

Title: 'Form' in conceptualising copyright as a property right

Abstract: In the UK, all works need to be recorded in some manner for copyright to subsist. While scholars acknowledge that this requirement exists, its teleological significance is not appreciated. This article argues that the need for record is a fundamental requirement in conceptualising copyright as a property right, which gives the content of copyright subject matter a form, demarcating its boundaries and triggering property protection. It analyses the rules governing form, which are sometimes expressly and sometimes impliedly stated in the statute, but not necessarily understood independently from other requirements of copyright subsistence. It goes on to explain why the need for form exists at all and why it exists as a precondition to copyright subsistence, unlike authors' rights regimes, going on to argue that the need for form is compatible with EU law.

Key words: Copyright, property right, property theory, fixation, CDPA

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‘Form’ in Conceptualising Copyright as a Property Right

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We are often told that it is not the ideas themselves, but the expression of those ideas that copyright protects.¹ In case of literary, dramatic and musical works, however, it is not the mere expression, but expression that is ‘recorded, in writing or otherwise’ that attracts copyright protection, as section 3(2) of the UK Copyright Designs and Patents Act, 1988 (CDPA) notes. This means that copyright as a statutory right does not arise in these works until it is so recorded. Artistic works are conspicuous by their absence from this provision. Why do we have this additional step to secure copyright protection for literary, dramatic and musical works? What does its absence mean to artistic works? Is there a need for record also for works like sound recordings, films and broadcasts? Is the requirement of record a mere procedural matter? Or is it a more substantive requirement?

Commentators address the requirement for recording a work under the heading ‘fixation’. Some recognise that fixation is necessary both to prove the existence of the work and to establish what the work consists of, so that it can be judged whether the work has been copied or otherwise infringed.² This indicates a seemingly important role for fixation. However, the scholarly literature presents varied explanation for this requirement. From the point of view of the positive law, scholars argue that fixation is merely a practical matter.³ They insist that since the requirement of record can be easily fulfilled under the CDPA, in practice it does not pose a problem in most cases.⁴ From a normative perspective, there are those who argue that fixation as a requirement for copyright subsistence should be abolished because it is a hurdle for extending copyright protection to a broader range of subject matter such as spoken word and improvisational music. The argument is that all expressions perceptible to human senses must be protected per se.⁵ Proponents of this argument point out that authors’ rights jurisdictions generally function without the need for fixation for copyright subsistence and so, there is no need for the UK to be different. As regards improvisational traditions such as jazz music, the argument is that those whose compositions are recorded are paid a higher fee by the collecting societies than those who improvise music on stage which is not recorded, because the former are regarded composers and the latter only as performers.⁶ They point out that even if the performers bring original content into the composition while improvising and are authors to that extent, since their performance is not recorded, copyright does not subsist in their work.⁷ Therefore, the question arises whether the need for record is really a mere practical matter that can be done away with, in favour of a sweeping expansion of copyright subject matter.

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¹ *Designers Guild Ltd v Russell Williams* [2000] 1 WLR 2416, 2422 (per Lord Hoffmann).

² Gilliam Davis, et al, *Copinger and Skone James Copyright* (Sweet & Maxwell, 16th edn, 2016) para [3-179].

³ *ibid.* para [3-179]; Mary Vitoria, et al, *The modern law of copyright and designs* (LexisNexis, 4th edn, 2011) para [3.33].

⁴ Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP 2018) 88-89.

⁵ David Brennan and Andrew Christie, ‘Spoken words and copyright subsistence in Anglo-American law’ (2000) IPQ 309, 348.

⁶ Giuseppe Mazziotti, ‘Music improvisation and copyright’ in Enrico Banadio and Nicola Lucchi (eds), *Non-Conventional Copyright* (Edward Elgar Publishing, 2018) 198;

⁷ *ibid* 190-191, 198; Gregory S. Donat, ‘Fixing fixation: copyright with teeth for improvisational performers’ (1997) 97(5) Columbia Law Review 1363.

This article argues that recording a work is a necessary requirement in the conceptualisation of copyright as a property right, which gives the content of copyright subject matter a form, draws its boundaries and triggers protection. Although the need for record is driven by pragmatic considerations, the form and boundaries that the record gives rise to, are at the heart of right to exclude, which is one of the most fundamental characteristics of a property right.⁸ Unlike other types of intellectual property, such as patents and trade marks, copyright subsistence is not contingent upon registration. The processes of examination and registration which arguably determine the boundaries of the ensuing registered right in patents and trade marks and trigger protection, are absent in copyright. Although printing, publication and registration were some of the formalities that had existed within the copyright statutes in the past, the Berne Convention has abolished these formalities.⁹ There are arguments to bring back some of these formalities for copyright,¹⁰ but as the law stands today, the requirement of record is the last remaining formality that is specifically permitted by the Berne Convention.¹¹ Therefore, exploring the need for record as a formality that triggers protection and demarcates the boundaries within which the protection operates are all the more essential to be appreciated in copyright.

The teleological explanation for the requirement of form in the extant scholarship leaves much to be desired. When commentators do refer to the requirement of boundaries, the discussion typically addresses the content of the subject matter of copyright protection, namely the ‘work’.¹² What amounts to a work can be a deeply contentious issue involving socio-cultural considerations, resulting in a significant amount of literature being devoted to it. Consequently, the need for form within the CDPA, the case law and scholarly literature is often not appreciated or understood separately, becoming instead, merged within the broader question of defining a work. Even if it is understood separately, the reason for this requirement within copyright regime is not appreciated.¹³ This makes the need for record seem unimportant, giving rise to arguments against it.

This article unfolds in four parts: Part 1 provides a positive law explanation unpacking the doctrine in the UK, separating the rules of the content of the subject matter from its form. Part 2 provides the teleological explanation as to why we have this requirement by offering reasons arising from the copyright discourse on infringement. Part 3 pushes the teleological explanation further by addressing why the need for record is a precondition for copyright protection. It explores this in three sections: (a) pointing out the distinction between the conceptualisation of copyright under the authors’ rights regimes like France and the property right regime like the UK; (b) drawing on property discourse on formalities; and (c) distilling the underlying policy considerations. Part 4 examines the compatibility

⁸ See for example, Thomas Merrill, ‘Property and the Right to Exclude’ (1998) 77 Neb L Rev 730, 740, where Merrill, who argues that the right to exclude is ‘sine qua non of property’ describes it as a right of a property owner to exclude others from a valued resource. James Penner, *The Idea of Property in Law* (OUP, 2000) 71, where Penner argues that the right to exclude is a right in rem that imposes a corresponding duty in rem on the rest of the world to exclude themselves.

⁹ Berne Convention, Article 2(2).

¹⁰ See generally, Stef van Gompel, *Formalities in Copyright Law: An analysis of their History, Rationales and Possible Future* (Kluwer, 2011).

¹¹ Berne Convention, Article 5(4).

¹² See for example, Michael Spence and Timothy Endicott, ‘Vagueness in the Scope of Copyright’ (2005) LQR 657, where the opening line refers to “boundary” of subject matter, and the article explores the content of subject matter vis-à-vis the vagueness in doctrine of infringement and the idea-expression dichotomy. See also, Davis (n 2) para [3-181].

