UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

Law

Rebalancing Copyright Law

by

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Thesis for the degree of Doctor of Philosophy

August 2015

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

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This research focuses on copyright law particularly its ability to provide for the competing needs of both the public and rights holders. The arrival of the internet has brought copyright to the forefront of legal, political and public discussion and has presented copyright law with a unique challenge. The internet although enabling creators to disseminate their works to a wider audience has also facilitated free illegal access to copyrighted materials. This has not only undermined copyright's effectiveness and caused chaos but has questioned the very legitimacy of the entire concept of copyright. This research discusses copyright law specifically how the concept of balance between right holders and the public originated and if this fundamental concept is maintained in current law. Focus is given to the founding principles of modern copyright law in the *Statute of Anne 1710* and *Donaldson v Beckett* where copyright was deemed to have a dual purpose. The first purpose of copyright is to protect the interests of rights holders so they are incentivised to create socially useful works and can exploit their work. The second opposing purpose of copyright is to protect the interests of the public so knowledge is disseminated, learning is encouraged and the public can adequately access copyrighted works. Although a suitable balance between these rival purposes was once achieved, this research will discuss the changing dynamic between rights holders and the public. This will involve discussion of the history of copyright law as well as the impact of areas such as human rights, copyright subsistence and fair dealing.

My motivation for this research is that copyright law is currently facing a crisis with widespread infringement and disregard for the law through piracy. Governments are failing to enforce copyright law and public support for copyright is diminishing. This research is important because governments have repeatedly tried to solve the crisis however these attempts have been unsuccessful and piracy has become commonplace. The current governmental approach is to continue copyright expansion for rights holders and to introduce harsher legislation against users. My research aims to embark on a fundamental reassessment of the nature of copyright itself, what is the purpose of copyright and the competence of current legislation to meet these purposes. This will involve discussion of key internal and external components of the copyright regime to assess their ability to achieve these purposes and protect the interests of both right holders and the public. The thesis will conclude the abovementioned components, current legislation and case law favours the economic interests of right holders above the interests of the public and that a series of reforms are necessary to rebalance copyright law. The thesis makes a contribution to copyright academic discussion by providing a framework for a balanced copyright regime where the interests of the public are a fundamental guiding principle. The overall aim is for the public to be considered equally alongside rights.

Wordcount- 482

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Chapter Six- Ideas and Expression- the abandoned dichotomy:

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Academic Thesis: Declaration Of Authorship

I, **CHRISTOPHER JOHN ADDUONO** [please print name]

declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

[title of thesis] **REBALANCING COPYRIGHT LAW**

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;

2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

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7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]:

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Date: October 13th 2015

Acknowledgements

I would like to express my special appreciation and thanks to my supervisor Dr. Remigius Nwabueze for his help and assistance in the past three and a half years. I would also like to thank the members of my upgrade panel including Dr Sophie Stalla-Bourdillon and Professor Stephen Saxby for their feedback on my thesis and advice on how to develop the research. I also want to thank the contract law team who supported me in my teaching activities. I would also like to thank the University of Southampton for the studentship provided because without it this research would not have been possible. Finally a special thanks to my family. Words cannot express how grateful I am to them for their support.

Definitions and Abbreviations

AG- Advocate General of the European Court of Justice.

Berne- Berne Convention for the Protection of Literary and Artistic Works 1886.

CDPA- Copyright, Designs and Patents Act 1988 C.48

CESCR- The Committee on Economic, Social and Cultural Rights, a UN Body that monitors implementation of the International Covenant on Economic, Social and Cultural Rights.

CFREU- Charter of Fundamental Rights of the European Union

DEA- Digital Economy Act 2010, 59 Eliz. 2 c.24

ECHR- European Convention on Human Rights 1950

ECtHR- European Court of Human Rights

ECJ- European Court of Justice

EPO- European Patent Office

EU- European Union

GATT TRIPS- General Agreement on Tariffs and Trade 1994 and Agreement on Trade Related Aspects of Intellectual Property Rights

HRA- Human Rights Act 1998 46 Eliz. 2, c. 42

ICESCR- International Covenant on Economic, Social and Cultural Rights 1976

Infosoc- Copyright and related rights in the Information Society Directive 2001/29/EC

IPO- Intellectual Property Office

IPR- Intellectual Property Right

ISP- Internet Service Provider

LDMA- literary, dramatic, musical and artistic works

MP- Member of Parliament.

Statue of Anne- Copyright Act 1710 8 Ann. c.21

Three Strikes System (Graduated Response)- aimed at stopping online piracy and implemented under the Digital Economy Act. Consumers are given a series of warnings informing them that they have infringed copyright. Repeat offenders on the 3rd warning will be at risk of having their internet disconnected and being blacklisted with other ISP's.

UDHR- Universal Declaration of Human Rights, UNGA Res 217 A (III) U.N. Doc. A/810 (Dec. 10, 1948)

Wash-up period- the end of a Parliament after a new election has been announced, the government attempt to pass laws before dissolution.

WCT- WIPO Copyright Treaty

WIPO- World Intellectual Property Organisation.

WTO- World Trade Organisation

1. Chapter One-PhD Introduction

1.1-Copyright:

Copyright has divided politicians, scholars and the public since its creation and continues to be controversial to this day. Contention has focused on what role, protection, rights and defences should be provided to rights holders (those creating copyrightable works) and the general public (those needing access to and using copyrighted works), 'the copyright system... has created, in the public interest, a balance between the rights of the authors, on the one hand, and the interest of the public in access to protected works, on the other.'[1] Copyright law has attempted to provide for the needs of both groups, to encourage rights holders to create socially useful works whilst providing the public with adequate access to copyrighted works and a robust public domain. 'Each of these groups... argue that its interests should predominate within the legal framework... It is the legislature's responsibility to be dispassionate, to mediate between these often competing interests in order to craft appropriate legislation... by "appropriate," I mean balanced in setting the appropriate parameters between adequate protection and adequate access'[2]. Legislators have rarely been able to balance these competing interests and adequately provide for the needs of both parties, 'there appears to be widespread agreement that copyright is structured as a balance. The debate is... about how that balance is to be struck, about what the legitimate scope of the author's right of exclusion is or ought to be'[3]. The need for balance in copyright law and

[1] Davies G, Copyright and the Public Interest (VCH, 1994), Page 4
[2]Tawfik M, History in the Balance: Copyright and Access to Knowledge, in Geist M, From radical extremism to balanced copyright (Irwin Law, 2010), Page 69.
[3]Drassinower A, 'From Distribution to Dialogue: remarks on the concept of balance in copyright law' 34 J. Corp. L. 991 2008-2009, Page 992.

the aim of protecting the interests of both groups originates in the *Statute of Anne 1710*[4] where the title stated the Act was for, 'the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies'. This dual function continues to form the underlying rationale of copyright law today.

This twofold function was made explicitly clear in *Donaldson v Beckett*[5] *1774* where the precise nature of copyright was established. Firstly it was confirmed copyright was fundamentally different from physical forms of property predominantly because of its underlying social function. In rejecting perpetual copyright, copyright was forever distinguished from traditional property by explicitly recognising copyright law must adequately safeguard the interests of both rights holders and the public. *Donaldson* established copyright law is underpinned not only by the economic interests of rights holders but the societal needs of the public. Physical property is tangible, a limited resource, perpetual and owned at the exclusion of all others. Copyright after *Donaldson* was a right granted by the State to creators of certain intangible work that allows them for a limited period to control how the work is used, 'the House of Lords held... copyright is not a vindication of authorial right but a policy instrument designed in the name of the public interest'[6]. This distinction from tangible property and the eminent role attributed to the needs of the public mean justifications and explanations for tangible property are inapplicable to copyright. Copyright today is subject to numerous controls that regulate its scope and in theory should act as a restraint on excessive copyright and prevent any imbalance. The result of *Donaldson* was that 'a

[4] Statute of Anne 1710, 8 Anne, c.19
[5] Donaldson v. Beckett (1774) 4 Burr. 2408
[6] Drassinower A, 'A Rights-Based View of the Idea/ Expression Dichotomy in Copyright Law', 16 Can. J.L. & Jurisprudence 3 2003, Page 19.

balance will need to be struck between these interests, as stronger individual rights inevitably impinge on the interests of society as a whole and vice versa'[7] or as Lord Mansfield came to state shortly after *Donaldson*, '[copyright] must take care to guard against two extremes equally prejudicial; the one, that men of ability who have employed their time... may not be deprived of their just merits and the reward of their ingenuity and labour: the other that... the progress of the arts be retarded.'[8] In contemporary copyright law this means copyright 'is based on the fundamental principle of balance- the balance between the interest and needs of the public and those of creators... when the legal system... no longer maintains the correct balance or even worse, neglects it, then respect for those systems and intellectual property erodes'[9]. Given this dual economic and social function, the question becomes who are rights holders and the public and what exactly is the nature of these two different interests?

1.2-The Public interest and the Public Domain:

The principles originating from the *Donaldson* decision still influence copyright today, 'the traditional economic justification for granting... copyright is that the conferring of such rights addresses the collective action and public good problems... by providing individuals with incentives to devote time, energy, and resources to inventing that will have value to society'[10]. Copyright firstly must protect the interests of rights holders. These interests are predominantly concerned with their economic interests, copyright must facilitate exploitation of work. Copyright law must provide incentives to

[7] Torremans P, Copyright (and Other Intellectual Property Rights) as a Human Right, in Torremans P, Intellectual Property and Human Rights (Kluwer Law International, 2008), Page 206.
[8] Sayre v Moore (1785),102 E.R. 139 at 140.
[9]Kawooya D, Kakungulu R and Akubu J, Uganda, in Armstrong C, De Beer J and Kawooya D, Access and Knowledge in Africa: The Role of Copyright, (IDRC, 2010), Page 294.
[10] Rai A, 'Regulating Scientific Research: Intellectual Property Rights and the Norms of Science' 94 Nw. U. L. Rev. 77 1999-2000, at 116.

encourage rights holders to create socially useful work and provide adequate financial remuneration for their efforts whilst preventing others from appropriating their expression and competing with them. If copyright law does not facilitate this aim, rights holders are discouraged and the output of useful works diminishes, negatively impacting on society's knowledge base. Copyright's second function is to protect the public interest and create an effective public domain, 'in all copyright systems, furthering the interest of the public is said to be an important goal.[11]' Two key concepts must be discussed at this juncture. Firstly the public interest relates to what the public need from copyright law and their role within copyright law. Secondly the public domain relates to the ability of the public to use works and the area where copyright protection does not apply. The public interest in copyright law requires that knowledge is not only disseminated but that the public can use copyrighted works where necessary, 'copyright's... purpose is to encourage the dissemination of works, in order to promote public access to them.'[12] Disseminating knowledge is essential because it enables the public to access works so they can be enjoyed, critiqued and developed. The public interest however is not just limited to ordinary users but one can also consider right holders themselves as part of the public interest. Whilst right holders want their work protected, it is also in the public interest to prevent excessive protection. The public interest requires future right holders are able to use copyrighted works in order to build upon society's knowledge to 'allow subsequent creators to draw on copyrighted works for their inspiration and education.'[13]

[11]Patry W, How to Fix Copyright (Oxford University Press, 2011), Page 131
[12] Litman J, Revising Copyright Law for the Information Age, in Thierer A and Crews C, Copy Fights: The Future of Intellectual Property in the Information Age, (Cato Institute, 2002), Page 129.
[13] Goldstein P, Goldstein on Copyright: Volume One (Aspen, 2005), at 1:41

The public interest is not only concerned with works reverting to the public domain but should play a fundamental role with copyrighted works. Rights holders are given several exclusive rights to control use of their works however the public interest requires occasions where the work may be used. If the public interest were limited to those works in the public domain this would severely limit their role and exclude the public interest. This work considers the public interest in relation to copyrighted works and the ability of the public to adequately use these works through mechanisms such as the fair dealing provisions Copyright enables owners to control how their work is used and the work cannot be used without being purchased or with permission. The public interest however requires recognition within copyright law that there are legitimate circumstances where it will be necessary to use copyrighted works. The public interest requires free use of copyrighted works in appropriate circumstances. It is therefore essential the public are provided with rights that not only secure their interests but are an effective counter to the protection right holders obtain. The public interest is therefore two fold. Firstly rights holders must not be given excessive copyright protection because this prevents the public accessing copyrighted works. Secondly copyright must provide adequate scope for the public interest to be defended so copyrighted works can be used where there is a legitimate reason, 'exceptions... are all in the public interest, in that they facilitate access to, and use of, copyrighted material'[14].

The public domain, 'is that territory where no intellectual property rights apply, a domain where everyone is free to enter.'[15] The public domain is a fundamental part of

[14] Dreier T, Regulating competition by way of copyright limitations and exceptions, in Torremans P, Copyright Law: handbook of contemporary research (Edward Elgar Publishing, 2007), Page 235.
[15] Benabou VL and Dusollier S, Draw me a public domain, in Torremans P, Copyright Law: handbook of contemporary research (Edward Elgar Publishing, 2007), Page 165

balancing copyright law and is one of the most important areas that represent the public interest. Broadly speaking the public domain is traditionally seen as the area where works fall into once copyright has expired, 'after that limited time, the work falls into the public domain free of restraint, so that "second comers,"... "might do a much better job than the originator" with the original idea.'[16] The public domain includes 'the wealth of information that is free from the barriers to access... It is the raw material from which new knowledge is derived and new cultural works are created'[17]. Besides encompassing works whose copyright has expired, the public domain can be interpreted much wider as relating to how and when the public access copyrighted works, 'access to works remaining under copyright is therefore a critical public interest'[18] and 'is reflected in the exceptions to copyright infringement... which seek to protect the public domain in traditional ways such as fair dealing'[19]. In order to secure the public interest outlined above it is essential to have a robust public domain because it defines what works the public can access and what knowledge is free for public consumption, 'having a healthy and thriving public domain is essential to the social and economic well-being of our societies.'[20] The public require a strong public domain, 'excessive control by holders of copyrights... may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization'[21]. Excessive protection limits the public domain and inhibits future advancement 'once a work formerly protected by copyright is in the public domain, it can be freely adapted to create other works, and it is

[16] Lessig L, The Future of Ideas: the fate of the commons in a connected world (Random House, 2001).
[17] Communia Public Domain Manifesto 2010 available at http://www.publicdomainmanifesto.org/ [last accessed September 30th 2014], Preamble
[18] Supra Note 11, Page 133.
[19] Théberge v. Galerie d'Art du Petit Champlain Inc. [2002] 2 S.C.R. 336, At 331.
[20] Supra Note 17.
[21] Supra Note 19, at 32.

true that such re-uses perform a valuable public purpose furthering the goals of copyright'[22]. The scope of the public domain is essential to the public interest, 'the public domain... and limitations to copyright... go a long way to ensure that everyone has access to our shared culture and knowledge in order to facilitate innovation and cultural participation for the benefit of the entire society'[23].

1.3-The Copyright Balance:

Copyright law since its inception has worked on a symbolic set of scales where the needs of rights holders and the public outlined above should be equally protected. If copyright law deviates from this balance, the entire system becomes ineffective. The interests of one group gain disproportionate protection at the expense of the other. The idea of copyright balance has not only been the fundamental guiding principle since copyright's founding, but the concept is present in every piece of copyright legislation with theories, laws, academics and governments falling on one side of the divide or the other. The idea of balanced copyright is inherent in the international copyright regime. The preamble of the WIPO Copyright Treaty recognises 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information'[24] whilst article 7 of TRIPS provides, 'enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'[25]. Balance is also

[22] Supra Note 11, Page 133.
[23] Supra Note 17.
[24] WIPO Copyright Treaty (WCT), Preamble
[25] Agreement on Trade Related Aspects of Intellectual Property Rights, Article 7.

promoted in recital 31 of the Copyright Directive 2001, 'a fair balance of rights and interests between... the different categories of right holders and users of protected subject-matter must be safeguarded'[26]. The reason for focusing on this idea of balance is that, 'few propositions are more frequently asserted in contemporary copyright discussion than the proposition that copyright is a balance... between the incentive to create and the imperative to disseminate works. In spite of the pervasive, recurrent, and vigorous debate about copyright, there appears to be widespread agreement that copyright is structured as a balance.'[27]

Since the establishment of copyright, rights holders have increasingly come to dominate copyright law.[28] Longdin states, 'the balance nowadays is markedly tilted towards protecting the interests of copyright owners'[29] whilst Balganash states current law 'focuses almost completely on the institution of copyright in its capacity as an affirmative "grant" of rights. It locates copyright's justification and functioning entirely in its rights, without so much as alluding to the correlative duty.'[30] The balance has

[26] Copyright and related rights in the Information Society Directive 2001/29/EC, Recital 31.
[27] Supra Note 3
[28] For example copyright reform has continuously expanded copyright duration providing right holders with longer copyrights not once reducing the copyright term. Reform has also provided right holders with more rights. There is also concern over the power and influence the Copyright Lobby (the creative industries and governments) have over policymakers at the expense of the public. See Eechoud M, Harmonising European Copyright Law: The Challenges of Better Law Making, (Kluwer Law International, 2009) at 300 criticising the effect of powerful lobby groups on the creation of copyright legislation. Hesmondhalgh D, The Cultural Industries, (Sage, 2012) at 162-167 examines copyright expansion and the influence of right holders in expanding copyright protection. Also see George A, Constructing Intellectual Property,(Cambridge University Press, 2012) , Chapter 2 discussing right holders role in expanding copyright and strategies used by the creative industries to change copyright law in their favour.
[29] Longdin L, Cross Border Market Segmentation and Price Discrimination: Copyright and Competition at odds, in Macmillan F, New Directions in copyright law volume 6 (Edward Elgar Publishing, 2007), Page 128.
[30] Balganesh S, 'The Obligatory Structure of Copyright Law: Unbundling the wrong of copying' 125 HARV. L. REV. 1664 (2012)

firmly shifted in favour of right holders[31], 'this era's copyright law is regrettably unbalanced in favour of rights holders, and against emergent cultures of all kinds'[32] and 'it is clear intellectual property regimes remain unbalanced in favour of the demands sometimes unreasonable of the holders'.[33] Although the idea of balance is familiar and an inherent part of domestic and international copyright law, in practice it has been reduced to mere rhetoric. Right holder pressure has resulted in unrelenting expansion of copyright duration, rights and scope. There is often little consideration of the effect expansion has on the public and the balance that should guide copyright, 'copyright which was originally intended to promote the interests of the public, presents itself increasing as protection of a few private entities... this means the balance... tips in favour of rights holders.'[34] The effect of this expansion has been widespread public disillusionment with copyright and the current 'copyright crisis' where piracy has become commonplace with falling investment, profits and output from creative industries. The current formulation of copyright law and the continuous expansion of copyright means, 'copyright law today would be unrecognisable to those who first set it out... the course of events has brought us undeniably to the point where.... I have yet to find among those who must use and understand the law of copyright...very many who are satisfied with the precarious balance we have today'[35].

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[31] See Patry W Supra Note 11, Chapter 1, discussing why copyright law needs to be fixed and how current copyright law is no longer effective at providing for both right holders and the public.
[32] Aufderheide P and Jazsi P, Reclaiming Fair Use: How to Put Balance Back in Copyright, (University of Chicago Press, 2011), Page 146.
[33] Rodrigues B.E., The General Exception Clauses of the TRIPS Agreement, (Cambridge University Press, 2012), Page 323.
[34] Geiger C, The Constitutional Dimension of Intellectual Property, in Torremans P, Intellectual Property and Human Rights (Kluwer Law International, 2008) , Page 110.
[35] Harper G, 'Will We Need Fair Use in the 21st Century' http://copyright.lib.utexas.edu/fair_use.html, [last accessed September 30th 2014].

This work aims to use instrumentalist principles present in the Statute of Anne and the Donaldson decision to re-establish the public as a fundamental element of a balanced copyright law. Chapter three looks at copyright history to establish its origins, its aims and how the interests of right holders and the public came to underpin the copyright regime. Chapter four discusses human rights and the effect of external legal systems on the balance between right holders and the public. Chapters five and six focus on copyright originality and the idea/expression dichotomy respectively. These chapters assess the ability of internal copyright mechanisms to place limits on right holders. Finally chapter seven discusses the fair dealing provisions to establish whether the provisions achieve their purpose of providing the public with adequate access to copyrighted works. The objective is to assess the role of the public in each component and assess if a balance is currently secured. The contribution to novelty of this work will be the fundamental reassessment of copyright law and the reforms suggested which will enable a balanced copyright regime to be created.

Wordcount-2,490 (3,179 including footnotes)

2. Chapter Two-Theoretical Framework

2.1-Introduction:

When discussing copyright law, its function, its objectives and how it can achieve a balance between rights holders and the public, two main theories have informed the debate. Each theory argues which side of the balance the law should fall, 'there is a view of copyright law as the vindication of the author's natural right to the products of her labour. This rights-based view posits that the inherent dignity of authorial right is the defining axis around which the law of copyright either does or ought to orbit. On the other hand, there is a view of copyright law as a statutory instrument designed to balance incentives necessary for the author's productivity with the public interest in access.'[1] The conflict between these two theories continues to prove divisive however 'natural rights, that ideas should be protected in perpetuity... has never been accepted by even the most ardent promoters of a strict intellectual property regime.'[2] Various theories have been advocated to explain the unique nature of copyright ranging from Locke's Labour Theory[3], Hegel's personality theory[4], Utilitarianism[5], Instrumentalism, and in contemporary academic discussion even theories by academics including Kaplan[6] and Drahos[7] that question the very existence of copyright. Each theory adopts a distinct perspective on the justifications for copyright and whose interests should be the laws focal point however no one theory is universally accepted. One common theme however

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[1] Drassinower A, 'A Rights-Based View of the Idea/ Expression Dichotomy in Copyright Law', 16 Can. J.L. & Jurisprudence 3 2003, Page 3.
[2] Ibid, Page 4.
[3] Locke J, 'Second Treatise on Government- The True Original, Extent, and End of Civil-Government' 1690.
[4] Hegel G, 'Philosophy of right', (Oxford: Clarendon Press, 1967)
[5] Bentham J, An Introduction to the Principles and Morals of Legislation (1789)
[6] Kaplan B, An Unhurried view of copyright (Columbia University Press, 1967).
[7] Drahos P and Braithwaite J, Information Feudalism: Who Owns the Knowledge Economy? (Earthscan, 2002).

permeates each theory which is the idea of balance, 'the idea of "balance" within copyright law is not a new concept... as the history of copyright law demonstrates, the entire legislative system required balancing between various interests in order to achieve its primary policy objective: that of fostering an environment for the generation, dissemination and acquisition of knowledge'[8] This work intends to refocus copyright law on these aims and to be guided not only by the interests of rights holders but also the needs of the public, , 'the genesis of copyright law... has much to teach modern copyright policy-makers about establishing the appropriate normative policy framework'[9].

2.2-Utilitarianism-happiness of the whole:

This work does not strictly follow any one theory but has been influenced by several theories mainly instrumentalism and utilitarianism. Utilitarianism sometimes called welfare consequentialism by academics including Williams and Sen[10] was given its modern formulation by Jeremy Bentham and his adherent John Stuart Mills. The basic premise is that law should secure the greatest good for the greatest number of people. 'The utilitarian argument presupposes that we should choose laws and policies that maximize "wealth" or "utility." With respect to copyright... the idea is that more artistic and inventive "innovation" corresponds with, or leads to, more wealth'[11] and that 'lawmakers' beacon when shaping property rights should be the maximization of net social welfare.'[12] Bentham set out his theory of utility in 1781, 'by the principle of

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[8] Tawfik M, 'History in the Balance: Copyright and Access to Knowledge', in Geist M, From radical extremism to balanced copyright (Irwin Law, 2010), Page 70.
[9] Ibid.
[10] Sen A and Williams B, Utilitarianism and Beyond (Cambridge University Press, 1982)
[11] Kinsella N.S, 'Against Intellectual Property' Journal of Libertarian Studies 15, no. 2 (Spring 2001) available at www.mises.org/journals/jls/15_2/15_2_l.pdfat 10 [last accessed September 30th 2014]
[12] Fisher W, Theories of Intellectual Property, in Munzer S, New Essays in the Legal and Political Theory of Property', (Cambridge University Press, 2001), at 169.

utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish happiness'[13]. Mills refined the theory in *Utilitarianism* where he argues, 'utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure'[14]. Bentham and Mills contended the creation of laws depended on two factors, pain and pleasure, 'nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do... they govern us in all we do'[15]. Bentham explained that one must consider the ability of laws, 'to produce benefit, advantage, pleasure, good, or happiness... or prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual'[16]. The premise of Utilitarianism is that maximum pleasure and the avoidance of pain should be the ultimate aim of law and the only standard to judge their achievements, 'an act or practice is right or good or just in the utilitarian view insofar as it tends to maximize happiness, usually defined as the surplus of pleasure over pain.'[17] Therefore when evaluating the effectiveness of the current copyright regime and when advocating reforms one must consider the good promoted or unhappiness avoided, particularly whether copyright's purposes are promoted.

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[13] Supra Note 5, Chapter I, Section II
[14] Mill J.S, Utilitarianism (Broadview Press, 2010)
[15] Supra Note 5, Chapter I, Section I
[16] Ibid, Chapter I, Section III
[17] Posner R, 'Utilitarianism, Economics, and Legal Theory' 8 J.LEGAL STUD. 103 (1979), at 111

Bentham stated that when assessing a given situation one can use the utility calculus which states, 'the value of a pleasure or a pain... will be greater or less, according to seven circumstances: 1. its intensity [how strong is the pleasure], 2. Its duration [how long will the pleasure last], 3. Its certainty or uncertainty [how certain is it the pleasure will happen], 4. Its propinquity or remoteness [how quickly will the pleasure occur], 5. Its fecundity, 6. Its purity [the likelihood the action will or will not be followed by consequences of the same kind] and ... 7. Its extent; that is, the number of persons to whom it extends'[18]. Bentham proposes each factor should be evaluated for the pleasure and pain it provides. One for example may briefly conclude current copyright law brings pain under factors 2, 3 and 7 because of its overlong duration[19], the fact certain aspects of copyright law are uncertain for the public causing a possible chilling effect and that copyright affects a large number of people for the benefit of the few. On the other hand it can also be argued the current copyright regime brings pleasure under factors 3, 5 and 6 for protecting the interests of right holders and ensuring a productive society where knowledge is disseminated. Utilitarianism then requires a balance of the pleasures and pain from the perspective of both the individual and wider society, 'sum up the numbers expressive of the degrees of good tendency, which the act has... do this again with respect to each individual, in regard to whom the tendency of it is bad upon

[18] Ibid, Chapter IV, Section IV

[19] Copyright duration has been subject to widespread academic debate with the majority of academics arguing current copyright duration is excessive & arguing for shorter terms. For example Pollock argues copyright duration is overlong and support a 15 year duration period (Pollock R, 'Forever Minus a Day? Some Theory and Empirics of Optimal Copyright' Unpublished). Lessig argues copyright duration is too long and creates a 'copyright black hole' and suggests 80 years duration renewable every 5 years, (Lessig L, The Future of Ideas: the fate of the commons in a connected world (Random House, 2001). Samuelson whilst not specifying an exact duration period argues current duration is far too long and must be much more limited in order for works to reach the public domain faster (Samuelson P, 'Preliminary Thoughts on Copyright Reform'. Utah Law Review, 3, 551-571). Finally Boldrin and Levine have argued for copyright to be abolished altogether (Boldrin M, Levine D, 'Does Intellectual Monopoly Help Innovation?' Review of Law and Economics, 5 (3), 991-1024)

the whole'[20]. Mills also discussed the typical copyright scenario where competing interests means pleasure for one party results in pain for another, 'it is quite compatible with the principle of utility to recognise the fact, that some kinds of pleasure are more desirable and more valuable than others'[21]. Therefore placing the pleasure provided to one group over another is entirely compatible with Utilitarianism, 'the familiar utilitarian guideline... requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions... and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations'[22].

After establishing his general theory of utilitarianism, Bentham applies his hypothesis to law stating, 'the general object which all laws have, or ought to have... is to augment the total happiness of the community; and... to exclude mischief'[23]. Law therefore is a means to an end, a tool to secure the happiness of the community and it is a mechanism that will help achieve wider social goals, 'rights in a utilitarian system are strictly instrumental goods. The only final good is the happiness of the group as a whole'[24] and 'for Bentham, one must take into account the effect an action has on everyone affected by the action when determining the rightness or wrongness of the action.'[25] Mills is aware of this point and explains happiness refers not only to individuals but all concerned parties, 'happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned'.[26] Mills insists

[20] Supra Note 17, Chapter IV, Section V
[21] Supra Note 14, Page 44
[22] Supra Note 12, Page 168
[23] Supra Note 5, Chapter XIII, Section I
[24] Supra Note 17, at 116
[25] Shaw W, Contemporary Ethics: Taking Account of Utilitarianism, (Wiley, 1999), Page 8.
[26] Supra Note 14, Page 53

under utilitarianism individual interest, in our circumstances right holders, must be balanced against those of society with the happiness of both being equally important, 'utility would enjoin, first, that laws and social arrangements should place the happiness... of every individual, as nearly as possible in harmony with the interest of the whole'[27]. This proposition means utilitarian copyright should find the lowest level of incentive required for right holders to be encouraged to create the greatest amount of work, 'copyright's doctrinal basis has traditionally been understood as utilitarian. Although the immediate effect of copyright law is to secure a fair return for an author's creative labour, the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good'[28]. Under utilitarianism copyright is viewed as a social bargain trying to balance the needs of the public and right holders, 'the utilitarian story is based on the assertion that only by providing copyright protection will there be sufficient incentives for authors to distribute their works to the public'[29] and 'the utility gains from increased incentives for innovation must be weighed against the utility losses incurred from monopolization of innovations and their diminished diffusion.'[30]

Whilst utilitarianism under Bentham and Mills is generally supportive of intellectual property Mills expressed concern, 'to any other system which would vest in the state the power of deciding whether an inventor should derive any pecuniary advantage from the public benefit which he confers, the objections are evidently stronger and more

[27] Supra Note 14, Pages 53-54
[28] Lee P, 'The Evolution of Intellectual Infrastructure' Washington Law Review, Vol 83(1), 39-122 2008, at 13
[29] Patry W, Moral Panics and the Copyright Wars, (Oxford University Press, 2009), Page 62.
[30] Palmer T, 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects', Harvard Journal of Law and Public Policy 13 (1990), at 849

fundamental than the strongest which can possibly be urged against patent.'[31] Bentham makes a final, particularly poignant point in relation to copyright, 'all punishment in itself is evil. Upon the principle of utility... it ought only to be admitted in as far as it promises to exclude some greater evil...punishment ought not to be inflicted... where it cannot act so as to prevent the mischief or where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented.'[32]. Given the current public scepticism towards copyright and harsher punishments currently being adopted to counter the copyright crisis[33], one must consider if copyright causes more pain than it solves. The constant expansion of copyright and inability to provide for the needs of all interested parties has led academics to question whether utilitarian principles guide copyright and if the current regime truly secures happiness, 'Would more rights produce more benefits than costs to society? would more rights result in an increase in the sort of creation we wish to encourage... One suspects that in many, if not most cases, the answer to these questions would be a resounding "no''...if we were to do the utilitarian math across the landscape of copyright-weighing the costs of exclusivity against its benefits-we might discover that some (if not all) authors should have fewer exclusive rights'[34].

2.3-Instrumentalism-all law has a purpose:

Instrumentalism in relation to law, 'refers to the idea that law is a tool that serves a general purpose. When applied to property, instrumentalism does not reflect the

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[31] Mill J.S, Principles of political economy: with some of their applications to social philosophy, Volume (Longmans, Green, Reader, and Dyer, 1871), Page 563.
[32] Supra Note 5, Chapter XIII, Section III
[33] For example public protests were held in the USA when copyright duration was expanded by the Copyright Term Extension Act (CTEA), public protests were held outside Parliament in New Zealand when a three strikes system was to be introduced. There was also widespread public international opposition to the Anti Counterfeiting Trade Agreement (ACTA) with protests across the world leading to the EU rejecting the agreement in 2012.
[34] Stadler S, 'Forging a Truly Utilitarian Copyright' 91 Iowa L. Rev. 610 2005-2006 at 670

essential nature of property; it only reflects its purpose'[35] and 'an instrumental approach regards law as a tool, and tries to investigate the contingent connections and processes that exist between property and the formation of groups and factions.'[36] Under this theory 'the law considers authors as engaged in instrumental rather than autonomous activity. They therefore do not enjoy legally cognizable autonomy interests in their works... when rights-holders exercise their rights, they interfere with the autonomy of persons who wish to use expression'[37]. Instrumentalism was discussed by academics such as James and Dewey with the basic proposition that one must look at the consequences of an act to determine its effectiveness. James referring to the theory as pragmatism stated the effectiveness of law is assessed by its consequences, 'the pragmatic method... is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to anyone if this notion rather than that notion were true? If no practical difference whatever can be traced... all dispute is idle... we need only determine what conduct it is fitted to produce: that conduct is for us its sole significance'[38]. This means one must observe the consequences of a particular act and determine whether these consequences achieve the objective originally intended, 'must not the guiding principle... be simply to satisfy at all times as many demands as we can? That act must be the best act, accordingly, which makes for the best whole, in the sense of awakening the least sum of dissatisfactions... whose realization the least possible number of other ideals are destroyed.'[39] James proposes law is merely a device guided only by its ability to achieve the aims we deem desirable,

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[35] Barbosa G, 'The philosophical approaches to intellectual property and legal transplants', Houston Journal of International Law 31, No.3 209 515-64, at 519.
[36] Rahmatian A , Copyright and Creativity: The Making of Property Rights in Creative Works, (Edward Elgar Publishing, 2011), Page 32.
[37] McGowan D, 'Copyright Nonconsequentialism', 69 MO. L. REV. 1 (2004), at 6.
[38] James W, Pragmatism, (Harvard University Press, 1975), Page 28.
[39] James W, The Will to Believe and Other Essays in Popular Philosophy (Cosimo Inc, 2007), Page 205

'theories thus become instruments not answers to enigmas... Pragmatism unstiffens all our theories, limbers them up and sets each one at work... an attitude of orientation, is what the pragmatic method means. The attitude of looking away from first things, principles, categories, supposed necessities and of looking towards last things, fruits, consequences'[40]. The end result of any adopted law and its practical effect on the concerned parties are what is of concern.

Dewey built upon the work of James and proposed every action should be assessed by 'the doctrine of the value of consequences... If we form general ideas and put them into action, to produce consequences that would not be produced otherwise. These considerations naturally lead us to the movement called instrumentalism.'[41] Dewey proposes every act has a goal and an act is only successful when these goals are achieved, 'each type has its own end and its validity is entirely determined by its efficacy in the pursuit of its end[42]. In *The Quest For Certainty* Dewey argues one cannot simply look at the immediate effects of an act but one must examine the consequences of an act in practice upon those who are affected to determine its value, 'hypotheses are conditional they have to be tested by the consequences of the operations they define and direct. But their final value is not determined by their internal elaboration and consistency, but by the consequences they effect in existence as that is perceptibly experienced'[43]. In *Reconstruction in Philosophy* Dewey stated 'notions, theories, systems... must be regarded as hypotheses. They are to be accepted as bases of actions

[40] Supra Note 39, Page 32.
[41] Dewey J, The Development of American Pragmatism, in Boydston J, The Later Works of John Dewey, Volume 2, 1925 - 1953: 1925-1927, Essays, Reviews, Miscellany, and the Public and Its Problems, Volume 2, (SIU Press, 2008), Page 13.
[42] Ibid, Page 18.
[43] Dewey J, The Play of ideas, in Boydston J, The Later Works 1925-1953: 1929, (SIU Press, 1984), Page 133.

which test them... they are tools. As in the case of all tools, their value resides not in themselves but in their capacity to work shown in the consequences of their use'[44]. Sullivan underlines this approach, 'we can critically assess our original hypothesis that 'X is the best for the future' by evaluating its consequences with respect to how well it solves the problems of the original experience in which it arose'[45]. Copyright since 1710 has had a dual purpose of providing for the needs of both right holders and the public, current copyright law must be appraised by its ability to fulfil these two purposes, 'the test of their validity and value lies in accomplishing this work. If they succeed in their office, they are reliable, sound, valid, good, true. If they fail to clear up confusion, to eliminate defects, if they increase confusion, uncertainty and evil when they are acted upon, then are they false.'[46]

Economic philosopher Friedman has also discussed the theory, reiterating one must look at the consequences of law and how it works in practice. Friedman also notes copyright can negatively impact upon society. Friedman firstly argued one must consider the consequences of actions and assess their practical impact, 'the consequences of changes in circumstances on the course of events, with prediction and analysis, not with evaluation. It has something to say about whether specified objectives can be achieved and if so, how... they are partly revealed in their consequences'[47]. Secondly Friedman noted what copyright was aiming to achieve in regards to right

[44] Dewey J, Reconstruction in Philosophy, in Boydston JThe Middle Works of John Dewey 1899-1924: 1920, (SIU Press, 2008), Page 163.
[45] Sullivan M, Legal Pragmatism: Community, Rights and Democracy (Indiana University Press, 2007), Page 38.
[46] Ibid, Page 169.
[47] Hook S, Human Values and Economic Policy: A Symposium, (New York University Press, 1967), Page 85.

holders, 'the inventor will find it difficult or impossible to collect a payment for the contribution his invention makes to output. He will, that is, confer benefits on others for which he cannot be compensated. Hence he will have no incentive to devote the time and effort required to produce the invention. Similar considerations apply to the writer'[48]. In addition to setting out copyright's objective Friedman recognised its underlying social function and questioned if current copyright law achieved this, 'copyrights are in a different class from the other governmentally supported monopolies and illustrate the problem of social policy that they raise. One thing is clear. The specific conditions attached to copyrights... are not a matter of principle. They are matters of expediency to be determined by practical considerations'[49] and 'you are enforcing a monopoly pricing, as it were, that limits output to lower than the optimum social level. You cannot be in favour of infinite copyright... whether you have 17 years, 25 years, 10 years, 50 years. What's written down on paper is not what matters. What matters is what happens in practice'[50].

Dewey applied this theory to law in *My Philosophy of Law* with the view that law is a social instrument designed to secure social aims, 'law is through and through a social phenomenon; social in origin, in purpose of end, and in application'[51]. Dewey argues law is not self contained and must be judged by its impact on wider society, 'law must be viewed both as intervening in the complex of other activities and as itself a social process... law cannot set up as if it were a separate entity, but can be discussed only in

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[48]Friedman M, Capitalism and Freedom: Fortieth Anniversary Edition, (University of Chicago Press, 2009), Page 127.
[49] Ibid.
[50] Friedman M, Preface: Economic Freedom Behind the Scenes, in Gwartney J Lawson R and Edwards C, Economic Freedom of the World: 2002 Annual Report, (The Fraser Institute, 2002), Page XVIII
[51]Dewey J, My Philopshy of Law, in Boydston J, The Later Works of John Dewey, 1925-1953: 1939-1941, Essays, Reviews, and Miscellany, (SIU Press, 1988), Page 117.

terms of the social condition in which it arises and of what it concretely does there'[52]. The ability of law to fulfil its underlying social purpose is of paramount concern, 'a given legal arrangement is what it does and what it does lies in the field of modifying... human activities... without application there are scraps... but nothing that can be called law'[53]. Dewey concludes we must consider the purpose the law was created and the consequences that result from a particular law, 'the standard is found in consequences, in the function of what goes on socially... it demands [investigation] in terms of the context of actual situations, the consequences of legal rules and of proposed legal decisions...social facts are going concerns and all legal matters have their place within these ongoing concerns'[54]. Law therefore must be viewed not only as being designed for a particular purpose but also that one must give credence to laws impact on society and its practical consequences upon various groups. Summers when reviewing the role of instrumentalism stated law is, 'merely a means to achieve external goals that are derived from sources outside the law... it assumes that a particular use of law cannot be a self justifying end in itself. Uses of law can be justified only by reference to whatever values they fulfil... law's function is to satisfy democratically expressed wants and interests.'[55] One must therefore ask what are the values and aims copyright law should be trying to achieve and from that we can assess the ability of the current law to achieve these aims and suggest reform to ensure these aims are met.

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[52] Ibid.
[53] Ibid, Page 118.
[54] Ibid, Page 122.
[55] Summers R, 'Pragmatic Instrumentalism in Twentieth Century American Legal Thought: A Synthesises and Critique of Our Dominant General Theory about Law and Its Use', 66 Cornell L. Rev. 861 1980-81, at 863.

Dewey when discussing intellectual property 'advocated the diffusion of learning based on the model of the scientific community, in which scientific inquirers share their knowledge'[56]. Dewey argued it was a two way system where the value of knowledge lay in its dissemination to wider society, 'No scientific inquirer can keep what he finds to himself or turn it to merely private account without losing his scientific standing. Everything discovered belongs to the community of workers. Every new idea and theory has to be submitted to this community for confirmation and test'[57]. Dewey further discussed this view in *Art as Experience* where he 'argues... the process is barren without the agency of the appreciator, Dewey underscores the point by distinguishing between the "art product," the painting, sculpture, etc., created by the artist, and the "work of art" proper, which is only realized through the active engagement of an astute audience'[58]. Dewey argues creators should not be considered in isolation but recognised the valuable function of society within intellectual property. Dewey however was highly critical of intellectual property laws, 'in one biting passage, Dewey appears to lay upon intellectual property much of the blame for the failings of democracy: Back of the appropriation by the few of the material resources of society lies the appropriation by the few in behalf of their own ends of the cultural, the spiritual, resources that are the product not of the individuals who have taken possession but of the cooperative work of humanity'[59]. Dewey argued intellectual property benefits right holders at the expense of the public and only fulfils part of its purpose, 'because of the conditions that were set by legal institutions... when scientific and industrial revolutions came, the chief usufruct of

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[56] Netanel N, 'Copyright and a Democratic Civil Society', 106 Yale Law Journal 283 (1996), at footnote 302.
[57] Dewey J, Individuality in our Time, in Boydston J, The Later Works of John Dewey: 1929-1930, Essays, the Sources of a Science of Education, Individualism, Old and New, and Construction of a Criticism, (SIU Press, 2008), Page 115
[58] Field R, 'John Dewey' 2001, available at http://www.iep.utm.edu/dewey/ [last accessed September 30th 2014]
[59] Supra Note 57.

the latter has been appropriated by a relatively small class. Industrial entrepreneurs have reaped out of all proportion to what they sowed'[60].

Copyright law under instrumentalism exists to serve a general purpose and the law must fulfil this purpose to be effective, 'when applied to the context of copyright, utilitarian theory requires legislators to strike an effective balance between stimulating the creation of copyright and works, and protecting public access.'[61] Under instrumentalism copyright must be judged by its ability to achieve the purposes we ascribe, '[under] instrumentalist reasoning... copyright is not there to "protect" authors but rather to maximize the creation, production and dissemination of knowledge and access thereto. In other words, protection is not an end but a means to achieving that purpose, which implies that the level of protection must be properly calibrated'.[62] Whilst utilitarianism and instrumentalism are separate theories and Dewey was critical of the former, in copyright law utilitarianism and instrumentalism merge because both have the aim of achieving balance and securing the wider social function of copyright, 'the difference between instrumentalism and utilitarianism is that, under instrumentalism, the law serves a purpose and, under utilitarianism, that purpose should be the pleasure of the majority of the people. In the case of copyright law, there is an overlap because the general purpose of copyright is to benefit the majority of society'[63]. This underlying purpose means 'the differences between the utilitarian approach and the

[60] Dewey J, Renascent Liberalism, in Boydston J, The Later Works of John Dewey, 1925-1953: Essays, Reviews, Trotsky Inquiry, Miscellany, and Liberalism and Social Action, (SIU Press, 2008), Page 53.
[61] Yijun Tian, Re thinking intellectual property: the political economy of copyright protection in the digital age, (Routledge, 2008), Page 67.
[62] Gervais, *D 'The* Purpose of Copyright Law in Canada', University of Ottawa Law & Technology Journal, 2005, Vol. 2, 315–358, at 423.
[63] Supra Note 36, at 520.

instrumentalist approach are minimal when applied to the copyright'[64] and that 'the holder of the copyright is subject to the purpose of intellectual property, which is the heart of an instrumentalist view.'[65] Viewing copyright from an instrumental perspective means, 'the purpose of IP is not to ensure individual or corporate gain but to benefit society by encouraging invention'[66].Therefore throughout this work copyright's dual purpose of protecting right holder's economic interests and wider social interests has been the underlying rationale in all discussion, 'one might say that whereas the public domain is an aspect of copyright law, the public interest is the goal that, in the instrumentalist view, copyright law, including the public domain, serves'[67].

Instrumentalism and Utilitarianism however have limits, the main limit being they only propose that copyright has a purpose and do not indicate how this purpose can be achieved or how the law should be structured, 'the problem is that instrumentalism can offer no concept of the necessary role of the public domain in copyright law'[68]. This means that instrumentalism and utilitarianism whilst defining what copyright law should be aiming to do and whose interests should be protected, does not explain the precise nature and scope of copyright. This has led to academics using instrumentalism in different ways to explain how to achieve copyright's purpose. Two distinct theories have arisen; copyright minimalists[69] and maximalists[70], 'copyright minimalists object

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[64] Ibid, at 521.
[65] Ibid.
[66] Correa C, Intellectual Property Rights and international economic governance, in Linarelli J, Research Handbook on Global Justice and International Economic Law, (Edward Elgar Publishing, 2013), Page 173.
[67] Supra Note 1, at 10.
[68] Drassinower, A Note on Incentives, Rights, and the Public Domain in Copyright Law, 86 Notre Dame Law Review 1869 (2011), at 1880.
[69] Such as Lessig L, The Future of Ideas: the fate of the commons in a connected world (Random House, 2001).and Creative Commons.

strenuously to [copyright] expansion, copyright maximalists support it. Equally unsurprisingly, both maximalists and minimalists formulate their position from the shared standpoint of instrumentalist copyright theory'[71]. The division between maximalists and minimalists under instrumentalism is that maximalists believe copyright's purpose can only be achieved with strong and expansive copyright, 'the copyright maximalist position can be defined as the position which holds it is appropriate to use the strongest copyright protection allowed'[72]. Minimalists argue the purpose may only be achieved through weaker and minimal copyright law, 'the hegemony of instrumentalist... means that copyright discourse stages a battle between copyright "maximalists" and copyright "minimalists," between those who see strong protections as conducive to the public interest and those who, on the contrary, see weaker protections as conducive to the public interest. Whatever their differences, however, these loyal opponents share a fundamental belief that copyright is but an instrument of the public interest'[73].

2.4-Case Analysis:

The classic theoretical challenge to utilitarianism and instrumentalism are natural rights. Under this theory, instead of copyright law being a tool used to secure purposes we assign, copyright is seen as an inherent right. Under natural rights 'author rights are given paramount importance as intellectual asset of the creator and is regarded as a

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[70] Such as Drassinower Supra Note 2 and Netanel N, 'Copyright and a Democratic Civil Society', 106 Yale Law Journal 283 (1996).
[71] Supra Note 70, at 1870.
[72] Wittkower W.D, Against Strong Copyright in E-Business, in Palmer D, Ethical Issues in EBusiness: Models and Framework (Idea Group, 2010), Page 155.
[73] Drassinower A, 'Taking User Rights Seriously' in Geist M, In The Public Interest: The Future of Canadian Copyright Law, (2005, Irwin Law), at 479.

recognition to their natural claims to avail proprietary benefits'[74] and 'it is the author who spends time and effort on the creation of a new work... it is deemed justified to afford him the opportunity of reaping the fruit of his labour. Accordingly, it is posited the author acquires a property right in his work by virtue of the mere act of creation'[75]. The result of adopting a natural rights approach is that rights holders are given precedence over the public interest and copyright's social function, 'natural private rights... have priority over conflicting interests. Thus it is hardly surprising that a simultaneous focus on the interests of author and public has often led to the elevation of private rights over public interest.'[76] Whilst a natural rights approach to copyright was rejected in *Donaldson*[77], this did not end the matter and the conflict between natural rights and instrumentalism has continued ever since. In contemporary law there has been a shift towards natural rights and this shift is demonstrated by *Ashdown v Telegraph Group*[78] where the instrumentalist principles copyright law was founded upon were lost sight of. *Ashdown* exemplifies the current judicial and legislative predisposition to interpret copyright as a natural right rather than an instrumental tool.

In *Ashdown v Telegraph*, Paddy Ashdown the Liberal Democrat leader met the Labour Party over coalition talks and took minutes of the meeting. Following his resignation Mr Ashdown wanted to publish his diaries which contained information about this meeting and political events. He showed the minute on a confidential basis to eight journalists and The Telegraph published parts of the minutes. The unauthorised

[74] Prasad A and Agarwala A, Copyright Law Deskbook: Knowledge, Access and Development, (Universal Law Publishing, 2009), Page 134.
[75] Senftlebten M, Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law, (Kluwer Law International, 2004), Page 11.
[76] Craig C, Copyright, Communication and Culture (Edward Elgar Publishing, 2011), Page 88.
[77] Donaldson v. Beckett (1774) 4 Burr. 2408
[78] Ashdown v Telegraph [2002] R.P.C 5.

extracts amounted to one fifth of the total copyright work and one quarter of the overall article and included verbatim quotations. The Court of Appeal rejected all fair dealing defences, the public interest defence and concerns over freedom of expression and found infringement[79]. The important point from the case is that instrumentalism had little effect on the outcome . The argument copyright works as a balance was not followed because the effect of the decision was a failure to protect the public interest. Bentham and Mills argued we have to judge an action by its ability to cause pleasure or pain. James and Dewey argued we have to consider the consequences of an action and if they achieve the original goal. Under instrumentalism the pleasures or aims copyright pursues is to provide an incentive for rights holders to create works whilst enabling knowledge to be disseminated to the public. The approach of the Court of Appeal more closely follows a natural rights interpretation of copyright than an instrumental one because copyright was protected despite valid public interests in use of the minutes.

A key distinction between instrumentalism and natural rights are exceptions to copyright, when copyright can be limited because wider social interests justify restriction. Under instrumentalism if a legitimate public interest is concerned which will further copyright's underlying purposes then copyright should be limited. This requires extensive exceptions, 'these laws generally include an elaborate structure of limitation and exceptions, whose aim is to exclude material that must be kept free from individual ownership... to further certain socially desirable goals'[80]. Under natural rights copyright is viewed as an absolute right and exceptions are either rejected outright or at best

[79] The issues of fair dealing, the public interest defence and freedom of expression in the case will be discussed in more detail throughout the research.
[80] Beldiman D, Functionality, Information Works and Copyright, (Lulu.com, 2008), Page 2.

extremely narrow, 'in countries with authors' rights legislation, the courts are bound by a principle of strict or narrow interpretation of exceptions'[81]. In Ashdown the court adopted a natural rights approach to exceptions with all possible defences failing despite valid social reasons allowing use of the minutes. Firstly a legitimate public interest was at issue because the matter concerned the governing of the country. The use of the minutes promoted political transparency and accountability, added authenticity to the article and most importantly allowed political information to be communicated to the public and for the public to participate in political discussion. The court recognised the legitimate public interests at issue, 'Mr Ashdown's own words gave the factual material a detail and authority which was novel'[82] and 'information about a meeting between the Prime Minister and an opposition party leader... is very likely to be of legitimate and continuing public interest.'[83] Despite recognising the public interests at issue all the defences submitted failed. This illustrates the exceptions being interpreted from a natural rights perspective and not an instrumental one. The various exceptions were not being used to further socially desirable goals, which the court itself acknowledged. Instead the various defences were narrowly interpreted consistent with natural rights.

If we analyse the court's decision through James and Dewey's proposition that we judge an act's effectiveness by its consequences, we can see the consequences are that copyright's dual purpose is not pursued. The consequences of the decision are that in rejecting all defences to the action, the court supported a natural rights understanding of copyright where right holders copyright was protected over competing social concerns.

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[81]Poullard-Dulian F, The Dragon and the White Whale: Three Steps Test and Fair use, in Takenaka T, Intellectual Property in Common Law and Civil Law (Edgar Elgar Publishing, 2013), Page 159.
[82] Supra Note 78, at 79.
[83] Ibid, at 64.

Firstly despite attributing the public interest defence with a wide definition, the defence ultimately failed. The court also rejected fair dealing under sections 30(1) and 30(2) *CDPA.*[84] The Court whilst acknowledging freedom of expression could trump copyright in very rare circumstances, this case was not one of them. What this shows is the court did not balance the interests of right holders and the public. The court treated copyright analogous to a natural right that will only be restricted in limited circumstances rather than an instrumental tool to ensure the interests of the public and rights holders were protected. Section 30(1) failed because the article criticised Mr Ashdown and not the work, section 30(2) failed because it could not satisfy fairness under the Laddie Factors. The court when discussing the public interest defence declared, 'it will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches'[85]. Under natural rights theory social interests capitulate to copyright, this is what we find in *Ashdown*. Legitimate social concerns were deemed incapable of limiting copyright however if instrumentalism was followed copyright should have been restricted.

The consequences of the decision are that copyright was not being used to achieve its dual purpose but was used to prevent political discussion and uphold Mr Ashdown's copyright above competing interests. The consequences were particularly damaging for the public's side of the copyright balance. Firstly the press act as a public watchdog on politicians and perform a vital public function particularly through the use of leaked information. The role of copyright is not to control what the press can discuss which in effect is what the case did. Under instrumentalism copyright aims to incentivise rights

[84] Copyright, Designs and Patents Act 1988 C.48
[85] Supra Note 78, at 59.

holders to create works and to allow them to exploit this work. In the case the use of the minutes did not endanger any of these aims because under Bentham's pleasure and pain principle, Mr Ashdown would encounter little pain if the Telegraph were permitted to use his work. The pain would be minimal because he would still be able to exploit his book, the minutes only formed a very small part of years of political commentary. Secondly from the public's perspective allowing use of the minutes would bring many pleasures; it disseminates vital political information, gives the article integrity, supports political participation and gives the public the opportunity to discuss, review and critique the minutes and the actions of the government. If we apply the utilitarian calculus to the act of allowing the minutes to be used it is clear the pleasure to the public far outweigh the pain of Mr Ashdown. Under factors one to four we can see the pleasure resulting from allowing use of the minutes will be intense, of long duration, certain and not remote because the benefits to the public outlined are numerous. Of particular relevance is the seventh factor because the pain of forbidding the minutes to be used will extend to society at large and affect the entire electorate. For all these reasons the Court in *Ashdown* should have allowed the use of the minutes, instead the court dismissed these compelling social interests and upheld copyright above them. Copyright however has to protect these social interests and balance them against right holder's economic interests and that can only be done if instrumentalism forms the basis of copyright.

2.5-Taking the theoretical framework forward:

This work analyses the concept of balance in copyright law. The aim is to assess, if the purpose copyright law is meant to serve is being adequately met by current law,

particularly how balance is currently embodied in copyright's components such as originality, the idea/expression dichotomy and fair dealing and to evaluate the ability of each area to provide for the needs of the public and rights holders. Where necessary reforms will be recommended to restore balance and create a workable copyright regime, 'a reformation of copyright law should be guided by the overriding goal of promoting the public interest in the encouragement and dissemination of works of the arts and intellect'[86]. These reforms will be strongly guided by instrumentalism and centre on achieving copyright's dual purpose. The aim is to provide a regime that does not provide excessive right holder protection. Instead the work aims to create a regime equally focused on the needs of the public. The work will reform certain aspects of copyright law so, not only are rights holders encouraged to create socially useful works but the needs of the public are also provided for.

Wordcount-5,739 (7,125 including footnotes)

[86] Rimmer M, Digital copyright and the consumer revolution: hands off my iPod (Edward Elgar Publishing, 2007), at 151.

3. Chapter Three-The Rise and Fall of Copyright

3.1-Introduction-history repeating

In 2010 the *Copyright Act 1710* commonly known as the *Statute of Anne,*[1] regarded as the first copyright Act in the world observed its tri-centennial. To commemorate this landmark however you will notice little celebration for this important event in legal history. Conversely you would encounter disdain from most quarters because copyright is now, as it has always been throughout its history, a divisive economic, legal, political and social issue. The *Statute of Anne* was revolutionary, for the first time legislation explicitly noted the two underlying rationales justifying copyright law and attempted to balance these conflicting aims. The first rationale was copyright law must encourage right holders to create socially useful works and protect their economic interests to reward them for their efforts. The second opposing rationale is copyright law must provide for the needs of the public so knowledge can be disseminate and works accessed. Right holders, supported by the creative industries and governments, support the idea first expounded by John Locke's *labour theory* (possessive individualism).[2] Locke contended creators of works by exerting labour and creating a work have an inherent natural right to financially and morally benefit from the work they create. Proponents of the public interest strongly challenge this notion. For these parties, information should be freely available in the public domain for improving the progression of society. The quandary for copyright law throughout its history has been how to effectively balance these competing interests, 'the question of how to balance

[1] 8 Ann. c.21, An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned. Sometimes referred to as 8 Ann. c.19 and dated as 1710. See Appendix A.
[2] Locke J, 'Second Treatise on Government-The True Original, Extent, and End of Civil-Government' 1690.

public and private interests is as pertinent as ever. What are the rights of property and rights of access?... to strive to strike an expedient balance is expected in any copyright policy debate'[3]. Whilst copyright law once balanced these competing interests, the advent of the internet with instantaneous 'free' access to copyrighted materials is seen as radically undermining the traditional role of copyright, 'the nature of digital media has changed the copyright landscape exponentially... Never again will copyright law apply primarily to large corporations.'[4] Modern concerns including piracy and access to materials have been faced by copyright throughout its history and the system adapted. Copyright however has ineffectively adapted to the digital age and the current copyright crisis has not only called into question the ability of the system to achieve the instrumentalist purposes it was founded upon but also the legitimacy and future of the entire copyright regime.

