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COPYRIGHT EXCEPTIONS AND CONTRACT

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ABSTRACT

This thesis addresses the relationship between copyright exceptions and contractual provisions which seek to preclude users relying on those exceptions. It argues that the topic has been insufficiently theorised and that, in order to properly understand the interaction of copyright and contract, attention must be given to the rationale for freedom of contract and the contested rationales for copyright exceptions.

Chapter 2 of the thesis addresses the doctrinal relationship between copyright exceptions and contract in UK. The chapter also considers recent legislative reforms in the EU and the way in which copyright exceptions and contract have been conceptualised under EU law, forming a context for the theoretical examination in later chapters.

Chapter 3 discusses the nature of freedom of contract which is often referred to as a foundational or preeminent value within 'western' legal systems. The chapter argues that under the main theoretical understandings of contract theory there is significant scope to justifiably limited parties' freedom of contract, particularly in connection with protecting the interests of third parties or where transaction involves significant externalities cannot take into account by the parties to the contract.

Chapter 4 addresses Locke's labour theory of property entitlement and the way it has been applied to copyright law. It analyses the extent to which Lockean theory can be applied to intellectual property law, discussing the nature of the intellectual commons that authors draw upon in order to create copyright protected works. It argues that the Lockean sufficiency, waste and charity provisos require the existence of copyright exceptions in order for property rights in expression to be legitimate.

Chapter 5 of the thesis considers the law and economics understanding of copyright law and copyright exceptions. The chapter concludes that under a properly articulated law and economics approach to copyright law, copyright

exceptions play important role in optimising the level of copyright protection and maximising social welfare.

Chapter 6 considers the relationship between freedom of expression and copyright exceptions. It concludes that at both a theoretical level and within the approach taken by the courts, copyright exceptions must be consistent with freedom of expression interests and that copyright exceptions play important role in giving life to the broader social dimensions of freedom of expression.

Chapter 7 draws together the material in chapter 3 on the nature of freedom of contract with the material in chapters 4, 5 and 6 on the rationales for copyright exceptions. The chapter argues that once the underlying theoretical rationales for both contract and copyright fully considered, it is clear that copyright exceptions are required under each of the underlying copyright rationales and that freedom of contract rationales do not justify permitting private parties to modify these copyright exceptions in their contractual dealings.

DECLARATION

I hereby declare that:

i. This thesis comprises only my original work towards the degree of Doctor of Philosophy.
ii. Due acknowledgement has been made in the text of this thesis to all other material used.
iii. The thesis is fewer than 100,000 words in length, exclusive of the bibliography and appendices.

Adrian Aronsson-Storrier

8 December 2019

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exceptions.html. I am also grateful for the questions and inspiration provided by students whom I have had the pleasure to teach over the years.

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1. INTRODUCTORY COMMENTS

I. INTRODUCTION

This thesis addresses the relationship between copyright exceptions and contractual provisions which seek to preclude users relying on those exceptions. While there have been excellent doctrinal investigations into this relationship,[1] the topic has been insufficiently theorised. It is argued here that in order properly to understand the interaction of copyright and contract attention must be given to the rationale for freedom of contract and the contested rationales for copyright exceptions. Considered together, these rationales suggest that copyright exceptions should be resistant to contractual override.

This research project has been inspired by a series of puzzling phenomena. The first phenomenon has been the increasing legislative attention to the relationship between

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[1] Notably including Niva Elkin-Koren, 'Copyright Policy and the Limits of Freedom of Contract' (1997) 12 *Berkeley Tech L.J.* 93; Severine Dusollier, Yves Poullet and Mireille Buydens, *Copyright and Access to Information in the Digital Environment* (A study prepared for the third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace Infoethics, UNESCO, 17 July 2000); Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Contract* (Kluwer Law International, 2002); Copyright Law Review Commission, *Copyright and Contract* (Copyright Law Review Commission, 2002); Jacques de Werra, 'Moving beyond Conflict between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for on-Line Information Licensing Transactions: A Comparative Analysis between U.S. Laws and European Law' (2003) 25 *Colum. L.L & Aers* 239; Estelle Derclaye, 'Copyright Contracts, Public Policy and Antitrust' in Christopher Heath and Kung-Chung Liu (eds), *Copyright Law and the Information Society in Asia* (Hart, 2007) 167; Martin Kretschmer et al, *The Relationship between Copyright and Contract Law* (Research Report No 4, SABIP, 2010); James Griffin, 'The Interface between Copyright and Contract: Suggestions for the Future' (2011) 2(1) *European Journal of Law and Technology*; Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)* (13 February 2014); Note also David Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (Research Paper, Centre for Copyright Studies Ltd, May 2002) which represents a rare and detailed effort to understand the relationship from a law and economics perspective; and Thomas Dreier, 'Contracting out of Copyright in the Information Society: The Impact on Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 385 examining the issue from a freedom of expression perspective.

copyright exceptions and contract in circumstances where there have been few, if any, recent major litigated disputes about the issue.[2] In recent years legislative provisions dealing with the relationship between copyright exceptions and contract have been adopted in the United Kingdom (UK),[3] the European Union (EU)[4] and even arguably at the international level.[5] These legislative provisions have attempted to protect copyright exceptions from contractual override, yet there seems to be little evidence by way of litigation to indicate that contractual interference with copyright exceptions is causing difficulties, with the most recent decision on contractual override to receive sustained academic review arising in the United States (US) in the late 1990s.[6]

The second, and related, phenomenon is the absence of disputes concerning contractual override of copyright exceptions. An increasing volume of the cultural works including films, books and music are made being available online only after users agree to contractual licenses which seek to alter the contours of the statutory copyright regime.[7] These contractual modifications often include attempts to directly

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[2] In the US context see for example Guy A Rub, 'Copyright Survives: Rethinking the Copyright-Contract Conflict' (2017) 103 *Virginia Law Review* 1141.

[3] See Intellectual Property Office, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (2011), leading in 2014 to a series of new copyright exceptions in the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; Copyright and Rights in Performance (Disability) Regulations 2014, SI 2014/1384; and Copyright (Public Administration) Regulations 2014, SI 2014/1385.

[4] See EU Commission, 'Shaping the Digital Single Market', *Digital Single Market - European Commission* (Text, 25 March 2015) <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market> leading to *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC* [2019] OJ L 130/92 ('*Copyright in the Digital Single Market Directive*').

[5] See *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.* Art 4; and Laurence R Helfer et al, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press, 2017) 77–78 suggesting that states must ensure copyright owners do not use contracts to prevent beneficiaries making use of the exception. The EU implementation of the Marrakesh Treaty is discussed in Chapter 2 Part V.I. 'The relationship between copyright exceptions and contract in the EU', as the exception in the EU has been made resistant to contractual override.

[6] *ProCD, Inc v Zeidenberg* (1996) 86 F.3d 1447.

[7] But see Guibault (n 1) 2 where similar concerns were being expressed almost two decades ago.

or indirectly preclude availability of copyright exceptions.[8] For example, the terms of use for the online video content streaming service Netflix limits access to non-commercial use and prevents any reproduction of the works in its catalogue, except as explicitly authorized in the contractual terms, which (if effective) would prevent users exercising a range of copyright exceptions.[9] If contractual arrangements routinely exclude the operation of exceptions, why have so few cases been brought by copyright owners against users who have violated these contractual restrictions?

The third phenomenon is the volume of law reform and academic commentary concerning the design, interpretation and implementation of copyright exceptions. Why do academics devote so much time to questions concerning the interpretation of copyright exceptions if exceptions are merely default rules, capable of freely being set aside by inconsistent contractual provisions? Should academics and legislatures devote effort to design and calibrate copyright exceptions if they can be rendered sterile and ineffective by copyright owners through the use of contractual provisions.

The final phenomenon has been the recent trend in which courts have begun to describe copyright exceptions as 'user rights', without making clear whether this accurately reflects the legal significance of those exceptions or whether the language of rights is being used only to emphasise the normative significance of exceptions which have traditionally been understood as defences to liability.[10] Such language has notably been used in the Canadian Supreme Court[11] and within the Court of Justice

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[8] See generally Aaron Perzanowski and Jason M Schultz, *The End of Ownership: Personal Property in the Digital Economy* (The MIT Press, 2016) 57.

[9] See Netflix, 'Netflix Terms of Use', *Netflix* (April 24, 2019) <https://help.netflix.com/legal/termsofuse>, where in § 2 the use of the service is restricted to non-commercial use only, and § 5 where users '…agree not to … reproduce, distribute, modify, display, perform, publish, license, create derivative works from, offer for sale, or use … content and information contained on or obtained from or through the Netflix service…'. While these terms do not explicitly restrict copyright exceptions such as quotation, it would make a commercial quotation a violation, and reproducing any Netflix content in order to quote it would presumably not be a 'streaming only' use of the service.

[10] See Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford University Press, First edition, 2017) 5 for the different means of the term 'user rights'.

[11] Starting in *CCH Canadian v Law Society of Upper Canada* [2004] 13 S.C.R. 339 at § 48

of the European Union (CJEU)[12] but it remains unclear what significance, if any, the shift to the language of rights may have on the entitlements of copyright owners or users.

The research project has also been motivated by frustration at the manner in which successive law reform reviews have resorted to a balance metaphor in justifying or discussing contractual override of exceptions. Law reform bodies have sought to 'balance' the interests of copyright owners against the interest of copyright users who rely on exceptions,[13] without articulating a satisfactory rationale for copyright law, contractual freedom, copyright exceptions or the goal of any balancing exercise. Until such rationales and their relative importance can be clearly expressed it seems premature to undertake a balancing exercise. This concern has been compounded, as without an understanding of the proper relationship between copyright exceptions and contract in a negotiated contract between two parties, it is difficult to understand how trends towards standard form online contracts, the use of technological protection measures or towards conceptualising copyright as a right of access should be evaluated.[14]

This thesis sets out to understand from a theoretical perspective whether it should be possible to override the operation of copyright exceptions by the operation of an inconsistent contractual provision. It argues that despite the recent flurry of legislative activity there has been insufficient attention to the rationale of the copyright exceptions and the rationale of freedom of contract, meaning that current debates on the appropriate approach have resorted to a meaningless attempt to 'balance' opposing interests. Providing an account of how the competing interests *should* be

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[12] CJEU, Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] Judgment of the Court (Grand Chamber) § 70 and CJEU, Case C-516/17, *Spiegel Online GmbH v Volker Beck* [2019] Judgment of the Court (Grand Chamber) § 54.

[13] See for example Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Independent Report, May 2011) 51.

[14] L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, 1991) 191; Zohar Efroni, *Access-Right: The Future of Digital Copyright Law* (Oxford University Press, 2011) 144; Chapdelaine (n 10) 148.

resolved may have value for policymakers and courts when faced with either disputes or with law reform reviews. The thesis concludes that a number of copyright exceptions under a Lockean, utilitarian law and economics or freedom of expression approach should be incapable of being set aside by inconsistent contractual provisions.

While the substantive focus of the thesis is on the theoretical understanding of the contractual overridability of copyright exceptions, at various points the project discusses doctrinal and law reform debates in several jurisdictions, including the United Kingdom, European Union, United States of America, Australia and Canada. While the thesis is not intended as a detailed jurisdictional-specific doctrinal study of the contractual overridability of copyright exceptions, some discussion of interesting aspects of the position in these jurisdictions is included to contextualise the need for a better theorised understanding of the relationship between contract and copyright. The specific jurisdictions discussed have been chosen due to their legislature or courts having given relevant attention to the role of copyright exceptions or to broader theoretical concerns relevant to the project. The scope of the jurisdictional comparison has however been limited to English language materials.