¹³ For example, see Ysolde Gendreau, ‘The Criterion of Fixation in Copyright Law’ (1994) 159 *Revue Internationale Du Droit D’Auteur* 110, which provides an extensive and helpful review of the requirement of fixation across different jurisdictions, but does not address the teleological basis of this requirement.

of the need for form with EU law. Given that the need for record is distinctly a UK requirement, absent in most other Member States, it raises the question of harmonisation.

1. Need for record explained

Copyright confers a number of exclusionary rights to the copyright owner in relation to the subject matter defined by the statute. It makes sense to divide the copyright subject matter into content of the subject matter which answers the question of *what* is protected and form of the subject matter which responds to the question of *how* the content is protected. Such division along the substantive and formal lines particularly while unpacking the copyright doctrine would be helpful, so that the rules governing the form can be made visible. Accordingly, this Part begins with briefly enumerating the categories of the content and goes on to examine the rules of form in relation to each category, to demonstrate how the content differs from its form.

A. Rules governing content of the subject matter

This section lays out briefly the landscape of the content of copyright subject matter. The statutory framework of the CDPA puts forward the notion of a ‘work’ as a ‘common denominator’ to describe the content of the subject matter of copyright.¹⁴ A work can be an authorial work being an expression of literary, dramatic, musical or artistic kind, or an entrepreneurial work namely, a sound recording, film, broadcast or the typographical arrangement of a published edition.¹⁵ Each of these categories must satisfy the definitions and descriptions set forth in the respective provisions. Some commentators regard this as the ‘form’ that the work must take – such as literary work having to take a written, spoken or sung form, or that artistic work having to take one of the forms enumerated in s 4, CDPA, such as a drawing, painting, sculpture and so on. But it is more appropriate to describe these as part of the internal description of the work.¹⁶ Certainty of the content of the subject matter is as important as the certainty of the boundaries, so that the rest of the world is aware what it must refrain from interfering with. However, many of these definitions of the categories of subject matter are inclusive to encompass newer manners of expressions, thereby balancing flexibility and certainty.¹⁷ Apart from the definition and description of these works in the statute,¹⁸ case law has added rich doctrine bringing in other socio-cultural considerations in conceptualising a work.¹⁹ Additionally, authorial works must satisfy the originality requirement,²⁰ and entrepreneurial works should ‘not be a copy’ of a previous entrepreneurial work of that kind.²¹

¹⁴ Brad Sherman, ‘What is a Copyright Work’ (2011) 12 Theoretical Inq L 99, 111.

¹⁵ CDPA, s 1(1)(a) to (c).

¹⁶ Davis (n 2) para [3-181].

¹⁷ See generally, Poorna Mysoor, ‘Does UK Really Have a “Closed” List of Works Protected by Copyright?’ (2019) EIPR 474.

¹⁸ CDPA, s 3(1) describes literary, dramatic and musical works, s 4 describes artistic works, s 5A defines sound recordings, s 6 defines broadcasts and s 8 defines published editions.

¹⁹ For example, in *Hensher v Restanville* [1976] AC 64 a work of artistic craftsmanship and in *Lucasfilm v Ainsworth* [2012] 1 AC 208 a sculpture were held to require artistic intention.

²⁰ CDPA, s 1(1)(a).

²¹ CDPA, ss. 5A(2), 5B(4), 6(6) and 8(2).

The doctrine on the content of subject matter is by no means a settled area of law, which explains the plentiful scholarly literature exploring this area.²² Since the focus of this article being the form of subject matter, it is outside the scope of this article to dwell deeper into the content of the subject matter. However, it suffices to point out that judges and scholars have a tendency to bunch all those requirements that contribute to copyright subsistence including originality and the need for record, within the notion of the subject matter.²³ It is generally not problematic in the context of an internal critique of the subject matter.²⁴ However, these discussions do blur the distinction between what copyright protects and how it protects it, and the corresponding policy considerations. This is where the need arises for content of the subject matter, i.e., the work, to be separated from its form.

B. Rules governing form of subject matter

A work gets its form because of its record. It signifies a process of reification of the work. Within the statutory framework of the CDPA, the rules governing the form are not always separately stated as such. In some instances, the rules of form are implied. The following paragraphs bring to fore the rules of form in relation to different categories of works. If an expression on its own is incapable of providing boundaries such that it cannot be determined when the work comes into existence, then a further requirement of such expression having to acquire a specific form will have to be imposed. Without this, it is difficult to make sense of copyright as a property right. Exclusion will have no meaning if one cannot discern when the conduct has taken place to trigger liability. The existence of a record of the work makes the existence of the work itself objectively ascertainable with a greater degree of precision. These rules can be discussed under the heading of form of subject matter.

(i) In relation to literary, dramatic and musical works

As stated at the outset, s 3(2), CDPA states that literary, dramatic and musical works need to be ‘recorded, in writing or otherwise’, for copyright to subsist in them. It is important to understand what recording means here. Most commentators use the phrase ‘fixed in a material form’,²⁵ to refer to the recording requirement. From this comes the term of art ‘fixation’. These words come from Art 2(2) of the Berne Convention which leaves it ‘for legislation in the countries of the Union to prescribe that ... works shall not be protected unless they have been *fixed in some material form*’.²⁶ The words ‘material form’ seem to convey that the materiality or the tangibility of the form of a copyright work is essential. This may well have been the case as the provision was formulated in 1967. But the wording has not

²² See note 32 above; Justine Pila, *The Subject Matter of Intellectual Property* (OUP, 2017) Chapter 3, where she lays down a framework for the identification of the subject matter of intellectual property protection, adopting possible philosophical methodologies such as artefacts, types and tokens, categories and corresponding properties. See also Tanya Aplin, ‘Subject Matter’ in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, 2009) 50, for a more doctrinal description.

²³ *ibid* (Pila) 157-159; (Aplin) 54-55; Sherman (n 14) 108-110, 115-119.

²⁴ For example Jonathan Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) OJLS 767, where the author argues that the pragmatic requirements that the UK had in place such as originality and fixation are being diluted by the rulings of the CJEU; Justine Pila, ‘An Intentional View of the Copyright Work’ (2008) 71(4) MLR 535, where the author provides an internal critique as to the subject matter that there must be a subjective intent on part of an author to create an authorial work, but as part of this discussion she also elaborates on the need for ‘fixation’ in pp 541-42, although the impact of fixation on the subjective authorial intent is unclear. See also, Justine Pila, ‘Copyright and Its Categories of Original Works’ (2010) OJLS 229, 237, for a similar discussion.

²⁵ Davis (n 2) para [2-05]; see Vitoria (n 3) para [3.33].