3.2-The Statute of Anne-A Confusing Beginning:

After the collapse of the Licensing Acts which previously governed printing regulation, a new regime was needed. Between 1695 to 1707 twelve Bills were introduced to Parliament for a new regime of formal protection. This included Bills or petitions on the very day the *Licensing Act* lapsed,[5] 1703[6], 1704[7] and 1706.[8] In 1709

[3] Goebel L, 'The role of history in copyright dilemmas' 9 J.L. & Inf. Sci. 22 1998, at 22.
[4] Lamoureux E, Intellectual Property Law and Interactive Media: Free for a Fee (Peter Lang Publishing, 2009), at 67.
[5] CJ 11:340, 341, 343, 345.
[6] CJ 14:260-270.
[7] CJ 15:321, 322.
[8] Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, and Improvement of Printing 1706, Lincolns Inn Library: MP102, Fol.312.

'following intense lobbying by booksellers,'[9] a Bill 'coloured by commercial motive'[10] was introduced by Wortley which later became the *Statute of Anne*. Following the *Act of Union* in 1707[11] concerns over competition with the Scottish book trade made protection inevitable, 'the free interchange of trade including books, and the end of the copyright agency in Scotland, confirm Scottish factors were also vital to the precise timing of the British legislation'[12]. The Bill[13] introduced in 1709 differed from the final enacted Statute in several ways. The Bill's title was, 'a Bill for the Encouragement of Learning and for Securing the Property of Copies of Books'. This title recognised the needs of the public for the first time by referring to the encouragement of learning. The final Act however went even further with explicit reference in its title to the interests of authors, 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned'. Most significantly, the Bill provided no time limit for the right, reinforcing the perpetual nature of copyright previously provided in common law. The needs of the public and the rights of authors were now central to copyright protection with the preamble stating the Act's purpose was, 'the encouragement of learned men to compose and write useful books'. The Acts most fundamental function was that it ended the previous censorship regime that had previously existed and printing was no longer to be dependent on State approval, 'did not condition the enjoyment of copyright rights upon collaboration with church- or state-sponsored censorship schemes'[14] and finally marked

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[9] Burkitt D, Copyrighting Culture- The History and Cultural Specificity of the Western Model of Copyright (2001) 2 IPQ 146-186.
[10] Ibid
[11] An Act for the Union of the Two Kingdoms of England and Scotland (1707) 5&6 Anne c.8
[12] Deazley R, Privilege and Property: Essays on the History of Copyright (Open Book Publishers, 2010), at 65
[13] A Bill for Encouragement of Learning, and for Securing the Property of Copies of Books to the Rightful Owners thereof 1709 CJ 16:260
[14] Cotter TF, 'Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism', 91 Cal. L. Rev. 323 (2003).

'the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation'[15].

Although the terminology copyright is not used in the Act, the core components of our modern system were introduced for the first time, 'two of the principles established by the *Statute of Anne* were revolutionary at the time: recognition of the author as the fountainhead of protection and... a limited term of protection[16]'. The first fundamental change was authors gaining rights in their work, 'unlike the earlier rights granted to the Stationers' Company, the rights conferred... vested in authors.'[17] This drastic change theoretically meant authors were the proprietary owners of their intellectual work and were the main party to benefit economically. Authors should hypothetically be the centre of protection and would no longer be an ancillary party. This meant underlying intellectual works could be owned by any person and that authors were recognised as the originators of their work and therefore had a legal interest in the use of their works. This change is evidenced by the fact an author brought the first case under the Act, in *Burnet v Chetwood*[18]. During the second reading in the Commons, a limited duration of protection was introduced. Section I provided a duration of twenty-one years for works already published and fourteen years for new works, 'the Author of any Book...already printed... shall have the sole right and liberty of printing such Book for the term of one and twenty years... Books not printed... shall have the sole liberty of printing... for the term of fourteen years'. A further House of Lords amendment resulted in section XI

[15] , Rose M, Authors and owners: the invention of copyright (Harvard University Press, 1995) at 48.
[16] Garnett K, Copinger and Skone James on Copyright Volume 1 Fifteenth Edition (Sweet and Maxwell, 2004), at 34.
[17] Spinello R, A defense of intellectual property rights (Edward Elgar Publishing, 2009), at 20
[18] (1721) 2 Mer. 441

which provided, 'after the expiration of the said term of fourteen years the sole right of printing... shall return to the Authors thereof if they are then living for another Term of fourteen years'.

This limited duration was to radically transform the very nature of copyright law. The *Statute of Anne* not only challenged the accepted view a work received perpetual protection but also accepted for the first time copyright law had to work towards other purposes, 'the Statute of Anne is the obvious starting point of a modern history of copyright law particularly one that seeks to expose the role of the public interest... [it embodies] the utilitarian underpinnings of copyright law[19]' Copyright no longer had the sole purpose of upholding the book trade's commercial interests but also had the purpose of protecting the public interest, 'the monopoly was limited in order to stimulate creativity and... wide public access to works in the public interest.'[20]. Copyright law now had to ensure it also met the requirements the public had from the regime, 'the public domain resulted... in the Statute of Anne [from]... the limited term of copyright which ensured that all copyrighted works would eventually be free and.... constitutes a watershed recognition of the public interest that copyright serves'[21] and 'because of its cultural importance and social utility, it was deemed completely normal that copyright... would enter the public domain'[22]. It is at this time when utilitarian and instrumentalism principles first began to take hold in copyright law. The *Statute of Anne* has been the subject of widespread academic debate. Opinions range from praise for the

[19] Alexander I, Copyright Law and the Public Interest in the Nineteenth Century, (Hart Publishing Limited, 2010), Page 17.
[20] Fellenstein C, Vassallo J and Ralston R, The Inventor's Guide to Trademarks and Patents, (Pearson, 2005), Page 32.
[21] Patterson L, The Nature of Copyright: A Law of User's Rights, (University of Georgia Press, 1991), Page 30
[22] Gompel S, Formalities in the Digital Era: an obstacle or opportunity? In Bently L (eds.) Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace (Edward Elgar Publishing, 2010), Page 421.

Act's progressiveness, 'a liberal measure, examining and attempting to balance evenly the merits of publisher, author and reader,'[23] to outright condemnation, referring to the Act as 'a miserable havoc,'[24] 'that was no more than a codification... of publishing practices that in Parliament's view had become respectable simply by virtue of their antiquity rather than the product of rational and well-thought-out policy choices'.[25] Other commentators merely reference the Act as 'a trade regulation not a copyright protection act'[26] that 'was directed to the problem of monopoly.'[27] In truth, although the 1710 Act 'closed the period of experiment and tentative administration of literary property and opened the period of modern copyright law,'[28] it was legally uncertain, and 'nowhere does the 1710 Act define "copies" or "books" or "rights", it merely assumes an understanding of them'[29]. The Act predominantly outlined book trade regulation rather than signifying a legal revolution however it was nonetheless a defining moment in copyright and legal history that later in the eighteenth century would firmly establish the public and the author as fundamental to copyright law.

Overall one can view the *Statute of Anne* as the first step towards a modern copyright system. It was not a comprehensive or perfectly formed new system but was a significant departure from the previous regime. As Deazley suggests, the Act 'secured the continued production of useful books through striking a culturally significant social

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[23]Avis F, The First English Copyright Act 1709, (Glenview Press, 1965). , at 8
24 Deazley R, On the origin of the right to copy (Hart Publishing, 2004), at 31.
[25] Zimmerman D, 'The Statute of Anne and its progeny: variations without a theme' 47 Hous. L. Rev. 965 (2010), at 971.
[26] Halbert D, Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights (Quorum Books Westport, 1999), at 51.
[27] Patterson L, Copyright in historical perspective (Vanderbilt University Press, 1968), at 45
[28] Ransom H, 'The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710' (Austin University of Texas Press, 1956), at 106
29 Feather J, Publishing, Piracy and Politics (Continuum International Publishing Group, 1994), at 63.

bargain, a trade-off involving the author, the bookseller and the reading public.'[30] The Act represented an arrangement which balanced several competing interests. Authors were provided with an exclusive right in their work to reward them for their efforts and encourage the creation of useful works. This right however was limited in duration so the work would eventually revert to the public domain to facilitate societies learning and aid the dissemination of knowledge. The two-fold problem however is this bargain was not understood at the time and the vague *Statute of Anne* 'did not settle the theoretical question behind the notion of literary property.'[31] Several fundamental questions remained unresolved. What was literary property, how was it different from tangible property and how did limited statutory duration affect perpetual common law copyright. These questions remained unanswered for almost 65 years until the seminal *Donaldson v Beckett*[32]decision in 1774. The *Donaldson* decision is the point where the *Statute of Anne* revolutionised copyright law and was where the needs of the public and authors were given credence for the first time. The *Statute of Anne* was revolutionary and 'signalled a strong blow at the continuation of the bookseller's monopoly even if this was not entirely clear until *Donaldson*[33].

3.3-The Booksellers Comeuppance-an unintentional revolution:

The limited duration of twenty-one years provided to 'books already printed' under the 1710 Act ended in 1731 with the works entering the public domain although this was not universally acknowledged. 1731 heralded the beginning of the Battle of the Booksellers, 'in their moment of triumph, the book trade oligarchs perhaps did not

[30] Supra Note 24, at 46.
[31] Supra Note 15, at 48
[32] (1774) 4 Burr 2408
[33] Supra Note 17, at 19

consider very carefully the implications of these temporal limitations.'[34] This battle ended in 1774 and during the period the nature of copyright was settled, the question of literary property was resolved and the public interest became a focal point of the copyright system. In 1731 the prevalent belief amongst English booksellers was the *Statute of Anne* was supplementary to the common law, 'they argued, copyright was already a property interest protected by the common law well before the Statute... the Statute was meant to augment, not erase it'[35]. The idea of perpetual common law copyright not only pre-dated the 1710 Act but according to the booksellers was evidence, that following the expiration of statutory protection the common law would continue to protect literary works perpetually. 'Hitherto the belief in perpetuity had been general, booksellers believing that any literary property which they had purchased became their and their successors' for all time.'[36] This support for perpetual copyright meant '[booksellers] continued to assign rights in literary property after the statutory period had expired.'[37] The Scottish Booksellers, having been subject to no Scottish copyright laws before the *Act of Union,* asserted the Act was the sole competent authority governing copyright. They contended that once the statutory period expired, the works belonged to the public domain, '[*the Statute of Anne*] mirrors exactly the limited terms of patent protection provided for inventions by the Statute of Monopolies'[38]

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[34]Feather J, A History of British Publishing Second Edition (Routledge, 2006), at 55
[35] Supra Note 25, at 976.
[36] Mumby F and Norrie I, Publishing and Bookselling: From the Earliest Times to 1870, Fifth Edition (Jonathan Cape, 1974), at 128.
[37] Sherman B, The Making of Modern Intellectual Property Law (Cambridge University Press, 1999), at 12.
[38] Supra Note 9.

The English booksellers were not oblivious to the impending conflict[39] and quickly changed their position. The booksellers in their original broadside[40] strongly supported the Bill however issued second[41] and third[42] broadsides when a limited duration was introduced. The booksellers stated in the third broadside they were seeking to assert their common law rights, 'if we have the right for Ten Years, we have a Right for ever' asserting their rights were, 'the same as with that of Houses'. When statutory protection ended in 1731 booksellers petitioned Parliament with a Bill in 1735[43]. This bill, the first to refer to the term 'Copy-right', wanted to extend the protection period. Another Bill introduced in 1737[44] wanted to extend duration to the life of the author plus eleven years but both Bills failed. The failure to secure new statutory protection was truly significant. Firstly it shows the booksellers understood their rights had been limited. Why else would the booksellers continually petition for new statutory protection if they already received perpetual common law rights once the statutory period ended? Secondly the failure to secure new statutory protection made the booksellers turn to the overly generous judiciary which began the battle of the booksellers in earnest. Notably despite the 1710 Act placing authors at the centre of protection 'the parties in these cases were all booksellers, not authors.'[45] Initially injunctions were rightfully granted in the 1720's in cases such as *Knaplock v Curl*[46] and *Gay v Read*[47] for works still under

[39] Based on Rose supra note 15, at 43-45.
[40] The Booksellers Humble Address to the Honourable House of Commons, In Behalf of the Bill for Encouraging Learning, etc. London, 1710.
[41] More Reasons Humbly Offer'd to the Honourable House of Commons, for the Bill for Encouraging Learning, and for Securing Property of Copies of Books to the Rightful Owners thereof. London, 1710
[42] The Case of the Booksellers Right to their Copies, or Sole Power of Printing their Respective Books, Represented to the Parliament. London, 1710.
[43] A Bill for the better Encouragement of Learning and the more effectual securing of the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein mentioned, (1735) Bod. Lib. M.S. Carte 114 391-396.
[44] A Bill for the Better Encouragement of Learning by the more Effectual Securing the Copies of Printed Books to the Authors or Purchasers of such Copies, (1737) BL B.S. 68/16 (1).
[45] Supra note 15, at 5
[46] (1722) c11 690/5
[47] (1729) c33 351/05

statutory protection. Following 1731 and the lapse of statutory protection, the Statute was either widely ignored or misunderstood by the English Courts. Chancery Injunctions were awarded in *Eyre v Walker*[48], *Motte v Faulkner*[49], *Walthoe v Walker*[50] and *Tonson v Walker*[51] to prevent the printing of literary works that should have entered the public domain. In the *Eyre* and *Walthoe* cases, the *Statute of Anne* was not even mentioned.

Perpetual copyright poses a significant problem for the public because it withholds work from the public domain forever, making the *Statute of Anne* redundant. The opposing London and Scottish booksellers consistently contested the nature of copyright with the English Courts sympathetic to the London booksellers. The Scottish Courts in a mixture of antagonism and contempt for the monopolistic actions of the London booksellers took a very different view. The Scottish Court of Session in the first case invoking the common law, ruled in *Midwinter v Hamilton*[52] a literary work could not be protected beyond the statutory period of protection[53] however on appeal (*Millar v Kincaid*[54]), the House of Lords held a work could be protected perpetually in common law. Two cases subsequently followed, where the English Courts once again asserted common law copyright. The court in *Tonson v Collins 1761*[55]*-1762*[56] strongly supported perpetual copyright[57]. Willes J later commented, that 'so far as the Court had

[48] (1735) c.11 1520/29
[49] (1735) c.11 2249/4
[50] (1737) c.11 1534/62
[51] (1739) 3 Swans 672
[52] (1748) Mor Dict 8305
[53] No damages were awarded in the case because the work had not been entered on the Stationers Register.
[54] (1743) (unreported) 98 ER 210.
[55] 1 Black W. 301
[56] 1 Black W. 321
[57] The case was ultimately dismissed because of collusion between the parties.

formed an opinion, they all inclined to the plaintiff'[58]. In *Millar v Taylor*,[59] which represents the quintessential natural rights approach to copyright law, Robert Taylor was sued for publishing James Thomson's *'The Seasons'* even though the copyright was purchased in 1729 and had fallen out of statutory protection. The majority in the 3:1 decision held authors had a perpetual common law property right in their work and granted a perpetual injunction. The arguments in both *Tonson* and *Millar* not only exemplify the two opposing viewpoints on the nature of copyright but these arguments have changed very little in 250 years and remarkably resonant in contemporary copyright law debate.

In *Tonson v Collins* William Blackstone, argued in support of perpetual copyright stating, 'the uniform opinion of that Court [Chancery], was that a copy-right may, and does subsist, independent of the Statute of Queen Anne'[60]. Furthermore 'the natural foundation and commencement of property, [were] invention and labour'[61] and argued there was no distinction with tangible property, 'both were exerted in literary production...the present work is... an original composition... implying invention... property may with equal reason be acquitted by mental as by bodily labour.'[62] Joseph Yates conversely argued, 'the right contended for... clashes with every species of property known in this kingdom'[63], 'from... publication, they are thrown into a state of universal communion'[64] and 'it is no species of property... because, it is incapable of separate and exclusive enjoyment... the act of publication... made the work common to

[58] Millar v Taylor (1769) 4 Burr. 2303, at 2327
[59] Ibid.
[60] Tonson v Collins, 1 Black W. 301 1761-1762, at 332.
[61] Ibid, at 321.
[62] Ibid
[63] Ibid, at 333.
[64] Ibid

everybody... it is become a gift to the public'[65]. These issues were finally addressed in the *Millar* decision where Lord Mansfield, the most ardent proponent of common law copyright in eighteenth century England, stated, 'an author should reap the pecuniary profit of his own ingenuity and labour. It is just that another should not use his name without consent'[66] and that 'the 8th of Queen Ann is no Answer. We are considering the Common Law, upon Principles before and independent of that Act.'[67] Mansfield in reference to the cases discussed above concluded, 'I look upon these injunctions as equal to any final decree'[68]. Willes J assented, stating 'it is certainly not agreement to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work'[69] and that 'there is a common law right of an author... not taken away by the 8th of Anne'[70]. Aston J concurred stating, 'I do not know, nor can I comprehend any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works'[71].

Yates J dissented, 'all property has it proper limit, extent and bounds... [perpetual copyright] would lead to inconvenient consequences the public may feel... instead of tending to the advancement... of literature'[72]. Perpetual copyright he contended would, 'forever restrain the rest of mankind... by an endless monopoly... it is my duty... as a member of society and even as a friend to the cause of learning, to support the limitations of statute'[73]. He sensibly concluded, 'the Statute of Queen Ann. has vested a

[65] Ibid, at 334.
[66] Supra Note 58, at 2398
[67] Ibid.
[68] Ibid.
[69] Ibid, at 2334.
[70] Ibid, at 2411.
[71] Ibid, at 2345.
[72] Ibid, 2357. Yates J was previously the Counsel for the defendant in Tonson v Collins discussed above.
[73] Ibid, 2395.

new right in authors for a limited time'[74] and 'there is not one clause, one expression . . . that hints at a prior exclusive right in authors to an eternal monopoly'[75]. Unfortunately, Yates provided a dissenting judgement; the decision of the majority must be criticised because it effectively made the *Statute of Anne* redundant and rendered the encouragement of learning and the needs of the public mere afterthoughts. The Scottish Courts when faced with such an affront were not silent. In *Hinton v Donaldson 1773*[76], a deliberately provocative judgement, the Scottish Court refused to follow *Millar*. The Court did not recognise copyright as tangible property stating it was a new form of property, 'the ordinary subjects of property are well known, and easily conceived ... lands and tenements, houses... property, when applied to ideas or literary... compositions is perfectly new'[77]. Secondly perpetual copyright was not recognised, Lord Gardenstone stated, 'all civilised nations do support the author's claim to a temporary protection, not to a... perpetual right'[78]. Lord Kames concluded 'even if the common law right existed in England it did not in Scotland'[79] to which Lord Hailes and Lord Clerk agreed, 'all our authors have acted as if there had been no such right'[80]. Lord Kames commented perpetual copyright was 'contradictory to the first principles of society'[81] and enforcing perpetual copyright 'would be a sad day for learning'[82], 'ruinous to the public interest,'[83] and that the public interest 'could not be sacrificed to

[74] Ibid, 2386.
[75] Ibid, at 2390.
[76](1773) Mor. Dict. 8307. Discussion is based on Deazley, R. (2008) 'Commentary on Hinton v. Donaldson (1773)', in Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer.
[77] Ibid, at 25.
[78] Ibid, at 22
[79] Ibid, at 18-21.
[80] Ibid, at 14.
[81] Ibid, 18-21.
[82] Ibid
[83] Ibid

the pecuniary interests of a few individuals'[84]. The *Hinton* decision meant the English and Scottish judicial approaches were irreconcilable and a final resolution was needed.

The House of Lords in *Donaldson v Beckett*, in what was effectively an appeal against *Millar*, ended the Battle of the Booksellers and the Question of Literary Property, albeit not to everyone's satisfaction, 'perpetual copyright was butchered by an Act of Parliament passed by an ignorant legislature.'[85] *Donaldson v Beckett* will live in infamy as the defining moment in copyright history, and 'when it was handed down... was taken as marking the end of what remains one of the most important periods in the history of intellectual property law.'[86] It was time for the English booksellers to reap what they had sown. Booksellers first pressured Parliament for new legal protection when the Licensing Acts lapsed and booksellers who used the author to further their own commercial interests. It was now time for the booksellers to yield to the public. The case once again involved the notorious Scottish Bookseller Donaldson and Thomson's work *'The Seasons'*. The case reached the House of Lords where, at this time, Judges provided an advisory opinion and the Peers then voted on the issue. Eleven of the twelve judges provided their advice.[87] They held 7:4 that authors had a perpetual copyright in their works but held 6:5[88] the *Statute of Anne* limited this right. The Peers then voted 22-11 common law copyright had never existed at all and overturned the perpetual injunction awarded by Lord Chancellor Apsley.

[84] Ibid
[85] Birrell A, Seven lectures on the law and history of copyright in books (Cassell, 1899), at 19.
[86] Supra note 37, at 14
[87] Mansfield abstained because he had previously provided his opinion in Millar v Taylor.
[88] This figure has been contested.

Donaldson has been severely criticised in some quarters, 'how annoying, how distressing, to have evolution artificially arrested and so interesting a question stifled by an ignorant Legislature'[89] and 'another venerable custom shattered...the supposed perpetuity of copyright.'[90] Undoubtedly, however, the correct decision was reached and was later adopted in America in *Wheaton v Peters*[91]. *Donaldson* was revolutionary in three respects. Firstly, the supremacy of the *Statute of Anne* was recognised, 'as a result of the decision, the concept of perpetual copyright was finally laid to rest,'[92] with the outcome that, 'unlike tangible property [copyright] is not perpetual but strictly temporary as if it were an organic life form reaching the end of its life span'[93]. The Peers held copyright was, 'a purely statutory phenomenon... fundamentally concerned with the reading public, the encouragement and spread of education.'[94] Despite the Lords ruling copyright was a creation of statute, many commentators are of the opinion that, 'ultimately, what has been taken from *Donaldson* is that there did exist a perpetual common law copyright... but that it was... prescribed by the Statute of Anne'[95]. The second, and most important revolutionary point, was that *Donaldson* represented the final nail in the coffin for literary monopolies with an assertion of the public interest in copyright law. 'It was a most strategic victory for those who would insist that claims to trading exclusivity must be balanced against public interest'[96]. At long last the forgotten aims of the *Statute of Anne*, to encourage learning were realised. The main rationale

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[89] Supra note 36, at 128
[90] Ibid, at 171
[91] 33 US 591 (1834)
[92] Murphy A, Shakespeare goes to Scotland: a brief history of Scottish editions in, Murphy A, Scotland and Shakespeare (Manchester University Press, 2004), at 160.
[93] Saint- Armour P, The Copywrights- Intellectual Property and the Literary Imagination (Cornell University Press, 2003), at 1.
[94] Deazley R, 'The Myth of Copyright at Common Law' Cambridge Law Journal, (2003) 62(1) 106-133, at 132.
[95] Deazley R, 'Re-reading Donaldson 1774 in the Twenty First Century and why it matters' (2003) European Intellectual Property Review 25(6) 270-279, at 275.
[96] Cornish W and Llewellyn D, Intellectual Property: patents, copyright, trade marks and allied rights (Sweet and Maxwell, 2007), at 10-03.

underlying the judgement being, 'to strike a more appropriate balance between the interests of the author and the wider social good.'[97] During the Battle of the Booksellers, particularly the granting of perpetual injunctions, it seemed the public interest and the encouragement of learning were merely ancillary to the economic interests of booksellers. In *Donaldson* the public interest was championed as a fundamental component of copyright law.

The third revolutionary point was the emerging role of the author. Neither *Donaldson* nor the *Statute of Anne* were solely responsible for the shift from bookseller to author. The Battle of the Booksellers influenced eighteenth century public debate and the 'the aftermath of that struggle left behind a newly minted vision of the author as a social benefactor, a mental labourer laying claim to his intellectual property as a matter of natural right'[98]. Authors began to assert their rights, became recognised as the primary right holder and the party who had rights in literary works. Booksellers, the party that previously dominated the literary landscape, with only an economic interest in literary works normally at the expense of both the author and the public, would no longer be supreme. Since the Battle of the Booksellers, 'the author gradually came to be recognised as a more important player in the commercial world of the book'[99] and 'after Donaldson... any discussion of the law of copyright were to revolve around authors as much as or more than they did around the book trade'[100].

97 Deazley R, Rethinking Copyright: history, theory and language (Edward Elgar Publishing, 2006), at 24.
98 Supra Note 25, at 14.
99 Supra Note 29, at 56
100 Ibid.

The rationale underlying other forms of intellectually property is inherently clear. Patents reward inventors who further human knowledge because they sustain cost in developing their inventions. Trade marks guarantee quality, protect consumers, identify the source of goods and protect reputation. The rationale underlying copyright however was not so apparent but was finally determined in *Donaldson*. The consensus in *Donaldson* was copyright law had a dual purpose. Firstly *Donaldson* recognised authors had to be encouraged to create works and upheld author's statutory rights. Secondly copyright law had the purpose of promoting the aims originally incorporated into the *Statute of Anne* of encouraging learning amongst the public. In order to achieve this second purpose limited duration was upheld. Since *Donaldson* these dual purposes have formed the basis of copyright law with the system trying to balance the economic interests of right holders against the needs of the public. Subsequent reforms have focused on how best to achieve these purposes. Discussion has focused on copyright duration, subsistence and the scope of copyright exceptions rather than any discussion on the fundamental nature of copyright or the purposes it is meant to achieve. *Donaldson* struck an effective balance between the public and the author with the accord lasting almost seventy years. *Donaldson* was the first time instrumentalism formed a fundamental part of copyright law. The decision recognised rights were provided to authors for a limited time because this was considered the best method to secure the intended purposes of encouraging the creation of works whilst disseminating knowledge to the public. A balance had been struck where both rights holders and the public were adequately provided for. Continuous expansion in the following centuries however has undermined this balance with reform frequently favouring the economic interests of right holders. The current copyright crisis has reignited the debate about the adequacy of copyright law to balance the interests of right holders and the public.

Questions have arisen over whether copyright has abandoned the principles established in *Donaldson* and if current law still protects this dual purpose.

3.4-Copyright Expansion:

The *Statute of Anne* changed very little in its substantive nature between its enactment and the *Copyright Act 1842*[101]. The *1801 Copyright Act*[102] extended the *Statute of Anne* to Ireland following the *Act of Union 1800.*[103] At this time copyright also rapidly expanded to endow other subject matter with copyright protection. The *Statute of Anne* unlike copyright legislation of today was not an all encompassing law but protected 'books and other writings' only. Subsequently, separate statutes protecting different subject matter were enacted to protect various subject matter including designs[104], sculptures, models and busts[105], lectures[106], dramatic performances[107], musical compositions,[108] paintings and photos[109].

The *1842 Copyright Act* can be viewed as the origin of many problems facing current copyright law and the accompanying political debates of the time are remarkably familiar to current debate. The Act is known as Talfourd's Act because of the persistence of Thomas Noon Talfourd. He introduced annual Bills in Parliament from 1837 with the sixth Bill[110] becoming the *1842 Copyright Act*. Talfourd stated, 'the claim of the author to perpetual copyright was never disputed until literature had received its

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[101] An Act to Amend the Law of Copyright 1842, 5 & 6 Vict., c.45
[102] 1801, 41 Geo.III, c.107
[103] 1800, 40 Geo.III, c.38
[104] Engraving Copyright Act 1735, 8 Geo. II, c.13 and 1766, 7 Geo. III, c.38
[105] Models and Busts Act 1798, 38 Geo.III, c.71
[106] Publication of Lectures Act 1835, 5 & 6 Will.IV, c.65
[107] Dramatic Literary Property Act 1833, 3 & 4 Will.IV, c.15
[108] Held to be within the Statute of Anne in Bach v Longman (1777) 2 Cowp. 623
[109] Fine Art Copyright Act, 1862, 25 & 26 Vict., c.68
[110] Bill to Amend the Law of Copyright, 1841, Paper No.6, I, 429

first fatal present in the first Act of Parliament'[111] and that 'the present term of copyright is much too short for the attainment of that justice which society owes to authors'[112]. Lowndes, the first to issue a treatise on British copyright law[113] reiterated this, 'copyright did formerly exist at common-law, and was only taken away by a mistaken interpretation of the effect of the Statute of Anne'[114] and that 'there was no doubt a measure so imperatively one of national justice... which allows genius and learning to pursue their labours in the face of death... secure in the knowledge that the fame which posterity will confer... will not be unaccompanied by substantial benefits to their family'[115].

The opposing side led by Lord Macaulay argued an extended period was 'a tax on readers for the purpose of giving a bounty to writers'[116] and that it 'should not last a day longer than is necessary,'[117] Warbutron agreed that 'the bill as it stood... might prevent the diffusion of political information... the public would be deprived of many advantages.'[118] The various Parliamentary Bills also created much public interest with clear public support against any reform. Between 1838-1840, there were 500 petitions with 30,000 signatures against the Bills but only 37 petitions with 341 signatures supporting such legislation[119]. The Act when enacted was important in two respects. Firstly the author was the centre of protection, 'it was an authors' act... just as the 1710

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[111] Hansard XXXVIII, 868 (May 18th, 1837)
[112] Hansard XLII, 556 (25 April 1838).
[113] Lowndes J, An Historical Sketch of the Law of Copyright Second Edition (Saunders and Benning, 1842)
[114]Ibid, VIII
[115] Ibid
[116] Hansard LVI (5th February 1841), at 348
[117] Ibid
[118] Hansard XLV 939 (February 27th 1839)
[119] Seville C, Literary Copyright Reform in Early Victorian England. The Framing of the 1842 Copyright Act (Cambridge University Press, 1999),, at 33.

Act had been a book trade act.'[120] It was prominent authors including Carlyle, Southey, Arnold and Wordsworth[121] who pursued reform not Booksellers. The book trade, in 'a striking reversal,'[122] opposed the various copyright Bills and 'mounted a formidable campaign against it in Parliament and in the press, in each of the five successive sessions'[123] because 'they did not want to see a sudden decrease in the number of public domain books available for reprinting.'[124] Secondly, the duration of protection was extended to 42 years from publication or the life of the author plus seven years, whichever was longer[125]. Although this was shorter than Talfourd's original life plus sixty years proposal, it was the first posthumous protection period. The issue however is that the public interest which underpinned the *Statute of Anne* and *Donaldson* had been marginalised. The preamble to the 1842 Act shows a dramatic shift with the aim being, 'to afford greater encouragement to the production of literary works of lasting benefit to the world'. The admirable aims of encouraging learning were replaced by the objective of rewarding authors for their work which simply translated to providing longer protection with little consideration of the impact on the public interest or the ability of copyright law to achieve the dual purposes established in *Donaldson*.

The 1842 Act severely undermined the balance achieved in *Donaldson* by hindering the ability of copyright to protect the public interest. By 1842, the basic nature of copyright was understood; 'Copyright did achieve some form of ideological

[120] Supra Note 29 , at 6.
[121] Wordsworth W, 'A plea for authors' 1838
[122] Supra Note 15, at 111.
[123] Feather, J, 'Authors, Publishers and Politicians: The History of Copyright and the Book Trade', (1988) 12 European Intellectual Property Review, 377-80, at 380.
[124] Supra Note 34, at 114
[125] 1842 Copyright Act, Section 4

closure during the late nineteenth century'[126]. Despite acceptance of the ideological nature and purpose of copyright, the 1842 Act was the first time since the *Statute of Anne* that the author's economic rights were given priority above the needs of the public. Yates J as outlined above in 1769 stated he would not entertain the opinion that profit from 28 years protection could not satisfy right holders. In 1842 duration of life plus 7 years was imposed however does this extension and subsequent expansion of duration achieve the purposes copyright is meant to? If we are arguing copyright is instrumentalist in nature, in that it is tool used to achieve the defined set of purposes established in *Donaldson*, we can conclude longer duration does not help met these objectives. The requirements the public have from an effective copyright regime such as accessing works, having knowledge disseminated and having a robust public domain were fundamental to the *Donaldson* judgement however became marginalised when duration was expanded. Although proponents of copyright may argue a post mortem term is a proportionate reward for authors that encourages creativity and allows their works to be exploited for longer, this is highly questionable. A post mortem term significantly curtails the scope of the public domain. Works are withheld from the public for decades even though the vast majority of economic reward has already been garnered and the works value to society has diminished over time. Copyright proponents argue it's unjust for another party, for instance a 'pirate' to appropriate the mental labours of an author however the same argument can be applied to a post mortem term. Heirs of authors are rewarded for the labours of another when they have not exerted any mental effort and have made no contribution to society's knowledge base.

[126] Supra Note 93, at 51.

3.5-Public Domain Revival:

The expansion of copyright in the nineteenth century and the negative impact on the public interest encouraged attempts to limit the scope of copyright and reassert the public interest as a fundamental aspect of copyright law. The Royal Commission report,[127] published on May 24th 1878, was 'a serious attempt from within the government to abolish copyright law or at least rethink its immanent ideology'[128] The Commission recommended a term of life plus thirty years and the codification of the eighteen various copyright laws concluding copyright law was 'wholly destitute of any sort of arrangement, incomplete, often obscure and even when it is intelligible... so ill expressed that no-one... can expect to understand it'.[129] The final report witnessed the traditional divide between advocates of copyright as a natural right and those supporting the public interest. Ten of the fifteen commissioners attached dissenting statements and Sir Louis Mallet repudiated the entire report. The overall conclusion was that although copyright had its defects, 'monopoly copyright embodies the best compromise between individual creative incentives and the public interest'[130]. The 1878 Royal Commission Report however did not result in any immediate changes, as Lord Manners 1879 Copyright Consolidation Bill,[131] Lord Monkswell's 1890 Copyright Bill[132] and the Copyright (Amendment) Bill 1897 failed to be enacted. The failure to reform copyright law after the Royal Commission's Report led Lord Monkswell to conclude, 'copyright

[127] Report of the Royal Commission of 1878: 24 PP (C2306)
[128] Supra Note 93, at 55
[129] Supra Note 127
[130] Supra Note 93, at 55.
[131] Bill to Consolidate and Amend the Law Relating to Copyright (1878-9) (No. 265) 2 Parliamentary Papers 3.
[132] A Bill to amend and consolidate the law relating to Copyright (1890)

law was in a glorious muddle, the law of copyright is contained in eighteen Acts of Parliament and in some ill defined common law principles'[133].

The Berlin Act 1908 eventually provided the impetus for reform and the 1909 Copyright Committee looked to implement the Berne Convention into domestic law. The report recommended a period of life plus 50 years and that, 'it would be of great advantage if the British law were placed on a plain and uniform basis'[134]. The report recommended Parliament adopt the Berne Convention which was then implemented in the *1911 Copyright Act*[135]. This Act was a changing point in copyright history because the Berne Convention was incorporated into British Law and the majority[136] of the various copyright statutes were codified into a unified regime for the first time. By 1911 protectable subject matter included paintings, drawings, photographs, sound recordings, architectural works and each photograph of a film.[137] The 1911 Act besides ensuring 'British copyright was governed by a single, integrated piece of copyright legislation for the first time since 1710,'[138] made several fundamental changes that undermined the public interest. Firstly copyright protection was extended to the life of the author plus 50 years.[139] Significantly the Act undermined the public interest by expanding the exclusive rights available to authors. Since the *Statute of Anne* the sole traditional right was to copy but under the 1911 Act the author gained additional rights. The author was now given exclusive rights to 'reproduce, perform or publish any translation of the

[133] Lord Monkswell, 353 PARL. DEB., H.L. (3d ser.) (1891) 438.
[134] Report of the committee on the Law of Copyright, Cmd.4978 (1909), at 7.
[135] 1 & 2 Geo. V, c. 46.
[136] Did not include Musical (Summary Proceedings) Copyright Act 1902 2 Edw. 7. c. 15 and Musical Copyright Act 1906 Edw. 7. c. 36.
[137] Barker v Hutton [1912] 28 TLR 496
[138] Phillips J, Whale on Copyright Fifth Edition (Sweet and Maxwell, 1997), at 9.
[139] Section 3.

work'[140] and also works could be 'converted' to other forms of subject matter, 'in the case of a dramatic work, to convert it into a novel or other non-dramatic work'[141]

The 1911 Act also provided an innovation that once again recognised copyright had a second purpose in addition to the economic interests of right holders. Compulsory licensing and fair dealing provisions were introduced. The fair dealing provisions were originally a judicial concept[142], dating back to 1740[143] and had first been discussed by Parliament in Talfourd's 1837 Bill but were not adopted until 1911. Fair dealing provisions act as an exception to the copyright monopoly and allow copyrighted material to be used in limited circumstances and provide a defence against rights holder's infringement proceedings. They control when the public may use copyrighted works and are essential to achieving any balance. The problem however is that, 'when Parliament did finally step in to provide for a series of exceptions it did so in a very restrictive way, replacing a general fair use defence with the much less flexible fair dealing provisions'[144]. The six narrow exceptions provided under sections 2(1)(i)-(vi) only allowed use of copyrighted works in very limited circumstances. These exceptions were a step in the right direction for the public which had become somewhat dormant under the previous Acts. Copyright had constantly expanded in terms of duration, subject matter and rights without reciprocal expansion for the public. As the fair dealing provisions illustrate, not only had the public interest been inadequately provided for previously, but also copyright expansion had acted as a constraint on learning and the dissemination of knowledge, otherwise why was it necessary to introduce these exceptions. The fair dealing provisions are the embodiment of the conflict between

[140] Section 1(2)(A)
[141] Section 1(2)(B)
[142] The courts also previously referred to the concept as fair use.
[143] Read v Hodges 1740 Bro. P.C. 138 and Gyles v Wilcox 1740 2 Atk. 141; 26 E.R. 489.
[144] Burrell R, 'Reining in copyright law: is fair use the answer? I.P.Q. 2001 No 4, 361-388. at 367.

rights holders and the public interest. The public can circumvent copyright through the fair dealing provisions and the scope of these provisions help determine the balance between the public and right holders and are essential for copyright to achieve its intended purpose, 'the public domain haunts copyright through the category of fair use, which gives the commodity a fore glimpse of its eventual death into a public gift economy. Copyright reciprocally haunts the public domain through the possibility that unprotected works might continue to function as scarce, embattled, commodfied resources'[145].

3.6-Towards Modernity:

The *1911 Copyright Act* was subsequently reformed by the *1956 Copyright Act*[146] and the *Copyright, Designs and Patents Act 1988 (CDPA)*[147], the latter of which is still in force. The 1911 Act and its 'basic principles still underpin the law of copyright in Britain.'[148] The 1956 Act maintained protection for the life of the author plus fifty years[149] and technological advances were considered with the protection of broadcasts[150], cinematograph[151] and typographical arrangements[152] for the first time. Most significantly the 1956 Act expanded the fair dealing provisions under sections 6-10. The provisions however remained narrow and were strictly interpreted in *Sillitoe v McGraw-Hill Book Co (UK) Ltd*[153], *Independent Television Publications Ltd v Time Out Ltd*[154] *and Associated Newspapers Group Plc v News Group Newspapers Ltd*[155].

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[145] Supra Note 93, at 130.
[146] 4 & 5 Eliz .2 Ch.74
[147] C.48
[148] Lai S, The copyright protection of computer software in the United Kingdom (Hart Publishing, 2000), at 129.
[149] Section 3.
[150] Section 14
[151] Section 13, protected for a period of fifty years.
[152] Section 15
[153] [1983] FSR 545
[154] [1984] FSR 64
[155] [1986] RPC 515

The 1956 Act and 'the fair dealing provisions were a step in the right direction'[156] and extended fair dealing to use of copyrighted material for the purposes of criticism or review[157], reporting current events,[158] use in judicial proceedings[159] and the public reading of a reasonable extract.[160] The 1956 Act made very few fundamental changes and quickly became outdated. Technological advancements began to transform not only the way business, education and politics functioned but also began to undermine the effectiveness of the copyright system, 'in the 1970's it was clear that if copyright was to survive the impact of modern technology-photocopying... adaptations of UK law and practice would be needed'[161].

The Whitford Committee investigated these issues and published their report in 1977[162] which eventually led to the *CDPA* 1988. The report supported the traditional balance between the public interest and right holders stating, 'we agree with the generally held view that the balance between the rights of the copyright owner... and the exceptions in favour of copyright users... is about right, and that no abrupt change in the balance is called for'.[163] The *CDPA* 1988 maintained this stance and the balance shifted further in favour of rights holder rather than the public. The fair dealing provisions under the Act which have consequently been amended by the Copyright and Related Rights Regulations 2003[164] are far more comprehensive then under previous legislation. 'Some 57 sections which set out, often in great detail, a wide range of acts which will

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[156] Supra Note 5, at 207.
[157] Section 6(2).
[158] Section 6(3).
[159] Section 6(4).
[160] Section 6(5).
[161] Supra Note 96, at 10-17
[162] Report of the Committee to Consider the Law on Copyright and Designs, Cmnd 6732 (1977)
[163] Ibid, at 16.
[164] Transpose of Directive 2001/29/EC.

not infringe copyright.'[165] The public however have benefitted very little from this expansion firstly because the Courts have once again interpreted the fair dealing provisions very narrowly, particularly in *Hyde Park v Yelland*[166]. Secondly in other jurisdictions, principally the US[167], a general fair dealing defence is provided which provides much stronger and flexible protection to the public when using copyrighted material. The *Whitford Committee* recommended a general fair dealing defence where use of the copyrighted material would *'not unreasonably prejudice the copyright owner's legitimate interests'.*[168] *This recommendation was unfortunately never adopted.* The public domain is further encroached upon under the *CDPA 1988* not only because the duration of copyright was lengthened to the life of the author plus seventy years,[169] for the majority of subject matter but also copyright was extended to new subject matter including satellite broadcasting,[170] cable programmes,[171] as well as providing rental rights[172] and performer rights[173] for the first time.

Since 1988, the *CDPA* has remained the key governing copyright statute, however, the copyright legislative regime has been amended several times with the UK a signatory to the *WIPO Copyright Treaty* and *GATT TRIPS*[174]. The European Union has also had a significant effect. Unlike Designs[175] and Trade Marks,[176] no unified copyright regime has been implemented at Community level, although the CJEU has

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[165] Supra Note 144, at 361.
[166] [2001] 3 WLR 1172
[167] Known as fair use in US, Title 17 US Code Sections 107-118.
[168] Supra note 162, at 676.
[169] Section 12(2).
[170] Section 6
[171] Section 7
[172] Section 5(B)
[173] Section 180.
[174] General Agreement on Tariffs and Trade 1994 and Agreement on Trade Related Aspects of Intellectual Property Rights.
[175] Designs Directive 96/9/EC
[176] Trade Marks Directive 2008/05/EC

begun a harmonisation agenda attempting to harmonise several aspects of copyright law through its judgements. The EU has also legislated in specific areas including computer circuits[177], computer programs[178], rental and lending[179], satellite broadcasts[180], copyright duration[181], databases[182], resale right in works of art[183] and the Information Society *Directive*.[184]

3.7-Copyright Duration:

The current duration of copyright for the majority of subject matter is the life of the author plus 70 years although longer periods have been proposed[185]. In terms of balance, the issue of duration is essential because it determines when a work reverts to the public domain. A duration that is too short will damage the interests of right holders who are discouraged from creating works because they cannot effectively exploit them. An excessive duration like the one currently enacted will damage the public interest because works are withheld from the public domain for decades. We must ask if expansion from the original 28 year period to life plus 70 years benefits the public? does the expanded term encourage learning or help to disseminate knowledge? The answer is a resounding no, 'there has been remarkably little detailed examination of the policy considerations applicable to the determination of protection for copyright.'[186] Excessive duration can remove the incentive to create because right holders are able to rely on one

[177] Semiconductor Topographies Directive 87/54/EEC
[178] Computer Programs Directive 91/250 EC
[179] Rental and Lending Rights Directive 2006/115 EC
[180] Satellite broadcasting and cable retransmission directive 93/83/EEC
[181] Copyright Term of Protection Directive 2006/116/EC
[182] Database Directive 96/9/EC
[183] Artist's Resale Right Regulations 2006 No. 346.
[184] Directive on Copyright and related rights in the Information Society 2001/29/EC
[185] A period of 95 years was originally proposed for sound recordings for Directive 2011/77/EU

[186]Jehoram Cohen H and Keuchenius P, Audiovisual media and copyright, (Kluwer,1994), Page 27

work for their lifetime rather than having to create new works to earn revenue. Secondly disproportionate duration withhold works from the public. Not only does this conflict with the aims of the *Statute of Anne* by discouraging learning and preventing knowledge from being disseminated to the public but it also hinders creativity amongst the public who cannot use copyrighted materials to create new works. For example numerous adaptations exist of Shakespeare because his works are not under copyright protection. Current copyright laws can protect works for well over a century and prevent such adaptations even though they help fulfil copyright's purpose of adding to society's knowledge base. In *Donaldson* Lord Camden expressed concern that perpetual copyright would result in all learning being controlled by booksellers. This has become realised under the current duration period with the creative industries being able to control public access to copyrighted materials, 'too long a period of protection leads to... the inability to use the work without permission of... those who own the rights long after the author has died.'[187]

The result of the current duration period is that an adequate balance cannot be achieved. Changes to duration have been discussed extensively by academics however I propose the original duration of 28 years imposed by the *Statute of Anne* is more than sufficient. This period is preferable firstly because it rewards the person creating the work not a third party who has contributed nothing to society's knowledge base. A 28 year period would mean the purpose copyright has of providing an incentive to creators is maintained because creators are still given ample opportunity to exploit their work. The current period of life plus 70 years is excessive because the majority of works earn revenue in the first few years, 'the expected commercial life of a copyrighted work is so

[187] Patry W, How to Fix Copyright (Oxford University Press, 2011), Page 193.

much shorter than the copyright term'[188]. Landes and Posner conducted a study on the *US Copyright Acts* of 1831 and1909 which provided a 28 year duration that was renewable for an additional 14 and 28 year period respectively. They found that after 28 years, even with a nominal renewal fee only 11% of works were renewed between 1883-1964 whilst a 1960 US Copyright Office study estimated that less than 15% of works were renewed[189]. This figure fell to 11% for Drama, 7% for books, 0.4% for lectures, 4% for Art and 0.4% for technical drawings[190].This means current copyright duration not only protects works for decades longer than necessary but withholds works from the public domain that have already been successfully exploited and their commercial value has been realised. A shorter period allows works to enter the public domain earlier meaning the public are able to use, adapt, research and expand upon knowledge, 'shorter protection increases the use of existing creative work, and hence raises the benefit to end-users and also facilitates new creations that build upon earlier works.'[191] A shorter duration would also encourage more creativity because a creator would have to keep creating works rather than relying on their pre existing works. This not only incentivises creation but would also result in more knowledge being disseminated to the public and a considerably improved public domain. A reduction in copyright duration is essential to achieving a balanced copyright regime because excessive duration whilst benefitting a very small minority of works severely damages the public interest.

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[188] Landes W and Posner R, The Economic Structure of Intellectual Property Law, (Harvard University Press, 2009), Page 247

[189]Subcommittee on Patents, Trademarks and Copyrights of the Subcommittee on the Judiciary, (86th Congress, 2nd session), Copyright Law Revision Study No. 31 (Comm Print 1961), at 187. Available at http://www.copyright.gov/history/studies/study31.pdf

[190] Fishman S, The Public Domain: How to Find & Use Copyright-Free Writings, Music, Art & More, (Nolo, 2012), Pages 389-390.

[191] Png Ivan and Qiu-hong Wang, 'Copyright duration and the supply of creative work' SSRN 932161 (2006), Page 2

3.8-The Digital Age-Copyright Collapse:

The 2006 Gowers Review of Intellectual Property noted the continued importance of balance between the public and rights holders in the digital age, 'the ideal IP system creates incentives for innovation, without unduly limiting access for consumers... it must strike the right balance'[192]. The review also found that, 'the current system to be broadly performing satisfactorily'[193] and that 'creativity, innovation and investment are crucial to boosting the productivity of the UK economy... the UK must be able to harness creativity... in order to compete in the global, knowledge-based economy. Intellectual Property creates the link in the chain which incentivises individuals'[194]. These assertions however could not be further from the truth. The right balance is not currently struck between rights holders and the public and the current system is not fit for purpose. The digital age, particularly internet piracy, poses the most significant threat that the copyright regime has ever confronted. Noam correctly describes contemporary copyright law as 'the copyright- crisis era,'[195] whilst other academics have commented the digital era has 'propelled the music industry into chaos',[196] that 'the emerging global communication network erodes intellectual copyright control,'[197] and that 'challenges to copyright in this area are made particularly apparent by the wide

[192] Gowers Review of Intellectual Property 2006, available at https://www.gov.uk/government/publications/gowers-review-of-intellectual-property [Last Accessed September 30th 2014], foreword.
[193] Ibid, Section E.6
[194] Ibid, Section 7.1
[195] Steinmueller W.E, Peer to Peer Media File Sharing: From Copyright Crisis to Market, in Noam E, Peer to Peer Video: the economics, policy and culture of today's new mass medium (Springer, 2008), at 33.
[196] Spinello R, Cyberethics: morality and law in cyberspace (Jones & Bartlett Learning, 2006), at 104.
[197] McNair M, Cultural Chaos: journalism, news and power in a globalised world (Taylor & Francis, 2006), at 188.

acceptance of downloading...which copyright protection has been altogether ineffective in managing'.[198]

The digital age has reawakened the historical debates between right holders and the public with more intensity than ever before. The public interest has faced resurgence with widespread disenchantment with copyright law and new political parties seeking to abolish copyright altogether. Technological initiatives such as P2P, digital formatting of copyrighted works, Google Books, CopyLeft and Creative Commons have undermined the traditional copyright regime. New technologies have diluted the ability of right holders to control their work and have enabled copyright works to be disseminated to a wider audience than ever before. In the face of such revolutionary changes and strong opposition, right holders and the creative industries have sought more radical means of enforcing copyright. Copyright since its inception has faced issues of piracy; but the internet age has enabled piracy to become common place and rampant on a scale never seen before. Previously piracy was commonly limited to rival booksellers such as Alexander Donaldson. The internet has enabled every member of the public to access copyrighted material in a matter of seconds from their own home and for 'free'. Current copyright legislation has not only been unable to react to the challenges of the digital age but widespread contempt for the very idea of copyright has called into question the legitimacy and very existence of copyright. The effect of this public disdain has been widespread unemployment in the creative industries, decreased investment, significant falls in tax revenues and rights holders receiving no economic reward for their creations. A University College London study[199] estimated the UK government losses £12 billion

[198] Golvan C, Copyright law and practice (Federation press, 2007), at 92.
[199] 'Copycats? Digital Consumers in the Online Age'.

a year in revenue because of piracy whilst in December 2010 BPI,[200] estimated that 1.2 billion tracks were illegally downloaded in the UK with 1 in 3 people regularly illegally downloading copyrighted material. The IFPI Digital Music Report 2011 also estimated in Europe 240 billion Euros will be lost in revenue between 2008-2015, 1.2 million jobs will be lost by 2015 because of piracy and the value of the worldwide music industry fell 31% from 2004-2010. Political opposition to copyright has also increased with political parties formed solely to limit or abolish copyright. The Pirate Party UK argue 'copyright should give artists the first chance to make money from their work, however that needs to be balanced with the rights of society as a whole,'[201] and campaign for a duration of ten years, stating duration should be 'closer to the original duration of 14 years - reflecting the much greater ease with which works can now be made and distributed.'[202]

The reaction of the UK Government to the current crisis has been draconian, wholly disproportionate and completely ineffective. The *Digital Economy Act 2010,*[203] following the examples of France,[204] South Korea[205] and New Zealand[206], introduced a three strikes system (graduated response), 'few Acts have caused as much controversy and outrage... organisations such as the Open Rights Group... have denounced the Act as undemocratic'[207]. The system, first discussed in the *Gowers Review* works by downloaders of copyrighted material being given two warnings before having their internet disconnected on the third instance of copyright infringement. ISP's have to

[200] Digital Music Nation 2010.
[201] Pirate Party UK Manifesto
[202] Ibid
[203] 59 Eliz. 2 c.24
[204]HADOPI Law, Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet.
[205] Copyright (Infringing File Sharing) Amendment Act 2011
[206] Article 133bis of the Korean Copyright Act 1957.
[207] Farrand B, 'The Digital Economy Act- a cause for celebration or a cause for concern, European Intellectual Property Review, 2010, 32, 10, 536-54, at 537.

enforce the system or face a fine of £250,000[208]. The Act also provides under sections 17 and 18 for websites 'from which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright' to be blocked. Several ISP's sought a judicial review of the Act, however, the High Court in April 2011 rejected the application[209] and the Court of Appeal[210] in March 2012 supported the ruling. In the widely discussed *Scarlet v Sabam* case, the legality of a system that monitored internet communication to prevent internet piracy was questioned. AG Cruz Villalon[211] advised the ECJ in a non-binding opinion that 'EU law precludes a national court from making an order... requiring an internet service provider to install, in respect of all its customers... as a preventive measure, entirely at the expense of the internet service provider and for an unlimited period, a system for filtering all electronic communications passing via its services'[212]. The ECJ[213] followed this advice and ruled such a system violated EU law.

The *DEA* is wholly inadequate and has been described as 'perfectly useless and terrible. It consists almost entirely of penalties for people who do things which upset the entertainment industry'[214]. The *DEA* completely undermines the balance between the public and right holders with total neglect of the public interest in copyright law in favour of right holder's economic interests. The Act can be criticised on several

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[208] Section 14.
[209] R (on the Application of British Telecommunications Plc & TalkTalk Telecom Group Plc) v The Secretary of State for Business, Innovation and Skills [2011] EWHC 1021
[210] R. (on the application of British Telecommunications Plc) v Secretary of State for Business, Innovation and Skills [2012] EWCA Civ 232
[211] Advocate General's Opinion in Case C-70/10 Scarlet Extended v Société belge des auteurs compositeurs et éditeurs (Sabam)
[212] Ibid.
[213] Case C-70/10 Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM) (C-70/10**)** [2012] E.C.D.R. 4
[214] Doctorow C, 'Britain's new Internet law: as bad as everyone's been saying, and worse. Much, much worse' in BoingBoing Technological News, November 20, 2009.

grounds. Firstly, the Act was passed in Parliament's wash-up period with only two hours of debate and not even half of MP's were present for the vote; 'it will not help that one of the most controversial changes to intellectual property law in recent times has been pushed through at the end of Parliament'[215]. Secondly there are clear issues concerning Human Rights with ISP's having to monitor the internet use of their subscribers. This is particularly problematic because the EU in May 2009 made internet access a fundamental right and on June 3rd 2011 a UN Report[216] stated they were 'alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights... such as the... Digital Economy Act 2010'[217] and had concerns over 'intermediary liability and the right to freedom of expression'[218].The Act also would cut off the internet connection of an entire household even where only one person may have committed an offence. There are also practical problems that monitoring costs may outweigh any financial benefit gained from lowering piracy levels and the Act adopts a guilty until proven innocent approach. What is needed instead of harsh measures against the public is a fundamental reassessment of the basic components of copyright law to ensure the public are treated equally to right holders.

Whilst legislatures have introduced more stringent measures concerning copyright such as three strike systems & website blocking, reforms have also been recently made that benefit the public. Two key changes have been to fair dealing and orphan works following the Hargreaves Report[219]. Firstly the report criticised fair dealing for only

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[215] Smith J and Meale D, 'Internet- Digital Economy Act 2010' E.I.P.R. 2010, 32(8), N75-76
[216] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue.
[217] Ibid.
[218] Ibid.
[219] 'Digital Opportunity: a Review of intellectual property and Growth' by Professor Ian Hargreaves, May 2011, available at http://www.ipo.gov.uk/ipreview-finalreport.pdf [Last Accessed September 30th 2014].

allowing narrow exceptions to copyright law and that this could inhibit innovation, 'EU law confines copyright exceptions to a closed list of categories, such as criticism, news reporting, research, or archiving. Almost all are restricted to non-commercial uses... innovation may be blocked and growth hampered when unduly rigid applications of copyright law enables rights holders to block potentially important new technologies. In these circumstances, copyright in its current form represents a barrier to innovation and economic opportunity.'[220] The report recommended that several new fair dealing provisions be introduced and it was stated that copyright law had to adapt to the digital age and needed to reflect what the public considered fair and reasonable, 'the significant problem is that we have in recent years witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people.'[221]. The fair dealing changes recommended included; 1-a private copying exception[222] to allow individuals to make personal copies of copyright works for private non commercial use. This allows personal format shifting e.g. to digitise CD's provided the original was legally purchased, 'EU law permits Member States to introduce an exception for private copying, provided that fair compensation is paid...private copying exceptions are supported by levies on copying equipment, but the schemes vary greatly in terms of the size of levies'[223]. 2-a parody exception[224], 'the most important issues in that area concern freedom of expression...video parody is today becoming part and parcel of the interactions of private citizens... and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy'[225].

[220] Ibid, section 5.6
[221] Ibid, section 5.10
[222] Ibid, sections 5.27-5.31
[223] Ibid, section 5.27
[224] Ibid, sections 5.32-5.42
[225] Ibid, section 5.35

3- A data mining exception,[226] 'the law can block valuable new technologies, like text and data mining, simply because those technologies were not imagined when the law was formed'[227] and 4-to extend the non commercial research[228] exception to all types of work, 'extending the existing provisions relating to copying for non-commercial research 'to cover the full range of media': this particularly affects sound recordings and film, which are not specified in the current legislation'[229]. These changes are significant because they allow the public to legally use copyrighted work in a wider set of circumstances and limit overly extensive copyright law. This is particularly important to counteract expansion of copyright in other areas that benefit right holders such as longer duration, more subject matter protected and the severe measures implemented under the *DEA*.

