An Intentional View of the Copyright Work

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An Intentional View of the Copyright Work†

JUSTINE PILA*

The questions at the heart of copyright – what is a work, and the extent of copyright protection – are considered. Arguments are presented firstly for an understanding of works oriented around expressive intent, and secondly for a statutory test of infringement that pays closer attention to issues of policy and the authorial acts that copyright rewards. The article revisits two central cases of modern English copyright law, Walter v Lane and Interlego v Tyco Industries, and suggests that their reasoning is problematic; Walter v Lane because the transcripts of Lord Rosebery’s speeches were not books for copyright purposes, and Interlego because the technical specifications were part of the drawings, which were consequently new artistic works for copyright purposes. This is supported by contemporary authority – including paradoxically Sawkins v Hyperion Records, which recently affirmed the correctness of both cases – and has wider implications for our copyright regime.

1. Introduction

While analytically separate, legal conceptions of copyright and its works are frequently conflated. According to Yates J in Millar v Taylor, the same was true of common law copyright (literary


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property). Indeed, in his Lordship’s view it was the majority Judges’ confusion of literary property with the exclusionary rights of copyright that led them into error. According to the majority, literary property derived from the theory of Locke for whom property was the natural entitlement of a creator. When we take something from the common and mix it with our labour, Locke said, we create an object of property the boundaries of which depend on the extent of our labour and the conveniences of life. In their own determination of those boundaries the majority Judges differed. For Willes and Aston JJ literary property comprised the shallow right to reprint an expression. For Lord Mansfield it was more expansive: a

1 Michael Spence, and the anonymous referees for their help. Thanks also to Barbara Lauriat for the Charles Read reference in n 7 below.

2 See (1769) 4 Burr 2303, 2362, 2385; 98 ER 201, 233, 245 (describing the plaintiff’s claim to literary property comprising a right to copy, which the majority accepted, as resting on the confusion of ‘a mere right of action’ – a right in personam – with a right of property – a right in rem). See also Walter v Lane [1900] AC 539, 547 (Lord Halsbury, suggesting confusion in the reasoning of the Court of Appeal ‘between two very different things: one, the proprietary right of every man in his own literary composition; and the other the copyright, that is to say, the exclusive privilege of making copies created by the statute’). (1769) 4 Burr 2303, 2334-5; 98 ER 201, 218 (Willes J: ‘It is certainly not agreeable to natural justice that a stranger should reap the beneficial pecuniary produce of another man’s work…’); (1769) 4 Burr 2303, 2338; 98 ER 201, 220 (Aston J, quoting from Locke: ‘[T]o deprive a man of the fruit of his own cares and sweat; and to enter upon it … as if it was the effect of the intruder’s pains and travel; is a most manifest violation of truth: it is asserting, in fact, that to be his, which cannot be his’); (1769) 4 Burr 2303, 2398; 98 ER 201, 252 (Lord Mansfield: ‘From what source, then, is the common law drawn, which is admitted to be so clear, in respect of the copy before publication? From this argument – because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour’). Cf (1769) 4 Burr 2303, 2340; 98 ER 201, 221 (Yates J in dissent, arguing that property at common law is confined to corporeal objects capable of exclusive occupation and clear identification).

3 John Locke, Two Treatises of Government (1690) Chapter V (‘Of Property’) Section 36 (‘The measure of property nature has well set by the extent of men’s labour and the conveniences of life…’).

4 (1769) 4 Burr 2303, 2349; 98 ER 201, 226 (Willes J, describing literary property as ‘the right of the copy’); (1769) 4 Burr 2303, 2342; 98 ER 201, 222 (Aston J, describing literary property as ‘copy-right’).
right to protect a published expression, extending to a right of withdrawal, a right of integrity, and a right to object to false attribution.\(^6\)

As a theory of copyright, Locke’s view of property finds little support among modern scholars.\(^7\) While in one sense this is not surprising – since 1911 or earlier copyright has derived exclusively from legislation\(^8\) – in another it is, for the theory maps well to contemporary cases. The reason is that while copyright at law is a bundle of rights grafted to certain expressive objects, it is cast by the courts as a duty of conscience not to reap from the skill and labour of authors.\(^9\)

\(^6\) (1769) 4 Burr 2203, 2398-9, 98 ER 201, 252-3 (Lord Mansfield, describing literary property as the right ‘to protect the copy after publication’, derived from the natural right of an author (a) to ‘[be] master of the use of his own name’, ‘control … the correctness of his own work’, ‘prevent additions’, ‘retract errors’, and ‘amend, or cancel a faulty edition’ of his work, (b) to ensure that others do not print, pirate and perpetuate any imperfections, to the disgrace and against the will of the author’ or ‘propagate sentiments under his name, which he disapproves, repents and is ashamed of’, and (c) generally to reserve to him ‘discretion as to the manner in which, or the persons by whom his work shall be published’).

\(^7\) Compare the support it had among 19\(^{th}\) Century scholars and men of Letters; an admittedly extreme example being Charles Reade, who went so far as to describe Yates J (for his views in \textit{Millar v Taylor} as a ‘pettifogger’ and ‘Satan’ who had ‘founded a school of copyright sophists, reasoning \textit{a priori} against a four-peaked mountain of evidence’: ‘I must undeceive mankind about Judge Yates and his fitness to rule the Anglo-Saxon mind’ (Charles Reade, \textit{Readiana: Comments on Current Events} (1883) Sixth Letter, 171). For a recent scholarly use of Locke see Benjamin G Damstede, ‘Limiting Locke: A Natural Law Justification for the Fair Use Doctrine’ (2003) 112 Yale LJ 1179.

\(^8\) See Copyright Act 1911 (UK) s 31 (abrogating any literary property surviving \textit{Donaldson v Beckett} (1774) 2 Bro PC 129, 1 ER 837 (HL)).

\(^9\) See for example the frequency with which copyright infringement is described as plagiarism and copyright as protecting against the misappropriation of authorial labour and skill: \textit{John Richardson Computers v Flanders} [1993] FSR 497 (Ch) (Ferris J, describing copyright infringers as plagiarists and copyright as protecting labour and skill); \textit{Ibcos Computers Ltd v Barclays} [1994] FSR 275 (Ch) (Jacob J, suggesting as a good guide in infringement enquiries the notion of an over-borrowing of the author’s skill, labour and judgement); \textit{Harman Pictures v Osborne} [1967] 1 WLR 723 (Ch) 732 (Goff J, describing as ‘the true principle’ in infringement enquiries that ‘the defendant is not at liberty to use or avail himself of the labour
Without denying its normative implications, my purpose in this article is primarily analytical. Specifically, it is to consider the questions at the heart of copyright – what is a work and the extent of protection which copyright confers? – with a view to presenting two central arguments. The first is for an understanding of copyright works oriented around authorial intent, and the second is for a statutory test of infringement that pays closer attention to issues of policy and the authorial acts that copyright rewards. In developing these arguments I revisit two of the central cases of modern English copyright law, *Walter v Lane*¹⁰ and *Interlego v Tyco Industries*,¹¹ and suggest that their reasoning is problematic; *Walter v Lane* because the reporter’s fixations of Lord Rosebery’s speeches were not books for copyright purposes, and *Interlego* because the technical specifications were part of the plaintiff’s production drawings, which were consequently new artistic works for copyright purposes. This suggestion is supported by contemporary authority – including paradoxically *Sawkins v Hyperion Records*¹² in which the correctness of both cases was most recently affirmed¹³ – and has wider implications for our copyright regime.

which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man’s labour, or, in other words, his property’ (quoting from a decision of Hall VC approved by Lord Atkinson in *MacMillan & Co Ltd v Cooper* (1923) 40 TLR 186 (PC)); *Elanco Products Ltd v Mandalog* [1979] FSR 46 (CA) (suggesting that the defendant ought to have sourced the information for its work from the public domain rather than from the applicant’s work); *Ravenscroft v Herbert and New English Library Limited* [1980] RPC 193 (Brightman J, stating that a defendant must not appropriate to himself the literary labours of an author); *Designer’s Guild v Russell Williams Textiles Ltd* [2000] 1 WLR 2416 (Lord Scott, describing as an underlying principle of copyright law that a copier is not at liberty to appropriate the benefit of another’s skill and labour); *Baigent & Leigh v Random House Group* [2007] EWCA Civ 247 (Mummery LJ, describing copyright infringement as plagiarism). Cf *Navitaire v easyJet Airline Co* [2004] EWHC 1725, [80] (Pumfrey J: ‘It is not sufficient to say that the purpose of the act is to protect original skill and labour’).

