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Copyright and its Categories of Original Works†

JUSTINE PILA*

Abstract

In this article, the categories of literary, dramatic, musical and artistic (LDMA) works in which copyright subsists are considered, and an argument made that the Legislature’s division of protected works into categories is appropriate given the psychology of art appreciation, and the fact that in order to perceive a work qua work one must perceive it in relation to a category of work. Nonetheless, an argument is also made that the statutory definitions of LDMA works suffer from the defects of formalist theory. Those defects are outlined, and an alternative theory of works proposed, drawing on the scholarship of art theorist Kendall Walton and the intentional, historical view of the work developed in a recent publication.1

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Copyright and its Categories of Original Works

According to that theory, LDMA works are constituted in part by their properties of form and in part by the history of their individual production. Consistent with this, the statutory categories of work are cast as denoting authorial traditions: evolving practices of LDMA expression that exist and are experienced in a particular social context. In addition to its general explanatory and normative value for copyright, this theory has specific implications for the Legislature’s expression of the categories of works in which copyright subsists.

1. Introduction

Under the Copyright, Designs and Patents Act 1988 (UK), copyright subsists in and only in works of the following statutory type: original literary, dramatic, musical and artistic (LDMA) works; sound recordings; films; broadcasts; and typographical arrangements of published editions. Notwithstanding definitions in the Act itself, the meaning and scope of each of these categories are matters of significant legal uncertainty, not resolved by the relevant parliamentary debates. Further, while uncertainty at the margins is plainly inevitable, particularly in a statute “of such wide and varied scope”, the uncertainty which exists is more pervasive, going to the heart of the categories themselves. Indeed, in some cases this seems to have been recognised by the legislative drafters, and expressly left for the courts to resolve.

In the current article I consider the uncertainty that exists in this area by studying the LDMA categories of works. Doing so leads

2 Copyright, Designs and Patents Act 1988 (CDPA), s. 1(1).
3 Board of Trade, Report of the Copyright Committee (Cmd. 8662, 1952), at [227].
4 See, e.g., HL Deb. vol. 495 cols. 610-1 (29 March 1988) (deciding to “leave the door ajar” for the courts’ recognition of the principle of reporters’ copyright and the authority of Walter v. Lane [1900] A.C. 539 (H.L.) rather than resolve the issue legislatively, notwithstanding the importance of that issue to conceptions of the literary work).
5 For alternative perspectives on one or more of the LDMA works, see A. Barron, “Copyright, Art, and Objecthood” in D. McClean & K. Schubert
me to defend the statutory scheme from the perspectives of law and theories of art. In particular, and drawing on the writings of certain art theorists, I suggest that in order to perceive a work *qua* work one must perceive it in relation to a category of work. Further, the same is reflected in the reasoning of the courts, particularly on the issue of “substantial part”.6 Hence my conclusion, that the existence of recognised categories of works is grounded in theories of art appreciation, and supported in turn by the reasoning of the courts.

Nonetheless, I do have criticisms of the statutory scheme, which suffers from the defects of formalist theory in its definitions of the categories of original works. In the analysis below I outline those defects, before proposing an alternative theory of the categories. According to that theory, literary, dramatic, musical and artistic works are constituted in part by their properties of form and in part by the history of their individual production. Consistent with this, the statutory categories of original works are cast as denoting authorial traditions: evolving practices of LDMA expression that exist and are experienced in a particular social context. In addition to its general explanatory and normative value for copyright, this theory has specific implications for the Legislature’s expression of the categories of works in which copyright subsists.

6 CDPA ss. 16(2), 16(3)(a) (defining copyright infringement as the unauthorised doing, or authorization of another’s doing, of any of the acts restricted by copyright in relation to “the work as a whole or any substantial part of it”).
2. **Formalist Conceptions of the Copyright Work**

Legal definitions of literary, dramatic, musical and artistic works in U.K. copyright correspond to the formalist theory of art. According to that theory, art is an aesthetic object that exists and is perceived in virtue of its form. While understandings of “form” have varied among theorists, reflecting different understandings of aesthetics itself, all share the premise that in order to appreciate art (as art) one need only to perceive its sensory surface and other non-relational properties intrinsic to the object. As Sibley says:

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7 Cf. Berne Convention for the Protection of Literary and Artistic Works (1886, as amended in 1979), art. 2(1) (“The expression ‘literary and artistic work’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression…”)  
8 See R. Wollheim, “On Formalism and Pictorial Organization” (2001) 59 Journal of Aesthetics and Art Criticism 127, 127 (“Analytic (or constitutive) Formalism is a theory about how paintings essentially are. It holds that necessarily they are organized in a certain way, and that this organization is what we need to take account of, and all that we need to take account of, in coming to understand them.”)  
9 Compare, e.g., Maurice Denis’s 1890 notion of actual form (“a picture … is essentially a plane surface covered with colours assembled in a certain order”: M. Denis, “A Definition of Neo-Traditionism”, quoted in H. Martienssen, “A Note on Formalism” (1979) 19 British Journal of Aesthetics 144–46, 146), Clive Bell’s 1913 notion of significant form (a picture is “a combination of lines and colours … that moves me aesthetically”: C. Bell, Art (New York 1913), available at http://www.gutenberg.org/files/16917/16917-h/16917-h.htm), and Roman Ingarden’s 1960 notion of interior form (“[the form of a work of art is] the connection existing between the regularity among the elements of the work and the harmonious gestalt”: R. Ingarden, “The General Question of the Essence of Form and Content” (1960) 57 Journal of Philosophy 222–33, 233).  
10 See N. Zangwill, “Feasible Aesthetic Formalism” (1999) 33 Noûs 610–29, 611 (defining formal properties as “properties … entirely determined by narrow nonaesthetic properties”, and “narrow nonaesthetic properties” as comprising “both sensory properties, non-relational physical properties, and also any dispositions to provoke responses that might be thought to be partly constitutive of aesthetic properties”); cf. G. Parsons, “Moderate Formalism as a Theory of the Aesthetic” (2004) 38 Journal of Aesthetic
In short, aesthetic works apply ultimately because of, and aesthetic qualities ultimately depend upon, the presence of features which, like curving or angular lines, color contrasts, placing of masses, or speed of movement, are visible, audible, or otherwise discernible [by anyone with normal eyes, ears, and intelligence\(^{11}\)] without any exercise of taste or sensibility.\(^{12}\)

In formalism, it is these non-aesthetic features which constitute the work.\(^{13}\)

The same premise is reflected in copyright law, in the statutory definitions of LDMA works. Those definitions proceed from the existence of a generic “work” to set conditions for its categorization as literary, dramatic, musical or artistic. The conditions it sets reflect the formalist theory that the properties of a work are intrinsic to the work, being “visual, audible, or otherwise discernible”.\(^{14}\)

By section 3 of the CDPA, for example, a work is literary if it “is written, spoken or sung”, where “writing” is elsewhere defined in the Act to “include[] non-literal forms of notation and code”.\(^{15}\) “Accordingly”, the statute provides, literary works “include (a) a table or compilation other than a database, (b) a computer program, (c) preparatory design material for a computer program, and (d) a database”.\(^{16}\) Consistent with this, and as the drafters intended,\(^{17}\) the

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\(^{12}\) Ibid., at p. 424. Here I use “aesthetic properties” and related terms in the sense understood by Sibley, i.e., as properties that require taste or perceptiveness for perception (ibid., at p. 421).

\(^{13}\) See generally Zangwill, note 10 above, at pp. 610-2.

\(^{14}\) See note 12 above.

\(^{15}\) CDPA, s. 178.

\(^{16}\) CDPA, s. 3(1). See also section 3A(1) (defining “database”). On the meaning of “accordingly” in a similar context see Newspaper Licensing Agency Ltd v. Marks & Spencer plc [2001] UKHL 38, at [10].

\(^{17}\) See, e.g., HL Deb. vol. 490 cols. 832-4 (30 November 1987) (considering proposals to delete the words “accordingly” and “written table or
courts have accepted as literary works any subject matter presented in notational form, with an exclusion for dramatic, musical and artistic works. For example, in *Donoghue v. Allied Newspapers*, Farwell J. defined literary works as the “particular form of language” by which information or ideas are conveyed to an audience.