These changes were eventually implemented into copyright law in 2014[230] which amended the *CDPA* with nine new exceptions altogether. The private copy exception was introduced under section 28(B), 'the making of a copy of a work, other than a computer program, by an individual does not infringe copyright.'[231] Several limits were placed on the exception; the copy had to be a copy of 'the individual's own copy of the work'[232], a personal copy for themselves not for others[233] and use cannot be for

[226] Ibid, sections 5.20-5.26
[227] Ibid, section 5.3
[228] Ibid, section 5.32
[229] Ibid , section 5,32-5.33
[230] The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 SI 2014/2361, The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 SI 2014/2356 and The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 SI 2014/1372. For changes in the CDPA see Appendix B.
[231] CDPA section 28B(1), All implemented by the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 SI 2014/236, Regulation 3.
[232] CDPA section 28B(1)(A)(i)
[233] CDPA section 28B(1)(B)

commercial purposes.[234] This exception is an important part of modernising copyright law and is important for the public who have already legally purchased the copyright work at issue. The exception under the *CDPA* however did not provide any form of compensation scheme for right holders unlike most other EU nations who have implemented the exception, the reason given was that the exception in the CDPA is narrower than its European counterparts which allow copyrighted works to be given to other people. An exception was introduced for parody, 'fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work'[235]. Long recognised in other EU nations this exception is vital to protecting freedom of expression. Section 30(1) which allows use of copyrighted works for the purposes of criticism of review was extended to include quotation under section 30(1ZA), 'the new quotation exception extends the existing fair dealing exceptions for "criticism or review". It allows quotation ("whether for criticism, review or otherwise"). The UK Intellectual Property Office's guidance suggests that short quotations of a copyright work in an academic paper or history book are permitted under this exception, but long extracts are not.'[236] This should significantly widen the exception and allow the public to directly quote copyrighted works not just limited to the narrow categories of criticism, review or news reporting. Section 29(1) was also amended so that the non commercial research exception applied to all forms of copyright work, 'in section 29(1)-(a)in subsection (1), omit "literary, dramatic, musical or artistic.''[237] These exceptions

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[234] CDPA section 28B(1)(C)
[235] CDPA section 30A(1), Implemented by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 SI 2014/2356, Regulation 5.
[236] Berry K, 'New private copying, quotation and parody copyright exceptions', available at http://www.linklaters.com/Insights/Publication1403Newsletter/TMT-News-8-December-2014/Pages/UK%E2%80%93New-private-copying-quotation-parody-copyright-exceptions.aspx#sthash.chCXJklm.dpuf, [Last Accessed April 20th 2015]
[237] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 SI 2014/1372, Regulation 3(1)(A)

whilst clearly beneficial to the public and vital in securing a balance with right holders have already encountered problems. The private copying exception was subject to a judicial review in the High Court. Under article 5(2)(B) of *the Information Society Directive* provides a private copying exception is permitted if fair compensation is provided to right holders however recital 35 provides 'in certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.' In the BASCA case[238] the court ruled that the private copying exception was unlawful because it provided no compensation to right holders. The government's defence was that because the provision was narrowly drafted and use was limited to personal use, rather than friends or family (the household exception), that right holders had priced in this use into the cost of their content and there would be no harm. The court rejected this argument. Whilst the provision could be repealed, the government could alternatively introduce a compensation system e.g. levies on blank media. The trouble is consumers have already paid for the copyright work and it seems unjust that right holders should be paid again for work that has already been legally purchased, particularly given the narrow scope of the exception. Whilst the recent reforms to fair dealing should be welcomed as supporting the public interest and trying to reach a balance in copyright law, it is vital that the courts also interpret the provisions with this balancing aim in mind, which is not what happened in the *BASCA* case.

The second major reform to have recently occurred from the perspective of the public concerns orphan works. An orphan work is one where the work is still in copyright but the owner is unknown or cannot be found but because the work is still protected by copyright it cannot be used. This means that works cannot be accessed or

[238] British Academy of Songwriters, Composers and Authors & Ors, R (On the Application Of) v Secretary of State for Business, Innovation And Skills [2015] EWHC 1723

used by the public. Two schemes have been launched to solve the problem of orphan works; the EU *Orphan Works Directive*[239] and the UK scheme, Extended Collective Licensing (ECL). The EU directive is woefully inadequate and extremely narrow in scope, 'it is fair to say the Directive is deliberately of narrow scope. It focuses on non-commercial, public interest uses of orphan works by a limited set of organizations and right holders remain able to opt out.'[240] The Directive provides for an exception under article 6, 'Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC'. This orphan works exception however is extremely limited. Firstly use is limited to the reproduction right and making the orphan work available to the public, 'it is notable that no other right is affected, including the EU-wide right of distribution.'[241] Article 1(1) limits the Directive to public institutions who may only use orphan works for aims related to their public interest missions, 'This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organizations, established in the Member States, in order to achieve aims related to their public-interest missions.' This point is further clarified in article 6(2), 'The organizations referred to in Article 1(1) shall use an orphan work... only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.' This is a severe limit that undermines the effectiveness of the entire Directive because individual

[239] Directive on certain permitted uses of orphan works 2012/28/EU OJ L 299/5.
[240] Stokes S, Digital Copyright: Law and Practice Fourth Edition, (Bloomsbury Publishing, 2014), at 9.4
[241] Suthersanen U and Frabboni M.M, 'The Orphan Works Directive' 653-696 in Stamatoudi I and Torremans P, EU Copyright Law: A Commentary, (Edward Elgar Publishing, 2014), at 684.

users cannot use orphan works nor can commercial entities many of whom play a fundamental role in the use and communication to the public of orphan works, 'for users other than those specified in the Directive, no preference has been expressed for any one particular solution'[242] and 'the beneficiaries of this Directive are very limited, raising fairness issues with respect to other persons and organizations... it is obviously not a full solution to the orphan works problem. A full solution should address the authorized uses of orphan works by other persons or entities for purposes other than public interest missions.'[243] Article 1(2) limits the scope of the Directive even further by only applying to certain works, 'Article 1(2) enumerates exhaustively four types of orphan works that are regulated under this directive: writings, cinematographic or audiovisual works, phonograms and embedded protected works/subject matter'[244]. This again limits the scope of the Directive, 'The EU regime is relatively limited in scope…it does however not apply to stand alone photographs.'[245] The Directive also only protects works that are first published within the EU and non EU works are not covered[246].

In addition to the actual scope of the directive, in terms of types of subject matter covered, the rights provided and the institutions who can rely on the exception, the Directive is also limited in other ways. Article 3(1) provides that to establish a work as an orphan work and for the exception to operate, a diligent search has to be carried out in good faith to find the copyright owner for every work, this search has to be carried out in the Member State of first publication (article 3(3)) and the search has to continue

[242] Aplin T and Davies J, Intellectual Property Law: Text, Cases and Materials, (Oxford University Press, 2013), at 134
[243] Lu B, 'The Orphan Works Copyright Issue: Suggestions for International Response', the. J. Copyright Soc'y USA, 60, 255 (2012), at 271
[244] Supra Note 240, at 13.10
[245] Bently L and Sherman B, Intellectual Property Law Fourth Edition, (Oxford University Press, 2014), at 330-331.
[246] Recital 12.

in other countries (article 3(4)). This raises the important issue of cost, 'the provisions of the orphan works directive, however, do not provide a solution to the practical hurdle of the transaction costs that are involved in the diligent search operation for right-holders'[247]. The cost could be particularly high to carry out a diligent search particularly if it involved searching several nations, if there are several right holders or copyright has been passed down in wills for example. If the general public were ever to be included under the Directive this could form a substantial barrier to using orphan works. The Directive does have several measures to help alleviate this cost, nonprofit institutions can generate revenue from orphan works under article 6(2), the EU is also establishing EU wide databases containing information on right holders e.g. ARROW[248] and one of the main advantages is that once recognised as an orphan work in one member state it applies throughout the EU. Article 5 provides protection to right holders who can reappear and reassert their copyright and end the status of the work as an orphan work, 'once a work has been considered as being orphan, the exclusivity vested by copyright in such work will be frozen.'[249] The overall result of the Directive is that the majority of orphan works still cannot be used despite the owner not being found whilst individual users have no rights whatsoever, 'the Directive's focus is on non profit and/or non-commercial usage… it is also clearly implicit that the Directive does not allow individual users to benefit from its safe harbor.'[250] This severely undermines the rationale of copyright law to help disseminate knowledge and fundamentally undermines copyrights ability to achieve a balance between the public and right holders,

[247]Belder L, 'The digitization of public cultural heritage collections and copyright in public private partnership projects' 175-191, in Vadi V and Whitte B, Culture and Economic Law (Routledge, 2015), at 185

[248] Accessible Registries of Rights Information and Orphan Works, see http://www.arrow-net.eu/ [Last Accessed May 3rd 2015]

[249]Dusoillier S, 'Inclusivity in intellectual property 101-119, in Dinwoodie G.B, Intellectual Property and General Legal Principles: is IP a Lex Specialis, (Edward Elgar Publishing, 2015), at 112.

[250] Supra Note 240, at 13.07

'this directive does not address the wider issue of 'out of commerce' works or use of orphan works by commercial institutions'[251].

The UK scheme came into force in October 2014 and is far wider in scope than the EU Directive and more adequately represents the public interest firstly because a licensing system is implemented rather than a mere exception as with the *Orphan Works Directive*. The Hargreaves Report described orphan works as the starkest failure of copyright law and highly damaging to the public, 'the problem of orphan works to which access is effectively barred because the copyright holder cannot be traced represents the starkest failure of the copyright framework to adapt. The copyright system is locking away millions of works in this category'[252]. The report referenced several examples of the negative effect orphan works have, 'it is difficult to put a firm value on unlocking orphan works, but it is complacent to assume that value is minimal just because the works are not "in print". The British Film Institute estimates that if legal provisions enabled it to trade in orphan works it might generate an additional annual gross income for itself of more than £500,000'[253] and 'the British Library points to findings by the Arrow study of an orphaning rate of 40 per cent in some EU archives.'[254] The Hargreaves Report concluded by supporting the licensing of orphan works 'Government...should begin by legislating to release for use the vast treasure trove of copyright works which are effectively unavailable "orphan works" to which access is in practice barred because the copyright holder cannot be traced. This is a move with no economic downside.' [255] The licensing scheme was later implemented in

[251] Ibid, at 13.04
[252] Supra Note 219, at 4.52
[253] Ibid, at 4.54
[254] Ibid, at 4.52
[255] Ibid, Executive Summary

the *Enterprise and Regulatory Reform Act 2013*[256] section 77 which introduced section 116A of the *CDPA*. This licensing scheme is far wider and more effective than the *Orphan Works Directive* and its broad scope has even led academics to question whether the scheme is incompatible with EU law[257]. Under the scheme an orphan works licence can be gained from the Intellectual Property Office (IPO), the non exclusive licence lasts for seven years and starts from £20 and can include commercial use.

Firstly the UK scheme is more extensive than the Directive because it is not limited to public interest institutions or their public interest mission and covers all forms of copyright work, 'the UK regime will cover all works, including stand-alone photographs... the types of potential licensee, are not limited to 'publicly accessible cultural and heritage organisations' and thus might include commercial entities'[258]. These key differences means the UK scheme has a much wider scope than the Directive would allow individual users to apply for a licence and would permit use of any form of work. As with the Directive, the licence applicant must undertake a 'diligent search' to find the right holder[259]. Also the UK scheme is not limited to only EU works so non EU orphan works can also be used however one drawback is that the licence only applies in the UK and is not EU wide as the exception under the Directive is, 'UK licences can authorise acts only within the United Kingdom so while the legislation is more extensive, it is necessarily rather local in effect.'[260] Importantly the UK scheme also allows commercial use of orphan works which under the Directive is only permitted

[256] Enterprise and Regulatory Reform Act 2013 c.24
[257] See Rosati E, 'The Orphan Works provisions of the ERR Act: are they compatible with UK and EU Laws? European Intellectual Property Review, Forthcoming (2013).
[258] Supra Note 245, at 332
[259] CDPA Section 116A(3).
[260] Supra Note 245, at 332.

only to recover costs of digitising orphans works and making them available to the public. The government estimated in October 2014 that 91 million orphan works[261] could become available as a result of the scheme and several institutions have already applied for licences for a range of works[262]. The key differences between the Directive and the UK scheme including; allowing use of all subject matter, using a licence rather than an exception, permitting commercial use, allow a variety of potential users not just public institutions means the UK scheme far more effective than the Directive.. The UK scheme not only allows sufficient access to orphan works unlike the restrictive Directive but is able to work towards copyright's underlying aims by allowing works to be disseminated to the public without damaging the interests of right holders, 'the UK regime thus has potentially much greater reach than its European counterpart and might be regarded as establishing an example of what the European legislature should be striving for.'[263]

3.9-Conclusion:

Copyright throughout its history has continuously expanded since the *Statute of Anne* in terms of duration, author rights and subject matter protected. The balance between right holders and the public was held to be the central tenet of copyright law in *Donaldson* however the nineteenth century to the present day has seen these principles slowly eroded away.. The recent copyright crisis is only one crisis copyright has faced in its history however the inability of copyright law to solve the crisis and its constant disregard of the public interest is a cause for concern. In 1710, the *Statute of Anne*

[261] https://www.gov.uk/government/news/uk-opens-access-to-91-million-orphan-works [Last Accessed April 30th 2015]
[262] In the first six months of the scheme, licences were applied for 263 works the vast majority of which were photographs. http://the1709blog.blogspot.it/2015/04/who-has-adopted-orphans.html [Last Accessed April 30th 2015]
[263] Supra Note 245, at 332.

aimed to encourage learning and disseminate knowledge however these purposes have been neglected meaning a balance is no longer achieved. The dual function of copyright law established in *Donaldso*n is not realised. What is needed is copyright reform to reassert the principles expounded in the *Statute of Anne* and *Donaldson*. The first reform suggested is that copyright duration should reflect the original 28 year period provided under the *Statute of Anne*. This would enable right holders to effectively exploit their work whilst ensuring the encouragement of learning and dissemination of knowledge is not hindered by an overly long duration period stifling the public domain. Subsequent chapters will now examine other areas of copyright law to discuss their effectiveness in balancing right holders and the public and where necessary implement reforms to conform to the dual purpose modern copyright law was founded upon.

Wordcount-11,739 (14,377 including footnotes)

4. Chapter Four-Copyright and Human Rights:An Unhappy Marriage

4.1-Introduction:

As the discussion of copyright history illustrated, copyright law has rarely been able to balance the interests of rights holders and the public with the tendency to elevate rights holders on the proverbial scales, 'even those who believe in... legislature's objectively balancing competing interests in order to achieve maximum public good have long recognized reality is often the contrary'[1]. This legislative disparity continues in current legislation, 'the balance is increasingly being tilted in favour of rights holders at the expense of the wider public'[2] and has 'shifted the balance away from public good'[3] This chapter discusses external controls or what is referred to as copyright's external conflict. External controls encompass various measures from outside copyright law that in theory should represent the public interest and balance them against copyright protection. External controls[4] are implemented to 'ensure copyright does not result in monopolies.'[5] Internal controls limit right holders exclusive rights and arise solely within copyright itself. External controls also limit copyright's scope by allowing 'assistance beyond the exceptions... available in the copyright system'[6]. External controls narrow copyright by recognising copyright law is not autonomous but is subject to other legal principles which typically arise 'where two legal regimes directly

[1] Patry W, How to Fix Copyright (Oxford University Press, 2011), Chapter 4
[2] Haynes R, Media Rights and Intellectual Property (Edinburgh University Press, 2005), at 15.
[3]Hilmes M, Only Connect: A Cultural History of Broadcasting (Cengage Learning, 2011), at 401.
[4] Also referred to as the internal and external conflicts.
[5]Dworkin G, Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer's Perspective, in Griffiths J and Suthersan U, Copyright and Free Speech: comparative and international analyses (Oxford University Press, 2005), at 154.
[6] Ibid, at 163.

face each other'[7]. Internal and external controls are crucial to ensuring the public are not marginalised but also in preventing excessive copyright protection.

4.2-Copyright and Human Rights-an ambiguous relationship:

Right holders wish to classify copyright as a fundamental human right to further their economic interests[8], 'the predominant discourse of intellectual property maximalists continues to appeal to personhood interests of authors, not users as a basis for the further ratcheting up of protection'[9]. Supporters of the public interest conversely argue copyright is not a human right and is subject to limits such as public human rights and user rights. Human rights are natural rights that are 'fundamental, inalienable and universal entitlements'[10] encompassing the most basic innate rights, 'there is a frequent inclination... to transform everything people believe is valuable... into a fundamental right. However, the term "fundamental", was created to separate certain important principles from other, less important, to establish some kind of hierarchy of values.'[11] Two questions arise in relation to copyright's relationship with human rights. Firstly can copyright be classed as a human right, an inalienable natural right each person is inherently entitled to or should copyright be a statutory privilege lower down the hierarchy of values subject to limits in the public interest Despite the revolutionary

[7] Birnhack M 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' Ent LR 24, at 3.
[8] See Tehranian J, 'Parchment, Pixels & Personhood: User Rights and the IP (Identity Politics) of IP Intellectual Property, 82 U. Colo. L. Rev. 1, 5–6 (2011) who provides a discussion of how right holders drive the need for stronger rights and expanded protection.
[9] Ibid, at 84.
[10] Matthews D, Intellectual Property, human rights and development (Edward Elgar Publishing, 2011), at 209.
[11] Cornides J, 'Human Rights and Intellectual Property - Conflict or Convergence?' J. World Intell. Prop. 135-167, at 138.

impact of human rights on many legal areas, copyright and human rights remained relative strangers until very recently, 'widespread recognition of the relationship... has a relatively recent vintage... few observers recognised the existence of such a relationship or viewed it as more than marginally relevant.'[12]Copyright's relationship with human rights was until the late 1980's rarely discussed and meaningful examination of the interaction between human rights & copyright has only been discussed in the last three years at European level. Several recent cases mark a significant change in the role of human rights within copyright law as well as defining how conflicting human rights should be balanced. These cases have also had a considerable impact on the conventional argument that copyright's internal mechanisms alone adequately balance right holders and the public. The historical segregation between human rights & copyright law has also recently changed through the academic work of Torremans[13], Jehoram[14], Hugenholtz[15] and others.[16] The interaction between human rights and copyright has now become vital with human rights redefining copyright, 'long ignored by both communities, the relationship... has now captured the attention of government officials, judges, communities and scholars'[17] however there remains 'a tendency of judges to downplay the interaction'[18]

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[12] Austin G and Helfer L.R, Human Rights and Intellectual Property: Mapping the Global Interface (Cambridge University Press, 2011), at 1.
[13]Torremans P, Copyright (and Other Intellectual Property Rights) as a Human Right, in Torremans P, Intellectual Property and Human Rights (Kluwer Law International, 2008)
[14] Jehoram H.C, 'Freedom of Expression in copyright law' EIPR (1984) 3
[15] Hugenholtz P, Copyright and Freedom of Expression in Europe?, in Dreyfuss R, Zimmerman D and First H, Expanding the Boundaries of Intellectual Property (Oxford University Press, 2001), at 343-363.
[16]See various contributors in Grosheide F, Intellectual Property and human rights: a paradox (Edward Elgar Publishing, 2010)
[17] Supra Note 12, at 1.
[18] Burrell R and Coleman A, Copyright exceptions: the digital impact (Cambridge University Press, 2005), at 15.

The second question arising over the relationship between human rights and copyright is outlined by Helfer[19] in his renowned article which asks do human rights and copyright conflict or coexist? Rights holders argue there is no external conflict reasoning both copyright and human rights work in conjunction to, 'define the appropriate scope of private monopoly power that gives authors... a sufficient incentive to create while ensuring the consuming public has adequate access.'[20] Under this approach the conflict is internalised in that internal copyright measures are seen as adequately protecting the public interest with human rights reinforcing copyright's legitimacy. The opposing view is that copyright and human rights are incompatible because copyright is best regarded as a statute based privilege subject to limitations in the public interest. The natural rights interpretation of copyright undermines copyright's social function, 'this framing sees strong intellectual property protection as undermining and therefore as incompatible with a broad spectrum of human rights obligations'[21] The contentious issue is giving copyright natural right attributes unduly restricts freedom of expression particularly within the media and political discourse. The influence of natural rights theory in interpreting copyright laws position within human rights has created the conflict which can be dissolved by following instrumentalism and recognising copyright is not a fundamental human right but an instrumentalist tool used to incentivise creation. States should, 'recognise the normative primacy of human rights law over intellectual property law'[22] This conflict between human rights and copyright and the ability to override freedom of expression 'is now

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[19] Helfer L, 'Human Rights and Intellectual Property: Conflict of Coexistence?', Minnesota Intel. Property Rev. Vol. 5 (2003) 47-61.
[20] Ibid, at 48.
[21] Supra Note 19, at 48
[22] Murshed M, Curbing Software Piracy in eCommerce: Compatibility with Human Rights: Challenges and Possible Solutions, in Mpazi S, Human rights and intellectual property rights (Martinus Nijhoff Publishers, 2007), at 19.

widely, although by no means universally, accepted to be the most controversial potential consequence of providing strong copyright protection.'[23] The traditional position of the courts at both domestic and international level was that human rights and copyright did not conflict. Once again however recent case law has somewhat reversed this position with the recognition that copyright can conflict with human rights and particularly can restrict the right to freedom of expression.

The role of intellectual property[24] within human rights law 'dates from the beginning of the international human rights movement.'[25] The *Universal Declaration of Human Rights 1948*[26] was the first instrument to provide minimum international human rights standards and whilst only advisory, 'its provisions have attained the status of international customary law.'[27] The *UDHR* provides general protection to property, 'everyone has the right to own property alone as well as in association with others'[28] and 'no one shall be arbitrarily deprived of his property'.[29] Whilst a minority of human rights instruments explicitly protect intellectual property, they are often extremely vague, legally uncertain and their status as fundamental rights controversial, 'they are relatively unknown territory in comparison to other classical human rights' for instance

[23] Supra Note 18, at 17.
[24] Human rights are not specifically mentioned in the Berne Convention or TRIPS Agreement however.
[25] Supra Note 12, at 171.
[26] UNGA Res 217 A (III) U.N. Doc. A/810 (Dec. 10, 1948), Henceforth referred to as UDHR. See Appendix D
[27] Wong T, Torsen M and Fernandini C, Cultural Diversity and the Arts: Contemporary Challenges for copyright law, in Wong T and Dutfield G, Human Rights Human Development (Cambridge University Press, 2010), at 283
[28] UDHR 1948, Article 17(1).
[29] UDHR 1948, Article 17(2)

freedom of expression'[30]. The majority of instruments recognise the right of creators whilst simultaneously recognising several rights of the public. Dessemontet underlines the problem, 'how could the Declaration simultaneously proclaim the freedom to create, the freedom to benefit from the creation and the protection of intellectual property'.[31]

The *UDHR* can be seen as acknowledging both instrumentalism and natural rights theory. Article 27(1) *UDHR* represents the public interest recognising the instrumentalist explanation for copyright and that wider social interests must be considered, 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' Article 27(2) *UDHR* recognises natural rights and that creators have an inherent right to benefit from work they create, 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. Article 27 is closely reiterated in the *International Covenant on Economic, Social and Cultural Rights 1976*[32] which provides extremely similar rights[33] under Articles 15(A)-(C) providing, 'the right of everyone (a) to take part in cultural life, (b) to enjoy the benefits of scientific progress and its applications' and (c) 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. Under article 15, 'these three components must These provisions have not resolved the underlying

[30] Adalsteinsson R and Thorballson P, Article 27, in Gudmundur A and Eide A, The Universal Declaration of Human Rights: a common standard of achievement (Martinus Nijhoff Publishers, 1999), at 575.
[31] Dessemontet F, Copyright and Human Rights, in Intellectual Property and Information Law Essays in Honour of Herman Cohen Jehoram 116 (Kluwer Law International, 1998), at 14.
[32] Henceforth known as ICESCR. See Appendix E
[33]Extremely similar provisions are also found in other jurisdictions including America- article 13 of the American Declaration on the Rights and Duties of Man 1948.

conflict because they recognise both natural rights and instrumental theory without supporting one theoretical basis. Articles 27(2) *UDHR* and 15(C) *ICESCR* incorporate the arguments of Locke and the basic proposition that the act of creation creates a property right the law must protect, 'whatsoever then he removes out of the state that nature... he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property... that excludes the common right of other men.' [34] Simultaneously however articles 27(1) *UDHR* and 15(A) and (B) *ICESCR* recognise copyright's instrumental goals. Incorporating these two opposing theoretical explanations of copyright does nothing to indicate the correct balance and does not clarify the role of copyright within human rights.

Classifying copyright as a human right is hugely difficult because it confirms copyright as a natural right rather than an instrumental good. Natural right theories which directly oppose instrumentalism argue copyright is an inherent natural and absolute right, 'John Locke's... ideas were assumed by Blackstone, who saw property as an absolute right which should not be restricted'[35] where 'a person has as his substantive end the right of putting his will into any and everything and thereby making it his... this is the absolute right of appropriation'.[36] Under natural rights copyright is seen as a property right that laws should protect, '[natural rights] sees the foundation of the rights of an author in the very nature of things. Laws have no other purpose but to recognise the existence of author's rights... these rights are not created by laws because

[34] Locke J, 'Second Treatise on Government- The True Original, Extent, and End of Civil-Government' 1690, Chapter V, at 27
[35] Sainsbury M, Moral Rights and their application in Australia, (Federation Press, 2003), at 25.
[36] Hegel G, 'Philosophy of right', (Oxford: Clarendon Press, 1967), section 44.

they have always existed'[37]. The result is classification of copyright as a human right diminishes the role of instrumentalism and copyright's social function is overlooked, 'upon the first principles of proprietorship... an author has an exclusive and perpetual right... to the fruits of their Labour... the literary man has title, perfect and absolute.'[38], To classify copyright as a human right is to adopt natural rights 'in order to recognize copyright as a human right one must adopt the view that it is a natural right.[39] Whilst a natural rights argument views copyright as an inherent right of the creator, instrumentalism and utilitarianism take a different approach. Under instrumentalism there are no natural rights, only rights created by positive law with Bentham stating 'natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense- nonsense upon stilts'[40]. Bentham argued natural rights had no legal basis, 'to me a right and a legal right are the same thing, for I know no other. Right and law are correlative terms...by natural right is meant a sort of a thing which... is to have an effect paramount to that of law, but which subsists not only without law, but against law'[41]. Instrumentalism views rights as created by law and determined by the legal system and subject to limitations. Any role human rights have within copyright is focused around achieving the purposes copyright is intended to meet, 'all the benefits listed as human rights... are subject to the promotion of the greatest good within a society. As such an individual's benefits claimed as a human right may be compromised, diluted, or even completely denied... where that right has to be weighed against the claim of... society as

[37] Kase F, Copyright Thought in Continental Europe, (F.B Rothman, 1967).
[38] William W Ellsworth, Report of House Judiciary Committee on Copyright, December 17 1830.
[39] Afori F, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law', Fordham Intell. Prop. Media & Ent. LJ, 14, 497, at 519.
[40] Bentham J, The Works of Jeremy Bentham volume 2, (W.Tait, 1843), at 501
[41] Stark W, Jeremy Bentham's Economic Writings: Volume One (Routledge, 2013), at 334-335.

a whole'[42]. Under utilitarianism and instrumentalism rights are subject to limitations in order to achieve the end purpose, 'the end goal of maximising a kind of good... may override the individual...the end may justify the means... Utilitarians such as Mill recognised the importance of rights... but noted they could be limited if necessary to protect others'[43].

The fundamental issue therefore is if copyright itself can be considered a human right. Instrumentalism views copyright as a legal privilege provided by the state as the preferred method to achieve wider social purposes. Contrastingly natural rights interpret copyright as a universal right not dependent on law. Classifying copyright as a human right discards instrumentalism because it recognises copyright as a fundamental inalienable right. Human rights are widely seen as the successor of natural rights, 'the true forerunner of human rights discourse was... natural rights developed by figures such as John Locke'[44] and 'the forerunner to the notion of human rights is the notion of natural rights, which emphasises that some rights are grounded in nature rather than in governments'.[45] Classifying copyright as a human right is fully justified under natural rights theory. Under Locke if a person exerts labour they gain a right in their creation, 'labour, in the beginning, gave a right of property, wherever any one was pleased to employ it upon what was common'[46]. According to Locke this right is not acquired through manmade law or because it helps attain socially useful aims but much like

[42] Heard A, 'Human Rights: Chimeras in Sheep's Clothing', (1997), available at http://www.sfu.ca/~aheard/417/util.html [last accessed September 30th 2014].
[43] Rainey B, Human Rights Law Concentrate, (Oxford University Press, 2013), Page 3
[44]Sharma N, Human Rights from rhetoric to reality, in Parekh P, Human Rights Year book 2010, (Universal Law, Publishing 2010), at 197
[45] Fieser J, Moral Philosophy Through the Ages', (McGraw-Hill Higher Education, 2000), at 134
[46] Supra Note 34, at 45

human rights of today, this right transcends law, 'amongst those... who have made and multiplied positive laws to determine property, this original law of nature, for the beginning of property, in what was before common, still takes place.'[47] Under instrumentalism copyright cannot be classified as a human right because this exclude copyright's social function, 'property cannot, in an instrumentalist theory of property, operate as a fundamental value or right, for this would be to push the theory in proprietarian direction'[48]

Commentators are divided on the status of copyright under the *UDHR*. Some academics argue they are revolutionary confirming copyright as a human right and that a shift towards natural rights has occurred. Beacourt argues, 'the Universal Declaration considers copyright to be a human right itself'[49]. This view has found significant support, 'copyright has become a human right equal to freedom of expression'[50] and 'article 27... elevates copyright to the status of a human right'[51]. Other commentators conversely argue the provisions are, 'often understood (erroneously) to refer to copyright'[52] and that 'nowhere in the provisions is anything mentioned about intellectual property rights, although commentators at times have mistakenly described them... as intellectual property provisions'[53]. Torremans summarises the consensus

[47] Ibid, at 30.
[48] Drahos P, A Philosophy of Intellectual Property, (Dartmouth Publishing Company, 1996), at 215.
[49] Beacourt D, 'Copyright and Human Rights' 32 Copyright Bull. 13,14 (1998).
[50] Gendreau Y, Copyright and Freedom of Expression in Canada, in Torremans P, 'Copyright and Human Rights', (Kluwer Law International, 2008), at 22.
[51] Supra Note 13, at 200.
[52] Russwurm L, 'Copyright Isn't A Human Right' available at http://laurelrusswurm.wordpress.com/2011/02/24/copyright-isnt-a-human-right/ [last accessed September 30th 2014].
[53] Yu P, 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' (2007) 40 U.C. Davis Law Review, 1039–1149, at 1079.

'copyright has a relatively weak claim to human rights status, its inclusion in international human rights instruments... were only included because they were seen as tools to give effect to and to protect other more important human rights.'[54] One should not consider intellectual property rights in themselves human rights, 'both Articles [27 and 15] are very generally and vaguely worded. They leave a broad margin of discretion'[55] and 'the architects of the human right treaties... have consistently placed the right to cultural participation and the interests of authors side-by-side... an acknowledgement of the inherent tension...It is well established in human rights law that intellectual property rights are not themselves human rights'[56]. Despite debate over the exact status of intellectual property rights, it is evident the incorporation of such rights into human rights instruments embodies a natural rights approach not an instrumental one, 'the UDHR... was clearly shaped by a natural rights perspective'[57] and 'the author's rights contained in the UDHR and ICESCR has a close relationship with natural rights and also coincides with the natural right justification.'[58]

The effect of these provisions on the balance between the competing parties is limited 'what is clear is that copyright as a human right requires a balance between the concepts expressed in article 27(1) and those expressed in article 27(2).'[59]Natural rights theory has been incorporated but so has instrumentalism. The provisions do not go as far as supporting one theory over the other and they do not classify copyright as a

[54] Torremans P, 'Is Copyright A Human Right', 2007 MICH. ST. L. REV. 271, at 280.
[55] Mylly T, Intellectual Property and Fundamental Rights: Do They Interoperate 185-229, in Brunn, Niklas ed. Intellectual Property Beyond Rights (WSOY, 2005), at 197.
[56] Supra Note 8, at 14.
[57] Delaet D, The Global Struggle for Human Rights, (Cengage Learning, 2014), at 17.
[58] Xiong P, An International Law Perspective on the Protection of Human Rights in the TRIPS Agreement, Martinus Nijhoff Publishers, 2012), Page 266.
[59] Supra Note 54, at 277.

human right itself and cannot be said to implement a natural rights interpretation fully. Both provisions cannot constitute fundamental rights because, 'neither the UDHR nor the ICESCR creates an obligation on... States to establish exclusive rights... the Articles only require there to be some form of protection'[60]. The *UDHR* and *ICESCR* simply provide each signatory must protect these rights, 'the aforementioned Articles thus place a positive obligation on states.'[61] This means States must protect such rights but have the discretion to decide how those rights are protected. Article 27(2) has been directly applied in several French cases including the *Asphalt Jungle*[62] and *Charlie Chaplin*[63] cases, it appears copyright does not hold human right status under the *UDHR*.. Despite AG Tesauro in a non-binding opinion[64] stating article 27(2) *UDHR* evidences 'the classification of copyright as a human right'[65], this has not been universally accepted. The EPO[66] stated article 27(2) 'provides a guarantee States should provide their citizens with copyright laws to protect their interests'[67] whilst AG Gulmann[68] stated copyright[69] is not a fundamental right but is a right States must provide for, 'copyright is of fundamental importance... Member States have entered into international commitments to give copyright owners sufficient protection.'[70] Resolution 2000/7 from the UN Commission on Human Rights[71] referred to articles 27(2) and 15(1)(C) and stated

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[60] Supra Note 55, at 197.
[61] Ibid.
[62] Angelica Huston et autres c. Societe d'exploitation de la cinquieme chaine at autres, Tribunal de Grande Instance de Paris, 23 November 1988.
[63] Societe Roy Export Company Establishment et Charlie Chaplin cj. Societe Les Films Roger Richebe in RIDA 28 (1960) 133.
[64] Case C-200/96 Metronome Music v Music Point Hokamp [1998] ECR I-1953
[65] Ibid, footnote 7.
[66] Priorities from India (G2/02, G3/02), [2004] E.P.O.R. 39
[67] Ibid, at 483.
[68] Case-241/91 and P and C-242/91 RTE and ITP v Commission [1995] ECR I-743
[69] It was stated this statement would not include any related rights.
[70] Supra Note 66, at 11.
[71]This has been followed in several other resolutions- Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2001/21, Intellectual Property and Human Rights, E/CN.4/Sub.2/RES/2001/21. Committe on Economic and Social Rights, Statement on Human Rights and

copyright was, 'subject to limitations in the public interest'[72] and States should recognise 'the primacy of human right obligations over economic policies.'[73] In 2001 the Committee on Economic, Social and Cultural Rights[74] clarified the position, 'the fact the human person is the central subject and primary beneficiary of human rights distinguishes human rights including the right of authors... from legal rights recognized in intellectual property systems...moreover, the scope of protection... of the author provided for under article 15 does not necessarily coincide with what is termed intellectual property rights'[75]

The proposition copyright is not a human right under the *ICESCR* and *UDHR* gains further support from *General Comment No.17*[76] *2005* which 'emphatically distinguished IPR's from the human right to the protection of moral and material interests of authors'[77] and 'helped clarify the long-standing debate on the relationship between IP rights and human rights, by stating IP rights are not human rights'[78]. It is at this juncture we witness a departure from Locke and natural rights. The natural rights argument that copyright is a universal entitlement arising independently from law is rejected by the comment. Locke's labour theory submits that if a person exerts labour they gain a natural property right that enables them to remove their creation from the commons, 'as

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Intellectual Property E/C.12/2002/15 and Intellectual Property Rights and Human Rights: Report of the Secretary General' [E/CN.4/Sub.2/2001/12.

[72] Resolution 2000/7 U.N. Comm. On Hum. Rts. 52 mtg, (2000), at 3.

[73] Ibid.

[74] Twenty-seventh session "Human Rights and Intellectual Property", Statement by the Committee on Economic, Social and Cultural Rights, 29 November 2001, E/C.12/2001/15, at 6. Henceforth CESCR.

[75] Ibid.

[76] This is highly persuasive authority.

[77] Wong T, Intellectual Property Through the Lens of Human Development, in Wong T and Dutfield G, Human Rights Human Development (Cambridge University Press, 2010), at 39

[78] Ovett D, 'Intellectual Property and Human Rights: Is the Distinction Clear Now?: An Assessment of the Committee on Economic, Social and Cultural Rights General Comment 17', Policy Brief 3 of 3D organisation, October 2006.

much land as a man tills... so much is his property. He by his labour does, as it were, inclose it from the common.'[79] Under Locke's theory of value a person's labour creates value, 'tis Labour indeed that puts the difference of value on everything and let anyone consider, what the difference is between an Acre of Land planted with Tobacco... and an Acre of the same Land lying in common, without any Husbandry... the improvement of labour makes the far greater part of the value'.[80] For Locke labour creates economic and social value. When applied to copyright rights holders through the act of creation generate value and for this, secure a natural property right not dependent on law. The alternative is that resources are left undeveloped. The comment however takes a different approach and concludes copyright is fundamentally different to Locke's theory.

General Comment No.17 concluded that whilst right holders are entitled to protection, copyright can be distinguished from natural rights. Although article 15(C) was 'a human right',[81] intellectual property rights were distinguished, 'human rights are fundamental as they are inherent to the human person... whereas IPR's are means by which the State seeks to provide incentives for inventiveness.'[82] It was stressed 'it is therefore important not to equate intellectual property rights with the human right recognized in article 15'[83] because 'in contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else...human rights are timeless expressions of fundamental entitlements of the

[79] Supra Note 34, at 31
[80] Supra Note 34, at 40.
[81] CESCR 2005, General Comment No.17, E/C.12/GC/17, 12th January 2006, at 1
[82] Ibid.
[83] Ibid, at 3

human person.'[84] The comment recognised copyright is fundamentally different from natural rights. Copyright is not an inalienable right inherent to every person as Locke suggests but is a tool to facilitate creativity which far more closely resembles instrumentalism. The natural right ideology has been rejected by the comment which views copyright as a privilege created by law, '[copyrights] because of their different nature, are not protected at the level of human rights.'[85] The comment also stated 'the private interests of authors should not be unduly favoured and the public interest... should be given due consideration'.[86] Under the *UDHR* and *ICESCR* States have to provide authors with protection for their intellectual creations however, 'protection need not necessarily reflect the level and means of protection found in present copyright... as long as the protection available is suited to secure authors the moral and material interests resulting from their productions'[87].

In *General Comment No. 21 CESCR 2009*[88] it was recognised the right to cultural participation has to be balanced against rights holders' rights. It was stated Article 15 *ICESCR* meant everyone, 'has the right to seek and develop cultural knowledge'[89] and that the provision encouraged cultural goods to be 'open for everyone to enjoy and benefit from... to promote effective access by all to intangible cultural goods.'[90] In both comments No.17 and No.21 whilst natural rights are considered they are not fully supported. The result of incorporating instrumentalism and rejecting a purely natural

[84] Ibid, at 2
[85] Ibid, at 7
[86] Ibid, at 35
[87] Ibid, at 10
[88] CESCR 2009, General Comment No.21: Right of everyone to take part in cultural life, E/C.12/GC/21, 20th November 2009.
[89] Ibid, at 15.
[90] Ibid, at 70.

rights approach is that the rights provided under the *UDHR* and *ICESCR* take the form of 'lesser rights' with recognition of a general duty on the State to protect the interests of both parties. The end result is that the *UDHR* and *ICESCR* have little effect on copyright balance. Both instruments recognise the conflict but do not implement measures to tackle the root of the imbalance. The *UDHR* and *ICESCR* 'merely lays a focus on everyone's right to share in the creativity of others... however immediately connected to a respect for the legal protection of the results of artistic or literary creativity. This article is therefore better seen as a statement on... freedom to access to information, not being quite equal to freedom of expression'.[91]

4.3-The European Convention on Human Rights:

Whilst several countries[92] have entrenched copyright protection in their Constitutions, our jurisdiction makes no such allowance although *The Human Rights Act 1998*[93] and several international instruments have significantly influenced domestic copyright law. *The European Convention of Human Rights*[94] through the *HRA* has become legally binding at national level meaning primary legislation must be 'compatible with Convention rights'[95] and parties whose rights are violated can 'invoke these rights before the domestic courts'[96]. This 'has shifted the emphasis from the

[91] Rosen J, 'Copyright in Perspective: External Limitations on Copyright: freedom of expression' EBU Copyright Symposium, Barcelona March 2006.
[92] Article 42(2) Portuguese Constitution, Article 5 Brazilian Constitution, Section 19 Swedish Constitution, Article 43(1) Slovakia Constitution, Article 34 Czech Charter of Fundamental Rights and article 44(1) Russian Constitution.
[93] Henceforth HRA.
[94] Henceforth ECHR. See Appendix G
[95] Section 3(1) HRA 1998.
[96] Mak C, Fundamental Rights in Contract Law (Kluwer Law International, 2008), at 24.

internal dimension to the external one.'[97] This means whilst internal controls were once the main mechanisms to restrict disproportionate copyright protection, external controls have come to the forefront of discussion. The *ECHR* and *HRA* have no specific copyright provisions and debate focuses on Article 1 of the First Protocol. The so-called 'property clause' provides, 'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law'. The second paragraph provides these rights may be limited, 'the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. Domestic and *European Court of Human Rights*[98] case-law has repeatedly confirmed copyright is protected under the First Protocol with an extremely wide definition attributed to the term possessions, 'there is no doubt intellectual property rights constitute possessions.'[99] In the *Gasus Dosier-und*[100] case, in what has become the standard judicial passage[101], it was stated possessions, 'has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights... can also be regarded as 'property rights', and thus as 'possessions'[102]. This view has been routinely supported, 'Article 1... is not limited to the ownership of physical goods.'[103]

[97] Supra Note 7, at 4.
[98] Henceforth ECtHR
[99] Coban A, Protection of Property Rights within the European Convention of Human Right (Ashgate Publishing, 2004), at 149.
[100] Gasus Dosier-und Fordertechnik GmbH. v. the Netherlands App. No. 15375/89 (1995).
[101] Beyeler v. Italy, Application no. 33202/96 (2000), at 100, Broniowski v. Poland, App. No. 31443/96 (2004), at 129 and Kanayev v Russia, App. No. 43726/02 (2006).
[102] Supra Note 100, at 53.
[103] Iatridis v Greece, App. No. 31107/96 (1999), at 54.

In stark contrast to the *UDHR*, the role of copyright within the *ECHR* is firmly Lockean. Not only is copyright classified as a human right but the core characteristics of natural rights theory are supported. Intellectual Property was not specifically discussed until recently however following a deluge of cases 'there is no longer any doubt the exploitation right is also protected'[104]. The *Anheuser-Busch*[105] case concerning trade marks confirmed 'intellectual property... undeniably attracts the protection of art.1'[106] The First Protocol has also been held to encompass domain names[107] and patents[108], 'the Commission finds that a patent accordingly falls within the scope of the term possession.'[109] Copyright has also been repeatedly recognised as being protected in *Aral v Turkey,*[110] *Melnychuk v Ukraine,*[111] *Dima v Romania*[112] and in *Balan v Moldova.*[113] This final case concerned the applicant's photo of a historical building the State used without permission on national identity cards. The court stated it 'reiterates that article 1 of protocol 1 is applicable to intellectual property'[114] and 'the Court concludes the applicant had a "possession" within the meaning of Article 1'[115]. The inclusion of copyright as a possession and protectable as a human right is questionable. Is copyright intrinsic to every person and should it be placed on an equal footing to the prohibition of slavery, discrimination and torture?. Academics have also acknowledged copyright's human rights status, 'copyright is clearly a possession to which attach all the rights

[104] Geiger C, Copyright's Fundamental Rights Dimension at EU level, in Derclaye E, Research Handbook on the future of EU Copyright (Edward Elgar Publishing, 2009), at 32.
[105] Anheuser Busch Inc v Portugal, App. No. 73049/01 (2007).
[106] Ibid, at 78.
[107] Paeffgen GmbH v Germany, unreported September 18, 2007, ECtHR.
[108] Lenzig AG v. United Kingdom, App. No 33817/97 (1998)
[109] Smith Kline & French Laboratories v Netherlands, App. No. 12633/87 (1990), at 70
[110] App. No. 24563/94 (1998)
[111] App. No. 28743/03 (2005)
[112] App. No. 58472/00 (2005)
[113] App. No. 19247/03 (2008)
[114] Ibid, at 34.
[115] Ibid, at 36.

associated with property[116]' and 'copyright...has been attached to the property right granted... by article 1.'[117] Our jurisdiction also recognised this position in *Ashdown v Telegraph Group*[118], 'the infringement of copyright constitutes interference with the peaceful enjoyment of possessions.'[119] In *Veolia*[120] it was stated, 'the concept of "possessions" is broad and covers a wide range of things... which It extends to... forms of intellectual property, including copyright'[121]. The point was once again accepted in the *Newsbin2*[122] and the *Response Handling* cases, 'in particular that right to enjoyment of their property would include intellectual property'[123] and 'copyrights are property rights protected by Art.1'[124] This is also clearly underlined in the *CDPA 1988* by the general assertion, 'copyright is a property right'.[125]

Locke's labour theory outlined above would justify the inclusion of copyright under the First Protocol. Locke's most basic proposition is that creators gain a right over the fruits of their labours, 'property in all that he could effect with his labour; all that his industry could extend to, to alter from the state nature had put it in, was his.'[126] This fundamental principle is embodied under the First Protocol where copyright works gain protection equivalent to that of any other form of property. Locke reasoned a person gained property through their labour and were able to withhold their creation from the

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[116] Dabydeen S, An introduction to intellectual property (iUniverse, 2004), at 32.
[117] Geiger C, Author's Right , Copyright and the Public's Right to Information, in Macmillan F, New Directions in copyright law volume 5 (Edward Elgar Publishing, 2006), at 28.
[118] Ashdown v Telegraph [2002] R.P.C 5.
[119] Ibid, at 28.
[120] Veolia ES Nottinghamshire Ltd v Nottinghamshire CC [2010] EWCA Civ 1214.
[121] Ibid, at 120.
[122] Twentieth Century Fox Film Corp v British Telecommunications plc [2011] EWHC 1981 (Ch).
[123] Response Handling Ltd v British Broadcasting Corporation, [2007] CSOH 102 at 19.
[124] Supra Note 123, at 913.
[125] Section 1(1) CDPA 1988.
[126] Supra Note 34, at 46.

commons because this was of greater value then the resource remaining uncultivated, 'he by his labour does, as it were, inclose it from the common... improve it for the benefit of life, and therein lay out something upon it that was his own....thereby annexed to it something that was his property.'[127] Incorporating copyright into the First Protocol corresponds with natural rights theory because copyright is being considered a universal entitlement. Any person who creates work through their labour gains a human right and in the words of Locke is able to 'inclose it from the common'. The *ECHR* has made instrumentalism unimportant because it has adopted proprietarianism whereby property rights, which here include copyright, are treated as superior to social aims and other public rights. Drahos defines the concept, 'proprietarianism consists of... moral priority of property rights over other rights... a proprietarian is one who believes that activities that first give rise to economic value also necessarily create property rights'[128]. Copyright however is not the correct subject matter to be encompassed as a property right because this makes copyright's social function irrelevant. Proprietarianism would involve the superiority of copyright over social interests which conflicts with the founding copyright principle that right holders interests and the public interest must be balanced.

The courts neatly placing copyright alongside traditional forms of property is to implement a proprietarian interpretation and is highly debatable because copyright by its very nature has fundamental differences with traditional property. The elevation of copyright to human rights status conflicts with and eradicates copyright's underlying

[127] Supra Note 34, at 32.
[128] Supra Note 48, at 202

social function and represents a drastic move away from instrumentalism. This classification completely disregards the distinctive role the public occupies in copyright and undermines the instrumentalist goals copyright in intended to achieve, 'privilege holders, for reasons of rational self-interest, campaign for greater privileges. Their outlook does not take account of the social cost of such privileges...Under the guise of subjective right intellectual property rights are treated like any other form of property. Their distinct character and the threats they pose are clouded by rhetoric of private property.'[129] At this point instrumentalism has been abandoned in favour of a natural rights approach, 'to sum up, fundamental rights and human rights are a synthesis of the bases of natural law'[130]. In *Donaldson*[131] the court ruled copyright does not only protect property rights but has a second social function. It was held rights holder's rights do not trump community interests but both must be adequately provided for. Under the *ECHR* we observe a move away from *Donaldson* and copyright being treated more akin to a natural right as described by Locke than a socially rooted instrumental tool used to secure copyright's dual function. Under utilitarianism rights are given based on their ability to secure general welfare rather than private interest, 'according to utilitarian philosophers, the justification for basic rights should be... general welfare...human beings... have rights only to the extent the provision of such rights produces the greatest good'[132]. The current position under the ECHR is that rights are given solely to further right holder's interests.

[129] Supra Note 48, at 200
[130] Supra Note 104, at 34.
[131] Donaldson v. Beckett (1774) 4 Burr. 2408
[132] Supra Note 57

Copyright has fundamental differences with traditional forms of property which distinguishes the role of the public interest. Firstly copyright is the creation of statute and protected for a limited duration whereas traditional property is tangible, perpetual and not created by statute. Copyrighted works are also non-rivalrous because works can be infinitely reproduced without deprivation of quality or economic value. Tangible property however is rivalrous because they are a limited resource with a defined owner who excludes all others and cannot be shared amongst society. The crucial point the courts have overlooked when construing article 1 of the first protocol is that unlike traditional property copyright serves a wider social function. Copyright should not be classed as a human right and proprietarianism is wholly given copyright's fundamental purpose of balancing rights holders and the public interest. Classifying copyright alongside traditional property is to treat copyright as a natural right and completely undermines the balance between right holders and the public. Under utilitarianism and instrumentalism one must decide what aims the law has and structure rights around achieving these aims. Current human rights law does not do this and protects copyright as a property right with little consideration of the appropriateness of the right provided or limits placed on the right. This is particularly evident with the incorporation of copyright in the definition of possessions.

Drahos argues instrumentalism is the correct theoretical basis for copyright not proprietarianism as currently employed under the *ECHR*, 'instrumentalism would require a strongly articulated conception of the public purpose... The juristic development of intellectual property law would have to adhere rigidly to that purpose. Instrumentalism would require an old-fashioned way of talking: the language of

property rights would be replaced by the language of monopoly privileges.'[133] Under instrumentalism the relationship between copyright and human rights is limited. The priority under instrumentalism in contrast to proprietarianism and natural rights is not to secure property rights but to ensure social aims are met, 'the instrumental attitude to property... endorses an approach that calculates the social costs of intellectual property protection.'[134] Under Drahos copyright would be guided by the values that we set, in our case the principles endorsed by the *Donaldson* case. Property rights would only be provided where these aims are supported not as a matter of inherent right, 'under instrumentalism intellectual property would be located in the context of some broader moral theory and set of values. Property rights would be morality's servants and not its drivers.'[135]Under proprietarianism and natural rights, property rights are given precedence over other interests, 'proprietarianism is a creed which says that the possessor should take all, that ownership privileges should trump community interests'[136]. This is the approach we find in the *ECHR*, the inclusion of copyright under the first protocol has enabled copyright to trump wider social concerns and take precedence over the public interest. The result is copyright is treated as a natural right where creator's interests gain greater protection, all of which means a balance is not achieved. The premise of natural rights theory is the 'requirement that the resulting creation is recognised as the exclusive property of its creator'[137] and 'is concerned with individual benefit rather than social benefit'[138]. Current human rights laws have adopted

[133] Supra Note 48, at 223
[134] Supra Note 48, at 214
[135] Supra Note 48, at 223
[136] Ibid, at 202
[137] Davison J, Monotti A and Wiseman L, Australian Intellectual Property Law, (Cambridge University Press, 2012), at 188
[138] Supra Note 123, at 499.

these principles, treating copyright as an inherent right where instrumental social purposes have no role.

4.4-Charter of Fundamental Rights of the European Union[139]:

Article 17(1) *CFREU* provides, 'everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest... The use of property may be regulated by law in so far as is necessary for the general interest'. The ECJ has consistently held since the *Hauer*[140] case that intellectual property is within the scope of property however article 17(2) denotes a new chapter in the copyright and human rights relationship. Article 17(2) recognises intellectual property separately from a general property provision. It is however badly drafted and extremely vague simply providing, 'intellectual property shall be protected'. The separation of intellectual property has proved controversial, 'the main goal of the drafter... to assure better visibility of IP in Europe...could contribute to amplifying the crisis of legitimacy that IP is currently facing in public opinion.'[141] Whilst some commentators view the separation as beneficial, 'IP is... mentioned separately because of its difference from the right to property in general, because it concerns property of a special kind... property that is socially rooted,'[142] it is questionable if article 17(2) has had any effect on copyright, 'article 17(2) cannot be interpreted to imply a more absolute nature of IP possessions.'[143] It is convincingly

[139] Henceforth CFREU, see Appendix F
[140] Hauer v Rheinland-Pfalz, ECR 3727, 44/79, ECJ (1979)
[141] Supra Note 8, at 117
[142] Supra Note 104, at 35.
[143] Supra Note 55, at 207

argued article 17 simply reinforces the *UDHR* in that States must provide some form of protection to intellectual creations, 'it is possible to interpret Article 17(2) as establishing an obligation on public institutions... to guarantee the continuation of intellectual property protection.'[144] Article 17(2) by duplicating the *UDHR* adds little to the debate and does nothing to help secure a balanced regime, 'there was no practical need to create an obligation similar to article 27(2).'[145] Of greatest concern is that whilst article 17(1) contains the familiar limitations on property rights, 'article 17(2) does not expressly make provision for limitation'[146]. The current limitations that restrict fundamental property rights are rightly narrow only operating in limited circumstances. This may be appropriate for traditional forms of property however, 'limitations upon the private property rights of creators cannot go too far without undermining the very essence of the property rights'[147].

If copyright is to be classified as a human right which I have argued against, it is necessary that the public are provided with robust protection, 'it is suggested to rebalance copyright in order to recognize the interests of users on the same level as right holders'[148]. Without reciprocal protection the public interest is being demoted to a secondary consideration and a balance cannot be achieved, 'to analyse copyright through the lens of fundamental right would lead to understanding there... are also fundamental rights for users, such as the right to expression, to information and especially knowledge... it is therefore necessary to find the correct balance between

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[144] Ibid, at 206
[145] Ibid.
[146] Supra Note 12, at 220.
[147] British Copyright Council, Intellectual Property and Human Rights response to the Sub-Commission on Human Rights Resolution 2000/7, (Resolution E/CN.4/SUB.2/RES/2000/7), at 2.
[148] Schovsbo J, 'Integrating consumer rights into copyright law: from a European perspective', (2008) Journal of Consumer Policy, Vol. 31 No. 4, pp. 393-408, Page 393.

these rights[149]. Human rights are being used to uphold right holders interests and ignore copyright's social purpose and the effect on copyright law is to further shift the balance in favour of rights holders in this new legal field. Given the classification of copyright alongside traditional tangible property it is vital to consider how the public interest is being protected. One possible mechanism to protect the public interest and achieve a balance in copyright law has been the idea of user rights which will be discussed in chapter seven. In the human rights context the public interest is predominantly embodied in freedom of expression.

4.5-The Public-No Rights:

The root of the conflict between copyright and human rights is freedom of expression[150]. Freedom of expression is one of the main provisions embodying the public interest by legitimately restricting copyright and allowing the public to use copyrighted works. If given primacy freedom of expression could redefine the balance and help copyright fulfil its intended purposes. The argument copyright and human rights coexist is refuted when freedom of expression is discussed because they limit the scope of one another, 'copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.'[151] Freedom of expression protects the ability of any person to hold an opinion and to impart and receive information. This directly opposes copyright which controls speech, limits what materials can be used and controls the use of knowledge. The right to freedom of expression however may not extend to

[149] Aghrib S, Moujaddidi E and Ouazzani A, Morocco, in Armstrong C, De Beer J and Kawooya D, Access and Knowledge in Africa: The Role of Copyright, (IDRC, 2010), Page 155.
[150] Sometimes referred to as freedom of speech.
[151] Supra Note 118, Lord Phillips, at 30.

copyrighted material, 'when a speaker wishes to "use" another author's expression as part of his own expression he has to obtain the owner's permission. It is this very limitation, the essence of copyright law that creates the tension'[152]. Equally other occasions require reference to copyrighted works to adequately express oneself, 'copyright punishes expressions by speech and press when such expression consists of the unauthorised use of material protected by copyright.'[153] Freedom of expression is guaranteed under article 10 ECHR[154], '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas... (2) 'the exercise of these freedoms... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society... for the protection of the reputation or rights of others'.

Article 10(1) theoretically protects the public's right to express themselves even if this involves restricting copyright, 'it may also allow judges to step in and correct certain excesses when the basic values of copyright are lost sight of.'[155] A generously interpreted article 10(2) however further imbalances the public and rights holders by frequently allowing copyright to override freedom of expression, 'the free speech approach has largely failed to place limits on copyright law'[156] and 'the characterisation of copyright as a species of private property... ensures free expression concerns

[152] Supra Note 7, at 2.
[153] Nimmer M, 'Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press? (1970) 17 UCLA L.Rev at 1181.
[154] Section 12 HRA 1998, article 11 CFREU and article 19 ICCPR provide similar rights.
[155] Supra Note 104, at 48.
[156] Rothman J, 'Liberating Copyright: thinking beyond free speech' 95 Cornell Law Review 463 (2010), at 485.

typically give way to private copyright control'[157]. This has resulted in copyright being given superior status and the balance more prejudiced than ever. Freedom of expression can be limited if; i- the interference is prescribed by law, ii- it falls under one of the aims of article 10(2) and iii- the restriction is necessary in a democratic society. Copyright easily fulfils these conditions whereas freedom of expression rarely limits copyright. Copyright is prescribed by domestic law (*CDPA 1988*), interference with freedom of expression is justified under the aim of protecting the rights of others. The question if the restrictions are necessary are based on the specific facts of the case however is only necessary where 'the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued[158] and whether the reasons given by the national authorities are 'relevant and sufficient.'[159] The courts however routinely restrict freedom of expression even in circumstances where it could hardly be described as necessary or proportionate. Of course one would not argue freedom of expression should be used to justify piracy 'one who pirates the expression of another is not engaging in *self*-expression in any meaningful sense'[160] there may be justifiable reasons for freedom of expression to limit copyright, 'arguments for preferring liberty rights over property rights... are particularly strong... there is minimal interference with copyright holders' ability to use their property...the competing liberty interests of users should outweigh loss of profit'[161].