II. CONCEPTUALISING COPYRIGHT EXCEPTIONS

II.A. *Defining copyright exceptions*

Copyright exceptions are provisions in domestic copyright laws which permit limited use of a work without the permission of the copyright owner. Distinctions are sometimes drawn here between inherent limitations on the scope of the authors copyright rights (such as the originality threshold, substantial part analysis, duration of copyright protection, idea-expression dichotomy and exhaustion) and exceptions which permit the reproduction or use of original work in circumstances which would

otherwise amount to a copyright infringement.[15] Limitations in this sense might be considered 'as a means to describe the structural outer limits of copyright'.[16]

The important role of copyright exceptions has long been identified in international copyright instruments,[17] with provisions 'granting latitude to member states to limit the rights of authors in certain circumstances'[18] with flexibility around exceptions being included in the earliest versions of the Berne Convention, dating back to 1886.[19] Indeed, there is some evidence of a growing international trend towards making it mandatory for states to incorporate specific copyright exceptions into their domestic law, in contrast to the historical approach toward exceptions which was more permissive and allowed more flexibility for states.[20] While EU Directives concerning computer programmes and database protection have included mandatory copyright exceptions since the 1990s,[21] a wider range of law makers have more recently made it mandatory for states to adopt specific copyright exceptions. Recent examples of a shift toward mandatory exceptions include the recent Marrakesh Treaty,[22] the WIPO Standing Committee on Copyright and Related Rights efforts in connection to a proposed International Legal Instrument on Exceptions and Limitations for Libraries

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[15] Guibault (n 1) 5; See also Christophe Geiger and Franciska Schönherr, 'The Information Society Directive' in Irini A Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar Publishing, 2014) 395, 438–9 noting '...an exception describes the derogation from arule or a principle, whereas a limitation indicates that the exclusive right does not extend to a particular use of the work.'

[16] Chapdelaine (n 10) 43; See also Graham W Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press, 2018) 279.

[17] *Berne Convention for the Protection of Literary and Artistic Works (as Amended on September 28, 1979)*

[18] Sam Ricketson, *WIPO Study On Limitations And Exceptions Of Copyright And Related Rights In The Digital Environment* (No SCCR/9/7, 5 April 2003) 3.

[19] Ibid noting '...at the outset of the negotiations that led to the formation of the Berne Convention in 1884 the distinguished Swiss delegate Numa Droz stated that it should be remembered that "limits to absolute protection are rightly set by the public interest."".

[20] Sam Ricketson, 'Protection of Limitations and Exceptions in the International Copyright Framework' in Shyamkrishna Balganesh, Wee Loon Ng-Loy and Haochen Sun (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (Cambridge University Press, Forthcoming) 11.

[21] See Chapter 2, Part VI.

[22] Helfer et al (n 5).

and Archives,[23] and provisions in the European Union's Copyright in the Digital Single Market Directive.[24] There is also active debate as to whether the quotation exception in Article 10(1) of the Berne Convention is mandatory,[25] with a division of views as to whether the exception is optional[26] or whether the correct interpretation of the Berne Convention requires its implementation by member states.[27]

Within the EU, the Information Society Directive[28] has achieved a level of harmonization in the copyright exceptions of member states. Articles 5(2) and 5(3) of the Directive provide a 'shopping list' of possible categories of copyright exceptions which member states may implement within their domestic legal system.[29] By way of example, Article 5(3)(d) provides that member states may implement a quotation exception which is then implemented in the UK in section 30(1ZA) of the Copyright Designs and Patents Act 1988.[30]

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[23] Standing Committee on Copyright and Related Rights, *Working Document Containing Comments on and Textual Suggestions Towards an Appropriate International Legal Instrument (in Whatever Form) on Exceptions and Limitations for Libraries and Archives* (No SCCR/26/3, World Intellectual Property Organisation, 10 December 2013).

[24] Copyright in the Digital Single Market Directive (n 4).

[25] For arguments that the exception is mandatory see for example Ricketson (n 18) 14; Martin Senftleben, 'Quotations, Parody and Fair Use' in PB Hugenholts, AA Quaedvlieg and DJG Visser (eds), *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (deLex B.V., 2012) 345, 354; Annette Kur and Henning Grosse Ruse-Khan, 'Enough Is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection' in *Intellectual Property Rights in a Fair World Trade System* (Edward Elgar Publishing, 2011) 359, 380.

[26] Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered By WIPO* (WIPO, 2003) 61; Jørgen Blomqvist, *Limitations and Exceptions* (Edward Elgar Publishing, 2014) 159.

[27] Lionel AF Bently and Tanya Aplin, *Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism.* (SSRN Scholarly Paper No ID 3119041, Social Science Research Network, 6 February 2018) 13–16 <https://papers.ssrn.com/abstract=3119041>; Tanya Aplin and Lionel AF Bently, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use* (SSRN Scholarly Paper No ID 3119056, Social Science Research Network, 6 February 2018) 2 <https://papers.ssrn.com/abstract=3119056>.

[28] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167 22.6.2001, p. 10 ('*Information Society Directive*')

[29] P Bernt Hugenholtz, 'Harmonisation or Unification of European Union Copyright Law' (2012) 38(1) *Monash University Law Review* 4, 7.

[30] *The Copyright, Designs and Patents Act 1988* (UK) ('*CDPA 1988*')

One particularly important issue in understanding the nature of copyright exceptions is determining whether they are defences to copyright infringement or whether they operate as positive rights for users. The following sections, therefore, introduce Wesley Hohfeld's taxonomy of legal relations in an attempt to provide clarity as to the nature of copyright exceptions and their potential status as rights. Hohfeld's taxonomy has been chosen as an analytical method, given its prominence within the copyright literature on copyright exceptions discussed in section II.B. below and due to its ability to clarify legal thought and to aid in understanding of problems in the law. These approaches will then be built upon in chapter 2 to consider the extent to which recent changes to the law in the UK have modified the nature of copyright exceptions.

II.B. *Hohfeld's taxonomy and the relationship between exceptions and rights*

Hohfeld's system for more precisely describing legal relationships was developed in two articles on the topic of fundamental legal conceptions as applied in judicial reasoning.[31] Hohfeld's framework describes all legal relationships as being made up of sets of interrelated sets or rights and duties; privileges and no-rights; powers and liabilities; and immunities and disabilities. Hohfeld argued that the term 'rights' 'tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity in the strictest sense',[32] and an important aspect of his approach was to encourage clarity in legal analysis by clearly distinguishing between these various legal relationships. Hohfeld's other major input was in insisting on describing legal relationships in 'correlative' terms, arguing that there is a symmetrical interdependence between them – under Hohfeld's approach, it is not possible to have

[31] Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710.

[32] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 31) 16.

or to understand a right without its correlative duty; and no privilege without its correlative no-right.

As is discussed below, a number of copyright scholars have drawn upon the Hohfeldian taxonomy and have produced at times contradictory analyses of the Hohfeldian interests involved in copyright exceptions. It is useful critically to interrogate those approaches in order to illuminate the difficulty of identifying and protecting the interests of copyright users who wish to rely on exceptions.

Under Hohfeld's taxonomy, in order to describe person A as having a 'right', it is also necessary to ascribe the correlative term 'duty' to the person against whom the right can be invoked. Quoting US judicial authority, Hohfeld described the right-duty legal relationship as follows: '[a] duty or legal obligation is that which one ought or ought not to do. "Duty" and "right" are correlative terms. When a right is invaded, a duty is violated'.[33] As an example, if A owns blackacre, then law will give A the right to exclude person B from the land. B will therefore have a correlative duty not to enter the land.[34] In this way, rights cannot be properly understood without simultaneously understanding the nature of the duties that they impose upon others (and vice-versa). In a copyright setting, the exclusive right of reproduction is, for example, a right held by the copyright owner and users are under a corresponding duty not to interfere with that right.

Under Hohfeld's approach it is necessary to distinguish the conception of a right from the conception of a privilege.[35] A privilege is a situation where a person has a freedom[36] or liberty[37] against another to either do a given act or not do the act. Expressed differently, this means that the privilege holder has no duty in relation to another person *not* to do a certain action. The other party, holding the correlative 'no-

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[33] Ibid.

[34] Ibid 32.

[35] Ibid 33.

[36] Devlin Hartline, 'Why Copyright Is a Right and Fair Use Is a Privilege', *Law theories* (Blog) <http://lawtheories.com/?p=436>.

[37] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 31) 41

right', lacks any legally enforceable claim against the privilege holder to compel or prevent the act in question. Following the land example begun above, if A owns blackacre, then A will not only have the right to exclude B from the land, but A will also have the privilege of entering the land.[38] B will have a 'no-right', or the absence of a legally enforceable claim against A to require A to keep off the land.

One important aspect of the privilege – no-right relationship is that the no-right holder does not (generally speaking) owe a duty of non-interference with respect to the privilege holder; and as a consequence may interfere with the attempts by the privilege holder to exercise the privilege.[39] This aspect is explained by Hohfeld by way of an example: A owns a salad and might say to B '[y]ou have my permission to eat this salad, if you can, but I do not agree not to interfere with you'. Here, if B succeeds in eating the salad, he has violated no rights of A; but similarly if A manages to hold tightly to the salad bowl and keep it away from B such that B is unable to eat, then no right of B's has been violated.[40] This lack of a duty of non-interference in relation to privilege holders is of especially relevant when Hohfeld's analysis is applied to the relationship between copyright owners and those seeking to make fair use or fair dealing of the works. As explained below, the beneficiaries of a copyright exception hold a privilege to use a work in the manner permitted by the exceptions. However, copyright owners do not generally owe a duty of non-interference with the exercise of that privilege.

The remaining categories of Hohfeldian legal relations can be addressed more briefly, as they are infrequently addressed in the copyright law literature concerned with applying Hohfeldian analysis. A 'power' refers to the ability of a person with volitional control over some facts or group of facts to effect a particular change in legal relations,[41] and is correlative to a liability. Returning to our example, if A is the owner

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[38] Ibid 32.

[39] Hartline (n 36).

[40] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 31) 35.

[41] Ibid 44.

of blackacre, A will have the power to transfer his interest to B by way of gift.[42] B will be subject to a liability or possibility that B's legal relationship will be changed when and if A exercises the power. An immunity is a freedom, exemption or impunity from the rights of another and is correlative to a disability, which is an inability to exercise a power and change a particular legal relationship that one would normally be able to change.[43]

In the absence of copyright law, authors have no ability to bring action against a person who copies their work. Authors are however under no obligation to make their works available, and can keep a work confidential and unpublished or take other steps to prevent an individual user from accessing a work. Considered from the perspective of users, in the absence of copyright law they have no duty *not* to copy works, but lack any affirmative rights to copy the work.[44] In Hohfeldian terms, in a jurisdiction without copyright law users have a privilege to copy works, matched by authors having a no-right or inability to bring action to prevent the copying of a work. Recalling the discussion above, the author will however have no duty of non-interference with respect to the use who holds of the privilege to copy, and may take steps to prevent a user from accessing or copying a work. Where authors have a privilege to keep the work private, then users will have no right of access to the work, but other than general rules about being under a duty not to enter the author's home or private property, will also be under no duty of non-interference and can take steps to access and copy a work without infringing any right of the author.

As an alternative to keeping a work private, an author might seek to utilise contract to supplement their interests in a jurisdiction without copyright law. Authors might seek to enter into contracts with individual readers, where they (for instance) agreed to provide the reader with a copy of the work in exchange for a contractual promise

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[42] Hogan Hunter, 'A Hohfeldian Primer', *Chicago-Kent College of Law* (Legal Blog, 20 December 2007) <http://www.kentlaw.edu/perritt/blog/2007/12/hohfeldian-primer.html> giving the example of a power held by the owner of money to gift it.

[43] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 31) 55.

[44] See Hartline (n 36) where the author notes that in the absence of copyright law, users have no right to copy particular works (but does not address whether users might hold a privilege.

from the reader not to make further copies of it. In Hohfeldian terms, authors would have a power to enter into such contracts.[45] If a contract was entered into, the reader would obtain a Hohfeldian right to access the work and authors would place themselves under a duty to make the work available to those readers with whom they had contracted. In relation to those they had contracted with, authors would also hold a right to prevent copying of their work, and readers would undertake a Hohfeldian duty not to copy in exchange for 'upgrading' their privilege to access the work into a right.