With respect to dramatic and musical works see CDPA, s. 3(1). (See also HL Deb. vol. 490 col. 832 (30 November 1987) and HL Deb. vol. 493 col. 1058 (23 February 1988) (evidencing the Legislature’s rejection of a proposal to replace the word “which” in the draft statutory phrase “which is not a musical or dramatic work” with the word “but”).) With respect to artistic words see HL Deb. vol. 195 col. 1052 (16 February 1956) (describing the transfer of “maps, charts and plans” from the statutory definition of “literary works” to “artistic works” in the Copyright Act 1956 as based on the Legislature’s recognition of the illogicality of their categorisation as literary); cf. Anacon Corp Ltd v. Environmental Research Technology Ltd [1994] F.S.R. 659 (Ch.) (see ibid.); Comprop Ltd v. Moran [2002] J.L.R. 222 (Jersey Royal Court) (finding a map to be a literary work).

With respect to dramatic and musical works see CDPA, s. 3(1). (See also HL Deb. vol. 490 col. 832 (30 November 1987) and HL Deb. vol. 493 col. 1058 (23 February 1988) (evidencing the Legislature’s rejection of a proposal to replace the word “which” in the draft statutory phrase “which is not a musical or dramatic work” with the word “but”).) With respect to artistic words see HL Deb. vol. 195 col. 1052 (16 February 1956) (describing the transfer of “maps, charts and plans” from the statutory definition of “literary works” to “artistic works” in the Copyright Act 1956 as based on the Legislature’s recognition of the illogicality of their categorisation as literary); cf. Anacon Corp Ltd v. Environmental Research Technology Ltd [1994] F.S.R. 659 (Ch.) (see ibid.); Comprop Ltd v. Moran [2002] J.L.R. 222 (Jersey Royal Court) (finding a map to be a literary work).

[18] [1938] 1 Ch. 106, 110. See also Hollinrake v. Truswell [1894] 3 Ch. 420, 424 (Lord Herschell L.C.) (describing the object of copyright as being “to prevent any one publishing a copy of the particular form of expression in which an author conveyed ideas or information to the world”), adopted with reservations by three members of the High Court of Australia in *IceTV Pty Ltd v. Nine Network Pty Ltd* [2009] HCA 14 (at [26], cf [45]). Cf *Infopaq International A/S v. Danske Dagblades Forening* (C-5/98) (unreported, 16 July 2009) at [39] (describing literary works as consisting “of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of the words and their order that the work acquires intellectual content.”).
Peterson J. defined them as any “work expressed in print or writing, irrespective of the question whether the quality or style is high”, and as therefore including mathematics papers. In *Anacon Corp Ltd v. Environmental Research Technology Ltd*, Jacob J. held a circuit diagram to be a “literary work”. And in *Walter v. Lane*, the House of Lords decided that a person who first materially fixes the speech of another through the exercise of independent skill and labour is the literary author of that material fixation, and therefore entitled to literary copyright in it.

“Artistic work” is also defined in the statute, to mean “(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, (b) a work of architecture, being a building or model for a building, or (c) a work of artistic craftsmanship”. According to section 4(2), a “building” includes “any fixed structure, and a part of a building or fixed structure”, a “graphic work” includes “(a) any painting, drawing, diagram, map, chart or plan, and (b) any engraving, etching, lithograph, woodcut or similar work”, a “photograph” is “a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film”, and a “sculpture” includes “a cast or model made for purposes of sculpture”. Interpreting these provisions, the courts have required a material object manifesting properties of visual form, consistent again of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation”).

21 [1916] 2 Ch. 601 (Ch.).
22 [1916] 2 Ch. 601, 608.
26 CDPA, s. 4(1).
with the drafters’ intent. A further requirement that the properties be visually significant was established in Interlego v. Tyco Industries, where the Privy Council described artistic copyright as “concerned with visual image”, and denied its subsistence in re-drawings on the basis of their failure to manifest new properties of “visual significance”. In the Australian version of that case, the Full Federal Court criticized the emphasis on visual significance as importing a requirement of novelty into U.K. law, and supported a requirement of visual distinctiveness instead. Still, it did not challenge the conception of artistic works as material objects manifesting properties of visual form. Further evidence of that conception in U.K. law includes the definition of “paintings” in Harpbond v. Merchandising Corp as images fixed in paint on a surface, of “sculptures” in Metix v. Maugham as three-dimensional objects carved or shaped by hand, of “collage” in Creation Records Ltd v. News Group Newspapers Ltd as

27 On the materiality of artistic works see, e.g., HL Deb. vol. 491 cols. 845, 852 (10 December 1987) (Lord Beaverbrook, arguing against proposals to include typefaces and holograms in the statutory list of artistic works with reference to their abstract nature, in contrast to the concrete or tangible nature of the other types of artistic work). (See also HL Deb. vol. 493 col. 1068 (23 February 1988) (“I do not think that we should add abstract concepts to the list of works which should have copyright protection. It is rather like adding to the list the phrase ‘an idea for a painting’. An idea, whether it be for a painting or typeface design, becomes a work only when it is set down on some medium.”) On the visual form of artistic works see, e.g., HL Deb. vol. 495 cols. 614-5 (29 March 1988) (Lord Hailsham, responding to the question “how it is possible for a negative to be a copy of a print when by definition what is black in a negative is white in a print and vice versa?” with the statement “The shape is the same!”).

two or more things stuck together with adhesive,\textsuperscript{34} and of “works of artistic craftsmanship” in \textit{Hensher v. Restawile}, as durable, useful, handmade objects successfully created with artistic intent.\textsuperscript{35} The definition of “collage” in \textit{Creation Records} recalls the following statement recorded in the CDPA legislative debates:

[The principle of collage is] well known. One takes a part of a painting, for example, or of a diagram, map, chart or whatever, and makes a composition which is stuck on a piece of canvas. That is then a work in its own right.\textsuperscript{36}

Also recorded in those debates is the general legislative approval of \textit{Hensher v. Restawile}, with the following observation by Lord Morton:

[It is] odd that on the matter of artistic craftsmanship a court must look at the question of what is or is not artistic when that is something at which it is forbidden to look in relation to graphic works, photographs and sculpture. Where the distinction is drawn between sculpture and artistic craftsmanship seems to be an area of supreme difficulty.\textsuperscript{37}

Notwithstanding this difference and source of uncertainty, each of the definitions above supports a conception of the artistic work as a material object supporting new (created) properties of visual significance. Strictly speaking, the artistic work ought to be conceived as the new properties themselves, rather than the material object that incorporates them. That it is not is consistent with the general understanding of “form” in this Neo-Kantian sense to mean the adapted raw material, including by “an easy shift of meanings … the ‘model’ according to which a certain number of specimens of a

\textsuperscript{34} [1997] E.M.L.R. 444, 450 (Ch.) (Lloyd J., describing “as an essential element [of a collage] the sticking of two or more things together”).

\textsuperscript{35} [1976] A.C. 64 (H.L.). See also Hi-Tech Autoparts Ltd v. Towergate Two Ltd (No 2) [2002] F.S.R. 270 (Ch.) (defining engravings as works produced by “marking, cutting or working the [typically flat] surface of an object”).

\textsuperscript{36} HL Deb. vol. 490 col. 849 (30 November 1987).

\textsuperscript{37} HL Deb. vol. 490 col. 848 (30 November 1987).
certain type are fabricated”.\(^{38}\) The truth of this statement in copyright is clear from the statutory definitions of sculptures and photographs,\(^{39}\) and from judicial understandings of engravings and works of artistic craftsmanship. With respect to the latter, for example, there are the findings of the New Zealand and Australian Courts in *Wham-O Manufacturing v. Lincoln* and *Burge v. Swarbrick* respectively, that artistic copyright subsisted in the metal moulds for creating Frisbees, as engravings,\(^ {40}\) and that prototypes can also be protected as works of artistic craftsmanship.\(^ {41}\)

Less expansive are the definitions of dramatic and musical works; a dramatic work including any “work of dance or mime”,\(^ {42}\) and “musical work” meaning “a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music”.\(^ {43}\) When extrapolating these definitions, the courts have emphasised the works’ performative nature without treating either as performance itself. An example is *Sawkins v. Hyperion Records*,\(^ {44}\) where the Court of Appeal described musical works as analogous to dramatic works, and as including as such all those “elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators”.\(^ {45}\) Another example is *Hadley v.*