²⁶ Emphasis supplied.

been revisited since, despite the technological advancements over time. Even the WIPO Guide to Berne Convention which was issued in 1971 was too early to have foreseen non-material reification.²⁷

In the UK, there is no reference to a ‘material’ form, nor that it be ‘fixed’ under s 3(2). With the increasing ubiquity of digital form in which content is recorded and cloud services where content is stored, ‘material form’ can be misleading. It could lead to a conclusion that if one creates a poem on one’s laptop, she needs to have a material form in which her poem is fixed – such as a USB drive or a CD ROM or the like. What if the author saves her poem directly on the ‘cloud’? It satisfies the CDPA requirement that it is recorded, but it may not qualify as a ‘material form’. There is a comma after the word ‘recorded’ in s 3(2). So, being recorded is what is required of a literary, dramatic or musical work, and such record may be in writing or in any other form. Further, s 178, CDPA states that writing ‘includes any form of notation or code, whether by hand or otherwise and regardless of the method by which or medium in or on which, it is recorded.’ Therefore, the requirement of recording in ‘writing’ extends to digital recording for sure. The word ‘otherwise’ in s 3(2) opens up possibilities of a record that is not necessarily in writing and not necessarily in ‘material’ form either.²⁸ Recent case law has confirmed that the technical means by which recording is achieved is irrelevant.²⁹ Therefore, instead of typing her poem on to her laptop, if the author simply recites a poem of the top of her head and records her recitation as a sound file uploading it at the same time to the cloud, then that would satisfy the recording requirement under the CDPA.

Although one may realise that words such as ‘fixed’ or ‘fixation’ are terms of art, these could also become problematic as they may imply permanence. Indeed, some scholars have referred to this requirement as recording in permanent form.³⁰ As far as literary, dramatic or musical works are concerned, nothing in s 3(2) requires permanence of the record. However, a more helpful way to put it is perhaps to say that it is sufficient if the record ‘is in a medium that is capable of being reproduced’.³¹ Thus, on this view, instead of uploading to the cloud, if our poet in the example above had live streamed her recitation on the internet, this may or may not be a record sufficient to attract copyright protection, depending on whether the live stream was reproducible. Thus, as far as the UK law is concerned, it is important therefore, that both the terms ‘fixed’ and ‘material form’ are understood within the context of the provisions of the CDPA. For good order, in this article, neither the word ‘fixed’ nor the word ‘material’ is used when expressing this author’s own views on form.

What if record is not created by the author herself or with her consent? Section 3(3), CDPA states that it does not matter who records and whether such record is with the consent of the author. Pila argues that this provision reiterates that the work will continue to exist regardless of who makes the record.³² This also means that the requirement of recording does not influence authorship.³³ Creating a literary, dramatic or musical work is within the author’s powers, but creating its record may or may not be. And if the work is recorded by someone else, it does not take away from the existence of the work itself or the fact of authorship. Thus, this provision helps separate the work from its record, and the author from the recorder. It also helps reassess cases such as *Walter v Lane*, where a

²⁷ Articles 2.9 to 2.12 in the WIPO Guide to Berne Convention.

²⁸ Davis (n 2) para [3-183]. US Copyright Act 1976, 17 U.S.C. s 102(a) speaks of reproducible medium.

²⁹ *SAS Institute v World Programming* [2013] RPC 17 [29].

³⁰ William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property* (Sweet & Maxwell) para [11-33].

³¹ Davis (n 2) para [2-05].

³² Pila (n 24) (Intentional View) 541.

³³ Elizabeth Adeney, ‘Authorship and Fixation in Copyright Law: A Comparative Comment’ (2011) 35(2) Melb ULR 677.

reporter in the audience taking down verbatim the lecture given by Lord Rosebery, was held to be a protectable work of the reporter's.³⁴ Lord Rosebery was not a party to the dispute and the question as to whether Lord Rosebery was the author of his own words was not considered by the House of Lords.³⁵

Interesting issues may arise as to how one may assess the completeness and accuracy of the record if the author has no control over or has not authorised the making of the record. This may especially be a problem with making of a record from memory by a member of the audience after the work had been communicated live to an audience. Questions may arise as to what may happen if the record is in a different language from the one chosen by the author or recorded in a different instrument from the one played by the author. These issues have not yet been litigated. But much will depend on the copyright owner's ability to prove that what was recorded was her work.

Nevertheless, the upshot is that the CDPA separates authorship from copyright ownership. The author is the one who creates the work.³⁶ An author may or may not become a copyright owner, depending on whether the work she authors becomes a copyright work by being recorded.³⁷ It follows that even if there was no record, it does not take away the connection between the work and the author. Copyright ownership affects what the author can enforce against the rest of the world. But if there is any advantage the authors can have as authors, they should not be prevented from enjoying them even if they do not go on to become copyright owners.³⁸

Finally, unlike artistic works, an express provision requiring recording exists for literary, dramatic and musical works. This is because, unlike artistic works, with works of this kind, it is possible that there is an expression capturing a certain idea, but such expression has not yet been recorded in any form. For example, an extemporised speech, or a dance or a tune that is improvised. Indeed in *Hadley v Kemp*, the words of the song and the music that was set to it had come into existence before these were recorded.³⁹ It may well be that the speech, the dance or the tune satisfies the definitional requirement as a literary, dramatic or musical work respectively, but cannot be regarded as copyright works – meaning works in which copyright subsists,⁴⁰ until they are recorded. With this distinction being drawn, we move to artistic works below.

(ii) In relation to artistic works

With artistic works, as stated above, there is no express requirement of recording.⁴¹ However, this does not mean that a record is not required. The CDPA requires that the artistic works are expressed through one or more of the enumerated methods such as painting, engraving, sculpture and so on,

³⁴ [1900] AC 539.

³⁵ Scholars also discuss this case in relation to the need for originality, which goes to the content of subject matter. But see Pila (n 24) (Intentional View) 546-550, for a contemporary critique of *Walter v Lane*.

³⁶ CDPA, s 9.

³⁷ CDPA, s 11 states that author is the first owner of any copyright in the work.

³⁸ See below for a discussion on jazz musicians.

³⁹ [1999] EMLR 589. *Sawkins v Hyperion Records* [2005] 1 WLR 3281 [53], is another example where Mummery, LJ recognises that a musical work can exist before it is recorded.

⁴⁰ CDPA, s 1(2) read with s 3(2).

⁴¹ Pila (n 24) (Intentional View) 542.

which inevitably create a record of the work when the work itself is created.⁴² One might argue that in this sense, the work is defined in terms of its form and therefore indistinguishable from it. This may well be the reason why a work merges with the form in most scholarly literature. However, this is exactly the kind of reasoning one must avoid, in order not to confuse the form with the work itself.

A classic example of this confusion is *Merchandising Corporation v Harpbond*. In this case, when a question arose as to whether make-up on a person's face is a painting, Lawton, LJ held that '[a] painting is not an idea; it is an object; and paint without a surface is not a painting.'⁴³ On this basis, he held that make-up, however idiosyncratic, cannot be a painting. If painting was an object, then there would be no distinction between the property in the tangible painting and that in the intangible artwork. The surface only serves to create the record of the work. When a person buys a painting on a canvas, for example, what she acquires is the property in the physical object that the canvas is together with the painting over it. Subject to the terms of sale, what remains with the copyright owner is the artwork she has created, which includes inter alia the configuration of the artwork, brush strokes involved, the choice of colours and so on. This is because such artwork can exist independently as a subject matter of a property right, namely copyright. It is within the powers of the author of the painting to paint the same artwork, configuration and brush strokes on any other surface – a ceramic plate for example. Thus, the content of the subject matter in these cases is the artwork and such artwork gets its form because of the record that can be created – on the surface of canvas or ceramic plate in the above examples.