¹⁰ [1900] AC 539 (HL).
¹³ See [2005] EWCA Civ 56, [33] (regarding *Walter v Lane*); [2005] EWCA Civ 56, [81]-[84] (regarding *Interlego v Tyco Industries*; Jacob LJ, Mance LJ agreeing, supporting the view of commentators that *Interlego* is to be read as confined to its facts, suggesting support for it thus confined).
2. Copyright and its Works

According to the opening words of the first section of the Copyright, Designs and Patents Act 1988 (UK) (CDPA), ‘copyright is a property right’; not a right of possession but a right of exclusion, a right to exclude others from making certain unauthorized uses of the following categories of protectable subject matter: (a) original literary, dramatic, musical and artistic (LDMA) works;\(^{14}\) (b) sound recordings, films or broadcasts (SFBs);\(^{15}\) and (c) typographical arrangements of a published edition. The distinction between each of these paragraphs is substantive, reflecting differences in the subject matter and the rights they attract. Typographical arrangements are layouts of editions of LDMA works,\(^{16}\) copyright in which is owned by their publisher and protects against facsimile copying.\(^{18}\) SFBs are material fixations of expressive content, copyright in which is owned by their maker and protects against mechanical copying.\(^{20}\) LDMA

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14 See CDPA s 3(1) (defining LDMA works to include any ‘written, spoken or sung work (not being a musical work or dramatic work)’ for literary works, any ‘work of dance or mime’ for dramatic works, and any ‘work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’ for musical works); s 4 (defining ‘artistic work’ to mean ‘a graphic work, photograph, sculpture or collage, irrespective of artistic quality; a work of architecture being a building or model for a building, or a work of artistic craftsmanship’, and ‘graphic work’ to include ‘(a) any painting, drawing, diagram, map, chart or plan, and (b) any engraving, etching, lithograph, woodcut or similar work’).

15 See CDPA s 5A (defining ‘sound recording’ to mean ‘(a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced – regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced’); s 5B (defining ‘film’ to mean ‘a recording on any medium from which a moving image may by any means be produced’); s 6 (defining ‘broadcast’ to mean ‘an electronic transmission of visual images, sounds or other information satisfying the requirements of section 6’).

16 CDPA s 8; Newspaper Licensing Agency Ltd v Marks & Spencer plc [2002] RPC 225 (HL).

17 CDPA s 9(2)(d); s 11(1) (subject to s 11(3)).

18 CDPA s 16(1), 17(5).

19 CDPA s 9(2)(aa), (ab), (b); s 11(1) (subject to s 11(2), 11(3)).
works are conceptually more difficult; on the argument that follows, intentional expressions of LDMA ideas, copyright in which is owned by their creator and protects against material reproduction.

(a) LDMA Works as Intentional Expressions of LDMA Ideas

According to Lord Justice Lloyd in *Baigent v The Random House Group*, ‘[c]opyright does not subsist in ideas; it protects the expression of ideas, not the ideas themselves.’ This statement contains the two classic formulations of the idea/expression distinction, as a principle of subsistence and a principle of infringement. As a principle of infringement the distinction’s validity is uncertain, for whether copyright does protect ideas ‘all depends on what you mean by ideas’ or more correctly, on whether ideas are part of a work, and capable of being a substantial part. As a principle of subsistence the distinction’s validity is more certain, for however ideas might reasonably be defined they will never be a work for copyright purposes, separate from a self-contained form of expression. This has been repeatedly affirmed in the cases, including in *Designer’s Guild v Russell Williams Textiles Ltd* for unexpressed ideas, in *Green v Broadcasting Corporation of New Zealand* for dramatic ideas, in *IPC 20 CDPA s 16(1).*

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20 CDPA s 16(1).
21 See CDPA s 11(1) (subject to s 11(2), s 11(3)).
22 CDPA s 16(1), 17(2) (where by ‘material reproduction’ I mean mechanical or non-mechanical reproduction in a material form).
23 [2007] EWCA Civ 247, [5].
25 Discussed further below.
26 [2000] 1 WLR 2416, 2422 (Lord Hoffman, stating that ‘there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work’). See also *Donoghue v Allied Newspapers* [1938] Ch 106, 110. The same has always been true; see W A Copinger, *The Law of Copyright in Works of Literature and Art* (1904) 38.
27 [1989] 2 All ER 1056 (PC) (deciding that copyright was not infringed by the reproduction of the format of a TV show on the ground that the format lacked the certainty and unity of a dramatic work). See also *Novszczan v Arks Ltd (No 2)* [2000] FSR 363, 367 (‘no copyright subsists in mere style or technique’).
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Media v Highbury-Pleasure Publishing for artistic ideas,\(^{28}\) and in Baigent v Random House for literary ideas.\(^{29}\) However, while confirming that ideas are not LDMA works, these cases convey mixed messages about whether ideas are included in works.

Ambivalence on that issue has long been expressed. In Donoghue v Allied Newspapers,\(^{30}\) for example, Farwell J defined a literary work as a form of language for communicating ideas, but appeared to exclude the ideas themselves.\(^{31}\) The context for his definition was a dispute over the ownership of copyright in an account of the plaintiff’s life that had been written by a journalist after interviewing the plaintiff. The argument of the plaintiff was that as the person responsible for supplying the work’s facts it was he and not the journalist who was the author of the work, and he and not the defendant who was the owner of its copyright. That argument was rejected, with the Judge distinguishing the plaintiff’s act in supplying the ideas from the journalist’s act in clothing them in expression. Only the latter, he held, was an act attracting copyright.\(^{32}\)

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\(^{28}\) [2005] FSR 20 (Ch) (rejecting a claim of copyright infringement involving the reproduction of a selection of design elements from different magazine articles and covers on the ground that such elements were not an artistic work).

\(^{29}\) [2006] EWHC 719 (Smith J, by reasoning (cf result) rejected on appeal, finding that copyright in the plaintiffs’ book had not been infringed by the unauthorized reproduction of its alleged central theme on the ground that the theme was not itself an original literary work protected by copyright).

\(^{30}\) [1938] Ch 106.

\(^{31}\) See [1938] Ch 106, 110 (describing copyright as ‘exist[ing] in the particular form of language in which, or in the case of a picture the particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or to look at it’). See also Baigent & Leigh [2006] EWHC 719, [260] (describing copyright in non-fictional works as ‘protecting the effort and time that has gone into the way in which [the] ideas and facts … are presented as distinct from the ideas and facts as such’).

\(^{32}\) See [1938] Ch 106, 110. This was despite the fact that ‘many of the stories were told in the form of dialogue, and to some extent Mr. Felstead no doubt tried to reproduce the story as it was told to him by the plaintiff’. See also Kenrick v Lawrence (1890) 25 QBD 99 (doubting that a person could be an author without putting pen to paper).
Another case supporting a limited conception of the work with reference to the distinction between ideas and expression is *Merchandising Corp v Harpbond*. There the Court denied copyright to theatrical makeup on the ground that a face is an insufficient surface for a painting, and that paint without a surface is an idea and not a work. According to Lawton LJ:

> [A] painting must be on a surface of some kind. The surface upon which the startling make-up was put was Mr Goddard’s face and, if there were a painting, it must be the marks plus Mr Goddard’s face. If the marks are taken off the face there cannot be a painting. A painting is not an idea: it is an object; and paint without a surface is not a painting. Make-up, as such, however idiosyncratic it may be as an idea, cannot possibly be a painting for the purposes of the Copyright Act 1956.

Like *Donoghue*, *Harpbond* suggests that copyright works are forms of expression that eclipse the ideas they seek to express. However, it also implies that forms of expression not fixed on a surface are merely ideas and therefore not works. In so doing it demonstrates the historical role of material form in excluding authors’ property from the realm of ideas.

That role was apparent even in *Millar v Taylor*. There the King’s Bench agreed that literary compositions include their ideas but disagreed on the implications of that inclusion for literary property. For Yates J it was the ideal nature of creative works that precluded them being property, for ‘[w]hat distinguishing mark can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them?’ For the majority the answer was print. By requiring authors to fix their ideas in printed expression, and conceiving their

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35 (1769) 4 Burr 2303, 2365-6; 98 ER 201, 235.
36 See (1769) 4 Burr 2303, 2349; 98 ER 201, 226 (Willes J, describing ‘the paper, ink, type’ as the incidents or vehicle of a literary composition); (1769) 4 Burr 2303, 2341-2; 98 ER 201, 221-2 (Aston J, describing print as conferring sufficient *indicia certa* to make a work ‘a distinguishable subject of property … not totally destitute of corporeal qualities’); (1769) 4 Burr 2303, 2398; 98 ER 201, 252 (Lord Mansfield, describing copyright as ‘an incorporeal right to print a set of intellectual ideas or modes of thinking’).
property with respect to that expression, the concerns of Yates J could be easily solved and the ideas of authors secured for the public.\textsuperscript{37} In the Willes/Aston formulation the result looked like copyright,\textsuperscript{38} for in 200 years from the Statute of Anne literary copyright was similarly anchored to printed expression and similarly limited to a right of reprinting.\textsuperscript{39} Since then it has expanded considerably; the biggest leap having been taken in 1911, when copyright was vested in LDMA works and extended to include rights of non-literal reproduction.\textsuperscript{40} The result was to vindicate Yates J’s concerns by untethering the work from the material realm and reorienting copyright away from the Willes/Aston right to reprint forms of expression toward the Lord Mansfield right to protect acts of composition; from a right conceived through the eyes of a printer to a right conceived through the eyes of an author.\textsuperscript{41}

Who is an author? For Farwell J, the literary work was a form of expression and the sole author of the work the creator of that

\textsuperscript{37} See, eg, (1769) 4 Burr 2303, 2341; 98 ER 201, 222 (Aston J).
\textsuperscript{38} The essential difference was in the term of protection; literary property existing in perpetuity, unlike copyright, which under the Statute of Anne 1709 (8 Anne c 19) lasted for a renewable term of 14 years from first publication, extended under the Copyright Act 1842 (5 & 6 Vict c 45) to life of the author plus seven years. On a strict application of Locke’s theory copyright ought only to last for as long as is appropriate having regard to the labour expended and social convenience.
\textsuperscript{39} See Statute of Anne (‘the author of any book or books … 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’); 1842 Act (vesting ‘the sole and exclusive liberty of printing or otherwise multiplying copies of books’ from the date of first publication, and defining ‘book’ ‘to mean and include every volume, part of division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published’).
\textsuperscript{40} See 1911 Act s 1(2) (defining ‘copyright’ to mean among other things ‘the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever,’ including the right to translate, novelize or dramatize it).
expression. This view, however, has not generally been followed, with the modern courts recognizing the importance of ideas to LDMA works and the importance of conception to authorship itself. Indeed, according to Laddie J in *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd*, such is the importance of a work’s ideas – the concepts, data and emotions it expresses – that contributing the same can be an act of joint authorship, even without contribution to the form of expression. If this represents a shift since *Donoghue*, a corresponding shift in the other direction can be seen in the treatment of material fixation. Before 1911, when statutory copyright subsisted in ‘books’, fixation was described as a substantive requirement, part of what constituted the book itself. For LDM works this is clearly not the case; material form does not constitute the work, but rather is required to prove its existence. Under the CDPA this is made clear by section 3(2), which states that LDM works must be recorded to be protected, but also confirms that having been so recorded they exist and are protected independent of their record. The same understanding is reflected in the cases.

