Garcia v Google Inc* (2015) 786 F 3d 733 (Court of Appeals, 9th Circuit) 749-750.

¹⁶³ See the *Sorbelli* case: Paris Court of Appeal, 3 December 2004, *Sorbelli v Yoshida*, n° 04/06726: D. 2005, juris, p 1237; Paris Court of Appeal, 18th Ch, 18 February 1993, n° [XP180293X]: D 1993, p 397 note Weksteinbeg; Paris Court of Appeal, 4th Ch, 4 July 2008, n° 06/21406, *Universal Music... : RTDCom. 2008, 745*, obs. Pollaud-Dullian; Versailles Court of Appeal, 9 October 2008, *Randall G v Ste First Media*, No 06/03959.

¹⁶⁴ text to n 136.

¹⁶⁵ Reading in French *Art Pute* and *Tentative de rapport avec un chef-d'oeuvre* respectively.

latex, mesh tights, high heels, garter-belts on occasion, and just what is needed of make-up, lipstick, earrings, and his hair back in a headband, so as to have none mistake his occupation'.¹⁶⁶ His performance involved walking the streets of Paris offering his details to bystanders before attending shows at the Louvre, or the Jeu de Paume to name only a few of the impromptu stages of his work.¹⁶⁷

In this dispute, Sorbelli sought to assert his legal authorship of photographs capturing his performance in the Louvre. Yoshida, a photographer, had photographed Sorbelli, with his consent, performing as a prostitute in front of the *Mona Lisa* in the Louvre museum. Yoshida later exhibited and sold the photographs. Before the Paris Tribunal, Sorbelli claimed ownership in the photographic works fixing his performance, together with a right to a portion of the proceeds of the sales. In the first instance, the Tribunal rejected his claim, holding that the artist-performer had failed to evidence his authorial input in the photographs, which thus ought to be regarded as the sole result of the photographer's creative input. In the eyes of the Tribunal, Sorbelli's work qualified as a performance and not as a work of authorship in the meaning of the French intellectual property law code. Here, Sorbelli's claim to legal authorship is not set back by the idea/expression dichotomy but by the author-performer divide intellectual property laws have created between what they regard to be authorial works (subject matter to copyright) and performances (the preserve of performers' rights).¹⁶⁸

On appeal, the Court of Appeal overturned the Tribunal's judgment. The Court confirmed Sorbelli's claim according to which his input in the photograph was greater and more original, because it was more active, than that of an ordinary model. The Court held that 'the facts presented before us reveal that M. Sorbelli was not just a subject photographed by Miss Yoshida, a passive subject which would have taken poses dictated by the photographer, but was an active subject'.¹⁶⁹ To obtain the status of co-author of the picture in which he featured as model, the performer evidenced his 'initiative'¹⁷⁰ in the creative process and an 'active role'¹⁷¹ in his collaboration with the photographer. The Parisian Bench further explained that it was 'upon Sorbelli's initiative and because of the existence of his creation that the photographer had captured elements of his creation since the shooting consisted in photographing his portrait "in situation"'.¹⁷² For this reason, his portraits were adjudged to be the result of photography and performance combined, warranting that the status of co-author be given to Sorbelli.

¹⁶⁶ André-Louis Paré, 'De La Bonne Distance En Art Ou Figure de L'artiste En Prostitué' (*Inter: Art actuel*, 2006) <<http://e-artexte.ca/25186/1/2216.html>> accessed 18 July 2017. Author's translation.

¹⁶⁷ Paré (n 166). Sorbelli's work draws parallels between the work of a prostitute and that of an artist, as he regards time and the ability to seduce and move others as the commodities both profession monetise.

¹⁶⁸ For more on the author-performer divide see, Pavis 'Is there any-body on stage?' (n 115) 114; Mathilde Pavis, 'The Author-Performer Divide in Intellectual Property Law: A Comparative Analysis of the American, Australian, British and French Legal Frameworks' (University of Exeter 2016).