II.C. *Existing Hohfeldian understandings of copyright exceptions*

Returning from a hypothetical jurisdiction without copyright protection to the position in the UK (by way of example), academic commentary reveals a difference of opinion exists as to the nature of the interest held by copyright owners under intellectual property statutes, and the extent of the interests of those who wish to take advantage of copyright exceptions. While some academics, including Tom Bell have argued[46] that the interest held by copyright owners is a privilege in the Hohfeldian sense, most copyright scholars who utilise the Hohfeldian framework instead describe the interests of copyright holders as being rights.[47]

In his account, written in the context of US law, Bell acknowledges that the US Copyright Act defines certain interests of the copyright owner as rights, but '[i]t does so only subject to a very wide range of exceptions',[48] and that because these exclusionary rights are weak it is therefore more accurate to describe the copyright

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[45] Note that power in the Hohfeldian sense does not imply that the author would be in a position to compel the users to enter into such contracts. Instead the power provides that that the author has physical control of their own writings, and could use that volitional control over that group of facts to effect a particular change in legal relations by offering to exchange that physical control for legal entitlements.

[46] Tom W Bell, 'Copyright as Intellectual Property Privilege' (2007) 58 *Syracuse Law Review* 523; Tom W Bell, *Intellectual Privilege: Copyright, Common Law, and the Common Good* (Mercatus Center, George Mason University, 2014).

[47] David R Johnstone, 'Debunking Fair Use Rights and Copyduty under U.S. Copyright Law' (2004) 52 *Journal of the Copyright Society of the U.S.A.* 345, 366; Hartline, (n 35).

[48] Bell (n 46) 534.

owner's interest as a privilege.[49] Such an approach he argues would offers 'a rhetorical counterbalance' against the common copyright-as-property rhetoric and help rebalance the scope of copyright to be less favourable to copyright owners.[50] While Bell describes his approach as one '[t]hat offers a more fully and fairly positivist description of copyright, and one more true to Hohfeld's project than descriptions blandly observing that all rights limit each other'[51], it does not address the ability held by copyright owners to bring (at least in some circumstances) a legally enforceable claim against those who copy a work.[52] As expressed by Devlin Hartline, '[i]f copyright merely grants me a privilege, then there would be no such duty on the part of another to not copy my work, and I would have no legally enforceable claim against another that copies my work. Clearly copyright has given me something more than a mere privilege'.[53] An analysis which treats the interest of copyright owners as being primarily a right to prevent copying is in closer conformity to positive law in the UK, which provides copyright owners with the ability to bring copyright infringement actions against users who have breached some form of Hohfeldian duty to the copyright owner. Following this more conventional approach this thesis treats the interest of a copyright owner as a right, although the importance identified implicitly by Bell of carefully delineating the scope of the right is recognised.

Taking the position that copyright law provides authors with rights against the reproduction of their work, what type of interests are provided to users under copyright exceptions? Hartline argues that users' interests amount to Hohfeldian privileges, negating the duty that the user would have not to copy a work, and leaving the copyright owner with a correlative no-right in the sphere of operation of the

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[49] Ibid 535.

[50] Ibid 542.

[51] Ibid 530. Note that it is open to suggest that Bell's project is more accurately focused on the sphere of rhetoric, and that he would accept that in a purely Hohfeldian sense the author's interest under copyright law would be a form of limited right.

[52] Hartline (n 36)

[53] Ibid.

exception.[54] Again, significant in this account is the idea that copyright owners owe no duty of non-interference with any would-be user's attempt to make use of a work under an exception. Quoting US case law, Hartline argues that '[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original',[55] and that under this account the copyright owner is free to permissibly interfere and hinder the ability of a user to make a fair use of a work, for instance by utilising contract law or technological protection measures which make such uses impossible. This is consistent with the analysis of Zohar Efroni, '[i]f user B wished to use owner A's work in order to perform an act that might qualify as fair use and A refuses to facilitate such act (e.g., to hand over a copy of the work to B), A is not breaching any duty of his, and therefore, B cannot be said to have a claim-right to make fair use'.[56] At the same time, however, other than the duty not to copy a work outside of the application of fair use or fair dealing, users do not hold a duty of non-interference in relation to the author's enjoyment of a work, and the user had a privilege to access copyright works without the owner's permission.[57]

David Johnstone's[58] approach to the Hohfeldian understanding of fair use is broadly consistent with the characterisation offered by Hartline and Efroni. Johnstone treats fair use as generally being a mere Hohfeldian privilege in the hands of copyright users, which merely acts to 'interrupt' the Hohfeldian rights held by the copyright owner.[59] Johnstone explicitly addresses the extent to which authors might hold a duty of non-interference in relation to those making fair use of a work, rejecting it in the US

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[54] Ibid; See also Efroni (n 14) 158.

[55] *Universal City Studios, Inc.,* (1984) 464 U.S. 417, 421

[56] Zohar Efroni, 'Towards a Doctrine of "Fair Access" in Copyright: The Federal Circuit's Accord' (2005) 46(1) *IDEA: The Journal of Law and Technology* 99, 118–119.

[57] Ibid 119. Note that the impact of the DMCA in the US is explored by Efroni from 122. While the role of TPMs is not explored in this piece, they can be understood in Hohfeldian terms as providing authors with a power - which once exercised in relation to a work provides them with additional rights as against users.

[58] Johnstone (n 47).

[59] Ibid 352

context: 'No remedy would be owed to a would-have-been user who has been obstructed (e.g., via technical protection measures) in her ambition to make what otherwise might have been adjudicated as a fair use, because no claimable right has been trammelled'.[60] Johnstone similarly notes that a user could not secure the production of an unpublished work.[61] In a footnote Johnstone does, however, note that in the US constitutional context, First Amendment protected fair uses might in some instances have priority over the rights held by copyright owners,[62] an approach discussed in greater detail by Efroni.[63]

To summarise then, under the Hohfeldian analysis of copyright exceptions, in the absence of rules relating to contract, copyright owners hold a Hohfeldian right to prevent copying, which is negated by a privilege held by copyright users to make fair use or fair dealing with a work. Copyright owners hold no duty of non-interference in relation to users fair use privileges, and copyright owners have the privilege to impair the ability of users to access or make a fair use or dealing with a work.

II.D. *Copyright exceptions as user rights*

In Canada a number of more recent court decisions have characterised fair dealing copyright exceptions as user rights. In 2004, the Canadian Supreme Court described the fair dealing exception as an integral part of the Copyright Act, rather than merely defences to infringement actions, and that '[t]he fair dealing exception, like other exceptions in the Copyright Act, is a user's right'.[64] This categorisation of exceptions as users' rights has been repeated in more recent Canadian Supreme Court cases on

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[60] Ibid 358.

[61] Ibid.

[62] Ibid 352.

[63] See Efroni, (n 14) 178 concluding that 'When the giants of copyright exclusivity and free speech law clash, the constitutional entitlement to receive information (insofar as it exists) is too abstract and aloft to play a meaningful role in the struggle. Recipients are likely to discover they have neither standing nor an enforceable cause of action against the state or private rights-holders to vindicate their right to receive information ... For most practical purposes, the right to receive information is not much more than a non-statutory privilege to access information if you can'.

[64] *CCH Canadian v Law Society of Upper Canada* [2004] 13 S.C.R. 339 § 48

fair dealing,[65] including most recently in *Keatling Surveying v Teranet*.[66] In addition there is some limited US Circuit Court authority which suggests that exceptions should be considered to be user rights,[67] and in Europe CJEU jurisprudence has used the language of 'ancillary rights' in a case discussing the operation of Article 5(2)(c) of the Information Society Directive,[68] and has recently in the *Funke Medien* case referred to the exceptions and limitations in Article 5 of the Information Society Directive as users rights.[69] Noting academic interpretations that the quotation exception provided for in Article 10(1) of the Berne Convention is mandatory[70], Ginsburg has gone as far as suggesting that the quotation exception is the Berne exception 'which comes closest to embodying a "user right"'.[71]

The problem with much of the analysis of fair dealing as a user right is that it fails to properly define the scope of the corresponding duty on the copyright owner. Does the duty require the copyright owner not to interfere with the users' right to fair dealing? One account that begins an attempt to formulate the scope of the duty on

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[65] Lisa Di Valentino, 'Conflict between Contract Law and Copyright Law in Canada: Do Licence Agreements Trump Users' Rights?' Available at SSRN <http://papers.ssrn.com/abstract=2396028>, 4.

[66] *Keatley Surveying v Teranet*, 2019 SCC 43 § 43-46 confirming that fair dealing in Canada is a users' right and must be balanced with the copyright owner's rights; with the minority concurring reasons at § 140 similarly recognising fair dealing as a user right.

[67] David Vaver, 'Copyright Defences as User Rights' (2013) 60 *Journal of the Copyright Society of the U.S.A.* 661, 667.

[68] CJEU, Case -117/13, *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] Judgment of the Court (Fourth Chamber) § 47 and 43.

[69] *Funke Medien NRW GmbH v Bundesrepublik Deutschland* (n 12) § 70 with the Court writing that '...although Article 5 of Directive 2001/29 is expressly entitled "Exceptions and limitations", it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter...'; see also *Spiegel Online GmbH v Volker Beck* (n 12) § 54.

[70] See for example Ricketson (n 18) 14.

[71] Jane C Ginsburg, 'Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPs?' in Rochelle C. Dreyfuss, Harry First and Diane L. Zimmerman (eds), *Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (2010) 477; See also Blomqvist (n 26) 160 noting that 'it is often referred to as "the right of quotation"'.

copyright owners is that of Zemer, who generally conceptualises the idea/expression dichotomy as a user privilege enabling use of the underlying idea,[72] and that:

> In Hohfeldian terms [within the scope of the fair use doctrine] the user has a complete privilege (correlative to a compulsory license). Also, one could argue that a user has a temporary, and strictly defined, right to use, while the copyright owner has a duty to allow such use. These limitations are so central to the legitimacy of the copyright system as they seek to establish a proper balance between the legitimate rights of copyright owners and the legitimate public interests.[73]

The difficulty with Zemer's approach is that it does not explore the limits of a duty to allow the use. Does it extend to requiring an author to make a work available to a potential fair user? If so, on what terms? How far would a related duty of non-interference extend? One response to this from David Vaver is that '[t]here is however nothing inherently wrong in treating copyright defenses as user rights. They may not be entitlements that may be transferred or that have correlative duties in the way Hohfeld conceived of rights, but they are entitlements nonetheless'.[74] Accordingly, it might be the case that if we were to insist on strict conformity with Hohfeld's taxonomy, the Canadian courts approach might be interpreted as not going so far as to describe fair dealing exceptions as Hohfeldian rights, as they lack defined correlative duties on copyright owners to make a work available to someone wishing to make a fair dealing use of the work.

Lucie Guibualt similarly argues that in some instances, users will have a right to make use of a work. Writing in relation to the EU Computer Program Directive,[75] she notes that there is a right for users to make a backup copy of a computer program,[76] but that the right is not transferable and may not confer an independent right of action

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[72] Lior Zemer, 'What Copyright Is: Time to Remember the Basics' (2006) 4 *Buffalo Intellectual Property Law Journal* 54, 75.

[73] Ibid 81.

[74] Vaver (n 67) 669.