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42 See, eg, *Designer’s Guild v Russell Williams Textiles Ltd* [2000] 1 WLR 2416, 2422 (Lord Hoffman, describing ‘every element in the expression of an artistic work (unless it got there by accident or compulsion) [as] the expression of an idea on the part of the author’). See also *Baigent & Leigh v Random House* [2007] EWCA Civ 247 (Mummery LJ) [141], [156]; Copinger, n 26 above, 38.

43 See *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) (emphasizing the inappropriateness of dissecting works into their protectable and nonprotectable parts when determining subsistence on the ground that copyright subsists in works as a whole, and dividing the authorship of a work into its conceptual and expressive stages is artificial).

44 See especially [1995] FSR 818 (Ch).

45 See especially [1995] FSR 818, 836 (‘What is protected by copyright in a drawing or a literary work is … both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected’).

46 See, eg, E J Macgillivray, A Treatise Upon the Law of Copyright (1902) 11 (describing books for copyright purposes as requiring a certain physicality).

47 See CDPA s 3 (providing that ‘[c]opyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references … to the time at which such a work is made are to the time at which it is so recorded’).
Hyperion Records, for example, performance editions of 17th Century musical compositions were held to be musical works distinguished from ‘the fact and form’ of their material fixation.\textsuperscript{49} Even in \textit{Norowzian v Arks Ltd (No 2)}, where a film was held to be a dramatic work in order to secure its makers copyright for its expressive (non-dramatic) content, the Court distinguished the film itself from the cinematographic content which the copyright protected.\textsuperscript{50} The principle therefore stands that while the record of an LDM work may itself attract copyright – a record of a dramatic work being potentially a film, and a record of a musical work potentially a sound recording – it will never be part of the recorded (LDM) work itself.\textsuperscript{51} This is important, for it means that fixing an LDM work will never make one

\textsuperscript{48} Cf Baigent v Random House [2007] EWCA Civ 247, [141] (Mummery LJ, describing copyright as a reward for fixing a literary work in material form, viz, ‘in recognition of the investment of effort, time and skill in reducing it into material form, such as words, signs and symbols’).

\textsuperscript{49} [2005] EWCA Civ 565, [53] (Mummery LJ, describing the musical score as ‘the traditional and convenient form of fixation of the music’ and as ‘conform[ing] to the requirement that a copyright work must be recorded in some material form’, but as separate from ‘the music in which copyright subsists’).

\textsuperscript{50} See [2000] FSR 363 (CA), 368 (Buxton LJ, Brooke LJ agreeing, describing a film as ‘a physical recording, whether in celluloid or in another medium … that … is something different from the cinematographic work contained within it’). \textit{Norowzian v Arks Ltd (No 2)} can be read either as supporting the principle that copyright can reach beyond the subject matter in which it subsists (the copyright there having subsisted in the film as a dramatic work, but protected the (non-dramatic) cinematographic work which the film recorded), or that the CDPA grants non-mechanical copyright in cinematographic works within the meaning of Article 14bis of the Berne Convention. Buxton LJ at least seems to have intended the latter ([2000] FSR 363, 369). On either view the decision is problematic for the reasons suggested by Rattee J at first instance, who rejected the plaintiff’s claim for dramatic copyright in the film as an invitation to fill the legal lacuna created by the CDPA’s failure to recognize copyright in cinematographic works ‘by giving a forced construction to the meaning of the term “dramatic work”’ ([1999] EMLR 67, 79). For a defence of the judgment see Richard Arnold, ‘Joy: A Reply’ [2001] IPQ 10.

\textsuperscript{51} Note that in \textit{Norowzian v Arks (No 2)} the film was held not to record a dramatic work.
joint author of that work, nor consequently earn one joint ownership of its copyright.\textsuperscript{52}

If LDM works are distinguished from the fact and form of their material fixation, are artistic works? Their exclusion from section 3(2) suggests they are not, as do the terms of their statutory definition: buildings, graphic works, photographs and sculptures all being forms of artistic expression materially fixed in a tangible medium.\textsuperscript{53} However, while material conceptions of such works have intuitive force – it is difficult to think of a building without walls, a collage without glue, and a photograph without paper – they also raise the issue of the destruction of the material, and its impact on the copyright subsisting in the work. Strictly speaking, if a work is constituted by its material form, destruction of that form will destroy the work and consequently destroy its copyright as well. This, however, seems not to be so. In \textit{Lucas v Williams},\textsuperscript{54} for example, the plaintiff established copyright in a painting despite being unable to produce the original canvas. In the view of the Court, the existence of the canvas was a question of evidence; provided the painting could otherwise be proven even a copy of it in court might not have been required.\textsuperscript{55} A further implication of this decision may be that artistic

\textsuperscript{52} Cf \textit{Norowzian v Arks (No 2)} (assuming the makers of the film to be the authors of its content), relevantly critiqued in Tom Rivers, ‘Norowzian Revisited’ [2000] EIPR 389.

\textsuperscript{53} CDPA s 4(2) (defining ‘building’ to include ‘any fixed structure, and a part of a building or fixed structure’, ‘graphic work’ to include ‘(a) any painting, drawing, diagram, map, chart or plan, and (b) any engraving, etching, lithograph, woodcut or similar work’, ‘photograph’ to mean ‘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’, ‘sculpture’ to include a cast or model made for purposes of sculpture’). See also \textit{Harpbond v Merchandising Corp} (n 34 above); \textit{Creation Records Ltd v News Group Newspapers Ltd} [1997] EMLR 444 (Ch) 450 (Lloyd J, describing ‘as an essential element [of a collage] the sticking of two or more things together’); \textit{Navitaire v easyJet Airline Co} [2004] EWHC 1725, [98] (Pumfrey J, accepting screen displays to be artistic works for copyright purposes, but emphasizing in doing so their fixation in code).

\textsuperscript{54} (1892) 2 QB 113 (CA).

\textsuperscript{55} (1892) 2 QB 113, 116-117 (Lord Esher MR: ‘Suppose neither the alleged copy nor the original picture were produced… I am not prepared to say that the infringement could not be proved by calling a witness to say that he knew the original picture, and had seen the picture which was alleged to be a copy of it, and they were both exactly alike’).
works are distinct from their material fixation, in which case paint ought not to be essential for the existence of a painting.\footnote{See Cala Homes [1995] FSR 818 (Laddie J, treating artistic and literary works as similarly distinguished from their forms of fixation); Pearce v Ove Arup [2002] ECDR CN 2 (Ch) [33] (Jacob J, accepting an analogy between architectural and musical works).} The question then arises as to what is essential, and wherein lies the difference between a painting and other work. On the view herein expressed, a painting is an intentional realization of a particular idea associated with expressive traditions of painting.

Conceiving works with reference to expressive intent finds widespread support in the LDMA work cases.\footnote{The emphasis on authorial intent connects with a further theme in copyright regarding the right of authors to determine the readiness of their works for publication. That theme has its roots in Millar v Taylor, and finds contemporary expression in the principle that an unauthorized dealing with a work is less likely to be fair for section 29 and 30(2) purposes than if the work was previously unpublished. In relation to Millar v Taylor compare (1769) 4 Burr 2303, 2363; 98 ER 201, 233 (Yates J, describing any voluntary act of publication by an author as ‘virtually and necessarily, a gift to the public’) with (1769) 4 Burr 2303, 2348; 98 ER 201, 226 (Willes J, describing the act of publication as giving ‘no more … to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains’). In relation to fair dealing see Ashdown v Telegraph Group Ltd [2002] QB 546 (CA); but cf CCH Canadian v Law Society of Upper Canada [2004] 1 SCR 339 (suggesting that defendants in Canada will be more likely to succeed on a fair dealing argument where the protected (non-confidential) work in question has not previously been published, in recognition of the role of copyright in encouraging dissemination). See also CDPA s 30(1) (excluding unpublished works from the fair dealing for criticism or review provisions); Re Postcards of the Wrapped Reichstag [2004] CC 25 (German Fed Sup Court, suggesting that interpretations of the German public display exception must take account of the intent of the author, objectively construed, with respect to his or her work’s exposure). For further examples of the role of intent in contemporary copyright, albeit not authorial intent, see Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605 (CA) (defining the purpose of a dealing as depending on the true intention of the dealer determined with reference to the impact of his or her dealing on the public); Hyde Park Residence Ltd v Yelland [2001] Ch 143 (CA) (suggesting as the test of fairness whether a fair minded and honest person...)} In Hensher v
Restawile, for example, Lord Kilbrandon defined a work of artistic craftsmanship as the product of a craftsman intended to be artistic.\(^{58}\) Similarly in Exxon Corp v Exxon Insurance Consultants International Ltd, Stephenson LJ defined literary works as ‘intended to afford either information or instruction, or pleasure, in the form of literary enjoyment’.\(^{59}\) In Pearce v Ove Arup, Jacob J defined architectural works as arrangements of spaces conceived with deep thought about how they will be experienced.\(^{60}\) And in Hyperion Records, Mummery LJ defined musical works as combinations of sounds distinguished from noise by the intent of their creators.\(^{61}\) When read in combination these cases suggest that for an object to be an LDMA work it must have been successfully created to exist as such; meaning successfully created with the subjective intent that it exist as an expression of a LDMA idea. In relation to the question, what is an LDMA idea? It is an idea that can be located within one of the authorial traditions denoted by the categories of (LDMA) works.