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38 Ingarden, note 9 above, at pp. 229-30.
39 Reproduced above.
41 [2007] HCA 17, at [60]; but cf. Hensher v. Restawile [1976] A.C. 64 (H.L.) (deciding that a prototype boat-shaped chair was not a work of artistic craftsmanship) and Guild v. Eskandar [2001] F.S.R. 645 (Ch.) (deciding that sample garments were prototypes for mass production and so not works of artistic craftsmanship).
42 CDPA, s. 3(1).
43 Ibid. On Parliament’s intent regarding use of the words “means” and “includes” in the statutory definitions see HL Deb. vol. 490 col. 854 (30 November 1987) (“the word ‘means’ is an exclusive definition which covers everything within it. ‘Includes’ is a non-exclusive definition and the word in question has its natural meaning but includes other things”).
44 2005] EWCA (Civ) 56.
45 [2005] EWCA (Civ) 56, at [55]. See also Beckingham v. Hodgens [2003] F.S.R. 238, at [46] (Ch.) (describing “the final musical expression” of the musical work as “what the audience will hear”). On the concepts of performative
Kemp,\textsuperscript{46} where Park J. suggested that all musicians can be expected to perform songs to the best of their abilities, and that “injecting elements of individuality and artistry into their performances [does] not make them joint authors” of the works they perform.\textsuperscript{47} Such decisions support a conception of musical works as combinations of sounds for listening to. Hence Mummery L.J.’s statement in Sawkins v. Hyperion Records that, “[i]n the absence of a special statutory definition of music, ordinary usage assists: as indicated in the dictionaries, the essence of music is combining sounds for listening to”.\textsuperscript{48} That statement finds support also in the earlier case of Stuart v. Barrett, where the Court described the musical work as a whole composition with shape and drive provided by its constituent aural elements,\textsuperscript{49} and in the Australian case of Schott Musik v. Colossal Records, where Hill J. defined musical works as consisting “of a combination of sounds and noises organized in different ways as to such elements as pitch, volume, quality, duration and rhythm”.\textsuperscript{50} It is also consistent with Norowzian v. Arks Ltd (No. 2), where the Court of Appeal supported a corresponding view of dramatic works as “works of action … capable of being performed before an

\textsuperscript{46} [1999] E.M.L.R. 589 (Ch.).
\textsuperscript{47} [1999] E.M.L.R. 589, 646–47 (Ch.).
\textsuperscript{48} [2005] EWCA (Civ) 56, at [53].
\textsuperscript{49} [1994] E.M.L.R. 448, 460 (Ch.).
Conceived in these terms, musical and dramatic works are best thought of as arrangements of acoustic or behavioural elements that are stable (i.e., endure) when presented in performance. This conception is from Ingarden’s description of “form” as “identified with what repeats itself continuously in many individuals”.

In emphasizing performance, it is consistent with both the decision in *Norowzian v. Arks Ltd (No.2)* that dramatic copyright does not subsist in combinations of movements unable to be performed, and the decision in *Creation Records* that dramatic copyright does not subsist in scenes due to their “inherently static” nature, and their lack of any “movement, story or action”. Further, it supports the conclusion that that which constitutes the work *qua* performative work is that which can be expected to be repeated in its individual performance; a conclusion that again reflects the relevant parliamentary intent. For example, in explaining the CDPA’s distinction between dramatic and literary works, a member of the House of Lords legislative committee commented that “[d]ramatic works are principally intended for performance and so are separated from literary works which are generally read”. And finally, the conception of literary and dramatic works proposed suggests that the Court of Appeal was wrong to decide in *Norowzian v. Arks Ltd (No. 2)* that a film can exist *qua* dramatic work, for while a film can be “shown”, it cannot be “performed”, as the different use of those terms in the CDPA reflects.

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52 See Ingarden, note 9 above, at p. 228.
54 HL Deb. vol. 490 cols. 830-1 (30 November 1987). In the same debates, “musical annotations or directions on a score” were described as “part of the musical work”, consistent with the conception of such work as performative in nature.
56 See CDPA, ss. 5B(3), 19 (referring to the “showing” of a film and the “playing” of a sound recording, in contrast to the “performance” of a literary, dramatic or musical work).
(a) Problems with Formalist Conceptions of LDMA Works

The implication of the Act and its definitional provisions is that LDMA works are categories of works organized according to properties of form. A further implication is that the meaning of “form” varies between categories; literary form connoting a mode of presentation, artistic form a mode of creation, and musical/dramatic form a stability of composition. While works’ properties of form will inevitably vary according to the nature of their discernible features, one’s underlying conception of form ought not to do so. That it does in copyright reflects the incoherence of formalist (aesthetic) theory in law, and the definitions of works which that theory supports.

The different conceptions of form in copyright also reflect different conceptions of the work, contradicting the implication that that concept is stable; that there exists in copyright a core concept of “work”. As seen above, that implication derives from the references to “work” in each of the statutory definitions, which make it clear that when identifying an LDMA work one starts with a work and only then considers whether it is of LDMA type. However, the definition of artistic form implies that works derive from and exist in a material object, and depend on that object for their constitutive qualities. That implication is supported by Hansard, which suggests

57 For a discussion of these and other theories of form see Ingarden, note 9 above.
58 See here Martienssen, note 9 above, at p. 144 (describing the formalist perspective as “the realization that all works of art – pictures, poems, music – shared the characteristic of meaningful shape or arrangement and congruence of parts”, and view “that the shape was the factor in terms of which the object or experience could be regarded as a work of art”).
59 See further HL Deb. vol. 493 col. 1061 (23 February 1988) (noting as the preliminary issue in determining copyright in spoken words whether a word might amount to “a work”).
60 This concept is referred to as “heteronomy” by Ingarden and discussed in the context of intentional objects in A.L. Thomasson, “Ingarden and the Ontology of Cultural Objects” in A. Chrudzimski (ed.), Existence, Culture,
that it was the material nature of the statutory types of artistic works which lead the Legislature to reject two separate proposals to include typefaces and holograms among them.\textsuperscript{61} By contrast, the definitions of literary, dramatic and musical forms imply that while works may be evidenced by their material fixations, they are created and exist independent of those fixations. That implication is made explicit in the provision by section 3(3) of the CDPA, that the person who materially fixes an LDM work, and thereby triggers copyright subsistence in it, need not be its author and presumptive first copyright owner. This provision accounts for the statement in \textit{Hadley v. Kemp} that “the Act assumes that a work may exist before it is reduced to material form”,\textsuperscript{62} and the view in \textit{Sawkins v. Hyperion Records} that musical works exist separate from “the fact and form” of their material fixations.\textsuperscript{63} That the same was intended is apparent from the parliamentary records, which reveals the drafters’ deletion of a clause defining literary, dramatic and musical works to include “records, perforated rolls, or other [physical] contrivances by means of which a work may be mechanically performed or delivered”.\textsuperscript{64}

The conclusion to be drawn is that just as different kinds of works have different modes of formal ontology, so too they have different modes of material and existential ontology.\textsuperscript{65} This suggests that the copyright work is ontologically unstable; an instability which, even if resolved for certain doctrinal purposes by section 153(3) of the CDPA (which provides that “[i]f the qualification requirements … are once satisfied in respect of a work, copyright does not cease to subsist by reason of any subsequent event”, presumably including the destruction of an artistic work\textsuperscript{66}),

\begin{footnotesize}
\begin{enumerate}
  \item See note 27 above.
  \item [1999] E.M.L.R. 589, 645 (Ch.).
  \item [2005] EWCA (Civ) 565, at [53] (Mummery L.J., others agreeing).
  \item See HC Deb. vol. 29 col. 2192 (17 August 1911).
  \item In this way, CDPA, s. 153(3) resolves the problem identified in Pila, note 1 above, at p. 542.
\end{enumerate}
\end{footnotesize}
undermines the law’s claim to theoretical coherence, and the possibility of proper understanding of the copyright work. Further, the absence of a coherent legal conception of the work is apparent from the parliamentary debates, which reflect uncertainty on the following three specific issues of current importance: the distinction between works and books; the distinction between LDMA and non-LDMA works; and the relationship between the requirements for an LDMA work and originality. On the other hand, if the conclusion to be drawn is that the nature of works under the CDPA was a matter of uncertainty for the UK Legislature, this did not stop Lord Beaverbrook from proclaiming in 1987, in a discussion of copyright in

67 Compare, e.g., HC Deb. vol. 23 col. 2592 (7 April 1911) (suggesting that replacing the statutory category of “books” with the categories of “original works” involved a change of form only), HC Deb. vol. 29 col. 2192 (17 August 1911) (suggesting that LDM works lack the physicality of books) and HL Deb. vol. 370 col. 29 (27 April 1976) (suggesting that “books” lack the originality of “works”, consistent with a view of the latter as artefactual (i.e., intentional products of authorship in the sense of R. Hilpinen, “Authors and Artefacts” (1993) 93 Proceedings of the Aristotelian Society 155-78)).