[75] *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs* (Codified version) [2009] OJ L 111, 5.5.2009, p. 16–22 ('*Computer Programs Directive*')

[76] Guibault (n 1) 90.

to enforce it.[77] The right to decompile however, as expressed in the Directive, applies only to a person 'having a right to use the computer program', which avoids the question of how a right to make use of an exception requires or interacts with any duty to access the work. Her analysis goes on to address both the US and continental European traditions, suggesting that in the continental traditions users have an 'objective right' to accomplish the acts specified in the relevant copyright acts.[78] On her account, this objective right is however not equivalent to a full Hohfeldian right. She describes the objective right as being closer to the notion of a legitimate interest, as it imposes no individual right of redress and it is only as strong as the legitimate interest or public policy objective underlying it.[79] This analysis is discussed by Estelle Derclaye, who writes that the majority view in France is that exceptions are interests, rather than rights, even though some academics use the language of user rights when discussing a right to parody or to decompile a computer program.[80]

Lisa Di Valentino has argued that the Canadian Court's characterisation of fair dealing as a user right compels the conclusion that there is a 'corresponding duty on the copyright owner to refrain from interfering with its exercise'.[81] Di Valentino suggests that in the Canadian context a contractual waiver of fair dealing rights would be an interference, but that there is no obligation on the copyright owner to 'facilitate the exercise of an exception'.[82]

One possible analysis of the scope of the duty on copyright owners might be that they are not permitted to utilise contractaul terms or TPMs[83] to restrict users' ability to make fair dealing with a work, but retain the privilege of either deciding not to release the work, or a privilege to set the price of access to the work at a level of their

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[77] Ibid 106.

[78] Ibid 97.

[79] Ibid 109.

[80] Derclaye (n 1) 200.

[81] Di Valentino (n 65) 22.

[82] Ibid.

[83] Technological protection measures ('TPMs') are software or technology used to restrict access or dealings relating to a work. See Information Society Directive Art 6 for their protection in EU law.

choosing. If the copyright owner chose to set the price of access to the work particularly high, users may not be afford to able to access the work in order to create a fair dealing, but even in the Canadian jurisdiction it is unlikely that a court would compel a copyright owner to produce an unpublished work or set a specific price for the work so a user could make a fair dealing use or it.

In summary therefore, even though some courts have described fair dealing as a right, the scope of the correlative duty however remains uncertain, and there is not yet authority to suggest there is a broader obligation or duty on copyright owners to make works available at a price that users can afford, or even to release their works. In the Canadian context, even where fair dealing copyright exceptions are described as rights, it is very uncertain what, if any, duties are imposed on copyright owners. The Canadian right to make fair dealing with a work may in practice accordingly be quite narrow, as it is treated by some commentators as being contingent on the copyright user being able to access the original work in a form from which they are able to make a fair dealing. Therefore, the extent of any duty of non-interference imposed on copyright owners extends only to situations where a copyright user already holds a copy of a work and wishes to make a fair dealing of it, and the duty imposes no obligation to release the work at a certain price, or in general to release the work in a certain format.[84]

II.E. *Summary of the Hohfeldian taxonomy applied to copyright exceptions*

While a purely Hohfeldian analysis assists in clarifying the nature of the rights, duties, privileges and no-rights provided under a specific copyright statute, it does not speak

[84] While there is in general no requirement under copyright laws to release a work in a specific format, see the discussion of the in Chapter 2, Part VI on the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Signed 27 June 2013, Entered into force 30 September 2016). Under Article 4 of the Treaty, in states where the Treaty is in force and has been implemented, there is a requirement for contracting parties to introduce an exception to facilitate the availability of works in accessible format copies for beneficiary persons. That exception can be limited 'to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market', and the exception may be made subject to remuneration.

to the way that rights and duties should be allocated. As noted by Efroni, a Hohfeldian analysis 'does not necessarily offer answers to the question of which actor should have a certain legal interest in a certain situation. Instead, it helps to determine what type of interest is actually held by the actor according to a given legal constellation'.[85] The set of entitlements under a Hohfeldian analysis set out above is only a first step. The balance of the thesis considers the ways in which various theoretical justifications for copyright law understand how Hohfeldian rights and privileges should be allocated, and the scope of the Hohfeldian powers which should be available to copyright owners to modify that set of legal entitlements using contract law.

III. STRUCTURE OF THE THESIS

This thesis commences with a brief discussion of the doctrinal relationship between copyright exceptions and contract, before addressing in greater detail the theoretical rationales for contractual freedom. It examines the rationales for copyright exceptions within Lockean, law and economics and freedom of expression theories for copyright. It then finally addresses the interrelationship between the various theories to conclude that Lockean, utilitarian or freedom of expression justifications for copyright require the protection of copyright exceptions from contractual override.

Chapter 2 of the thesis addresses the doctrinal relationship between copyright exceptions and contract, with a particular emphasis on the position inthe UK. The UK has been chosen for additional discussion in the chapter as it has recently undergone a review of copyright exceptions and made a number of those exceptions resistant contractual override. Before examining the doctrinal position in the UK the chapter charts international developments in the relationship between copyright exceptions and contract from the US and from Australia in order to give context to the UK's decision to review copyright exceptions. The chapter notes inconsistencies in the UK's approach to contractual override and attempts an Hohfeldian analysis of

[85] Efroni (n 56) 114.

the impact of the amendments on the rights and duties of copyright owners and authors. In its final section, the chapter considers recent legislative reforms in the EU and the way in which copyright exceptions and contract are conceptualised in EU law. The analysis in chapter 2 provides background and context to the theoretical analysis in the balance of the thesis, but is not intended as a comprehensive doctrinal analysis.

Chapter 3 discusses the nature of freedom of contract, being the ability of individuals to freely choose the parties with which they wish to contract and the terms and conditions of their agreement. Freedom of contract is often referred to as a foundational or preeminent value within 'western' legal systems, however the chapter argues that under the main theoretical understandings of contract theory there is significant scope to justifiably limited parties' freedom of contract. The chapter focuses particularly on an analysis of autonomy-based rationales for freedom of contract and the approach of consequentialist law and economics scholars. It argues that under both autonomy and law and economics rationales there is significant scope for limitations of freedom of contract, particularly in connection with protecting the interests of third parties or where transaction involves significant externalities cannot take into account by the parties to the contract.

Chapter 4 addresses Locke's labour theory of property entitlement and the way it has been applied to copyright law. It analyses the extent to which Lockean theory can be applied to intellectual property law, discussing the nature of the intellectual commons that authors draw upon and mixed their labour with in order to create copyright protected works. Building upon the work of modern Lockean scholars, it argues that the Lockean sufficiency, waste and charity provisos set out in his Second Treatise of Civil Government require the existence of copyright exceptions in order for property rights expression to be legitimate.

Chapter 5 of the thesis considers the law and economics understanding of copyright law and copyright exceptions. The chapter builds upon the Landes and Posner model of optimal copyright law, incorporating insights from Wendy Gordon's transaction cost analysis of copyright exceptions and Frischmann's spillover analysis of externalities. The chapter concludes that, under a properly articulated law and

economics approach to copyright law, exceptions play an important role in optimising the level of copyright protection and maximising social welfare.

Chapter 6 considers the relationship between freedom of expression and copyright exceptions. At a theoretical level the chapter draws upon autonomy, truth and democratic rationales for freedom of expression and speech. It details the way in which, properly understood, freedom of expression theories have a collective dimension, and are designed to protect not only the interests of the author and user, but also the broader societal interest. The chapter then considers the way in which these freedom of expression rationales have been applied to understanding copyright exceptions within copyright litigation in the US, ECtHR and CJEU. These jurisdictions have been chosen for analysis, given the rich theoretical insights that can be drawn from the relevant judgments. It concludes that at both a theoretical level and within the approach taken by the courts, copyright exceptions must be consistent with freedom of expression interests and that copyright exceptions play important role in giving life to the broader social dimensions of freedom of expression.

Chapter 7 draws together the material in chapter 3 on the nature of freedom of contract with the material in chapters 4, 5 and 6 on the rationales for copyright exceptions. The chapter argues that once the underlying theoretical rationales for both contract and copyright fully considered, it is clear that copyright exceptions are required under each of the underlying copyright rationales and freedom of contract rationales do not justify permitting private parties to modify these copyright exceptions and contractual dealings. The chapter also highlights the contribution that this thesis makes to copyright scholarship and considers the ways in which the analysis may be drawn upon in future projects to better understand whether specific copyright exceptions should be made resistant to contractual override, the legitimacy of 'copyleft' contractual licences and the understanding of digital locks or technological protection measures.

IV. LIMITATIONS OF THE ANALYSIS

In order to consider the theoretical rationales for freedom of contract and copyright exceptions in sufficient detail it was necessary to limit the scope of the analysis in this thesis. For instance, this thesis does not offer a fully detailed account of the various contract law doctrinal tools that might be used to challenge mass market licences which constraint users' ability to rely upon copyright exceptions, as pre-existing excellent literature already examines this issue.[86] The thesis also constrains itself to a consideration of copyright exceptions such as the UK's fair dealing exceptions, rather than more broadly addressing limitations on the scope of the rights provided under copyright law, such as the duration of protection, the idea–expression dichotomy, and exhaustion doctrines.[87] Indeed, other than briefly in chapter 7, the thesis avoids significant discussion of whether specific copyright exceptions as articulated in the legislation of a specific jurisdiction should be subject to contractual override. In part this is to broaden the relevance of the thesis, noting that while general theoretical justifications for copyright exceptions may have significance between different jurisdictions, the precise scope, expressed legislative justification and operation of an individual countries copyright exceptions may prevent meaningful comparisons between jurisdictions concurring. In addition, the proliferation of legislative copyright exceptions would make a comprehensive doctrinal analysis of even a single jurisdiction challenging, with the UK CDPA alone including over 60 distinct copyright exceptions.[88] Additionally, the thesis avoids the related issue of technological exclusion of copyright exceptions under digital rights management or technological protection measures software other than a few words in the conclusion. This does not deny significant interrelationship between technological restrictions on

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[86] While now somewhat dated, the analysis in Guibault (n 1); and Copyright Law Review Commission (n 1) both provide insightful consideration of the various contractual doctrines which might be employed to challenge a contract excluding the operation of copyright exceptions.

[87] Guibault (n 1) 15.

[88] Note that a range of exceptions exist from s 28A of the CDPA 1988 to s 76, with over 60 distinct exceptions in the UK jurisdiction alone.

copyright exceptions and contractual restrictions. This thesis however argues that a clarification of the theoretical relationship between exceptions and contract is necessary before any subsequent attempt to understand the interaction of copyright exceptions and technological restrictions.

Finally, examining the rationale for copyright has been a popular area of academic commentary, and there are a multitude of contested and conflicting variations in academic understanding of the justifications for copyright law. As a result, there are necessarily a range of interpretations of Lockean copyright, utilitarianism and free speech justifications which are not addressed in the thesis. An attempt has been made to consider those variations which pose interesting issues for the role of exceptions, however, necessarily some justifications have not been addressed in detail.

2. DOCTRINAL RELATIONSHIP BETWEEN COPYRIGHT EXCEPTIONS AND CONTRACT IN THE UK

I. INTRODUCTION

Before addressing whether contracts should be able to exclude or modify exceptions under domestic copyright regimes, it is useful to first address whether under current domestic law such contracts are enforceable. This exercise is useful to justify and contextualise the need for a better theorised understanding of the relationship between contract and copyright, elaborated in later chapters of the thesis.

This chapter therefore considers the relationship between copyright exceptions and contract under UK law. The UK was chosen for analysis because the jurisdiction has recently engaged in a significant review of their statutory copyright exceptions (in the form of the Digital Opportunity Review[1] in the UK, prepared by Ian Hargreaves) and may also remain aligned to EU copyright standards after its exit from the EU and may therefore consider implementing Copyright in the Digital Single Market Directive,[2] which will necessitate further consideration of the relationship between exceptions and contract. More generally, it is hoped that the analysis of the law in the UK and the accompanying Hohfeldian analysis will provide lessons for reconceptualising the

[1] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (Department for Business, Innovation & Skills 2011) ('the Hargreaves Report').