The premise of this thesis is the same intentional historical conception of the work that was central to the House of Lords decision in Hensher. According to Lord Simon in that case, while the boundaries of the category of works of artistic craftsmanship were set by the aims and achievements of the Arts and Crafts movement, they would have dealt with the copyright work in the manner of the defendant for which s/he did); Ashdown v Telegraph Group Ltd (finding the defendant’s dealing not to have been fair on the basis in part of its commercial motives, which were implied by the Court to be incompatible with serving the public interest; an interesting perspective in a system routinely justified as a mechanism for incentivizing authors through the prospect of making money!)

\(^{58}\) [1976] AC 64, 97. See also [1976] AC 64, 95 (Lord Simon, defining the same as a work of craftsmanship manifesting the vocational aim and impact of an artist, in a definition also focused on authorial intent, but objectively conceived).

\(^{59}\) [1982] Ch 119 (CA) 143 (quoting from the judgment of Davey LJ in Hollinrake v Truswell (1894) 3 ChD 420 (CA) 427); but see Navitaire v easyJet [2006] RPC 3, [79] (describing this definition as ‘unhelpful … dicta from a different world’).

\(^{60}\) [2002] ECDR CN 2 (Ch) [38] (describing the building as having as its ‘whole point … an exhibition space’, and suggesting as self-evident that ‘the designer of such a building must think deeply about how people are to move about within it – moving from exhibition space to exhibition space’).

\(^{61}\) [2005] EWCA Civ 56, [53] (contrasting music from noise as ‘intended to produce effects of some kind on the listener’s emotions and intellect’).
were not constrained by the methods of its earliest members.\textsuperscript{62} As the High Court of Australia recently noted, when defined in this way the category is ‘apt to carry forward the objects of that movement’,\textsuperscript{63} meaning apt to accommodate intentional expressions of the utilitarian aesthetic which the movement created.\textsuperscript{64} In my view this reasoning is as appropriate for other LDMA works as for works of artistic craftsmanship. It also explains the decisions of the courts; not only in their emphasis on expressive intent, but also in their reliance on authors and experts in understanding the nature of individual works. An example is \textit{Designer’s Guild v Russell Williams Textiles Ltd}, where Lord Hoffman rejected the ‘reductionist’ view of the artistic work on which the Court of Appeal’s decision had turned in preference for the view formed by Mr Collins QC after hearing evidence from a witness with ‘expertise in visual literacy’.\textsuperscript{65} Another is \textit{Pearce v Ove Arup}, where Jacob J’s understanding of the architectural work at issue was influenced by evidence regarding its creation, including the conceptual process of the architects in question.\textsuperscript{66} Such decisions help allay concerns regarding judicial enquiries into authorial intent becoming mired in assessments of authorial merit.\textsuperscript{67} A similarly sanguine view was expressed in \textit{Burge v Swarbrick} \textsuperscript{63} (HCA 17, [62], making it clear that whatever the case at the turn of the 19th Century, in 2007 ‘a prototype … might qualify as a “work of artistic craftsmanship” even though it was to serve the purpose of reproduction and then be discarded’).

\textsuperscript{62} See [1976] AC 64 (HL) 90-91.
\textsuperscript{63} \textit{Burge v Swarbrick} [2007] HCA 17, [62].
\textsuperscript{64} See [2007] HCA 17, [60] (making it clear that whatever the case at the turn of the 19th Century, in 2007 ‘a prototype … might qualify as a “work of artistic craftsmanship” even though it was to serve the purpose of reproduction and then be discarded’).
\textsuperscript{65} See [2000] 1 WLR 2416, 2423.
\textsuperscript{66} See [2002] ECDR CN 2 (Ch) [33]–[34]. See also \textit{Pearce v Ove Arup Partnership Ltd} [2000] Ch 403 (CA) 422 (suggesting that when the matter came to trial expert evidence might be admissible ‘for instance, to explain the plans; to point out similarities and dissimilarities; to explain how architects proceed conceptually and how they produce their plans and drawings; and to explain generally what factors bear upon the shapes and dimensions of buildings such as these…”).
\textsuperscript{67} See also \textit{Hensher v Restawile} [1976] AC 64, 94-95 (Lord Simon, emphasizing the importance of establishing the required artistic intent on the basis of expert evidence scrutinized without prejudice to any particular metaphysics of art). The distinction between intent and merit is particularly important for graphic works, photographs, sculptures and collages, which attract
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...where the High Court of Australia, following Lord Simon from Hensher, described the intent required for an artist-craftsman as 'a matter for objective determination by the court, assisted by admissible evidence and not unduly weighed down by the supposed terrors for judicial assessment of matters involving aesthetics.'

Returning to Harpbond in the light of this discussion, it is clear that the makeup was an intentionally created image in paint, but unclear that that alone was sufficient to make it a painting. One could argue it was not. As Lawton LJ commented, 'the plaintiffs specialise in exploiting the commercial opportunities which exist these days out of the reputations of persons in the public eye, particularly those in the world of pop entertainment.' Implicit in this comment is a disapproval of the plaintiffs for attempting to use copyright for inappropriate ends, namely, the protection of an object unrelated to art, being the stage personality of their client, Mr Goddard. Cast in that light, the decision recalls the later principle of Laddie J in Metix v Maugham that a subject matter created as a step in the production of another object cannot be a sculpture for copyright purposes. This principle is consistent with the intentional view of LDMA works above, and suggests an analogy between the copyright 'irrespective of artistic quality' (see n 14 above). An analogous tension exists in contract law, between judicial constructions of personal intent and judicial control of individual bargains, on which see generally Hugh Collins, Regulating Contracts (1999).

68 [2007] HCA 17, [63].
70 The same point could of course be made in respect of any artistic (or non-artistic) work, namely, that it is merely a step in the production of another object, being the author as author.
71 [1997] FSR 718 (Ch) (rejecting a claim of artistic copyright in moulds for use in the production of cartridges as sculptures on the ground that the moulds had no independent significance outside a commercial production process, and had not been made by an artist’s hand with a view in part to non-functional aspects of shape or appearance); contra Wham-O Manufacturing v Lincoln [1985] RPC 127 (NZ CA) (finding artistic copyright to subsist in a model of a mass-produced Frisbee as a sculpture) and Breville Europe Plc v Thorn EMI Domestic Appliance Ltd [1995] FSR 77 (Pat Ct) (finding artistic copyright to subsist in a plaster shape made to produce moulds for toasters as a sculpture). The Metix principle was formulated by Laddie J in explanation of the decision in Davis v Wright Health Group [1988] RPC 403 (Ch), and consistent with his Lordship’s extra-judicial criticism of the extension of copyright to cover industrial designs (see H Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated' [1996] EIPR 253, 254-256).
makeup in *Harpbond*, the dentistry casts and models in *Davis v Wright*, the cartridge moulds in *Metix v Maugham*, and the photographic scene in *Creation Records*, all of which were created for similarly ulterior ends and were (accordingly) denied the protection of copyright. This is important, for it suggests an alternative basis for the decision in *Harpbond*, which is not that the makeup lacked a surface, nor that it lacked the permanence of a work, but that it was not – in the Court of Appeal’s view at least – intended to express an (artistic) idea associated with authorial traditions of painting.

The definition of LDMA works herein advanced raises the issue of copyright in copies, and whether a skillfully produced record is an LDMA work capable of attracting its own LDMA copyright.

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72  [1988] RPC 403 (rejecting a claim of artistic copyright in dentistry casts and models for use in the production of dental impression trays as sculptures on the ground that they were merely steps in a commercial production process, and were neither intended to have any continuing existence nor created for the purpose of sculpture).

73  [1997] EMLR 444 (Ch) 450 (rejecting a claim of artistic copyright in a photographic scene on the ground among others that it was ‘intrinsically ephemeral’ in the sense of having been ‘put together solely to be the subject matter of a number of photographs and disassembled as soon as those were taken’, and not having been intended by its creator to have any continued existence in its own right, separate from the photograph).