[157] Craig C, Copyright, Communication and Culture (Edward Elgar Publishing, 2011), at 204.
[158] The Sunday Times v United Kingdom (1979) 2 EHRR 245, 277-278, at 62
[159] Pinto T, 'The influence of the European Convention on Human Rights on intellectual property rights', 24 EIPR 209, at 211
[160] Ibid, at 485.
[161] Supra Note 156, at 513

Returning to Drahos as outlined above under proprietarianism, copyright is a property right that is able to override other rights, 'proprietarianism...assigns to property rights a fundamental and entrenched, status. Property rights are given a priority ranking over other kinds of rights and interests'[162]. Article 10 case-law has followed proprietarianism in that copyright is being ranked above other rights, in this case freedom of expression. Copyright frequently takes precedence over freedom of expression which has become 'a reserve power to be used by defendants in copyright infringement cases almost as a last resort and the courts will need a lot of persuasion to depart from the copyright Act.'[163] Holland acknowledged copyright may be limited by article 10, 'copyright is not immune to the need for balancing with freedom of expression'[164], however rarely puts such sentiments into practice. In *Boogschutter*[165] a humorous photograph of a statue of an archer 'shooting' the interviewee was considered copyright infringement with no applicable fair dealing provisions and freedom of expression submissions failed. The Anne Frank case[166] and the Supreme Courts of Austria, Germany and France came to the same conclusion. In *Utrillo*[167] a French television network without permission showed twelve Maurice Utrillo paintings in a two minute news item to highlight a forthcoming exhibition. The broadcaster's freedom of expression defence failed, 'freedom of expression, as the text specifically emphasises, carries with it duties and responsibilities... the restriction on the public's right to information which results from the right granted to authors... pursues the goal of protecting the rights which these authors possess in their own creations'[168] The court

[162] Supra Note 48, at 200.
[163] Supra, Note 5, at 168.
[164] XS4all v Scientology IER 2003-6, 358.
[165] Boogschutter, District Court of Amsterdam 19 January 1994
[166] Anne Frank Fonds v. Het Parool, Court of Appeal Amsterdam 8 July 1999, [1999] Informatierecht/AMI 116.
[167] Cour d' Appel, 30 May 2001, [2001] Dalloz 2504

concluded, 'the television company had the necessary means available to it to inform the public of the existence of the exhibition in question without it also being necessary to reproduce the 12 works'[169] The Court reasoned domestic copyright legislation provided adequate exceptions internally that already reached an adequate balance between rights holders and the public. The same reasoning was adopted in Germany in the *CB-Infobank*[170] and *Lili Marleen*[171] cases and in Austria in the *Head-Kaufvertrag*[172] case. The ECtHR/ Commission[173] have also discussed article 10. In the *France 2*[174] case, infringement was claimed when Edouard Vuillard's frescos were seen for 49 seconds in a theatre advert. The Commission held copyright overrode freedom of expression and none of France's fair dealing provisions applied. *De Geillustreerde Per N.V v The Netherlands*[175] concerned the refusal to allow television schedules to be republished. It was held the refusal did not violate article 10 and that freedom of expression once again could not limit copyright, 'there has been, in the circumstances, no interference with any of the rights protected by Article 10 (1) of the Convention'[176]. The Commission remarkably suggested freedom of expression only extended to authors, 'the freedom under Art. 10... is only granted to the person who produces, provides or organises it and... is limited to information produced... by the person claiming that freedom being the author'[177]

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[168] Ibid, at 19-21.
[169] Ibid, at 24.
[170] CB-Infobank II, German Federal Supreme Court 16 January 1997, [1997] I ZR 38/96; GRUR Int, 1997,464
[171] LG Berlin (Photographs of Ulrike Meinhof) [1978] G.R.U.R. 108 and BGH, March 7, 1985 (Lili Marleen)
[172] Head-Kaufvertrag Austrian Supreme Court 17 December 1996, [1997] Medien und Recht 93.
[173] Includes the now non-existent European Commission of Human Rights.
[174] France 2 v. France, European Commission of Human Rights 15 January 1997, Case 30262/96, [1999] Informatierecht/AMI 115.
[175] De Geïllustreerde Pers N.V. v. The Netherlands, 6 July 1976, European Commission of Human Rights Decisions & Reports 1976 (Volume 8)
[176] Ibid, at 89
[177] Ibid, at 84.

The common element in all the above cases is copyright is interpreted through proprietarianism. Drahos contends that under proprietarianism copyright is given moral supremacy over other rights, 'the consequence within normative theory is that property interests are continuously given a moral primacy.'[178]. The various judgements narrowly define freedom of expression with little consideration of the public interest. The problem comes down to the distinction between rights and privileges, 'one of the reasons why intellectual property rights are no longer thought of in this way [privilege] is that they are continually referred to by the aggregated term of rights...their relocation in the language of private property has obscured their origins in public privilege'[179]. Proprietarianism and natural rights support copyright as a right, something that is an inherent entitlement. Copyright under instrumentalism is a privilege that can be limited and would yield to rights such as freedom of expression. In the cases discussed copyright is classified as a right rather than a privilege, 'to call copyright 'property' risks vesting copyright holders with more than they deserve. To call it 'privilege'...reminds copyright holders of what they owe the public.'[180]In *Boogschutter* should freedom of expression have been restricted? I would strongly argue no because freedom of expression should only be limited in rare circumstances and here the artist's ability to exploit their work was not inhibited, 'copyright represents an exception to the general rule we can speak the truth. It thus won't do to call copyright simply a property right'[181]. I would also strongly argue that copyright should not have restricted freedom of expression in *Utrillo* and *France2* because the use of copyrighted works was not

[178] Supra Note 48, at 201
[179] Ibid, at 213.
[180] Bell T, 'Copyright as Intellectual Property Privilege', 58 SYRACUSE L. REV. 523, 529–31 (2008), at 21.
[181] Ibid, at 7.

intended to compete with or deprive the artists of revenue. In fact the use may have raised awareness of the work.

Under instrumentalism the purpose of copyright for right holders is to encourage them to create socially useful works and to facilitate exploitation of this work. In the aforementioned cases the expression of the defendants did not interfere with the achievement of these purposes and yet copyright was able to restrict their expression. The needs of the public particularly their right to freedom of expression is given little consideration, 'the European Commission has been reluctant to accept freedom of expression and information arguments'[182]. Copyright's ability to routinely restrict freedom of expression also raises the possibility of a 'chilling effect'. The rigid application of copyright discourages the public from using copyrighted material for fear of infringement proceedings. In relation to freedom of expression we once again see a natural rights approach at the expense of copyright's social purposes. Copyright is being treated as a natural right above freedom of expression and closely resembles the Lockean and Blackstonian vision of property, 'so great moreover is the regard of the law for private property, that it will not authorize the least violation of it; not even for the general good of the whole community'[183]. Blackstone's statement accurately represents the current situation between copyright and freedom of expression. Copyright is being upheld as a proprietarian natural right where violation of copyright will not be tolerated even where there are legitimate and pressing reasons to protect freedom of expression. The result is a balance in copyright law cannot be achieved when rights

[182] Supra Note 15, at 15.
[183] Blackstone W, Commentaries on the Laws of England, (Strahan, 1783), at 139

holder's rights are classified as natural rights but public rights such as freedom of expression are treated as rare exceptions to copyright.

The various human rights provisions are wholly inadequate given copyright's unique social function which has been disregarded 'the rights of the individual have to be carefully balanced against societal interest... it seems the best balance is achieved when it is remembered that IPRS were originally created in order to secure societal purposes... the usage of the term "property" has emerged much later.'[184] The recognition of copyright as a fundamental right and its frequent ability to override freedom of expression is not offset by adequate limitations or equivalently robust rights for the public, 'copyright holders' fundamental rights are not jeopardized by some limits on the scope of their copyrights'[185]. Current human rights law is imbued with a natural rights ideology and this completely undermines copyright's instrumentalist basis, 'courts have systematically denied the clash between free speech right and copyright protections.... it is laden in the discourse of property rights, signalling the hegemony of a natural rights vision of copyright over an instrumentalist view'[186]. An instrumentalist approach if adopted would use human rights law as a tool where the rights provided would be limited to give effect to copyright's social function, 'under the instrumental view... it allows imposing limitations thereon, thus achieving the public good or the proper balance'[187]. Current law protects rights holder's interests above any competing social concerns, 'if copying protecting is justified as a "natural right" of an author then the fact

[184] Supra Note 10, at 167.
[185] Supra Note 156, at 511.
[186] Tehranian J, Infringement nation: copyright 2.0 and you (Oxford University Press, 2011), Page 153.
[187] Suboong L, 'The relationship between copyright and freedom of expression is controversial', available at http://www.lsblawyers.com.au/column_detail_view.php?seqno=17&page=1&category= [Last Accessed September 30th 2014]

that copyright interferes with freedom of expression does not mean that the former should give way.'[188] Following a natural rights approach has hindered the balance in copyright law in two main ways. Firstly the integration of copyright alongside traditional property completely ignores the unique role of the public within copyright. Secondly adherence to proprietarianism has restricted the public's right to freedom of expression which is deemed subservient to copyright. Human Rights have principally been used to support rights holders and have been unable to adequate represent the public interest. A balance cannot be achieved in copyright law until the role of the public interest in human rights is acknowledged and this requires an instrumentalist reading not the natural rights one currently adopted.

4.6-Balancing Human Rights:

From the above discussion the ECtHR and the CJEU took a very one sided interpretation of the relationship between copyright and human rights. Both were reluctant to recognise a conflict between copyright and other human rights notably freedom of expression. Both also regularly protected copyright as a property right that took priority over other human rights and relied on internal copyright provisions to protect freedom of expression and balance right holders and the public. Both the ECtHR and the CJEU have discussed balancing copyright with other fundamental rights most notably in the *Promusicae*[189] and *Scarlet*[190]cases, '_national authorities and courts must strike a fair balance between the protection of copyright and the protection of the

[188] Ibid.
[189] Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU (C-275/06) [2008] E.C.R. I-271
[190] Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM) (C-70/10) [2011] E.C.R. I-11959

fundamental rights of individuals.'[191] It was not until 2012 however when several cases fundamentally re-examined the human rights-copyright relationship and outlined how to balance conflicting fundamental rights. Returning to article 17 CFREU, the *Luksan*[192] and *Telekabel*[193] cases provide valuable insight into the scope and interpretation of article 17. Firstly the *Luksan* case concerned Mr Luksan who signed an agreement to direct & write a WW2 documentary, Pictures From The Front whilst Mr Van Der Let produced the film. Mr Van Der Let made the documentary available online and a dispute arose over the right of making the documentary available to the public on digital networks, with Mr Luksan claiming this right resided with him. Under Austrian law the right resided with the producer & a preliminary ruling was made to determine whether this provision violated EU law. It was held that the Austrian provision did violate EU law. The importance of the decision is the discussion of article 17 and the approach to balancing competing human rights both of which are brief and inadequate. Firstly the court ruled Mr Luksan had a property right in his work, 'the principal director of a cinematographic work must be regarded as having lawfully acquired, under European Union law, the right to own the intellectual property in that work.'[194] Secondly it was held denial of this exploitation right violated article 17(2) of the CFREU, 'the fact that national legislation denies him the exploitation rights at issue would be tantamount to depriving him of his lawfully acquired intellectual property right'[195] and 'would not be consistent with the requirements flowing from Article 17(2).'[196]

[191]Ibid, at 45.
[192] Luksan v Van der Let (C–277/10) [2013] ECDR 5
[193] UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH (C-314/12) [2014] Bus. L.R. 541
[194] Supra Note 192, at 69
[195] Ibid, at 70
[196] Ibid, at 71

The first problem with the judgement is that there is no in-depth discussion of article 17, the court merely classified copyright as a fundamental property right and found a violation of this right, 'it is simply asserted that, as the principal director is entitled to the rights at issue... no reference is made to the existing jurisprudence on the interpretation of the property.'[197] This not only raises all the inherent problems of classifying copyright as a fundamental property right as discussed above but also appears the CJEU is simply using article 17 to support the traditional position that copyright can override other fundamental rights, 'one is left with the strong impression that the Court's conclusion on Art 17 is primarily rhetorical, serving to bolster the prior decision that the exploitation rights in question were to be be allocated to authors as a matter of European copyright law.'[198] The case provided no discussion of essential issues such as how article 17 should be applied? how can copyright be restricted? and most importantly did not discuss the role of the public. The court did acknowledge different fundamental rights did have to balanced & referred to recital 31 of the *InfoSoc Directive*[199] and the fair balance concept, 'a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded'. Once again the court referenced this important point but gave no further explanation of how a fair balance was to be achieved between fundamental rights, 'in the recent copyright cases, the application of the "fair balance" concept is vague'[200] and 'the question of whether or not that provision represented a "fair balance" between the property right of the director and the more general interest was not even considered by the Court.'[201] Groose Ruse

[197] Griffiths J, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law, 38, 65-78 (2013), at 76.
[198] Ibid, at 77.
[199] Directive on Copyright and related rights in the Information Society 2001/29/EC
[200] Supra Note 197, at 74.

Khan argues the result of the case is that the CJEU once again protected copyright above other rights, 'such an approach generally leads to prioritizing obligations for IP protection over options for limiting them. That is because there are few obligations to limit IP protection...The approach adopted by the CJEU hence supports the tendency of continuously strengthening IP rights.'[202] Whilst we finally see the court acknowledging the need to balance conflicting rights in *Luksan* the court did not go any further, 'a thorough assessment of the "fair balance" requirements in the specific circumstances of the case ought to have involved much closer attention to the respective weights of the rights at issue.'[203]

Following *Luksan* the courts have paid much closer attention to rights at issue and have not only acknowledged copyright can conflict with freedom of expression but also discussed how this conflict should be dealt with. The *Telekable* case concerned blocking injunctions for websites providing illegal access to copyrighted material. The court stated several fundamental rights conflicted and these had to be balanced, 'it [is] necessary to strike a balance, primarily, between (i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter, (ii) the freedom to conduct a business and (iii) the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter.'[204] It was held an adequate balance between these conflicting rights had been struck in the case however the court acknowledged copyright can conflict with other fundamental rights, explained

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[201] Ibid, at in the recent copyright cases, the application of the "fair balance" concept is vague 77.
[202] Grosse Ruse-Khan H, 'Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights' in Geiger C, Research Handbook on Human Rights and Intellectual Property (Edward Elgar Publishing, 2015), at 78.
[203] Supra Note 197, at 74.
[204] Supra Note 193, at 47.

how conflicting rights should be balanced and gave a prominent role to fundamental rights protecting users not just right holders. The court stated that where several fundamental rights are at issue that copyright law has to be interpreted consistently with those fundamental rights, in this case this meant a users right to freedom of information had to be protected alongside the right holders copyright, 'the ISP had to ensure that the measures ensured compliance with the fundamental right of internet users to freedom of information in other words they had to be targeted to bringing an end to the website operator's copyright infringement without affecting the ISP's customers' ability to lawfully access information available on the internet.'[205] The court itself specifically stated ISP's had to consider the impact of a blocking injunction on users, 'he must ensure compliance with the fundamental right of internet users to freedom of information'[206] and 'the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available.'[207] The court put these sentiments into action and held 'there is nothing whatsoever in the wording of Article 17(2) to suggest that the right to intellectual property is inviolable and must for that reason be absolutely protected[208]'. Applying this to the case it was held that the blocking injunction had to be targeted not open ended or this would violate users right to freedom of information, 'measures adopted by the ISP must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright but without thereby affecting internet users... failing that, the provider's

[205] 'Siteblocking Orders-"You be the Judge", CJEU tells ISPs', available at http://www.osborneclarke.com/connected-insights/publications/siteblocking-orders-you-be-judge-cjeu-tells-isps/#sthash.0gVbbMCj.dpuf [Last Accessed April 20th 2015]
[206] Supra Note 193, at 55.
[207] Ibid, at 63.
[208] Ibid, at 61.

interference in the freedom of information of those users would be unjustified in the light of the objective pursued'[209].

This is a significant change. Firstly in comparison to *Luksan*, here the court not only acknowledged the capability of copyright to conflict with other fundamental rights but also detailed how a fair balance could be achieved although this responsibility is given to ISP's. Copyright was not given precedence over other rights but given equal treatment and crucially the court even stated that copyright could be limited by other fundamental rights, for example if in this case the measures used were not strictly targeted then the users right to freedom of information would have been violated and copyright would have acquiesced, 'it would be incompatible with the weighing of the fundamental rights of the parties to prohibit an ISP generally and without ordering specific measures from allowing its customers to access a particular website that infringes copyright.'[210] The ECtHR has followed this reasoning in *Yildirim v Turkey*[211] where the blocking of the entire Google site to prevent access to one website was deemed to violate article 10 ECHR. The result of the decision is that the freedom of information of users has to be taken into account alongside copyright and this is a noticeable change from the previous case law where although mentioned the fundamental rights of users were frequently overruled by copyright and treated as secondary. The judgement is problematic in that the court gives ISP's the role of determining what measures need to be taken. ISP's have to determine the correct balance between conflicting rights and the court provided little guidance simply stating,

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[209] Ibid, at 56

[210] Rosati E, 'CJEU says that blocking orders are OK and do not have to be specific' available at http://ipkitten.blogspot.it/2014/03/breaking-news-cjeu-says-that-blocking.html [last accessed March 30th 2015], this therefore means blocking injunctions are likely to be considered valid as they are targeted and specific whereas general filtering or monitoring systems will not, see Scarlet Supra Note 190.

[211] Ahmet Yildirim v. Turkey App no 3111/10 (2012).

'such an injunction allows its addressee to avoid liability by proving that he has taken all reasonable measures. That possibility of exoneration clearly has the effect that the addressee of the injunction will not be required to make unbearable sacrifices'[212]. The term 'reasonable measures' is inherently vague and it will be difficult for ISP's to prevent illegal access to copyrighted material whilst maintaining user's freedom of information. The court however did give a role to users albeit limited, with the ability to challenge measures protecting copyright to ensure their fundamental rights are protected, 'in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction...national procedural rules must provide a possibility for internet users to assert their rights before the court.'[213] The public therefore have a right to ensure the ISP protects their rights and have a way of ensuring copyright does not dominate their fundamental rights as it has done in the past, 'whether or not an intermediary has succeeded in striking this delicate balance must be subject to judicial review... national procedural rules must provide internet users with *locus standi* before the courts after the implementing measures have been taken by the ISP.'[214] This locus standi however is likely to be ineffective in overruling copyright and protecting the public interest, blocking injunctions are normally 'strictly targeted' and it has already been ruled that they do not violate users fundamental rights with numerous blocking injunctions being granted.[215]

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[212] Supra Note 193, at 53
[213] Ibid, at 57.
[214] Angelopoulos C, 'CJEU in UPC Telekabel Wien: A totally legal court order…to do the impossible' available at http://kluwercopyrightblog.com/2014/04/03/upc-telekabel-wien/ [Last Accessed March 25th 2015]
[215] See EMI Records Ltd & Others -v- British Sky Broadcasting Ltd and others [2013] EWHC 379 (Ch), Twentieth Century Fox & Ors -v- Newzbin Limited [2010] EWHC 608 (Ch), FSR 21, Twentieth Century Fox Film Corp -v- British Telecommunications plc [2011] EWHC 1981 (CH). [2012] Bus LR 1471 and Dramatico Entertainment Limited & Ors -v- British Sky Broadcasting Limited & Ors [2012] EWHC 1152 (Ch)

Following the *Telekabel* judgement, a blocking injunction was granted in the *Paramount*[216] case and the fundamental rights of users were considered and balanced, 'none of the relevant articles have precedence over the others and where their values conflict their comparative importance needs to be closely examined together with the justifications for interfering with or restricting each right. Ultimately a balancing test must be applied.'[217] In such a blatant case of piracy the consideration of the fundamental rights of users made little difference to the outcome, 'Henderson J. considered it plain that the result of the balancing exercise must be that the rights of the applicants to protection of their copyright should prevail over the rights to freedom of expression.'[218] The overall effect of these cases is a growing recognition of the role of the public within copyright law particularly that their rights are equal to those of right holders and that they must be balanced however fundamental rights such as freedom of expression or information still rarely limit copyright.

4.7-Redefining Article 10

Alongside the EU jurisprudence and the UK blocking injunction cases, the ECtHR has also challenged the traditional position that copyright law and human rights do not conflict and that freedom of expression is adequately protected by copyrights internal components. The ECtHR has recently had to rule on balancing freedom of expression article 10 ECHR and the right to property under article 1 of the first protocol and the result is, 'a major change of perspective has been introduced, by two recent rulings'.[219]

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[216] Paramount Home Entertainment International Ltd and others v British Sky Broadcasting Ltd and others [2014] EWHC 937 (Ch)
[217] Ibid, at 41.
[218] James S, 'Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd - another battle on in the UK in the war against online piracy', Ent. L.R. 2014, 25(8), 319-322 at 321.
[219] Geiger C and Izyumenko E, 'Copyright on the human rights' trial: redefining the boundaries of

In the *Ashby Donald*[220] case three photographers took photographs of a Paris fashion show and published them online without the permission of the fashion house and were convicted in France for copyright infringement. At the ECtHR the applicants complained their rights under article 10 had been breached. In the *PirateBay*[221] case the operators of the infamous pirating website complained there conviction for committing crimes in violation of copyright law breached their freedom of expression. Both cases recognised that a conviction for copyright infringement can in principle interfere with freedom of expression, 'the Court explicitly held that the appellants' activities fell within the exercise of the right of freedom of expression and that the conviction interfered with that.'[222] The *PirateBay* case also concluded freedom of expression had been interfered with and that even illegal file sharing was protected by article 10, 'the ECtHR found that the appellants' criminal convictions for operating the Pirate Bay site interfered with their right to freedom of expression, since they had put in place the means for others to impart and receive information.'[223] Both cases also confirmed interference with freedom of expression is only acceptable if the three requirements under article 10(2) discussed above are fulfilled and that the third requirement is where balancing occurs. In *Ashby Donald* it was held there was no violation of freedom of expression because the photographs concerned commercial speech rather than contributing to a pressing social need or public discussion, 'The ECtHR considered that even though... the photographers had a lucrative aim in mind, the online publication of the photos by the photographers fell under their right to freedom of expression. And the

exclusivity through freedom of expression', IIC 2014, 45(3), 316-342, at 317

[220] Ashby Donald and others v. France, App No 36769/0810, (2013), the case has not yet been translated into English.

[221] Fredrik Neij and Sunde Kolmisoppi v Sweden, App No. 40397/12, (2013)

[222] Smith G, 'Ten ways in which copyright engages freedom of expression' available at, https://inforrm.wordpress.com/2013/05/02/ten-ways-in-which-copyright-engages-freedom-of-expression-part-1-sliders-one-to-five-graham-smith/ [Last Accessed May 1st 2015]

[223] Ibid

photographer's condemnation for copyright infringement interfered with their right to freedom of expression.'[224] The ECtHR found that whilst the applicants right to freedom of expression had been interfered with their was no violation of article 10, 'Ashby Donald was noteworthy as it seems to accept that speech infringing copyright can in principle claim [article 10] protection'[225].

Both cases are truly significant not just because the conflict between copyright and freedom of expression was explicitly recognised for the first time but also it was held that copyright would have to yield to freedom of expression in certain cases. In both cases the court held convictions for breaching copyright interfered with their right to freedom of expression however this interference was prescribed by law, protected the rights of others and was necessary in a democratic society. The court however stated that because of the nature of the use of work in the cases national courts have a particularly wide margin of appreciation in balancing conflicting fundamental rights and justifying the interference with the applicant's right to freedom of expression, 'the ECtHR essentially rejected a violation of Art.10 because of the wide margin of appreciation it grants to national decisions balancing competing rights under the Convention here freedom of expression and the right to property.'[226] It was held that the national court correctly balanced freedom of expression and the right to property and that the ECtHR should not overrule their reasoning, 'in cases that require a balance to be struck between two fundamental rights... national authorities enjoy an even wider

[224] Ibid
[225] Woods L, 'ECtHR decision in Pirate Bay', available at, https://blogs.city.ac.uk/cljj/2013/03/15/comment-ecthr-decision-in-pirate-bay-case-neij-and-sunde-kolisoppi-v-sweden/ [Last Accessed May 1st 2015]
[226] Supra Note 202, at 20.

margin of appreciation. In the present case, the ECtHR found no reason to consider that the national authorities exceeded their margin of appreciation and consequently did not find the need to undertake itself the balancing exercise'[227]. The court however did not specify the exact detail of how the freedom of expression and the right to property should be balanced however it is now beyond any doubt not only must national courts recognise the conflict but they also have to balance these two fundamental rights and ensure that freedom of expression is adequately protected and given equal status to copyright which was not the situation previously. This is exemplified by the court stating exceptions to freedom of expression must be narrow and rare, 'the Court hereby confirms its approach that while freedom of expression is subject to exceptions, these exceptions must be construed strictly, and the need for any restrictions must be established convincingly'[228]. This therefore means the effect of the cases is limited where copyrighted material is used for commercial speech, 'due to the important wide margin of appreciation available to the national authorities in this particular case, the impact of Article 10 however is very modest and minimal'[229]. These two cases were not appropriate scenarios to limit copyright because they made no contribution to public debate they simply reproduced the images & sold them, 'the applicants' approach had essentially been a commercial one.'[230]

[227]Chirvase T, 'Copyright and the Freedom of Expression in the Knowledge Society' J. Intell. Prop 10 (2013): 324 at 12.
[228] Supra Note 219, at 38.
[229] Voorhoof D, 'Copyright vs. Freedom of Expression judgement' available at, http://echrblog.blogspot.it/2013/01/copyright-vs-freedom-of-expression.html [Last Accessed March 17th 2015]
[230] Supra Note 222

The decision of the court would have been reversed if a matter of public interest was concerned, 'it would undoubtedly have been different if the pictures posted on the Internet had contributed to a public debate e.g. on women's rights in the world of fashion, or on public health issues related to anorexia'[231]. The photos were used in a purely commercial way however the court held if use of copyrighted material contributed to 'debate of general interest' then copyright would have to defer to freedom of expression. This means that use of copyrighted material contributing to public debate will gain greater protection than use for commercial reasons. This was explicitly recognised in the *PirateBay* case, 'distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate'.[232] The most important effect of the cases is that the public will be able to use freedom of expression to challenge copyright, 'the ECtHR's Ashby Donald decision means that any copyright interpretation could be challenged on the basis of freedom of expression.'[233] Following the *Ashby Donald* and *PirateBay* cases the crucial factor in determining the balance between copyright and freedom of expression is the margin of appreciation. Geiger notes the difficulty with both of the decisions is the defining line between commercial and public interest speech. Whilst the divide was clear in these cases, the court provided no clear guidance, 'what the Court understands by the "public debate of general interest" is not clear: the case law suggests rather vaguely that "[t]he definition of what constitutes a subject of general interest will depend on the circumstances of the case". While this might be so, recognition of the general public interest in information is not reduced to political context.'[234] There may

[231] Jones J, 'Internet pirates walk the plank with article 10 kept at bay: Neij and Sunde Kolmisoppi v Sweden', E.I.P.R. 2013, 35(11), 695-700, at 698
[232] Supra Note 221.
[233] Mylly T, 'The constitutionalisation of the European legal order: Impact of human rights on Intellectual Property, in Geiger C, Research Handbook on Human Rights and Intellectual Property, (Edward Elgar Publishing, 2015), at 129

be legitimate circumstances where non-political speech may need to use copyrighted material. *Ashby Donald* and the *PirateBay* cases do not provide clear direction on how to achieve a balance in these circumstances nor do they provide any protection for those rare occasions where copyrighted material needs to be used for commercial purposes.

This latest development in the relationship between copyright and human rights challenges the traditional position of national and European courts that internal copyright components adequately protect freedom of expression, 'one can no longer state that copyright is immune for *external* article 10 ECHR checking based on the existence of *internal* checks within the copyright system'[235] and 'the Ashby Donald decision makes it clear that article 10 ECHR applies in copyright cases, and that copyright law may constitute an interference with one's freedom of expression'[236]. These decisions mean that restricting the use of copyright or finding infringement of copyright interferes with freedom of expression and a conflict does exist, '*i*t is, in other words, no longer sufficient to justify a sanction or any other judicial order restricting one's artistic or journalistic freedom of expression on the basis that a copyright law provision has been infringed.'[237] The overall effect of the decisions is to confirm there will be occasion when internal copyright measures cannot adequately balance the public and rights holders, 'the recent case law of the European Court confirms explicitly that the right to freedom of expression... can act as an external constraint on the scope of

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[234] Supra Note 219, at 325
[235] Van Besien B, 'Does copyright conflict with freedom of expression? First round - The Ashby Donald case', available at, http://www.newmedia-law.com/news/copyright-and-freedom-of-expression-first-round-the-ashby-donald-case/ [Last Accessed April 10th 2015]
[236] Ibid
[237] Supra Note 229.

copyright.'[238] This is a significant change in approach. It is now being recognised the long maintained argument that internal copyright components protect the public interest is in certain circumstances wrong, 'external factors can be applied to ensure a balanced protection beyond the already existing exceptions and limitations built into copyright legislation… hence, both rulings highlight the potential importance of freedom of expression for delineating the appropriate boundaries of exclusivity.'[239] Only by using external measures such as freedom of expression to challenge copyright can the public interest be adequately protected and a balanced secured, 'the decisions suggests Strasbourg judges may one day conclude that national IP laws transgress these principles and thus violate the right to freedom of expression.'[240]

Whilst the recent decisions of the ECtHR represent important milestones in the copyright-human rights relationship several problems still remain. Firstly as noted above the interpretation of the margin of appreciation was somewhat narrow with political speech protected but this does not account for other valuable non political uses of copyrighted material, 'if one starts from the premise that not only political, but also cultural, artistic or otherwise "societal" expression is given sufficient Article 10 protection, the case might have looked quite different'[241]. What is lacking is clear guidance on when freedom of expression will limit copyright or how non political speech should be classified,'the recent case-law of the ECtHR does not contain clear or instructive guidelines to predict what the outcome will be in other circumstances e.g.

[238]Voorhoof D, 'Freedom of Expression and the right to information: Implications for Copyright' in Geiger Supra Note 203, at 331
[239] Supra Note 219, at 318
[240] Helfer L, 'Mapping the Interface between human rights and intellectual property', in Geiger Supra Note 203, at 7
[241] Supra Note 219, at 327

related to journalistic reporting, access to information ,quotations...parody, satire'[242] and 'the Court does not reflect on the essential elements to be taken into account in the balancing exercise, it states that the margin of appreciation depends, among others, on the type of information'.[243] Another issue with the rulings is that the ECtHR has at times taken a narrow view of political speech meaning all political speech may not be protected. In *Szima v Hungary*[244] it was held freedom of expression had to be interfered with when a series of articles exposed wrongdoing in the police service whilst in *Peta Deutschland v Germany*[245] the court ruled article 10 was not violated when extremely controversial posters comparing the atrocities of Nazi Germany to animal slaughter were banned. All of these cases involved matters of general public interest and political connotations but freedom of expression was not protected. In other cases freedom of expression has been protected even where it is not purely political in nature. Whilst not concerning copyright, in *Eon v France*[246] a man was charged with a criminal offence and a fine for offending President Sarkozy with an impolite placard using a quote the President himself had used. The ECtHR held this violated article 10 and that this comment had a satirical element that had to be protected or there could be a chilling effect on political discussion. Whilst this case featured political elements the court also protected this satirical expression. Going forward the scope of the margin of appreciation will be vital. If only political speech (or a narrow definition of what constitutes political speech) is protected under article 10 this may not be sufficient to protect legitimate use of copyrighted material such as satirical or socially beneficial

[242] Supra Note 238, at 349.
[243] Baraliuc I, 'Intellectual Privacy: A fortress for the individual user?' in Big Data: Challenges and Opportunities. Proceedings of the 9th International Conference on Internet, Law & Politics. Universitat Oberta de Catalunya, Barcelona (2013), at 35
[244] Szima v Hungary App No. 29723/11 (2012)
[245] Peta Deutschland v. Germany App No. 43481/09 (2012)
[246] Eon v France App No. 26118/10 (2013)

uses, 'the effect of this is to add an external human rights dimension to copyright enforcement. However, this perspective should not be overstated prematurely. The margin of appreciation available to the national authorities, which can be particularly wide, as in this case, can render the impact and importance of art.10 of the Convention as a very modest and rarely efficacious defence to copyright infringement'[247]

4.8-The Public Interest Defence-a lost opportunity:

The public interest defence is a common law defence although it has a statutory footing under section 171(3) *CDPA*, 'nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest'. The defence allows use of copyrighted material if the use is in the public interest and if successful, 'provides a shield against an injunction or damages... it would justify use of copyright without authorisation'[248]. Permitting use of copyrighted material in the public interest is fundamental to defending freedom of expression and is vital to balancing copyright law. The question therefore becomes when will use of copyrighted material be considered in the public interest? In copyright law the defence's precise scope is ambiguous with conflicting judgements however it is now inextricably linked to article 10 *ECHR*. The term 'the public interest' has no statutory definition or uniform interpretation and there 'is little guidance... as to when the defence would operate...the circumstances in which it might operate are not capable of precise categorisation'.[249]

[247] Supra Note 231, at 697.
[248] Tang G, Copyright and the public interest in China (Edward Elgar Publishing, 2012), at 59.
[249] Alexander I, Inspiration or Infringement: the plagiarist in court, in Bentley L, Copyright and Piracy: An Interdisciplinary Critique (Cambridge University Press, 2010), at 10.

The defence originally prohibited copyright subsisting in immoral[250] or fraudulent[251] works but traces it modern application to breach of confidence in *Initial Services v Putterill*[252] where it protected disclosure of, 'any misconduct of such a nature that it ought in the public interest to be disclosed'[253]. In the landmark *Hubbard*[254] case a book exposing questionable Scientology practices using the founder's letters was permitted with Lord Denning stating the law, 'would not intervene to suppress freedom of speech except when it is abused[255]' The *Beloff v Pressdram*[256] case concerning the publication of a memo was the 'first to affirm that the public interest defence is available to an action for infringement of copyright.'[257] The defence however did not apply because at the time the use of the copyrighted work had to expose, 'threats to national security, breach of law, fraud and doubtless other misdeeds of similar gravity'[258].

The requirement that use of the copyrighted material exposed a misdeed was an extremely narrow interpretation, 'as it was in early breach of confidence cases.'[259] Copyright's purpose is not to keep information confidential, 'using copyright to maintain confidences censors disclosure of important information and restricts public access.'[260]. *Lion Laboratories v Evans*[261] was the first case not to require a misdeed, 'I

[250] Glyn v Weston Feature Film Co [1916] 1 Ch. 261
[251] Slingsby v Bradford Patent Truck and Trolley Co [1905] W.N. 122
[252] [1968] 1 QB 396.
[253] Ibid, At 405.
[254] [1972] 2 QB 84.
[255] Ibid, 96-97.
[256] [1973] RFC 765.
[257] Guanhong T, 'A Comparative Study and the public interest in the United Kingdom and China' (2004) 1:2 SCRIPTed 272.
[258] Supra Note 256, At 260.
[259] Colston C, Modern Intellectual Property Law third edition (Taylor & Francis, 2010), at 339
[260] Supra Note 14, at 251.
[261] [1985] QB 256.

can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing'[262]. Here the Daily Telegraph acquired four confidential copyrighted documents showing breathalyzer kits were defective. Use of the documents was permitted because it was in the public interest for the information to be disclosed, 'we must not restrain the defendants from putting before the public this further information'[263]. The court recognised copyright was not absolute and that in certain circumstances copyright had to yield to the public interest. The defence however only operated in limited circumstances, 'there is a wide difference between what is interesting to the public and what it is in the public interest... the public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know.[264] Accordingly the public interest defence can override copyright, 'the courts will restrain... breaches of copyright unless there is a just cause or excuse for... infringing copyright'[265]. The scope of the defence is therefore essential because it determines when copyrighted material may be used.

Unfortunately the defence was initially narrowly defined in the infamous *Hyde Park Residence*[266] case. Here the Sun bought security camera photos of Princess Diana and Mr Dodi Fayed shortly before their deaths from the security firm's employee. They were used to disprove allegations made by Dodi Fayed's father. The security company launched infringement proceedings and the Sun sought to rely on the public interest

[262]Ibid, At 433.
[263] Ibid, At 546.
[264] Ibid, At 537
[265] Ibid, At 536.
[266] [2001] Ch. 143

defence. At first instance[267] Jacob J held the defence applied however the Court of Appeal held copyright provided comprehensive defences internally[268]. The Court of Appeal closely reflecting a natural rights interpretation of copyright held no public interest defence applied, 'the majority held there was no general defense of public interest to copyright infringement claims'[269] and 'the court rejected outright the existence of a common law public interest defence to copyright infringement.'[270] Aldous LJ concluded, 'the 1988 Act does not give a court general power to enable an infringer to use another's property, namely his copyright in the public interest.'[271] Although Aldous LJ noted copyright would not be enforced in some circumstances[272] it was held there was no public interest in publication because the information could be conveyed without publishing the photos. Mance LJ dissented adopting a broader position, 'whilst account must be taken of the different nature of the right involved in copyright...the circumstances in which the public interest may override copyright are probably not capable of precise categorisation or definition'[273]. The majority have been heavily criticised 'free press advocates condemned the decision as an attempt by the courts to... exercise tighter judicial control of the media'[274] and 'the Court of Appeal's rationales for rejecting the public interest... are unsatisfactory and the judges take a particularly narrow view of the law that is neither based on precedent nor justified on

[267] [1999] E.M.L.R. 654
[268] The fair dealing provisions were not applicable in the case.
[269]Garnett K, The Impact of the Human Rights Act 1998 on UK Copyright Law, in Griffiths J and Suthersanen U, Copyright and Free Speech (Oxford University Press, 2005) at 204.
[270] Yurkowski R, 'Is Hyde Park Hiding the Truth?' [2001] VUWL Rev 51, Section 4(D).
[271] Supra Note 267, at 43.
[272] Aldous LJ stated copyright would not be enforced if it was'(i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in at 66.
[273] Supra Note 266, at 83.
[274]Ibid

policy grounds'[275]. *Hyde Park* not only makes the public interest defence redundant but further imbalances the public and rights holders. This is evidenced in *Imutran Ltd v Uncaged Campaigns Ltd*[276] where Morritt VC stated 'Hyde Park Residence Ltd v Yelland is binding on me. That decision establishes there is no public interest defence to copyright.'[277] The outright rejection of a public interest defence evidences a natural rights interpretation of copyright as a right unhindered by social concerns and public policy.

The Court of Appeal's rejection of the public interest has been explained by Burrell as emanating from the court's interpretation of copyright as a natural right, 'the proprietary nature of copyright was used to justify the refusal to recognise a public interest defence.'[278] The Court itself acknowledged copyright was a property right set above freedom of expression, 'copyright is by contrast a property right... copyright does not lie on the same continuum as...freedom of expression. The force of an owner's interest in the protection of his copyright cannot be weighed in the same direct way against a public interest in knowing the truth[279]. Copyright was being interpreted as a natural right above limitations and beyond the scope of a public interest defence, 'public interest will rarely, if ever, trump the proprietary interests of the copyright holder... the courts were unwilling to engage with the question of the relationship between copyright and public interest.'[280] The effect is that instrumentalism has little significance. Wider

[275] Supra note 270, Section 5(C).
[276] [2002] FSR 26.
[277] Ibid, at 32.
[278] Supra Note 18, Page 239.
[279] Supra Note 266, at 76
[280] Macmillan F, Public interest and the public domain in the era of corporate dominance, in Anderson B, Intellectual Property Rights: innovation, governance and the institutional environment (Edward Elgar Publishing, 2006), Page 63.

social interests including freedom of expression were given little consideration because they were deemed to be of inferior status to copyright, 'up until the enactment of the HRA, no external conflict was visible. While freedom of expression was recognised by the Common Law, it did not enjoy an explicit, superior normative position that was conceived as equal to, let alone superior to, copyright law'[281].

4.9-Ashdown- The Case to fully implement Ashby Donald?

The *Ashdown* case was held more than 10 years before *Ashby Donald* and the *Piratebay* cases. Whilst it came to a similar conclusion in that it recognised a conflict between article 10 and copyright was recognised, the court took a different approach to the recent changes in the ECtHR and if held today would be an ideal candidate to exemplify when freedom of expression may limit copyright. The House of Lords concluded article 10 and copyright conflicted, 'Article 10 is obviously in potential conflict with existing UK copyright law and practice'[282]. *Ashdown* marked a complete departure from the restrictive *Hyde Park* approach and 'may serve, perhaps, not as a dyke, but as a lifebuoy for bona fide users drowning in a sea of intellectual property.'[283] *Ashdown v Telegraph,* previously discussed in the theoretical framework concerned the publication of Paddy Ashdown's minutes from a political meeting. The Telegraph newspaper relied on the public interest and fair dealing defences but also submitted a novel argument, which would later be used in *Ashby Donald* and the *Piratebay* cases that the court had to consider freedom of expression. 'In other words the newspaper

[281] Supra Note 7, at 30.
[282] Supra Note 269.
[283] Supra Note 7, at 3

argued for the recognition of a new "freedom of expression" exception to copyright law'[284]. Following *Hyde Park* the argument was rejected at first instance because the *CDPA* already struck an appropriate balance, 'Morritt VC did not accept the impact of the Convention was that the court had to consider... whether the exceptions... required to be extended... he could see no reason why the court should travel outside the provisions of the *CDPA* and recognise... other exceptions to the restrictions on the exercise of the right to freedom of expression.'[285] The Court of Appeal held the public interest defence was inapplicable and found copyright infringement. The conclusion, reflecting the European cases at the time was that freedom of expression in the majority of cases is adequately protected by copyright's internal controls.

The significant point however was Lord Phillips judgement. He not only recognised the conflict between copyright and freedom of expression, 'copyright is the antithetical to freedom of expression'[286] but also supported Mance LJ's dissenting judgement in *Hyde Park*, acknowledging a wider public interest defence, 'the circumstances in which the public interest may override copyright are probably not capable of precise categorisation or definition.'[287] It was recognised, 'there will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright them... it is the form and not the content of a document which is of interest'[288] and that the public interest can override copyright, 'it is essential... to bear in mind that

[284] Ibid, at 7.
[285] Ryan C, 'Human Rights and Intellectual Property' E.I.P.R 2001(23) 11, at 523.
[286] Supra Note 118, at 30.
[287] Ibid, at 83.
[288] Ibid, at 43.

considerations of public interest are paramount'[289] and 'the protection afforded to copyright under the 1988 Act is, however, itself subject to exceptions.'[290] Most importantly the court, just as the ECtHR did over a decade later, acknowledged internal controls could not protect freedom of expression in every situation. In exceptional circumstances freedom of expression requires use of copyrighted material, 'now that the HRA 1998 is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the 1988 Act.'[291] The Court however did not specify what type of rare cases would trump copyright however the recent ECtHR cases have built upon the foundations of Ashdown and we now have clearer guidance with the issues of commerciality and political nature of the expression being key. These ground-breaking comments mean the public interest defence can permit the public to use copyrighted work where necessary, 'the English court of appeal in Ashdown has somewhat revived the defence for copyright... after blows dealt by... Hyde Park.'[292] An extensive public interest defence and the need for compatibility with article 10 is a small shift in favour of the public however this change did not prevent copyright infringement in the case.

Ashdown acknowledged its limited scope, 'rare circumstances can arise where the right of freedom of expression will come into conflict with... the 1988 Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound... to apply the Act in a manner that accommodates the right to freedom of expression... we do not foresee this leading to a flood of

[289] Ibid, at 71.
[290] Ibid, at 28.
[291] Ibid, at 158.
[292] Firth A, Holding the Line-the relationship between the public interest and remedies granted or refused, be it for breach of confidence or copyright, in Torremans P, Intellectual Property and Human Rights (Kluwer Law International, 2008), at 141

litigation.'[293] The overall effect of *Ashdown* is that there has been a move away from the natural rights approach adopted in *Hyde Park*. Whilst *Ashdown* refused to follow *Hyde Park* in the view that copyright was an absolute natural right that the public interest defence could not limit, it did not fully endorse an instrumentalist interpretation. The public will still only be allowed to use copyrighted material in extremely narrow circumstances, 'freedom of expression is only ever likely to override the rights of the copyright owner where there is a compelling public interest in the publication of the very expression of an author's ideas'[294] The Court of Appeal did not assert an instrumentalist interpretation but simply recognised freedom of expression could restrict copyright in very limited circumstances. Whilst reinvigorating the public interest defence the effect on the balance between rights holders and the public is limited, 'the English courts may now have to consider the public interest in freedom of expression when they assess copyright infringement on a case-by-case basis'[295] The court was very reluctant to override copyright, 'if a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author...freedom of expression should not normally carry with it the right to make free use of another's work.'[296] In addition shortly following *Ashdown, the Information Society Directive* was introduced which provides a list of permitted exceptions to copyright and this did not include a public interest defence. A recent example demonstrates the need for a broad public interest defence and that internal controls alone are insufficient. Following[297] the Riots in August 2011 the BBC without

[293] Supra Note 118, at 45.
[294] Supra Note 269, at 184
[295] Supra Note 159, at 218
[296] Supra Note 118, at 46.
[297] Based on IPKAT http://ipkitten.blogspot.com/2011/08/hey-dude-thats-my-photo-social-media.html, [Last accessed September 30th 2014]

permission or attribution used Andy Mabbtet's[298] twitter photos to exemplify the situation. Following his complaint, the BBC incorrectly replied twitter photos 'were not subject to the same copyright laws because it is already in the public domain.'[299] The issue is should use of copyrighted material in these circumstances be permitted through a wider public interest defence, 'the story... reinforced the centuries-old legal difficulty that lies in the intersection between copyright law and freedom of speech'[300]. Although no twitter users took legal action over the BBC's unauthorised use, such use would not be within the scope of *Ashdown*. There is however a strong argument that an effective public interest defence should defend legitimate uses of copyright such as this. The BBC's use of the photos illustrated the seriousness of the riots and the damage caused. This could not be conveyed without photos so can be distinguished from *Hyde Park*. Should rights holders in these types of situations where there is an urgent need to disseminate copyrighted works to the public be able to prevent their distribution through copyright? Copyright in these circumstances is merely a facade to censor what can be said or shown. At the time *Ashdown* was a step in the right direction by recognising the conflict between copyright and freedom of expression. The recent ECtHR cases however may lead to a different result in the case if it were held today. *Ashdown* is a perfect example of a case where the ECtHR could conclude that article 10 should override copyright. The reasoning in *Ashby Donald* & the *Piratebay* as to why there was no violation of article 10 focused on the fact copyrighted material was used for commercial not political purposes, 'the nature of the information at hand, and the balancing interest mentioned above, both are such as to afford the State a wide margin

[298] http://pigsonthewing.org.uk/bbc-fundamental-misunderstanding-copyright/, [Last accessed September 30th 2014]
[299] http://www.bbc.co.uk/blogs/theeditors/2011/08/use_of_photographs_from_social.html, [Last accessed September 30th 2014]
[300] Supra Note 297.

of appreciation which, when accumulated as in the present case, makes the margin of appreciation particularly wide '[301]. Whilst the use of copyrighted material in *Ashdown* did involve a commercial element it also concerned important political expression. I would argue applying recent ECtHR case law to *Ashdown* would permit the use of the copyrighted material. The contents of the minutes concerned the composition of the government and political future of the country. Copyright in circumstances such as this, involving an issue of such public importance should not prevent use particularly as the fair dealing provisions provided no defence. The margin of appreciation given to the national authority is this case would not be broad as it was in *Ashby Donald* because the use of the minutes contributes to a matter of general interest. Under recent ECtHR case law the margin of appreciation depends on several factors, 'the type of discourse or information at issue is of particular importance. Thus, whilst there is little scope under Art. 10(2) for restrictions on political speech, for example, the Contracting States have a broad margin of appreciation in the regulation of speech in commercial matters… it being understood that the extent of the margin of appreciation must be reduced when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest.'[302] Whilst *Ashby Donald* and the *PirateBay* cases could be categorized as commercial matters with a broad margin of appreciation where article 10 yielded to copyright, *Ashdown* is an example of a case where use of copyrighted material did concern political speech and is subject to a reduced margin of appreciation and greater protection. Therefore if it came before the ECtHR today, *Ashdow*n would provide a contrast to *Ashby Donald* & the *PirateBay* and

[301] Supra Note 222.
[302] DW, 'Ashby Donald v France: European Convention on Human Rights 1950 art.10', IIC 2014, 45(3), 354-360, at 359

it should be held that article 10 would be violated and freedom of expression should override copyright in *Ashdown*.

4.10-Conclusion:

Currently human rights law and the public interest defence are ineffective in balancing rights holders and the public. This is predominantly because copyright is being interpreted in both areas as a natural right not an instrumentalist tool. Copyright and freedom of expression conflict however because proprietarianism is followed, copyright is classified as a property right of superior status which has shifted the balance in favour of right holders. Whilst cases such as *Ashby Donald* and the *PirateBay* have the potential to represent the public interest and in theory freedom of expression may limit copyright this appears to only apply in very rare circumstances. Whilst political expression may appear able to override copyright other non political legitimate expressions particularly those involving a commercial aspect are unlikely to limit copyright. Copyright habitually satisfies article 10(2) to override freedom of expression and despite liberalisation in the ECtHR copyright rarely yields to the public interest. Current human rights laws give little credence to social interests with instrumentalism having little significance. The effect of attributing copyright with the status of a proprietary right is that a form of censorship arises where right holders use copyright not to protect their economic interests but as a weapon to prevent what can be said, 'conflicts between copyright and freedom of speech often arise when the right holder uses his position to suppress any publication'[303]. This is exemplified in *Ashdown* and *Hyde Park*. In both cases the use of copyrighted material had a legitimate purpose but was prevented under the guise of copyright even though such use did not undermine

[303] Kur A and Levin M, Intellectual property Rights in a Fair World Trade System (Edward Elgar Publishing, 2011). at 278.

the rationale of copyright. The external controls discussed only restrict copyright on rare occasions and fail in their most basic objective, to resolve any inherent imbalance between rights holders and the public. In fact they only widen the imbalance, 'if copyright can be regarded as a human right, a more contemporary understanding of that human right can lead one to see it as a human right for a happy few... a small group within society, authors who are thus protected, pitted against the rest of society.'[304] External controls however are only one part of the system that restricts copyright. The justification by academics and the judiciary for a narrow interpretation of human rights and the public interest defence is that internal controls such as the idea/expression dichotomy, originality and the fair dealing provisions adequately provide for the needs of the public. The next chapters assess these internal controls, 'are copyright's internal safeguards enough? If they were so in the past, do they still successfully maintain the balance? Has the (external) conflict between IP and human rights escalated too greatly in the information society for the copyright regime to handle alone?'[305]

Wordcount-15,291 (18,665 including footnotes)

[304] Supra Note 13, at 22
[305] Angelopoulos C, 'Freedom of expression and copyright: the double balancing act', IPQ 2008(3), 328-353, at 333.

5. Chapter Five-Originality:the wrong standard

5.1-Introduction:

The previous chapter focused on the relationship between human rights and copyright with the conclusion the two areas conflict with copyright routinely overriding freedom of expression. The standard judicial explanation for this failure is that internal copyright measures sufficiently protect the public. No additional external intervention is necessary because internal controls including limited duration, originality, the idea/expression dichotomy and the fair dealing provisions provide effective protection and achieve a balance. The aim of this and the following chapters are to evaluate the accuracy of the statement, 'the copyright system sufficiently respects freedom-of-expression values by virtue of internal mechanisms such as the originality requirement, the idea/expression dichotomy, and the fair dealing defence.'[1]

5.2-Originality-no place for novelty:

The subsistence requirements are one of the most important components of copyright's internal controls. Whilst copyright has no registration requirement works must fulfil several subsistence requirements which determine which works are copyrightable and which are freely available in the public domain. The threshold of these subsistence criteria remains a cornerstone in attempting to balance copyright law, 'copyrightability, is one of the major components of the balance drawn by copyright law between the competing claims of copyright owners and copyright users'[2].

[1] Craig C, 'Putting the community in communication: dissolving the conflict between freedom of expression and copyright', U. Toronto L.J. 75 2006. at 78.
[2] Abrams H, 'Originality and Creativity in Copyright Law' 55 Law & Contemp. Probs. 3 1992, at 4.

Subsistence requirements are the first instance where the economic interests of right holders may be limited in favour of the public interest, 'the public interest has to play a critical role in determining the subject matter to which copyright interests ought to attach... at this stage, perhaps more than any other, the public has interests at stake'[3]. The public interest must be a fundamental consideration in copyright subsistence, 'there cannot be sufficient appreciation for the public's side of the copyright "balance" when the public interest plays no part in determining the subsistence of copyright.'[4] Subsistence requirements must place limits on copyright protection because if they are too expansive, protection will be bestowed on all forms of creation. This severely limits works available to the public and prevents knowledge from entering the public domain. At the same time subsistence requirements must not be construed too narrowly otherwise right holders will be discouraged from creating socially useful works. To qualify for copyright protection a work must be fixed[5], be a qualifying work[6] and fall within a category of work specified in the *CDPA 1988*[7]. The most important requirement in regards to our discussion is the prerequisite that works must be original, with the *CDPA* stating copyright subsists in 'original literary, dramatic, musical or artistic works'[8].

The originality requirement first introduced in the *1911 Copyright Act*[9] has been described as 'a keystone of copyright law'[10] and the 'benchmark for ascertaining the

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[3] Craig C, 'The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest', (2005) 2:2 UOLTJ 415. 1, at 436.
[4] Ibid.
[5] Sections 3(2) and 58 CDPA 1988
[6] Section 153-155 CDPA 1988
[7] Contained in sections 3-8 CDPA 1988
[8] Section 1 (1)(A) CDPA 1988.
[9] 1 & 2 Geo. V, c. 46.
[10] Litman J, 'The Public Domain' (1990) 39 Emory L.J. 965, at 7.

scope of an author's private property in the contents of her works.'[11] Originality 'is probably the most important concept in copyright... because it determines the scope of legal protection by "drawing a line" between the works that are protected by law and the works that are not.'[12] The idea is that only original works are capable of adding to society's knowledge base and fulfilling the function attributed to rights holders in the wider copyright regime. Originality however has been a matter of enormous contention firstly over its definition and secondly over the fact that the concept more than any other in copyright law is strongly influenced by natural rights rather than instrumentalism. Originality determines entrance to copyright protection not based on the ability of works to fulfil copyright's aims as instrumentalism would demand but instead bases protection on the authors labour. In the copyright context originality does not take the standard dictionary definition and 'is not concerned with whether the work is inventive, novel or unique'[13] and is not akin to the novelty requirement[14] in patent law, 'originality is not the same thing as novelty. A work may be original even if it closely resembles another work'[15]. This had led commentators to suggest originality is simply 'a proxy for answering the question: Has the author done enough to justify preventing the world from copying from his or her output?'[16] and that 'the notion of originality is a fiction. It is not tangible, but a means to separate what is worthy of copyright protection from what is not.'[17] Originality is not defined in any international copyright treaty[18] or

[11] Ibid, at 29.
[12] Waisman A, 'Revisiting Originality' E.I.P.R. 2009, 31(7), 370-376, at 370.
[13] Bently L and Sherman B, The Making of Modern Intellectual Property Law (Cambridge University Press, 1999), at 88.
[14] Section 2 Patents Act 1977.
[15] Murray M, 'Copyright, Originality and the End of the Scenes A Faire And Merger Doctrines for Visual Art', 58 Baylor L. Rev. 779 2006, at 785.
[16] Vaver D, 'Canada's Intellectual Property Framework: A Comparative Overview' (2004) 17 Intellectual Property Journal 125, at 141
[17] Nordell J, 'The Notion of Originality- redundant or not?', ALAI Nordic Study Days June 2000 Proceedings 73-86, at 98.

the *CDPA* and as with the majority of copyright discussion two divergent schools of thought have emerged. The first objectivist approach referred to as the sweat of the brow test requires authors to expend minimal skill, labour or effort in order to gain copyright protection. The opposing subjectivist approach requires authors show a modicum of creativity or based on the continental approach, the work must reflect the author's personality. The decision over which approach to adopt has been divisive and is critically important in securing a balanced copyright system. Abrams underlines the importance of the definition attributed to originality, 'if the standards for a work to be considered original... are raised or lowered, both the number and types of works that can claim copyright protection will change. Thus what is at stake in any definition or redefinition of originality is the coverage of the copyright monopoly and the balance between copyright owners and users at its most basic level'.[19]

5.3-Skill and Labour-unfit for purpose:

Under Locke's Labour theory, 'private property is created when the individual removes materials from the state of nature and mixes his labour with them, thereby producing an item of personal property'[20]. Copyright is gained when an author exerts mental labour because it is morally right he can reap the fruit of his labour. A right is given merely because of the act of creation and wider social concerns core to an instrumentalist approach are given little consideration. Locke argues exercising labour creates 'something that is his own, and thereby makes it his property. It being by him

[18] As noted by Fudge E and Gervais D, Of Silos and constellations: comparing notions of originality in copyright law, in Brauneis R, Intellectual Property Protection for fact based work: Copyright and its Alternatives (2009, Edward Elgar Publishing), at 98. Originality is not even mentioned in the international treaties and has only been defined in several countries; Malaysia, Bulgaria and Burkino Faso.
[19] Supra Note 2, at 5.
[20] Rose M, Authors and owners: the invention of copyright (Harvard University Press, 1995), at 114.

removed from the common state nature placed it in, it hath by this labour something annexed to it that exclude the common right of other men'[21]. Originality particularly the sweat of the brow approach is strongly based on Locke's approach with natural rights forming the basis of copyright protection, 'Locke's Labour theory explains some of the facets of UK copyright law such as the interpretation of the requirement of originality.'[22] The correlation between Locke and sweat of the brow originality is that protection is framed in terms of the authors labour, as long as the author has laboured to produce a work in the vast majority of circumstances this will result in protection, 'originality provides that the author's labour of origination is a prerequisite of copyright protection. The author acquires his copyright in and through her labour.'[23] Since *Donaldson* however, copyright has been based on instrumentalist principles fundamentally underlined by social policy objectives. Basing originality on natural rights rather than instrumentalism undermines the balance in copyright law because protection should not be based on the mere exertion of labour, 'the basic philosophy of copyright is utilitarian... the philosophy supporting copyright is not that a creator has a natural right to the fruits of his labours'[24]. Our jurisdiction traditionally reflects the sweat of the brow test[25] however recent ECJ judgements have challenged the orthodox approach. Under the sweat of the brow approach, 'copyright laws do not require that a work should be unprecedented, that is, new…A copyright…is good provided a sufficient amount of work was originated by the author independently, even if some

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[21] Locke J, 'Second Treatise on Government- The True Original, Extent, and End of Civil-Government' 1690, at 26

[22] Birnhack M, Copyrighting Free Speech: A TransAtlantic view, in Torremans P, Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy at 50.