¹⁶⁹ Paris Court of Appeal, 3 December 2004, *Sorbelli v Yoshida*, n° 04/06726: D. 2005, juris, p 1237, para 3. Author's translation.

¹⁷⁰ *ibid.* Author's translation, the original text reads: 'c'est à son initiative et en raison de l'existence de sa création'.

¹⁷¹ *ibid.* The original text reads: 'tenait un rôle actif'.

¹⁷² *ibid.*

The concept of *situation* gives the author pause. The ‘situation’ of Sorbelli’s work here is the reference to Leonardo Da Vinci’s *Mona Lisa*, the Louvre and its exhibitions. His performance is a work of dialogue between his performance and cultural heritage. These references to cultural heritage are the context or ‘situation’ which carry and construct the meaning of Sorbelli’s work. The performance’s context is the cultural dimension of his surroundings, from which Sorbelli’s work draws the meaning of its creative expression. Consequently, one cannot help but wonder whether Sorbelli’s performance, taken outside this culturally-loaded context, would have received the same legal recognition by the Court. Indeed, the emphasis on Sorbelli’s input in the performance together with the situation of his performance are the cumulative factors which motivated the Court of Appeal’s decision to overturn the judgment in the first instance.

One could thus suggest that the elements of cultural heritage framing his performance conferred its copyright character to the work and constructed Sorbelli’s legal authorship. In this light, the subtle influence of our cultural heritage can be felt even in places and jurisdictions where they are explicitly banned.¹⁷³ This may imply that if Sorbelli’s performative work were to be taken out of its cultural context (i.e. the Louvre, the exhibition, *Mona Lisa* in the photograph) little in law would separate his performance from that of an ordinary model posing in front of the camera. This analysis does not advocate for artists like Sorbelli to be stripped of their rights because they were informed or influenced by considerations of cultural heritage. Rather, it proposes to view the contribution of models to fashion shows as valuable as Sorbelli’s performance to the photographs for they are similar in nature and only differ in their context, or in the way their ‘context’ is perceived by the judiciary.

The above comments illustrate the degree to which copyright case law can be partial to well-established, or dominant, expressions of culture to the extent that they become standards of reference against which new subject-matter is assessed. This analysis argues that such technique of comparison or analogy, perhaps used by judges to set out more clearly the laws of copyright, in effect, modifies its substance. The technique crystallises within the legal precedents of copyright biases towards dominant, or particular, views on culture in places where the law does not warrant it. As evidenced in the context of Reality TV performances, this pattern has already prejudiced the entry of contemporary creative expressions into the scope of copyright, for it invites judges to consider the cultural standing and weight of creative practices in their application of copyright law. By doing so, it is argued that judges move from being authors of the cultural heritage discourse to behaving as active cultural gatekeepers. Such judicial practice can be seen as replicating in a different form the condition of transmission from ‘generation to generation’ provided by the 2003 Convention. Ultimately, this poses clear questions of community representation and the suitability of judges to endorse this role.

More worrying perhaps, is the unspoken or tacit nature of this influence cultural heritage considerations have on the interpretation of copyright law. As the practice goes unnoticed in

¹⁷³ See *Victor Hugo* case text to n 62.

the jurisprudence as well as in the scholarship, it also goes unguarded and unchallenged. Indeed, the question has received little attention from legal scholars, at least not from the perspective of cultural heritage safeguarding.¹⁷⁴ This gap may be attributed to our propensity to frame copyright almost exclusively as a commercial and neo-liberal tool.¹⁷⁵ The above comments evidence that such a representation of the copyright model is myopic as it fails to account for the nuances of protection attributed by copyright described above,¹⁷⁶ or for the sociocultural and economic weight of judicial decisions, as stressed in the introductory comments.¹⁷⁷