68 Compare, e.g., HL Deb. vol. 490 col. 823 (30 November 1987) (recording the decision to treat sound recordings, films, broadcasts and typographical arrangements of a published edition as “works” in order to “enhance the status of neighbouring rights”), HL Deb. vol. 493 cols. 1056-7 (23 February 1988) (describing originality as an inappropriate criterion for neighbouring rights on the basis of their fundamentally different nature from authorial rights) and HC Deb. vol. 23 cols. 2639-40 (7 April 1911) (expressing concern that an Act covering both authorial and neighbouring rights would create confusing and misleading analogies), HL Deb. Vol. 493 cols. 1073-4 (23 February 1988) (treating photographic copyright as analogous to film copyright).

69 See, e.g., HL Deb. vol. 490 col. 837 (30 November 1987), HL Deb. vol. 491 col. 117 (8 December 1987) and HL Deb. Vol. 493 col. 1059 (23 February 1988) (treating the issue of reporters’ copyright as depending entirely on the question of originality, as distinct from the question whether a material fixation of another’s literary work is itself a literary work, notwithstanding the acceptance of such works as intangible, in contrast to the tangible nature of artistic and non-LDMA works).
spoken words, “we must not forget that copyright is about protecting works”.70

A question that arises is whether the conclusion that LDMA works do not share a concept of work suggests that identifying them ought to require a single enquiry (“is there an LDMA work?”) rather than the two implied by the statute (“is there a work and of LDMA type?”). As a question of law, Exxon v. Exxon Insurance Corp71 suggests that it ought to; the Court of Appeal having there rejected both the existence of a single concept of work and the definition of literary works contained in the statute. In its judgment, the term “literary” in the statutory phrase “literary work” colours and extends the meaning of “work”, with the result that an object might be a work expressed in literary form without being a literary work for the purpose of copyright. Hence the following statement by Stephenson L.J. (with whom the other Judges agreed):

If you take the phrase “original literary work” to pieces, this word “Exxon” is original for the reason that I have given, it is literary and it is a work. Why, then, is it not an “original literary work”? .... [I]t is the expression as a whole in the context of the Act which has to be construed. “Literary” is given a broader meaning in the Act of 1956 than it was given in the Act of 1842, and that broader meaning must colour and extend the meaning of “work”.72

Considering what aside from form would be required for such a work, the Court identified intentional, representational and expressive properties, accepting as literary works any subject matter “intended to afford instruction, or information, or pleasure in the form of literary enjoyment”.73 Similar was the view of literary works in Francis Day & Hunter v. Twentieth Century Fox, as products of literary composition sufficiently substantial to merit protection.74 Importantly, while this deprives “the work” independence of the

70    [1982] Ch. 119 (Ch).
71    [1982] Ch. 119, 139 (Ch.). See also [1982] Ch. 119, 144-5 (Oliver L.J., Sir David Cairns agreeing).
72    [1982] Ch. 119, 139 (Stephenson L.J., quoting from Hollinrake v. Truswell (1894) 3 Ch. 420, 428 (Ch.) (Davey L.J., others agreeing).
LDMA concepts, it does not deprive “the work” of separate existence per se, with the result that one may still speak meaningfully of the copyright work.\footnote{75}{See, e.g., note 154 below.}

The definition of literary works with reference to non-formal properties undermines the formalist premise, that in order to appreciate a work (qua work) one need only to perceive its sensory surface and other intrinsic and discernible properties of form. In addition, while the definition in Exxon has been criticised as “unhelpful … dicta from a different world”,\footnote{76}{See Navitaire v. easyJet [2006] R.P.C. 3, at [79] (Ch.).} it has been used as recently as 2009 to support the denial of literary copyright on de minimis grounds. Thus, in State of Victoria v. Pacific Technologies (Australia) Pty Ltd,\footnote{77}{[2009] F.C.A. 737.} the Federal Court of Australia held that the words “Help-Help-Driver-in-Danger-Call-Police-Ph.000” were not an original literary work in which copyright subsists, relying among other things on the Exxon definition.\footnote{78}{[2009] F.C.A. 737, at [20].} Also in Australia, that definition has been used to support literary copyright in compilations in the face of opposition on de minimis grounds. This is despite the express inclusion of compilations in the statutory definition of “literary works”, and reflects the impact of that inclusion on judicial understandings of non-statutory literary works. An example is Express Newspapers plc v. Liverpool Daily Post & Echo plc,\footnote{79}{[1985] F.S.R. 306 (Ch.).} where individual tables of five letter sequences were held to be literary works by virtue of their provision of information and instruction, or pleasure in the form of literary enjoyment. Another is Olympic Amusements Pty Ltd v. Milwell Pty Ltd,\footnote{80}{(1998) 81 F.C.R. 403 (F.C.A.).} where prize scales for poker games were held to be literary works by virtue of their provision of “information and instruction regarding the rewards for each of the listed hands”. Such use of the Exxon definition underlines what is in
any case apparent, namely, that literary works as defined in the statute are difficult to conceive in formalist terms.

The same can be said for non-literary works. Indeed, it has occasionally been stated implicitly by the courts, mainly in the context of artistic copyright. In considering three-dimensional objects and lines and shapes, for example, the courts have looked beyond the formal properties of works to consider the intent of their individual creators and the view of society with respect to their nature. 81 This occurred most recently in LucasFilm Ltd v. Ainsworth, 82 in an approach subsequently approved by the Court of Appeal, 83 where the Judge drew the following helpful distinction.

A pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for 2 weeks preparatory to a building project is equally plainly not. One asks why there is that difference, and the answer lies, in my view, in having regard to its purpose. One is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes. I appreciate that this example might be criticised for building in assumptions relating to what it seeks to demonstrate, and then extracting, or justifying, a test from that, but in the heavily subjective realms of definition in the artistic field one has to start somewhere. 84

This excerpt and the distinction it draws between a pile of bricks qua bricks and qua artistic work recalls the following statement of Lord Hutchinson in the legislative debates.

[We] are dealing with artistic works. At the drop of a penny, the cognoscenti will say that a work has to have some aesthetic quality in order to be artistic. At the Tate Gallery there is a fine sculpture by Carl Andre called ‘The Bricks’, and there are those who say that it is not a sculpture because it does not have any aesthetic quality. ... One does not want copyright to be ruled

81 See generally Pila, note 1 above.
82 LucasFilm Ltd v. Ainsworth [2008] EWHC (Civ) 1878.
83 [2009] EWCA Civ 1328, at [77].
84 LucasFilm Ltd v. Ainsworth [2008] EWHC (Civ) 1878, at [118].
by the cognoscenti. We do not want copyright to be ruled by the Philistines. We want copyright to be ruled by those who have some common sense.\footnote{HL Deb. vol. 490 col. 839 (30 November 1987). For a description and photograph of the sculpture referred to, see http://www.tate.org.uk/servlet/ViewWork?workid=508 (accessed 31 December 2008).}

The implication of this passage, that the proper conception of a subject matter \textit{qua} LDM work is simply a matter of “common sense”, reflects a concerning (if not popular) view which ignores the difficulty and complexity of the issues at stake, and underlines the different attitude to works and (patentable) inventions. Nonetheless, Lord Hutchinson’s view accords in substance with the suggestion of LucasFilm that formalism fails as a theory of the work, just as it fails as a theory of art. Three reasons have been offered for the second of these suggestions. The first is the uncertainty over whether aesthetic qualities exist and can be satisfactorily defined.\footnote{See, e.g., R. David Broiles, “Frank Sibley’s ‘Aesthetic Concept’” (1964) 23 Journal of Aesthetics and Art Criticism 219–25 (rejecting Sibley’s understanding of aesthetic concepts); J. Margolis, “Sibley on Aesthetic Perception” (1966) 25 Journal of Aesthetics and Art Criticism 155–58 (arguing that works of art do not possess aesthetic qualities at all).} The second is the problematic basis of the formalist premise that aesthetic properties are entirely determined by perceptual properties, which basis resides in the observation that non-aesthetic properties are scientifically important, and the conclusion that they must for that reason be ontologically real and prior.\footnote{See, e.g., G. Stahl, “Sibley’s ‘Aesthetic Concepts’: An Ontological Mistake” (1971) 29 Journal of Aesthetics and Art Criticism 385–89.} And the third is the fallacy in the assertion that the representational, expressive and (other) contextual characteristics of art are irrelevant to its aesthetic existence and essence. Some theorists have responded to such criticisms by redefining formalism in moderate terms, as determining some but not all of the constitutive properties of art.\footnote{See, e.g., Zangwill, note 10 above, at p. 612 (arguing for a distinction between extreme and moderate formalism); but see Parsons, note 10 above} In the copyright context,
however, the formal dimension in the perception and understanding of LDMA works – even taking account of that dimension’s scientific importance, and the value which this gives it specifically for law – is insufficient to justify its current priority in legal conceptions of LDMA works.