74  The intentional, historical conception of LDMA works herein supported allows for the possibility of makeup and other forms of body art in different cultures being recognised as artistic works (paintings) for copyright purposes. Expressive traditions have been significant in other areas of copyright and moral rights as well, particularly in Australia. See for example *CBS Records Australia Limited v Gross* (1989) 15 IPR 385 (Fed Ct Ausl) [22] (noting that understandings of a musical work’s ‘newness’ will differ for classical and popular works respectively) and *Schott Musik International GMBH v Colossal Records of Australia* [1997] FCA 331 (Lindgren J, suggesting that a treatment of a work that makes the work available to the tastes of a different period of time or a different subculture or both will be less likely to be derogatory).

75  The CDPA makes no explicit provision with respect to LDMA copyright in copies; but see CDPA s 3(3) (providing that ‘…where [a work] is not recorded by the author nothing in [section 3(2)] affects the question whether copyright subsists in the record as distinct from the work recorded”). Non-LDMA (mechanical) copyright will be separately available for copies of musical and dramatic works constituting sound recordings and films under CDPA section 1(1)(b). An interesting question is whether a transcript of a musical work is a sound recording
In *Interlego v Tyco Industries* the Privy Council said no: ‘A well executed tracing is the result of much labour and skill but remains what it is, a tracing’.\(^{76}\) On the view of works above this statement seems right, for a copyist seeks not to express an LDMA idea but materially to fix the expression of another.\(^{77}\) Despite this, and the judicial and legislative support for the understanding of works from which it derives, the *Interlego* dictum was rejected in *Sawkins v Hyperion Records* as inconsistent with the decision in *Walter v Lane*.

(b) The *Walter v Lane* Anomaly: Literary Copyright in Literary Transcripts

In the 1890s, Lord Rosebery delivered a series of speeches to a small public audience without notes, the Times reporters in the audience transcribed the speeches verbatim for publication in the newspaper,\(^{78}\) and the defendant reproduced the published transcripts in an anthology of Lord Rosebery’s speeches. Hence the question for the Court, which was whether in doing so the defendant breached someone’s copyright.

In considering that issue the House of Lords assumed from the outset that there could be no copyright in Lord Rosebery’s speeches on the ground that Lord Rosebery had not recorded them.\(^{79}\)

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\(^{76}\) [1989] AC 217 (PC) 263.

\(^{77}\) See *Designer’s Guild* [2000] 1 WLR 2416, 2422 (Lord Hoffman, n 42 above). In a copy, the choices described by Lord Hoffman are not made by the copyist, but by the author of the original (copied) expression.

\(^{78}\) [1900] AC 539, 539 (‘The reporters for The Times took down the speeches in shorthand, wrote out their notes, corrected, revised and punctuated their reports for publication, and the reports were published in The Times, the speeches being given verbatim as delivered by Lord Rosebery’). Neither the skill of the reporters nor the accuracy of their reports was in dispute before the House of Lords.

\(^{79}\) See, eg, [1900] AC 539, 550 (Lord Davey: ‘Copyright is the right of multiplying copies in a published writing. There is no copyright in a speech although delivered on a public occasion…’); 557 (Lord Brampton: ‘The oral speech is not a “book,” the written
This did not mean that Lord Rosebery was not an author, rather that the speeches he had authored lacked the material form required of a book for copyright purposes. While the reporters’ transcripts of the speeches gave them that form, the possibility that this might have made them books was not considered by their Lordships, who expressly distinguished the speeches from the reports and confined their attention to the status of the latter.  

According to their Lordships, while Lord Rosebery’s speeches were not books, the reporters’ transcripts were, raising the question who was their author? According to the majority it was the reporters, for it was the reporters who had, by the exercise of independent skill and labour, produced them. This exercise of independent skill and labour was critical, for it was that which distinguished the reporters from mere scribes in the sense either of having copied an existing
book or of having written the words down mechanically as they were spoken.\textsuperscript{83} So too the conception of the books as reports of the speeches separate from the speeches, for it was that which ensured that their copyright would be limited, and would not prevent other members of the audience from claiming their own copyright in respect of their own published reports of Lord Rosebery’s speeches.

This reasoning is problematic. For a start, the emphasis on the freedom of the audience is confusing, for it is self-evident that copyright in a book will only prevent copying from the book itself. So too the emphasis on the reporters’ skill and labour, for books and authors are correlative concepts, with the result that if the transcripts were books the reporters had to be authors. That there was doubt on that issue underlines what is in any case apparent: that the reports were not books, and the reporters not authors.

According to the majority in \textit{Walter v Lane}, the reports were books by virtue of their publication as individual sheets of letterpress contained in The Times.\textsuperscript{84} The books, however, were not the sheets themselves, but the literary matter printed upon them. That matter comprised the arrangement of words which Lord Rosebery had spoken, conveyed to the press by the hand of its reporters. Hence the view of Lord Robertson in dissent, that the reporters were acting not as an author\textsuperscript{85} – a person who ‘thinks the thoughts and chooses the words and the arrangement of them’\textsuperscript{86} – but as the human approximation of a phonographic instrument – ‘the echo, the mocking bird, the slave of the speaker’;\textsuperscript{87} and that however great

\textsuperscript{83} See [1900] AC 539, 547 (Lord Halsbury, distinguishing the production of a book by exercise of skill and expenditure from the copying of it); 551 (Lord Davey, emphasizing the report as the independent creation of the reporter); 554 (Lord James, distinguishing the art of a reporter from ‘mere transcribing or writing from dictation’); 557 (Lord Brampton, distinguishing the reporter from ‘a person who merely writes an article from the dictation and as the servant of another’).

\textsuperscript{84} See n 81 above; following the statutory definition of ‘book’ in the 1842 Act as including ‘every … sheet of letterpress … separately published’ (n 39 above).

\textsuperscript{85} Ibid. Indeed, even Lord Halsbury expressly avoided use of the word ‘author’ to describe the reporters: see [1900] AC 539, 547. Cf [1900] AC 539, 554-5 (Lord James, n 82 above).

\textsuperscript{86} See [1900] AC 539, 560.

\textsuperscript{87} See [1900] AC 539, 543 (counsel).
their art of literary transcription, it was not appropriately rewarded by literary copyright.\textsuperscript{88}

This analysis is vindicated by the distinction in contemporary law between LDMA copyright for LDMA works and mechanical copyright for SFBs.\textsuperscript{89} It is also consistent with the \textit{Interlego} dictum and the understanding of LDMA works suggested above; for the reporters’ acts of literary transcription were not intentional expressions of literary ideas but intentional acts of material fixation, and while the result may have been products of great social value that alone could not give them the characteristics of a book. One way in which the reports might have had those characteristics was as part of a jointly authored book containing the speeches. That conception, however, was neither suggested nor supportable, for the men’s respective contributions were not collaboratively made and could not therefore have converged in any jointly authored work.\textsuperscript{90} Nor were the contributions indistinct from each other, underlining that while the reporters may have been the joint \textit{makers} of a book with Lord Rosebery, they were not his joint \textit{authors}, nor (joint) owners of copyright. This view is consistent with contemporary principles of joint authorship, which provide additional support for Lord Robertson’s dissent.\textsuperscript{91}

\textsuperscript{88} See [1900] AC 539, 562 (Lord Robertson, describing as ‘inappropriate the result of holding the statute to confer on the stenographer a reward which has no relation whatever to his art’).

\textsuperscript{89} The right mechanically to copy was created in 1911, when copyright was first vested in ‘records, perforated rolls, and other contrivances by means of which sound may be mechanically reproduced’: 1911 Act s 19(1).

\textsuperscript{90} See CDPA s 10(1) (defining a work of joint authorship as ‘a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other[s]’); \textit{Cala Homes} [1995] FSR 818, 835 (Laddie J, noting that in \textit{Walter v Lane} the issue of joint authorship was and could not have been in issue, as ‘there was no question of any sort of co-operation between Lord Rosebery and the reporter’).

\textsuperscript{91} See \textit{Cyprotex Discovery v The University of Sheffield} [2004] RPC 43 (CA) (deciding that there was no inconsistency in the Trial Judge’s finding that Dr Rostami was joint maker but not joint author of the programs).
So, too, do contemporary authorities regarding LDMA works, including *Hyperion Records* referred to above. This is paradoxical, for in *Hyperion Records* the Court of Appeal applied *Walter v Lane* to support the principle of LDMA copyright in non-servile copies. With respect, however, that principle was neither necessary for the Court’s decision nor supported by its reasoning, for as Lord Justice Jacob himself sought to make clear, Dr Sawkins’s performance editions were not ‘copies’ produced by labour and skill, but intentional expressions of the musical idea of enhancing the performability of an existing combination of sounds. For this reason it seems open to question whether *Hyperion Records* does support *Walter v Lane* and the subsistence of LDMA copyright in non-servile copies. Indeed, applying Jacob LJ’s own reasoning to the facts of that case – that ‘Dr Sawkins recreated Lalande’s work using a considerable amount of personal judgment [so] as to create something really new using his own original (and not merely copied) work’ – the only ‘really new’ characteristic possessed by the reporters’ transcripts was the material form which they gave to the speeches, and while undoubtedly the product of much labour and skill, it is difficult to see in that form the ‘judgement’ of an author.

If not as it was in 1900, how ought *Walter v Lane* to be decided today?