4. Copyright: an ‘authorised heritage discourse’?

Contrasting with the lack of critical approaches to copyright law on this particular point, the scholarship in museum and cultural heritage studies has engaged with the question extensively, from both theoretical and practical perspectives.¹⁷⁸ This scholarly work has most notably contributed to identifying dominant discourses, or bias, in practices of cultural heritage management, safeguarding and regulation.¹⁷⁹ The following section proposes to begin a critical dialogue between the copyright framework and critical assessments of dominant cultural heritage discourses, focusing on the main one: the authorised heritage discourse. This chapter reveals that the copyright model and the authorized heritage discourse have much in common, but that the two paradigms also bear notable differences. For this reason, this chapter concludes that cultural heritage discourse need not be one of authorized heritage and can be freed of its grasp to achieve its full potential as an alternative safeguarding model for contemporary performances, or contemporary intangible forms of creative expressions more generally.

4.1. The ‘authorized heritage discourse’

In 2006, Laurajane Smith’s *Uses of Heritage*, often referenced in this volume,¹⁸⁰ offered the first comprehensive account of these dominant patterns which she gathered under the umbrella term of ‘authorized heritage discourse’ (AHD). AHD refers to a set of specific patterns in identifying, framing, and preserving cultural heritage which leads to ‘the legitimacy of certain things and practices to the exclusions of others’.¹⁸¹ Smith writes:

The authorised heritage discourse (AHD) focuses attention on 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

¹⁷⁴ There are a few notable exceptions outside the legal literature *stricto sensu*, this is notably the case for Rosemary Coombe’s work, Coombe (n 58).

¹⁷⁵ As reported by Macmillan, this volume.

¹⁷⁶ Text to n 27.

¹⁷⁷ Lixinski, this volume.

¹⁷⁸ Smith *Uses of Heritage* (n 3); Smith ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (n 10); Lixinski, this volume.

¹⁷⁹ Smith *Uses of Heritage* (n 3) 29-34.

¹⁸⁰ See for a brief account of such engagement, Smith ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (n 10). See also, Lixinski, this volume.

¹⁸¹ Schofield, this volume.

their “education”, and to forge a sense of key consequences of this discourse in constituting and legitimizing what heritage is, and in defining who has the ability to speak for and about the nature and meaning of heritage.¹⁸²

According to Smith, the AHD not only ‘organizes the way concepts like heritage are understood, but [also] the way we act, the social and technical practices we act out’.¹⁸³ In her view, AHD ‘naturalize[s] a range of assumptions about the nature and meaning of heritage’ which include a ‘focus’ on ‘things’ to determine value and identity.¹⁸⁴ She explains:

Although this discourse is inevitably changing and developing, and varies in different cultural contexts and over time, there is nonetheless a particular focus and emphasis – primarily the attention it gives to ‘things’. This often self-referential discourse simultaneously draws on and naturalizes certain narratives and cultural and social experiences – often linked to ideas of nation and nationhood. Embedded in this discourse are a range of assumptions about the innate and immutable cultural values of heritage that are linked to and defined by the concepts of monumentality and aesthetics.¹⁸⁵

Smith points to the practical implications such discourse holds on the practice of heritage preservation and engagement. She argues that AHD is a professional discourse that privileges expert values and knowledge about the past and its material manifestations, and dominates and regulates professional heritage practices’.¹⁸⁶

As a result, Smith counts a number of consequences of this discourse she regards to be problematic, and inherently linked to its ideology. For instance, AHD often relies upon a ‘spokesperson for the past’¹⁸⁷ invariably found within specific and narrow groups of experts, most often historians and archaeologists.¹⁸⁸ In effect, they are chosen to act as the gatekeepers of cultural heritage on behalf of the communities or individuals to whom the former relates. Smith identifies the relation of synonyms built by the discourse between heritage and the past to the source of such reliance on experts in the management of heritage. It is her view that it is the ‘vagueness’ and ‘mystery’ associated with the concept of ‘the past’, thus of ‘heritage’ which ‘works to render it subject to the judgements of experts such as archaeologists and historians’.¹⁸⁹ The authorised heritage discourse thus creates an ‘authority of expertise’ which has communities and individuals disengage with their heritage or past, preventing their ‘active use of the past’.¹⁹⁰ Uses and re-uses of heritage by the non-experts, the communities themselves, or individuals would therefore be discouraged, directly or indirectly. At best, the public and spectators are invited to ‘gaze’ at items or sites or heritage, as ‘passive consumers’

¹⁸² Smith *Uses of Heritage* (n 3) 29.