(b) Conclusion

Legal conceptions of the copyright work are problematic. The reason lies in the absence of any coherent theory of the work underpinning those conceptions, due partly to the distraction and shortcomings of the formalist perspective to which those conceptions do (and were intended to) correspond.

It does not follow, and is not here argued, that formalist ideas have no value in copyright. For example, in rejecting the formalist perspective I am not rejecting the importance of form and advocating a purely historical – including intentional – conception of the work. Rather, I am rejecting the centrality of that perspective in contemporary law. Similarly, while not advocating an explicitly aesthetic theory of the work, I am equally not advocating aesthetic neutrality, nor suggesting that it is possible to keep aesthetics entirely out of copyright, notwithstanding the many judicial and legislative statements to the contrary. In particular, I say this notwithstanding the description of copyright in section 4 of the CDPA as subsisting in (rejecting moderate formalism on the ground that it fails to reveal any substantial formalist dimension in the aesthetic appreciation of artworks).

89 See Stahl, note 87 above.
90 See Parsons, note 10 above, at p. 33.
91 Examples of such theories of art from which such an understanding might be developed include those of Bloom and Levinson; see P. Bloom, “Intention, History and Artifact Concepts” (1996) 60 Cognition 1-29; J. Levinson, “Defining Art Historically” (1979) 19 British Journal of Aesthetics 232-50; J. Levinson, “Refining Art Historically” (1989) 47 Journal of Aesthetics and Art Criticism 21-33. See further the theories of Dickie, developed in publications such as G. Dickie, Art and the Aesthetic (New York 1974), and relied on by Booton (in note 5 above) to support an “institutional approach” to defining works of artistic craftsmanship and sculptures.
most artistic works “irrespective of artistic quality”, and the statement of Lord Reid in *Hensher v. Restawile* that “[t]here is a trend of authority that a court ought not to be called on to make an aesthetic judgment ... Judges have to be experts in the use of the English language but they are not experts in art or aesthetics”,92 the feasibility of which must at least be questioned, as other cases and the parliamentary records themselves acknowledge. Indeed, even in *Hensher v. Restawile*, the House of Lords’ eschewal of the relevance of aesthetic judgement in determining the existence of a work did not prevent it from defining the category of works of artistic craftsmanship with reference to the aesthetic of the Arts and Crafts movement. Similarly in the *Hansard* debates, there is evidence that the phrase “irrespective of artistic quality” was intended to ensure artistic copyright to engineering and other functional works rather than to preclude aesthetic judgments of copyright works.93 There is also a record of Lord Howie appealing to the aesthetic properties of the Waterloo Bridge in support of an argument that copyright subsists in architectural structures other than buildings.94 Finally, just as categorization is central to formalist conceptions of the work, so it is essential to the understanding supported here; the difference being that in that understanding the LDMA categories of copyright works do not denote particular properties of form, but traditions of authorial (i.e., original) expression.

That “author” and “original work” correlate in copyright has been the position of the courts since 1911, when LDMA copyright was first vested in LDMA works.95 Despite this, it has never been subject to satisfactory explication through a definition of what

93 HL Deb. vol. 490 col. 841 (30 November 1987).
94 Ibid.
Copyright and its Categories of Original Works

authorship entails. The closest the U.K. courts have come to offering such a definition may have been in Sawkins v. Hyperion Records, where Jacob L.J. relied on Jane Ginsburg’s analysis of originality in support of the principle of LDMA copyright in LDMA copies.\(^96\) In the paper of Ginsburg that he cited, that analysis is premised explicitly on a conception of the author as “a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work”.\(^97\) If authorship and original works are correlates, however, this conception is problematic, for it proceeds from the existence of a “work”, which is part of the object it is seeking to establish. The same applies with respect to the most commonly cited and supported definition of “originality”, formulated by Peterson J. in University of London Press, as meaning “that the work should originate from the author”.\(^98\)

3. The LDMA Categories

The LDMA categories are central to copyright: they mark out the works of protectable type. As shown below, however, they also determine the properties of a work, and the significance of those properties for copyright infringement.

(a) The Perception of Works (in Relation to their Categories)

The need to engage with the LDMA categories when considering issues of copyright infringement is a consistent theme in the decisions of the courts, and also pervades the legislative debates of post-1911 copyright legislation. In Newspaper Licensing Agency Limited v. Marks & Spencer plc, for example, the House of Lords began with an analysis of typographical arrangements and their form of expression in

\(^96\) [2005] EWCA (Civ) 56, at [83].


published editions.⁹⁹ In *Electronic Techniques (Anglia) Ltd v. Critchley Components Ltd*,¹⁰⁰ Laddie J. emphasized the need when considering a claim of literary copyright to conceive the subject matter properly, “*qua* literary work”.¹⁰¹ And in *Baigent & Leigh v. Random House Group*,¹⁰² the Court of Appeal cautioned against analogizing literary works given the variety of different subject matter included among them.¹⁰³ Similarly in the legislative debates of 1911, the *Copyright Bill 1911 (Imp)* was criticised for covering “vastly too large a ground”;¹⁰⁴

Hitherto the Bills that have been brought before Parliament have dealt with separate compartments of this question. How is it possible to deal in one Bill with all the wide range of subjects which you attempt to deal with here, from the future production of a ‘Paradise Lost’ down to the reproduction of the echoes of the voice of Mr. Harry Lauder. How is that possible in one Bill? Does it not create analogies of a completely misleading character? The man in the street, the ordinary citizen, when you mention copyright to him, thinks chiefly of authors’ copyright, and is it fair when dealing with this question to mix it up with the vast range extending from an author’s creation to the production of miscellaneous sorts of cinematograph, gramaphone, and various other things?¹⁰⁵

The need which this creates for engagement with the statutory categories of works was underlined in *Electronic Techniques* by Laddie J., as follows:

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⁹⁹ See [2001] UKHL 38, at [23].
¹⁰⁰ [1997] F.S.R. 401 (Ch.).
¹⁰² [2007] EWCA (Civ) 24.
¹⁰³ [2007] EWCA (Civ) 24, at [142] (describing the “[t]he relevant form of expression of [an anthology of poetry] for deciding whether there has been an infringement of copyright” as “the selection and arrangement of the poetry, not the text of the individual poems themselves”).
¹⁰⁴ HC Deb. vol. 23 col. 2639 (7 April 1911).
¹⁰⁵ HC Deb. vol. 23 cols. 2639-40 (7 April 1911). See also the comments of the 1952 Gregory Committee (note 3 above).
Historically, copyright has been divided into discrete categories or compartments. With the passage of time, the number of these categories has grown as has the differences between them. Thus the term of protection, acts constituting infringement and specific defences which apply, say, to copyright in artistic works are very different to those which apply to, say, the copyright in a cable programme. Identifying correctly the particular copyright category into which an author’s work fits therefore can be of importance both to the duration and scope of the rights.\(^\text{106}\)

In the case law, the importance of the LDMA categories is particularly apparent in discussions of similarities between individual works, and their sufficiency to support an inference of copying. In \textit{Norowzian v. Arks Ltd (No 2)},\(^\text{107}\) for example, the allegation of substantial copying was “destroyed by the evidence of an expert choreographer” that when perceived specifically as works of dance there was no similarity between the films of the parties.\(^\text{108}\) In \textit{Pearce v. Ove Arup},\(^\text{109}\) Jacob J. suggested that while a side-by-side comparison of the works as plans might reveal similarities suggestive of copying, when the works were perceived as architectural works a different impression and conclusion resulted.\(^\text{110}\) In \textit{Electronic Techniques},\(^\text{111}\) Laddie J. refused to give summary judgment in a case involving a circuit diagram on the basis “that, \textit{qua} literary work, the circuit diagram is no more than a list of five or six components”.\(^\text{112}\) Implicit in these decisions is that works exist and are perceived (as copyright works) relative to their particular statutory category.