With artistic works, not only does the question as to the need for record arise, but also as to whether the medium used to record the artistic work must be permanent. Although Lawton, LJ did not say it in so many words, *Harpbond* poses the risk of being interpreted as requiring a permanent medium to record artistic work. When Lawton LJ says that a painting needs a surface, and a face cannot be a surface for a painting, one thinks of the logic as being one can wash off the paint from one's face; whereas if the painting is on a canvas, it would have greater permanence. What the CDPA implies is that a record is needed, but the form it takes and its degree of permanence are left to the discretion of the author. For instance, Arnold J (as he then was) says in *SAS Institute*, that an artistic work may be recorded in source code,⁴⁴ which conveys that the record can be in a non-material form. Further, *Abraham Moon v Thornber*,⁴⁵ observes obiter that ephemerality of artistic works should not matter for copyright subsistence. Scholars have rightly and strongly argued that permanence is not required.⁴⁶ A recent High Court authority has also reinforced this.⁴⁷ The test appears to be similar to literary, dramatic and musical works that so long as the form that artistic work takes is such that it can be reproduced, it should suffice.⁴⁸

⁴² CDPA, s 4 enumerates an exhaustive list of the expressions that artistic works can take such as graphic work, sculpture, photographs collage, works of artistic craftsmanship, works of architecture. Graphic work, however, is defined inclusively to subsume painting, drawing, diagram, map, chart or plan, engraving, etching, lithograph, woodcut or similar work.

⁴³ [1983] FSR 32, 46.

⁴⁴ [2013] RPC 17 [29].

⁴⁵ [2012] FSR 17 [105].

⁴⁶ Estelle Derclaye, 'Debunking some of UK copyright law's longstanding myths and Misunderstandings' (2013) IPQ 1, 12-17.

⁴⁷ *Islestar Holdings v Aldi Stores* [2019] EWHC 1473 (Ch) [48] (unreported).

⁴⁸ Davis (n 2) para [2-05].

It must be acknowledged however, that the form which the work takes is controlled by the method through which the author chooses to express. For example, the form taken by a sculpture as an artistic work is likely to be three-dimensional and a drawing may be two dimensional. But there ought to be some flexibility as to the form which the artistic work takes, to give room for artistic freedom. To the extent permitted by property narrative, artists should not be constrained by strict legal definitions of artistic works. Therefore, the absence of an express requirement of creating a record leaves it to the author's artistic freedom as to the kind of record that the author wants to create. As noted above, the subject matter is defined with inclusive definitions under the CDPA, enabling artistic freedom to be exercised.

The extent of freedom available to choose an expressive form has been explored in *Abraham Moon*. Here Birss, J held that a fabric ticket which contained numbers and letters, could be in itself an artistic work, because for persons versed in the field the fabric ticket is as good as a visualisation of the fabric design itself.⁴⁹ Since the CDPA is open as to how artistic works are recorded, this decision means that an artistic work can be expressed by way of words. In traditional expressions of art such as sculpture, the form is supplied by the medium of its expression, for example, stone. *Abraham Moon* makes it possible that the form of this work can exist far removed from the medium in which the work will be eventually actualised, but in the form of instructions in words and numbers. Although Birss J held that there was an artistic work in the instructions, the artistic work was not the text visible on the fabric ticket, but in the fabric design that could be visualised by reading the instructions. It is only because the fabric design can be an artistic work that the fabric ticket was held to be an artistic work. It may be more accurate to regard it as a textual record of an artistic work. However, the instructions must be so precise that they are an accurate substitute of the actualised work itself.

It does not follow that recipes can be a textual record of the culinary dish. This is because the dish as the eventual actualisation of a recipe is not an artistic work as far as the taste of the dish is concerned.⁵⁰ The aesthetic presentation of a dish can be an artistic work, but there is no clear authority on this.⁵¹ Therefore, even if a recipe is sufficiently detailed, it may not enable the visualisation of the dish in *Abraham Moon* sense. It has been argued that textual instructions of conceptual art should be protected based on *Abraham Moon* reasoning.⁵² Even if the eventual actualisation of instructions results in an artistic work, unless the instructions themselves enable complete and accurate visualisation of the work, this argument is unlikely to succeed.

(iii) In relation to entrepreneurial works

Sound recordings and films by definition must be a record to become a work.⁵³ A broadcast is not expressly required to be recorded, but the nature of electronic transmission, meaning the packets of information that are part of a transmission give the broadcast its form.⁵⁴ A typographical arrangement

⁴⁹ *Abraham Moon* (n 45) para [102].

⁵⁰ Case C-310/17 *Lerola Hengalo v Smilde Foods BV* [2019] ECDR 2 held that taste of cheese was not a 'work' under the Infosoc Directive.

⁵¹ For commentary, see Neil Yap, 'The proof is in the plating: copyright protection of culinary arts and reform for the categories of authorial works' (2017) EIPR 226.

⁵² Shane Burke, 'Conceptual Art' in in Enrico Banadio and Nicola Lucchi (eds), *Non-Conventional Copyright* (Edward Elgar Publishing, 2018) 52.

⁵³ Sections 5A and 5B, CDPA

⁵⁴ See for nature of broadcasts, David Brennan, 'Australian Television Broadcasts as Copyright Property', <<http://ssrn.com/abstract=1027502>>, accessed 4 November 2019.

is protected not in isolation, but as part of a published edition, which means that it has a form in which it exists. There is no work without its record in case of entrepreneurial works. In other words, the record merges with the work. Entrepreneurial works are, therefore, more in the nature of tangible property where the content of the subject matter is the same as its form. Again, the form that the record takes can be purely digital, such as a song in MP3 format that can be streamed from a website.

2. Why record at all

All works need form – for some there is an express provision, for some it is implied, and for the rest it is merged with the work. Having established this, the obvious teleological question arises – why record any work at all. The following paragraphs address this by drawing on the infringement discourse.

Copyright owners have the right to exclude the rest of the world from performing any of the restricted acts in relation to the work. This places a corresponding duty on the rest of the world to exclude oneself from performing these acts. Breach of this duty, i.e., performing any of these acts when not authorised, leads to liability for tortious action of copyright infringement. In an action for infringement, the copyright owner should be able to prove what the work is and where the boundaries of the work lay, in order to demonstrate that a restricted act has been performed in relation to the work. While such proof is made possible by the record of the work, the CDPA sets forth acts from which the rest of the world must exclude itself. Restricted acts can be generally divided into three categories: those that concern doing of an act in relation to firstly, the record of the work itself; secondly, the copies of the work; and thirdly, the content of the work. For entrepreneurial works, the law only protects the record and its copy, whereas for authorial works, the record, the copy and the content are protected. Let us examine how each of these relates to form.

The restricted acts that concern only the record are the rights to public performance and communication to the public. These rights apply to both authorial works (excluding artistic works for public performance) and entrepreneurial works alike. Sections 19 and 20, CDPA which respectively refer to the acts of public performance and communication to the public, refer to the work being performed or communicated, rather than the record of the work. However, it is the work as recorded that helps to prove the content and the boundaries of the work, so that a court can assess whether what is performed in public or communicated to the public is what is protected as a work.