¹⁸³ *ibid* 4.

¹⁸⁴ *ibid*.

¹⁸⁵ *ibid*.

¹⁸⁶ *ibid*.

¹⁸⁷ *ibid*, 29.

¹⁸⁸ *ibid*.

¹⁸⁹ *ibid*.

¹⁹⁰ *ibid*.

or ‘empty vessels’.¹⁹¹ Users of heritage who offer ‘re-enactments’ are, according to Smith, ‘condemned’ or ‘patronized’ by experts as ‘amateurish, unauthentic, sanitized, escapist’ to only name a few of the criticisms reported by the scholars in the current literature.¹⁹²

Interestingly, a number of scholars and practitioners report in this volume the positive impact this critical effort has had on the practice and regulatory frameworks governing cultural heritage preservation,¹⁹³ as others have elsewhere.¹⁹⁴ One of its landmark achievements is the shift in focus from the tangible to the ICH in national and international policy-making.¹⁹⁵ Such achievements were notably materialised by the introduction of the 2003 Convention. However, Smith herself points to the many instances in which this new focus or awareness on the need to safeguard ‘intangible’ heritage has only reinforced central features of AHD in international policy-making, such as the distinction between tangible and intangible heritage itself.¹⁹⁶ In her view, true improvements on this front would have seen the distinction itself removed as all heritage is viewed to be intangible.¹⁹⁷

Substantive and systemic similarities between AHD processes and copyright narratives are notable. First, one could link copyright with the logic of legitimisation of some creative expressions to the exclusion of others, as core to AHD.¹⁹⁸ Indeed, copyright selectively awards legal authorship.¹⁹⁹ The correlation between recognised items of cultural heritage according to the dominant discourse and the conferral of copyright protection is particularly forceful in American case law on the right against destruction of works of ‘recognised stature’.²⁰⁰

Furthermore, both approaches operate on the basis of a similar process, i.e. a group of individuals acting as representatives of a community award an ownership title whether it is an individual right of appropriation in the form of copyright, or a collective right to preservation embodied by the listing of practices on registers recognised internationally. Both processes thus implement an assessment of the value of a given creative work made by representatives of a community to protect or not to protect a particular form of creative expression. In these regards, the act (or process) of conferring copyright or cultural heritage protection to a creative practice or object appear similar. When this symmetry is brought into perspective with the impact copyright holds over the safeguarding of cultural heritage, and the reliance of its case law on established cultural figures, one wonders whether copyright law has not become a forum for cultural custodianship with judges becoming gatekeepers of culture – or *a* culture –

¹⁹¹ *ibid.*, 32.

¹⁹² Smith *Uses of Heritage* (n 3) 34.

¹⁹³ Schofield, this volume.

¹⁹⁴ Lourdes Arizpe, ‘The Cultural Politics of Intangible Cultural Heritage’ (2007) 7 *Art Antiquity and Law* 361.

¹⁹⁵ *ibid.*; Blake, Macmillan and Lixinski, this volume.

¹⁹⁶ Smith ‘Intangible Heritage: A Challenge to the Authorised Heritage Discourse?’ (n 10).

¹⁹⁷ *ibid.*

¹⁹⁸ This point can be mitigated in the context of copyright see text to n 224.