The same idea is central to the theory of art propounded by Kendall Walton, in his article entitled “Categories of Art”.\(^\text{113}\) That article was first published in 1970, “in the context of debates about the intentional fallacy and, more generally, about the relevance of

\(^{109}\) [2002] E.C.D.R. C.N. 2 (Ch.).
\(^{110}\) See [2002] E.C.D.R. C.N. 2, at [45]-[56] (Ch.).
\(^{111}\) [1997] F.S.R. 401 (Ch.).
contextual matters in the evaluation of artworks”. In 2008, following its republication, Scott Walden described its philosophical basis as “so generally accepted [among philosophers of art] that one might worry that [it is] of historical interest only.”

The premise of Walton’s “categories” theory is that formalist conceptions of art – “the seemingly common-sense notion that aesthetic judgments about works of art are to be based solely on what can be perceived in them, how they look or sound” – are “seriously misleading”, that while works are to be judged solely on their form, it is first necessary that they be correctly perceived. The reason lies in the psychology of art appreciation, and the dependence of our judgements about individual works on the categories in which the works are perceived and the variability of their properties relative to that category. Hence the two issues with which he is concerned are the same as the issues that occupy the courts: how correctly to identify the category of a work, and how to perceive the work relative to that category. Importantly, Walton’s theory is not a category-relative theory, for it posits categories as being either correct or incorrect for the work in question.

According to Walton, “to perceive a work in a certain category is to perceive the gestalt of that category in the work”.

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115 Ibid.
116 Walton, note 113 above, at p. 367.
117 Ibid. Walton adds that “examining a work with the senses can by itself reveal neither how it is correct to perceive it, nor how to perceive it that way”.
118 See Walton, note 113 above, at p. 355 (suggesting that while “aesthetic judgments are in some contexts amenable to ... category-relative interpretations, especially aesthetic judgments about natural objects ... most of our aesthetic judgments can be forced into this mold only at the cost of distorting them beyond recognition”, and describing as his “main objection” to such interpretations their failure to “allow aesthetic judgments to be mistaken often enough”).
119 Walton, note 113 above, at p. 340.
same understanding can be seen in the cases. An example is *Krisarts SA v. Briarfine Ltd.* where Whitford J. considered an allegation of infringement in respect of paintings of “very well known subject[s].” In his view,

...[w]hen one is considering a view of a very well known subject like the Houses of Parliament with Westminster Bridge and part of the Embankment in the foreground, the features in which copyright is going to subsist are very often the choice of viewpoint, the exact balance of foreground features of features in the middle ground and features in the far ground, the figures which are introduced, possibly in the case of a river scene the craft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution.

Similar is the reasoning in *Bauman v. Fussell*, where copyright in a photograph of two birds fighting was alleged to have been infringed by the unauthorized reproduction of the position of the birds. The plaintiff argued that “[d]esign is a substantial part of an artistic work”, and as the position of the birds was “the main part of the design of the photograph”, reproducing that position was an infringement of its copyright. That argument was rejected. According to Lord Somerville, while the relative position of objects depicted in a painting could be described as substantial where the work was a painting, the same could not always be said where the work was a photograph. What *would* count as substantial to a photograph, he suggested, varies according to the category of photograph, and the essence or *gestalt* of that category itself. For example, while the *gestalt* of the category of photojournalism derives from the objective depiction of a scene or event with a view to telling

120 [1977] F.S.R. 557 (Ch.).
121 [1977] F.S.R. 557, 562 (Ch.).
122 [1977] F.S.R. 557, 562 (Ch.).
125 The reasoning of his Lordship was discussed approvingly by the drafters in their consideration of photographic copyright under the CDPA; see HL Deb. vol. 493 cols. 1073-4 (23 February 1988).
a certain story, the *gestalt* of the category of fine art photography derives from the arrangement of objects to create by photographic means a harmonious design representing an idea and having a “feeling and artistic character”.\(^{127}\) While Romer L.J. dissented in *Bauman v. Fussell*, his Lordship also perceived the work relative to the category of photography in which it fell, as can be seen from his following statement:

The photograph is of two birds engaged in the one activity for which they were reared and trained; and I cannot but think that the positions in which the camera caught them are of the essence of the plaintiff’s skilful presentation of that activity. It is clear that in certain photographs of bird or animal life the attitudes of the subjects are the prime essentials. Many people nowadays are familiar with bird photography, to which much time and thought have been devoted in recent years…\(^{128}\)

This accords also with the approach in *Designers Guild Limited v. Russell Williams (Textiles)*.\(^{129}\) In that case, the House of Lords’ identification of the properties of the work was strongly informed by the *gestalt* of painting, and the perception of the same in the design of the fabric:

The plaintiff’s expert Mr. Herbert described his expertise as “the art of visual literacy.” This seems to me to be right. So I think that the judge, having heard Mr Herbert, was well placed to assess the importance of the plaintiff’s designer’s brush strokes, resist effect and so forth in the overall artistic work. The Court of Appeal, on the other hand, adopted a reductionist approach which ignored these elements.\(^{130}\)

The result – consistent with the judgments of the other Lords – was a view of the work as consisting not in “the mere notion of stripes and flowers”, but in the combination of visual effects that produced “the

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\(^{130}\) [2000] 1 W.L.R. 2416, 2423 (H.L.) (Lord Hoffmann).
distinctive impression of looseness and boldness combined with lightness and fragility which the designer”, through the application of particular artistic techniques, “wished to achieve”; a view which accounted for their Lordships’ disagreement with the Court of Appeal.

It seems clear that the courts’ practice of perceiving works relative to a category (and perceiving the gestalt of that category in the individual work) is encouraged in the case of artistic works by the statutory divisions of the CDPA, and the aesthetic connotation of the phrase “artistic work”. Still, the same practice has been adopted for non-artistic works, including such works as compilations. In Norowzian, for example, the Court’s association of the dramatic work with the category of dance was critical to its rejection of the claim of infringement. Hence the suggestion of Buxton L.J., that what gave joy its essence and originality was its “representation in stylized form of a young man hesitating with tension when coming amongst a group of unknown people but gradually gaining self-confidence”, with the result that the reproduction of the techniques by which the film had been edited without the reproduction of the dramatic action itself did not amount to “copying … of joy in its status as a copyright [original dramatic] work”. Similarly in Ravenscroft v. Herbert and New English Library Limited, the Court supported a different standard of assessment for historical and expressive novels respectively, consistent with the presumptive intent of their authors. In its judgment, a novel is intended “to interest the reader and to contribute to his enjoyment of his leisure”, in contrast to a historical work, which “may properly be assumed … to have another purpose as well, namely to add to the knowledge possessed by the reader and perhaps in the process to increase the sum total of human experience

132 That connotation was recognized by the Legislature, and suggested as one justification for expressing artistic copyright alone as subsisting “irrespective of artistic quality”. See HL Deb. vol. 490 cols. 839-40 (30 November 1987).
133 See HC Deb. vol. 82 col. 630 (5 July 1985) (see note 17 above).
and understanding”, such that the author of the latter “must ... have attributed to him an intention that the information thereby imparted may be used by the reader, because knowledge would become sterile if it could not be applied”.[136] In CBS Records Australia Limited v. Gross,[137] the Federal Court of Australia suggested that assessments of the “newness” of a musical work ought to proceed differently for the classics and pops.[138] And in Cambridge University Press v. University Tutorial Press,[139] Maugham J. decided that the unauthorised reproduction in a different arrangement of 13 essays from an anthology of 20 did not infringe copyright, on the ground among others that when robbed of their arrangement, the essays were not substantial to the work qua compilation.[140] This supports the implication of the judgments in Designers Guild, Electronic Techniques, Krisarts v. Briarfine, Bauman v. Fussell, Norozwian v. Arks, Sawkins v. Hyperion Records and Pearce v. Ove Arup, among others,[141] that it is only by perceiving a work relative to its category that its features as a work can be properly identified. The question that remains is, how does one correctly identify the category of a work?

(b) Categorizing Works

In Walton’s theory, our perception of the features of a work depends on our perception of the work’s properties of form and their variability or otherwise relative to their category.[142] In developing
this view he adopts a classificatory system of standard, variable and contra-standard features, defining a feature as standard if it is “among those in virtue of which works in that category belong to that category”, variable if “it has nothing to do with a work’s belonging to that category”, and contra-standard if “its presence tends to disqualify works as members of that category” (by virtue of being a misfit or doing violence to the same).

While the standardness or variability of a feature will not always be clear, in many cases it will be. Perceived relative to the category of painting, for example, the flatness of a work and motionless of its markings would be standard, its shapes and colors would be variable, but a protruding three-dimensional object would be contra-standard. It does not follow, however, that paintings are flat objects with motionless markings distinguished from each other by their shapes and colors, nor that works containing a three-dimensional protruding object will be excluded for that reason from the category of painting. Rather, the point is that our perception of the features of a work as standard, variable, or contra-standard affects the way we perceive them and the work.