The restricted acts that concern the copy of the work are rights to make copies, issue copies to the public and renting and lending copies of the work, as set forth under sections 17, 18 and 18A of the CDPA. Again, these rights apply to both authorial and entrepreneurial works.⁵⁵ The CDPA does not define a ‘copy’ as such, but it does explain under s 27(2) that an ‘infringing copy’ is an article whose ‘making constituted an infringement of the copyright in the work in question.’ To be able to assess whether a copy is an infringing copy, the work that is protected by copyright must be proved. To prove it, the record of the work should exist for it to be compared with the copy to ascertain if any of the rights above are infringed.

The restricted acts that concern the content of the subject matter are the rights against altered copying (explained below). This applies only to authorial works. When the content of the subject

⁵⁵ As per s 17(5), CDPA typographical arrangement of published edition can only be infringed by making facsimile copy of it. No other restricted act applies to this kind of work.

matter is engaged, the issues of originality will arise, as well as the idea/expression dichotomy. This is, because the assessment is about whether the part taken by the defendant is from the original part of the earlier work or broadly from the ideas expressed.⁵⁶ Since these are highly contentious issues, they take up all the prominence in scholarly writing. But this should not sideline the importance of form in deciding infringement of this kind.

Accordingly, s 17(2), CDPA which prohibits reproduction of an authorial work in any 'material form', a question arises as to the interpretation of the word 'material'. The context indicates that the word material is used as an adjective to the word form, thus meaning 'significant or relevant'.⁵⁷ Since transient copies are also included within the general definition of 'copying' under s 17(6), it is unlikely that the word 'material' in s 17(2) means physical or tangible. Copying a work in any significant or relevant way can include taking the content; but it can also refer to taking the form.⁵⁸ Further, s 17(3) states that in relation to artistic works, copying means reproducing a drawing, for example, in the form of a sculpture and vice versa. In relation to literary, dramatic and musical works, s 21, CDPA also grants a right against adaptation – meaning turning a novel into a play and vice versa or changing the arrangement of a musical composition. These types of copying can be together referred to as 'altered copying', which means the that restricted act might result in a form different from the form in which the prior work exists, but the rights of the copyright owner extend to the altered form. The form in which the author created the work takes on all the more importance because this is the basis for assessing the extent of alteration. Although in this sense, the initial form does not define absolute boundary, the boundary of the altered work follows the boundary of the initial work. Therefore, if altered copying is alleged, the record of the prior work draws the core boundary, against which the altered work is assessed as to whether it is captured within the penumbra of the prior work.

*Green v Broadcasting Corporation of New Zealand*⁵⁹ demonstrates how recording a work is a fundamental requirement in an infringement action. Here, the plaintiff was the creator and presenter of a television talent show called Opportunity Knocks in the UK, which had particular repeat characteristics, but otherwise a reality show. The defendant developed and broadcast a television talent show, which the plaintiff alleged to be infringing of his copyright. The plaintiff had indicated in his evidence that there was a script that was followed for his show, which he alleged the defendant adapted to its television show, infringing Green's right to adaptation. The question before the Privy Council was whether the defendant had infringed the plaintiff's copyright in the script as a literary work.⁶⁰ The decision turned on the need for record, among others. The plaintiff never produced the script in the court. The trial court in New Zealand observed that whatever could be inferred as being the content of the script from the oral evidence did not express more than 'a general idea or concept for a talent quest' and therefore, the content of the subject matter for protection could not be discerned.⁶¹ Accordingly, the Privy Council had to conclude that no literary work existed. *Green* is a classic example

⁵⁶ *Designers Guild* (n 1).

⁵⁷ For dictionary meaning of material see <<https://www.lexico.com/en/definition/material>> accessed 4 November 2019.

⁵⁸ For example, if a person P is giving a lecture which is being recorded, if a listener copies directly from the lecture, but not from the record, it would still infringe P's copyright in her spoken words, to the extent that they are recorded. If the only record created is the one by the listener, then the listener recording the lecture will give rise to P's copyright in it. P's copyright in the recorded lecture is not infringed until the listener goes on to exercise any of the restricted acts, such as copying or distributing the recorded lecture to the public.

⁵⁹ [1989] RPC 700.

⁶⁰ *ibid* 701.

⁶¹ *ibid* 702.

of how an infringement action could fail if no record of the work can be produced before a court. The content of the script was important not only to prove what the plaintiff's work was, but also that it was the basis for defendant's adapted show – an altered copy. When the core itself was not proved, there was no hope that its extension into the penumbra could have been proved.

Although the need for record is more pronounced in property rights regimes, even in authors' rights regimes like France, scholars refer to cases where because of the lack of record of a work, the court was unable to compare it with the allegedly infringing copy, and thus no infringement could be proved.⁶² Authors' rights scholars therefore, also acknowledge that if there is a total lack of a record of the work '[c]opyright exists in theory but the right holders are unable to make it respected.'⁶³

Even if it is accepted that a record is needed as proof, why can alternative evidence not be produced, so that the need for record can be done away with. Alternative evidence likely means oral evidence, since any other evidence documenting the work can count as record of the work. As explained above, the law is not prescriptive about the manner of record. Despite the safeguards of cross examination, oral evidence is a subjective recollection of the relevant witnesses. Even if we were to accept this, as evident from *Green* above, the oral evidence may not corroborate the existence of a work. To piece together from bits of oral evidence the content of the work sufficient to enable comparison with the alleged copy of the work or to assess if any other restricted act has been carried out, risks failure in most cases. Scholars of authors' rights regimes also point to the inferiority of oral evidence in copyright infringement cases.⁶⁴ Therefore, the evidentiary role of the record is fundamental, regardless of the choice of regime.

3. Why record before subsistence

Even if we were to accept that a record of the work is required, why should it come into existence before copyright protection arises? There are several arguments that can be put forward in this regard.

A. Copyright as 'property right' versus 'authors' right'

Due to the historical and philosophical trajectory that the UK copyright law has witnessed, copyright in the UK is not a status; it is a property right according to s1(1), CDPA. The very purpose of copyright as a property right is to make its infringement actionable, since an action for infringement enforces the copyright owner's right to exclude. There is no property right without a robust right against its infringement. If there is no need for record, the very existence of the content of the subject matter is in question. It then follows that the boundaries of the content are either non-existent or unclear, which will make an action for infringement doomed to failure from the outset. When such a fundamental aspect of protection is uncertain, this is granting no protection at all. Thus, even before infringement arises, it should be possible to ascertain the existence and the boundaries of the content of the subject matter. This is how fundamental the role played by the record is in the UK. It is not possible to argue, as some do, that the need for recording a work can be addressed if and when one has to deal with an infringement proceeding.⁶⁵ This is similar to arguing that a parcel of land need not have boundaries,

⁶² Antonia Latreille, 'From idea to fixation: a view of protected works' in *Research handbook on the future of EU copyright*, Estelle Derlaye (ed.) (Edward Elgar Publishing 2011) 146-147.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ Brennan and Christie (n 5) 320; Gerard McLay, 'Wither and Shadow: The Copyright Protection of Concepts, Characters and Titles' (1991) 21 Victoria Uni. of Wellington L R 335, 345.

because boundaries are only relevant if and when there is a border dispute. If this absurdity does not stand in land law, why should it in copyright law? Further, this argument puts the cart before the horse.