¹⁹⁹ See for examples already cited in this piece, Hill J’s comments with regard to fireworks in *Nine Network Australia Pty Ltd v Australian Broadcasting Corp* [1999] FCA 1864, para 22. See also, *Phillips v Pembroke Real Estate* (2006) 459 F 3d 128 (Court of Appeals, 1st Circuit) 143-4; *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit).

²⁰⁰ text to n 79.

themselves. This is certainly the concern voiced by the Australian Court in *Schott Musik*,²⁰¹ and American judges in *Martin*²⁰² and *Cheffins*.²⁰³

Second, the AHD and copyright model resonate with one another on their focus on or valorisation of the tangible over the intangible. The latter is translated within copyright law through the fixation condition²⁰⁴ but also through the limitation of the scope of the right against destruction against tangible works of visual art, provided by American Federal law.²⁰⁵

Third, the one-size-fits all approach to the protection of ‘works’ split into general categories of creative expression could also be read as a penchant for universalism, whereby the framework is conceived as all-encompassing. Fourth, similarly to AHD, copyright laws allow limitations to be placed on the creative re-use of works through the enforcement of a range of rights such as the economic right of reproduction or adaptation,²⁰⁶ the moral right of integrity, and the right against destruction of works of ‘recognized stature’.²⁰⁷ The engagement by the public or individuals with material covered by copyright protection, like items of ‘authorized heritage’, is mediated by right holders and, in cases of litigation, judges.

Lastly, like AHD, copyright laws have placed abstract and nebulous concepts at the centre of their paradigm. This is notably with the case of the notions of ‘work’, ‘authorship’, ‘originality’, and to an extent, of intellectual property itself.²⁰⁸ As with AHD, this haziness forces the interpretation of copyright law onto experts, in this case, counsels and judges. The malleability of these concepts presenting porous contours and ungraspable substance also renders the outcomes of judicial decisions both discretionary and difficult to predict. Going further, the role played by expert witnesses in the enforcement by courts of certain rights, such as the right to integrity or against destruction of works of recognised stature, is another feature of copyright case law which reinforces the perpetuation of AHD within the copyright model. This is because direct legal consequence in the form of intellectual property protection relies directly on the value assessment of designated art and museum experts. This suggests that not only does the copyright jurisprudence in the UK, US, Australia and France import discursive elements pertinent to AHD, but it also behaves like AHD on a systemic level. This is because the application and enforcement of copyright law follow similar modes of operation reliant on mediated representation and heavily technical rhetoric warranting the intervention of ‘experts’.

4.2. Copyright: an authorized heritage discourse that need not be

²⁰¹ *Schott Musik International GmbH & Co v Colossal Records of Australia Pty Ltd* (1997) 145 ALR 483.

²⁰² *Martin v City of Indiana* (1999) 192 F 3d 608 (Court of Appeal, 7th Circuit).

²⁰³ *Cheffins v Stewart* (2016) 825 F 3d 588 (Court of Appeals, 9th Circuit).

²⁰⁴ See text to n 99 on the fixation condition.

²⁰⁵ text to n 79.

²⁰⁶ Bently and Sherman *Intellectual Property Law* (n 26) 140-148; see also, text to n 28, n 34 and n 99.

²⁰⁷ Text to n 79.

²⁰⁸ Griffiths (n 105); Brad Sherman, ‘What Is Copyright Work?’ (2011) 12 *Theoretical inquiries in Law* 99; Mireille Van Eechoud (ed), *The Work of Authorship* (Amsterdam University Press 2014). See for legislators attempting to improve the ‘glorious muddle’ of copyright law: Sherman and Bently *The Making of Modern Intellectual Property* (n 105) 2-3, 48, 134.

All of these elements support the view that synergies exist between the defining characteristics of the AHD and *some* elements of the copyright framework. Nevertheless, these must be read in conjunction with the noticeable differences existing between the two systems. First, as explained in previous comments, whilst the re-enactments of protected material is indeed limited by authors' economic or moral rights, in most jurisdictions the courts have confined this prerogative to exceptional circumstances.