This insight regarding perceptions of art has explanatory and normative value for copyright. On one hand, it offers a coherent theory of the work that combines (as Walton said) the important and apparently contra-indicative intuitions that the origins of a work inform how it is perceived, while what matters about a painting is only how it looks. On the other hand, by casting categories as essential to our perception of individual works it suggests a theoretical model for our legislative scheme and the analyses of the courts undertaken within it. According to that model, the correct

143 Ibid., at p. 339.
144 Ibid.
145 Ibid.
146 Ibid., at p. 354.
147 Ibid., at p. 340.
148 See ibid., at p. 348.
149 See ibid., at pp. 352-3.
150 Ibid., at p. 354.
151 See ibid., at p. 337.
Justine Pila

The categorization of any work of art requires consideration of each of the following four factors.

(i) The presence in the work of a relatively large number of features standard with respect to the relevant category (for example, paint on a flat surface is standard to a painting).

(ii) The fact that the work is better or more interesting when perceived in the relevant category than when perceived in alternative ways (for example, sentences written in paint across a canvas are better when perceived as part of a painting than as one or more literary works).

(iii) The fact that the work is recognized by the society in which it was created as falling within the relevant category (for example, paint on the body is more likely to be recognised as painting in indigenous Australian than British societies).

(iv) The fact that the author of the work intended or expected it to be perceived within the relevant category (for example, the presentation of a painted window frame or a pile of bricks is more likely to be a painting or sculpture if intended by its presenter to be perceived as such).

Judicial enquiries into the nature of LDMA works at the infringement stage rarely go beyond (i). At the subsistence stage, however, they occasionally do. Indeed, most of the cases in which copyright has been denied to a subject matter for its failure to constitute an LDMA work are explicable with reference to one or more of (ii), (iii) and (iv).

152 See ibid., at pp. 357-8.
153 See HL Deb. vol. 490 col. 828 (30 November 1987) (the Earl of Stockton, expressing concern that the statutory definition of “written” be sufficient to cover “the mouse in Alice in Wonderland in which the arrangement of words is such that the letters become smaller and smaller as the tail grows shorter” so as to ensure that such mouse would be a “literary work” for copyright purposes).
154 Compare the intent here from that required for the existence of a work as an intentionally created form of expression, on which see generally Pila, note 1 above; J. Pila, “Compilation Copyright: A matter calling for ‘a certain … sobriety’” (2008) 19 A.I.P.J. 231-266; see also Hilpinen, note 67 above.
Intellectually this only makes sense if we distinguish between epistemological and constitutive factors, i.e., if we say that what makes something a painting is the existence of paint on a flat surface, but that our grounds for believing that something is a painting include other factors as well. Implicit in Walton’s analysis, however, is that this is not right; that works are constituted by things other than their form, with the result that (i) and/or (ii) alone will never be determinative of the existence of a work. The same view is reflected in the reasons of the courts for denying protection to certain subject matter regardless of its form.

As seen above, one example of such a subject matter is invented words and short titles and phrases, which have historically been denied literary copyright for offending the principle of *de minimis non curat lex* (“the law does not concern itself with trifling matters”). Before the decision in *Exxon v. Exxon Insurance*, justifications for that denial tended to focus on the absence of originality, the (qualitative or quantitative) insufficiency of the work’s form, and/or the public policy arguments against

155 See N. Zangwill, “In Defence of Modern Aesthetic Formalism” (2000) 50 Philosophical Quarterly 476–93, 479 (accusing Walton of confusing epistemological and constitutive matters in his theory); D. Nathan, “Categories and Intentions” (1973) 31 Journal of Aesthetics and Art Criticism 539–41, 540 (critiquing the historical and intentional aspects of Walton’s theory, and arguing that “(i) is all one needs to (and in fact does) consider in all but the most unusual cases, and that (ii) handles those remaining”).

156 See K. Walton, “Categories and Intentions: A Reply” (1973) 32 Journal of Aesthetics and Art Criticism 267–68, 267 (stating that “for any given work there are categories, indeed infinitely many of them, in which it would be unquestionably incorrect to perceive it but which satisfy (i) to the highest degree possible (ie, no features of the work are contra-standard with respect to them). In no case does (i) by itself determine how a work is to be perceived”).


159 See, e.g., Sinanide v. La Maison Kosmeo (1928) 44 T.L.R. 371 (C.A.).
conferring monopoly rights in the English language.\textsuperscript{160} In Exxon, however, the Court rejected these justifications, rationalising the principle with reference to the need for a literary work, “not imaginary, unreal, or apparent only”. This implication accords with the definition of “substantial” contained in the Oxford English Dictionary, as “[h]aving substance; not [being] imaginary, unreal, or apparent only; true, solid, real”, and derives support from the courts’ reliance on the Exxon definition to reject de minimis–based arguments in respect of compilations and tables. It also seems right, and underlines the value of the cases involving application of that principle as a window into judicial understandings of different types of works.\textsuperscript{162} Further, it implies that a subject matter may have aspects of literary form, and yet exist in law qua artistic work. That the courts themselves are sensitive to this is apparent from Emmett J’s emphasis in State of Victoria v. Pacific Technologies (Australia) Ptd Ltd on the plaintiff’s failure to have claimed non-literary copyright in respect of the “Help Words” that were there in suit.\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{160} See, e.g., Rose v. Information Services Limited [1987] F.S.R. 254 (Ch).
  \item \textsuperscript{161} See text accompanying note 73 above.
  \item \textsuperscript{162} For an indication of the legislative view, see HL Deb. vol. 493 col. 1061 (23 February 1988) (“It may also be said that the spoken words may not constitute a work within the meaning of the Bill; that is, they are too insubstantial to amount to a work. It is accepted, of course, that monosyllabic responses to, say, an interviewer in the street may not amount to a work, although the definition of a spoken work is inevitably untested. If one looks at precedent in relation to written works, even the smallest written work can be held to be such in certain circumstances and to be able to maintain copyright.”)
  \item \textsuperscript{163} 2009 FCA 737, at [16] (“It is not suggested that [the words] constitute any other work [than a literary work] that would receive protection under the Copyright Act.”). See also at [20] (“Whether or not those types of phrases might constitute a trademark is not a question that is presently relevant.”)
\end{itemize}
In Exxon, the word “exxon” was found not to be a literary work because of its failure to afford information or instruction, or pleasure in the form of literary enjoyment.\(^{164}\) Drawing on Walton’s theory, we might alternatively say that it lacked the features standard to the category of literary works. We might also note that the trade mark “Exxon” is better or more interesting as an artistic work, and that it was neither intended by its creator nor recognised by society as constituting any other type of work.\(^{165}\)

This conception of the *de minimis* principle is consistent with its application in the context of artistic works, or rather its non-application; the artistic equivalent of words and short phrases – shapes and lines – having never been denied copyright on *de minimis* grounds. On the contrary, the courts have consistently accepted that insubstantiality in the sense of “simplicity” of visual form is no bar to artistic copyright regardless of the nature of the particular work.\(^{166}\) This was recognised by Pincus J. in *Roland Corporation*, who rationalised the cases with reference to the distinction between mere random scribbles and “devices … plainly drawn with care, to obtain an effect”,\(^{167}\) confirming that the intent of an author (as part of the history of a subject matter) is a constitutive feature of an artistic work. The same is confirmed in the other cases in which artistic copyright

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164 \[1982\] Ch. 119, 143 (C.A.).


167 (1991) 22 I.P.R. 245, 249. Cf HL Deb. vol. 490 col. 838 (30 November 1987) (Lords Simon and Denning, defending inclusion of the phrase “irrespective of artistic quality”; Lord Simon: “It is absolutely necessary to avoid arguments such as “That is not a graphic work; that is a mere scribble” or “That is not a painting; that is a mere daub”. As I understand it, that is why the words were originally included and have been maintained for over 70 years.”; Lord Denning: “I agree that those words are there to make sure that the court does not have to inquire through experts or otherwise about artistic quality. If the work is graphic, or whatever, let it be taken as such, irrespective of its quality”).
has been denied to an individual subject matter notwithstanding its possession of artistic form.\(^{168}\)

Two immediate conclusions can be drawn from this discussion. The first is that LDMA works ought to be (and sometimes are) recognised as constituted by the history of their production as well as their particular LDMA form. And the second is that rather than denoting characteristics of form (being the interior form of a category’s \textit{gestalt}\(^{169}\)) or the body of works from which it emerges, the LDMA concepts denote authorial traditions: evolving practices of LDMA expression that exist and are experienced in a particular social context. An important implication of the second of these conclusions is that the LDMA categories are not fixed in time, but rather evolve.\(^{170}\) The possibility which this creates for a subject matter to move in and out of copyright protection underlines the importance of the questions – what constitutes a subject matter \textit{qua} copyright work, and from what point does it exist \textit{qua} copyright work?