By section 3(2) of the CDPA, the reporters’ transcripts of Lord Rosebery’s speeches would trigger the vesting of copyright in the speeches themselves as original literary works, which copyright would be owned by Lord Rosebery as their author. Having produced their transcripts the reporters would be free to publish them for the journalistic purpose for which they were made in reliance on CDPA section 58, provided Lord Rosebery had not objected and the conditions of subsection 58(2) were otherwise
satisfied.\(^{94}\) For the reporters to have their own copyright in the records they would need additionally to show that they were a type of work in which copyright subsists. For the reasons above they would (or ought to) be unable to do so; a written transcript of a literary work being neither an LDMA work within the meaning of section 1(1)(a) nor an SFB or typographical arrangement within the meaning of section 1(1)(b) or 1(1)(c). For a different result to be possible, the Legislature would need to amend section 1(1)(b) to grant mechanical copyright in literary transcripts. While it could alternatively amend section 1(1)(a) in order to grant them literary copyright, this would be undesirable for two reasons. First, it would produce a species of copyright protecting more than the work in which it subsists; and second, it would subvert the distinction on which our system is based between authorial works (attracting rights of reproduction) and material records (attracting rights mechanically to copy).

Ought the Legislature to amend section 1(1)(b)?

The implication of Walter v Lane is that it ought to, at least where the result is a product of genuine cultural interest that might otherwise remain inaccessible to the public.\(^{95}\) This is also the implication of Jacob LJ’s decision in Hyperion Records.\(^{96}\) Appropriately cast, such an amendment could avoid the problems of

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\(^{94}\) The s 58(2) conditions are that ‘(a) the record is a direct record of the spoken words and is not taken from a previous record or from a broadcast; (b) the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe copyright; (c) the use made of the record or material taken from it is not of a kind prohibited by or on behalf of the speaker or copyright owner before the record was made; and (d) the use is by or with the authority of a person who is lawfully in possession of the record’.

\(^{95}\) See [1900] AC 539, 549 (Lord Halsbury, suggesting ‘those who preserve the memory of spoken words, which are assumed to be of value to the public’ to be as deserving of intellectual property rights as ‘the importer of foreign inventions’); 559 (Lord Brampton, describing the reporters as having ensured that ‘the thousands of the readers of [The Times] might be truthfully and accurately informed of those intellectual and interesting utterances of Lord Rosebery which they had not been privileged to hear’).

multiple copyrights in multiple records of a single and otherwise freely available work raised by Cross J in *Roberton v Lewis*. Whether it could as easily avoid the problem of indefinitely renewable copyright in works the dissemination of which has been tightly controlled is unclear. Partly for this reason, it seems unlikely to secure the support of the Legislature. Indeed, the range of ‘miscellaneous permitted acts’ in relation to LDMA works contained in CDPA Chapter III, which include the journalistic use of *Walter v Lane* transcripts and the recording of *Roberton v Lewis* airs, suggest that the Legislature has considered this issue and decided against this type of copyright. So too does the existence of a 25-year publication right for the first publisher of LDMA works in which copyright has expired.

This leaves the quandary discussed in *Hyperion Records* – analogous to the quandary discussed by Finkelstein J for compilations in *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* – that the very qualities that make the subject matter difficult to produce and valuable to the public are also the qualities that deny it protection. In the case of compilations those qualities are accessibility and coverage of data. In the case of transcriptions they are fidelity to an existing work. For compilations this quandary has now been solved in the UK by the introduction of the Database Directive and its *sui generis* protection for database contents.

Even were it to be similarly solved for literary (and other) records there would remain the fact of limited copyright for exact reproductions and unrestricted (LDMA) copyright for inexact reproductions, and the questions: (a) when does a material record cease to be a record for copyright purposes and become instead an LDMA work (and the copyist an author)?; and (b) what is the measure of the property that

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97 [1976] RPC 169 (Ch) (rejecting a claim of musical copyright in the record of a tune on the ground among others that to allow multiple copyrights in multiple records of a single work would threaten to bring the law into disrepute).

98 CDPA ss 58, 61.

99 The Copyright and Related Rights Regulations (Statutory Instrument 1996 No 2967) rs 16, 17.


101 Directive 96/9/EC on the legal protection of databases.

102 See [2005] EWCA Civ 56, [81]-[83].
such an author has? With respect to (b): the measure ought properly to reflect the author’s contribution and relevant matters of social policy. With respect to (a): the answer must be when the record manifests the non-formal properties required of a statutory (LDMA) work.\footnote{Compare the answer to the same question (when can a subject matter be said to be a copy of an existing work?) suggested by the courts in the context of infringement. See, eg, \textit{King Features Syndicate v Kleeman} [1941] AC 417 (HL) 424.} This is consistent with the decision in \textit{Hyperion Records}, but inconsistent with the decision in \textit{Interlego v Tyco Industries} due to the formalistic conception of works it supports.\footnote{For a similar criticism of the Court of Appeal’s decision in \textit{Norowzian v Arks Ltd (No 2)} [2000] FSR 363 (that dramatic copyright did not subsist in the movements recorded by the plaintiff’s film due to their inability to be performed by humans) see Rivers, n 50 above, 390 (arguing that the issue ought to have been determined with reference to an enquiry into whether there was evidence, including expert evidence, ‘of an overall intention of the kind which would be expected from an author’).}

(c) The \textit{Interlego v Tyco Industries} Anomaly: No Copyright In A New Artistic Work

In \textit{Interlego v Tyco Industries}, the Privy Council held that production drawings of lego blocks revised to reflect new technical specifications lacked the necessary visual embellishments to constitute new artistic works for copyright purposes. According to the Court, the re-drawings were the product of skill and labour, but not skill and labour of the right kind, ie skill and labour in the production of visually significant alterations.\footnote{See [1989] AC 217, 264 (describing artistic copyright as ‘concerned with visual image’, and the re-drawings at issue as manifesting ‘visually insignificant’ variations from the original pre-1973 drawings from which they were derived). \textit{Cf Interlego AG v Croner Trading Pty Limited} (1993) 25 IPR 65 (Full Fed Ct Austral, deciding that copyright \textit{did} subsist in the Interlego re-drawings by reason of their incorporation of ‘visually distinctive’ changes).}

Central to this reasoning are two specific findings. The first is that technical specifications on production drawings are not part of the drawings for copyright purposes, and the second is that skill and labour in copying an existing work cannot confer LDMA work.
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copyright. The second of these findings is in my view right, not because the labour and skill will never be substantial, but because it will only ever result in a material record, which for copyright purposes is not an LDMA work. This leaves the first question, the answer to which depends on the nature of the work.

To the extent that this can be answered generically it has been: LDMA works are intentional expressions of particular ideas associated with a relevant authorial tradition. An important corollary of this definition is that the subject matter must have been created to exist as such, and not merely as a step in another object’s production, unless it is consistent with the genre of work that it do so. Examples of works that are intended to exist as steps in the production of other (functional or expressive) objects include prototypes, architectural models and production drawings. The subject matter in Interlego were of the last of these types: two-dimensional drawings for the production of three-dimensional objects. As such they ought to have included their technical specifications, as an essential part of the artistic idea which it was the evident intent of their creators to express. This is despite the fact that it was only the drawings and not the blocks in which copyright subsisted, distinguishing the case from both Pearce v Ove Arup and Sawkins v Hyperion Records as well.

This view finds support in the case law, which suggests that production and other working drawings need not be exclusively

106 See [1989] AC 217, 263 (stating that ‘copying, per se, however much skill or labour may be devoted to the process, cannot make an original work’). Compare the position with respect to representations of a natural scene, treated as analogous to copies of an existing work by Lord Halsbury in Walter v Lane [1900] AC 539, 549.

107 Contra Hyperion Records [2005] EWCA Civ 56, [83] (Jacob LJ, agreeing with Ginsburg – for whom an author at copyright law ‘is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work’ (see Jane Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’ (2003) 52 DePaul LR 1063, 1092) – that ‘[r]eproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are copies of pre-existing works’).

108 See Burge v Swarbrick [2007] HCA 17, [60] (deciding that prototypes were capable of qualifying as works of artistic craftsmanship: see n 64 above).
pictorial for copyright purposes. An example is Solar Thomson v Barton, where the Court of Appeal distinguished mere concentric circles (alleged to be too simple to attract artistic copyright) from the circles in issue, being ‘concentric circles drawn to the precise measurements which illustrate in plan the rubber ring to which the drawing relates’. Another is Lerose Ltd v Hawick Jersey International, where Whitford J rejected an argument that point patterns for knitting machines could not be regarded as artistic works by reason of their inclusion of technical instructions. A third is Wham-O Manufacturing v Lincoln, where the New Zealand Court of Appeal disagreed that ‘for copyright words and figures did not form part of the drawing and could not be taken into account in interpreting it’, describing the statutory categories of drawing as each conveying ‘in ordinary experience … the concept of drawn lines in combination with words and figures’.

These decisions cast doubt over the reasoning in Interlego by suggesting that for copyright purposes production drawings do include their technical specifications, and that by ignoring those specifications the Privy Council was either misconceiving the work or dividing it in precisely the way in which the House of Lords in

109 The cases to which the Privy Council was referred in Interlego on this point were all on the question of infringement and were regarded for that reason as of limited assistance (see [1989] AC 217, 264-5).

110 [1977] RPC 537 (CA) 558.