[2] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC* [2019] OJ L 130/92 ('*Copyright in the Digital Single Market Directive*').

relationship between copyright exceptions and contract in other jurisdictions, both within the EU and within common law countries who draw inspiration from the UK.[3]

In order to contextualise the interest in the relationship between exceptions and contract Part II of the chapter looks to earlier jurisprudence from the US surrounding the *ProCD v Zeidenberg* ('*ProCD*') case[4] and also looks at the subsequent work of the Copyright Law Review Committee in Australia, a body which has carried out the first[5] and still perhaps most detailed law reform analysis to date in scrutinising the topic.[6] The Part III considers the approach in the UK, and the reasons that the UK made new exceptions introduced in 2014 resistant to contractual override. Part IV notes some issues with the recent amendments to UK law before summarising the current doctrinal position, which is then analysed under the Hohfeldian framework in Part V. Finally, Part VI addresses the impact of the recently adopted EU Copyright in the Digital Single Market Directive. That EU Directive introduced additional copyright exceptions into EU law, and seemingly attempts to provide that those exceptions cannot be set aside by the impact of contract. As explored below however, the position in the EU relating to contractual override is more complex than suggested, and the new exceptions potentially allow a fairly significant degree of contractual interference with the uses permitted under the new exceptions.

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[3] See for example Wenwei Guan, 'Copyright v Freedom of Contract: The Contract Override Issue in Hong Kong's Copyright Amendment' (2017) 47(1) *Hong Kong Law Journal* 115, 120 arguing that comparisons with the UK CDPA 1988 and the lack of a contractual override provision contributed to the failure of copyright legislation in Hong Kong.

[4] *ProCD, Inc v Zeidenberg* (1996) 86 F.3d 1447 ('*ProCD*').

[5] Copyright Law Review Commission, *Copyright and Contract* (Copyright Law Review Commission, 2002) 201.

[6] Copyright Law Review Commission (n 5).

II. BACKGROUND AND CONTEXT

II.A. *ProCD and the relationship between copyright exceptions and contract in the US*

Much of the initial academic interest in and analysis of the relationship between copyright exceptions and contract was developed in the late 1990s and very early 2000's, triggered in significant part by the 1996 US decision of *ProCD, Inc v Zeidenberg*. The *ProCD* case was a seminal early decision about the relationship between copyright law and contract, notable also for its embrace of economic reasoning. This case has been described as seminal[7] but is also one of the most criticised[8] US copyright decisions. In addition, *ProCD* was one of the first cases examining the status of shrinkwap licences and its analysis had an impact on the drafting process of the US Uniform Computer Information Transactions Act (despite that Act ultimately leaving the relationship between copyright limitations and contract not fully resolved).[9]

The case concerned over 3000 telephone number directories which had been compiled into a database by ProCD at significant expense. The database was distributed by ProCD in an encrypted form along with computer software that was capable of decrypting the database and querying the database to retrieve specific telephone listings. The software and database were then sold by ProCD utilising a price discrimination strategy, with a cheaper version being made available to the general public and a more expensive version being made available to the trade. The defendant purchased the cheaper consumer version of the software and database and, in contravention of the terms of the included

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[7] Martin Kretschmer et al, *The Relationship between Copyright and Contract Law* (Research Report No 4, SABIP, 2010) 125; See also David Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (Research Paper, Centre for Copyright Studies Ltd, May 2002) 79.

[8] Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Contract* (Kluwer Law International, 2002) 3; See Guy A Rub, 'Copyright Survives: Rethinking the Copyright-Contract Conflict' (2017) 103 *Virginia Law Review* 1141, 1144 at footnote 3 noting some of the major academic responses to the ProCD case.

[9] Guibault (n 8) 4; Kretschmer et al (n 7) 156 noting 'The drafters of the UCITA specified that the preemption doctrine would "seldom apply to contracts"'.

contractual shrinkwrap licence, attempted to resell the software and database access online at a lower price.[10]

The Court in *ProCD* accepted that the shrinkwrap contract was binding. Easterbrook J writing for the Court was then required to address whether there was a conflict between the terms of the contract and the provisions of US copyright law, which provided under s 301 that any 'legal or equitable rights [such as contractual rights under US state law] that are equivalent to any of the exclusive rights within the general scope of copyright…' would be pre-empted and of no effect. The Court accepted that the telephone database itself would not be protected in the US under the Copyright originality standard[11] but despite the fact that the database was held to be insufficiently original to be protected by copyright in the US, it was considered to be 'within the subject matter of copyright'. As a consequence, the Court was required to consider if the rights provided under the shrinkwrap contract were equivalent to copyright. If the Court held that the rights were equivalent to those arising under the copyright statute then the preemption doctrine would preclude enforcement of the contractual terms.[12]

In the case however, referring to decisions from the 8th, 5th and 4th circuits,[13] Easterbrook J held that rights arising under copyright were not equivalent to rights arising under contract, because there was an extra element in the contract - 'A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create "exclusive rights."'.[14] This approach of

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[10] *ProCD, Inc v Zeidenberg* (n 4) 1450.

[11] Lindsay (n 7) 80.

[12] For an analysis of preemption in the context of the ProCD case see David Nimmer, Elliot Brown and Gary N Frischling, 'The Metamorphosis of Contract into Expand' (1999) 87(1) *California Law Review* 17, 40.

[13] National Car Rental Systems, Inc. v. Computer Associates International, Inc., 991 F.2d 426, 433 (8th Cir. 1993); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990); Acorn Structures, Inc. v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988).

[14] *ProCD, Inc v Zeidenberg* (n 4) 1454.

distinguishing between copyright protection as an *in rem* property entitlement and contract as an *in personam* right[15] has largely been followed in US jurisprudence in the years since the *ProCD* decision,[16] and has meant that in general contracts seeking to restrict the operation of copyright exceptions have been held as being consistent with US copyright law as they only displace the operation of the exceptions as between the contractual parties and not more widely.

The approach of the Court in *ProCD* was subject to significant criticism, noting the potential for the case to upset the delicate copyright balance established by the legislature between the interests of copyright owners and users.[17] These issues have the potential to become more significant as consumers access to copyright protected works are increasingly mediated by contractual relations,[18] particularly through the proliferation of online contracting, often coupled with electronic technological protection measures or digital locks that make accessing the copyright protected work impossible unless the contractual terms are agreed.

The concerns arising in the case have been the subject of significant attention by scholars in the decades since the decision. It has recently been argued in a quantitative study of US copyright jurisprudence since 1996 that the risks associated with the decision have been overblown, and that the decades since the case have not in practice seen litigation that suggests widespread use of contracts by copyright owners to restrict copyright

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[15] See generally Henry Smith and Thomas Merrill, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 10 *Yale Law Journal* 1; For a critical perspective see Niva Elkin-Koren, 'Copyrights in Cyberspace - Rights without Laws' (1998) 73 *Chi. Kent. L. Rev* 1155, 1164.

[16] Rub (n 8) 1170.

[17] Brandon Grusd, 'Contracting beyond Copyright' (1997) 10(2) *Harvard Journal of Law & Technology* 353, 363.

[18] See generally Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013); Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge, 2013) 149 and noting the impact of the ProCD decision in particular from p 153.

exceptions.[19] One challenge however of assessing the extent to which contractual terms are commonly setting aside the operation of copyright exceptions by reference to the number of decided cases is that this only gives insight into such disputes when they are litigated to their conclusion, while disputes that are either settled or which are not commenced are sidelined from the analysis.[20] This might be particularly common where individual users of copyright protected works face complex contractual terms in standard form agreements drafted by more sophisticated copyright owners. In such circumstances, the mismatch between the value of the fair use in the hands of an individual user and the value to the copyright owner in controlling what users may mean that there is no incentive for someone relying on a copyright exception which has been precluded by contract to commence legal action, deterring that individual user from commencing an action.[21]

Even if it is accepted that the risks associated with the *ProCD* approach have been 'overblown', the case remains an important trigger for the analysis of the relationship between copyright exceptions and contract which followed, as explored below.[22]

II.B. *Australian law reform reviews*

Following the interest in the US following the *ProCD* decision, the relationship between copyright exceptions and contract was considered internationally, including in Australia by the Copyright Law Review Committee (CLRC) in its report 'Copyright and Contract' in 2002.[23] These issues have also been addressed much more recently in other Australian

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[19] Rub (n 8) 1199.

[20] Ibid 1208.

[21] Ibid 1209.

[22] For example, the case is referenced in the Copyright Law Review Commission (n 5) 5.07; See also Kretschmer et al (n 7) 106.

[23] Copyright Law Review Commission (n 5).

enquiries[24] (including in the 2014 Australian Law Reform Commission Report 'Copyright and the Digital Economy',[25] the 2016 Australian Government Productivity Commission 'Intellectual Property Arrangements - Inquiry report'[26] and the 2018 Australian Government Department of Communications and the Arts 'Copyright modernisation' consultation paper[27]), but the 2002 CLRC report was notable for its depth of analysis and prescience.

Most copyright exceptions in Australia continue to include no explicit statutory provisions that prevent or void agreements which have the effect of excluding or limiting the operation of exceptions,[28] and as a consequence, copyright exceptions are considered as potentially subject to contractual override. The CLRC ultimately concluded that the issue was unsettled as a matter of Australian law and that the effect of such contracts was 'unclear'.[29] It therefore proposed amending Australian law to provide that an agreement, or a provision of an agreement, that excludes or modifies certain Australian copyright

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[24] For a brief summary of the recommendations of each report in relation to contract and copyright see Tim Webb and Sumer Dayal, 'The Trials of Australian Copyright Law Reform: Australia's Government Seeks Further Consultation', *Kluwer Copyright Blog* (18 April 2018) <http://copyrightblog.kluweriplaw.com/2018/04/18/trials-australian-copyright-law-reform-australias-government-seeks-consultation/>.

[25] Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)* (13 February 2014).

[26] Australian Government Productivity Commission, *Intellectual Property Arrangements - Inquiry Report* (No 78, 2016) 766.

[27] Australian Government Department of Communications and the Arts, *Copyright Modernisation* (Consultation Paper, Australian Government Department of Communications and the Arts, 2018); Note that the author participated in the consultation process for that review - see Adrian Aronsson-Storrier, *Submission to Australian Department of Communication and the Arts, Copyright Modernisation Consultation: Contracting out of Copyright Exceptions* (3 July 2018) <https://www.communications.gov.au/sites/default/files/submissions/adrian_aronsson-storrier.pdf>.

[28] Australian Law Reform Commission (n 25) 439.

[29] Copyright Law Review Commission (n 5) 265.

exceptions should have no effect.[30] In the interim, the CLRC however also identified several areas where Australian law might restrict the enforceability of contracts setting aside copyright exceptions, including where there were issues surrounding contractual formation, unconscionable conduct, consumer protection legislation, the application of equitable maxims, considerations of public policy and/or competition law.[31] Most of the CLRC's analysis of the doctrinal questions of contractual enforceability relate to specific fact sensitive scenarios, and the report does not identify a general rule that can be invoked in all circumstances by all copyright users when impacted by a contract seeking to exclude the operation of copyright exceptions. By way of example, the CLRC's analysis of contractual formation issues focused specifically on the enforceability of mass-market contracts, rather than contracts more broadly.[32]

While, as noted above, most copyright exceptions in Australia are potentially subject to contractual override, a different approach is taken in the Act in relation to computer programs. Section 47H of the Act provides that '[a]n agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, … [a number of computer program related exceptions] has no effect'.[33] The legislative history of this provision is based on the model of the EU Computer Program Directive[34] and similar exceptions and contractual override provisions are found in the equivalent provisions of

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[30] See Copyright Law Review Commission (n 5) § 7.49 identifying the exceptions then existing in ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, and 111A of the Act.

[31] Ibid 143.

[32] Copyright Law Review Commission (n 5) 143 - 147. In relation to unconscionable conduct, the CLRC considered contracts where one of the parties was under a special disadvantage. In relation to consumer protection legislation the CLRC considered that it was not generally applicable.

[33] Copyright Act 1968 (Cth) s 47H, making reference to copyright exceptions for a reproduction made in the technical process of running the computer program (s 47B(3)), Backup copies of a program (s 47C), the creation of interoperable products (s 47D), fixing errors (s 47E), or security testing (s47F).