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\(^{168}\) See for example the cases discussed in Pila, note 1 above, at pp. 544-5; LucasFilm Ltd v. Ainsworth [2008] EWHC (Civ) 1878.

\(^{169}\) See Ingarden, note 9 above, at pp. 230, 233 (defining gestalt to mean the interior form of a work; the “certain special regularity that ... appears in certain object’ so as to create by their occurrence “a mutual affinity (belonging)” among the same); cf. Walton, note 113 above, at p. 340 (describing the gestalt of a category as perceived in a work “when we perceive (without necessarily being aware of) features standard relative to that category ... combined into a single gestalt quality”).

\(^{170}\) On the evolving nature of the categories themselves see Walton, note 113 above, at pp. 352-3 (explaining that repeated exposure to works containing a feature that is contra-standard relative to a particular category of work will sometimes lead us to adjust our categories to accommodate that feature; either through recognition of a new category in which the offending features has become standard, or by expansion of an existing category in which the offending feature has become variable).
4. Conclusion

In copyright, the categorization of works as literary, dramatic, musical or artistic has two-fold significance: it tells us whether the work is of a type protected by copyright and how correctly to perceive it when determining infringement. Hence the centrality to copyright of the following two issues: how does one correctly categorize an LDMA work, and how does one perceive its properties once categorized? The same issues are at the centre of the theory propounded by Walton. In that theory, the correct categorization of a work depends on a mix of formal and historical factors. The perception of its properties is a matter more complex:

The question posed at the outset of this section was how to determine what aesthetic properties a work has, given that which ones it seems to have depends on what categories it is perceived in, on which of its properties are standard, which variable, and which contra-standard for us. I have sketched in rough outline rules for deciding in what categories a work is correctly perceived (and hence which of its features are absolutely standard, variable and contra-standard). The aesthetic properties it actually possesses are those that are to be found in it when it is perceived correctly.\textsuperscript{171}

As has been seen, this view corresponds to the approach of the courts to individual works when determining infringement. If I have a criticism of that approach, it concerns the courts’ failure always to take account of historical factors when “deciding in what categories a work is correctly perceived”. My main criticism, however, lies with the Legislature, and the method by which it categorizes section 1(1)(a) works. While it is appropriate that choices regarding copyright subject matter be dictated by considerations of social policy, the expression of those choices in the CDPA ought to be guided by a different consideration: the conceptual integrity of the legislative scheme, considered with regard to its related jurisprudence.\textsuperscript{172}

\begin{itemize}
  \item \textsuperscript{171} Walton, note 113 above, at p. 363.
  \item \textsuperscript{172} The U.K.’s choice of LDMA categories was influenced by the requirements of the Berne Convention for the Protection of Literary and Artistic Works (1886, as amended in 1979), including for compilations. The particular
\end{itemize}
expressing legislative choices as to subject matter is apparent from the examples of compilations and photographs. With respect to the former: it was largely the acceptance of compilations as “books” that led the House of Lords to recognise literary copyright in verbatim transcripts in *Walter v. Lane*. Whether consciously or not, the statutory designation of compilations as “literary works” can only have influenced the courts’ acceptance of that decision as authoritative even under post-1911 law, which acceptance has supported the recognition of LDMA copyright in copies as well as the principle of sweat-of-the-brow copyright. With respect to the principle of LDMA copyright in copies, for example, there is the decision in *Sawkins v. Hyperion Records* that a person who first fixes the literary work of another through the exercise of independent skill and labour is the author of that fixation and consequently entitled to literary copyright in it, applying the principle of *Walter v. Lane*. With respect to the principle of sweat-of-the-brow copyright, there is the decision of the Full Federal Court of Australia in *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd*, recently doubted but not yet overruled. Similarly with respect to photographs, the designation of which as “artistic works” encourages a view of the same as material in nature, with doctrinal implications beyond artistic copyright. For example, and noting the expression of that choice, however, is expressly left by article 2(2) of Berne to national legislatures. See note 7 above.

173 See *Walter v. Lane* [1900] A.C. 539, 546 (Earl of Halsbury L.C.), 552 (Lord Davey), 554 (Lord James). For a detailed discussion see Pila, note 154 above.

174 See *Sands & McDougall v. Robinson* (1917) 23 C.L.R. 49 (H.C.A.), extrapolating from the definition of “originality” supported by Peterson J. in *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601 (Ch.).

175 [2005] EWCA (Civ) 56, at [33].


177 IceTV Pty Ltd v. Nine Network Pty Ltd [2009] HCA 14, at [52], [137], [158], [188].

178 Even as the Legislature conceived them as analogous to films: see note 68 above.
analogy between “books” and “artistic works” in the legislative emphasis on the materiality of their form, it is partly the availability of artistic copyright in reprographic and other copies as original (artistic) works that has led modern courts and academics to support Walter v. Lane and the principle of LDMA copyright in LDMA copies.179 Hence my suggestion, that legislative expressions of policy decisions regarding the vesting of copyright in particular works ought to proceed with a greater awareness of how LDMA works are perceived by the courts, and the impact on those perceptions of categories of works.

By way of conclusion, a further implication of the analysis above may be noted. That implication concerns the recognition of a parody defence to copyright infringement on freedom of expression grounds. Such a recognition would overlook the fact that “parody” denotes a category of work, and “freedom of expression” a right the strength of which depends on the content and value of the expression itself. To cast parodic use per se as a right of freedom of expression is consequently problematic, for the value of a work’s expressive content cannot be determined without regard to the individual work, on the basis of the category into which the work falls.180 This possibly explains, and in any case supports, the U.K.’s failure to recognise a parody defence, notwithstanding the provision for one in the EU Directive 2001/29/EC.181

Central to my analysis has been a recognition of the impact of judicial perception on conceptions of LDMA works. While the same possibility for judicial influence exists in all areas of law, it seems especially pronounced in this area of copyright for reasons which may include the following factors: the complexity and cultural currency of LDMA works; the demographic of the intellectual

179 See, e.g., Sawkins v. Hyperion Records [2005] EWCA 56, at [79]-[83] (Jacob L.J., relying on the writings of Laddie, Prescott & Vitoria, the authors of Copinger & Skone James on Copyright, and Ginsburg, in his reasoning from artistic copyright in recreated paintings to literary and musical copyright in literary and musical transcripts).

180 I am grateful to Jonathon Jackson (Oxford B.C.L. class of 2006/2007) for an exchange on this issue.

property judiciary and Bar, which includes considerable expertise in disciplines other than law; and the uncertainty of the normative basis of copyright, particularly in an era of Europeanisation. The last of these factors emerges starkly from a comparison of two recent decisions of the European Court of Justice in Infopaq International A/S v. Danske Dagblades Forning and the High Court of Australia in IceTV Pty Ltd v. Nine Network Pty Ltd. By implication from Infopaq, the law of copyright infringement in UK and other EU Member States must henceforth be interpreted to reflect the aim of Directive 2001/29/EC, which the E.C.J. described as being “to introduce a high level of protection … for authors”. According to the Court in IceTV Pty Ltd, by contrast, the theoretical underpinnings of Anglo-Australian copyright legislation are unchanged since the Statute of Anne 1709, and lie in an understanding of copyright as existing to balance the competing interests of authors and the public in pursuit of certain social and democratic ends. Similar sentiments can be found in the U.K. cases. In Nova Productions Ltd v. Mazooma Games Ltd, for example, Jacob L.J. supported a restrictive interpretation of the scope of copyright protection for computer programs with reference, among other things, to the purpose of the system in providing an “incentive for creation”, and the importance of preventing it from being used as an “instrument of oppression”. In so doing, he invoked the following passage of Lindley L.J. from the 19th century case of Hanfstaengl v. Empire Palace and the long line of judgments in which the passage has been quoted.
The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.  

Amid such conflicting views of the normative basis of U.K. copyright legislation, and the other specific factors referred to above, it is perhaps unsurprising that judicial perspectives on the nature of LDMA works have assumed a particular importance in the U.K., and have challenged the more policy-oriented perspectives of the Legislature itself, including its tendency to treat the categories of LDMA works as technical terms of legal art.