The approach in the UK can be contrasted with the authors' rights regimes. While the UK has historically placed emphasis on copyright as a property right in relation to the subject matter that has content and form, jurisdictions that base their copyright laws on authors' rights put emphasis on the author as the creator of the work. The primary focus is to grant copyright as the reward and recognition for the act of creation itself.⁶⁶ Unlike the UK system, it is the act of creation and not the enforceability of the attendant rights that triggers copyright protection.⁶⁷ Thus, unlike in the UK, the enforcement of the right and the remedy for its infringement are dealt with if and when they must be dealt with. While scholars do speak of propertisation of copyright also in authors' rights regimes in recent times,⁶⁸ the conception of property in these regimes is not similarly driven by a rights and remedies approach like in the UK. While it is acknowledged that not all authors' rights countries have done away with the requirement of record,⁶⁹ the teleological justification for this requirement may not mirror that of regimes like the UK. It is not within the scope of this article to provide an exposition of how property is understood in authors' rights regimes. It suffices to say that the driving force behind the authors' rights regimes is different from that for the UK.

One must acknowledge that the UK law has taken influences from the authors' rights regimes, to the extent compatible with its conceptual foundation, in relation to the content of the subject matter such as originality. However, the need for form being a foundational aspect of property protection as described above, it would be incorrect to make cosmetic suggestions that UK should dispense with recording to mimic authors' rights jurisdictions.

B. Form, formal and formalities

A convincing explanation also lies in regarding the need for form as a formal constitutive requirement. Scholars who have written about formalities in copyright law such as van Gompel, do not regard the need for record as a formality. Although van Gompel's does refer to the need for record in an historical context, the formalities that take precedence in his work are registration, recordation of a transfer and renewal of a right.⁷⁰ This article regards the need for recording as a formality as understood in property law, since it is the work that captures the substantive content of the subject matter and the need for record reifies the work.

The need for record also has historical support, since historically, formalities have played a significant role in copyright law.⁷¹ It began with Statute of Anne, which extended statutory protection to 'books', the formal requirements being printing and publishing the book, recording it in the Stationer's Company and depositing a copy in the designated libraries. Statutory protection arose only upon first publication of the book. These formalities continued under Section III of the Copyright Act, 1842.⁷² Formalities came to be abolished under Art 5(2) of the Berne Convention, except the

⁶⁶ Davis (n 2) paras 1-06, 24-65.

⁶⁷ Jane Ginsburg, 'French Copyright Law: A Comparative Overview' (1989) 36 J Copyright Soc'y USA 269, 270.

⁶⁸ Cateruba Sganga, *Propertisation of European Copyright* (Edward Elgar Publishing, 2018) 178-190.

⁶⁹ Gendreau (n 13) 112-14.

⁷⁰ van Gompel (n 10) 18-22.

⁷¹ See generally, Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (CUP 1999).

⁷² Statute of Anne, London (1710) and Copyright Act, London (1842), Primary Sources on Copyright (1450-1900), eds Lionel Bently & Martin Kretschmer, www.copyrighthistory.org.

need for recording, which the Convention expressly preserved under Art 2(2), giving national governments the choice to retain this requirement. Accordingly, in Copyright Act, 1911 all other formalities were abolished due to the UK's accession to the Berne Convention, retaining only the need for form in relation to dramatic works, but ambiguities persisted in relation to the other works.⁷³ Copyright Act, 1956 applied it to literary, dramatic and musical works, even if in somewhat anomalous fashion.⁷⁴ Finally, the need for record was clarified in s 3(2), CDPA, uniformly for literary, dramatic and musical works. Thus, historically the need for record is the last remaining, but Berne-compliant formality now in existence.

Formalities play an important role in property law. In most cases formalities are imposed where property rights are derivatively acquired. However, when property rights over the content of a subject matter is to be acquired for the first time, if the content of the subject matter is intangible, it is conceivable that the law may impose a formal act that signals the boundaries for protection, triggering property rights. There is nothing in the objectives or the function of formalities that make them suitable only for derivative acquisition, as the following paragraphs explain.

(i) Objectives of formalities

Formalities are important because they achieve objectives such as certainty and objectivity – values that are fundamental to property law. Copyright as a property right places immediate *in rem* non-voluntary obligations on the rest of the world to exclude themselves from carrying on the restricted acts. As we have seen in case of land, it is not justifiable that such property obligations can be shrouded in uncertainties. *Tate v Fullbrook* eloquently demonstrates the importance of certainty in copyright law.⁷⁵ This was a case where the non-verbal aspects of the plaintiff's dramatic piece such as the scenic set-up and comic parts had been taken by the defendant. The applicable statute was Dramatic Copyright Act, 1833, under which the subject matter of protection was 'any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment'. The question was whether the protection of the 1833 Act extended to all aspects of a dramatic work or only to the aspects that complied with the twin requirements of form under the 1833 Act of being printed and published. The court held that the protection of the 1833 Act only extended to aspects that could be printed and published. In this context, Farwell, LJ observed that 'the Act creates monopoly and in such a case there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world.'⁷⁶ These words of Farwell LJ have been quoted in many cases over the last century, to support certainty of both content and form of the subject matter.⁷⁷

(ii) Functions of formalities

⁷³ Copyright Act, 1911, s 35(1).

⁷⁴ Copyright Act, 1956, ss 48(1) and 49(4).

⁷⁵ [1908] 1 KB 821.

⁷⁶ *ibid* 832-33.

⁷⁷ *Tate v Thomas* [1921] 1 Ch 503 where Copyright Act, 1911 was being considered; *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700 (PC) where the New Zealand Copyright Act, 1962 was being considered, *IPC Media Ltd v Highbury* [2005] FSR 20 [7]-[8] and *Baigent v Random House* [2006] EMLR 16 [156] both under the CDPA. Although in *Tate v Fullbrook* the reference was to the certainty of the form, in *Green* the quote was used to support certainty of the content of subject matter, namely the need for unity in a reality show for it to be a dramatic work.

Fuller explains three essential functions of formalities. Firstly, the evidentiary function,⁷⁸ where formalities provide evidence of the existence and purport of a legal relationship (such as a contract). In most cases, he states that this will be satisfied by requiring writing, or attestation, or the certification of a notary and so on. Similarly, in relation to land, Birks explains that all land rights are invisible – one cannot see a fee simple or a lease, and therefore, '[r]eal rights have to be made apparent through documents.'⁷⁹ It is not land rights alone that are invisible, but all property rights (and indeed, all rights). If unlike land, the content of the subject matter is invisible, like copyright, then the content of the subject matter to which the property right attaches, also must be made perceptible, objectively discernible and provable when the right is infringed. As such, it should come as no surprise that for an invisible property right in relation to an invisible content of the subject matter to subsist at all, there is a need for record. As argued in Part 2 above, evidentiary function of the requirement of record is one of the most fundamental, affecting the enforceability of copyright as a property right.

Secondly, Fuller refers to cautionary role of formalities. Giving the example of affixing the seal, Fuller explains it as 'an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future.'⁸⁰ Birks explains the importance of formalities taking the example of wills, where the need for writing makes the person making the will think deeply about what she wants to state in the will.⁸¹ In copyright, the need for record may have a less significant cautionary role since the deep thought goes much more into producing a creative expression than in recording it. But it still helps copyright owners to commit to their expression taking a particular form.