[34] *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version)* [2009] OJ L 111, 5.5.2009, p. 16–22 ('Computer Programs Directive')

the UK Act, discussed below. While some academic analysis has argued that contracting out of the fair dealing copyright exceptions in the Australian Act may be unenforceable generally on the basis of that to do so would be contrary to public policy,[35] the various Australian law reform reviews of the Act have not relied upon that interpretation and have instead proposed amendments to the Copyright Act buttressing copyright exceptions against the risk of contractual override.[36] Successive Australian governments have however not implemented those recommendations, despite continuing suggestions for reform having been made in subsequent reviews.[37]

III COPYRIGHT EXCEPTIONS AND CONTRACT IN THE UK

Prior to recent legislative amendments in 2014 it was generally considered possible to 'contract out' of most of the copyright exceptions contained within UK copyright legislation.[38] While, as noted above, the Copyright Designs and Patent Act 1988 ('CDPA 1988') included certain exceptions relating to database and computer programs which had explicit terms preventing contractual override,[39] most remaining fair dealing

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[35] See JW Carter, Elisabeth Peden and Kristin Stammer, 'Contractual Restrictions and Rights under Copyright Legislation' (2007) 23 *Journal of Contract Law* 32, 33 Note that some caution must be taken with this analysis, as it commences from the conceptual starting point that 'The Act confers a wide variety of rights on the users of works which are the subject of copyright'. This is problematic, for the reasons discussed in connection to Hohfeldian theory.

[36] Australian Law Reform Commission (n 25) 449; Australian Government Productivity Commission (n 26) 139; Australian Government Department of Communications and the Arts (n 27) 14.

[37] See for example Australian Law Reform Commission (n 25) 456; Australian Government Productivity Commission (n 26) 141; and Australian Government Department of Communications and the Arts (n 27) 18 which consulted on making unenforcable attempts to contract out of either prescribed purpose copyright exceptions or all copyright exceptions. To date the Department of Communications and the Arts has not published a response to their consultation.

[38] R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, Cambridge 2005) 69.

[39] As discussed below, exceptions relating to computer programs in section 50A of the CDPA 1988 have however long provided that contractual terms inconsistent with the exceptions are void.

exceptions in the Act were silent as to their relationship with contract.[40] Evidence collected prior to the 2014 amendments suggested that it was common business practice in many industries for copyright contracts to purport to restrict users' ability to make use of copyright exceptions.[41]

On 1 June and 1 October 2014 a number of amendments to the CDPA 1988 came into effect, introducing new copyright exceptions and amending a number of existing exceptions. Many of the new exceptions significantly altered the relationship between copyright exceptions and contract within their sphere of application. For example, the parody exception provides that 'to the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable'.[42] While the decision to introduce a copyright exception permitting purchasers of content to make a copy for their own private use was subject to an application for judicial review and ultimately quashed,[43] the remaining amendments to other new and amended provisions in the CDPA 1988 make contract terms which purport to restrict other exceptions unenforceable.

This section introduces the law reform process that led to the amendments and identifies the rationale of the UK Government in altering the relationship between copyright and contract. It then explores areas where the remaining new amendments may not meet the

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[40] An exception, also discussed below, is s 137 of the Broadcast Act 1996 (UK), which makes contractual terms void where they seek to prohibit or restrict a fair dealing for the purpose of reporting current events in s 30(2) CDPA 1988. S 36(7) of the CDPA 1988 also provides that the terms of a contractual licence with an educational establishment 'are of no effect so far as they purport to restrict the proportion of a work which may be copied … to less than that which would be permitted by this section', being not more than 5% of a work. See Estelle Derclaye and Marcella Favale, 'Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda' (2010) 18 *J. Intell. Prop. L.* 65, 83.

[41] See M Kretschmer et al (n 7) 141 – 142 and the studies referred to therein.

[42] CDPA 1988 s 30A(2) (as amended).

[43] See *R (on the application of BASCA & Ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin) and *R (on the application of BASCA & Ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin), discussed below.

Government's goal to prevent rightsholders from using contract to undermine the benefit of the exceptions. For example, some core public interest exceptions within the CDPA 1988 have been unamended and potentially remain subject to contractual override. The Government's goal of increasing the clarity of permitted acts in the UK is also undermined by a lack of certainty as to the consequences of a provision being unenforceable rather than void.

III.A. *What are the amendments?*

The changes to the CDPA 1988 which came into effect on 1 June and 1 October 2014 included new and amended copyright exceptions. The new exceptions permit users to engage in fair dealing with a copyright protected work to engage in quotation, parody, text and data mining.[44] The changes also included amendments to existing exceptions, including those relating to research and private study, disability, public administration, and educational establishments and libraries. These changes were made by the passing of 5 Statutory Instruments ('SIs'), each of which included a 'bundle' thematically linked

[44] A new exception (section 28B) permitting a person who legitimately acquires content to make a personal copy for private use was introduced into the CDPA 1988, but subsequently the decision to introduce that exception was subject to an application for judicial review and the exception was quashed.

amendments.[45] Three of these SIs came into force on 1 June 2014,[46] with the remaining two coming into effect on 1 October 2014.[47]

The new fair dealing exceptions cannot generally be set aside by contract, whereas the amended sector specific exceptions (such as those directed to libraries or educational institutions) have a more complex interaction with contract law. All of the completely new exceptions (quotation, parody, text and data mining) include a provision providing that 'to the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable'.[48] The same provision was incorporated into the amended exceptions for research and private study, illustration for instruction, interlibrary loans and recording of broadcasts for archival purposes. However, some of the amended exceptions include no provision in relation to inconsistent contractual provisions (such as the exceptions which permits librarians to provide single copies of unpublished works, record folk songs, and provisions relating to materials open for public inspection); and others include provisions which mediate a more complex relationship between copyright exceptions and contract. For example, the amended exception which permits the recording of broadcasts by educational establishments provides that the copyright exception will not operate 'if, or to the extent that, licences are available authorising the acts in question and the

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[45] Explanatory Notes to the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372, para 4.5 'In determining the most appropriate way to group these regulations together, the Government has taken account of several factors, including any relevant legal interconnections (e.g. the impact on consequential amendments), commonality of themes (e.g. research and education), novelty or public profile and other policy considerations'.

[46] Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; Copyright and Rights in Performance (Disability) Regulations 2014, SI 2014/1384; Copyright (Public Administration) Regulations 2014, SI 2014/1385.

[47] Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356; Copyright and Rights in Performances (Personally Copies for Private Use) Regulations 2014, SI 2014/2361.

[48] See for example the parody exception provisions, CDPA 1988 s 30A(2) (as amended).

educational establishment responsible for those acts knew or ought to have been aware of [the availability of a licence]'.[49]

III.B. *Process towards implementation*

There have been a significant number of recent partial reviews of UK Copyright law over the last decades, which form an important part of the legislative and policy backdrop to the recent amendments.[50] Many of the recently implemented UK amendments were initially considered in the Government commissioned Gowers Review of Intellectual Property,[51] prepared by Andrew Gowers and released in December 2006. This review proposed (amongst other changes) a limited private copying exception and an exception to permit caricature, parody and pastiche.[52] While the Gowers review did not address the relationship between copyright exceptions and contract,[53] it did recommend the creation of an independent strategic IP policy body to advise government, the Strategic Advisory Board for Intellectual Property ('SABIP').[54] Following the Gowers review, SABIP was established in June 2008 as an independent input into government policy making,[55] and it shortly thereafter identified the relationship between copyright and contract as one of

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[49] CDPA 1988 s 35(4) (as amended).

[50] Richard Arnold, 'The need for a new Copyright Act: a case study in law reform' (2015) 5 *QMJIP* 110, 119.

[51] A Gowers, 'Gowers Review of Intellectual Property' (Her Majesty's Stationery Office 2006) ('Gowers Review')

[52] Ibid 6, and 63. While draft statutory instruments were prepared following Gowers to implement these exceptions, they did not address the relationship between copyright exceptions and contract and were ultimately not implemented.

[53] Ibid. The Gowers review did however mention the related issue of DRM technology being used to prevent activities permitted under copyright exceptions at 73.

[54] Ibid 112.

[55] Strategic Advisory Board for Intellectual Property, *Strategic Priorities for* Copyright (SABIP March 2009) <no longer accessible at <www.sabip.co.uk>, but stored version is on file with the author>, 1.

strategic importance to the UK.[56] SABIP commissioned research into this relationship, and a report entitled 'The Relationship between Copyright and Contract Law' prepared by Professor Martin Kretchmer, Professor Estelle Derclaye, Dr Marcella Favale and Professor Richard Watt was published in 2010.[57] The commissioned report concluded that limiting the enforceability of contracts to protect copyright users could not be done effectively outside the copyright legislative framework.[58] However, shortly after the report was released, SABIP was dissolved by the UK Government[59] and thereafter the SABIP report appears to have had limited direct impact on UK government policymaking.

The more immediate impetus for the recent amendments to the relationship between copyright exceptions and contract was the May 2011 Report 'Digital Opportunity: A review of Intellectual Property and Growth', chaired by Professor Ian Hargreaves.[60] Professor Hargreaves was commissioned in that report to consider the extent to which the intellectual property framework was sufficiently well designed to promote innovation and economic growth in the UK. The report made a number of significant recommendations for reform, including establishing a Digital Copyright Exchange, permitting the licensing of orphan works, and introducing new copyright exceptions for format shifting, parody, non-commercial research and library archiving.[61] The report also proposed that any new exceptions introduced into the CDPA 1988 should not be capable of being set aside by contract.[62]

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[56] Ibid 2 and 17-18.

[57] See M Kretschmer et al (n 7).

[58] Ibid 134.

[59] Phillips, Jeremy, 'SABIP', *The IPKat Blog*, (19 July 2010) <http://ipkitten.blogspot.co.uk/2010/07/sabip.html>.

[60] Hargreaves (n 1).

[61] Ibid 8.

[62] Ibid 51.

In August 2011, after the Hargreaves report was published, the UK Government released a formal response indicating that it broadly accepted the recommendations of the Hargreaves Report and would implement new exceptions.[63] This was followed by a significant period of public, stakeholder and legislative scrutiny, and a public consultation on the proposed changes was held between December 2011 and March 2012.[64] In December 2012 the Government released its response to the feedback received in the consultations in a report named 'Modernising Copyright'.[65] In that response the Government indicated that it would legislate for a new system of permitted acts for copyright works and would make the changes by way of Statutory Instrument which they would make available for public scrutiny.[66] In June 2013 the Intellectual Property Office published the first set of draft secondary legislation for technical review and sought public comment on the drafting of the provisions.[67] The amendments were also subject to debate in the Delegated Legislation Committee[68] and the Secondary Legislation Scrutiny Committee[69] and were considered by the Joint Committee on Statutory Instruments,[70] before being approved by Parliament. The first set of 3 SIs were made on

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[63] Intellectual Property Office, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (Intellectual Property Office 2011), foreword ('Government Response to Hargreaves')

[64] Explanatory Notes to the Copyright and Rights in Performances (Personally Copies for Private Use) Regulations 2014, SI 2014/2361, para 7.4.

[65] Intellectual Property Office, 'Modernising Copyright: A Modern, Robust and Flexible Framework: Government response to copyright exceptions, and clarifying copyright law' (Intellectual Property Office 2012) ('*Modernising Copyright*').

[66] Ibid 21.

[67] Iona Silverman, 'Newsflash: draft legislation on copyright exceptions', *The 1709 Blog* (7 June 2013) <http://the1709blog.blogspot.co.uk/2013/06/newsflash-draft-legislation-on.html>.

[68] Delegated Legislation Committee Deb 12 May 2014, Cols 3 – 22; Delegated Legislation Committee Deb 9 July 2014, Cols 3 – 18.

[69] The Secondary Legislation Scrutiny Committee transcript of evidence 6 May 2014, questions 1-13.

[70] Joint Committee on Statutory Instruments, *Twenty-sixth Report of Session* (2013-14 HL 183, HC 166-xxvi) 2; Joint Committee on Statutory Instruments, *Third Report of Session* (2014-2015 HL 13, HC 332-iii) 16-20.