111 [1973] FSR 15 (Ch) 21 (describing the provision of the instructions as ‘the whole point of the drawing’, which, if it were ‘not to be regarded as a drawing because of its close association with … the provision of instructions [could] properly be described as a diagram’). See also Vermaat & Powell v Boncrest Ltd [2001] FSR 43 (Ch) 44-45 (relying on Lerose to reject an argument based on Interlego v Tyco that garment designs were not graphic works due to their dependence on technical figures and words to be understood).

112 [1985] RPC 127 (NZ CA) 146. The Court of Appeal further noted (at 146) that ‘words and figures are an integral part of drawings of the kind referred to’, echoing the decision of the UK Court of Appeal in Solar Thomson v Barton.
Ladbroke v William Hill said works ought not to be divided.\textsuperscript{113} Had the Council not done so, ie, had it conceived the drawings as including their specifications, the result would have been different, for the specifications were technically significant,\textsuperscript{114} and on the authorities of the time ought therefore to have been sufficient to save the re-drawings from \textit{de minimis} exclusion, and generally to confirm the plaintiff’s entitlement to copyright. This is consistent with the more general understanding of artistic copyright supported by the courts, as capable of subsisting in even the simplest of drawings provided they can be said to have been intentionally drawn. In the case of working drawings, the required intent will generally be presumed from the specifications themselves, as Pincus J of the Australian Federal Court in \textit{Roland Corporation v Lorenzo & Sons} has impliedly suggested:\textsuperscript{115}

In \textit{British Northrop Ltd v Texteam Blackburn Ltd} [1974] 91 RPC 57 at 68 and 69, Megarry J had to consider whether some rather simple drawings could be the subject of copyright. The judge said of the drawings:

“some of them are indeed simple. They include ... a block of leather, a washer and a collar. They are all carefully drawn to scale, with precise dimensions, and I cannot extract from the statute any indication that these drawings should not be able to qualify for copyright. If simplicity were a disqualification, at some point there would come enough complexity to qualify. It is not that I am unable to see exactly where the Act draws the line: it is that I cannot see that there is any intention to draw any line at all.”

On the other hand, in the same judgment, Megarry J made the point (at 68) that a single straight line “drawn with the aid of a ruler would not seem to me a very promising subject for copyright”.It is not easy to see why an allegedly copyright drawing of a washer, presumably being two concentric circles, does not require consideration on the score of simplicity. It may be that the view of Megarry J of the meaning of “drawing” involves an

\textsuperscript{113} See \textit{Ladbroke (Football) Ltd v William Hill (Football) Ltd} [1964] 1 WLR 273, 278 (Lord Reid), 293 (Lord Pearce).

\textsuperscript{114} See [1989] AC 217, 264 (accepting ‘the conclusion in both the courts below that [the specifications] were technically significant and were the result of considerable labour and expertise’, contrary to the argument of Mr Robin Jacob as counsel).

\textsuperscript{115} See also \textit{Solar Thomson} [1977] RPC 537, 558 (rejecting an argument that the drawings were too simple to attract copyright on the basis of their ‘precise measurements’); \textit{Wham-O} [1985] RPC 127, 146 (rejecting an argument that the drawings were mere sketches of an idea on the basis of their technical instructions).
approach which is difficult to reconcile with that taken in the English Court of Appeal with respect to the meaning of “literary work”: see Exxon … (at 144) where approval was given to the statement: “... a literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment.” A work may be so simple that it can afford none of these, except trivially. It seems clear that a mere random collection of letters of the alphabet could not be copyright and presumably a mere random scribble could not be either, but the devices with which I am concerned are by no means random and were plainly drawn with care, to obtain an effect. It is true that they are relatively simple and their simplicity will produce the result that only an exact or fairly exact copy will infringe; but that is not a problem for the applicants here.116

In my view this judgment is right with one exception; that Megarry J’s understanding of artistic works as including simple drawings ‘carefully drawn to scale, with precise dimensions’ is consistent with the Court of Appeal’s understanding of literary works in Exxon as excluding invented words such as ‘exxon’; the reason being that both understandings reflect the view of LDMA works above.117 Indeed, had the subject matter in Exxon been argued to be an artistic work, a different conclusion may well have been reached in reflection of the different nature of literary and artistic expression.118

The conclusion to be drawn is that copyright ought to have subsisted in the Interlego drawings as original artistic works for copyright purposes. This conclusion, however, says nothing of the

117 With respect to the working drawings, this is apparent from Pincus J’s description of the drawings in Roland Corporation, immediately above, as ‘by no means random and [having been] plainly drawn with care, to obtain an effect’ ((1991) 33 FCR 111, 114).
118 The decision in Exxon was reached by application of the principle de minimis non curat lex, which is a principle of limited scope that has only ever been applied in respect of short titles and invented words, and even then on the specific and limited point of literary copyright. The reason for suggesting that the outcome in the cases might have been different had the subject matter been presented as an artistic work is that invented words convey no meaning and have no significance independent of the context in which they are used, and are therefore better treated as artistic works. (See Copinger, n 26 above, 70-71 (suggesting that titles are more properly regarded as trade marks than copyright works).)
appropriate measure of that copyright, which, as the Privy Council itself suggested, was the real source of difficulty in the Interlego case.\footnote{See [1989] AC 217, 255-6 (noting that to allow the claim would be to support the plaintiff in its attempt ‘to obtain, effectively, a perpetual monopoly’).}

3. The Measure of Copyright

In the UK, copyright has reached as deep and as wide as the works in which it subsists.\footnote{In some cases it has gone deeper, eg, in \textit{Walter v Lane} [1900] AC 539 and \textit{Norowzian v Arks Ltd (No 2)} [2000] FSR 363, discussed above.} This is unsurprising, for under our statutory regime copyright subsists in a work as a whole and is infringed by the reproduction of a substantial part of it, and so long as content can be part of a work it must also be capable of being a substantial part.\footnote{See \textit{Designer’s Guild v Russell Williams Textiles Ltd} [2000] 1 WLR 2416, 2422 (Lord Hoffman, noting that the part of a work regarded as substantial ‘can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part,’ with the result that ‘if one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work’). See also the cases involving expressive works, where the courts have tended to determine infringement by identifying the essential characteristics of the protected work and asking whether the unauthorized use involved them. See, eg, \textit{Bauman v Fussell} [1978] RPC 485 (CA) (deciding that copyright had not been infringed on the ground that the feeling and artistic character of the protected photograph had not been reproduced); \textit{Norowzian v Arks Ltd (No 2)} [2000] FSR 363 (deciding that copyright had not been infringed on the ground that the essence or originality of the protected work lay in its dramatic action – the stylized depiction of a young man gaining self-confidence among a group of unknown people – which had not been reproduced); \textit{Designer’s Guild v Russell Williams Textiles Ltd} [2000] 1 WLR 2416 (deciding that copyright had been infringed on the ground that the defendant’s reproduction of the combination of artistic techniques employed by the artist – the notion of stripes and flowers, certain additional visual similarities arising from the brushwork, the resist effect, and the loose arrangement of freely drawn leaves and flowers – amounted to a reproduction of a substantial part of the work, despite the visual differences produced); \textit{Pearce v Ove Arup} [2002] ECDR CN 2 (deciding that copyright had not been infringed on the ground that while the features alleged to have been copied appeared from a visual comparison of the plans to be substantial, when the work was experienced as architectural works are intended to be experienced – not visually, but physically, as arrangements of spaces – that appearance was lost). While a...}
This statement underlines a central problem with our Act, which is the inadequacy of the mechanism by which it measures claimants’ copyright.\textsuperscript{122} That mechanism is a narrow question of fact – has the defendant reproduced a substantial part of the copyright work? – which takes no account of originality or policy. With respect to originality: every title to copyright derives from an individual author and the investment s/he has made in the creation of a work. Given however that a person may be the author of a work without having originated all of its aspects, it seems appropriate to measure his or her reward with reference to his or her specific contribution. Similarly with respect to policy: given that every finding of infringement implies a finding of protectability – that the part of the work which the infringing act involves is an appropriate object of exclusionary rights – it seems appropriate to enquire, when measuring a claimant’s copyright, into the policy implications of granting exclusionary rights.\textsuperscript{123}

Our Act fails to accommodate either of these enquiries, creating immediate difficulties for the courts in considering non-

\textsuperscript{122} Cf Michael Spence and Timothy Endicott, ‘Vagueness in the Scope of Copyright’ (2005) 121 LQR 657, 680 (suggesting that the responsibility for the defects in this area of the law rests with the courts, and their failure appropriately to exercise the power allocated to them by ‘the vagueness of the substantial part doctrine and the ideas-expression dichotomy’).

\textsuperscript{123} Contrast US Code Title 17 §102(b) (statutorily entrenching a common of unprotectable content by provision that ‘[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work’). On the importance of ensuring that determinations of infringement reflect matters of policy see also Spence and Endicott, ibid, 672.
literal copying, and the copying of content unoriginal to the author
(or, as was the case in Interlego v Tyco Industries, recycled by the
author from a pre-existing work). Faced with those difficulties the
courts have taken one of three approaches. The first has been to treat
the claim of infringement as a claim of subsistence involving the part
of the work alleged to have been copied. The second has been to
treat originality and policy as relevant to substantiality, such that
only protectable content that has originated from the author can be a
substantial part of the copyright work. And the third has been
effectively to distinguish protectability from substantiality and require
that each be resolved independent of the other. While deviating

124 See, eg, Norowzian v Arks Ltd (No 2) [2000] FSR 363, 367 (n 27); Baigent & Leigh [2006]
EWHC 719 (n 29). Cf IPC Media v Highbury-Pleasure [2005] FSR 20 (n 28) and Green v
Broadcasting Corp [1989] 2 All ER 1056 (n 27), where a similar approach was adopted but
due to the absence of any single work from which the reproduced part could be said to have
derived.