[23] Drassinower A, 'A Rights-Based View of the Idea/ Expression Dichotomy in Copyright Law', 16 Can. J.L. & Jurisprudence 3 2003, at 18.

[24] Scott G, Football Rising to the Challenge, (Jones & Bartlett Learning, 2006), at 296.

[25] It should be noted a different definition is attributed to the standard of originality required for the protection of computer programs, databases and photographs, 'the author's own intellectual creation reflecting his personality'. This is discussed later in the chapter.

other person had already produced an identical piece by sheer coincidence.'[26] Even though anomalous cases such as *Hadley v Kemp*[27] have interpreted originality as requiring creativity, originality has nothing to do with any standard of novelty or inventiveness.

Originality was developed in *Walter v Lane*[28] and was heavily based on natural rights. This approach strongly resembles Lockean theory and still influences originality. In the case a reporter attended a speech by Lord Rosebery and had taken shorthand notes of the speech that he then published in the newspaper. It was held despite only repeating the words of another, their reports constituted an original literary work. The basis of the decision, which has been applied since this time, reiterates Locke in two respects. Firstly copyright was given if the author laboured to create a work, 'it is obvious that the preparation of them involved considerable intellectual skill and brain labour beyond the mere mechanical operation of writing'[29]. It was held this labour was being appropriated, 'it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product.'[30] Secondly this view reiterates Locke because he did not place any qualitative restrictions on labour giving rise to rights, 'labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right'[31]. All that Locke required was that a person exerted labour to improve something from its natural state. Lords Halsbury parallels Locke on this point

[26] Laddie H et al, The Modern Law of Copyright, Second Edition (Butterworths, 1995), at 48.
[27] Hadley v Kemp [1999] EMLR 589
[28] Walter v Lane [1900] AC 539
[29] Ibid, at 556.
[30] Ibid, at 552.
[31] Supra Note 21, Chapter V, at 28.

confirming labour need not be intellectual labour, 'there is literary merit and intellectual labour, yet the statute seems to me to require neither, nor originality either in thought or in language.'[32] This approach was followed in the *University of London*[33] case where Peterson J confirmed originality 'does not require that the expression must be in an original or novel form, but that the work must not be copied from another work- that it should originate from the author'[34]. Academics have also confirmed originality is not dependent on any standard of novelty, 'when copyright says that a work must be original, this means that the author must have exercised the requisite intellectual qualities … in producing the work... copyright law focuses on the input that the author contributed'[35] and 'originality in the UK is not principally concerned with creativity...consequently humdrum works... attract the same copyright protection as magisterial literary works.'[36] The problem with this approach is that the public domain becomes extremely narrow, 'this wide scope of protection has raised concerns regarding access to public domain material'[37]. A low standard cannot only encompass derivative and trivial works but also withholds important basic information from the public, 'this over inclusiveness limits what users can legitimately appropriate from a copyright work.'[38] Drahos underlines the negative impact a low standard of originality has on the public interest, 'when the originality requirement is set very low... facts and information of all kinds can be recycled as copyright works... facts become the object of copyright

[32] Supra Note 28, at 548.
[33] University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601
[34] Ibid, at 609.
[35] Supra Note 13
[36] Supra Note 22, at 91
[37] Rahmatian A, 'The concepts of "musical work" and "originality" in UK copyright law - Sawkins v Hyperion as a test case', IIC 2009, 40(5), 560-591
At 584
[38] Supra, Note 22.

surveillance and enforcement. Copyright comes to function as a private tax on basic information exchanges'[39].

Originality demands skill, labour or effort, 'to be the subject of copyright the matter must be original, it must be a composition of the author, something which has grown up in his mind'[40]. Copyright will be awarded 'so long as skill and judgment have been employed'[41] or where there has been 'the application of skill or labour in the creation of the work'[42] and will be 'a matter of degree depending on the amount of skill, judgment or labour that has been involved'[43]. The level of skill, effort or labour has been confirmed to be very low[44] with Lord Bingham in the *Designers Guild*[45] case stating, 'the law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right[46]'. This means 'if a work is created through the effort of an individual, irrespective of the fact that the work contains only statement of facts and no creative input at all by an author, copyright can be granted to the work'[47]. This low threshold can be advantageous. It encourages works to be created because they gain protection regardless of merit and avoids the judiciary making subjective judgments. The issue however is originality is far too easy to demonstrate and is incapable of securing copyright's dual purpose. Only the most basic works devoid of any skill,

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[39] Drahos P, A Philosophy of Intellectual Property, (Dartmouth Publishing Company, 1996), Page 208
[40] Dicks v Yates (1881) LR Ch D 76, at 90.
[41] Express Newspapers plc v News (UK) Ltd [1990] 1 WLR 1320, at 1325
[42] Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others, [2012] Bus. L.R. 53 at 62
[43] Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273 , at 278
[44] Autospin (Oil Seals) Ltd v Beehive Spinning [1995] R.P.C. 683 Ch D.
[45] Designers Guild v Russell Williams [2000] 1 W.L.R. 2416
[46] Ibid, at 2418.
[47] Hariani A and Hariani K, 'Analyzing Originality in Copyright Law: Transcending Jurisdictional Disparity', 51 IDEA 491 (2011) At 509

labour or effort will be denied protection, 'a work was required to be "original" in the limited sense that the author originated it by his own efforts rather than by slavishly copying another's work.'[48] Originality is not an effective barrier to copyright protection because it's routinely satisfied and does not differentiate between works deserving copyright protection and trivial, basic, commonplace or derivative works. The originality standard results in a narrow public domain where the most basic works are withheld from public consumption, 'originality is not a high standard... It imposes no requirement of aesthetic or intellectual quality: even the most mundane of works... has copyright'[49] and 'the low test of originality fences off large quanta of basic information and dissipates the raw materials for future creativity'[50].

Only works completely devoid of any skill or effort will not qualify for protection. For example it was held enlarging an image on a photocopier was not an original artistic work because no skill was involved[51] or where the title of a book concerns a common expression.[52] The case law shows the vast majority of works no matter how trivial will qualify for protection and it is at this juncture originality is unfit for purpose. Originality cannot act as an effective internal control because an undemanding interpretation prevents any meaningful assessment of what type of works should gain protection. Firstly several trivial works have questionably gained protection for example betting coupons[53], exam papers[54] and TV listings[55].. In *Walter v Lane*, a case that predated the *1911 Copyright Act*, copyright was granted to The Times for a report reproducing the

[48] Sawkins v Hyperion Records Ltd [2005] 1 WLR 3281, at 3281.
[49] MacQueen H, Textbook on Intellectual Property (Oxford University Press, 2010) at 50.
[50] Supra Note 22, at 92
[51] Reject Shop plc v. Manners [1995] FSR 870
[52] Supra, Note 40.
[53] Supra, Note 43.
[54] Supra, Note 33.
[55] British Broadcasting Corp v Wireless League Gazette Publishing Co 43 [1926] Ch. 433

speeches of Lord Rosebery almost word for word. Despite simply repeating the words of Lord Rosebery, The Times were able to use this copyright to gain an injunction against a subsequent work that produced the speeches verbatim. In *Bauman v Fussell*[56] it was held a painting subsequently made of a photograph of two cocks fighting with only minor differences constituted an original work. The problem with this classification of originality and allowing such trivial works to qualify is that 'when courts... require something be more than a mere copy or that someone simply show industriousness... they tip the scale in favour of... creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation'[57]. The practical effect of the current approach is that an overly expansive originality standard provides excessive protection for right holders who gain protection when they make little contribution to society's knowledge base. In turn originality also undermines the purpose of disseminating knowledge because all types of trivial works are withheld from the public domain.

Besides a narrow public domain and the protection of trivial works, a greater problem results from the low threshold attributed to originality. Works are gaining copyright protection based on Locke's Labour theory which poses significant issues for the theoretical basis of copyright law. Under the sweat of the brow approach, protection is premised on exercising skill or labour, which as outlined above is also an undemanding standing, 'empirical examples of labour theory in intellectual property doctrines include copyright's *'*sweat of the brow*'* principle, which rewards property

[56] Bauman v Fussell [1978] RPC 485
[57] CCH Canadian Limited v. Law Society of Upper Canada, [2004] 1 SCR 339, at 23.

rights in return for the expenditure of labour.'[58] Originality is firmly rooted in natural rights and bases protection on the labour of the creator. Protection is not based on the ability of the creator to fulfil the role attributed to them by an instrumentalist approach or the work's ability to contribute to attain broader social objectives. Creators need only input a minimal amount of labour to obtain copyright protection. Originality is currently based on natural rights, 'from a natural rights perspective it is the industry and effort of the producer that the law must protect.'[59] Basing protection on industry or effort however is inconsistent with instrumentalism. Under instrumentalism or utilitarianism copyright subsistence would take an entirely different approach and be based on the achievement of goals, 'from a utilitarian perspective, the originality threshold might have been expected to sit at a different, more taxing level to ensure copyright protects only those works that would not have been produced but for the incentive provided by copyright'[60]. Instead of basing subsistence on working towards maximising social value, sweat of the brow originality embodies natural rights and allows property rights to be gained merely by the exertion of labour which severely undermines the public interest, 'in determining the originality of a work Lockean labour theory has provided support for the copyrightability of intellectual products involving only labour.'[61] The effect of disregarding instrumentalism is that rights holders are viewed as having a natural right that supplants copyright's social purpose, 'instead of copyright being an instrument subordinate to a broad social purpose, moral claims of an implicit right infiltrate the doctrinal framework, allowing Lockean perceptions of natural right to

[58] George A, Constructing Intellectual Property, (Cambridge University Press, 2012), at 342
[59] Craig C, Copyright, Communication and Culture (Edward Elgar Publishing, 2011), at 74.
[60] Bently L and Sherman B, Intellectual Property Law Fourth Edition, (Oxford University Press, 2014), at 95.
[61] Supra Note 59.

shape copyright policy. These perceptions are detectable throughout... 'sweat of the brow' notions of originality'[62].

5.4-Derivative Works-something borrowed:

In addition to protecting trivial works, originality also protects derivative works. A derivative work is one based on pre-existing works. Although all works can be derivative in the sense all work is loosely based on the knowledge that came before, in copyright, derivative works commonly include films remakes, cover songs or adapting works into another form. Although derivative works could infringe the copyright of the original work they may also gain copyright protection in their own right. The issue for our discussion is even though derivative works may pass the test of originality should they gain copyright protection? A natural rights approach would support the protection of a large proportion of derivative works because the creator has expended labour in creating something new despite it being based on another work. Instrumentalism would protect fewer derivative works and base protection on the impact on innovation. Under instrumentalism highly derivative works or those based on public domain works would be unlikely to receive protection however derivative works making significant changes from the original can be protected because they create something truly novel for society. For example should cover songs where the same lyrics and melody are used, receive copyright protection when all the essential elements of the work have been made available to the public previously? Film remakes also pose another issue because although the cast, directors and script may change, the underlying film remains the same. For example the 1960 film Psycho was remade in 1998 with exactly the same

[62] Ibid, at 76.

script, camera movements, score and identical scenes. Why should this remake receive copyright protection when it is almost identical to an existing work? Has this work added anything to society's knowledge base when the public already had access to essentially the same work.

A common example illustrating the fallacy of protecting derivative works is Marcel Duchamp's 1919 L.H.O.O.Q. portrait. This portrait consists of the original Mona Lisa portrait with the aforementioned initials and a drawn on moustache. This work gained copyright protection in France until 2039 however the legitimacy of protecting such work is highly debatable. Duchamp has not infringed copyright because the Mona Lisa belongs to the public domain however should his negligible efforts which involve little skill or labour result in copyright protection that prevents the public from using his version of the Mona Lisa. I would argue the minimal effort Duchamp used should not result in copyright protection because the work cannot fulfil the role rights holders are meant to perform in the copyright regime. This work adds nothing substantial to the society's knowledge and is extremely dependent on a previous work now in the public domain. Another example is the *Sawkins* case,[63] where Mr Sawkins edited the works of 18th century composer Lalande. He inserted missing material and recomposed several parts to create playable music. It was held Sawkin's modifications constituted an original work even though he did not create any new work, the creator has only edited the work of someone else. The minor alterations made did not create a new work and Rahmatian underlined the concern, 'the fear was expressed that a mere editor could be conferred the status of an "original" composer by overly generous copyright rules'[64].

[63] Supra, Note 48
[64] Supra Note 37, at 561

Yet again we see the dominance of natural rights in an area that should be based on instrumentalism. The inclination is to protect derivative works as long as some form of labour, no matter how negligible has been exerted. The cases discussed illustrate the redundancy of originality because the current standard does not effectively draw a line between works requiring protection and those that do not, 'given the low standard required for originality... this hurdle to copyright protection in the UK is likely to be satisfied by most digital copyright works'[65]. Nor does the originality standard adopted outline when a derivative work should be considered too dependent on an existing work and lacking in sufficient merit to justify copyright protection.

5.5-Intellectual Creation-the same difficulties:

As part of the CJEU's copyright harmonisation agenda, the EU courts have attempted to introduce an EU wide definition of the originality criterion trying to balance both the UK sweat of the brow approach & the continental personality standards. The EU in cases including *Infopaq*,[66] Bezpeènostní softwarová asociace (*BSA*)[67], *Murphy*[68], *Painer*[69], *Football Dataco v Yahoo*[70], *SAS Institute*[71] *and Deckmyn*[72] *has* challenged the conventional UK definition. A higher standard was given to originality in relation to computer programs[73], databases[74] and photographs[75] so that

[65] Stokes S, Digital Copyright: Law and Practice Third Edition (Hart Publishing, 2009), at 26.
[66] Infopaq International A/S v Danske Dagblades Forening (C-5/08) [2009] I-6569; [2012] Bus. L.R. 102.
[67] Bezpeènostní softwarová asociace -- Svaz softwarové ochrany v Ministerstvo kultury (C-393/09) [2011] E.C.D.R. 3.
[68] Football Association Premier League Ltd v Media Protection Services Ltd (C-403/08 and C-429/08) [2012] 1 C.M.L.R. 29.
[69] Eva-Maria Painer v Standard VerlagsGmbH (C-145/10) [2012] E.C.D.R. 6.
[70] Football Dataco Ltd v Yahoo! UK Ltd (C-604/10) [2012] E.C.D.R. 10.
[71] SAS Institute Inc v World Programming Ltd (C-406/10) [2012] ECDR 1
[72] Deckmyn v Vandersteen (C-201/13) [2014]
[73] Article 1(3) of Directive 91/250 on the legal protection of computer programs [1991] OJ L 122/42. See Appendix H

such works were only original if the work 'constitutes the author's own intellectual creation'. The standard of intellectual creation[76] which now extends beyond the Directives and applies to all copyright works is more slightly more demanding than skill, effort or labour and represents a move away from a purely natural rights approach. Originality can only be demonstrated where, 'through the choice, sequence and combination of words the author may express his creativity in an original manner and achieve a result which is an intellectual creation'[77]. In *Infopaq* it was stated 'copyright... is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation'[78]. This meant works would be considered original 'provided they contain elements which are the expression of the intellectual creation of the author of the work.'[79] The *Infopaq* decision, 'in effect, overrules *Ladbroke v William Hill* and all the decisions preceding or following it'[80]. Following the decision there were considerable questions over the impact on UK originality which is out of step with the majority of EU Members, 'the result could be a change in the scope and meaning of protected subject-matter in the first place, will certainly affect low-creativity and technical subject-matter'[81]. The *Infopaq* decision however is unlikely to ensure originality is an effective internal control. The current low standard has changed very little in subsequent UK cases and even if adopted, the intellectual creation standard would have little effect on obtaining balance.

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[74] Article 3(1) of Directive 96/9 on the legal protection of databases [1996] OJ L77/20. See Appendix H
[75] Article 6 of Directive 2006/116 on the term of protection of copyright and certain related rights [2006] OJ L372/12. See Appendix H
[76] Discussion based on Derclaye E, 'Wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law', E.I.P.R. 2010, 32(5), 247-251.
[77] Supra Note 66, at 45.
[78] Ibid, at 37.
[79] Ibid, at 39.
[80] Supra Note 76, at 248.
[81] Rosati E, 'Originality in a work, or a work of originality: the effects of the Infopaq decision', E.I.P.R. 2011, 33(12), 746-755, at 752.

In the *Meltwater*[82] case the Court of Appeal held the intellectual creation standard was the correct test for originality. Despite a change in terminology, it was held despite the *Infopaq* ruling that the existing UK test had not been modified, 'the test of quality has been re-stated but for present purposes not significantly altered by the *Infopaq* case I say that in the knowledge that the decision may sit awkwardly with some provisions of English law'[83] and 'the long established rule under domestic law... for originality did not connote novelty or merit but meant that the work had to have originated with the author, was unaffected by European jurisprudence'[84]. McDonagh[85] supports this suggestion concluding, 'even if the originality standard had been altered by *Infopaq*, the classic understanding of originality, as discussed in *Sawkins* would arguably still be highly relevant'[86]. Therefore a substantial change to originality does not appear to have occurred[87]and the *Infopaq* decision does not signify a transition to an instrumentalist approach. Even if adopted outright the impact of the intellectual creation standard would be minimal, in the *Infopaq* case itself it was stated the standard was very generous and even parts of sentences could be protected[88], 'certain parts of sentences... may be suitable for conveying to the reader the originality of a publication... by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Parts of sentences are, therefore, liable to come within the scope of the protection'[89].. The intellectual creation standard whilst

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[82] Supra Note 42.
[83] Ibid, at 72.
[84] Supra note 42, at 54.
[85] McDonagh L, 'Rearranging the roles of the performer and the composer in the music industry : the potential significance of Fisher v Brooker', I.P.Q. 2012, 1, 64-76.
[86] Ibid, at 67.
[87]For example several copyright textbooks were published after the Infopaq decision and only briefly mention the case, relying on the traditional UK explanation of originality. For example the second edition of Stokes S, Art and Copyright, (2011, Hart Publishing).
[88] The Infopaq case concerned headlines from articles consisting of eleven words.
[89]Supra Note 66, at 47.

requiring more than mere labour to be exercised, still protects trivial works and centres protection on the creator's process not on the wider impact protection has on copyright's social purposes. Despite using different terminology the intellectual creation standard seems no better suited to determining copyright subsistence. Trivial works adding little to society's knowledge base such as newspaper headlines would still qualify for protection. This has been exemplified in subsequent UK cases where although the EU terminology was adopted it was held to make little difference to the result with basic works being considered original. In *Temple Island Collections Limited v New England Teas*[90] the intellectual creation standard was treated as an amalgamation with the traditional UK approach, 'these elements above derive from and are the expression of the skill and labour exercised by Mr Fielder, or in *Infopaq* terms, they are his intellectual creation'[91] and 'the composition of the image can be the product of the skill and labour (or intellectual creation) of a photographer and it seems to me that skill and labour/intellectual creation directed to that end can give rise to copyright'[92].

Whilst the judiciary seem reluctant to recognise the potential reforming impact of the *Infopaq* decision, the ECJ has discussed the intellectual creation standard in more detail in subsequent cases which challenges the notion in *Meltwater* that the UK sweat of the brow originality has not been altered. . In the *BSA* case the CJEU held that the GUI could not be protected as a computer program under the software directive however held it was possible to protect the GUI under general copyright protection, 'the components of a graphic user interface do not permit the author to express his creativity

[90] Temple Island Collections Ltd v New English Teas Ltd [2012] EWPCC 1. Images of the works at issue in the case and the images being discussed in relation to the work of Duchamp can be found in Appendix I.
[91] Ibid, at 53.
[92] Ibid, at 37.

in an original manner and achieve a result which is an intellectual creation of that author...a graphic user interface is not a form of expression of that program... thus is not protected by copyright as a computer program. Nevertheless, such an interface can be protected by copyright as a work by Directive 2001/29 if that interface is its author's own intellectual creation.'[93] A GUI can only be protected by copyright generally if it could be considered the authors own intellectual creation, 'the graphic user interface can, as a work, be protected by copyright if it is its author's own intellectual creation.'[94] The court explained that to determine originality that one must consider, 'the specific arrangement or configuration of all the components which form part of the graphic user interface... in that regard, that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function'.[95] Therefore originality cannot be fulfilled where the expression of those components is dictated by their technical function. Intellectual creation was again discussed in the joint cases of *Karen Murphy* and *FAPL*[96] which provides an example of a work that cannot satisfy the intellectual creation standard. The joint case concerned premier league football matches and whether sporting events could be considered original. It was held sporting events could not be intellectual creations and therefore were not original because they involved no creative freedom, 'sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright. Accordingly, those events cannot be

[93] Supra Note 67, at 50-51
[94] Ibid, at 46.
[95] Ibid, at 48
[96] Joined Cases Football Association Premier League v QC Leisure (C-403/08) and Karen Murphy v Media Protection Services (C-429/08) [2012] 1 C.M.L.R 29

protected.'[97] The position was further upheld in the *SAS Institute* case involving a set of computer programs for statistical analysis. It was held elements of the computer program such as algorithms or commands could not be protected however all those elements taken together could if they reflect the author's own intellectual creation, 'the keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts which, considered in isolation, are not, as such, an intellectual creation of the author of the computer program. It is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation'[98]. The AG explained copyright protection is based on creativity and inventiveness not labour, 'He opined the author's own intellectual creation involves creativity, skill and inventiveness, though the merit, qualitative or aesthetic, of the subject-matter is not relevant… For a computer program to be copyright, "account should be taken not of the time and work devoted to devising the program nor of the level of skill of its author but of the degree of originality of its writing'[99].

The intellectual creation standard was again discussed in the Painer case. The case concerned a school portrait photograph of Natascha K taken before she was abducted in 1998. When she escaped her abductor in 2006 various media outlets used the photographs without attributing them to Ms Painer. The court held the photographs were original and clarified the intellectual creation standard. The court stated a work

[97]Ibid, at 98-99
[98] Supra Note 71, at 66-67
[99] Liu D, 'Of Originality: originality in English copyright law: past and present', E.I.P.R. 2014, 36(6), 376-389, at 384.

will be original if it reflects the author's personality, 'an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices'[100] and if it expresses the authors free and creative choices, 'photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.'[101] In the case the photograph was original because it did reflect the author's personality or as the court stated the author stamped the work with their 'personal touch', 'the photographer can make free and creative choices in several ways... in the preparation phase, the photographer can choose the background, the subject's pose and the lighting... he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing technique... By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'[102] and 'she took several photographs of Natascha K. designing the background, deciding the position and facial expression, and producing and developing them.'[103] The effect of this case is that it is made clear if it could not be deciphered from *Infopaq* that mere skill or labour is insufficient to confer originality and that more is needed. The initial UK reaction to *Infopaq* in the *Meltwater* case therefore must be wrong and the UK test has been altered and that a work simply originating from an author is insufficient to qualify for protection. What is now needed is the personal touch or personality of the author to be reflected in the work, 'relevant is an element of choice: there must be the possibility to choose one alteration over another. With these

[100] Supra Note 69, at 89
[101] Ibid, at 94
[102] Ibid, at 90-92
[103] Ibid, at 27

choices the author is able to express his creative abilities, and so the author can stamp the work with his ‘‘personal touch’’, to use the language of the CJEU in Painer.’[104]

Finally the Football DataCo case revolved around a database concerning football fixture lists and it the AG & Court both held that exercising skill and labour is not sufficient to gain copyright protection, ‘copyright protection is conditional upon the database being characterised by a ‘creative’ aspect, and it is not sufficient that the creation of the database required labour and skill’ and ‘the fact that the setting up of the database required... significant labour and skill of its author... cannot as such justify the protection of it by copyright’[105]. This statements means, ‘the ECJ has expressly confirmed, if it could not be inferred already from *Infopaq*, that those traditional stalwarts when assessing originality under English copyright law no longer have any place’[106]. Therefore exercising skill and labour cannot amount to originality, ‘the ECJ's position is clear; the selection or arrangement of data contained in a database must amount to an original expression of the creative freedom of its author... to qualify for protection’[107]. Football DataCo confirmed the UK approach is insufficient meaning the *Meltwater* interpretation of *Infopaq* is incorrect, ‘the court [Meltwater] misunderstood the *Infopaq* ruling of the CJEU; indeed, it is illogical to say that just because intellectual creation is a question of origin rather than novelty or merit, this must necessarily result in the English test of originality not being qualified by the *Infopaq* test, without at least

[104] Rahmatian A, ‘Originality in UK Copyright Law: The Old ‘‘Skill and Labour’’ Doctrine Under Pressure’, IIC-International Review of Intellectual Property and Competition Law 44.1 (2013): 4-34. at 13.
[105] Supra Note 68, at 42.
[106] Cook T, ‘Football Dataco: implications for copyright subsistence. P.L.C. 2012, 23(3), 8-9, at 9.
[107] Cran D and Joseph P, ‘Football Dataco: fixture lists not protected by database copyright’, Ent. L.R. 2012, 23(5), 149-151, at 151.

aligning the ingredients of the two tests'[108]. The CJEU held here that the football fixture lists were not the authors own intellectual creation because they were dictated by technical considerations and this therefore did not allow the author any creative freedom to stamp their personal touch, 'that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices...by contrast, that criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom.'[109] The case possibly has far reaching implications on originality, '*Sawkins* might therefore be decided differently today'[110] and the *Meltwater* decision now looks to have underestimated the impact of the *Infopaq* decision. For example Cran and Joseph[111] argue it will result in a higher standard that will prevent copyright from subsisting in football fixtures resulting in 'bookmakers and news providers... as well as information providers, welcoming the more stringent requirement of "originality" that the ECJ has now applied'[112]. The overall effect of the case is that the intellectual creation standard will not protect functional works, 'the court has talked about creative choice and it is clear that decisions that are limited by functional constraints or rules are not to be regarded as creative choices.'[113]

This series of CJEU cases harmonising originality has replaced the traditional UK test with that of intellectual creation however this new test has several drawbacks.

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[108] Supra Note 99, at 381.
[109] Supra Note 70, at 38-39
[110] Supra Note 106.
[111] Supra Note 107
[112] Ibid.
[113] Supra Note 60, at 101.

Firstly whilst it has been made explicitly clear from the CJEU that skill and labour alone will not be considered original, in practice there is little difference on the scope of copyright protection under intellectual creation. Academics consider intellectual creation as consistent with both the UK and continental approaches, 'The recent CJEU decisions on originality within copyright in the EU, Infopaq, BSA, Painer and Football Dataco, have arguably not upset either the existing systems of copyright in the UK or of author's rights laws in Continental Europe... the CJEU restated the law in the way in which it has already developed through court decisions and jurisprudence in the Member States'[114] and 'it is questionable whether the 'author's own intellectual creation' test is an appropriate standard for determining the eligibility of protection... the originality standard is so easy to attain that even works of minimal creativity qualify.'[115] Van Gompel even argues that the intellectual creation standard is only a reformulation of the UK approach with little impact on protection, 'for the most part the new standard probably will not lead to different results... while the European standard may be said to be 'higher' it is probably preferable to say it is different.'[116] The UK courts have continued to support the traditional UK originality test even after explicit rejection by the CJEU in *Taylor v Maguire*, 'for an artistic work to be original it must have been produced as the result of independent skill and labour by the artist. The greater the level of originality in the work the higher the effective level of protection is.'[117]

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[114] Supra Note 104, at 29
[115] Van Gompel S, 'Creativity, autonomy and personal touch: A critical appraisal of the CJEU's originality test for copyright' (2014): 95-143 in Van Eechoud M, The Work of Authorship (Amsterdam University Press, 2014), at 97.
[116] Ibid, at 97.
[117] Taylor v Maguire [2013] EWHX 3804, at 6.

The second issue is that the intellectual creation standard still protects trivial works and it is very possible that more works could be protected as it appears the CJEU has abolished the need for a work to fit into one of the copyright work categories required by article 2 of the Berne Convention, 'the CJEU's originality standard may perhaps impose more limitations than is currently recognised in legal discourse.'[118] Traditionally a work must be classified as belonging to a category of work e.g. literary and then afterwards originality is considered. The CJEU however has contended that as long as the work in the author's own intellectual creation it will qualify for protection regardless of subject matter. This could lead to more works gaining copyright protection, for example those works that could not previously fit into one of the prescribed categories of work. In both the *Football DataCo* and *SAS Institute* cases the court stated fixture lists dictated by their technical function and programming languages could not be protected under the database directive or computer programs directive respectively but nevertheless could attract general copyright protection if it fulfilled the intellectual creation standard, 'fixture lists do fulfil the definition of a database under Art. 1(2) of the Directive but even if not, copyright protection... is still available, provided... they constitute the author's own intellectual creation.'[119] The final concern over the intellectual creation test is that trivial works are still protected and copyright protection is excessively wide, 'the reference to 'the author's personality', 'creative abilities' and 'free and creative choice' seem to suggest that only culturally significant creations carrying an obvious personal stamp of the author qualify for protection. This is not the case.'[120] If we take example of the Painer case, several academics have questioned whether a simple portrait photograph should have gained protection. Handig contends

[118] Supra Note 115, at 97.
[119] Supra Note 104, at 9
[120] Supra Note 115, at 95

school portrait photographs are singular they leave little room for a personal touch or creative freedom, 'the conditions leave little scope for creative design: the parents of the children want to buy only well-lit, sharp portrait shots of their children, who should smile at the viewer… anyhow, the remaining small scope for individual design is apparently enough to create copyright works.'[121] Van Gompel also questions the scope of the intellectual creation standard, 'copyright applies to a wide range of culturally trivial objects with no unique distinctiveness as the Eva-Maria Painer case perfectly illustrates.'[122] Overall the intellectual creation standard will have little impact of changing the scope of copyright protection. Whilst the intellectual creation standard could represent a move away from a purely natural rights approach in that labour itself will not gain copyright protection, the standard still bases protection on the author's actions not the impact on achieving copyright's purposes. Replacing skill and labour with intellectual creation is a matter of semantics because neither standard represents a formidable barrier to copyright protection. Using the intellectual creation standard will not instil balance in copyright law and this new definition of originality has not transformed the criteria into an effective internal control because the same difficulties discussed in relation to the sweat of the brow test have not been overcome. Not only will trivial works still gain protection but Lockean theory remains the basis of protection. As discussed above instrumentalism would base protection of maximising innovation & achieving copyright's social purposes, under intellectual creation, protection is still based on the author's creation process not what he has provided to society's knowledge base.

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[121] Handig C, 'The sweat of the brow is not enough!- more than a blueprint of the European copyright term ''work'', E.I.P.R. 2013, 35(6), 334-340, at 335.
[122] Supra Note 115, at 96

5.6-Other Originality Standards:

In opposition to the approach to originality taken in the UK, the opposing school mainly used in America requires creativity to demonstrate originality. Under this more demanding approach a work must have a 'modicum of creativity'[123] or 'possess at least a minimal degree of creativity'[124]. The advantages of this approach is that by requiring more than just skill or effort, originality may act as a more effective barrier to copyrightability and truly function as some form of internal control, 'the more this concept is akin to the romantic concept of genius and creativity, the more originality becomes an effective threshold to protection.'[125] Demanding creativity is also advantageous because it is less likely trivial or highly derivative works will garner protection, 'there is also the concern that overprotection of certain works will thwart social and scientific progress by precluding persons from building upon earlier works.'[126] The creativity standard also has instrumentalism as its theoretical basis not Locke's Labour theory and the mere exertion of labour is insufficient to obtain protection. The standard is subjective which, 'complicates what should be a simple standard of review. The judiciary is not qualified... to make judgments about a work's literary or artistic merit'[127]. Such a standard leads to the judiciary debating the works merits and trying to establish the input of the creator when copyright is 'best served by a content-neutral, objective standard of originality'[128]. This could result in inconsistent definitions of originality with the judiciary's personal opinions as to what constitutes

[123]Feist Publications Inc v Rural Telephone Service Co Inc 499 U.S. 340 (1991), at 51.
[124] Ibid, at 10.
[125] Supra Note 81, at 537
[126] Supra Note 57, at 59.
[127] Olson D, 'Copyright Originality', 48 Mo. L. Rev. 29 1983, at 61.
[128] Ibid, at 57.

creativity influencing what is protected, 'how can judges be expected to determine intrinsic value, let alone apply it in a consistent way?'[129]

Besides derivative works one of the most contentious issues concerning originality is factual compilations. The question is should such works, which consist of basic information and involve minimal labour be copyrightable? The protection of factual compilations would evidence protection being based on Locke's Labour because whilst effort and labour are involved in creating such work, they make little contribution to society. *Feist* was a landmark American copyright case where originality was described as 'the sine qua non of copyright'[130] and 'the very premise of copyright law'.[131] It was held a white pages telephone directory did not meet the level required for originality because it was 'devoid of even the slightest trace of creativity'[132]. The creativity standard was able to effectively decide which works should be copyrightable by rejecting labour as the basis of protection, 'the primary objective of copyright is not to reward the labour of authors'[133] and 'the "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation... to the facts themselves'[134]. *Feist* was undoubtedly the correct decision because as stated in the case itself, 'given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to

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[129] Sherwood-Edwards M, 'The redundancy of originality', IIC 1994, 25(5), 658-689, at 678
[130] Supra Note 123, at 10.
[131] Ibid, at 14.
[132] Ibid, at 50. In the case originality was given five different meaning with originality being said to require, 1- a modicum of creativity, 2- possessing at least some minimal degree of creativity, and could not include situations where 3- the creative spark is utterly lacking, 4- the creative spark is so trivial as to be nonexistent or 5- where the work is devoid of the slightest trace of creativity.
[133] Supra Note 123, at 19.
[134] Ibid, at 28.

believe that any collection of facts could fail'[135]. Feist represents a move away from a purely natural right approach however is still influenced by the theory, 'this approach is also consistent with a natural rights theory of property law; however it is less absolute.'[136] Academics have argued that whilst creativity deviates from natural rights theory, it does not fully embrace instrumentalism because protection is still based on the author not social goals. Craig comments, 'the creativity test could fortify a conceptualisation of copyright as an inalienable authorial right'[137] and that such an approach bases protection on romantic authorship, 'legal scholarship criticises the persuasiveness of romantic authorship... compounded through the Feistian notion of originality'[138]. The creativity standard as recognised in Feist rejects labour conferring copyrightability, 'in assessing the originality of a work... we look only at the final product, not the process, and the fact that intensive skilful and even creative labour is invested... does not guarantee its copyrightability.'[139] This is closer to instrumentalism and a far more effective barrier to copyright protection as demonstrated in Australia where the sweat of the brow approach meant sufficient effort had been expended for copyright to be granted in factual compilations[140]. A low standard of originality as adopted in our jurisdiction is incapable of balancing copyright law. Basing copyright protection on natural right concepts such as exerting labour or skill results in unwarranted and excessive protection which completely undermines copyright's purpose because right holders gain control over basic information that is not being disseminated.

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[135] Ibid, at 54.
[136] Supra Note 57, at 15.
[137] Supra Note 59, at 132.
[138] Ibid.
[139] Meshwerks Inc. v. Toyota Motor Sales USA Inc. 528 F 3d 1258, at 1268
[140] Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd (2002) 192 A.L.R. 433. The position was reversed in Australia by the Telstra Corporation Ltd v Phone Directories Company Pty Ltd (2010) 194 FCR 142 case and the current law reflects the Feist approach.

Canada has adopted a new approach to originality and since the *Tele-direct*[141] case, where the sweat of the brow test was rejected, originality has moved closer to the creativity approach. As seen above the two main approaches to originality are ineffective. The sweat of the brow approach, 'has not only diluted the meaning of creative; it has also glutted the market with innumerable objects... thereby making it even more arduous for true creation to find a public.'[142] Although the US has rejected a natural rights approach, creativity is not defined and a higher standard may deter the creation of works. Canada has adopted a middle ground between the two extremes, 'the Court refuses to take sides in the debate. It posits, rather, a third standpoint'[143]. The seminal *CCH Canadian Ltd* decision concerned a compilation of judicial decisions. Although the work was held to be original both the UK and US approaches were dismissed as they undermined the balance between rights holders and the public, 'I conclude that the correct position falls between these extremes. For a work to be "original"... it must be more than a mere copy of another work. At the same time, it need not be creative'[144]. The Supreme Court stated the correct test was, 'what is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment... The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise'[145]. McLachlin C.J's reasoning[146] was that at its core copyright involves a balance of rights between society and creators. The sweat of the brow test it was argued tips the balance

[141] Tele-Direct (Publications) Inc v American Business Information Inc (1997) 76 C.P.R. (3d) 296
[142] Barzun, J. 'The Paradoxes of Creativity', (1989) 58 American Scholar 337, at 351.
[143] Drassinower A, 'Taking User Rights Seriously' in Geist M, In The Public Interest: The Future of Canadian Copyright Law, (2005, Irwin Law) at 463
[144] Supra Note 57, at 16.
[145] Ibid.
[146] Ibid, at 23

too far in favour of the creator whilst the test of creativity favours the public. The decision posits a middle ground approach based on balancing rights holders and the public, 'an in-between truly attuned to the dual purpose animating copyright law as a whole.'[147]

The Canadian middle ground approach despite trying to balance the public and right holders with a new standard, does not solve the inherent problems with originality, particularly as the approach seems very similar to the US approach. Varying definitions given to originality aim to establish the line between works which should qualify for copyright protection and what works should not. All standards including the Canadian approach have proved arbitrary and fail to balance the interests of right holders and the public, 'the main originality standards have become meaningless; the determination of originality is arbitrary and, to a certain extent, unpredictable'[148]. All standards revolve around a natural rights approach particularly in our jurisdiction and none are an appropriate standard because all 'have failed to offer meaningful standards for determining when a work is original,'[149]and '[awarding] copyright protection to only those aspects of a work that are original... while remarkably easy to state, proves to be impossible to apply'[150]. Canada has offered a third approach however a key issue remains, is originality the most appropriate standard? and is there a more suitable standard that can be implemented to determine copyright subsistence? Originality as a concept 'remains uncertain and confused, a condition that stems largely from an

[147] Supra Note 143, at 464.
[148] Zimmerman D, "It's an Original!' In pursuit of Copyright's Elusive Essence" 28 Colum .J.L. & Arts 187 2004-2005.
[149] Verstegg R, 'Rethinking Originality', 34 Wm. & Mary L. Rev. 801 1992-1993, at 804.
[150]Chused R, A Copyright Anthology: the technology frontier, (Anderson Publishing, 1998), at 5.

uncertainty over the appropriate nature of judicial review of material in which copyright is claimed'[151]. All of the various originality definitions including the *CCH* formulation share the same flaw, they focus on the process of the creator. The basis of copyright protection is the author's process, what did he execute in order for the work to be produced, whether that requires the exercise of skill or labour, creativity or skill and judgment that is not purely mechanical. Originality whatever definition it is attributed concerns what the creator has done to create the work rather than focusing on how the creator is fulfilling his role within copyright law.

5.7-Reform-closer to patent law:

The failure of any definition of originality to act as an effective internal control has lead academics to recommend reform or outright rejection of originality[152]. *Nordell* although questioning the usefulness of originality argues there is no suitable replacement, 'whether redundant or not, the prerequisites for copyright protection seems to be nothing but a matter of definition. If we abandon the notion of originality what do we have left?'[153] Originality fails to effectively determine what should be copyrightable and in order to provide an effective barrier to copyright protection, originality should be replaced with a new test[154] embodying instrumentalist principles. The test is envisaged as an amendment to the copyright legal framework to be applied to determine if a work should gain copyright protection and form part of the subsistence requirements just as the originality is currently applied. The test is inspired by inventive step (non-obviousness) in patent law, which requires qualitative newness. I am not suggesting

[151] Supra Note 127, at 31.
[152] For example Sherwood Edward (Supra Note 129), argues for the abolition of originality.
[153] Supra Note 17, at 110.
[154] This discussion relates to copyright subsistence not to the role originality plays in infringement.

inventive step should be transplanted into copyright law however the underlying concept provides a good basis for replacing originality in copyright subsistence. Inventive step does not require an invention to be ingenious or novel but requires the invention is a sufficient advance on what was known before. To answer this question, the invention in question is compared to the current state of the art and differences are looked for between the current art and the new invention to establish whether the invention was an obvious step[155]. In relation to copyright one would ask if the work in question benefits, advances or adds anything to society's knowledge base. This would not be a particularly demanding standard and would require works to make some form of contribution to society. Under instrumentalism copyright is a social bargain where rights holders gain copyright protection at the expense of the public's right to use that work on the basis they are providing something that once outside copyright protection will revert to the public domain and prove to be a valuable asset. The test would operate by assessing the works ability to fulfil rights holders' role within this social bargain, mainly adding to society's knowledge base.. Instead of looking at the process of the creator in producing the work e.g. did he exercise skill or labour or is the work the author's own intellectual creation, focus should be given to how the work helps fulfil the role attributed to rights holders under copyright law. Under instrumentalism we are arguing copyright law's dual purpose is to encourage the creation of socially useful works and to have knowledge disseminated to the public. With this dual purpose in mind, in order to gain copyright protection it should be exemplified what the work in question actually offers, does the work uphold the rights holders' side of the bargain? How does the work add to society's knowledge base and is it justified that the work

[155] See Windsurfing International Inc. v Tabur Marine (GB) Ltd. [1985] RPC 59 and Pozzoli Spa v BDMO SA & Anor [2007] EWCA Civ 588.

should be withheld from the public domain. Equally it should also be considered, if copyright protection was to be denied would this damage the public domain by discouraging right holders from creating? The test would be underlined by an instrumentalist theoretical basis rather than the current natural rights approach. This new test has been influenced by John Dewey's discussion in *My Philosophy of Law* referred to in the theoretical framework. Dewey reasoned law was a social instrument and its effectiveness had to be assessed by its wider consequences, 'a given legal arrangement is what is does, and what it does lies in the field of modifying and or maintaining human activities.'[156] When applied to originality one must consider what the consequences of the standard are in practice and if these consequences help us realize the original aims we intended, 'investigate...the consequences of legal rules and of proposed legal decisions and acts of legislation.'[157] The consequences of current law on originality, as discussed, are that it fails to fulfil its role as an effective barrier to copyrightability. The consequences are that the public domain is narrow, trivial works qualify for protection and right holders are given wide monopolies. In these circumstances where undesirable consequences arise and the objectives we wanted to achieve are not met, Dewey argues this failure can provide the impetus for reform, '[laws] have consequences and consideration of consequences may provide ground upon which it whether they be maintained intact or be changed.'[158] The new test has been formulated with copyright's dual purpose as its guide, subsistence will be based on consequences, mainly the works ability to contribute to the aims copyright is meant to achieve. Current law focuses on how works originate and what the author has done. Under this test subsistence would be based on the works ability to achieve copyright's social aims and its effect on right

[156] Dewey J, My Philopshy of Law, in Boydston J, The Later Works of John Dewey, 1925-1953: 1939-1941, Essays, Reviews, and Miscellany, (SIU Press, 1988), at 118
[157] Ibid, at 122
[158] Ibid, at 121

holder's innovation. The proposed test would involve asking if the work at issue was able to benefit, advance or add anything to society's knowledge base in respect of, but not limited to; culture, scientific/industrial knowledge, educational resources, business efficiency or provide entertainment. The majority of works should be able to fulfil this standard, for example software improves business efficiency, films provide entertainment and literary works can be educational resources. It is envisaged under such a test factual compilations and highly derivative works would fail to gain protection. Firstly under this test factual compilations would not gain copyright protection. Looking at Dewey, the consequences of protecting factual compilations would be to undermine copyright's purposes. The consequences can be highlighted by the *Feist* case. If rights holders were to gain protection in white pages for instance this would give them a monopoly over basic facts that are already available to the public. Another consequence would be that whilst collecting the information may be convenient, it does advance society's knowledge base. We are able to reference several examples to demonstrate how the test would work. If we take the *Painer* case than the school portrait photograph should not qualify for protection because it is such a trivial work. The photograph at issue is a work that is commonplace. Whilst the child changes the other elements such as the background, angle, lighting, contrast and colour although having slight variations are likely to be highly similar. No matter whom the author of the school portrait a generic work is being created. The photographer whilst providing a service parents may like and wish to purchase is not adding to society's knowledge base because the author is unable to make a distinctive contribution to society's knowledge base through such standardised works. This reasoning would be applicable to other generic photographs such as those in the *Temple Island* case which concerned a photo of Parliament with a Red London Bus in front of it. In comparison several other types of

photographs would pass the test and gain protection. If we take the example of a photograph from the recent Greek protests and riots against austerity then in comparison to Painer the photograph is contributing to society's knowledge base. Not only is the photograph contributing to an important public debate by illustrating the current situation it also encourages the dissemination of political information. Another example is a travel magazine publishing photos of a travel destination, not only can this provide entertainment to readers of viewing a destination and what it has to offer but it can also give insight into another culture. To take the example of photographs from Space of planets or asteroids for example not only are these photographs adding to society's educational resources by taking never before seen photographs but they may also help expand scientific knowledge by revealing previously unknown information e.g. a planet has water. In comparison a standard school portrait is unable to make comparable contributions to society and should not be protected. Referring back to other cases discussed will also exemplify how the test will operate. The test would not provide copyright protection to cases such as *Walter v Lane* or *Baumann v Fussell* because in both those cases the works at issue merely reproduced the work of another. The verbatim reports of another's speech or the painting of a pre-existing photograph add nothing to society's knowledge base as they are simply repeating something the public already has access to. Other examples also demonstrate how the test would operate. If we refer back to the *Infopaq* ruling, the court considered 11 word article summaries could be original, 'for the court, a single word is not protectable…11 words, can be protected by copyright if they encapsulate the author's own intellectual creation. The court thus rules that printing 11 words may be a reproduction.'[159] Under this test whilst the newspaper article itself would attract protection, an 11 word article summary would

[159] Supra Note 76, at 248

not because it cannot add to society's knowledge base. In *Infopaq* numerous extracts cumulatively allowed more than 11 words to be seen and lengthy extracts could be reproduced however 11 word extracts or headline themselves should be excluded from protection. Short extracts, headlines or summaries may well be a useful tool for users but they only act as a go between, it gives a brief glimpse of the article and cannot convey the entire meaning of the work or provide users with the full societal value the work offers, it is the article itself that adds to society's knowledge base not a short extract. Highly derivative works would also fail to pass this test because insignificant differences with existing works add very little to society. The exclusion of highly derivative works rather than all derivative works is necessary because otherwise the balance would shift in favour of the public. To fail all derivative works would exclude far too many works that could significantly advance existing knowledge. Works can be influenced in many ways by existing works. Some derivative works are able to sufficiently distinguish themselves from the original work to represent a truly novel creation. For example West Side Story although based on Romeo and Juliet with vaguely similar characters has a completely different script and setting, being centred in 1950's New York rather than 15th century Venice. West Side Story is only very loosely influenced by Shakespeare's work with significant differences and is able to add to society's knowledge base with an unquestionable ability to advance culture and add to society's entertainment resources. Works that would however fail the test would include Duchamp's L.H.O.O.Q, Sawkins composition and film remakes such as Psycho. The reason why these various works would fail the test is because they are almost identical to works already available with trivial differences. Duchamp and Sawkins for example merely slightly altered an existing work and in both situations it was this existing work that formed the basis of their 'new' work. In comparing the work of Duchamp with Da

Vinci or Sawkins with Lalande, the minor changes do not exemplify that anything appreciable has been added to society's knowledge base particularly in the situation where the original work is in the public domain. Cover songs for example simply represent a different person singing the same lyrics to the same melody. Films remakes can vary from the original more so then cover songs in terms of actors, sets, scripts and storyline however at the core the underlying work has already been provided to the public. I would strongly argue that such works should not be provided with equivalent protection as truly original works that offer something entirely new to society.

There are several objections and counter arguments to my proposed reform. The first possible criticism is that the test is subjective in that judges would make value judgements on whether works contribute to society or not. Subjectivism leads to inconsistent judgements and legal uncertainty however although not as legally certain or rigid as an objective standard such as sweat of the brow. The test however allows flexibility and the proposed test focuses on the work itself and analyses how the work benefits society directly incorporating the purposes we want to achieve. Also this criticism is also applicable to the intellectual creation standard which is subjective, 'the criterion of originality for all works is "free and creative choices" so long as the author can exercise those choices, there will be a personal touch and originality... This also means that the criterion adopted by the Court is subjective and not objective.'[160] A second criticism of the proposed test could be that there is no specific set definition or dividing line between what works benefit or add to society's knowledge base and which do not. Whilst this is valid, the intellectual creation standard provides no set definition of when a work has a 'personal touch', when it reflects 'personality' or represents 'free

[160] Derclaye E, 'Assessing the impact and reception of the Court of Justice of the European Union case law on UK copyright law: What does the future hold', Revue Internationale du Droit d'auteur 2014.240 (2014): 5-117, at 11

and creative choices' and when it does not. This is because it must be assessed on a case by case basis. Finally criticism of the test may be aimed that the standard is too high because it is more demanding than either the UK or EU approaches. Whilst the test has a slightly higher threshold this is necessary firstly because as discussed the UK and EU approaches are fundamentally flawed because they are too easy to fulfil and provide copyright protection to a wide variety of trivial and derivatives works. The test in comparison whilst excluding trivial works currently protected by the UK and EU approaches (e.g. the Painer case and 11 words newspaper extracts), aims to strike a fair balance between right holders and the public. As stated the test is not a particularly high standard but aims to ensure copyright subsistence is an effective internal control to ensure balance.

Despite these criticisms the proposed test should be adopted because it has several advantages. Firstly the test incorporates instrumentalism with the social bargain between right holders and the public guiding protection, the test requires right holders to contribute to society and only provides protection to work that fulfils right holders role within the copyright regime. Secondly current originality standards revolve around trying to ascertain the creators thought process and are unconnected from the purposes copyright is meant to achieve. Current originality standards including the intellectual creation standard as discussed by McLachlin C.J not only favour one group over the other but draw an arbitrary line between works which are copyrightable and which are not. The new standard suggested by the proposed reforms however is not artificial, does not draw an arbitrary line but is a legitimate attempt to find a balanced approach to determining copyrightability. In order to balance rights holders and the public,

subsistence should incorporate instrumentalist principles where the focal point is attaining copyright's purposes. Copyright should only protect those works that are able to fulfil rights holders' traditional role in the copyright regime, providing work that helps society and culture progress. If a work upholds right holders role within the social bargain than copyright should subsist in the work. Originality currently protects the majority of works and is completely unrelated to the role rights holder should fulfil in the copyright regime. This is a disadvantage to all concerned parties because the public domain is narrowed and rights holders discouraged from creating works. Rights holders instead of taking an economic risk with innovative concepts or work are discouraged from taking such a risk and are permitted by current copyright law to fall back on tried and tested works. The proposed test however challenges this and is a far more effective internal control then any form of originality currently adopted.

5.8-Conclusion:

Originality in its current form cannot act as an effective internal control. Originality does not operate as a genuine barrier to protection with the majority of derivative, trivial and factual works gaining copyright, the flood gates are open. This applies to the UK approach, continental approach & the new EU approach with the intellectual creation standard still protecting trivial works such as in the *Painer* case. This can mainly be attributed to the adoption of a natural rights approach where one only need exemplify a low level of contribution to gain protection, no standard of originality considers the contribution being made by the author to the copyright bargain. Wider social interests are sidelined and have little influence on determining subsistence. As a result copyright's purposes are undermined with the public domain lacking adequate resources. Furthermore in the previous chapter the judiciary justified weak external controls because the copyright regime already effectively provided for the needs of the

public internally, through measures including originality. This argument is deeply flawed. Relying on internal controls to discharge any conflict between human rights and copyright is a fiction. This is particularly true of originality which is guided by the need to protect as many works as possible. The ability of a work to promote instrumentalist purposes such as contributing to society or advancing our knowledge base are regrettably irrelevant. The ineptness of originality results in this internal control failing in its purpose of representing the public interest because the public domain is being diminished and a balance not achieved. Rights holders gain control over all types of trivial works at the expense of the public who cannot access them. Copyright is treated as a natural right where protection is granted without consideration of the effect on the public interest. Originality is unable to counter the narrow interpretation of external controls, discussed in the last chapter despite the assertion internal controls adequately protect freedom of expression and the public interest.

Wordcount-10,910 (12,723 including footnotes)

6. Chapter Six-Ideas and Expression-the abandoned dichotomy

6.1-Introduction:

The basis of the idea/expression dichotomy is that ideas are the domain of patent law and that 'an author's ideas, no matter how novel, are not subject to copyright protection. Only her expression of those ideas is. Thus the plaintiff in a copyright action must show not that her ideas have been adopted... but that the defendant has copied the plaintiff's expression.'[1] Under the dichotomy 'copyright in a work protects only the original expression contained in the work, and not the underlying ideas'[2], this means ideas will never be subject to copyright protection, 'copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression'[3]. Anyone may appropriate the underlying ideas of any work without infringement, ideas are only protected when they are expressed, given form, 'a person may create a work that uses someone else's ideas, as long as the expression used to advance those ideas is not taken'[4]. The dichotomy has been described as 'trite law'[5] and 'there is hardly a single principle of copyright law that is more basic'.[6] The rationale behind the dichotomy is that 'ideas are considered to be analogous to what Roman law refers to as res communes, namely goods which cannot be owned by anyone, including air, running water'[7]. Despite the dichotomies position as 'the most fundamental basic axiom of

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[1] Drassinower A, 'A Rights-Based View of the Idea/ Expression Dichotomy in Copyright Law', 16 Can. J.L. & Jurisprudence 3 (2003), at 4.
[2] Shiver M, 'Objective Limitations or, How the Vigorous Application of "Strong Form" Idea/Expression Dichotomy Theory in Copyright Preliminary Injunction Hearings Might Just Save the First Amendment', 9 UCLA Ent. L. Rev. 361 2001-2002, at 372.
[3] Hollinrake v Trustwell (1894) 3 Ch 420
[4] Denneson T, 'The Definitional Imbalance between copyright and the first amendment', 30 Wm Mitchell L.Rev.895.(2004), at 909
[5] L.B. (Plastics) Ltd. v. Swish Products Ltd[1979] F.S.R. 145, at 160.
[6] Samuels E, 'The Idea-Expression Dichotomy in Copyright Law', 56 Tenn. L. Rev. 321 (1989), at 322.
[7] Rosati E, 'Illusions Perdues: The Idea/Expression Dichotomy at Crossroads', http://www.serci.org/2009/Rosati.pdf, [last accessed September 30th 2014] at 7.

copyright law'[8] the dichotomy performs different functions in various copyright regimes.

6.2-More than an evidential rule?

In the UK the dichotomy is used as a mere evidential rule that is greatly underused with little impact on the balance between right holders and the public. The dichotomy is used in conjunction with originality, normally as a less important consideration, to determine infringement. The dichotomy plays a particularly prominent role in determining the issue of substantiality.[9] The dichotomy is severely limited because it is used as a counterpart to originality rather than a separate internal measure in its own right. The relationship between the two concepts is that ideas are far too abstract to be considered original, 'the idea/expression dichotomy is closely related to originality... one common explanation... is that ideas are denied protection because of lack of originality'[10] and 'copyrighting ideas is inconsistent with the doctrine of originality'[11]. The dichotomy is used to 'determine infringement when a defendant's copy is not literal, [to assess] the extent to which the copyright's owners skill, labour and judgement have been taken'[12]. In America the dichotomy forms an important part of copyright subsistence, 'in the US, the maxim is employed differently: rather than being significant to the determination of infringement, it has the effect of denying that any copyright subsists in a work at all'[13]. The dichotomy as utilised in America helps define

[8] Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)
[9] CDPA 1988 section 16(3)(A).
[10] Siebrasse N, 'A Property Rights Theory of the Limits of Copyright', (2001) 51 Uni of Toronto L.J., at 36.
[11] Supra Note 1, at 14.
[12] Colston C, Modern Intellectual Property Law third edition (Taylor & Francis, 2010), at 289.
[13] Ibid, 290.

what can be copyrighted. Copyright cannot subsist in ideas, only in the expression of those ideas. The distinction in approach with the UK is attributed to the UK's low standard of originality which allows the majority of works including basic ideas to qualify for copyright protection. The demanding creativity standard adopted in the US requires an assessment of the works merits and this is where the idea/expression dichotomy is used, 'because of the limited approach to originality [in the UK], efforts to distinguish between idea and expression find only occasional place when addressing questions of whether works attract copyright protection at all. As with other systems, however, the dichotomy... plays a necessary (if difficult) role'[14]. Rosati also notes the current redundancy of the dichotomy, 'the low British threshold to the subsistence of originality, has made the idea/expression dichotomy of limited use when addressing questions of whether a work attracts protection at all'[15]. Utilising the dichotomy in subsistence would help balance right holders and the public because it could be a meaningful barrier to protection that prevents valuable ideas from being withheld from the public.