19 May and came into force on 1 June 2014, while the remaining SIs were made on 26 August and came into effect on 1 October 2014.

The new amendments remained controversial after coming into effect. In an application for judicial review in November 2014 representatives of the music industry[71] challenged the decision by the Secretary for State for Business, Innovation and Skills to introduce the exception permitting the making of copies for personal private use.[72] The music industry representatives argued that the private use exception could not be introduced without the payment of fair compensation to rightholders.[73] The application for judicial review was ultimately successful and the exception was quashed with prospective effect.[74] This decision was reached on the basis that the evidence relied upon by the Secretary for State concerning possible harm to rightholders caused by introducing the exception was inadequate.[75] It remains open for the Secretary of State to engage in further factual enquiries on the issue of harm to rightholders and after doing so may reintroduce a private copying exception at a later date. The case did not however examine the provisions relating to the relationship between contract and copyright exceptions within

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[71] Namely the British Academy of Songwriters, Composers and Authors, the Musicians Union and UK Music.

[72] *R (on the application of BASCA & Ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin) in which the application for judicial review succeeded, with a subsequent judgment dealing with consequences flowing from that decision in *R (on the application of BASCA & Ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin).

[73] Amongst other grounds, the Claimants argued that if a private use exception could only be implemented if it complied with the requirement of payment of fair compensation to rightholders in accordance with Article 5(2)(b) of the Information Society Directive. The Secretary of State referred to Recital 35 to the Information Society Directive (providing that '[i]n certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise') and argued that no compensation was payable as the introduction of the section was expected to lead to minimal or zero costs to rightholders.

[74] In *R (on the application of BASCA & Ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin) para 12.

[75] *R (on the application of BASCA & Ors v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin) para 269- 273.

the challenged personal use exception provision. The contractual override provisions therefore remain untested in litigation and continue to operate within the remaining recently introduced amendments.

III.C. *Why did the Government seek to change the relationship between copyright exceptions and contract?*

Despite a significant degree of public consultation and Parliamentary debate, the UK Government has provided only brief statements as to the rationale for the amendments to the relationship between copyright exceptions and contract. Below the thesis sketches out the various comments made in relation to the issue by Government representatives during the amendments process, in order to extract the underlying rationale of the changes.

At the outset of the review process the Hargreaves report discussed the relationship between copyright exceptions and contract. In recommending that the proposed copyright exceptions should not be capable of being set aside by contract, the report argued that mandatory exceptions would minimize uncertainty, maintain balance between rightsholders and users, and prevent rightsholders from re-writing the limits of the property rights available to them under the Act. The report began its consideration of copyright exceptions by noting that they were generally 'designed to allow uses of content that offer benefits deemed either more important than those delivered by the core aims of copyright and/or benefits that do not significantly detract from those aims'.[76] This rationale for exceptions is consistent with the earlier Gowers Review, which stated that English fair dealing copyright exceptions exist to permit uses which would not otherwise occur due to transaction costs and to also permit uses which are consistent

[76] Hargreaves (n 1) 42.

with basic rights.[77] The Hargreaves Report argued that without mandatory exceptions there would be considerable uncertainty for users within the education sector as to whether they could rely on statutory copyright exceptions,[78] or whether instead they would need to consult the terms of a licence before making use of an exception.[79] In support of this argument, the report noted a study by the Libraries and Archives Copyright Alliance of contracts offered to the British Library, which found that contracts routinely attempted to set aside exceptions and that there was significant diversity between licence terms offered by rightsholders.[80] The report expressed a concern that a consequence of this was that risk adverse library and academic administrators (such as those at the British Library whose contracts were the focus of the report) who had entered into contracts with many providers might restrict users' access to the most restrictive set of terms, in order to be certain that contractual licences were not being breached. The report was also critical of the ability of rightsholders to 'rewrite the limits the law has set on the extent of the right conferred by copyright',[81] and it further recommended that the Government should legislate to ensure that both the existing and proposed new copyright exceptions could not be set aside by contract.[82]

In the UK Government's formal response to the Hargreaves Report it indicated that it would seek to ensure that 'unnecessary restrictions removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception'.[83] In the subsequent period of public consultations a

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[77] Gowers, (n 14) 61.

[78] Hargreaves (n 1) 41.

[79] Ibid 51.

[80] Ibid.

[81] Ibid.

[82] Ibid.

[83] Intellectual Property Office, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (n 63) 8.

number of rightsholders emphasized the importance of the principle of freedom to contract,[84] and the Government in response noted that:

> '[a]t their best [licenses] may create clarity and enable far more than the limited permitted acts allowed under European law. At their worst they can erode socially and economically important uses of copyright works. The Government wishes to mitigate these negative effects while allowing the former.'[85]

In the Government's response to the consultation it expressed its aim as 'not to establish contract as superior to permitted act or vice versa, but to ensure licensing does not restrict acts that are beneficial to society as a whole'.[86] This rationale was later reemphasized by the Minister for Intellectual Property at the Department for Business Innovation and Skills in a letter to the Secondary Legislation Scrutiny Committee who wrote that the role of the contractual override provisions was to '…provide legal certainty and protect beneficiaries of statutory rights'.[87]

In summary, it appears that the UK Government's rationale for preventing copyright exceptions from being overridden by contract was twofold. First of all, the Government took the view that mandatory exceptions provide certainty to users by allowing them to rely on the statutory rules, rather than being forced to consult the terms of a licence. Secondly, they also prevent rightsholders from acting in a way which undermines the

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[84] Intellectual Property Office, 'Consultation on Copyright Summary of Responses' (Intellectual Property Office 2012) 27; cf Intellectual Property Office, 'Modernising Copyright: A Modern, Robust and Flexible Framework: Government response to copyright exceptions, and clarifying copyright law' (n 65) 18.

[85] Intellectual Property Office, 'Modernising Copyright: A Modern, Robust and Flexible Framework: Government response to copyright exceptions, and clarifying copyright law' (n 65), 19.

[86] Ibid.

[87] Letter from Viscount Younger of Leckie, Minister for Intellectual Property to Lord Goodlad, Chairman of the Secondary Legislation Scrutiny (12 May 2014). Interestingly, in the UK copyright exceptions are generally considered to be user privileges, rather than statutory rights, which makes the ministers indirect reference to protecting beneficiaries of statutory r*ights* an interesting comment. The Minister may however have been referring to the purpose of contractual override provisions more broadly, which more commonly tend to be used to protect statutory rights, rather than mere privileges.

benefit of the exceptions to society, by using contract to prevent users from relying on the statutory exceptions.

IV ISSUES WITH THE UK AMENDMENTS AS IMPLEMENTED

IV.A. *Contractual override does not apply to all exceptions within the CDPA 1988*

While the Hargreaves Report suggested that the Government should legislate to ensure that both existing and proposed exceptions could not be set aside by contract, the recent amendments did not implement contractual override provisions in relation to all pre-existing exceptions in the CDPA 1988. This result is noted by Lionel Bently and Brad Sherman who identify that after the amendments not all copyright exceptions in the CDPA 1988 include a contractual override clause, and indeed that '[b]izarrely… the effect is that contractual limitations remain possible in relation to the core public interest exceptions…'.[88] Bently and Sherman do not consider the failure to redraft these exceptions (to include contractual override provisions) as being deliberate. They suggest that, at least in relation to the core public interest exception of fair dealing for criticism and review and reporting current events, the situation is likely only to persist 'until the Government embarks on the much needed codification' of the CDPA 1988.[89]

Due to the Government's failure to review the existing fair dealing exceptions in the CDPA 1988 during the recent round of amendments, there is no explicit contract override provisions in the CDPA 1988 for some of the key public interest copyright exceptions, such as criticism, review and news reporting.[90] An argument might however

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[88] L Bently and B Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 229.

[89] Ibid.

[90] CDPA 1988 s 30(1), although an override provision exists in relation to the new fair dealing for the purpose of quotation, which may overlap with activities permitted under the criticism and review fair dealing exception. Note also that as mentioned above s 137 of the Broadcasting Act 1996 also prohibits contractual restrictions on reporting current affairs in relation to sports events, and so the fair dealing for

be made that despite the lack of an explicit clause concerning contractual override in some parts of the CDPA 1988, as a matter of domestic UK statutory interpretation all exceptions within the Act should be understood as mandatory. This argument might be made with reference to the purpose of copyright exceptions within the CDPA 1988, their role in furthering the public interest and the fact that many exceptions further the human right to freedom of expression. As discussed above, a similar argument was considered in the 2002 Australian Copyright and Contract report[91] in relation to Australian fair dealing exceptions, where as in the UK, one difficulty of adopting such an interpretation is that explicit contractual override provisions preexisted in relation to computer program exceptions. Furthermore, in the UK a provision also exists in section 137 of the Broadcasting Act (1996), which provides that **'**Any provision in an agreement is void in so far as it purports to prohibit or restrict relevant dealing with a broadcast or cable programme in any circumstances where by virtue of section 30(2) of the [CDPA 1988] copyright in the broadcast or cable programme is not infringed'.[92]

As a result, an application of the *expressio unius est exclusio alterius*[93] cannon of construction might lead to a conclusion that the existence of express contractual override provisions in the Australian and UK Acts means that the other exceptions are capable of being set

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reporting current events exception is s 30(2) CDPA 1988 is protected from override in some limited circumstances.

[91] Copyright Law Review Commission, *Copyright and Contract* (Copyright Law Review Committee 2002).

[92] In other words, this provision provides that a broadcast or cable programme copyright owner cannot use contract to seek to prevent or restrict a fair dealing for the purpose of reporting current events. This section of the Broadcasting Act 1996 derived from an amendment proposed by the then Minister for Sport Ian Sproat, and was included in the bill without debate or significant comment: see Hansard HC vol 280 col 591(1 July 1996). The amendment was made in the context of changes being made to the law in relation to 'listed events', to ensure that key sporting events were made available to all television viewers, particularly those who could not afford the extra cost of subscription television. The section is described by Jonathan Griffiths as being intended to ensure that 'short extracts of sporting events [are] available for news reporting purposes whatever the source.' Jonathan Griffiths 'United Kingdom' in R Hilty and S Nérisson (eds), *Balancing Copyright - A Survey of National Approaches* (Springer, 2012)1059, 1069.

[93] To express one thing is by implication to exclude another.

aside by contract. An argument for all exceptions being mandatory may also be difficult to sustain in circumstances where a small number of the recently amended UK exceptions were deliberately drafted to permit contractual override.[94] Accordingly, it is likely that as a matter of domestic UK law unless a fair dealing exception has an explicit clause dealing with its relationship with contract, that exception will be treated by a court as being capable of being set aside by contract.

Going beyond a purely domestic interpretation of the CDPA 1988, as part of the reform process the UK Department for Business, Innovation and Skills argued that in the EU, unless contract or licence terms are expressly allowed to limit the scope of an exception in legislation, the default position under EU law is that the exception will prevail over any rightsholder authorisation.[95] This proposition was expressed by the Department as arising from the ECJ Judgment in *VG Wort*.[96] This is arguably an incorrect interpretation of the *VG Wort* Judgment,[97] but if considered persuasive by a UK court it would mean

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[94] Intellectual Property Office, 'Technical Review of Draft Legislation on Copyright Exceptions: Government Response' (Intellectual Property Office 2014), 15: 'A number of respondents commented that some of the amended sections did not include a provision to bar contracts from overriding the exception. The Government's policy is to prevent exceptions from being undermined by contracts, as long as such use is fair. The Government has therefore inserted the missing contract override provisions for the exceptions where libraries make single copies of published works and where libraries supply single copies to other libraries. No contract override provision is included in the dedicated terminals exception, in line with the Copyright Directive. Nor is one included where libraries make copies of unpublished works, in line with the existing provision which allows the copyright owner to prohibit copying of the work' ('Government Response to Technical Review').