Second and most importantly, copyright law is blind to aesthetic merit or judgement of any kind. This represents a major contradiction with the claim that frames AHD as a narrative placing much emphasis on 'aesthetically pleasing' creative items.²⁰⁹ Moreover, copyright has detached itself from notions of works of art, to extend almost the same level of protection to entrepreneurial works, or works with a high economic value but a low artistic one.²¹⁰ This also means that copyright is, or should be, indifferent to the cultural standing or weight of the creative expressions put before the courts – at least in theory. Whilst this chapter revealed that this has not always been the case, it is held that the copyright framework is apt to function without taking into consideration the cultural value or status of the creative practices it evaluates. For this reason, this analysis argues that the cultural heritage discourse of copyright has potential to evolve independently from the influence of the authorised heritage discourse. This is because the notion of cultural value or status of a work is (a) neither a requirement of copyright subsistence nor a concept to copyright theory, and (b) although this parameter was brought in through case law, the copyright framework would continue to function without it in practice. Therefore, it is concluded that current judicial practices could be stripped of influences or patterns akin to AHD. As such the cultural heritage discourse as it currently stands is an AHD that need not be.

4.3. Shifting discourses: implications on contemporary performances

In many regards, the influential role of judges in shaping the cultural heritage of copyright is to be welcomed. Indeed, this means that changes to introduce principles of best practice to stir the copyright heritage discourse away from AHD will not need to wait for legislative reforms but could be implemented within copyright litigation directly.²¹¹ With the right level of critical awareness and support from the communities of experts in the fields of intellectual property and heritage, copyright law could become a more responsive and flexible heritage safeguarding tool for contemporary ICH, including contemporary performances. Its ability to be formulated and amended on a case by case basis makes of copyright a more flexible and effective a tool

²⁰⁹ Smith (n 3) 29, except in the context of the right against destruction of works of 'recognized stature' (text to note 79).

²¹⁰ Rahmatian *Copyright and Creativity* (n 66) 59. See for example the protection of computer programs, UK: CDPA 1988, s. 3 (1)(b); France: IPC, Article L 112-2-13; Australia: 1968 Copyright Act, s 10 and 32(1) combined; US: US Code, Title, para 101 and 109; EU: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, codifying Directive 91/250EEC), L 111/16, Article 1(1). See also for a rejection of the copyright work to be limited to the notion of 'work of art': *Mazer v Stein* (1954) 347 US 201 (Supreme Court) 213-4. See also, *Lucasfilm Ltd & Ors v Ainsworth & Anor* [2011] UKSC 39, para 44.

²¹¹ David Booton, *Form in Intellectual Property Law* (Edward Elgar 2017) 44ff, 59ff.

than most processes of policy-making or legislative reforms which remain largely dependent upon political momentum.²¹²

Moreover, it should be stressed that authorship is attributed by judges only in cases where litigation between parties occur. In all other cases, copyright protection is claimed and granted by creators themselves, as there is no condition of registration reviewed by a panel under the copyright framework.²¹³ This alleviates some of the concerns of community representation raised in earlier comments.²¹⁴ This aspect of copyright also stresses that receiving the protection of copyright or performers' rights does not compel creators to enforce it, should they prefer to see their work left unprotected. In this regard, intellectual property rights can be seen as strengthening the agency of individuals within their creative communities or industries.

In practice, this slight shift in discourse would translate into a re-distribution of copyright to new forms of creative expressions and 'class' of creators. In other words, the range of creative practices recognised as copyright works by law, or case law, would increase to include new, contemporary forms of performances. This extension would enable the inclusion of contemporary performative expressions of cultural heritage, currently excluded from the scope of the 2003 Convention. In turn, the range of individuals eligible to receive copyright protection for their works would widen. In the context of performative practices, this means that artists which have until then been classed as 'performers' by law may become 'authors' in their own right and accede to a better level of legal protection. Similarly, artists who have been written off by intellectual property rights until now were neither believed to be authors or performers, such as Reality TV participants, could envisage claiming the advantages of performers' rights. Such rights, copyright or performers' rights, give their recipients the ability to control commercial and non-commercial uses of performative works and claim a share of the revenues such work may generate. This implication may have significant economic consequences as the Parliament of the European Union is currently looking to improve the right to equitable remuneration granted to artists covered by copyright and performers' rights.²¹⁵