Despite being described as 'the foundation upon which copyright law rests',[16] it is questionable whether the dichotomy even forms a rigid legal rule in our jurisdiction. The dichotomy is not explicitly recognised in case law, is not consistently applied and although it, 'does not enjoy an explicit statutory position, it is well established'[17]. There is however capacity in the existing legal framework to make the idea/expression

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[14] Cornish W, Aplin T and Llewelyn D, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights Seventh Edition (Sweet and Maxwell, 2010), at 11-10.
[15] Supra Note 7, at 10.
[16] Waltrip L, 'Copyright Law- The idea/expression dichotomy: where has it gone', 11 S. Ill. U. L.J. 411 1986-1987, at 416.
[17] Birnhack M 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' Ent LR 24, at 8.

dichotomy a fundamental part of copyright subsistence and an essential internal control. In our jurisdiction the dichotomy traces its origins back to *Millar v Taylor*[18] where it was stated authors may make 'unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it... oppose its sentiments; but he buys no right to publish the identical work'[19] whilst Yates J commented 'ideas are free'[20]. Despite no statutory recognition of the dichotomy, its basic premise has been acknowledged in case law, 'English judges have decided cases in such a way as to produce similar results.'[21] The dichotomy has also been recognised in several jurisdictions[22]. *The 1976 US Copyright Act* provides, 'in no case does copyright protection for an original work of authorship extend to any idea... regardless of the form in which it is described'[23]. The dichotomy has also been implemented at Community level and in various international instruments. Although not mentioned in the *Berne Convention*[24], *TRIPS*[25] provides, 'copyright protection shall extend to expressions and not to ideas'[26] whilst the *WCP*[27] reiterates the point, 'copyright protection extends to expressions and not to ideas'[28] The UK is also subject to the *Computer Program Directive*[29] which provides, 'ideas and principles which underlie any element of a computer program... are not protected by copyright'[30]. The

[18] Millar v. Taylor (1769) 4 Burr. 2303
[19] Ibid, at 2348.
[20] Ibid, at 2378.
[21] Bainbridge, Intellectual Property Law Seventh Edition (Longman Publishing, 2008), at 49.
[22] Several jurisdiction have explicitly noted the dichotomy in Statute including Italy (Section 2575 of the Italian Civil Code), Ireland (Section 17(3) Irish 2000 Copyright and Related Rights Act) The Czech Republic (Section 2(6) Czech 2000 Coyright Act) and Brazil (Section 8(I) of Law No. 9.610)
[23] 17 U.S.C. Section 102(b) (1982).
[24] Berne Convention for the Protection of Literary and Artistic Works 1886
[25] Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)
[26] Ibid, article 9(2)
[27] WIPO Copyright Treaty (WCT).
[28] Ibid, article 2.
[29] Directive 91/250 on the legal protection of computer programs [1991] OJ L 122/42.
[30] Ibid, article 1(2).

dichotomy is vital not only in providing balanced copyright law but also is a key distinguishing factor between instrumentalism and natural rights.

6.3-The Lockean Proviso-A New Interpretation of Natural Rights?:

The traditional approach towards natural rights is that they support a broad and strong interpretation of copyright law and that restriction on copyright such as the idea/expression dichotomy and the fair dealing provisions should be narrowly interpreted. The general academic consensus as discussed in previous chapters is that natural rights particularly the work of Locke conflict with a robust public domain by supporting copyright above the public domain, demanding limited not wide exceptions and asserting copyright as an inherent right not an instrumental tool. Recent scholarship however has challenged this traditional viewpoint, particularly in the fields of the idea/expression dichotomy and fair dealing. Academics have tried to argue that natural rights can support a wide interpretation of the dichotomy and fair dealing. One of the aims of this chapter and the following chapter is to explore this alternative scholarship and determine if natural rights are compatible with a robust public domain. Debate has focused on the Lockean Provisos predominantly how these provisos should be interpreted and what is the correct reading of their scope. Beginning with the conventional interpretation of natural rights, the traditional Lockean approach contends labour provides authors with property rights in their creations, ‘labour is mine and when I appropriate objects from the common I join my labour to them. If you take the objects I have gathered you have also taken my labour... Therefore I have property in the

objects'[31]. Copyright limitations oppose this doctrine by conceding labour alone does not automatically create property rights and must yield to wider social concerns. The idea/expression dichotomy is one such limitation that opposes natural rights by recognising copyright cannot extend to all subject matter, in this case ideas, because this would fundamentally undermine copyright's purpose of protecting the public interest. The dichotomy is a tool explicitly focused on achieving copyright's aim of maximising innovation and social welfare. The dichotomy challenges the Lockean notion creators have a right to the fruit of their labour, 'one may refer solely to utilitarian based concepts in trying to justify...the dichotomy principle.'[32] The dichotomy's underlying rationale is instrumental in nature in that if ideas were to be protected this would negatively impact copyright's social aims, 'monopolising idea through copyright law... would almost certainly result in an under producing society and a less optimal level of collective social welfare.'[33] The dichotomy if fully implemented is the adversary of Locke's labour theory. Labourers do not gain protection for all the fruits of their labour, only the fruits of their labour that do not unduly damage the public interest by withholding basic ideas from public consumption. This is the instrumentalist interpretation of the idea/expression dichotomy.

Advocates of natural rights however oppose this interpretation and argue instead that the idea/expression dichotomy is entirely consistent with natural rights. These academics argue through the natural rights interpretation of the dichotomy, natural

[31] Gordon W, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property', 102 Yale L.J. 1533, 1540-78 (1993).
[32] Westkamp G, Emerging Issues in Intellectual Property: Trade, technology and market freedom, (Edward Elgar Publishing, 2007), Page 95.
[33] Ibid.

rights can support a robust public domain. Lockean academics have tried to reconcile Locke with copyright limitations through the two Lockean provisos, 'the usual story is that Locke imposed two restrictions on acquisition...Locke thought these two restrictions would limit private holding.'[34] The first proviso known as the 'enough and as good' proviso or the sufficiency proviso provides, 'no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.'[35] Natural rights proponents argue that Locke is consistent with a robust public domain because this proviso protect the resources available for public consumption, 'the "enough and as good" proviso is effectively a "no loss to others" precondition for property acquisition. It requires that a labourer must not worsen others' position by her appropriation from the commons'[36]. The second proviso is the no spoilage proviso discussed in chapter seven. The 'enough and as good' proviso qualifies the labour theory by stipulating rights will only be gained if the labourer leaves enough resources and good resources in the common for future development, 'nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left.'[37] The argument by natural rights academics is that the two provisos when taken together act as two limits on Locke's Labour theory and restrict when property rights can be claimed, 'the sufficiency and spoilage provisos serve as two of Locke's checks on the optimality of property regimes.'[38] These academics argue the enough and as good proviso is the part of Locke's theory that allows copyright to be limited and yield to the public interest and

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[34] Waldron J, 'Enough and as Good Left for Others, 29 PHIL. Q. (1979) 319-328, at 319
[35] Locke J, 'Second Treatise on Government- The True Original, Extent, and End of Civil-Government' 1690, Chapter V, at 27.
[36] Craig C, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' (2002) 28 Queen's L.J., at 22
[37] Supra Note 35, , at 33
[38] Hull G, 'Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property', Public Affairs Quarterly (2009): 67-93.

therefore is compatible with a robust public domain, 'scholars argue that even though Locke claims to reconcile a robust common with strong private property rights, his property rights swallow the common. Thus, the object of Lockean theorists... is often concerned with limiting the scope of the Lockean property right'[39].

Several academics have tried to reconcile Locke with a robust public domain. Hughes argues that the proviso prevents Locke's theory from any attack because it enables everyone to exploit resources, 'the enough and as good condition protects Locke's labour justification from any attacks... essentially the enough and as good condition is an equal opportunity provision leading to a desert-based, but non-competitive allocation of goods: each person can get as much as he is willing to work for without creating meritocratic competition against others'[40]. Horowitz argues the effect of the proviso is twofold and that it ensures a robust public domain because it ensures not only is the common not emptied of resources but that it prevents the best resources from being appropriated, 'enough and as good is a two part proviso. The "enough" requires that labourers not overly deplete the common quantitatively one must not take so much that there is too little left for others. The "as good" part is a qualitative measure that prohibits labourers from justly appropriating all the best resources, leaving the common with lesser materials'[41]. Zemer has also adapted the proviso to copyright arguing a robust public domain is supported in several ways. Firstly he contends the proviso allows the public to access resources in the common, 'it respects the right of every fellow commoner to appropriate from the common. Practically, it does not require

[39] Damstedt B, 'Limiting Locke: A natural law justification for the fair use doctrine', Yale Law Journal (2003): 1179-1221, at 1181.
[40] Hughes J, 'The Philosophy of Intellectual Property' 77 Geo. L.J. 287, at 297
[41] Horowtiz S, 'Rethinking Lockean Copyright and Fair Use' Deakin L. Rev. 10 (2005): 209, at 216

the consent of all commoners prior to appropriation'[42]. Secondly he argues that the proviso supports a strong public domain because copyright protection will not apply to works that do not leave enough and as good left for the public to draw upon and this will provide new creators with adequate resources to make their own creations, 'it ensures that a "grant of property does no harm to other persons' equal abilities to create or to draw upon the pre-existing cultural matrix and scientific heritage" as it restricts the ownership of intellectual creations and widens the doorway to new creators'[43]. The accord amongst Lockean academics is that the proviso will act as an effective limit on copyright protection, 'goods which are illegitimately enclosed and which fail to leave "enough and as good" are lost to the common stock'[44] and 'sufficiency names a pre-production condition: I have an obligation not to take out too much, such that my use would impede the use of others, either now or in the future'[45]. In this way a robust public domain is achieved under Locke. Finally Damstedt who applies the proviso to fair use argues the main effect of the proviso is that it prevents too many materials being taken away from the public domain, 'the natural law principle that has been most commonly considered by scholars is the sufficiency proviso, which requires that the labourer not take too many materials out of the common'[46]. Damstedt argues that if the proviso is violated that copyright protection will not be acquired, 'the ability to independently produce a good is restricted when the sufficiency proviso is violated... in order to claim a property right in the state of nature, therefore, individuals must not violate the sufficiency proviso.'[47]

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[42] Zemer L, 'The Making of a New Copyright Lockean', Harv. JL & Pub. Pol'y, 29, 891 (2005), at 926
[43] Ibid.
[44] Supra Note 38.
[45] Ibid.
[46] Supra Note 39, at 1181
[47] Ibid, at 1186.

This reformulation of the proviso and the argument that natural rights can limit copyright is highly questionable and academics have argued that the traditional interpretation of natural rights as opposing strong copyright limits is correct. The first argument is that Locke has been misinterpreted and natural rights academics have extended the proviso beyond its original meaning 'Locke's "enough and as good" proviso limits appropriation by requiring that the common not be overly depleted. Locke does not explicitly state this as a proviso'[48] and 'The 'enough and as good' clause is not intended by Locke as a restriction on acquisition.'[49] Waldron concludes the proviso should not be classified as a proviso at all, 'the 'enough and as good' clause cannot be construed as a necessary condition, or as a restriction, on appropriation without concluding that it is downright inconsistent with what Locke claimed.'[50] The main problem with the argument made by natural rights academics is applying the proviso to copyright, 'the Lockean proviso that requires leaving "enough, and as good" for others faces problems in copyright law theory generally'.[51] This problem arises because Locke theory was not written with intangible intellectual property in mind, 'Lockean limits appear to be the most difficult aspect of Locke's property theory to adapt to intellectual products. This is because neither of Locke's provisos can limit intellectual property rights.'[52] The proviso has difficult applying to copyright because as discussed in chapter four, intellectual property is non rivalrous. This means that they can be infinitely reproduced and used. The common will therefore never be depleted and there will always be enough and as good left for others to use, '[the proviso]

[48] Supra Note 41, at 215.
[49] Supra Note 34, at 324.
[50] Ibid, at 326.
[51] Simon D, 'In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations, 16 Mich. Telecomm. & Tech. L. Rev. 355 (2010), at 386.
[52] Supra Note 41, at 225.

presupposes that the resource can be appropriated in such a way as to reduce its supply and cause its depletion.'[53] Simon supports this argument concluding the Lockean proviso can never be violated, 'a man who can eat only one boar may not kill all the boars in the forest, keeping them to rot. To do so would violate this first proviso by not leaving enough boars for others to eat. Because copyrighted expressions are nonrivalrous since use of copyrighted expression by one person does not inhibit simultaneous use of the same copyrighted expression by another there will always be "enough and as good" for others'[54]. The result is that natural rights academics have extended the proviso so much that their arguments no longer truly represent Locke's work or natural rights, 'Lockean theorists have... creatively adapted Locke's provisos to intellectual property... they admit that Locke's provisos do not naturally conform to the complexities of intellectual property, but instead of giving up the provisos, they change the meanings thereof. These creative adaptations are strained. They are so altered that they hardly resemble Locke's original provisos'.[55] The proviso is fundamentally flawed in relation to copyright, 'taken literally, the proviso is unworkable.'[56]

Gordon who produced one of the more detailed examinations of Locke contended the 'enough and as good' proviso justifies copyright exceptions under natural rights because where there are not enough resources left in the commons through right holders labour this will be unacceptable, 'creators should have property in their original works, only provided that such grant of property does no harm to other persons' equal

[53] Himma K.E, 'The Justification of Intellectual Property: Contemporary Philosophical Disputes', Journal of the American Society for Information Science and Technology, 59(7), 1143-1161.
[54] Supra Note 51, at 383
[55] Supra Note 41, at 226.
[56] Supra Note 42, at 931.

abilities to create or to draw upon.'[57] Gordon maintains that the proviso will be violated where a person's ability to access resources is harmed, 'Locke argues that one person's joining of her labour with resources... should not give that individual a right to exclude others from the resulting product, unless the exclusion will leave these other people with as much opportunity to use the common as they otherwise would have had. A person who wants access is entitled to complain only if he is worse off (in regard to the common) when he is denied access.'[58] The flaw in Gordon's argument is that a robust public domain cannot be created through Locke because the type of harm required for the proviso to operate is narrow and entirely inadequate, 'the problem with Gordon's analysis is that her conception of harm does not produce significant limits even granting her redefinition of the proviso'.[59] Gordon herself acknowledges harm to social aims or the public interest are insufficient to limit property rights, 'if the proviso is satisfied, the theory allows property to form regardless of whether a nonproperty status would better serve social goals'[60] and 'the proviso treats only one kind of harm as relevant for property-formation purposes: it protects the property less from depletion of the common.... harms to interests outside the common would not invalidate property under the proviso.'[61] This therefore means the main problem with the proviso is that it only accepts limitations if there is nothing left in the common to build upon, this is an extremely narrow interpretation and negative impacts on copyright's social aims are inadequate. Gordon states that the proviso is incapable of preventing copyright protection just because it serves the social good, 'the proviso does not allow property to

[57] Supra Note 31, at 1563.
[58] Ibid.
[59] Supra Note 41, at 228.
[60] Supra Note 31, at 1564.
[61] Ibid. At 1564

form merely because it is "efficient" or otherwise serves the social good'.[62] Whilst natural rights may limit copyright under the proviso in theory, in practice this will rarely happen, 'in order to violate the proviso, a property right must somehow hinder access to the common... but the creation and appropriation of a new intellectual expression does not affect access to the pre-existing common in any way.'[63] A robust public domain cannot be achieved under Locke's proviso because natural rights will not protect the public interest in most circumstances. It is not sufficient to only limit copyright when the proviso is violated, copyright must be limited in wider circumstances particularly where the public interest demands, 'Locke's labour or authors' right theories cannot adequately accommodate all of the social and cultural concerns scholars identify in the discussion on the limits of authorship and copyright.'[64] The proviso unlike instrumentalism will not intervene with the scope of copyright protection because the public interest is negatively affected, 'the proviso only offers limited protection for members of the public. Persons whose rights in the common are not adversely affected by the creator's property right would have no ground of complaint, and the creator could assert property rights against them unimpeded'.[65]A robust public domain can only be created where limits on copyright are permitted where they benefit social aims not only where the common is depleted of resources, 'the state of nature does not provide reasonable limits that apply to copyright. This is a problem, since limits are intuitively good for society'[66]. The instrumental theoretical basis of using law as a tool to achieve wider social goals plays no role under the proviso. As we discussed in relation to human rights in chapter four, legitimate scenarios arise where copyright's social aims justify

[62] Ibid.
[63] Supra Note 41, at 228
[64] Supra Note 42, at 935.
[65] Supra Note 31, at 1564
[66] Supra Note 41, at 229.

the restriction of copyright even though there is still 'enough and as good' left in the common for development. For example a person may need to use copyrighted material in order to exercise their right to freedom of expression or under the public interest defence may need to use copyrighted material for a variety of reasons such as political discussion or exposing wrong doing. The proviso would not permit these limitations because as Locke stated the common has not been depleted, 'for he that leaves as much as another can make use of, does as good as take nothing at all.'[67]

Lockean academics have applied to proviso to the idea expression dichotomy and argue natural rights fully support this copyright limit. Gordon contends protecting ideas violates the proviso and can't be copyrighted under the proviso, 'the proviso prohibits a creator from owning abstract ideas because such ownership harms later creators.'[68] Whilst protecting ideas undoubtedly does harm later creators, it is highly questionable whether the proviso would prevent ideas from being copyrighted. This again arises because ideas can never run out and the proviso cannot be violated, 'because there are conceivably an infinite number of ideas "out there," there will always be enough ideas available for others to possess and use. No one can claim harm as a result of another's intellectual property appropriation because everyone is equally free to write, compose, draw, develop, and invent'[69]. In this context this means the commons will never be completely emptied because unlike land ideas do not run out, 'the nature of IP law is such that most claimants can leave enough and as good for others to appropriate what

[67] Supra Note 35, at 33.
[68] Supra Note 31, at 1586.
[69] Supra Note 36, at 23.

they need'[70]. Locke's proviso particularly the application by Gordon is inapplicable to copyright because unlike land copyright is not a limited resource it will not deplete, 'unlike tangible objects, there is no scarcity of ideas and ways to express them.'[71] Zemer whilst supporting Gordon's position does acknowledge this criticism, 'many believe that with respect to ideas the proviso is satisfied and leaves no ground for complaint... ideas are an infinite resources, the same quantity (enough) and quality (good) is always left for others.'[72] Whilst Lockean academics have contended the proviso fully supports the idea/expression dichotomy there is a strong argument that the proviso opposes the dichotomy and could actually support copyright most ideas. This arises because ideas add to the common rather than deplete it, 'the Lockean "sufficiency" proviso can be satisfied fairly easily...on the theory that the deployment of most ideas enables other people to "reach" an even larger set of ideas and thus enlarges rather than subtracts from the commons'[73]. Under instrumentalism because ideas add to the common and represent the basic building blocks of creation they are not protected because of their social value. Under natural rights this value means they cannot deplete the common and therefore the proviso will not prevent ideas from copyright protection, 'one person's use of some ideas does not deplete the common; in fact, the common actually expands with use. Idea X makes possible ideas Y and Z, which could not have come into being without someone first having used X, thereby increasing the accessible common.'[74]

Despite natural right academics trying to use the proviso to incorporate the dichotomy under Locke, the consensus is that the dichotomy directly opposes natural

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[70] Merges R, Justifying Intellectual Property (Harvard University Press, 2011), at 58.
[71] Netanel N, Why has Copyright Expanded? Analysis and Critique, in Macmillan F, New Directions in Copyright Law Volume 6, (Edward Elgar Publishing, 2007), at 27.
[72] Supra Note 42, , at 932.
[73] Fisher W, 'Theories of Intellectual Property', in Munzer S, New Essays in the Legal and Political Theory of Property, (Cambridge University Press, 2001), at 187.
[74] Supra Note 36, at 24

rights theory, 'the idea/expression dichotomy, expiration of protection and copyright limitations... are deviations from the theoretical example given by Locke.'[75] The flaw in applying natural rights to the idea/expression dichotomy is that it inherently embodies the basic instrumental and utilitarian tenet of maximising dissemination of knowledge to society. Expression is copyrightable to encourage right holders to create work but ideas are not so basic information is not removed from the public domain, 'according to an incentive based view of copyright... it is wise not to extend a monopoly to ideas, because ideas are the starting point of any creative process'[76] and 'in such a theoretical framework, the rationale for the dichotomy is to prevent the creation of a cultural embargo on creative sources.'[77] The idea/expression dichotomy directly opposes the basic natural rights proposition that labour creates a property right. The dichotomy asserts a creator's labour alone will not result in copyright protection and prevents the basic ideas underlying the labour from protection, 'all that is copyrightable originates in the author's labour, but not everything originating in the author's labour is subject to copyright protection.'[78] In conclusion the argument that natural rights theory is compatible with a robust public domain is fundamentally flawed with the sufficiency proviso inapplicable to not only ideas but also copyright generally.

6.4-Unfulfilled potential:

Returning to the function of the idea/expression dichotomy, its role has been heavily debated with criticism directed at the uncertain nature of the doctrine, 'it should be

75 Senftlebten M, Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law, (Kluwer Law International, 2004), at 37.
[76] Supra Note 7, at 39.
[77] Ibid, at 40.
[78]Supra Note 1, at 18.

noted that the aphorism there is no copyright in an idea is likely to lead to confusion of thought'[79] and the fact the dichotomy has no statutory basis, 'the act does not expressly deny protection to ideas... why should we further curtail copyright by imposing additional criteria not in the Act?'[80]. Laddie in a frequently cited critique refers to the dichotomy as the 'idea-expression fallacy'[81] arguing the 'maxim is obscure or in its broadest sense suspect'[82]. He submits the dichotomy should not be followed, 'the task of the courts is not to apply an 'ideas/expression dichotomy' doctrine but the provisions of the act, which mention no such rule. What the act does do is stipulate what is protected, is an original work'[83]. His argument contends the dichotomy is redundant because ideas are not original and for a work to qualify for protection it must be fixed e.g. expressed whereas ideas reside in a man's brain and remain unexpressed and not fixed. The flaw in this argument however is the low threshold for originality does not provide an effective barrier to copyright protection with trivial works containing basic ideas qualify for protection. Despite this criticism the divide between ideas and expression has been recognised and applied with, h 'the House of Lords confirming the application of the rule in *LB Plastics*'[84].

LB Plastics concerned the alleged copying of the claimant's copyrighted furniture drawings with the defence that only the ideas were copied. The Lords recognised ideas could be appropriated without any resulting infringement, 'there can be no copyright in a mere idea, so if all that the respondents had done was to take from the appellants the

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[79] Ibcos Computers Ltd. v. Barclays Mercantile Highland Finance Ltd. [1994] F.S.R. 275, at 290.
[80] Supra Note 21, at 52.
[81] Laddie, P. Prescott, M. Vitoria et al, The Modern Law of Copyright and Designs Third Editions, (Butterworths, 2000), at 3.74.
[82] Ibid, at 2.73.
[83] Ibid, at 3.80
[84] Supra Note 5, at 258.

idea... the appellants could not complain'[85]. In the case however it was held that 'the respondents' 'borrowing' was at such a level of detail and specificity that it constituted much, much more than the general idea'[86]. The court recognised although copyright did not protect ideas, in this case a substantial part of the primary work had been appropriated. Since this time several other cases have recognised the divide between ideas and expression[87]. In *ENTEC (Pollution Control)*[88] it was stated 'copyright protects not ideas, but the form in which they are expressed'[89], in *George Ward (Moxley) Ltd*[90] it was held no copyright infringement arose because 'there was nothing to copy other than the idea'[91] and in *Jones v London Borough of Tower Hamlets*[92] it was held in relation to architectural designs that, 'protection is given to an artistic work such as a drawing or a plan but not to the ideas or concepts embodied in it'[93]. It was commented in the *Catnic Components*[94] case that 'what is protected is the artistic work... not any ideas or information which it may be designed to convey… What is protected is the skill and labour devoted to making the artistic work itself, not the skill and labour devoted to developing some idea'[95] *Kenrick v Lawrence*[96] concerned a drawing showing illiterate people how to vote in elections. When the defendants used a similar drawing it was held, 'it is clear that there is no copyright in the subject...a square can only be drawn as a square, a cross can only be drawn as a cross, and for such purposes as the plaintiffs'

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[85] Ibid, at 149.
[86] Rothnie W, 'Idea and Expression in a Digital World', 9 J.L. & Inf. Sci. 59 1998, at 63.
[87] The divide in principle has also been recognised in several other cases- Donoghue v Allied Newspapers Ltd [1938] Ch. 106, Total Information Processing Systems v. Daman [1992] F.S.R. 171 and John Richardson Computers Ltd. v. Flanders [1993] F.S.R. 497.
[88] ENTEC (Pollution Control) Ltd. v Abacus Mouldings [1992] F.S.R. 332
[89] Ibid, at 348.
[90] George Ward (Moxley) Ltd. v Richard Sankey Ltd. and Another [1988] F.S.R. 66.
[91] Ibid, at 68.
[92] Jones v London Borough of Tower Hamlets [2001] R.P.C. 23
[93] Ibid, at 416
[94] Catnic Components Ltd v. Hill & Smith Ltd [1982] R.P.C. 343
[95] Ibid, at 373
[96] Kenrick v. Lawrence (1890) 25 Q.B.D. 99.

drawing was intended to fulfil there are scarcely more ways than one of drawing a pencil or the hand that holds it'[97]. These cases all recognise labour on its own will not be enough to confer copyright protection and acknowledge copyright has broader social interests it must work towards, 'demonstrates considerable effort in detaching IP from natural law and the notion of labour... which basically expresses... the "sweat of the brow" is not translated to IP.'[98]

The most detailed discussion of the idea/expression dichotomy was provided in the *Designers Guild* case. The case concerned a fabric design and in the Court of Appeal[99] Morritt LJ stated 'copyright subsists, not in ideas, but in the form in which the ideas are expressed.'[100] Lord Millet in the House of Lords[101] asserted[102], 'similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas'[103] meaning copying of ideas will not constitute infringement. Lord Hoffman however discussed two specific circumstances where ideas would not be protected. The first situation arises with works that discuss 'ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work'[104]. Lord Hoffman referred to the example of a literary work describing an invention[105]. The second example concerned ideas where 'although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial

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[97] Ibid, at 104
[98] Gathegi J, 'Intellectual property, traditional resources rights and natural law: A clash of cultures', genesis 1541 (1993): 1543, at 1543.
[99] Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2000] F.S.R. 121
[100] Ibid, at 128.
[101] Designers Guild v. Russell Williams (Textiles) Ltd [2000] 1 W.L.R. 2416
[102] Discussion based on Endicot T and Spence M, 'Vagueness in the Scope of Copyright', (2005) 121 Law Quarterly Review 657-680.
[103] Supra Note 101, at 2425.
[104] Ibid, 2423
[105] Lord Hoffman referred to the case of Kleeneze Ltd. v. D.R.G. (U.K.) Ltd. [1984] F.S.R. 399 as an example.

part of the work.'[106] What Lord Hoffman has provided are narrow circumstances where ideas can be freely used however they are wholly inadequate, 'the exclusion is a narrow one, and does not encompass everything that might be referred to... as an idea'[107]. The main problem with the judgement is that the dichotomy is amalgamated with substantiality and originality. Under this approach the dichotomy cannot act as an effective internal control and brings no balance to the copyright regime, 'merging the idea/expression dichotomy and the test for substantial infringement... harbours serious drawbacks... Lord Hoffmann's elision... in *Designers Guild* must be resisted because it diminishes the importance of the tools required for curbing the expansion of copyright monopolies'[108].

Whilst the *Designers Guild* decision recognised the fundamental principle an idea cannot be copyrighted, it is given little consideration and means 'collapsing the rule on the non-protection of ideas into a rule of originality'[109]. The idea/expression dichotomy is being used as nothing more than a tool to determine if someone's skill or labour has been appropriated. The approach of the court has been described as being 'reluctant to whole heartedly embrace the idea-expression dichotomy'[110] and 'producing an unduly limited account of the exception'[111]. The dichotomy can be put to better use, 'the exclusion of ideas from the scope of protection is an important judicial technique used to reconcile the divergent interests of copyright owners with those of users, creators and

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[106] Ibid, 2423. Lord Hoffman referred to the Kenrick v Lawrence case discussed above.
[107] Bently L and Sherman B, The Making of Modern Intellectual Property Law (Cambridge University Press, 1999), at 183.
[108] Masiyakurima P, 'The futility of the idea/expression dichotomy in UK copyright law' IIC 2007, 38(5), 548-572, at 555.
[109] Supra Note 107.
[110] Dutfield G and Suthersan U, Global intellectual property law (Edward Elgar Publishing, 2008), at 83.
[111] Supra Note 107.

the public more generally'[112]. Such reasoning is accepted in America and creating a balanced copyright regime will be much better served by separating the dichotomy from originality and substantiality, 'The refusal to protect ideas is an independent public policy decision to acknowledge and preserve the intellectual commons and to restrict copyright'[113]. In the *Designers Guild* case the court did not go as far as to consider the dichotomy as an independent public policy issue however it would have been advantageous for 'the Law Lords to have laid down principles for the application of the dichotomy that paid due regard to the purposes for which copyright protection is afforded... the idea expression dichotomy ought to be grounded in the purposes of the copyright regime'[114]. The problem with the current application of the dichotomy is that it is entirely possible for ideas not falling into Hoffman's narrow categories to gain copyright protection and to be withheld from the public domain.

Copyright infringement has been found in several cases where only an idea has been appropriated. In the *Ibcos* case Jacob J stated 'I do not find the route of going via United States case law particularly helpful... copyright cannot prevent the copying of a mere general idea'[115] however continued to say copyright 'can protect the copying of a detailed idea. It is a question of degree where a good guide is the notion of over borrowing of skill, labour and judgment'[116]. This raises the possibility that detailed ideas could be copyrighted which would result in the total disregard of instrumentalism. Dewey argued law is a means used to achieve external goals and that success is

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[112] Ibid.
[113]Rahmatian A , Copyright and Creativity: The Making of Property Rights in Creative Works, (Edward Elgar Publishing, 2011), at 129.
[114] Supra Note 102, at 14.
[115] Supra Note 79, at 302.
[116] Ibid.

determined by the fulfilment of these goals. The goals of copyright law since *Donaldso*n extend to social purposes, in this context, the avoidance of monopolies over basic ideas and enabling the public to build upon knowledge. As with human rights we once again witness copyright being treated as a natural right able to override competing social concerns, 'the idea/expression dichotomy... brings into tension the author's private interests in maximum protection and the public interest in maximum creation... copyright law requires us to draw lines between the public and private domain. A natural law approach draws lines that tend to favour the latter'[117]

Case law illustrates copyright being treated as a natural right because creators private interests have been placed above public interest even where this damages copyright's social aim. In *Temple Island Collections Limited v New England Teas*[118] the disadvantages of not fully enforcing the idea/expression dichotomy were demonstrated. In the case a black and white picture was taken of Parliament with a red London bus in front of it. Subsequently New English Teas took a similar image however 'the actual composition of the defendant's photograph was in no way a faithful or close reproduction of the composition of the claimant's photograph'[119]. Key differences between the two works included using a different bus and using a different perspective to incorporate the River Thames. It was held 'the defendants' work does reproduce a substantial part of the claimant's artistic work'[120]. The issue however is Temple Island

[117] Craig C, Copyright, Communication and Culture (Edward Elgar Publishing, 2011), at 88.
[118] Temple Island Collections Ltd v New English Teas Ltd [2012] EWPCC 1. The idea expression dichotomy has also recently been discussed by the courts in Baigent & Leigh v Random House Group [2007] EWCA Civ 247 and Nova Productions Ltd v Mazooma Games Ltd [2007] EWCA Civ 219. Images involved in the case can be found in Appendix I.
[119] Rendle A and Shan N, 'Copyright protection for photographs - UK "red bus" case', W.I.P.R. 2012, 26(3), 49-50, at 50.
[120] Supra Note 118, at 199.

have a defacto monopoly over photographs of this type. There are only a limited number of ways the idea of a bus in front of Parliament can be expressed. Infringement was found even though the judge recognised the photos incorporated common London scenes, 'the idea of putting such iconic images together is a common one'[121] and employed conventional photographic techniques, 'the technique of highlighting an iconic object like a bus against a black and white image is not unique'[122]. The effect of the judgement is to totally undermine the idea/expression dichotomy and the public interest in copyright law, 'although the judge explicitly stated that the general idea of the claimant's photograph could not be protected, his finding of infringement could be said to come close, in practice, to protecting that idea'[123]. Although the two photographs were broadly similar, I would strongly argue only an idea has been appropriated. If independently creating the second work, changing the angle, bus and what features were incorporated still resulted in infringement, it is extremely difficult to envisage the extent of changes required to create a non-infringing similar artistic concept. The result of the decision is that the dichotomy has been made partially redundant and the divide between ideas and expression eroded 'the point at which the expression of an artist's inspiration becomes protected seems to move closer to protecting the inspiration itself'[124].

I propose the idea/expression dichotomy is given a statutory footing in the *CDPA* with a provision influenced by the formulation of the dichotomy in *TRIPS, the WCT*, the *US Copyright Act* and the *Hollinrake* case. This reform is envisaged as an amendment

[121] Ibid, at 208.
[122] Ibid.
[123] Supra Note 119
[124] Ibid.

to the current copyright legal framework and should be applied by the courts as an important part of copyright subsistence. Just as the courts apply originality to subsistence and ask whether a work is original or not, the application of this reformulation of the idea/expression dichotomy operates alongside originality to determine entry to copyright protection. The provision would provide 'copyright does not subsist in ideas, schemes, systems, methods, processes, concepts, principles or discoveries. Copyright is confined to their expression; and if their expression is not copied, the copyright is not infringed'. The aim of the provision is not to provide a specific definition of an idea or detail a legal test to differentiate ideas from expression because as discussed below this is a futile task. As Judge Hand famously stated, 'nobody has ever been able to fix that boundary, and nobody ever can'[125]. The dichotomy should be a fundamental requirement in addition to fixation and the reforms proposed in relation to originality. Copyright will only subsist in expression not in the underlying ideas of a work, the difference with current law being the application of the dichotomy. This means basic notions or concepts such as those embodied in the photograph in the *Temple Island* case will not be given copyright protection and therefore cannot be infringed. In effect 'the idea/expression dichotomy [should] work as a first exclusionary principle'[126] and should not be limited to only helping determine the issue of substantiality.

[125] Nichols v. Universal Pictures Corp., 45 F.2d 119, 7 U.S.P.Q, at 121.
[126] Benabou VL and Dusollier S, Draw me a public domain, in Torremans P, Copyright Law: handbook of contemporary research (Edward Elgar Publishing, 2007), at 167.

6.5-A balancing mechanism:

The idea/expression dichotomy although flawed in some respects, could be a far more effective tool in securing a balanced copyright regime. The suggested reform of placing the dichotomy on a statutory footing has met opposition from some quarters for several reasons. Firstly there is opposition to using the dichotomy to determine subsistence rather than limiting the rule to infringement 'the simple truth is that the idea/expression dichotomy should not be an issue of subsistence of copyright'[127] whilst Colston also opposes the role of the dichotomy in copyright subsistence, 'Lord Hoffman's interpretation should be welcomed if it restricts the idea/expression dichotomy to a rule of evidence... rather than a question of whether copyright subsists at all'[128]. The main criticism of my reforms is that the idea/expression dichotomy is not appropriate to decide copyright subsistence and should be limited to its current role of determining copyright infringement. The second objection to my reform is that because the distinction between an idea and expression is difficult to define that a statutory provision will not be able to define the terms and be inherently legally uncertain, 'if the idea-expression dichotomy is notoriously elusive (which it indeed is) a reasonably precise statutory definition is by nature impossible.'[129] The final possible objection to codifying the dichotomy into statute is that even if a statutory provision could be drafted that this will diminish the flexibility in the current application of the dichotomy in the UK, 'in the absence of statutory embodiment of the idea-expression dichotomy, the UK copyright law... [uses] the flexibility that may be found in the qualitative aspect of substantiality in the infringement criterion.'[130] These objections however can be

[127] Supra note 21, at 51.
[128] Supra Note 12, at 259.
[129] Supra Note 113, at 131.
[130] Ang S, The Moral Dimensions of Intellectual Property Rights, (Edward Elgar Publishing, 2013), at 142

overcome. Firstly in relation to limiting the dichotomy to infringement, the reason for codifying the dichotomy is that it is able simultaneously to protect the interests of rights holders and the public, the dichotomy 'works by leaving ideas, not already expressed in an original form, in a fallow land where they are only waiting for human authorship to save them from an un-property destiny.'[131] The dichotomy if used in subsistence would enable the most basic ideas to be used by all without restriction and distinguish copyright from natural rights by ensuring social aims can limit copyright, 'the idea/expression dichotomy is the paradigmatic example of the basic and fundamental proposition that the law of copyright does not protect the author's labour per se'.[132] The natural rights approach in its purest form argues creators own the ideas resulting from their labour, 'thoughts, concepts and ideas... are the utmost manifestation of the human personality and individuality, they belong by nature to the author'[133]. These reforms aim to counter this view and preventing copyright subsisting in ideas outright, rather than just determining infringement, would allow ideas to remain free. This fulfils the wider purposes of the copyright regime of 'assuring authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.'[134]

By using the dichotomy for subsistence rather than just in infringement, an effective barrier to copyright is being created and trivial works are barred from protection. The dichotomy would work in combination with originality to determine

[131] Supra Note 126, at 167.
[132] Supra Note 1, at 18.
[133] Borghi M, 'Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment', in Macmillan F, New Directions in copyright law volume 5 (Edward Elgar Publishing, 2006).
[134] Feist Publications Inc v Rural Telephone Service Co Inc 499 U.S. 340 (1991), at 19.

copyrightability. Finally the objections that a statutory footing is impossible and would deprive the dichotomy of its flexibility can also be surmounted. The dichotomy has a statutory basis in several other jurisdictions where a suitable provision has been drafted and has been effectively applied as a subsistence requirement, 'a consequence of the principle of non protection of ideas in copyright of a work being statutorily enshrined, as in section 102(b) of the 1976 Copyright Act of the US, is that it can be directly applied as a substantive rule on its own.'[135] The dichotomy has not been limited solely to infringement or substantial part and has already been used effectively to decide what should be protected by copyright laws and which works are ideas and therefore should be available to the public domain for future development. As regards the objection that a statutory basis of the dichotomy would remove flexibility, a statutory provision would allow flexibility to be maintained with the courts still able to assess litigation on a case by case basis but the dichotomy has been given a clear and prominent role in subsistence with a legitimate legal basis for courts to consistently apply the dichotomy, 'it is sometimes posited that the absence of statutory provisions entrenching the idea/expression dichotomy in successive UK copyright statutes casts serious doubts on its legitimacy. This technical position stems from a literal interpretation of the Berne Convention, which does not explicitly exclude ideas from copyright protection'[136]

Using the dichotomy to determine subsistence challenges a natural rights conception of copyright law and ensures the basic principles from the *Statute of Anne* and *Donaldson* such as encouraging learning and disseminating knowledge are achieved. Firstly copyright should not subsist in ideas because they are predominantly

[135] Supra Note 130.
[136] Supra Note 108, at 549.

the domain of patent law. Under patent law ideas are protected for a much shorter duration and subject to more rigorous standards such the requirements of invention[137], novelty,[138] inventive step[139] and industrial application[140]. The dichotomy and the line drawn between ideas and the expression of those ideas are fundamental because without such a division, creativity would be completely stifled and the copyright system would monopolise the most basic ideas. In effect without rigorously applying the dichotomy copyright would become a natural right because labour would be protected even where this only included basic ideas. An anonymous pamphlet published in 1762[141] recognised the benefits of not protecting ideas, 'he who obtaineth my copy may appropriate my stock of ideas, and by opposing my sentiments, may give birth to a new doctrine; or he may coincide with my notions, and by employing different illustrations, may place my doctrine in another point of view: and in either case he aquireth an exclusive title to his copy, without invading my property: for he may be said to build on my foundation.'[142] As this pamphlet exemplifies one idea can be expressed in many different ways to support diverse opinions, to analyse, correct or even expand or provide new interpretations of a basic concept, 'an idea may have more than one expression. One may copy the underlying idea, but express it in a different way. If the same idea can be expressed in a number of different ways, a number of different copyrights may exist and no infringement will result.'[143] Copyrighting ideas would severely restrict the public domain and also freedom of expression where the most basic notions would be

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[137] Sections 1(2) and 1(3) Patents Act 1977 c.37
[138] Section 2 Patents Act 1977
[139] Section 3 Patents Act 1977
[140] Section 4 Patents Act 1977
[141] Anonymous, 'A Vindication of the Exclusive Rights of Authors to their own works: A subject now under consideration before the 12 judges of England' (London: Griffiths, 1762).
[142] Ibid.
[143] Sankar and Chary, 'The Idea- Expression Dichotomy: Indianizing an international debate', (2008) Journal of International Commercial Law and Technology", 3(2), pp. 129-138 at 129.

unavailable to public discourse, 'as the primary demarcation between private rights and the public domain, the idea/expression dichotomy also serves to mediate the inherent tension between copyright and free speech.'[144]

Innovation is the central tenet throughout copyright law and the basic ideology of the system is to encourage rights holders to create socially useful works. The idea/expression dichotomy could potentially play a fundamental role in achieving this objective, 'copyright protection is granted for the very reason that it may persuade authors to make their ideas... freely accessible to the public so that they may be used for the intellectual advancement of mankind'[145]. If ideas were to be protected this precept would be weakened because the public domain would become overly limited with basic ideas not being available for use, 'the idea/expression dichotomy helps copyright strike a productive balance between providing incentives to create and protecting the public domain from being stripped of the raw materials'[146]. From a rights holder perspective protecting ideas would also be disadvantageous to their interests. As discussed in relation to originality, no work is truly original in that the vast majority of works borrow from what has come before. The idea/expression dichotomy by guarding entrance to copyright protection, 'makes the basic building blocks of creation available to authors who have encountered them in another work. It protects the most individualized contributions of the author rather than what the author draws from society'[147].. An absence of the idea/expression dichotomy would have disastrous effects on the public

[144] McIntyre S, 'Trying to Agree on Three Articles of Law: The Idea/Expression Dichotomy in Chinese Copyright Law', 1 CYBARIS INTELL. PROP. L. REV. 62 (2010) at 67.
[145] Nimmer M, 'The Law of Ideas', 27 S. CAL. L. REV. 119 (1954), at 120.
[146] Kurtz L, 'Speaking to the Ghost: Idea and Expression in Copyright', 47 U. Miami L. Rev. 1221 1992-1993, at 1223
[147] Ibid, at 1261.

domain, which would consist of no valuable material at all and would simply consist of the most mundane notions and creativity would be greatly impeded.

Derivative works were criticised in relation to originality because some are so similar to the primary work they add little to society's knowledge base. Some derivative works however are only very loosely influenced by previous works and as noted in *Jones v London Borough of Tower Hamlets*, 'if the idea itself were protected at law that would prevent any subsequent person using that idea producing a variant. That would give the originator of the idea a very wide monopoly and not one contemplated by law'[148]. Allowing copyright to subsist in ideas would drastically reduce the material available to prospective rights holders and would severely discourage creativity. The works of Shakespeare for example were heavily based on existing works, if these existing works were subject to current copyright protection they would have still been within the protection period when Shakespeare wrote his plays.[149] Shakespeare used these existing sources not only as a loose basis for his own work but in some instances took the main plot and even key characters from existing works. Protecting ideas through copyright law would make the most abstract and basic notions unavailable. Without the idea/expression dichotomy being rigorously applied one author would be able to control a very broad and undeveloped idea with all other potential creators being excluded from using the idea even if his work considerably varies from the original. This would completely undermine the purpose copyright was meant to achieve because

[148] Supra Note 92, at 419.
[149] Romeo and Juliet is loosely based on the medieval tale Tristan and Isolde, King Lear written between 1603-1606 was influenced by The Mirror for Magistrates published in 1574, Othello written in 1603 was based on Hecatommithi by Cinthio published in 1565 and the comedy As You Like it written in 1599-1600 was based on Rosalynde: Euphues Golden Legacie by Thomas Lodge published only ten years before in 1590.

knowledge would be withheld from the public, innovation discouraged and copyright's social function completely undermined.

The potential advantages of using the idea/expression dichotomy to prevent copyright subsistence in ideas can be exemplified by an American case, *Williams v Crichton*[150]. Williams wrote a collection of stories called The Dinosaur World. The works concerned stories about children visiting a dinosaur zoo and having to deal with escaped dinosaurs. Subsequently Michael Crichton published the famous Jurassic Park novel involving a similar storyline with analogous characters and storyline. It was held despite the similar settings, characters and scenes, Crichton had only appropriated William's ideas and not his expression[151]. Therefore no infringement arose and the similar features between the works were held to be ideas and could not be copyrighted. *Williams v Crichton* illustrates the idea/expression dichotomy benefits rights holders and the public. The dichotomy helps achieve a balance by preventing overly excessive copyright claims that include basic ideas to the detriment of all other parties. If copyright protection were to encompass ideas this would greatly inhibit future creativity, 'protection is denied to ideas because there are few original ideas, or the value of most ideas is low, so that granting protection would provide little in the way of incentives to create additional works'[152]. When contrasted with the *Temple Island* case the possible advantages of using the dichotomy independently from originality are evident. In both the *Temple Island* and *Williams* cases the possibly infringing works contained several similarities to the primary work, predominantly using a common premise however also contained key differences. In *Williams* the court held no copyright subsisted, 'because these were

[150] Williams v. Crichton, 84 F.3d 581, 587-89 (2d Cir. 1996)
[151] Ibid, at 587.
[152] Supra Note 10, at 19.

"ideas''... Williams could not claim protection for them'[153] whereas in *Temple Island* infringement was found.

Extending copyright protection to ideas would effectively require absolute novelty for works to be protected resulting in monopolies over basic information, an almost non-existent public domain and rights holders who are limited in what they can discuss. Whilst our jurisdiction does not protect ideas, the application of the dichotomy is extremely limited resulting in the position that detailed ideas gain copyright protection and rights holders gain control over basic ideas such as in the *Temple Island* case. The use of the dichotomy in our jurisdiction is another example of the judiciary treating copyright as analogous to a natural right rather than an instrumental one. There is a general reluctance to enforce the dichotomy to prevent copyright subsistence and it is not being used to give effect to copyright's social purposes. This is exemplified by the *Temple Island* case, the copyright in the original image was treated as a natural right where even the basic idea underlying the work had to be protected despite the valid reasons for permitting the defendant's image. By incorporating the dichotomy into the *CDPA* and utilising the doctrines full potential, balance can be achieved in copyright law by ensuring the visibility of copyright's wider social purposes in legislation. Using the dichotomy as a barrier to copyright protection would 'mitigate the rigors of what might otherwise be an overreaching monopolistic control by the copyright owner, thus promoting society's interest in enriching the public domain'[154]. Therefore the idea/expression dichotomy could potentially be one of the most important and effective

[153] Marabella T, 'Elemental Copyright: the complexity of ideas and the alchemy of mind-share', 90 B.U. L. Rev. 2149-2179 (2010), at 2151.
[154] Supra Note 146, at 1222.

internal controls because it is able to provide for the needs of both the public and rights holders whilst balancing the two competing interests, 'the dichotomy furthers the public-oriented objectives of copyright law by guaranteeing that authors have sufficient commercial incentives to produce and disseminate creative works, while safeguarding the public's right to build freely upon the ideas'[155].

6.6-It all depends on what you mean by ideas:

Despite the compelling reasons discussed above for preventing copyright from subsisting in ideas, Professor Joad identified the fundamental problem, 'it all depends on what you mean by ideas'.[156] If an idea is defined narrowly rights holders gain excessive protection and could potentially copyright basic information. In contrast if interpreted too generously, copyright would protect only innovative works meaning rights holders would be discouraged from creating works. The definition attributed to an idea and how to distinguish ideas from expression has been a persistent issue that undermines the dichotomy's role as an efficient internal control, 'commentators have raised problems.... but none have identified the root of the problem that an idea cannot exist apart from some expression'[157]. An idea can generally be defined as 'a thought, as a mental image, as a conception of a theory... as a formulation of thought'.[158] This definition does not adequately distinguish between ideas and expression in relation to copyright subsistence. With originality the line between what constitutes an original work and what was unoriginal was difficult to define. Under the idea/expression

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[155] Supra Note 144, at 66.
[156] Referred to by Lord Halisham in LB (Plastics) Limited v Swish Products Limited [1979] RPC 551**,** at 160.
[157] Jones R, 'The Myth of the Idea/Expression Dichotomy in Copyright Law' 10 Pace LR 551 (1990), at 552.
[158]Supra Note 143, at 129.

dichotomy the problem is even more acute and a definition or legal test remains elusive, 'the distinction between idea and expression has often proved as difficult as grasping moonlight'[159] and 'the dichotomy is riven with shortcomings emanating from the absence of a litmus test for separating ideas from expressions'[160]. The obscurity occurs because 'although the distinction.... is an easy one to make conceptually, and although the policies are easily articulated, the construction of an operable and consistent legal test... has vexed the courts and legislature for more than a century'[161] with 'courts finding the delineation of the idea/expression dichotomy to be extremely problematic'[162].

The lack of a clear test poses a problem however although difficult, articulation is not impossible and the dichotomy is not useless. Courts can adopt a consistent albeit adaptable approach particularly given the potential benefits the dichotomy has on freedom of expression and innovation. A common example referred to by academics to exemplify the difference between an idea and expression is Romeo and Juliet. If the play were to be performed today it would be copyrightable however the underlying premise, a tragic love affair involving rival families is an idea and is something that can freely be used by others, 'the idea of star-crossed lovers whose families object, and whose passion comes to a tragic end, would not be copyrightable'[163]. In other forms of work such as artistic works 'the particular selection and arrangement of shapes, colours,

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[159] Supra Note 153, at 2150.
[160] Supra Note 108, at 548.
[161] Supra Note 2, at 373.
[162]Spivack P, 'Does form follow function? The idea/expression dichotomy in copyright protection of computer software', 35 UCLA L. Rev. 723 1987-1988, at 724.
[163] Boucher J, 'The Next Frontier: "Intellectual Property and Intellectual Freedom', Memorial Lecture, Colorado Association of Libraries, Oct. 18, 2002, http://www.fepproject.org/commentaries/coloradointellprop.html, [last accessed September 30th 2014.

and other images in a painting are protected... Whatever "message" or "meaning" may be contained in the painting, however, is an unprotectable idea'[164]. The distinction between ideas and expression has also been more firmly established in American law which provides a workable approach. In *Nichols v Universal Pictures Corp*[165] two literary works both focused on a similar plot concerning a conflict between an Irish and a Jewish family whose children married and then, following many obstacles reconciled. It was held both works used the same underlying idea but the expression was very different and no infringement was found.

The divide between ideas and expression can be easily identified in certain types of works such as literary works. The distinction becomes more difficult with factual or functional works. The difficulty of applying the dichotomy to certain types of work however does not prevent the dichotomy from determining subsistence in those works. In regards to works where the distinction between ideas and expression is near impossible to determine, the merger doctrine has been adopted in the US. Under this concept, 'when an idea can only be expressed in a certain way, the expression is not protectable'[166] meaning that when 'an idea and the expression cannot be separated, they are said to have merged. When merger has occurred, the expression may not be copyrighted, because to do so would in effect be copyrighting the idea'[167]. The merger doctrine also extends to what is referred to as 'the idea expression identity'[168] where if one idea can only be expressed in a limited number of ways then the various

[164] Supra Note 4, at 910.
[165] Supra Note 125
[166] Supra Note 157, at 575.
[167] Supra Note 143.
[168] Referred to by Samuels Supra Note 6, at 159, Waltrip Supra Note 16, at 418 and Spivack Supra Note 162, at 741.

expressions of the idea will not gain copyright protection. This is an extremely important doctrine because of the lack of a clear distinction between ideas and expression and should be implemented within my reforms. The merger doctrine 'is a judicially created principle designed to prevent people from securing copyright ownership in an idea.'[169] Without the merger doctrine the entire dichotomy would be undermined because ideas could in effect be copyrighted. If the merger doctrine is used as a component of the dichotomy under the *CDPA*, this would not only mitigate the detrimental effects of having no set test but also could help determine copyright subsistence in works where the dichotomy lacks clarity.

The ability of the dichotomy to balance competing interests and act as an effective internal control is partially undermined because no set definition of an idea is provided. This has led academics to argue the dichotomy is inadequate, the idea/expression dichotomy often applies the balancing metaphor rhetorically, but make no serious attempt to address the relevant issues'[170] and is no more than a device to allow the judiciary to decide which works deserve copyright protection. Dam[171] observes the dichotomy 'can be said to be a metaphor for what courts choose not to protect'[172] whilst Cohen[173] contends 'a court's view of what constitutes the idea is influenced by how novel or creative the court considers the works at issue to be'[174]. Academic criticism focuses on the lack of an exact legal definition of an idea however copyright law, the

[169] Supra Note 157, at 911.
[170] Supra Note 10, at 14.
[171] Dam K, 'Some Economic Considerations in the Intellectual Property of Software' 24 Journal of Legal Studies 321, 338 n.65.
[172] Ibid, at 19.
[173] Cohen A, 'Copyright and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Value Based Judgements' 66 Indiana Law Journal 175, 212 (1990).
[174] Ibid, at 212.

public and rights holders would benefit from a flexible guiding principle. It is true from the discussion above that a precise boundary has not been forthcoming however this does not diminish the overall effectiveness of the dichotomy to help achieve a balance in copyright law. 'The idea expression dichotomy is not an artificial legal edifice... the application of the dichotomy can never be an exact science, but anyone with some experience in an analytical approach to the art... obtains a better feeling as to what can be idea and what expression in copyright'[175].

In addition to reforming the *CDPA* and use of the merger doctrine, we are able to use instrumentalism as a guide particularly Mills and Bentham's pleasure and pain principle. This aspect of my proposed reforms is intended to aid courts with the application of the dichotomy and to provide a framework by which it can be assessed whether a work or part of a work is an idea or expression. When discussing the issue of whether we are dealing with ideas or expression if we analyse the effect on copyright's purposes this provides a helpful basis to make the distinction although this needs to be flexible and assessed on a case by case basis. In the theoretical framework Bentham's pleasure and pain principle was outlined. One has to consider the ability of law to create pleasure and pain, 'pleasure, and freedom from pain, are the only things desirable as ends; and all desirable things are desirable either for the pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.'[176] This provides a good basis to assess the divide between ideas and expression. When assessing if the work at issue is an idea or expression, one can consider the pleasure and pain that copyright protection would have on copyright's dual purpose. It should be considered if

[175] Supra Note 113, at 132.
[176] Mill J.S, Utilitarianism (Broadview Press, 2010), at 183.

gaining copyright protection would remove a valuable piece of basic information from the public domain thereby causing pain to public learning. If copyright protection would result in the right holder gaining control over such basic information that it would completely undermine copyright's social purposes by preventing the public accessing it, this is an indication protection should not apply. It should also be equally considered, if not protecting the expression at issue would result in rights holders from being discouraged to create. Several examples can illustrate how this approach can ensure a balance is achieved and that copyright does not extend to basic information.

The *Temple Island* decision whilst bringing pleasure to the copyright owner, who was able to exploit his work, resulted in much greater pain for the public. Copyrights social purpose is undermined and pain caused because innovation is inhibited by the right holder controlling such a common place image. No other party could use the concept of a red bus against a black and white London background even with noticeable changes. The copyright owner is being provided with excessive protection and control over a very basic concept. There is a correspondence with natural rights here, it was considered more important to protect labour and copyright despite numerous legitimate pains the wider public would encounter such as monopolising a commonplace image. Copyright as we saw under human rights is being interpreted from a proprietarian standpoint where property rights are taking priority over valid social concerns. In this case if the infringing work were permitted, this would not undermine right holders because infringement could still be found if the image were to be reproduced with little substantial change. If we classified the claimant's bathroom architectural drawings as an idea in the *Jones v London Borough of Tower Hamlets* case this would cause pain to

both the copyright owner and the public. The copyright owner is discouraged from creating such works when rivals are easily able to appropriate them. Also unlike in *Temple Island* the design here was unique and novel, there are many other possible designs, the public have access to alternatives and copyright would not result in excessive control that would hinder future creativity. It is vital that our jurisdiction recognises the idea/expression dichotomy and that it is used as an important tool to prevent excessive copyright protection.