Thirdly, Fuller refers to as channelling function, arguing that formalities serve also to mark or signal a simple and external test of enforceability.⁸² This is the way the law determines enforceable from unenforceable contracts, for example. To Fuller formalities offer 'channels' for the legally effective expression of intention, or a legal framework into which a person can fit his or her actions. He states that this assists in 'judicial diagnosis' – meaning by following a formality a person relieves a judge from having to enquire into whether the legal transaction was intended.⁸³ By drawing comparison with language, Fuller states:⁸⁴

One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem.

These words are evocative also of a person who is about to create a work. Once an author has an idea she wants to execute upon, she must go on to actualise it by way of recognised channels, such as drawing, painting and so on for artistic works, or writing or recording music or speech. The recognised channels were far more rigid in the past, but under the CDPA, all that is required is for the work to

⁷⁸ Lon L Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799, 800.

⁷⁹ *ibid.*

⁸⁰ *ibid* 800.

⁸¹ Peter Birks, 'Five Keys to Land Law' in S. Bright and J. Dewar (eds.), *Land Law Themes and Perspectives* (OUP 1998) 483.

⁸² Fuller (n 78) 801. See also, van Gompel, n (10) above, p.31 where he refers to this as filtering function, referring to registration as a simple mechanism to determine protected from unprotected rights.

⁸³ Fuller (n 78) 801.

⁸⁴ *ibid* 802.

be recorded. Those that are recorded are channelled to acquire the exclusionary rights that copyright grants and those left unrecorded are channelled to public domain.

Other functions of formalities most relevant to copyright are the demarcating function, where the formality defines, identifies and outlines the protectable subject matter,⁸⁵ and signalling function which demonstrates the boundaries so drawn to third parties.⁸⁶ Signalling function has an additional significance in copyright in that recording as a formality triggers property rights. Likewise, publicity and information functions ensure that the subject matter and the scope of protection are made known to third parties.⁸⁷

It is more common for formalities to be complied with by the person who wants to protect the respective property right. However, the CDPA provides that any person can record a work, with or without the knowledge or consent of the copyright owner. As such, the need for record will be unable to prevent fraud in copyright law. This is because any third party can record an author's expressed work and claim it to be the third party's own. Even if that record brings the author's copyright work into existence, the author will still have to prove in a court that what was recorded was his work. This may frustrate the author's reasonable expectations of her work being protected. However, scholars do recognise that there can be disadvantages to formalities,⁸⁸ but on balance the need for record fulfils the need for certainty and objectivity in copyright law.

(iii) Legal effect of formalities

It does not follow necessarily that a formality is a mere formal matter and does not affect substantive rights. Whether a formality affects substantive rights depends on the nature of the formality itself and the objective sought to be achieved by the formality. The law can require that a property right cannot be substantively enjoyed unless a formality is complied with, if the certainty that the formality brings is fundamental to the exercise or enforcement of the relevant property right. These are constitutive formalities in that the compliance with these is a constituent element of the substantive right itself.⁸⁹ A good example is the requirement that the disposition of an interest in land having to be in writing.⁹⁰ The rationale goes back to the cautionary function explained above. A further example is the act of registration: though in itself a formal act, registration is what grants legal title to land.⁹¹ The rationale here is *inter alia*, to eliminate the uncertainties associated with the conveyancing system that existed before (whereby title deeds had to be examined at the time of each disposition of land) and to provide publicity to rights in land by bringing them all on to the Land Register.⁹² Therefore, it is within the legislative remit to use a formal act as an essential aspect of acquiring substantive property rights.

It is likewise well within the legislative remit to make the creation of a record an essential step before substantive rights of copyright can be enjoyed. Of all the functions of formality, the most relevant to copyright law is the evidentiary function. The record of a work plays a significant role in

⁸⁵ van Gompel (n 10) 35-42.

⁸⁶ *ibid* 43-44.

⁸⁷ Ben McFarlane, *Structure of Property Law* (OUP 2008) 100-104. See also van Gompel (n 10) 45-47.

⁸⁸ *ibid* (McFarlane) 107.

⁸⁹ van Gompel (n 10) 27.

⁹⁰ Law of Property (Miscellaneous Provisions) Act, 1989, s 2(1). This applies to both legal and equitable rights, an exception being a property right acquired by proprietary estoppel.

⁹¹ Land Registration Act, 2002, ss 29 and 30, read with s 58, excluding overriding interests.

⁹² McFarlane (n 87).

proving infringement, as discussed in Part 2 above. In the absence of any recording, the very existence of the work will be thrown into question, as we saw in *Green* above, given the vagaries of oral evidence. Being able to prove infringement is at the heart of copyright as a property right. Since the need for record is a formality that influences proof of infringement, and actionability of infringement is the essence of copyright as a property right, the need for record has been made a constitutive requirement for copyright protection to arise.

If recording is only a formality, what if the first or the only record of an authorial work is destroyed? This is similar to asking the question what happens if a written contract for sale of land is destroyed. Does this mean that the substantive rights that the parties had acquired before the destruction of the record are also destroyed? Clearly not. If independent evidence can be produced of the written contract, the substantive rights can be enforced. But this odd possibility where independent evidence can be used, cannot be used to challenge that writing is required for substantive rights in land dispositions to arise. It is the same logic with the need for record in copyright works. If the existence of the work and its content can still be proved based on independent evidence, then it is still possible to enforce copyright.⁹³ However, this odd possibility cannot be used to challenge the very need for the record. The destruction of the record only goes to distinguish between a work and its record, in that the work continues to exist regardless of the destruction of the record.

C. Record versus expression to trigger copyright subsistence

Let us begin this discussion by first establishing the relationship between the requirement of form and the well-known truism of copyright that copyright does not protect ideas, but the expression of those ideas. If an expression is not recorded according to s 3(2), CDPA, the result is simply that copyright does not subsist in such expression. By not recording it, an expression does not in itself become an idea in the abstract. Much depends on the level of abstraction and the degree of detail. For example, in *Donoghue v Allied Newspapers Ltd*,⁹⁴ the plaintiff had supplied the broad ideas for certain stories, which were written down in words as short literary pieces by one Mr Forestead. The plaintiff lost an action for infringement against the newspaper which published them, since what the plaintiff had provided were merely ideas at an abstract level. From this, one cannot draw a general conclusion that all spoken words are mere ideas. As it has been explained in *Donoghue* itself, if the plaintiff had dictated the stories as they appeared in newspaper to Mr Forestead to write down, the plaintiff would not have been regarded as expressing only his ideas, but rather a literary expression. Thus, an unrecorded expression is not always an idea. Equally, an idea does not become protectable simply because it is recorded. The content of what is recorded must be examined based on the rules of subject matter, including originality, as discussed above in relation to infringement.

By not protecting the ideas themselves, but only protecting those that are expressed, copyright achieves one policy objective – to keep ideas free. By requiring additionally that only recorded expressions be protected, it achieves another policy goal – to keep unrecorded expressions also free. However, this has not attracted universal acceptance. Scholars argue that mere spoken word as unrecorded expression should be protected by copyright. They give the example of *Iliad* which was committed to the memory of generations before being written down.⁹⁵ Their claim appears to be that

⁹³ Davis (n 2) para [3-186].

⁹⁴ [1938] Ch 106, 109-10. The applicable legislation was Copyright Act, 1911.