5. Concluding remarks

This chapter envisaged copyright law as a safeguarding tool for contemporary ICH with a view to bridge the gaps left by the 2003 Convention. The discussion first turned to copyright law for its alleged disregard for creative expressions' cultural stature, quality or genre and the open-endedness of its scope. Whilst this analysis confirms that the copyright framework offers leeway to be used as a heritage safeguarding mechanism without deforming or denaturing its initial purpose, it also reveals that, in many ways, it is as unsuited for the protection of contemporary performances as the 2003 Convention. This is because, in a number of cases, the copyright jurisprudence has been shaped by the cultural context or stature of a work when assessing its eligibility to legal protection to the extent that it internalized a resistance against the performative and the contemporary. In doing so, copyright case law has reinstated as the heart of the framework the concept that a creative expression or practice must hold a 'special

²¹² Smith 'Intangible Heritage: A Challenge to the Authorised Heritage Discourse?' (n 10).

²¹³ Berne Convention, Article 5(2).

²¹⁴ Text to n 185.

²¹⁵ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593, Recitals 37 and 40, Article 15.

place' within our culture to be deserving of copyright protection, mimicking the requirement that performances be passed on from generation to generation to be covered by the 2003 Convention.

This chapter argued that in influencing and engaging with questions of cultural heritage, copyright law has begun to develop its own cultural heritage discourse, which shares a concerning number of similarities with the 'authorized heritage discourse' as discussed by Smith. Because of these similarities, this analysis rules out copyright as a suitable alternative to the 2003 Convention for the purpose of safeguarding contemporary performances, *as it currently stands*. The most worrisome finding of this chapter lies in the tacit nature of this alignment between the copyright heritage discourse and the authorized heritage discourse for it disables opportunities to critique and challenge its existence.

This analysis also stresses that copyright law's bias towards culturally-recognised works or authors is neither inherent to the nature of its framework nor necessary for its enforcement in practice. In fact, in the context of explicit references to aesthetic or cultural assessments, Courts were in the position to put in place safeguards to avoid too high levels of subjectivity. This suggests that with the adequate level of critical support and self-reflection implicit prejudice against contemporary performances could be removed from the copyright framework without disrupting its application. This conclusion also speaks to the singularity the cultural heritage discourse of copyright holds vis-à-vis dominant heritage discourse such like the 'authorized' heritage discourse. In other words, within copyright law the tools to react to and resist patterns of authorised heritage discourse already exist.

The copyright framework offers a considerable level of flexibility: it relies on open-textured concepts²¹⁶ which may be moulded by judges on a case-by-case basis to stay clear of dominant patterns of heritage, and even remove existing ones from its framework. Whilst this offered fertile grounds of uninvited cultural prejudice in past precedents, it may also be used as an opportunity to have new, contemporary, forms of performances enter the scope of intellectual property law. This chapter thus identifies jurisprudence as a strategic place where to focus further critical efforts as courts play a significant part in developing copyright's cultural heritage discourse. It is argued that critical awareness of the existence of such discourses and their resemblances may suffice to initiate positive changes. Such changes would translate into practice by the attribution, or redistribution, of intellectual property rights to new classes of contemporary performative practices as well as any other contemporary performative expressions of cultural heritage. For the individuals and communities concerned, these changes would open new streams of revenue which may be considerable. Consequently, the present discussion which has been rooted in a theoretical and cultural context until now, could prove to hold significant practical and economic consequences for the individuals involved in the culture sector or creative industries.

²¹⁶ Booton (n 211) 59.