Under the reforms the court must balance the pain and pleasure that would result from 'the courts balance policies... if a court finds that a work merits protection, it applies the label "expression." If, however, a court concludes copyright protection would be tantamount to awarding an unfair monopoly, the court will... condemn the work to the public domain'[177]. The dichotomy at its core aims to prevent basic ideas from being copyrighted so the public domain is not emptied of material, rights holders have knowledge to build upon and competition is promoted, 'the idea/expression dichotomy restricts liability to a taking from the protected work, and not just from the type of work of which it is an exemplar'[178]. There may be several counterarguments to my reforms at this point and criticism of the use of instrumentalism and in particular the pain and pleasure principle. The first counterargument is that it could be difficult to apply the pleasure and pain principle here because it is difficult to measure pleasure or pain and quantify them. Secondly a criticism could be made that right holders and the public can all be classed as identifiable groups and that all will enjoy pleasure or suffer pain from a decision when for example different right holders could suffer pain whilst

[177] Pilarksi J, 'User Interfaces and the Idea Expression Dichotomy or are the Copyright Laws User Friendly', 15 AIPLA Q. J. 325 1987, at 327.
[178] Supra Note 14, 12-07

other right holders could simultaneously suffer pleasure. In response to the first criticism I would argue that in the context of copyright protection the pain and pleasure is well known and defined. Since the time of the *Statute of Anne* the pleasure that copyright protection is trying to achieve is to allow right holders to exploit their works whilst enabling knowledge to be disseminated to the public. This is what copyright is aiming to achieve and when these aims are endangered the result is pain. The pleasure and pain we are discussing is therefore clear. In relation to the second counterargument whilst the pleasure and pain is defined it is true that they do not necessarily correspond directly with the division between right holders and the public. For example the right holder whose work is at issue will prefer protection whilst other right holders may oppose protection so that the work can be used and developed free of copyright. Similarly members of the public who use the work may favour the work not to be protected whilst other members of the public who benefit from the work will support protection e.g. they work in an industry that profits from the work and provides them income. So whilst it may not be possible to apply pleasure and pain directly to all right holders or all of the public on each scenario, all the different forms of pleasure or pain can be considered and balanced. If we examine the *Temple Island* case, the right holder of the image at issue will gain pleasure from copyright protection by being able to exploit his work. Other right holders however will suffer pain as a result because a commonplace image has been removed from their resources and a wide monopoly has been gained. The public also suffer pain because they also cannot use a basic generic image severely limiting their freedom of expression in that particularly area, there are only so many ways a user can use the image of a red bus in front of Parliament without infringing the copyright the court supported in the case. Overall the dichotomy if adopted by the *CDPA* could not only act as an effective barrier to copyright subsistence

and ensure basic knowledge is available to be developed but no other standard discussed by the courts or academics comes close to protecting these fundamental copyright aims. The Courts have not implemented an effective replacement to the dichotomy 'it is hard to think of another indicator which would bring greater precision.'[179] The court in *Durham Industries* concluded, 'the idea/expression distinction, although an imprecise tool, has not been abandoned because we have as yet discovered no better way to reconcile the two competing societal interests that provide the rationale for the granting of and the restrictions on copyright protection'[180]. The dichotomy is not a perfect mechanism and does have shortcomings however could have a beneficial impact on balancing rights holders and the public.

6.7-Ideas and freedom of expression:

Chapter four previously concluded copyright regularly limited freedom of expression with rights holder's economic interests being protected above the public's right to freely express themselves using copyrighted material. The justification for limiting freedom of expression was that copyright's internal controls already adequately protected freedom of expression with Lord Phillips stating, 'the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work.'[181] Similar sentiments have been expressed in the US in relation to the Constitutional right to free speech. The US Supreme Court has commented the dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an

[179] Supra Note 14, 12-07
[180] Durham Industries, Inc. v. Tomy Corporation 630 F.2d 905 (2d Cir. 1980), at 912.
[181] Ashdown v Telegraph [2002] R.P.C 5, at 165.

author's expression'[182] and '[the legislation] puts the works on the latter half of the idea/expression dichotomy and makes them subject to fair use. This obviates further inquiry under the first amendment'[183]. Although originality does little to alleviate the conflict between copyright and freedom of expression, the idea/expression dichotomy is more successful and alleviates some concerns. Nimmer considers the idea/expression dichotomy vital not only dissolving the conflict between copyright and freedom of expression but also between rights holders and the public. He argues 'to grant property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open... for development and exploitation'[184]. Protecting expression rather than ideas fundamentally protects freedom of expression because the public and other rights holders are allowed to freely discuss, analyse and criticise basic ideas, 'on the whole... the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests'[185].

In relation to freedom of expression, the concern is that if ideas were to be copyrighted then not only would the public domain be diminished but also monopolies would be granted over basic ideas, 'the policy against inhibiting the free flow of ideas might arguably be described as preventing a monopoly on control of an idea'[186] and 'the danger is... that an individual might gain monopoly privileges over an idea, a result that

[182] Harper & Row Publishers, Inc. v. Nation Enterprises 471 U.S. 539 (1985), at 556.
[183] Eldred v Reno 239 F 3d 372, 376 (2001)
[184] Supra Note 145, at 120.
[185]Nimmer M, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?', 17 UCLA L. REV. 1180, 1184 (1970), at 1192.
[186] Hopkins D, 'Ideas, their time has come: an argument and a proposal for copyrighting ideas, Alb. L. Rev. 443 1981-1982, at 453.

would be antithetical to the free speech interest'.[187] The idea/expression dichotomy therefore partially protects freedom of expression because it avoids monopolies over basic ideas which the public are able to freely use and discuss. Preventing monopolies over basic ideas is extremely important considering how rigorously rights holders currently enforce their copyrights. The idea/expression dichotomy avoids restricting meaningful discussion or dissemination of ideas. If ideas were to be protected, freedom of expression would be a legal fiction, 'there would certainly be a serious encroachment upon [freedom of expression] values. The market place of ideas would be utterly bereft, and the democratic dialogue largely stifled if the only ideas which might be discussed were those original with the speakers'[188]. The dichotomy is utilised as a subsistence requirement would act as an effective internal control because by permitting the use of ideas, 'the dichotomy eases much of the initial appearance of a conflict between freedom of expression and copyright law'[189]. Although the dichotomy eases the initial conflict between the two legal regimes, the current narrow application of the dichotomy cannot entirely discharge concerns over freedom of expression, 'troubling is the fact that, when the courts even discuss the freedom of expression implications of copyright, they often rely on the idea/expression dichotomy to defend the restrictions imposed upon speech by copyright law'[190].

The idea/expression dichotomy is limited in how far it can protect freedom of expression and what material the public access, 'internal safeguards such as ... the idea/expression dichotomy are no longer adequate to protect vital free speech interests...

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[187] Pinard J, 'Defending the Public Domain—The First Amendment, the Copyright Power, and the Potential of Golan v. Gonzales', Oklahoma Law Review 61:395-424 (2008), at 401.
[188] Supra Note 185, at 1189.
[189] Supra Note 17, at 9.
[190] Supra Note 2, at 377.

the weight of authority in the academy supports the view that a clash exists between intellectual property and [freedom of expression][191]. As previously discussed the public as well as other rights holders occasionally need to refer to copyrighted works in their expressed form. This can involve using the exact wording, or expression of the work. It is at this point where the dichotomy is limited, 'the idea/expression dichotomy is not effective if a user must use both ideas and expressions of ideas'[192] and 'the most fundamental problem with the argument that the dichotomy prevents copyright from burdening freedom of expression is... the assumption that it is always possible to find an alternative means of conveying exactly the same ideas'[193]. Although freedom of expression is partially protected because 'the building blocks of creation' are freely available, the idea/expression dichotomy does not go further and will not permit use of the expressive parts of copyrighted works. Therefore the more detailed, socially valuable or novel aspects of copyrighted works are outside the scope of the dichotomy and cannot be used. The problem is the expressive components of copyright works if freely available would result in the greatest intellectual advancements. Secondly at this point the legally uncertain divide between ideas and expression raises the possibility of a chilling effect. Without a clear distinction between ideas and expression the public and rights holders will refrain from using ideas because of the possibility of copyright infringement, resulting in copyrighted works not being fully used even when it is beneficial and legal to do so, 'speakers often risk finding themselves on the receiving end of a copyright infringement action. That chilling effect alone ought to give pause to

[191]Tehranian J , 'Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal', 2005 BYU L. REV. 120, at 1204.
[192] Supra Note 108, at 570.
[193] Supra Note 113, at 21.

any court willing to examine afresh the dichotomy's efficacy as a limiting principle for protecting [freedom of expression] interests.'[194]

6.8-Conclusion:

In their current form originality and the idea/expression dichotomy not only fail to balance copyright's competing interests but do very little to alleviate the tension with freedom of expression. Theoretically both concepts should provide a meaningful barrier to protection. They should divide works that are so trivial or essential to society that they should be free, from works which add to society's knowledge base and deserve protection. Under originality if a creator exercises intellectual creation this will in the vast majority of cases result in protection. The idea/expression dichotomy notionally excludes the creators labour from protection if this labour only results in an idea. In practice however ideas are gaining copyright protection and rights holders are using copyright to prevent others from using those basic ideas. The reluctance to fully enforce the idea/expression dichotomy means a balance is not achieved. The instrumentalist purposes of copyright are not being given due consideration with copyright being regarded as a natural right where protection is gained for all subject matter regardless of the effect on the public. If the reforms suggested are implemented this would enable the dichotomy, despite the inherent vagueness over the exact dividing point between ideas and expression, to successfully act as an internal control. Giving the dichotomy a statutory footing and basing interpretation on the pleasure and pain caused by copyright protection would allow courts to approach the issue of subsistence with flexibility and allow them to weigh up competing interests, 'when a court decides that some feature of

[194] Netanel N, 'Locating Copyright within the First Amendment Skein', (2001) 54 Stanford L.R. 1, at 19.

a work is unprotected idea rather than protected expression, the court is merely balancing the degree of protection granted the original author against the degree of freedom allowed later authors'[195]. The interests of both parties are equally considered and protected by the reforms so one party is not favoured to the detriment of the other, 'courts have noted that the distinction between idea and expression accurately conceptualizes the fundamental elements in an artistic creation and balances the competing interests inherent in copyright law.'[196]

Wordcount-12,144 (14,293 including footnotes)

[195] Brinson J, 'Copyrighted Software: Separating the Protected Expression From Unprotected Ideas, A Starting Point', 29 B.C. L. Rev. 803 1987-1988, at 815.
[196] Supra Note 177, at 339.

7. Chapter Seven-Copyright Exceptions-Unfair Dealing with the Public

7.1-Introduction- beyond mere exceptions:

This chapter discusses the fair dealing provisions[1], the basic premise being copyright must provide a series of exceptions permitting use of copyrighted works, 'copyright systems provide exceptions, sometimes referred to as defences or users' rights, so as to privilege certain acts that would otherwise amount to infringement.'[2] Debate again has divided in two viewpoints. The first follows natural rights and argues because copyright is a natural right arising independent of statute, the fair dealing provisions are mere exceptions operating in limited circumstances. The opposing argument is that fair dealing provisions are more than exceptions and must be classified as user rights to ensure balance, 'there are several reasons to restrict the scope of copyright, all of which are designed to maintain a balance'[3] and 'fair dealing is an exception to the property rights of the creator, grudgingly given... it is the reverse side of the copyright coin, the right given to the public in return for the privilege of copyright protection.'[4] User rights could provide the public with significant protection within copyright law equal to those right holders receive, 'author rights and user rights would appear thereby as components of a single yet differentiated whole'[5] and 'copyright exceptions could be deemed as the second part of the copyright system,

[1] Also known as fair use in other jurisdictions such as the United States.
[2] Burrell R, 'Reining in copyright law: is fair use the answer? I.P.Q. 2001 No 4, 361-388, at 361.
[3] Guibault L, Contracts and Copyright Exemptions, in Hugenholtz P, Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management (Kluwer Law International, 2000), Page 127.
[4] Zwart M, 'A historical analysis of the birth of fair dealing and fair use: lessons for the digital age' I.P.Q. 2007, 1, 60-91, at 60.
[5] Drassinower A, 'Taking User Rights Seriously' in Geist M, In The Public Interest: The Future of Canadian Copyright Law, (2005, Irwin Law), Page 468.

which has been developed in parallel to authors' rights... copyright should primarily serve the instrumentalist function of satisfying social goals... a minimum balance between these two different interests should be found'[6]. User rights have quickly evolved, 'those arguing in favour of the public domain and increased limitations on copyright have increasingly sought to fight fire with fire to place substantive user's rights against the claims of intellectual property'[7]. Copyright limitations must be extensive to ensure the public are able to adequately use copyrighted works when necessary in order to secure a balanced copyright regime, 'user rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading.'[8] The fair dealing provisions are the most important internal mechanism in representing the public interest, 'this defence is aimed at advancing several public interests including aiding transformative use... curing market failure and promoting freedom of expression.'[9] It is therefore vital fair dealing is classified as a user right, 'fair dealing… is to be understood and deployed not negatively, as a mere exception, but rather positively as a user right integral to copyright law'[10]. Classification as user rights will ensure an expansive and strong application of copyright exceptions, 'if we recognise the public interest resides at the heart of copyright... this implies that fair dealing is not merely an exception to copyright: it does not derogate from copyright norms but confirms them[11].

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[6] Matulionyte R, 'Copyright on the Internet: Does a User Still Have Any Rights at All' Hanse L. Rev. 1 (2005): 177, at 181.
[7] Breakey H, 'User's rights and the public domain'. Intellectual Property Quarterly, (2010) 3: 312-324, at 312.
[8] Vaver D, Copyright Law (Irwin Law, 2000), Page 171.
[9] Yu P, Challenges to the Development of a Human Rights Framework for Intellectual Property, in Torremans P, Copyright and Human Rights (Kluwer Law International, 2008), Page 94.
[10] Supra Note 5, at 467.
[11] Craig C, Copyright, Communication and Culture (Edward Elgar Publishing, 2011), Page 162.

7.2-Fair Dealing-unfit for purpose?

The rationale for fair dealing is that although users technically infringe copyright, they do not excessively hinder rights holders' exploitation of their copyright and is driven by 'a desire to preserve some element of the public domain'[12] and 'seek to establish a proper balance between the legitimate interests of copyright owners and the legitimate desires of users of copyright material.'[13] These provisions are essential to securing balanced copyright law, 'the balance between the rights of the owner and those of the public has been struck by the legislative organ... there is no room for any further defences outside the code.'[14] To rely on the fair dealing provisions, it must be shown that use of the copyrighted material was fair although no definition is provided and the use must fall into one of the following categories; 'research for a non-commercial purpose'[15], 'for the purposes of private study'[16], 'for the purpose of criticism or review,'[17] format shifting[18], data mining[19], quotation[20], parody/caricature/ pastiche[21] or finally 'for the purpose of reporting current events.'[22] To achieve balance, fair dealing must have the needs of the public firmly rooted as its guiding principle and is the best tool to counter excessive owner rights, 'fair dealing defences occupy a pivotal position in copyright law. They ensure a balance between the interest of a copyright owner in securing a just return on creative work and the public interest in ensuring that

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[12] Stokes S, Digital Copyright: Law and Practice Third Edition (Hart Publishing, 2009), Page 40.
[13] 1981 Green Paper on Reform of the Law Relating to Copyright, Designs and Performers Protection (Cmnd 8302, 1981)
[14] Ashdown v Telegraph Group Ltd [2001] Ch. 685, at 696.
[15] CDPA Section 29(1B), see Appendix B
[16] CDPA Section 29(1C), see Appendix B
[17] CDPA Section 30(1), see Appendix B
[18] CDPA Section 28B
[19] CDPA section 29A
[20] CDPA section 30(1ZA)
[21] CDPA section 30A
[22] CDPA Section 30(2), see Appendix B

intellectual property does not impede the flow of ideas'.[23] Given the classification of rights holders' interests as rights and a system focused around these rights, it is essential the public interest is given the same standing as user rights, 'if copyright is to be understood as a reasonable balance between authors and users, then it needs to be a balance of like against like, not of author's rights against the public's privileges'[24].

The fair dealing provisions also again exemplify the conflict between natural rights and instrumentalism. A natural rights approach views, 'copyright as a natural right of an author that should be protected fully'[25] with 'critics suggesting Lockean copyright is so strong as to preclude fair use.'[26] Under natural rights theory copyright is defined as an inalienable property right that is not dependent on statute. Statutory limitations not only violate this inalienable right but also originate as a legal right not a natural one and should only limit natural rights in rare situations, 'copyright is a property right, copyright holders in principle enjoy absolute dominion over their works... exceptions and limitations... are isolated deviations from the copyright holder's proprietary rights tolerated only as required by special circumstances.'[27] The fair dealing provisions are therefore interpreted as mere exceptions, they only allow copyright to used if absolutely necessary and strongly oppose broad exceptions that aim to give effect to wider social objectives, 'this can be explained by the simple fact that, because the setting of Locke's

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[23] Griffiths J, 'Preserving judicial freedom of movement - interpreting fair dealing in copyright law' I.P.Q. 2000, 2, 164-186, at 169.
[24] Supra Note 7, at 312.
[25] Jong S, Fair Use: A tale of Two Cities, in Takenaka T, Intellectual Property in Common Law and Civil Law, (Edward Elgar Publishing, 2013), at 192.
[26] Horowtiz S, 'Rethinking Lockean Copyright and Fair Use' Deakin L. Rev. 10 (2005): 209, at 210.
[27] Netanel N, Why has Copyright Expanded? Analysis and Critique, in Macmillan F, New Directions in copyright law volume 6 (Edward Elgar Publishing, 2007), at 29.

labour theory is in the state of nature... it is not concerned with the prospect of imposing statutory or government regulated limits on naturally acquired property.'[28] Under Locke and natural rights whilst copyright limitations are not impossible they are extremely limited, 'in general Locke's labour theory does not seem to justify the introduction of a statutory regime of limitations.'[29] As with the idea/expression dichotomy, natural rights advocates have opposed this interpretation and tried to reconcile natural rights with a robust public domain. Debate focuses on the second Lockean proviso, known as the spoilage or waste proviso. Locke stated, 'the same Law of Nature, that does by this means give us Property, does also bound that Property too....To enjoy. As much as anyone can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others.'[30] The proviso only allows property rights to be given in goods that the appropriator can use, if the appropriator cannot use the goods and it goes to waste then this is excessive and property rights are denied, 'this limit on appropriation is called the spoilage proviso because it requires that appropriated goods are used before they spoil. The spoilage proviso says that it is wrong to hoard up millions of apples while your neighbour starves.'[31]

The second Lockean proviso has been used by natural rights academics to reconcile fair dealing with natural rights and challenge the traditional position fair dealing would be extremely limited or even impossible under a natural rights approach. The major

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[28] Gompel S, Formalities in Copyright Law: An Analysis of their history, rationale and possible future, (Kluwer Law International, 2011), at 222
[29] Supra Note 28
[30] Locke J, 'Second Treatise on Government- The True Original, Extent, and End of Civil-Government' 1690, Chapter V, at 31.
[31] Supra Note 26, at 215.

problem applying the second proviso to copyright is that Locke wrote this limit with tangible goods such as food in mind not intellectual property. These types of goods rot and spoil, intellectual property however does not spoil and is durable, 'Writing songs, or films do not spoil in the way that an unused basket of plums might. In that sense, one could say that they are non-perishable'[32]. This key difference between perishable goods and intellectual property has led academics to argue the spoilage proviso is inapplicable to copyright & will not limit property rights, 'the spoilage proviso fails because it depends on the natural process of spoilage. Locke explains that some goods are not limited by the spoilage proviso: for example diamonds. Intellectual products, like diamonds, do not spoil in the same way that an apple does.'[33] Natural rights academics have tried to overcome this flaw. Damstedt has provided the leading effort to reconcile the second Lockean proviso with fair dealing. He argues that copyright can spoil and argues the proviso should be violated if the product of labour is not put to any use 'the waste prohibition requires that each unit either be put to some use or sold to retain a property right in the good. In other words, property rights are lost to the extent that the laborer does not achieve "total money substitution," which I will define as the conversion into money of all units of a product of labour that an individual will not personally use'[34]. If a copyright work is not fully used or converted to money then property rights will not be gained and the work is considered to have 'spoiled'. In relation to fair dealing Damstedt argues the doctrine is compatible with natural rights. Use will qualify under fair dealing if the spoilage proviso is violated, where a copyright work provides no use value to the labourer then the work can be used by others, 'if the

[32]Craig C, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' (2002) 28 Queen's L.J, at
[33] Supra Note 26, at 225.
[34] Damstedt B, 'Limiting Locke: A natural law justification for the fair use doctrine', Yale Law Journal (2003): 1179-1221, at 1197.

labourer receives no use value from the good, another will do no injury to the labourer and thus, will not violate the taking prohibition by taking the good. In other words, only where the laborer violates the waste prohibition can another take the good without violating the taking prohibition. Therefore, justified taking can be seen as a natural way to police the waste prohibition'[35]. Macmillan suggests this interpretation could allow limitations under Lockean theory, 'as Damstedt argues, waste occurs not only when a resource is allowed to perish but also when 'a unit of product or labour is not put to any use'... if so Locke's waste proviso might give rise to fair use and other limitations on copyright holders rights.'[36]

Several problems exist with Damstedt formulation of the spoilage proviso. Firstly he has extended the scope of natural rights theory too far and incorporated instrumentalist principles into his interpretation. The entire Lockean theoretical framework is that labourers have a natural right to their labour, copyright should ensure authors can exploit their works. Fair dealing directly opposes this by allowing the labourer's work to be used by others, 'If copyright law serves to protect the natural rights of authors to the fruits of their intellectual labours, the natural corollary is that its purpose is to restrict the accessibility of copyrighted works for the expressive purposes of others'[37]. Fair dealing is evidence that copyright law is not based on natural rights because copyright is not just concerned with ensuring right holders can exploit the results of their labour but also protects wider social concerns, 'if I am right to say that Lockean theory justifies granting authors the right to exclude others from their works,

[35] Ibid, at 1196.
[36] Supra Note 27, at 29
[37] Fewer D, 'Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada', U. Toronto Fac. L. Rev. 55 (1997): 175, at 220.

then…it is very hard to square existing fair use rights, or any other set of fair use rights, with Lockean theory'[38]. These wider concerns whilst crucial to acquisition of property rights under instrumentalism, form no part of the gaining of property rights under the natural rights theoretical framework, , 'The natural rights approach... would erect boundaries around protected works that may impede both access to and dissemination of information. These rights are not given in pursuit of some grander social objective, as they are under the utilitarian approach; rather, the natural right to intellectual works follows from Locke's theory on property: property rights flow from the labourer's natural right to his or her own labour.'[39] Damstedt's interpretation not only displays little resemblance to Locke's labour theory but also by requiring full exploitation more closely reflects an instrumentalist approach, 'his reading is not simply that individuals must not appropriate more than they can before spoilage, but that any good must be put to some fully effective use...Damstedt uses a much different meaning of "waste" than Locke's... The proviso is not about effective use'[40]. Locke's Labour theory states a labourer is entitled to the fruits of their labour, it does not require their labour has to be put to effective use. If a labourer does not fully exploit the fruits of their labour Locke does not propose they lose all property rights as Damstedt suggests.

Other academics such as Hughes completely reject Damstedt's reasoning, arguing natural rights have no requirement work must be fully exploited, 'it is difficult to think of any other ways in which intellectual property schemes embody any notion of the non-waste condition. Patents, copyrights, and trade secrets all are recognized whether or

[38] McGowan D, 'Copyright Nonconsequentialism', 69 MO. L. REV. 1 (2004)
, at 51
[39] Supra Note 37, at 228.
[40] Supra Note 26, at 227.

not the owner is squandering or has shelved the idea.'[41] Hughes also illustrates another key point, even if copyright could be said to spoil this unlike Locke's theory is not absolute as with apples and could be reversed, 'unlike food, ideas are not perishable: they almost always retain future value. From an individual's perspective, it is much harder to say at a point in time, that the individual's investment in some idea is wasted. The investment may yield value at a later date.'[42] Therefore it must be concluded not only is it questionable if the spoilage proviso can apply to copyright but also natural rights does not support a broad fair dealing regime as this would undermine the concept of a labourer exploiting the fruits of their labour.

In contrast to natural rights, under instrumentalism exceptions to copyright should be liberal to protect a variety of socially beneficial uses, '[instrumentalism] permits a broad spectrum of socially and culturally valuable uses... courts in author's rights countries... incline to interpret statutory limitations to copyright as exceptions that are to be narrowly construed'[43]. Currently fair dealing operates as narrow mechanisms that only circumvent copyright in limited circumstances and cannot be considered rights in themselves, 'in Europe, the situation is clear: exceptions are not user's rights. At best, they represent immunities'[44]. In order to achieve any semblance of balance within copyright law it is essential to interpret the fair dealing provisions from an instrumentalist viewpoint and classify them as user rights, 'commentators tend to prefer to style the exceptions as users right... this suggests that such provisions are to be

[41] Hughes J, 'The Philosophy of Intellectual Property' 77 Geo. L.J. 287, at 329.
[42] Ibid, at 328.
[43] Goldstein P and Hugenholtz P, International Copyright: Principles, Law and Practice, (Oxford University Press, 2012), at 6-7
[44] Strba S, International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions (Martinus Nijhoff Publishers, 2012), at 146

treated on an equal footing with the rights given to copyright owners... it is a mistake to describe the current provisions in these terms.'[45] If defined as user rights there is the opportunity to balance copyright law. The distinction in language between rights and exceptions is truly significant, 'the very idea that users of copyright works should have 'rights' is decidedly empowering'[46] and 'conceptualized as a right, fair dealing establishes a corresponding duty on behalf of the owner to honour the user's right... the user has a positive claim-right against the copyright owner... it can be argued that copyright owners have a correlative obligation to permit users' fair dealings with their works'[47]. It is the very use of the language of exceptions and limitations in current copyright law that demonstrates a natural law approach. It is explicit recognition that copyright is a natural right and not a user right to equivalent of author rights, 'the phrase assumes that the natural order of Blackstonian absolute rights, and that every effort to permit behaviour not authorised by the copyright owner is a limitation on those absolute rights, an untoward exceptions from the natural state of affairs.'[48]

Currently copyright is being interpreted far closer to a natural right than an instrumental tool. If copyright is viewed as a natural right than exceptions to copyright should not exist or only be permitted in extremely limited circumstances, 'since limitations on copyright are merely exceptions to a natural right, those limitations are only allowed when there is no unreasonable prejudice against the legitimate interests of

[45] Burrell R and Coleman A, Copyright exceptions: the digital impact (Cambridge University Press, 2005), Page 10.
[46] Tawfik M, 'International Copyright Law and Fair Dealing as a User Right' (2005) UNESCO Copyright Bulletin, available at http://unesdoc.unesco.org/images/0014/001400/140025e.pdf [Last accessed September 30th 2014], at 7
[47] Supra Note 11, at 171.
[48] Patry W, Moral Panics and the Copyright Wars, (Oxford University Press, 2009). at 125

an author.'[49] In contemporary copyright law we encounter a fair dealing system that is narrow, weak and restrictively interpreted. This can be attributed to the classification of copyright as a natural right and as with human rights, we see proprietarianism drive the application of fair dealing. Copyright is considered a right that should not be limited even if restrictions on copyright serve a wider social purpose, 'the fair use defence is totally unjustifiable under the Lockean view of property, which does not allow exceptions to its absolutist proposition that a person must either receive the actual product of her labour.'[50] If copyright were considered an instrumental tool this would greatly improve the effectiveness of the fair dealing provisions. Classifying fair dealing as a user right rather than an exception, means the judiciary, legislators and rights holders will have 'a higher burden placed on [them] to ensure they clearly consider user interests when defining copyright policy.'[51] Following an instrumentalist approach and adopting user rights therefore has the potential to radically redefine the balance between right holders and the public, 'the vision of copyright law as a dual objective system presides over an integration of user rights intended to restore the lost copyright balance'[52]. Redefining exceptions as user rights would enable the public interest to occupy a fundamental place within copyright, 'cast as a user right, what fair dealing shows is not that certain reproductions are in some way to be exceptionally excused, but rather and more deeply that reproduction is not *per se* wrongful.'[53] The current interpretation of fair dealing is that copyright works may only be used in very rare circumstances, under user rights the law is saying another person's labour can be used if this works towards copyright's social aims. The issue of user rights is only one issue, in

[49] Supra Note 25, at 179.
[50] Lacey L, 'Of Bread and Roses and Copyrights', Duke Law Journal (1989): 1532-1596, at 1564.
[51] Supra Note 46, at 6.
[52] Supra Note 5, at 467.
[53] Ibid, at 474.

addition three main factors prevent the fair dealing provisions from being an effective tool to protect the public interest; the *CDPA, the Information Society Directive* and the three-step test.

7.3-The CDPA-an obstruction to balance

The *CDPA* does not recognise user rights and fair dealing remains a set of narrow exceptions disproportionate to the rights provided to copyright owners. In terms of scope, ability to fulfil copyright's purpose and effectiveness as a balancing mechanism the fair dealing categories are not an effective counter to the rights given to copyright owners. The use of restrictive categories means permitted uses are inadequately narrow and other legitimate uses of copyrighted material may not be encompassed. Looking at fair dealing for the purposes of research or private study[54] it can immediately be seen it does not facilitate legitimate uses of copyrighted material. Research or private study fair dealing is restricted by the exclusion of commercial activity, when the fair dealing provisions were amended in 2014 commercial research and private study remained excluded and only non commercial uses could be protected. Section 178 *CDPA* provides 'private study does not include any study which is directly or indirectly for a commercial purpose'[55] whilst Article 5(3)(A) of *The InfoSoc Directive* excludes commercial research, 'fair dealing has been reduced in scope in the last decade; now research must be non-commercial'[56]. This means, 'research which... is conducted... or intended should be ultimately used for a purpose which has some commercial value will

[54] See Appendix B
[55] See Appendix B
[56] Sims A, 'Strange bedfellows fair dealing and freedom of expression in New Zealand', E.I.P.R. 2011, 33(8), 490-498, at 497.

not be within the permitted act'[57] and 'limits the defence to personal activities'[58]. This limited scope is a major concern as the Royal Society noted, 'non-commercial research is intrinsically difficult to define and many research ventures only become commercial subsequently'[59]. This difficulty primarily relates to the distinction between commercial and non commercial research, 'there is a large amount of ambiguity in the distinction'[60] and the ability of the provision to adequately protect legitimate use, 'section 29(1) had to be construed in conformity with art.5(3)(a)... Thus the words "for the purposes of research" must be narrowly interpreted.'[61]

In relation to a balanced copyright regime, section 29 has the potential to fundamentally undermine the underlying purpose of copyright law. MacQueen refers to several examples[62]. The first scenario involves a professor composing a monograph which is published by a commercial publisher where he earns royalties or secondly where a professor publishes an article in a journal which is then developed into a commercial product. Both scenarios involve a commercial purpose thus removing any fair dealing defence. Reputable academic research however is perhaps one of the greatest tools to advance society's knowledge proving extremely valuable and results in significant advances in its particular field. Academic research however often requires in-depth use and discussion of copyrighted works. To prevent reliance on fair dealing in

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[57] Garnett K, Copinger and Skone James on Copyright Volume 1 Fifteenth Edition (Sweet and Maxwell, 2004), Page 496.
[58] Jones H and Benson C, Publishing Law (Taylor and Francis, 2011), Page 240.
[59] The Royal Society, 'Keeping science open: the effect of intellectual property policy on the conduct of science' http://royalsociety.org/uploadedFiles/Royal_Society_Content/policy/publications/2003/9845.pdf [last accessed September 30th 2014], at 4.19.
[60] MacQueen H, Waelde C, Laurie G and Brown A, Contemporary Intellectual Property: Law and Property (Oxford University Press, 2010), Page 170.
[61] Forensic telecommunications services v Chief Constable of West Yorkshire [2011] EWHC 2892 (Ch), at 109.
[62] Supra Note 60, Page 169

these circumstances, solely because a commercial purpose is involved, is detrimental to wider society and directly opposes the entire purpose of copyright law. Excluding commercial research from section 29 is inconsistent with copyright's fundamental purposes of encouraging innovation and disseminating knowledge. Research that uses copyrighted works is discouraged due to the possibility of infringement. This not only reduces the dissemination of knowledge but also discourages innovation amongst right holders seeking to expand current research, to the detriment of all parties. Section 29 is a key example of copyright being interpreted as a natural right, 'Lockean theory justifies the right to exclude others from using a privately owned intellectual product. Excluding others implies excluding what we consider fair uses of a product. Thus, Lockean theory does not allow for fair use.'[63] Under section 29 copyright owners are able to exclude the vast majority of users from using their work even though there are legitimate reasons for such use. This much more closely reflect a Lockean approach than an instrumental one.

Compounding these concerns is the *Green Amps Ltd* case[64] where the court, 'clarifies that research must be completely non-commercial, from beginning to end... this can be seen as worrying for academics as most of their research is multi-purpose'[65]. If we consider James and Dewey and look at the practical consequences of excluding commercial research, this directly conflicts with copyright's dual purpose. One argument in support of excluding commercial research is the ability of the research to compete with the original. This concern however is tenuous because copyright already

[63] Supra Note 26, at 220.
[64] Controller of HM Stationery Office & Anor v Green AMPS Ltd [2008] EWCA Civ 588
[65] Derclaye E, 'Of maps, Crown copyright, research and the Environment', European Intellectual Property Review, 30(4), 162-164, at 163.

has safeguards if commercial research were to be protected. Firstly if commercial research competes with a copyrighted work it used, the courts will prevent reliance on fair dealing. This is seen in *the University of London* case, 'the test is whether there is competition with the original object'[66] and in *Green Amps* itself, 'amongst the main factors to be taken into account are the degree to which the infringement involves competition with the exploitation of the copyright work.'[67] Secondly it would still need to be shown that the use was fair. Copyright's purpose is to encourage the creation of works and for these works to be disseminated. In the theoretical framework Dewey argued one must judge the effectiveness of law by its ability to fulfil its purpose.. The practical consequences of this exclusion are that research is completely discouraged. This hinders not only the encouragement of right holders to create new work and invest in research but also completely excludes a valuable source of knowledge from society.

The second fair dealing category concerns using copyrighted material for the purposes of criticism, review or reporting current events and is more successful in securing a balanced copyright regime. This was also recently expanded to include quotation[68], 'Section 30(1) is amended as follows...in the heading, after "review" insert ", quotation."[69] Firstly it encompasses all forms of work[70], 'they apply to a wide range of subject matter.'[71] Secondly section 30 is not limited to non-commercial purposes meaning it has a much wider scope. This has resulted in a partial balance in this limited

[66] Glyn v Weston Feature Film Co [1916] 1 Ch. 261, at 607
[67] Supra Note 64 , at 24
[68] Discussed in Chapter three, section 30(1) CDPA was amended by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 Regulation 3.
[69] The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, Regulation 3(1).
[70] Note that fair dealing for the purpose of reporting current events does not extend to photographs under section 30(1) CDPA.
[71] Supra Note 45, Page 44.

area because a variety of uses are protected. In *Pro Sieben v Carlton Television,*[72] a UK television programme used a 30 second extract from a German TV interview with a woman expecting eight children. This was considered fair dealing under both sections 30(1) and (2). Walker LJ recognised the role of fair dealing in achieving a balanced copyright regime, '[the provisions were] directed to achieving a proper balance between protection of the rights of a creative author and the wider public interest.'[73] In order to achieve a balance he also suggested the provisions must be liberally construed, 'if fair dealing is for the purpose of criticism that criticism may be strongly expressed and unbalanced without forfeiting the defence'[74] and 'reporting current events' are expressions of wide and indefinite scope... they should be interpreted liberally'[75]. This was explicitly supported in *Fraser Woodward v BBC*[76] where the BBC's use of fourteen of Fraser's photographs in a critique of tabloid journalism was for the purposes of criticism or review. In *IPC Media v News Groups Newspaper*[77] the Sun newspaper advertised its TV supplement with images of two additions of IPC's rival magazine. This was held to fall within the scope of section 30(2). Other cases also illustrate section 30 is able to balance the interests of rights holders and the public. In the *Clockwork Orange*[78] case section 30(1) applied where Channel 4 used extracts of the film in a documentary totalling 12.5 minutes, this was 8% of the total film, 40% of the documentary and included 9/10 of the film's violent scenes. Section 30 has also protected extracts of major sporting events[79] whilst *Hyde Park v Yelland*[80] and *Ashdown*

[72] Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605
[73] Ibid, at 612.
[74] Ibid, at 613.
[75] Ibid.
[76] Fraser-Woodward Ltd v BBC & Brighter Pictures Ltd. [2005] FSR 36, at 36.
[77] IPC Media Ltd v News Group Newspapers Ltd[2005] EWHC 317
[78] Time Warner Entertainment Co plc v Channel Four Television Corporation plc (1994) EMLR 1
[79] British Broadcasting Corporation v British Satellite Broadcasting Ltd [1991] 3 All ER 833
[80] Hyde Park v Yelland [2001] Ch. 143

v Telegraph Group[81] concluded current events included events of continuing interest, 'this Court held it was arguable the events of 30 August 1997, leading up to the death of the Princess of Wales... were still current a year later'[82].

The recent inclusion of quotation has also broadened section 30. Users are now able to quote copyrighted works under fair dealing and quotation is not only limited to criticism or review, 'Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise).'[83] In order to rely on the quotation fair dealing exception the work has to a-been made available to the public b-use of the quotation is fair c-the extent of the quotation is no more than required by the specific purpose for which it is used and d-the quotation is accompanied by a sufficient acknowledgement[84]. This amendment has helped balance the public and right holders with users now able to use the very words of a copyrighted work, 'a quotation may be used for any purpose but it must extend no further than is required to achieve that purpose'[85]. This not only prevents rights holders from preventing use of their work when their economic interests are not at threat but also aids freedom of expression, as discussed in Chapter Four it is sometimes necessary to use the exact words of a right holder for freedom of expression to be protected. The introduction of quotation under section 30(1ZA) has again benefitted the public and helped achieve a balance with right holders, 'the addition of the quotation exception, not limited by purpose but extent is a valuable liberalisation.'[86] The result is that users are able to make much greater use of

[81] Ashdown v Telegraph [2002] R.P.C 5.
[82] Ibid, at 63.
[83] Supra Note 68, Regulation 3(4).
[84] Ibid, Regulations 3(4)(A)-(D).
[85] Bently L and Sherman B, Intellectual Property Law Fourth Edition, (Oxford University Press, 2014), at 239.
[86] Ibid.

copyrighted material, '[the exceptions] permits legitimate uses of quotations that might not necessarily fall within the scope of the narrower exception for criticism or review, such as the use of titles and short extracts from protected works in academic research papers, bibliographies, blogs and tweets.'[87] The IPO has recently provided guidance on the application of the new fair dealing provisions stating, 'the law has been amended to give people greater freedom to quote the works of others for other purposes, as long as this is reasonable and fair '[88]. The IPO have provided examples of what can be considered fair dealing, 'the use of a title and short extract from a book in an academic article discussing the book is likely to be permitted, whereas the copying of a long extract from a book, without it being justified by the context, is unlikely to be permitted.'[89] The IPO stated it would be near impossible for the exception to apply to a photograph, 'it would only be in exceptional circumstances that copying a photograph would be allowed under this exception'[90].

A parody exception has also been introduced under *CDPA* section 30A. The IPO again provided guidance on its interpretation stating only minor uses of copyrighted work will be allowed, 'only minor uses are permitted and a use must be considered fair

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[87] Lee Y.H, 'United Kingdom copyright decisions and legislative development 2014' IIC 2015, 46(2), 226-237

[88] The Intellectual Property Office, 'Exceptions to Copyright: an Overview', October 2014, at 4. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448269/Exceptions_to_copyright_-_An_Overview.pdf, [Last Accessed] June 21st 2015

[89] The Intellectual Property Office, 'Exceptions to Copyright: Guidance for Consumers, October 2014, at 3/ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448273/Exceptions_to_copyright_-_Guidance_for_consumers.pdf [Last Accessed] June 21st 2015.

[90] The Intellectual Property Office, 'Exceptions to Copyright: Education and Teaching', October 2014, at 9. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375951/Education_and_Teaching.pdf, [Last Accessed June 21st 2015]

and reasonable'[91]. The IPO gave examples, 'the use of a few lines of song for a parody sketch is likely to be considered fair, whereas use of a whole song would not be'[92] however 'it would not be considered "fair" to use an entire musical track on a spoof video'[93]. The extent to which the parody fair dealing provision is able to adequately protect use of copyrighted material remains to be seen, 'as insightful as the IPO guidance is, it is not law. Creatives and right owners will have to rely on the courts for further clarification[94]. The CJEU however recently interpreted the parody exception broadly.[95] Whilst the new quotation and parody exceptions have limitations, overall they only enhance the effectiveness of section 30 and broaden its scope. The aforementioned cases illustrate that unlike section 29, section 30 is a component of the internal copyright regime that partially fulfils its intended role of balancing the interests of the public and rights holders.

If we look at section 29 through the lense of Bentham, it is evident why section 29 does not contribute to securing copyright's purposes. Under Utilitarianism the greatest happiness principle stipulates law should maximise happiness, with copyright law the basis of this maximisation is innovation. The inability of fair dealing to permit use of commercial research does not maximise innovation. As discussed above innovation is damaged because the public cannot access important research and right holders are able to prevent dissemination of knowledge. The great happiness principle is also

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[91] Supra Note 89 , at 4

[92] Supra Note 88, at 3.

[93] Erickson K, 'Parody and Pastiche', Available at http://copyrightuser.org/topics/parody-and-pastiche/, [Last Accessed] June 20th 2015/

[94] Adebiyi O, 'Law imitating life': will the day ever come? Parody, caricature and pastiche', Ent. L.R. 2014, 25(7), 243-245

[95] The CJEU also recently provided guidance on the parody exception in Deckmyn v Vandersteen (C-201/13) [2014]. The CJEU stated to be considered a parody, 'the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery' (Paragraph 20).

undermined because other right holders cannot rely on fair dealing to use the work, this greatly inhibits competition and prevents innovation. Bentham argued the success of every action must be assessed by its ability to augment or diminish the happiness of the parties whose interests are at issue. The interests of both right holders and the public are damaged by section 29 and the maximisation of innovation is completely undermined. Section 30 is far more effective in satisfying the greatest happiness principle. Innovation is maximised because criticism using copyrighted works is permitted in a wide range of circumstances allowing not only the creation of new works but also more in-depth analysis of existing works. Section 30 however is not an entirely effective internal measure. In chapter four it was the judiciary's view that fair dealing provisions along with other internal copyright measures offset concerns over copyright's ability to restrict freedom of expression. Denying a defence, as the court did in *Ashdown*, because use of the work involved criticism of a person rather than the work does nothing to alleviate concerns over copyright's ability to override freedom of expression. Again looking at the theories of Dewey and James the practical consequence is that copyright fails to protect a vital component of freedom of expression, the ability of the public and media to participate in political discourse, 'there may be occasions when the right to freedom of expression is inadequately protected by the specific qualifications contained in... legislation'[96]. In *Ashdown* reproducing the minute added weight to the political criticism. Use of the extract strengthened the article by bringing integrity to the piece, verifying the information and showing evidence directly from the parties. Copyright was not intended to censor such discussion and challenges the notion that fair dealing adequately protects freedom of expression concerns.

[96] Bradgate R and White F, Commercial Law (Oxford University Press, 2007), Page 424

7.4-The Three-step test-economic not public interests:

The Infosoc directive introduced a restrictive list of copyright exceptions and also adopted the three-step test both of which have contributed to a natural rights interpretation of copyright exceptions. Article 5 of the *InfoSoc Directive* provides twenty permitted exceptions[97]. Article 5(1) stipulates the only mandatory exception whilst articles 5(2) and 5(3) provide optional exceptions but Member States cannot introduce any exceptions outside of article 5. The first problem is article 5 does not achieve its aim of harmonisation, 'what makes the Directive a total failure, in terms of harmonisation, is that the exemptions are optional... Member States will prefer to keep intact their national laws.'[98] Secondly the consensus of academics is that article 5 does not help secure a balanced copyright regime because it is too narrow, 'Member States are not able to deviate from or add to these exceptions...it constricts the ability of national states to respond to technological change and potential new uses'[99] and 'these provisions will require any future "fair dealing" defence to be restrained within much tighter limits than has previously been the case'[100]. These criticisms have led academics to conclude the Directive is 'primarily geared towards protecting the rights of the 'main players' in the information industry'[101] and 'comes close to requiring the adoption of a presumption in favour of the copyright owner.'[102]The Directive is grounded in natural

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[97] See Appendix C
[98] Hugenholtz P, 'Why the copyright directive is unimportant, and possibly invalid', [2000] E.I.P.R. 499, at 502
[99]Wallace M, The Information Society Directive (UK Implementation): The End of Educational and Research Use of Digital Works? 4 (Paper presented at the 19th Annual BILETA Conference 2004), available at tp://www.bileta.ac.uk/pages/Conference%20Papers.aspx. [Last accessed September 30th 2014], at 2.3.
[100] Supra Note 23, at 183.
[101] Supra Note 98.
[102] Supra Note 23, at 183

law because copyright is being interpreted consistently with proprietariansim. Copyright is being defined as a property right that has priority over other rights and interests. The Directive implements a regime focused on this property right with the public interest being represented by strict limitations. The two interests of right holder and public are not being treated as equal.

The three-step test first introduced into the *Berne Convention*[103] under article 9(2) in 1967 has become a recurring feature of domestic and international copyright law[104], '[the test] has become the cornerstone for almost all exceptions to all intellectual property rights at the international level'[105] and 'has come to be regarded as providing the international yardstick for exceptions to exclusive rights.'[106] All copyright exceptions must comply with the test and it is fundamental to any discussion of balancing copyright law because it determines the scope of copyright exceptions, 'the "three-step test" restricts the ability of states to introduce, and maintain, exceptions to the exclusive rights of authors'[107] and 'establishes the criteria against which any exception... is to be assessed.'[108] The three-step test was incorporated under article 5(5) of the *InfoSoc Directive*, 'the exceptions and limitations provided for... shall only be applied in certain special cases (1) which do not conflict with a normal exploitation of

[103] Berne Convention for the Protection of Literary and Artistic Works 1886.
[104] The three-step test has been included in; Article 13 of TRIPS, Article 10 of the WIPO Copyright Treaty, Article 6(3) of the EU Database Directive and Article 6(3) of the directive on the legal protection of computer programs. WIPO Performances and Phonograms Treaty art.16
[105] Gervais D, 'Towards A New Core International Copyright Norm: The Reverse Three-Step Test" (Spring 2005) Marquette Intellectual Property Law Review 1-35, at 15.
[106] Ricketson S, 'The Three Step Test, Deemed Quantities, Libraries and Closed Exceptions. (2002) www.copyright.org.au/admin/cms.../151529254450808e3c7dea8.pdf at 1.1 [Last accessed September 30th 2014].
[107] Griffiths J, 'The "three-step test" in European copyright law - problems and solutions' I.P.Q. 2009, 4, 428-457, at 429
[108] Supra Note 106, Page 2.

the work...(2) and do not unreasonably prejudice the legitimate interests of the rightholder (3)'. The IPO concluded the three-step test 'involves a balancing exercise... and allows a balancing between the interests of rights holders and the needs of society'[109]. Whilst there is little case law on the test academics widely agree it is inadequate in balancing these competing interests, 'the three-step test... has developed into a legal instrument capable of challenging the exceptions to copyright, to the detriment of its social function and of a just balance of the interests involved'[110] and that the test is 'not fit to deal with the issue of which usage should exclusively be controlled by the right holder because... the test does not give judges sufficient latitude for considering other interests than the right holders'[111]. Huaiwen contends, 'the three-step test...is paramount to balancing copyright protection against other public policy objectives... this test must possess two-way flexibility to accommodate both copyright holders' and users' interests equally'[112]. As will be seen below, the current three-step test however does not accommodate both interests equally and is firmly weighted in favour of rights holders with copyright interpreted consistently with Locke's view. The inability to safeguard the public interest means exceptions are narrowly construed and are unable to act as effective internal control.

Whilst case law is scarce a *WTO Panel Report*[113] interpreted the three-step test under article 13 *TRIPS*. The first step[114] meant 'an exception or limitation must be

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[109] United Kingdom Intellectual Property Office, 'Taking Forward the Gowers Review of Intellectual Property--Proposed Changes to Copyright Exceptions', (January 2008), Page 7.
[110] Geiger C, 'From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test' E.I.P.R. 2007, 29(12), 486-491, at 491.
[111] Koelman K, 'Fixing the three step test', E.I.P.R. 2006, 28(8), 407-412, at 408.
[112] Huaiwen H, 'Seeking a balanced interpretation of the three-step test - an adjusted structure in view of divergent approaches', IIC 2009, 40(3), 274-308, at 307.
[113] Report of the WTO Panel dated June 15, 2000, United States Art.110(5) of the US Copyright Act, WT/DS160/R

limited in its field of application or exceptional in its scope... it suggests a narrow scope'[115]. The requirement exceptions have a narrow scope was discussed under section 29 *CDPA* which concluded such an approach was not sufficient to defend legitimate uses of copyrighted works. Under the second step the panel discussed rights holders economic interests concluding, 'limitations would be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not enter into economic competition'[116]. The crux of the issue was whether use resulted in competition, 'an exception... rises to the level of a conflict with normal exploitation... if use... enters into economic competition with the ways right holders normally extract economic value'[117]. Whilst this may maintain the right holder side of the balance there is little discussion of the public interest, 'whenever an excepted use deprives a right holder of a realisable commercial gain... the exception will necessarily be curtailed, regardless of any competing public interest consideration'[118]. This results in a firmly one sided interpretation, 'this interpretation...is highly controversial... such an approach could paralyse the application of a copyright exception altogether'[119] and 'the second step becomes a form of "show-stopper", precluding law-makers from taking into account any interests other than private economic interests'[120]. The public interest is given little if any consideration and copyright's social purposes are marginalised. The second step considers copyright a natural right where any interference with exploitation no matter how trivial prevents a defence. Whilst preventing commercial competition is

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[114] Discussion based on Gervais, Supra Note 105.
[115] Supra Note 113, at 6.109
[116] Ibid, at 6.181
[117] Ibid, at 6.183
[118] Supra Note 107, at 441.
[119] Rahmatian A , Copyright and Creativity: The Making of Property Rights in Creative Works, (Edward Elgar Publishing, 2011), Page 139.
[120] Geiger C, Griffiths J and Hilty R, 'Towards a balanced interpretation of the "three-step test" in copyright law', E.I.P.R. 2008, 30(12), 489-496, at 490

correct, the WTO's interpretation disregards those rare occasions where the public interest demands use of copyrighted works even where competition is the result. There may be genuine reasons for such use but this is excluded simply because some form of competition no matter how minimal is observed.[121] Academics have criticised this right holder focused approach, suggesting the public interest must be given due consideration for balance to be achieved, 'there is also a strong argument that a conflict with a normal exploitation... should only be regarded as arising where an author is deprived of an extensive share of his... potential market'[122] and 'an evaluation of "conflict" with "normal exploitation" entails consideration of the legitimate interests of the users and desired public policy'[123].

The third step incorporates the public interest, 'a balance of the competing interests is at present only possible while examining the third step... where analysis addresses whether the use may cause an "unjustified" prejudice to the authors' interests.'[124]. Unfortunately the interpretation of the third step strongly favours right holders and the WTO panel discussed it almost as an amalgamation with the second step. Whilst recognising right holders interests were not limited to economic concerns, 'that is not to say that legitimate interests are necessarily limited to this economic value'[125], the panel concluded 'prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception causes... an unreasonable loss of income to the copyright owner'[126]. Whilst this satisfactorily protects the financial interests of right holders by

[121] For example in France- Mulholland Drive, French Supreme Court, February 28, 2006 (2006) 37 I.I.C. 760, Holland- Ministry Press Reviews LJN AS 8778 and Belgium- Google Inc v Copiepresse SCRL, Court of First Instance of Brussels, February 13, 2007 [2007] E.C.D.R. 5.
[122] Supra Note 107, at 457.
[123] Supra Note 111, at 285.
[124] Supra Note 110, at 490.
[125] Supra Note 113, at 6.227.
[126] Ibid, at 6.229.

facilitating exploitation, it only upholds one side of the balance. The interests of the public are not given sufficient consideration. There may be occasions where copyrighted material legitimately needs to be used even where use may deprive the right holder of income, 'a public interest imperative may lead a government to impose an exception to copyright that may translate into a loss of revenue for copyright holders'[127]. Again we see under the third step a Lockean interpretation of copyright. Burrell when discussing natural rights states, 'understanding of copyright as natural rights of authors [means] exceptions will only be available in very rare circumstances and not merely because to override copyright would further some desirable end.'[128] Under the three-step test we see such sentiments put into practice. The three-step test only allows exceptions to operate in extremely rare circumstances and each step ignores any wider social purpose no matter how desirable. Such an approach has led academics to conclude, 'the framework set out in the [three-step test] resembles the natural law model of broad rights for authors and restrictively defined exceptions.'[129]

The three-step test also cannot ensure balance because, as the words of article 5(5) explicitly state, it solely focuses on 'the legitimate interests of the rightholder'. A three-step is also adopted in relation to other IPR's however the important distinction is that when accessing exceptions for other IPR's, consideration must be given to 'the legitimate interests of third parties'. This means the public interest is given equal consideration alongside right holders, 'exceptions are the most important legal

[127]Gervais D, The TRIPS Agreement and the Doha Round: History and Impact on Economic Development, in Yu P, Intellectual Property and Information Wealth: Issues and Practices in the Digital Age Volume 4 (Greenwood Publishing Group, 2007), at 41.
[128] Supra Note 45, at 201.
[129] Senftlebten M, Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law, (Kluwer Law International, 2004), Page 10

instrument for reconciling copyright with the individual... the Three-Step Test should not take into account only the interests of right-holders. The need to give equal consideration to third party interests is confirmed explicitly in the Three-Step Test as applied in industrial property'[130]. The WTO Panel decision in *Canada- Patent Protection of Pharmaceutical Product*[131] gave a wide definition to the legitimate interests of third parties, 'third parties had to be a reference to those who were adverse in interest to the patent owner... those, not having a property interest in the patent, had an interest in the availability, consumption, cost or production... Thus "third parties" included society at large... consumers... and would-be competitors'[132]. With patents the public interest is given a prominent role equal to that of right holder's economic interests. The three-step test under copyright however overlooks these wider interests, 'while TRIPS may contain built-in public interests provisions, this is only true where patents are concerned. It is not the case with copyright.'[133] The failure to consider the public interest is wholly inadequate when such considerations are essential to achieving a balanced system, 'it seems unwise to pre-set policy in a manner that automatically favours copyright owners. Equally, it seems unjustifiable for users of copyright-protected works to be treated less well than users of patented technology'[134]. The rejection of the public interest has led academics to conclude, 'the increasing prominence of the three-step test exacerbates the perceived concern that this test has lost its balance. It is now merely a one-way flexibility from which only the right holder can

[130] Max Planck Institute and Queen Mary University, 'Declaration: A balanced Interpretation of the Three Step test in copyright law', available at http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf , at 2. [Last accessed September 30th 2014]
[131] Report of the WTO Panel dated March 17 2000, Canada- Patent Protection, WT/DS114/R
[132] Ibid, Page 25.
[133] Supra Note 44, Page 78.
[134] Supra Note 107, at 445.

benefit'[135] and 'the "three-step test" should be redrafted to recognise explicitly the public interest.'[136] To secure a balanced copyright regime the public interest must be given equal prominence in determining the validity of copyright exceptions, the three-step test currently fails to do this.

7.5-Assessing Fairness-the Laddie factors:

In addition to fitting into one of the *CDPA's* categories and fulfilling the three-step test, use must also be shown to be fair. If use is held to be unfair infringement results, 'even if the dealing is shown to be for statutory purposes... the test of fairness remains to be satisfied'[137]. Despite no set definition of what is fair being acknowledged, there is guidance, 'judge by the objective standard of whether a fair-minded and honest person would have dealt with the copyright work in the manner in which [the defendant] did.'[138] Case law has also established several key factors in assessing fairness; is there commercial competition between the works, has the work been made available to the public and the amount and importance of the work used. In *Hubbard v Vosper* Lord Denning stated, 'you must consider first the number and extent of the quotations and extracts.... If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair.'[139] Use of unpublished works is a

[135] Supra Note 112, at 276.
[136] Supra Note 107, at 442.
[137] Waelde C et al, Contemporary Intellectual Property: Law and Policy Third Edition, (Oxford University Press, 2013), at 187.
[138] Stokes S, Art and Copyright, (Hart Publishing, 2003), Page 155
[139] Hubbard v Vosper [1972] 2 QB 84, at 94.

strong indication use is unfair,[140] if the work commercially competes with the original this is likely to be considered unfair[141] and using a substantial part of the work is indicative of unfairness.[142] In *Ashdown* the court supported the three 'Laddie Factors' proposed in The Modern Law of Copyright and Designs.[143] These factors 'were derived from a summary of fair dealing decisions'[144] and the court referred to them as, 'an accurate and helpful summary'[145]. This proposes three hierarchical factors when assessing fairness, 'the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation...the second most important factor is whether the work has already been published... the third most important factor is the amount and importance of the work that has been taken'[146]. This approach however has been criticised as narrowing fair dealing 'it could be argued that the judgment adopts a less flexible approach'[147] and 'the acceptance and usage of the "test" would appear to provide a simplistic view of fair dealing and make it even less likely for fair dealing to be made out.'[148]

Beginning with the second Laddie Factor concerning prior publication, this factor does not achieve a balance as the court itself acknowledged, 'it is necessary for the

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[140] Beloff v Pressdram [1973] RFC 765 and Commonwealth of Australia v. John Fairfax & Sons Ltd (1980) 147 C.L.R. 39
[141] Sillitoe v McGraw-Hill Book Co (UK) Ltd [1983] FSR 545 and Associated Newspapers Group Plc v News Group Newspapers Ltd [1986] RPC 515.
[142] British Oxygen v Liquid Air [1925] Ch. 383 and HRH Prince of Wales v Associated Newspapers Ltd [2006] EWHC 522.
[143] Laddie, P. Prescott, M. Vitoria et al, The Modern Law of Copyright and Designs Third Edition, (Butterworths, 2000), Paragraph 20.16
[144]Griffiths J, 'Copyright Law after Ashdown- time to deal fairly with the public' [2002] IPQ 264, at 248.
[145] Supra Note 81, at 70. Discussion based on this source.
[146] Supra Note 143.
[147]Supra Note 144, at 250.
[148] Sims A, 'Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law Since 1911', Intellectual Property Quarterly, 2, 192-224, at 216

purposes of legitimate public controversy to make use of 'leaked' information.'[149] The interests of right holders are being unduly preferred because copyright is being used to effectively censor what information the public have access to. The use of unpublished copyrighted material not only disseminates knowledge but also performs a vital social function of exposing wrong doing, 'where there is a public interest in the subject-matter of a copyright work, the public interest in disclosure of that work is likely to be greater where the work is unpublished'[150] and 'investigative journalism is vital in supporting the interests protected by Article 10 and much valuable investigative journalism derives from leaks'[151]. The availability of fair dealing should be based on the defendant's interference with the ability of copyright to fulfill its purpose. This purpose is to incentivise the creation of works and economically reward rights holders. Copyright owners however are not using copyright to uphold these purposes but to prevent discussion as *Ashdown* and *Hyde Park* demonstrate, 'using copyright as an indirect tool for maintaining confidences therefore restricts public access to current information'[152]. Copyright is being used to prevent use of copyrighted works where rights holder's economic interests are unimpeded and where the public have legitimate reasons for using work. This is illustrated in *Distillers Co v Times Newspapers*[153] where fair dealing did not apply and the copyright owner was able to stop use of documents that showed the dangers of thalidomide whilst in *Commonwealth of Australia v John Fairfax* copyright prevented publication of documents concerning Australian government

[149] Supra Note 144, at 248.
[150] Ibid, at 253.
[151] Ibid
[152]Masiyakurima P, Fair Dealing and Freedom of Expression, in Torremans P, Copyright and Human Rights (Kluwer Law International, 2008), at 99
[153] Distillers Co. (Biochemicals) Ltd v. Times Newspapers Ltd [1975] 1 All E.R. 41.

defence policy. Copyright's purpose is not to censor what can be said particularly where exploitation is not jeopardized.