⁹⁵ Brennan and Christie (n 5) 311-312.

when human memory can be so powerful, one does not need recording for the subsistence of copyright. The need for recording is only partly because of fallibility of human memory. A significant policy reason is that if copyright subsisted the moment a person like Homer uttered the words of *Iliad*, then each time anyone wanted to recite it from memory to their pupils, they would have needed Homer's permission to recite the work as it amounts to public performance (public being a group of unrelated persons outside a family). It is arguable that it also infringes reproduction right because if spoken word is itself a work in which copyright subsists without more, then speaking it again by someone else will create a copy of the work and will be infringing if the author of the first spoken words did not consent to it. This is reproduction in a form that is material to the work, being a work in existence as spoken. Scholars cite the ability of subsequent users to recite verses from memory truthfully, as a reason not to require recording them for copyright to arise; but the irony of this argument is that indeed it is such early acquisition of copyright that could prevent subsequent users reciting *Iliad* altogether, because they would be infringing Homer's copyright, if Homer had not consented to their recitation.

Acquisition of property rights at the earlier stage of expression, rather than waiting until it is recorded, prevents reciting and sharing of these expressions. Jazz as a system of music is premised on sharing, taking inspiration from and improvising over prior unrecorded expressions.⁹⁶ Similarly, improvised comedic acts use prior unrecorded comedic acts as a source and inspiration for creating newer acts.⁹⁷ There is no denying that a person who can come up with an impactful speech extempore or improvise music that moves the listeners are among the most creative amongst us. However, this is one space where propertisation does not lead to more creativity, but less – by preventing sharing of expressions with each other. Lawmakers must be mindful of the impact of property protection on the rest of the world.

Creativity of those who improvise should certainly be rewarded. Mazziotti speaks of a problem among jazz musicians who improvise live on stage receiving lower fee than those whose music is recorded. He proposes relaxation of the rules of recording musical works for this purpose.⁹⁸ The refusal to recognise performers who improvise also as authors has no basis in copyright law. As argued above, the need for recording is independent of the question of authorship. However, the issue is that to become a member of a performing society, normally a person must be a copyright owner as she needs to assign or licence her rights to the performing society. If authors have not yet become copyright owners, then they will have no rights to assign or licence. However, the CDPA does recognise performing societies that function as agents of authors. Jazz musicians can set up a performing society based on the agency model, and negotiate with licensees to recognise the difference between ordinary performers and performers who improvise with original content to achieve a fair compensation. This may fix the problem, but property rights in unrecorded improvised music will be eventually counter-productive to the jazz musicians' own cause because of the difficulties they will face in being able to prove their work in a tort of infringement.

⁹⁶ P. Vuust and M. Kringelbach, 'Music improvisation, a challenge for empirical research' in R. Ashley and R. Timmers (eds), *The Routledge Companion to Music Cognition* (Routledge, 2017) pp.265, 268-270, where the authors demonstrate the impact of pre-constructed and pre-learned patterns on improvisation.

⁹⁷ Trevor M. Gates, 'Copyright protection for modern comedic material' in Enrico Bondio and Nicola Lucchi (eds), *Non-conventional Copyright* (Edward Elgar Publishing, 2018) 219, 222; Cathay Smith, 'Copyright in Culinary presentations' in Enrico Bonadio and Nicola Lucchi (eds), *Non-Conventional Copyright* (Edward Elgar Publishing, 2018) 128, 147.

⁹⁸ Mazziotti (n 6) 190-191, 198.

Finally and importantly, property protection has the tendency to be expansionist. However, property is double edged: as much as it provides boundaries for the rest of the world to exclude itself, it also provides boundaries for the property owner not to claim beyond those boundaries. If expression alone was sufficient for copyright owner to claim copyright protection, she could control the extent of the work based on largely subjective oral evidence to suit the needs of a potential infringement action ex post. The need for record limits her ability to do this by drawing an objective boundary on what she can claim (either as a copy or as an altered copy).

4. COMPATIBILITY WITH EU DIRECTIVES

Thus far, the discussion has been focused on UK law. One might argue that with the harmonisation, the concept of copyright is autonomous and the UK cannot continue insisting on the need for record when most other Member States do not. Griffiths argues that the requirement of recording of literary, dramatic and musical works within the CDPA might be contrary to the EU copyright jurisprudence which, he argues, requires that the author's intellectual creation be the sole criterion for the subsistence of copyright.⁹⁹ Thus, a work having to be recorded for copyright to subsist may be in violation of the CJEU rulings, especially *Infopaq*¹⁰⁰ and *BSA*.¹⁰¹

However, *Levola Hengelo v Smilde* has revised this position by requiring that a work should not only be an intellectual creation, but such intellectual creation must be expressed to gain copyright protection.¹⁰² It explains that the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity by the authorities that enforce the exclusive rights. Such expression enables individuals and economic operators to know the protection extended to others, especially their competitors. The CJEU further held that in the process of identifying the subject matter, there should be no element of subjectivity, which the Court believes is detrimental to legal certainty.¹⁰³ Therefore, even if there was an apprehension that the process of harmonisation is increasingly moving towards intellectual creation as the sole criterion for granting copyright protection, post-*Levola*, it is clear that other factors are relevant for the grant of copyright protection.

However, expression is not the same as form. As demonstrated in case of an extempore speech or an improvised music is concerned, where expression can exist before it is recorded. Expression is a constituent of the content of subject matter (a work), rather than the form of subject matter. Nevertheless, the CJEU's observations in relation to the need for objectivity, precision and certainty of subject matter can refer equally to both content and form of the subject matter. It is important to point out that none of the EU Directives refer to the need for record. There is scholarly support for this to mean that the need for record is not harmonised.¹⁰⁴ However, *Marleasing* principle requires that UK copyright law is interpreted bearing in mind the objectives of EU law.¹⁰⁵ Since the need for form

⁹⁹ Griffiths (n 24) 782.

¹⁰⁰ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569.

¹⁰¹ Case C-393/09 *Bezpečnostní Softwarová Asociace-Svaz v Ministerstvo Kultury* [2011] ECDR 3 [50].

¹⁰² Case C-310/17 *Levola Hengelo v Smilde Foods BV* [2019] ECDR 2 [36]-[37].

¹⁰³ *ibid.* [40]-[41].

¹⁰⁴ Latreille (n 62) 133.

¹⁰⁵ Case C-106/89 *Marleasing v La Comercial Internacional* [1992]1 CMLR 305 [8].

achieves the same objectives identified by *Levola*, namely objectivity, precision and certainty, it cannot be said that it violates EU copyright jurisprudence; rather it upholds it.

5. CONCLUSION

In copyright more so than in tangible property, the appreciation of the form is important. The need for form is not asserted here as a panacea for all ills that arise from uncertainties in copyright. Uncertainties exist even in a system as formalised as title by registration of land. But this should not deny the extent to which the need for form brings certainty and objectivity to copyright law. Nor should the ease with which this requirement can be fulfilled in most cases take away from the significant role that it plays. One may insist that even if one describes the need for record as a formality, it is still only a practical matter. But it is important to appreciate that formalities being a practical matter certainly have deep rooted justification in the conceptual foundation of property law. Accordingly, the effort in this article was to bring to fore the rules governing form in copyright law and to explore their teleological explanation, so that one understands the depth of significance is understood.

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