125 This approach is implicit in methods of determining infringement oriented around
the ‘essence or originality’ of the protected work or the author’s skill and labour (see
n 121 above). See also Designer’s Guild v Russell Williams Textiles Ltd [2000] 1 WLR
2416, 2422 (Lord Hoffman, suggesting that ‘certain ideas expressed by a copyright
work may not be protected because, although they are ideas of a literary, dramatic or
artistic nature, they are not original, or are so commonplace as not to form a
substantial part of the work’ and that ‘in cases of artistic copyright, the more abstract
and simple the copied idea, the less likely it is to constitute a substantial part’ of the
protected work); Ladbroke v William Hill [1964] 1 WLR 273, 293 (Lord Pearce,
interpreting judicial observations that ‘there is no copyright in some unoriginal part
of a whole that is copyright’ to mean that ‘that which would not attract copyright
except by reason of its collocation will, when robbed of that collocation, not be a
substantial part of the copyright’); Warwick Film Productions v Eisinger [1969] 1 Ch 508
(Ch) (rejecting a claim of copyright infringement on the ground that the sections of
the protected work which had been reproduced were unoriginal and could therefore
not constitute a substantial part of the work as a whole).

126 See, eg, Baigent & Leigh [2007] EWCA Civ 247, [7] (Lloyd LJ, deriving from Designer’s
Guild a test of infringement that included as a discrete question ‘whether what was so copied
was on the copyright side of the line between ideas and expression’; [156] (Mummery LJ,
stating that while a work might include its expression and research material, the copyright it
attracts will ‘not …. extend to clothing information, facts, ideas, theories and themes with
exclusive property rights’); Navitaire v easyJet [2006] RPC 3, [130] (supporting a finding of
non-infringement with reference to policy, including the undesirability of extending copyright
to the field of business logic).
the most from the statutory language, this last approach is preferable, for it recognises the (potential) disjuncture between works and their authorship and avoids burying social policy in analyses of fact where they are obscured and sheltered from judicial review.127

This discussion has important implications for the law of originality. As a requirement of subsistence, originality has served little function beyond the denial of LDMA copyright for servile copies.128 The reason lies largely with Walter v Lane, as an authority on when a work will be said to have been authored so as to satisfy the requirement for originality as well.129 As has been seen, however, the House of Lords’ finding that the reporters were authors in law presupposed that their reports were copyright books. For the reasons above it is submitted they were not, with the result that the question of the reporters as statutory authors ought not to have arisen, and Walter v Lane ought not to have been decided in the way that it was.

127 See, eg, Designer’s Guild v Russell Williams Textiles Ltd [2000] 1 WLR 2416, 2423 (Lord Hoffman, describing “[t]he question of substantiality [as] one of mixed law and fact in the sense that it requires the judge to apply a legal standard to the facts as found, and consequently falls within the class of case in which an appellate court should not reverse a judge’s decision unless he has erred in principle”).

128 This is apparent from Hyperion Records [2005] EWCA Civ 565, [33] itself, where the Court accepted the House of Lords in Walter v Lane as having expounded ‘the essential elements of originality’, and understood those elements to support LDMA copyright in non-servile copies of LDMA works.

129 The requirement for originality was first introduced in the 1911 Act (s 1(2)) and defined by Peterson J in University of London Press v University Tutorial Press [1916] 2 Ch 601 (Ch) 608-609 to require ‘that the work must not be copied from another work – that it should originate from the author’. Thus defined originality correlated to authorship, accounting for Isaacs J’s view in Sands v McDougall v Robinson (1917) 23 CLR 49 (HCA) 55-56 that as the reporter in Walter v Lane ‘was … decided to be an “author” as to the report; and, as no such thing existed previously, he created, that is “originated,” the report’ with the result that the report was ‘in that sense … necessarily “original”’ (emphasis added)). While the UK law on originality has recently come under pressure from the stricter standard supported by the European Commission, as long as Walter v Lane continues to be regarded as good law it is unlikely to be discarded.
This analysis supports a further conclusion, namely, that the function currently served by the originality requirement is already served by the requirement for a work and the need to establish title to its copyright. The result is not that originality is redundant, but that it is redundant in the role it currently performs as a precondition for the subsistence of LDMA copyright. Where it is needed, but on the wording of our statute cannot strictly be raised, is at the stage of infringement when measuring claimants’ copyright. The enquiry there required, however, is not into the originality of the work as a whole, but the originality of that which is alleged to have been copied.130

4. Conclusion

The history of the copyright system has been described as a history of the law’s struggle to come to grips with the subject matter it protects. It is also a history of the law’s struggle to come to grips with the nature of copyright itself.131 While the tasks of defining copyright and its works are related, their relation ought to be unidirectional so that the boundaries of the work set the limits of copyright without those limits in turn determining the boundaries of the work.132

Ensuring that judicial interpretations of the statutory categories of copyright works are not led by considerations of copyright policy is important for at least four reasons. The first is to

130 The courts and even the Legislature have recognized this. In relation to the courts, see n 125 above. In relation to the Legislature, see CDPA s 3A(2), which requires that a database to be protected be shown by reason specifically of its method of selection and arrangement to be original. By resolving the issue of protectability at the point of subsistence, however, this contradicts the logic of the statute that grants LDMA copyright in works as a whole on the basis of contributions recognized as authorial, regardless of whether they are also protectable. See generally Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 27.


132 On the importance of ascertaining the boundaries of the work in order to determine the scope of its copyright, see Newspaper Licensing Agency Ltd v Marks & Spencer plc [2002] RPC 225 (HL).
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ensure that copyright never extends beyond the works in which it subsists. The second is to ensure that works are correctly perceived (as works), which requires that they be correctly categorized by the courts. The third is in recognition of the non-copyright consequences of legal conceptions of LDMA works and the designations of authorship that those conceptions support. And the fourth is to increase the value of copyright jurisprudence as a source of standards and insights in discussions of science and the arts. For these reasons alone, legal conceptions of LDMA works ought always to be anchored in non-legal conceptions of the same.

What is an LDMA work?

133 Those consequences include moral rights protection at law, and the additional reputational and social benefits (and responsibilities) that result from designations of authorship outside the law.

134 On the use of copyright as a source of policy standards in the regulation of science, see Rochelle Cooper Dreyfuss, ‘Collaborative Research: Conflicts on Authorship, Ownership, and Accountability’ [2000] 53 Vanderbilt LR 1162.

135 Cases in which the courts have relied expressly on policy to justify a finding of copyright subsistence include Norowzian v Arks Ltd (No 2) [2000] FSR 363, 369 (n 50 above); Hyperion Records [2005] EWCA Civ 56, [87] (Jacob LJ, describing the Court’s decision with respect to musical copyright subsistence in Dr Sawkins’s performing editions as ‘accord[ing] with a reasonable view of public policy – that the sort of work done by Dr Sawkins should be encouraged’); Interlego v Tyco Industries [1989] AC 217, 255-256 (n 119 above); Navitaire v easyJet Airline Co [2004] EWHC 1725, [80] (describing the question of literary copyright subsistence as ‘whether a written artefact is to be accorded the status of a copyright work having regard to the kind of skill and labour expended, the nature of copyright protection and its underlying policy’); Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd [2001] FCA 612 (Fed Ct Austl) (supporting a finding of copyright subsistence in local area telephone directories with reference to their commercial and social value). The dangers of allowing social policy to influence conceptions of the work were apparent in Roberton v Lewis [1976] RPC 169 (Ch), where Cross J refused to apply Walter v Lane to allow musical copyright in a record of an old Scottish air on the ground that to do so would have raised the possibility of multiple copyrights in multiple records of a single work, and in doing so threatened to bring the law into disrepute. The context for that decision was very different from that in Walter in Lane; the effect of copyright in the latter case having been to secure for the public a work which it might otherwise not have had access to, unlike in Roberton v Lewis, where the effect would have been to grant copyright in the record of a work which had been living in the Scottish cultural unconscious for generations. See also n 127 above.
An LDMA work is, and ought to be, an intentional expression of an LDMA idea; meaning an intentional expression of a particular idea associated with a tradition of LDMA authorship. This explains why even skillfully produced records of works ought not to attract LDMA copyright: because they are not LDMA works. If the creators of such records are to be rewarded with copyright it ought to be mechanical copyright of the type already granted to the makers of records of other LDMA works. To the extent that this analysis leaves the quandary considered by Jacob LJ in Hyperion Records, it ought to be resolved by an appropriate test of when a recreated work will satisfy the definition above, and by an appropriate mechanism for measuring the copyright which such works attract.

The premise of this analysis is a view of the author as a person working in the shared and evolving tradition of a particular expressive tradition. According to that understanding, the boundaries of the categories of LDMA works must shift over time and across cultures. In the UK, it is possible to see this view reflected in the cases. If the result is an increased reliance on evidence from authors and others concerning those traditions – evidence from people able ‘to explain how [authors] proceed conceptually and how they produce their [works]’136 – then that is to be welcomed, particularly in addressing the issues above.

136 Pearce v Ove Arup Partnership Ltd [2000] Ch 403, 422 (see n 66 above).