The courts have also interpreted the third Laddie Factor, the amount and importance of the work taken, to benefit rights holders. In *Ashdown* the court concluded, 'a substantial portion of the minute was copied and it is reasonable to conclude… the most important passages in the minute were selected for publication'[154]. The problem with such a conclusion was 'neither judgment contained any explicit explanation of why this was so. Indeed, they offered no detailed justification for this finding at all'[155]. In the case there is a strong argument that freedom of expression was not protected and a lengthy reproduction should not preclude fair dealing.. Here the use of the minutes should have been deemed fair because not only could this add to the article's authenticity but as Buxton LJ later acknowledged, 'it is not clear to me why [a person cannot] throw his opponent's own words back in his face or, indeed, into the face of the public'[156]. Griffiths argues *Ashdown* failed to protect freedom of expression, 'in Fressoz v France... the ECHR stated: "in essence, [Article 10] leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility.'[157]It is evident that reproduction of a substantial amount of the minute may have been fully justified in order to protect freedom of expression. The failure of the fair dealing provisions to provide a defence means the court's assertion that the provisions along with other internal mechanisms will, in the vast majority of cases protect a defendant's right to freedom of expression is incorrect. The second and third Laddie factors also

[154] Supra Note 81, at 76.
[155] Supra Note 144, at 254.
[156] Musical Fidelity Ltd v Vickers [2003] F.S.R. 50, at 29.
[157] Supra Note 144, at 254-255

represent a move towards natural law with copyright once again only being limited in rare circumstances, 'the fair use doctrine has played a central role in the move towards a natural-law based protection of copyright'[158].

The final Laddie Factor states if use of copyrighted work commercially competes with the original this will not qualify as fair dealing[159], 'where the purpose is not so much to provide criticism but the same information as the original work and compete with it, the activity cannot be allowed.'[160] This means 'two publications and the likelihood... of their entering into competition with each other is not only a relevant but may be even the determining factor'[161] and 'any use which may compete with the author's exclusive utilization rights are prohibited'[162]. Commercial competition provides a sensible basis to determine fairness and is, 'designed to exclude dealings that are principally motivated by a desire to profit from the original expression.'[163] The courts take a generous approach to competition considering both depriving revenue and securing a competitive advantage unfair. If competition is found, this undermines the entire purpose of copyright from a rights holder perspective and if defended, would shift the balance in favour of the public. Copyright for rights holders must allow them to exploit their works so they are able to earn revenue, 'the ability to enforce copyright to secure a financial return… lies at the core of the right.'[164] Excluding fair dealing because of commercial competition can be seen as truly balancing the competing

[158] Tehranian J, 'Et Tu, Fair Use-The Triumph of Natural-Law Copyright', UC Davis L. Rev. 38 (2004): 465, at 495.
[159] See Ashdown, Sillitoe, Fraser, Hubbard v Vosper and Associated Newspapers v News Group Newspaper
[160] Supra Note 137, at 182
[161] Supra Note 161, at 305
[162] Campbell D and Cotter S, Copyright Infringement (Kluwer Law International, 1998), Page 220.
[163] Supra Note 9, Page 240.
[164] Supra Note 144, at 250.

interests and an effective internal mechanism. The courts have recognised copyright would be redundant if competitive use was permitted, 'they have appropriated the result of labour and to their own use... deprived them of the advantage, which their copyright conferred on them, of being able to publish such a book as the defendants' book at much less labour and expense[165]'. Any fair dealing defence should be based solely on whether the new work commercially competes with a work it has used.

7.6-User Rights-equality with right holders:

In contrast to our jurisdiction, Canada has acknowledged the concept of user rights and robustly defended the public interest and created a system decidedly closer to instrumentalism than natural rights. The Canadian Supreme Court in *CCH Canadian Limited v Law Society of Canada* classified fair dealing as a user right, 'the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence...the fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively'[166]. The recognition of user rights meant, 'user rights are as central to copyright law as author rights. *CCH* thus affirms the irreducible centrality of the public domain'[167]. Classifying fair dealing as a user right means the public and right holders are truly treated as equal and both given equivalent consideration, 'the traditional approach to fair dealing as a mere exception falls short of the appropriate balance. It upholds the authorial domain at the expense of the public. Thus the vision of copyright law as a dual objective system

[165] Supra Note 161, at 305
[166] CCH Canadian Limited v. Law Society of Upper Canada, [2004] 1 SCR 339, Para 48.
[167] Supra Note 5, at 463.

presides over an integration of user rights intended to restore the lost copyright balance'[168] and 'the Court's unambiguous affirmation of the integral role of the public domain in copyright law... regards copyright as a "dual objective" system, of which author and public are equally constitutive'[169]. Most importantly user rights illustrate the rejection of a natural rights approach to fair dealing.

The *CCH* ruling has been supported in subsequent cases[170] and represents a complete redefinition of the role of the public and reassessment of the theoretical basis of fair dealing. In contrast to our jurisdiction copyright is not considered a natural right which may only be limited by extremely narrow exceptions. The public interest through fair dealing is a fundamental consideration equal to author rights that forms a fundamental part of discussion, 'rather than a marginal exception to the norms of Canadian copyright law, the fair dealing defence is an instantiation of the public-author balance'[171]. Fair dealing is not a mere exception to a natural right of the author rather fair dealing is a vital tool in representing the public interest and ensuring copyright's social purpose are achieved. The court ruled classification of fair dealing as mere exceptions undermined the balance in copyright law and restrictive approaches such as those under the *CDPA* were criticised, 'these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights'[172]. The adoption of user rights and the encouragement of a broad encompassing approach is a step towards

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[168] Ibid, Page 467.
[169] Ibid, Page 478.
[170] Society of Composers, Authors and Music Publishers of Canada v Bell Canada, 2012 SCC 36, Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright) 2012 SCC 37 [Alberta] and Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 [CRTC].
[171] Supra Note 47 at 181.
[172] Supra Note 166, Para 54

securing a balanced copyright regime. Users are being given a right, something they are able to use to protect their interests rather than just excusing one particular use. Rights holders are not only given exclusive rights but originality, the idea/expression dichotomy, copyright duration and human rights all favour rights holders. User rights provide the opportunity to counter the excessive protection right holders garner in these other areas, 'by reinforcing the 'copyright as balance' approach and by speaking the language of 'rights'... *CCH v. Law Society* provides an important counterbalance to the maximalist view that tends to direct copyright policy towards the interests of rights-holders to the detriment of other considerations'[173]. The current approach to fair dealing fails in balancing the public and right holders because narrow exceptions are incapable of protecting the public interest and fail to counter right holder protection. User rights however reassert copyright as an instrumentalist tool, the needs of the public form a vital part of any discussion and are considered just as important as owner rights. This could truly bring balance to the copyright system, 'user rights challenges the prevailing wisdom that copyright is to inure to the benefit of rights-holders exclusively and is a fundamental part of a growing awareness of some of the harms that may result from very high standards of copyright protection'[174].

Comparing the Canadian approach to our approach it becomes apparent why a balance is not achieved. Under the three-step test and Laddie factors one must consider the effect on the exploitation of the work and focuses on the impact on right holder's legitimate interests. Whilst this adequately protects right holders interests, it is insufficient in regards to the public. *CCH* recognised the interests of right holders in a

[173] Supra Note 46, at 7
[174] Ibid, at 15.

similar fashion noting many of the same factors, 'the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work'[175]. The court however analysed these factors from the public's perspective. When discussing if alternatives to dealing were possible the court stated, 'if a copyright owner were allowed to license... its work and then point to a person's decision not to obtain a licence as proof that... dealings were not fair, this would extend the scope of the owner's monopoly... in a manner that would not be consistent with the *Copyright Act*'s balance between owner's rights and user's interests'[176]. When discussing the nature of the work it was concluded, 'it is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained.'[177] This is a significantly different approach to *Ashdown* where the work concerned vital political information important to the public interest and where infringement was still found. The courts consistent reference to the public interest and the impact of finding infringement on wider social interests mean that, 'adopting a broad... interpretation of 'fair dealing'... has shifted the locus of analysis away from the pre-eminence of the copyright interest. What is therefore being advanced is equality of treatment of both rights-holders and users in which neither interest takes precedence'[178]. The *CCH* decision gave equal consideration to the interests of both right holders and the public to consider the impact on each group, something discussion under the *CDPA*, the *InfoSoc directive* and three-step test fail to do. *CCH* rejected a natural rights interpretation of fair dealing. Copyright was not considered a natural right that could not be overridden by public

[175] Supra Note 166, Para 53.
[176] Ibid, Para 70
[177] Ibid, Para 71
[178] Supra Note 46, at 6.

policy considerations, instead the idea of copyright being a social bargain involving the interests of both the public and rights holders was upheld. The ability of the Canadian approach to secure a balanced regime is illustrated by *CCH i*tself where fair dealing provided protection even though the research was for commercial purposes, 'research must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts'[179]. This is a marked difference in comparison to how fair dealing is applied under section 29 *CDPA*.

7.7-Reform-reasserting the purposes of copyright:

Extensive academic and political discussion over reforming fair dealing has focused on whether fair use should be implemented as in the US[180]. This involves a general open ended defence not restricted by narrow categories and is an approach where the public interest is given more significance, 'the application of fair use is facilitated by... widely acknowledged public purposes of copyright.'[181] Academic opinion is divided and support is not universal, 'by reputation fair use is notoriously uncertain... at times fair use excuses the wholesale reproduction of copyright'[182] and 'fair use... has been

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[179] Supra Note 166, Para 51

[180] United States fair use is contained under 17 USC §107 and provides a four stage assessment ; 'In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole and (4) the effect of the use upon the potential market for or value of the copyrighted work'.

[181] Supra Note 11, Page 162.

[182] Maskus K, The Economics of Global Intellectual Property and Economic Development, in Yu P, Intellectual Property and Information Wealth: Issues and Practices in the Digital Age Volume 4 (Greenwood Publishing Group, 2007), Page 177.

criticised for creating significant ex ante uncertainty... potential fair users may be deterred from engaging in fair uses.'[183] Such academics argue, 'fair use... remains isolated on an international level: nowhere else has this rule really taken root'[184]. Despite these criticisms there is strong support for the adoption of a more flexible and publicly minded approach, 'the concept of fair use is of more general scope, giving a privilege to other than the owner of a copyright to use copyrighted material in a reasonable manner'[185], 'fair use... remains a highly flexible instrument'[186] and 'the object of the fair use defence is to confirm, not contradict, copyright law's basic goal to put copyright works to their most beneficial use'[187]. Craig concludes fair use closely resembles copyright defences as the British courts originally developed them, 'fair use... more closely reflects the origins and purposes... originally conceived in the eighteenth century jurisprudence... as a way to safeguard, on a case by case basis, the public interest the copyright system is expected to serve'[188]. Providing a general copyright defence provides not only the opportunity to have the public interest at the core of copyright law but also distinguishes copyright from natural law arguments by acquiescing to copyright's social purposes.

In our jurisdiction fair use has been rejected several times, 'the Government does not feel it would be justified in making an amendment which might result in further

[183] Song H.S, New Challenges of Chinese Copyright Law in the Digital Age: A comparative analysis of ISP Liability, Fair Use and Sport Telecasts (Kluwer Law International, 2011), Page 61.
[184], Poullard-Dulian F, The Dragon and the White Whale: Three Steps Test and Fair use, in Takenaka T, Intellectual Property in Common Law and Civil Law (Edgar Elgar Publishing, 2013), Page 162
[185] Davies G, Copyright and the Public Interest (Sweet and Maxwell, 2002), Page 283.
[186] Supra Note 45, Pages 249-250.
[187] Goldstein P, Copyright: Principles, law and practice: Volume two (Brown, 1989).
[188] Supra Note 11, Page 162.

encroachments into basic copyright.'[189] Most recently the *Hargreaves Report* rejected the idea because of the incompatibility with EU legislation, 'significant difficulties would arise in any attempt to transpose US style Fair Use into European law'[190] and 'importing Fair Use wholesale was unlikely to be legally feasible in Europe'[191]. A general defence would not be compatible with the *InfoSoc Directive* however a general copyright defence is not without merit, indeed from the public's viewpoint a general, flexible and open ended defence may help in reaffirming the purposes copyright was created for in the first place. The Whitford Committee appreciated the benefits of such an approach and proposed 'there should be a general exception covering all classes of copyright works and subject matters in favour of 'fair dealing' which does not conflict with the normal exploitation of the work or subject matter and does not unreasonably prejudice the copyright owner's legitimate interests'[192]. The report made clear the reasoning for supporting a general exception, to 'expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and that cause little prejudice to rights' holders abilities to exploit their work.'[193] This liberal interpretation would have greatly benefitted the public however the White Paper, Intellectual Property and Innovation[194] rejected the proposal.

The first step of any reform to fair dealing is that it must be classified as a user right not a mere exception. It is vital the public are treated as equal to rights holders and have an internal mechanism that recognises the fundamental role they play within copyright.

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[189] Reform of the Law relating to Copyright, Designs and Performers' Protection: A Consultative Document, 1981 (Cmnd 8302), Para 6
[190] Supra Note 50, at 5.19
[191] Ibid, at 5
[192] Whitford Committee: Report to Consider the Law of Copyright and Designs, Cmnd. 6732 (1977), Para 676-677
[193] Ibid
[194] White Paper on Intellectual Property and Innovation (Cmnd 9712, 1986)

Academics have discussed user rights with some advocating the introduction of specific rights for users, 'we propose to give specific "Users' Rights" to reproduce and communicate to the public copyrighted works in order to engage in: democratic use, information use, transformative use, personal use and reasonable commercial use'[195]. I however propose no set of categorised user rights and recommend abolishing categories of exceptions and replacing them with a test. Underlying this reform is not only the debate over flexible fair use against narrower fair dealing but what should be the basis for assessing when use of copyrighted works should be protected. The aim of this reform is to ensure the public interest becomes a fundamental element of fair dealing. Academics have supported the abolition of categories of exceptions, 'in a well-balanced copyright system which recognizes user rights on the same level as author rights there would arguably be no need of specific limitations'[196] and 'the fair dealing provisions ought to be amended so as to make it clear that the listed categories... are not exhaustive'[197]. To truly protect user rights and secure a balanced regime, narrow categories of exceptions should be abolished. This is because trying to confine the public interest into narrow categories prevents the full social function of copyright from being considered alongside the rights of copyright owners, 'the fundamental problem is that, no matter how large and liberal the interpretation of a defendant's purposes, not all fair dealings will be subsumable into the specified purposes: there is a limit to how far a "users' rights" approach can stretch the finite meanings of words like "research," "private study," "criticism," "review" and "news reporting'[198].

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[195] Schovsbo J, 'Integrating consumer rights into copyright law: a European perspective', 31 Journal of Consumer Policy 393 (2008), at 405.
[196] Ibid, at 404
[197] Supra Note 5, at 471.
[198] Supra Note 47, at 185.

The proposed test consists of two stages. Both stages aim to allow copyrighted works to be used where the purposes of copyright law are not endangered and prohibit use where the purposes of copyright are undermined. It also aims to embody the role given to the public interest through user rights in Canada. The first stage considers commercial competition with the original work whilst the second stage would defend works that although compete with the original, have an underlying public interest justifying their use. Competition with the original work is fundamental to the three-step test, the *CCH* case, the most important Laddie factor and in case law, 'a use is most likely to be considered permissible if the resulting work does not poach on the commercial value of the original.'[199] Under the first stage if use results in significant commercial competition with the original work then this should be regarded as unfair and no defence should be provided. If there is no commercial competition or negligible competition than use should be permitted. This means the requirement to fall into one of the *CDPA* categories and the other factors discussed in the case law, under the three-step test and the Laddie Factors would be irrelevant. It is unlikely these reforms would conform with *InfoSoc* or the three-step test, discussed in more detail below. The reasoning for solely focusing on commercial competition is that this would reinforce the purposes of copyright. From a rights holder perspective under Anglo-American copyright systems, the purpose of copyright is profit based. Copyright's purpose is to incentivise and reward right holders for creating socially useful works by allowing them to financially exploit their work. If use does not affect the right holder's exploitation, than use is acceptable because the purposes of copyright are not compromised and the balance is not disturbed. Use will only be prohibited where the copyright owner's

[199] Strong W, The Copyright Book: A Practical Guide (MIT press, 1999), Page 187.

ability to exploit the work is diminished. The question therefore becomes how should we interpret commercial competition.

A wide definition should be given to commercial competition so the balance does not shift to far in favour of the public but only competition that significantly hinders a right holders ability to exploit their work should result in infringement. Current case law defines commercial competition liberally. In *IPC Media v News Group Newspapers* a very wide definition was given, 'in copying the work to advance its own competing commercial purposes at the expense of the claimants, the defendant was taking advantage.'[200] In *Fraser* it was concluded 'the exposure of these photographs on this programme would indeed compete seriously with his own exploitation of the photographs in the future'[201]. To partially limit the scope of commercial competition the caveat is that this competition must be significant. Whilst what amounts to significant will be assessed on a case by case basis it has been implemented to allow use where competition is negligible. When assessing if competition is significant, it should be considered; have sales, profit, royalties, licensing fees or customer base been negatively impacted, do they target the same market and how is the original's market share impacted? Such a caveat ensures negligible competition that poses little hindrance to exploiting work will not result in infringement. Academics have supported this suggestion noting several problems with an all encompassing definition of competition, 'here is a risk that even traditionally privileged uses, such as scholarship or parody, could be deemed 'normal exploitations', assuming copyright owners could develop a

[200] Supra Note 76, at 21.
[201] Ibid, at 61.

low transaction cost method of charging for them'[202] and 'the new possibilities offered by digital technology could lead to the understanding... all forms of exploitation of considerable economic or practical importance, encompasses nearly all ways of using and enjoying works of the intellect'[203].

If negligible competition resulted in infringement, this would undermine the benefits the new work could provide to the public particularly as the original work is largely unaffected. Rights holders will not be able to stop the public from using copyrighted works unless their legitimate financial interests are damaged which also prevents infringement being found for frivolous reasons. This would alleviate concerns over right holders using fair dealing for censorship and restricting free speech. Secondly this approach still protects right holders original expression being appropriated for improper purposes which means they are still encouraged to create works because the core purpose of copyright of facilitating exploitation remains fundamental. Looking at the previous cases discussed many would result in the same decision. For example *University of London v University Tutorial Press*, *BBC v Wireless League Gazette Publishing, Green Amps Ltd* and *Sillitoe* would all fail to pass this first stage because the use of copyrighted work significantly competed with the original work and targeted the right holder's main source of revenue. Equally cases such as *Hubbard* would permit the use because there is no commercial competition with the original work. Another advantage is that right holders would not be able to use copyright as a censorship tool to prevent negative press thereby protecting freedom of expression. Right holders, without competition with their work being present, could not prevent use because they are

[202] Ginsburg J, 'Towards Supranational Copyright Law' (2001) 187 RIDA 2, at 14.
[203]Supra Note 129, Page 181.

criticised, exposed or embarrassed. Under these reforms the opposite result would be held in *Distillers Co v Times Newspapers* and *Hyde Park.*[204] In *Distillers Co* the use of the claimant's documents aimed to discuss the litigation over the thalidomide tragedy not to commercially compete with the work. In *Hyde Park* the use of copyrighted materials was aimed at disproving several claims made by Mr. Fayed concerning the death of Princess Diana. The use of copyrighted material did not commercially compete with the original or cause financial loss. These reforms are focused around the purposes of copyright. The interests of rights holders are discussed but wider social interests must be given equal consideration, something current law neglects, 'law-makers may be prevented from taking fully into account important interests... such as access to information and the promotion of competition that are, to some extent, in conflict with the economic interests of a right-holder'.[205]

The second stage will be the point where the public interest is considered and distinguishes these reforms from the approach adopted by the three-step test and the Laddie Factors where the public interest is given no explicit recognition. This second stage also provides the opportunity to implement a reformed public interest defence. Chapter four concluded cases such as *Hyde Park* and *Ashdown* created an extremely narrow and unworkable public interest defence. This transpired because despite a broader interpretation in *Ashdown*, the public interest is still unlikely to override copyright with circumstances involving a legitimate public interest still resulting in infringement. Under this second stage, if commercial competition is found, failing the

[204] It would however be likely in these cases that use of the copyrighted materials would still be prohibited because of violation of other legal doctrines because of how the materials were obtained, for example breach of confidence.
[205] Supra Note 120, at 490.

first stage, the second stage could still permit use even though they compete with the original because they involve a legitimate public interest justifying use of the work. This second stage must be limited in nature or the interests of right holders would be undermined. No exact definition can be provided of what type of use will be in the public interest and should remain flexible to consider the specific facts of each case. We can however go back to the purposes of copyright for guidance as to what is legitimately in the public interest. Copyright for the public must ensure knowledge is disseminated, copyrighted works can be accessed and that copyright does not censor what information can be put before the public. Particularly important at this junction is the dissemination of knowledge and freedom of expression. Copyright should not be used to stop the disclosure of vital information to the public or to unduly prevent works from being disseminated where they provide an appreciable benefit to the public and further copyright's aims.

Under this second stage the positive effect on the balance between right holders and the public is clear. If we consider MacQueen's two examples referred to earlier of academics who would earn revenue from their academic work. Academic work uses and discusses copyrighted works and there is a strong argument it would fail the first stage because it competes with the original as they share the same market and could very easily deprive the original work of revenue. Under the second stage however this use would be defended because the purposes of copyright are being promoted. Academic work allows knowledge to be disseminated and promotes educational advancement amongst the wider public with original academic works being challenged, revised and advanced. When use of copyrighted works operates to further and enhance copyright's purpose, it must be acceptable for a balance to be achieved. Looking at the case law

discussed the advantages of these reforms can be illustrated further. If the two works compete with minimal public benefit the second stage would not be fulfilled as this would be far too generous and undermine the position of right holders. Therefore neither stage would defend cases such as *Sillitoe* or *University Tutorial Press* where the benefits to the public are minimal and competition is extensive. In the *University Tutorial Press* case whilst the use of exam papers disseminated knowledge, the contents were already available and the competition between the works was so far-reaching a minimal public benefit cannot justify such abuse of copyright. Equally in *Sillitoe* whilst the publication of the study notes may have aided learning, the interference with the copyright owner's ability to exploit their work was so intrusive the second stage here should not provide a defence.

This second stage however can make a noteworthy change in cases like *Ashdown*. Copyright's purpose is not to prevent the public from accessing information relating to matters in the public interest. Matters in the public interest should trump a minimal amount of competition on the right holder's ability to exploit this work. In *Ashdown* it was held the article competed with Mr. Ashdown's memoirs 'the publication in the Sunday Telegraph destroyed a part of the value of the memoirs... equally we are in no doubt that the extensive quotations of Mr Ashdown's own words... will have been of significant commercial value in enabling the Sunday Telegraph to maintain, if not to enhance, the loyalty of its readership.'[206] One however can question whether this can justify the failure of fair dealing. Firstly whilst the works competed, the level of competition was not significant because his memoirs covered a wide range of events

[206] Supra Note 81, at 72

covering almost a decade not just one meeting. The article competed with a tiny proportion of his memoirs and also the two works had different markets and audiences, the article appealing to casual readers and the book to political followers. Also the newspaper by highlighting the significance of the meeting could aid the exploitation of Mr Ashdown's memoirs. The article could invoke public curiosity in the event and encourage the public to read about his perspective on those events. Secondly there is a very strong legitimate public interest in this case which would justify the second stage defending the use of the minutes. The meeting concerned the composition of the government and possible coalition, the public interest in such matters is indisputable because such matters affect the governing of the entire country. Therefore given such a commanding public interest in the information coupled with the questionable extent of competition between the two works, such use should be deemed fair.

If we consider the compatibility of these reforms with copyrights international obligations it is possible they may conflict with the *Infosoc Directive* and the three step test. Firstly the *Infosoc* directive limits fair dealing exceptions to those prescribed under articles 5(1) and 5(2), 'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases'. Whilst recital 32 states 'this Directive provides for an exhaustive enumeration of exceptions and limitations'. Member States cannot introduce any other exceptions other than those listed, 'Article 5 of the InfoSoc Directive provides an exhaustive list of limitations of the exclusive rights of right-holders'[207] and 'Article 5 contains an exhaustive list of exceptions... Member States are not free to introduce new ones'[208]. The proposed

[207] Abovyan A, Challenges of Copyright in the Digital Age, (Herbert Utz Verlag, 2014), at 90.
[208] Savin A, EU Internet Law, (Edward Elgar Publishing, 2013) at 133

reforms however do not provide any closed list of exceptions and will apply to other scenarios outside the permitted exceptions under article 5 and the *CDPA*. In addition to the issue of specific exceptions, the InfoSoc Directive also only allows some exceptions to operate in non commercial circumstances[209]. The first step of the proposed reforms is compatible with this requirement because it prevents use of work for commercial purposes. The second step of the proposed reform, allowing commercial use to be defended if a public interest justifies the use of the work, could conflict with article 5 particularly those articles only apply to non commercial uses. If we now consider the compatibility of the proposed reforms with the three step test it is likely the proposed reforms would not conform. If we refer back to the WTO panel report for guidance on how to interpret the three step test, the proposed reforms conform with the first step. The proposed reform will only apply in certain special cases and in the words of the WTO Panel will be limited in its field of application. The reforms however could possibly conflict with the second step. The WTO panel stated conflict with normal exploitation arises if use enters into competition with the original work or how right holders extract economic value. The first stage of my reform conforms to the second step as use of copyrighted work will not be permitted if commercial competition transpires. The second stage of the proposed reform conflicts with the second step because it can defend commercial use which competes with the original. This would however be justified because the second step was criticised above for being too narrow and a form of 'show-stopper'. The second step prevents any limitation if competition results without given due to regard to any wider social concerns. The second stage of my reform operates where there is a legitimate public interest justifying use of the work,

[209] For example articles 5(3)(A), 5(3)(B), 5(3)(J) only apply to non commercial uses.

something the second step does not consider. Finally the WTO Panel stated the legitimate interests of right holders were unreasonably prejudiced if they incur an unreasonable loss of income. It is questionable whether my reforms conform to this third step. The first stage of my reform is compatible with the third step because economic competition is not defended and right holder income in unaffected. The second stage of my reform however may in rare situations limit right holder income however the extent of competition is a key factor. If a public interest is involved justifying use, use will not be permitted under the second stage if competition is extensive. Therefore if a right holder were to lose a significant amount of their income it is unlikely the second stage of my reforms would provide a defence.

Therefore my proposed reforms will not conform to article 5 or the second step of three step test (and rarely the third step) but given the criticism of both of these above this could be advantageous to the balance between the public and right holders. Article 5 and the three step test were both criticised for being too narrow and favouring the interests of right holders above the public interest, my reforms whilst not compatible can overcome these existing shortcomings and enable a more balanced approach. The overall aim of suggested reforms is to reassert copyright as an instrumentalist tool socially rooted in the public interest. From the research it is evident this statement is correct. Fair dealing in addition to other components of copyright law including originality, the idea/expression dichotomy and human rights law have created a copyright system premised on natural rights principles. Fair dealing in particular has been influenced by natural law. The three-step test, *CDPA* and *InfoSoc Directive* have created an extremely narrow system of exceptions where user rights are not recognised in order to protect copyright. Public policy concerns, social interests and legitimate uses

of copyright are deemed inferior to authors copyright and insufficient to limit copyright unless there are exceptional circumstances. The reforms suggested aim to reverse the propensity of fair dealing to follow a natural rights approach and create a system where users have rights that enable them to use copyrighted works when appropriate and where the purposes of copyright are upheld.

7.8-Conclusion:

The fair dealing provisions are asserted as being 'copyright's central tool for securing the public domain and protecting the intellectual commons'[210] and 'strikes directly at the issue of the appropriate balance between the rights of creators and the public interest.'[211] The failure of other internal measures to counter excessive copyright protection meant strong fair dealing provisions were vital to creating a balance, 'systemic weaknesses of most copyright exceptions including the enervating doubts surrounding the public interest defence, the low standard of originality'[212]. Current fair dealing provisions however interpret copyright as a natural right. Fair dealing is construed narrowly and in favour of right holders. Fair dealing is treated as a mere exception not as a user right equal in stature to copyright owner's rights. The assertion fair dealing secures a balanced copyright regime and also discharges concerns over copyright restricting freedom of expression is illusionary. The fair dealing provisions fail to give the public interest adequate representation within copyright law which

[210]Macmillan F, Public interest and the public domain in the era of corporate dominance, in Anderson B, Intellectual Property Rights: innovation, governance and the institutional environment (Edward Elgar Publishing, 2006), Page 62.
[211] UNCTAD-ICTSD, Resource Book on TRIPS and Development, (Cambridge University Press, 2005), Page 186.
[212] Masiyakurima P, 'The futility of the idea/expression dichotomy in UK copyright law' IIC 2007, 38(5), 548-572, at 549.

means right holders are faced with few restraints on their rights. The reforms identified aim to provide users with a strong mechanism that can be used to enforce their legitimate interests. The two stage test suggested aims to incorporate the broad definition attributed to user rights in Canada to ensure the public are a fundamental part of any discussion alongside right holder's economic interests. The test would allow the purposes of copyright to be at the heart of any discussion concerning use of copyrighted material. When the purposes of copyright are undermined infringement would be found, if the purposes of copyright are not impacted upon and are upheld then users will be protected. This is desirable because the interests of right holders and the public are both given equal weight unlike the current law which is inclined to give prominence to right holder's economic interests whilst sidelining the public interest.

Wordcount-13,392 (16,104 including footnotes)

8. Chapter Eight-PhD Conclusion

8.1-Introduction:

This study set out to explore the concept of balance in copyright law. The idea that copyright has a dual purpose and has to provide for the interests of both rights holders and the public. The research focused on instrumentalism, the proposition that copyright law is a tool used to secure the dual purpose determined by the *Statute of Anne*[1] and *Donaldson v Beckett*[2]. Copyright law must incentivise innovation amongst right holders whilst facilitating the dissemination of knowledge to the public. Numerous internal and external mechanisms are used to secure this dual purpose including human rights,the public interest defence,originality,the idea/expression dichotomy and the fair dealing provisions. The research aimed to assess the ability of copyright law to achieve these purposes with a focus on these key mechanisms and their capacity to secure a balanced copyright regime. Such research was necessary firstly because copyright law has been unable to adapt to the digital age. The current copyright crisis has not only undermined the effectiveness of the entire system but governments have been unable to solve the crisis. Secondly the research was merited because copyright has continuously expanded for rights holders whilst becoming more restrictive for users. Rights for owners, copyright duration, subject matter protected and human rights law have all expanded without reciprocal protection for the public or suitable discussion of the effect on the public interest. Research was also necessary because from the public's perspective, copyright has become more restrictive in terms of their ability to use copyrighted work and the scope of the public domain.

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[1] Copyright Act, 1710 (Statute of Anne), 8 Ann. c.21
[2] Donaldson v. Beckett (1774) 4 Burr. 2408

The study began by focusing on copyright history, focusing on how the concept of balance originated and what the traditional role of the public and right holders in copyright law should be. Subsequent chapters discussed key components of copyright law. An analysis found them profoundly ineffective. Not only is a balance not achieved but these components strengthen right holders within copyright law at the expense of the public. This ineffectiveness has resulted because the purposes copyright should work towards have been abandoned. Whilst the interests of rights holders are adequately protected the same cannot be said of the public. The purposes of encouraging learning, disseminating knowledge and the notion of a robust public domain have been marginalised. The research is evidence of copyright law moving from an instrumentalist based system to a legal framework resembling a Lockean natural rights approach. Coupled with a right holder focused interpretation of the aforementioned components, copyright law was found to protect right holders economic interests above the needs of the public. The instrumentalist view of copyright developed in *Donaldson* considered copyright a tool used to secure a social bargain. Copyright provided right holders with the best incentive to create socially useful works for the benefit of wider society. Under this approach the public were established as a fundamental part of copyright and their interests had to be given equal consideration alongside right holders. This approach however is no longer a realistic view of contemporary law as the research illustrated because the public interest has become peripheral.

8.2-Thesis findings:

The research concluded current copyright law fails to achieve a balance between right holders and the public resulting in a wholly ineffective system. The failure to achieve a balance can be attributed to two main reasons. Firstly the interests of rights holders are favoured in the drafting of law and secondly the interpretation of law frequently supports rights holders economic interests at the expense of copyright's social function. This is evidenced by originality and the idea/expression dichotomy, both of which provide no effective barrier to copyright protection. Originality even given the new intellectual creation standard favours rights holders because originality is not concerned with any standard of novelty. It simply requires the work constitutes the authors own intellectual creation. Originality is easy to satisfy and does little to assess a works contribution to knowledge. This has resulted in the protection of trivial and highly derivative works. A balance cannot be achieved when almost any work no matter how trivial or derivative gains protection. This withdraws the work from public access and means basic information is copyrighted and very little is added to society's knowledge. This not only negatively impacts future innovation but also prevents access to fundamental information. In combination with expanding copyright duration the public domain is becoming narrower and with less resources. The idea/expression dichotomy also favours the interests of rights holders by its inability to distinguish between ideas and expression. Basic ideas which the public need access to are currently protected and are unavailable even though they represent the basic building blocks of creativity. Ideas have been narrowly defined and remain legally uncertain which only acts to diminish the public domain, reduce creativity and create monopolies over basic information.

In relation to human rights the research found human rights instruments strongly support right holders interests with the tendency to interpret their rights as human rights alongside traditional forms of property. The ECtHR classified copyright as a property right under article 1 of the First Protocol despite fundamental differences with tangible property. This classification has eroded any balance because it ignores the social function inherent in copyright law and the differences between rivalrous and non-rivalrous property. Article 17 of the *CFREU* has also placed copyright alongside traditional forms of property and protected intellectual property in its own right. The public interest defence also prevents a balance from being achieved because the defence's limited scope is incapable of providing adequate protection to those who need to use copyrighted material for legitimate reasons. The public interest defence even after *Ashdown v Telegraph*[3] is an extremely narrow doctrine. *Ashdown* only minimally liberalised the defence's scope. A low standard of originality, an ineffective idea/expression dichotomy and classifying copyright as a human right means a balance cannot be achieved. The interests of rights holders are treated as paramount and given excessive protection that does not give adequate deference to the public interest. In addition to rights holders being given greater protection, the research also found a balance cannot be achieved because the public interest is being further encroached upon. The interests of the public are narrowly drafted and interpreted restrictively. The right to freedom of expression under Article 10 *ECHR* has been interpreted very narrowly particularly Article 10(2). This has meant where it was necessary to use copyrighted material in order to exercise the right to freedom of expression, no defence was found. Copyright regularly fulfils the conditions under Article 10(2) meaning rights

[3] Ashdown v Telegraph [2002] R.P.C 5.

holders are able to easily restrict the public's right to freedom of expression.. The court in *Ashdown v Telegraph* recognised rare circumstances where freedom of expression could limit copyright however this was held to occur only in exceptional situations. Recent ECtHR and CJEU cases such as *Ashby Donald*[4] and *PirateBay*[5] also recognised freedom of expression could limit copyright although this did not appear to apply to commercial speech. The precise circumstances of when copyright must yield to freedom of expression must be further explored in future decisions and it will be vital that freedom of expression is protected.

The research finally concluded the fair dealing provisions are inadequate and ineffective despite recent expansion. The provisions do not provide the public with adequate access to copyrighted material because of the implementation of narrow exceptions under T*he Information Society Directive*[6] which limits the number of possible defences. The fair dealing provisions are ineffective because not only are the exceptions drafted narrowly but they have also been interpreted restrictively. This has resulted in infringement being found where use of copyrighted work in no way competed with the original work or affected the right holder's economic revenue. This has resulted in infringement even where the public have legitimate reasons for using the copyrighted work particularly where the work is of political value. The research concluded the failure to define fair dealing as a user right is a significant barrier to achieving balance. Users are provided with narrow exceptions that operate in limited circumstances rather than being given equal protection to the rights given to copyright

[4] Ashby Donald and others v. France, App No 36769/0810, (2013), the case has not yet been translated into English.
[5] Fredrik Neij and Sunde Kolmisoppi v Sweden, App No. 40397/12, (2013)
[6] Copyright and related rights in the Information Society Directive 2001/29/EC

owners. Whilst fair dealing achieves balance in limited areas such as section 30 *CDPA*, in other areas balance is completely unachievable. Section 29 *CDPA* excluding commercial research poses a significant problem for the purpose of promoting learning. A valuable source of knowledge is not protected and incentives to create work are removed. The three-step test also prevents a balanced copyright regime because its requirements focus on rights holder's economic interests. . The three-step test places the interests of right holders as paramount with little consideration of the public interest. The public interest is omitted from the drafting of the three-step test in regards to copyright but not other intellectual property rights. Overall the fair dealing provisions fail to bring balance to copyright law. The thesis concluded fundamental components of copyright law are unsuccessful in performing their intended tasks of countering the exclusive rights given to copyright owners. As the research illustrated each component of the copyright regime is tailored to favour right holders. These various components originally designed to represent the interests of the public are unfit for this purpose.

8.3-Contribution to Copyright Discussion:

Copyright law is currently facing its biggest crisis in its three hundred year history. The very idea of copyright itself is in danger with some academics calling for abolition, pirate political parties being founded and political protests over legal measures against piracy. Right holders are unable to effectively exploit their work because they lose a significant proportion of potential income because of piracy. This consequently negatively impacts upon the public because less works are being created for their consumption with the creative industries outputting less. The resources in the public

domain are becoming more limited and strict copyright law impedes the public from accessing works. It is hoped this research has shown that two fundamentally opposed groups with conflicting requirements from copyright law can effectively be reconciled through an instrumentalist approach. The research has used instrumentalism to assess copyright's effectiveness by its ability to fulfil the purposes we want it to achieve. The idea that copyright is a social bargain and that copyright law is a tool used to achieve a balance has underpinned this research. The contribution to knowledge has firstly been to use instrumentalism to conduct a fundamental reassessment of contemporary copyright law and use these principles as guidance for reform. Reform has revolved around the theories of Bentham, Dewey, James and the consequences of current law on instrumentalist goals. The research assesses the various components of copyright law by their impact on the balance between rights holders and the public. Copyright's components must all operate on the basis of securing the purposes copyright is meant to achieve. The reforms suggested contribute to the copyright discussion by reformulating each component so that each adequately represents the public interest alongside the economic interests of rights holders. The reforms suggested including shorter duration,basing fair dealing on competition with the original work,reforming originality,the public interest defence,adapting the idea/expression dichotomy and recognising user rights all aim to promote the purposes we want to achieve from copyright law. When taken as a whole each component works together to create a balanced system. This challenges the current view particularly by the judiciary that these components are already adequate in securing copyright's dual function.

The contribution to the copyright discussion from this research is not limited to legal reforms. It is also hoped this research will impact theoretical discussion. The current

inclination in copyright law is the primacy of rights holder's economic interests and a move towards natural rights. Whilst the idea copyright is a balance is regularly cited, in practice it is rarely considered in copyright judgements or reform. By using the idea of instrumentalism this research contributes to the discussion by showing balance can only be achieved and an effective system created by ensuring the purposes of copyright remain the fundamental basis of copyright law. Constant copyright expansion has meant contemporary copyright law resembles a Lockean approach. Whilst not implemented in every aspect of copyright law, contemporary law is deviating from instrumentalism towards natural rights consistent with Lockean principles. Several factors illustrate a fundamental shift towards natural rights; excessive duration,classification of copyright as a human right, copyright overriding freedom of expression,protection of a variety of trivial works and narrow exceptions rather than user rights. The research contributes to the discussion by illustrating how this theoretical shift has negatively impacted upon the public and how an instrumentalist approach can remedy the situation. The research contributes by showing how instrumentalist principles can be applied to contemporary copyright law. The research provides a framework for reform to ensure the public are given an equal position to rights holders. It also contributes to copyright discussion by creating an entire system focused around providing for the needs of both groups where instrumentalism guides the discussion.

The research contributes to copyright discussion because whilst academics discuss copyright's history, this is not then used to reform modern copyright law. The majority of these sources provide an overview of copyright history focusing on the relationship

between rights holders and the public but do not go further. Rose[7] and Lowenstein[8] focus on the development of the role of the author whilst Feather[9], Pollard[10] and Plant[11] concentrate on the role of the book trade and Timperley[12] discusses copyright history from the perspective of printers. Rose, Lowenstein, Marshall[13], Zemer[14] and Saunders[15] all have specific chapters on right holders however provide no corresponding detailed discussion of the public. This research not only focuses on the public but goes a step further by using copyright's founding principles to reform modern copyright law. Whilst academics have focused on the role of the public in copyright, this research challenges the notion that the concept of balance is unhelpful in copyright reform. Patry[16] has also sought to reform copyright law and discussed the role of the public. Unlike the majority of other authors he devoted a chapter to the public interest. In this chapter however he suggests no specific reforms in relation to the public, only stating, 'the public interest need not be so narrowly considered'[17]. Despite discussing the role of the public, my work can be distinguished from Patry because he does not have copyright's dual purpose as underlying his suggested reforms. Most importantly my research implements reforms based on the idea of balancing rights holders and the public. Patry however is dismissive of the concept referring to, 'the fallacy of the

[7] Rose M, Authors and owners: the invention of copyright (Harvard University Press, 1995).
[8] Lowenstein J, The Author's Due: printing and prehistory of copyright (University of Chicago Press, 2002).
[9] Feather J, A History of British Publishing second edition, (Routledge, 2006), Feather J, Publishing, Piracy and Politics (Continuum International Publishing Group, 1994), Feather J, The Provincial Book Trade in Eighteenth Century England (Cambridge: Cambridge University Press) Feather J, 'Authors, Publishers and Politicians: The History of Copyright and the Book Trade', European Intellectual Property Review, 12 (1988), 377-80 and Feather J, The Book Trade in Politics: The Making of the Copyright Act of 1710 Publishing History, 8 (1980), 19-44.
[10] Pollard M, Dublin's Trade in Books 1550-1800 (Oxford: Clarendon Press, 1989).
[11] Plant M, The English Book Trade. An Economic History of the Making and Sale of Books Second Edition. (George Allen & Unwin Ltd, 1965)
[12] Timperley C, A dictionary of printers and printing; with the progress of literature; ancient and modern (H. Johnson, 1839).
[13] Marshall L, Bootlegging: romanticism and copyright in the music industry, (SAGE, 2005).
[14] Zemer L, The idea of authorship in copyright law (Ashgate Publishing, 2007).
[15] Saunders D, Authorship and Copyright (Routledge, 1992).
[16] Patry W, How to Fix Copyright (Oxford University Press, 2011).
[17] Ibid, at 132.

balance metaphor'[18] and the concept provides no basis for his work. This research not only provides an opposing view to Patry but seeks to show the concept of balance can create a workable system.

The overall contribution to the copyright discussion this research aims to provide is a framework for a balanced copyright regime. A framework which is more public focused than the current system is, where rights holder's interest are an important concern but not paramount. Whilst it is undoubtedly clear a balanced copyright regime does not currently exist, the question facing legislators, academics and the public is where does copyright go from here? The reforms suggested hope to answer this question. The reforms represent a series of targeted changes within key copyright components that aim to ensure both the public interest and right holders' interests are provided for. The contribution to copyright discussion resides in these reforms that all have the founding principles of copyright law as their basis. It is hoped the discussion will mark a change in the way in which we interpret and formulate copyright. The research will hopefully make us question the expansionary nature of copyright, how that expansion impacts on the public and how the expansion advances the underlying purposes of copyright. Does copyright reform promote or hinder creativity, learning, exploitation, the dissemination of knowledge, access to works or negatively impact the scope of the public domain. The reforms this research discusses are the beginning of such an approach where copyright is reassessed with both the interests of right holders and the public as it fundamental guiding principles.

[18] Ibid, at 134.

8.4-Future Research:

With copyright at a crossroads where the systems very future is in question, it remains to be seen how policymakers will react. Copyright is simply failing to perform its intended role of protecting intellectual creations and it will continue to do so without reform. Future research needs to focus on the reaction to the copyright crisis as well as how future reform to copyright will impact on both right holders and the public. Particular regard should be given to the instrumentalist basis copyright law was founded upon. One area of future research will be the effect of measures against piracy such as the Digital Economy Act 2010[19] with the implementation of a three strikes system and blocking injunctions. Future research needs to consider the ability of the measures to achieve their purpose of combating piracy as well as their effect on human rights. Future research must also discuss alternatives to the stringent and expansionary measures that have consistently been enacted at national and international level. Future research needs to question the merits of further expansion and whether harsh policies damage the public interest for very little benefit. Embracing the principles copyright was founded upon and ensuring a balanced copyright regime must be the starting point of any future reforms. Other areas for future research will not only be limited to the legal sphere but will also involve the creative industries and how they can adapt to the digital age through different methods of distribution and making works more accessible to users.

[19] Digital Economy Act 2010, 59 Eliz. 2 c.24

8.5-Conclusion:

Despite the assertion in theoretical and policy debates that copyright has a dual purpose and works as a balance between the competing interests of rights holders and the public, in practice the research has shown this is not the case. The instrumentalist principles copyright was founded upon have over time been eroded with the balance firmly favouring the interests of rights holders. The social function of copyright and its associated objectives of promoting learning and disseminating knowledge have become secondary with a noticeable shift towards natural rights. The research provides a valuable contribution to the debate by ensuring the dual purpose of copyright law remains the fundamental basis of key components of the copyright system. The study is significant because copyright is in crisis. There is widespread circumvention of the law to the detriment of all parties, public opposition is extensive and the entire concept of copyright is being questioned. It is hoped a fundamental reassessment of copyright based on its founding principles can counter the prevailing view that the solution is to expand copyright further. Future copyright reform must not only recognise the public have legitimate interests in copyright but steps have to be taken to ensure that these interests are in practice incorporated as equal to the economic interests of rights holders. If the copyright system continues to deviate from its founding principles and continues to expand without considering the impact on the public or trying to regain public support, the crisis will continue unabated and entire concept of copyright will have no future.

Wordcount

Wordcount-3,196 (3,474 including footnotes)

- PhD Abstract-482
- Chapter One-PhD Introduction- 2,490 (3,179 including footnotes)
- Chapter Two-Theoretical Framework-5,739 (7,125 including footnotes)
- Chapter Three- The Rise and Fall of Copyright Law - 11,739 (14,377 including footnotes)
- Chapter Four- Copyright and Human Rights: An Unhappy Marriage- 15,291 (18,665 including footnotes)
- Chapter Five- Originality: the wrong standard - 10,910 (12,723 including footnotes)
- Chapter Six- Ideas and Expression- the abandoned dichotomy- 12,144 (14,293 including footnotes)
- Chapter Seven- Copyright Exceptions- Unfair Dealing with the Public- 13,392 (16,104 including footnotes)
- Chapter Eight- PhD Conclusion- 3,196 (3,474 including footnotes)

Total-74,901 (89,940 including footnotes)

Appendix A

The Statute of Anne 1710 8 Anne c.19

An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

I. Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted, and be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same;

II. That from and after the tenth day of April, one thousand seven hundred and ten, the author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books, share or shares thereof, or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said tenth day of April, and no longer; and That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer; and That if any other bookseller, printer or other person whatsoever, from and after the tenth day of April, one thousand seven hundred and ten, within the times granted and limited by this act, as aforesaid, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any such book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such book or books, without such consent first had and obtained, as aforesaid: then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copy thereof, who shall forthwith damask, and make waste paper of them; and further, That every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of her Majesty's courts of record at Westminister, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed. II. And whereas many persons may through ignorance offend against this act, unless some provision be made, whereby the property in every such book, as is intended by this act to be secured to the

proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further enacted by the authority aforesaid,

That nothing in this act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the title to the copy of such book or books hereafter published shall, before such publication, be entered in the register book of the company of stationers, in such manner as hath been usual, which register book shall at all times be kept at the hall of the said company, and unless such consent of the proprietor or proprietors be in like manner entered as aforesaid, for every of which several entries, six pence shall be paid, and no more; which said register book may, at all seasonable and convenient time, be resorted to, and inspected by any bookseller, printer, or other person, for the purposes before-mentioned, without any fee or reward; and the clerk of the said company of stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding six pence.

III. Provided nevertheless, That if the clerk of the said company of stationers for the time being, shall refuse or neglect to register, or make such entry or entries, or to give such certificate, being thereunto required by the author or proprietor of such copy or copies, in the presence of two or more credible witnesses, That then such person and persons so refusing, notice being first duly given of such refusal, by an advertisement in the Gazette, shall have the like benefit, as if such entry or entries, certificate or certificates had been duly made and given; and that the clerks so refusing, shall, for any such offence, forfeit to the proprietor of such copy or copies the sum of twenty pounds, to be recovered in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege or protection, or more than one imparlance shall be allowed.

IV. Provided nevertheless, and it is hereby further enacted by the authority aforesaid, That if any bookseller or booksellers, printer or printers, shall, after the said five and twentieth day of March, one thousand seven hundred and ten, set a price upon, or sell, or expose to sale, any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable; it shall and may be lawful for any person or persons, to make complaint thereof to the lord archbishop of Canterbury for the time being, the lord chancellor, or lord keeper of the great seal of Great Britain for the time being, the lord bishop of London for the time being, the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, the lord chief baron of the court of Exchequer for the time being, the vice chancellors of the two universities for the time being, in that part of Great Britain called England; the lord president of the sessions for the time being, the lord chief justice general for the time being, the lord chief baron of the Exchequer for the time being, the rector of the college of Edinburgh for the time being, in that part of Great Britain called Scotland; who, or any one of them, shall and have hereby full power and authority, from time to time, to send for, summon, or call before him or them such bookseller or booksellers, printer or printers, and to examine and enquire of the reason of the dearness and inhauncement of the price or value of such book or books by him or them so sold or exposed to sale; and

if upon such enquiry and examination it shall be found, that the price of such book or books is inhaunced, or any wise too high or unreasonable, then and in such case the said archbishop of Canterbury, lord chancellor or lord keeper, bishop of London, two chief justices, chief baron, vice chancellors of the universities, in that part of Great Britain called England, and the said lord president of the sessions, lord justice general, lord chief baron, and the rector of the college of Edinburgh, in that part of Great Britain called Scotland, or any one or more of them, so enquiring and examining, have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book and books, from time to time, according to the best of their judgments, and as to them shall seem just and reasonable; and in case of alteration of the rate or price from what was set or demanded by such bookseller or booksellers, printer or printers, to award and order such bookseller and booksellers, printer and printers, to pay all the costs and charges that the person or persons so complaining shall be put unto, by reason of such complaint, and of the causing such rate or price to be so limited and settled; all which shall be done by the said archbishop of Canterbury, lord chancellor or lord keeper, bishop of London, two chief justices, chief baron, vice chancellors of the two universities, in that part of Great Britain called England, and the said lord president of the sessions, lord justice general, lord chief baron, and rector of the college of Edinburgh, in that part of Great Britain called Scotland, or any one of them, by writing under their hands and seals, and thereof publick notice shall be forthwith given by the said bookseller or booksellers, printer or printers, by an advertisement in the Gazette; and if any bookseller or booksellers, printer or printers, shall, after such settlement made of the said rate and price, sell, or expose to sale, any book or books, at a higher or greater price, than what shall have been so limited and settled, as aforesaid, then, and in every such case such bookseller and booksellers, printer and printers, shall forfeit the sum of five pounds for every such book so by him, her, or them sold or exposed to sale; one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety to any person or persons that shall sue for the same, to be recovered, with costs of suit, in any of her Majesty's courts of record at Westminster, by action of debt, bill, plaint or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance shall be allowed.

V. Provided always, and it is hereby enacted, That nine copies of each book or books, upon the best paper, that from and after the said tenth day of April, one thousand seven hundred and ten, shall be printed and published, as aforesaid, or reprinted and published with additions, shall, by the printer and printers thereof, be delivered to the warehouse keeper of the said company of stationers for the time being, at the hall of the said company, before such publication made, for the use of the royal library, the libraries of the universities of Oxford and Cambridge, the libraries of the four universities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the faculty of advocates at Edinburgh respectively; which said warehouse keeper is hereby required within ten days after demand by the keepers of the respective libraries, or any person or persons by them or any of them authorized to demand the said copy, to deliver the same, for the use of the aforesaid libraries; and if any proprietor, bookseller, or printer, or the said warehouse keeper of the said company of stationers, shall not observe the direction of this act therein, that then he and they so making default in not delivering the said printed copies, as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of five pounds for every copy not so delivered, as also the value of the said printed copy not so delivered, the same to be

recovered by the Queen's majesty, her heirs and successors, and by the chancellor, masters, and scholars of any of the said universities, and by the president and fellows of Sion College, and the said faculty of advocates at Edinburgh, with their full costs respectively.

VI. Provided always, and be it further enacted, That if any person or persons incur the penalties contained in this act, in that part of Great Britain called Scotland, they shall be recoverable by any action before the court of session there.

VII. Provided, That nothing in this act contained, do extend, or shall be construed to extend to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas; any thing in this act contained to the contrary notwithstanding.

VIII. And be it further enacted by the authority aforesaid, That if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done any thing in pursuance of this act, the defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath.

IX. Provided, That nothing in this act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

X. Provided nevertheless, That all actions, suits, bills, indictments or informations for any offence that shall be committed against this act, shall be brought, sued, and commenced within three months next after such offence committed, or else the same shall be void and of none effect.

XI. Provided always, That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

Appendix B

Copyright, Designs and Patents Act 1988 c.48

Section 1 Copyright and copyright works.
(1)Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—
(a) original literary, dramatic, musical or artistic works

Section 16 The acts restricted by copyright in a work.
(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom-
(a) to copy the work (see section 17);
(b) to issue copies of the work to the public (see section 18);
(ba) to rent or lend the work to the public (see section 18A);
(c) to perform, show or play the work in public (see section 19);
(d) to communicate the work to the public (see section 20);
(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);
and those acts are referred to in this Part as the "acts restricted by the copyright".

Section 29 Research and private study.
(1)Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.
(1B)No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.
(1C)Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.

(2)Fair dealing with the typographical arrangement of a published edition for the purposes of research or private study does not infringe any copyright in the arrangement.

(3)Copying by a person other than the researcher or student himself is not fair dealing if—
(a)in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or
(b)in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

(4)It is not fair dealing—
(a)to convert a computer program expressed in a low level language into a version expressed in a higher level language, or

(b)incidentally in the course of so converting the program, to copy it,
(these acts being permitted if done in accordance with section 50B (decompilation))
(4A)It is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with section 50BA (observing, studying and testing)).

Section 30 Criticism, review and news reporting.
(1)Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.
(1A)For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including—
(a)the issue of copies to the public;
(b)making the work available by means of an electronic retrieval system;
(c)the rental or lending of copies of the work to the public;
(d)the performance, exhibition, playing or showing of the work in public;
(e)the communication to the public of the work,
but in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act.

(2)Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3)No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.

Section 171 Rights and privileges under other enactments or the common law
(3)Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.

Section 178 Minor Definitions
‘Private study’ does not include any study which is directly or indirectly for a commercial purpose

Appendix C

Information Society Directive 2001/29/EC

Article 5- Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use
of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
(g) use during religious celebrations or official celebrations organised by a public authority;
(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
(i) incidental inclusion of a work or other subject-matter in other material;
(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
(k) use for the purpose of caricature, parody or pastiche;
(l) use in connection with the demonstration or repair of equipment;
(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Appendix D

Universal Declaration of Human Rights 1948

Article 17
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 27
(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Appendix E

International Covenant on Economic, Social and Cultural Rights 1976

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Appendix F

Charter of Fundamental Rights of the European Union

Article 17- Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired
possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Appendix G

European Convention on Human Rights 1950

Article 10– Freedom of expression

1- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Protocols

1. Enforcement of certain Rights and Freedoms not included in Section I of the Convention The Governments signatory hereto, being Members of the Council of Europe, Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as 'the Convention'),

Have agreed as follows:

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Appendix H

Duchamp and Da Vinci Images

Marcel Duchmap's L.H.O.O.Q work:

Da Vinci's Mona Lisa:

Appendix I

Images from Temple Island Collections Ltd v New English Teas Ltd [2012] EWPCC 1

The claimant's photograph:

The defendant's photograph:

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