[95] Voluntary memorandum from the Department for Business, Innovation and Skills to the Statutory Instruments Joint Committee (27 March 2014).

[96] CJEU, Joined Cases C-457/11 to C-460-11, *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and Others* [2013] Judgment of the Court (Fourth Chamber), ('*VG Wort*').

[97] It is argued that the UK Department for Business, Innovation and Skills may be wrong to describe the situation as a default position. Instead, it is arguable that following *VG Wort* the ECJ goes further and that where a member state has introduced an exception to the right of reproduction 'any authorising act the rightholders may adopt is devoid of legal effects under the law of that State' (para 37). In other words, any attempt to utilise contract to exclude the operation of an exception would be ineffectual. While it could be argued that a 'default rule' style exception to copyright exception would instead by classified by the Court in *VG Wort* as a limitation where the reproduction right has been preserved to the rightholder

that the remaining unamended copyright exceptions may be mandatory, even in the absence of the much needed codification of the CDPA 1988 discussed by Bently and Sherman.

IV.B. *Significance of 'void' vs 'unenforceable'*

The new copyright exception provisions provide that contractual terms which restrict the new exceptions are 'unenforceable'. This stands in contrast to the existing provision in the CDPA 1988 in relation to copyright exceptions permitting backup copies, decompilation and testing of a computer program ('computer program exceptions'),[98] which provide that certain terms in an agreement 'shall be void'.[99] Similarly, the existing provision in section 137 of the Broadcasting Act relating to contractual override and fair dealing for the purpose of reporting current events provides that 'Any provision in an agreement is void…'. The preparatory material for the new exceptions do not conclusively address what consequences the drafter intended by introducing a distinction between void contractual terms and unenforceable contractual terms, or whether the difference in terminology in different sections of the CDPA 1988 was merely an oversight. Part of the difficulty in anticipating the outcome if a suspect contract was challenged in court is that there is uncertainty as to the significance of a contract being void. This uncertainty flows from the inexact way in which courts have in the past used the word void to signify both contracts that are void *ab initio* and contracts which are

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(para 38 and 39), this approach is inconsistent with the jurisprudence of the ECJ on the extent to which exceptions and limitations are harmonized across the EU (see for example CJEU, Case C-435-12, *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* [2014] Judgment of the Court (Fourth Chamber) § 34), and would be inconsistent with Recitals 31 and 32 of the Information Society Directive, which seek that member states arrive at 'a coherent application of [the] exceptions and limitations'.

[98] CDPA 1988 s 38.

[99] CDPA 1988 s 296A.

merely voidable by one party.[100] This uncertainty is compounded where the legislation provides that only the impugned *term* is considered to be void, rather than the contract as a whole.

One possible explanation for the difference in language is that the pre-existing computer program exceptions were drafted to implement Article 8 and Recital 16 to the Computer Programs Directive, which requires member states to provide that certain contractual provisions 'shall be null and void'.[101] In contrast, the contractual provisions in the new exceptions are not intended to implement an EU directive and the drafters therefore may have felt less constrained in their choice of statutory language.[102]

While in the technical review the Intellectual Property Office implied a substantive difference between void and unenforceable terms,[103] the Office was not explicit as to what it saw as the result of the drafting difference. Similarly, Viscount Younger of Leckie, the Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills, explained to the House of Lords Grand Committee that a court's approach to void and unenforceable terms was 'slightly different' and that 'rendering the term void would be a disproportionate measure in many cases',[104] but again did not explain what the difference was.

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[100] Abraham Levin, 'The Varying Meaning and Legal Effect of the Word "Void"' (1934) 32 *Michigan Law Review* 1088, 1092.

[101] Computer Programs Directive Art 8.

[102] Note that however s 137 of the Broadcasting Act 1996 was not drafted to implement an EU directive. There is limited material available to suggest why that statutory provision was drafted using the term void rather than unenforceable.

[103] Intellectual Property Office, 'Technical Review of Draft Legislation on Copyright Exceptions: Government Response' (Intellectual Property Office 2014), 2, 'The draft legislation contains clauses providing that to the extent that any contractual terms purport to prevent or restrict the doing of a permitted act allowed by a copyright exception, those terms are unenforceable. This language does not void the term of any contract'.

[104] HL Deb 5 December 2013, vol 750, col GC78.

It is difficult to anticipate whether a UK court would discern a difference in outcome between an impugned contract with an unenforceable term and a contract with a void term. In most instances where such contracts would be challenged in court there would be a licence agreement whereby the rightsholder granted permission for certain uses of a copyright protected work, while the user paid a license fee for those uses. In such circumstances, a determination that a single term of the agreement relating to copyright exceptions was void is likely to be severable from the balance of the agreement, on the basis that striking out that term would not entirely alter the scope and intention of the agreement. Similarly, if a single term of the agreement was unenforceable the remaining terms of the agreement are likely to be unaffected. Indeed, the intent of the drafters was that where one term of a contract is unenforceable the '[o]ther contract clauses will be unaffected'.[105] In the usual course of events therefore there is unlikely to be a distinction of significance between categorising terms as void or unenforceable.

One underexplored area in the copyright literature where a possible difference between void and unenforceable terms could potentially have legal significance is in the unlikely event that the *only* contractual consideration from one party to a contract was a promise not to utilize one of the recently introduced fair dealing exceptions.[106] If a user accepted the payment in exchange and subsequently broke their promise not to utilize an exception, then as the users sole contractual consideration has been removed, the categorisation of the user's broken promise as either void or unenforceable may have

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[105] Intellectual Property Office, 'Technical Review of Draft Legislation on Copyright Exceptions: Government Response' (Intellectual Property Office 2014), 2.

[106] This may occur where a musician or director wishes to prevent the creation of a parody of their work under the new CDPA 1988 s 30A Parody exception by a particular individual. Assuming the individual user already has access to the work, the musician or director may wish to pay the potential parodist in exchange for a promise from them to not parody the specific work. The contractual promise not to parody a work would be unenforceable due to the new CDPA 1988 s 30A(2). This hypothetical is however contingent on the parodist already having lawful access to the work such that the contract does not include both a standard licence permitting access to the work, in addition to the specific term in relation to the parody.

some impact on a court's decision in relation to whether the payment by the rightsholder is recoverable.[107] Outside of this narrow case however the distinction drawn in the legislation is of limited practical significance and it is argued that the Government's goal of reducing uncertainty may have been better served by drafting the language of the new provisions in the CDPA 1988 consistently with the existing contractual override provisions relating to computer program exceptions.

IV.C. *Meaning of 'restrict the doing of any act'*

The provision in the new copyright amendments preventing contractual override operates where 'a term of a contract purports to prevent or restrict the doing of any act' permitted by the relevant exception. While it is not controversial to consider that a contractual clause forbidding a user from engaging in an act would clearly 'purport to prevent' within the meaning of the provision, it is less clear when a term of a contract will merely 'restrict' the doing of an act. For example, it is unclear whether the payment of a license fee in exchange for being permitted to engage in a use of a work would be interpreted as a restriction on engaging in that use. On one potential understanding the payment of the royalty fee does not restrict the use and instead merely acts to confirm that the use is permitted.

Many UK copyright exceptions apply only where a use is considered fair, with discretion left to the courts to determine when a specific use is considered to be a fair dealing. Risk averse parties may wish to include in their contracts criteria which assist them to determine when a particular contemplated use is either fair or unfair, to avoid recourse to litigation in the event of a dispute. For example, a copyright owner might enter into a

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[107] Jesse Schaefer, 'Beyond a Definition: Understanding the Nature of Void and Voidable Contracts' (2010) 33 *Campbell Law Review* 192, 200, noting the distinction between an unenforceable contract and void contract in American law is that the law recognizes an abstract duty of performance only in relation to the former case.

contract with a parodist of their work, where in exchange for payment they authorise the party and negotiate how much of the original work can be reused, the ways the parody could be commercially distributed and other circumstances under which the parties consider the parody to be a fair dealing. Conceived of in another way however the payment places a financial burden on the parodist, financially restricting their ability to parody original works and might therefore fall within the category of terms which restrict the doing of an act permitted by the relevant exception. It is unclear whether such a payment would qualify as a restriction and therefore whether such contractual terms would be unenforceable. The new exceptions and their explanatory material do not provide helpful guidance on this issue, although one factor which might be relevant in resolving such questions would be the extent to which the parties' contractual fairness criteria are consistent with those which a court might utilise in resolving a hypothetical fair dealing question.

IV.D. *Summary of the UK Doctrinal position*

Despite the contractual override provisions in the new copyright exceptions it is likely that many rightsholders will continue to insert terms in contracts which purport to preclude the new fair dealing copyright exceptions. As discussed above, due to some lingering uncertainty in the scope of the amendments they may be doing this in an attempt to subvert the intention of the legislator and control utilisation of the exceptions.

There may, however, be legitimate reasons to seek to include such terms, even where the rightsholder is aware that they are unenforceable. For example, unenforceable terms might be included in a contract where the parties are aware of the law but instead seek to rely on a 'gentleman's agreement', rather than binding force of law, to ensure that

terms are complied with.[108] Unenforceable terms might also function as a signalling device, acting as an unenforceable signal of rightsholders' wishes in relation to certain uses of their works.[109] On a more cynical note, it is also likely that many rightsholders will include such terms in their agreement in the hope that the parties whom they contract with are either unaware that such terms are unenforceable or are unwilling to risk the expense of litigation to vindicate their rights.[110]

V. AN HOHFELDIAN ANALYSIS OF THE UK AMENDMENTS

As discussed above, many of the new exceptions introduced into the UK CDPA 1988 in 2014 significantly alter the relationship between copyright exceptions and contract within their sphere of application, by providing that 'to the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable'.[111] On the assumption that prior to the amendments the doctrinal position in UK law was that copyright owners had a right to prevent copying of their work, and users had a privilege to engage in fair dealing, it is interesting to consider how the UK amendments have modified the distribution of rights and privileges.

V.A. *The conventional Hohfeldian conception of the amendments*

There are a number of ways that the amendments might be considered within a conventional Hohfeldian analysis. At one end of the spectrum of possibilities, the provisions merely create an immunity for copyright users, such that copyright owners

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[108] Charles Sullivan, 'The Puzzling Persistence of Unenforceable Contract Terms' (2009) 70 *Ohio State Law Journal* 1127, 1134.

[109] Ibid 1135.

[110] Ibid 1136.

[111] CDPA 1988 s 30A(2) (as amended).

cannot utilise contract to limit their ability to engage in fair dealing. Under this analysis, copyright owners would be under a correlative disability, in the sense that they would be unable to use contract to limit the freedom of users. On this analysis the users would continue to hold a privilege to engage in fair dealing, which in a practical sense would be strengthened, as the copyright owner's ability to interfere with the exercise of that privilege would be more limited than the position prior to the amendments. This, however, might not extend to creating a broader duty on copyright owners not to engage in acts to interfere with users exercise of a privilege to engage in fair dealing, and copyright owners would continue to be able to set any price for access to their works, or take other lawful steps outside of contract to interfere with users ability to make a fair dealing of the work.

At the other end of the spectrum, an alternative understanding of the effect of the legislation could be that the UK has indirectly introduced a right for users to engage in fair dealing, by limiting the ways that a copyright owner could in practice interfere with the user making a copy for fair dealing. On this interpretation, copyright users would be under a corresponding duty, similar to that which was described above. Again however, the difficulty with such an approach is the limited extent to which the scope of that duty might be understood. The UK amendments make it clear that copyright owners cannot enter into contracts restricting the exercise of the exception, but they do not otherwise address the extent of the relevant duty.

The legislative history of the UK amendments provides some very limited support for an understanding of the effect of the legislation as imposing a broader duty on copyright owners of non-interference. The Hargreaves Report was critical of the ability of rights holders to use contract to 'rewrite the limits the law has set on the extent of the right conferred by copyright',[112] and in the UK Government's formal response to the Hargreaves Report it indicated that it would seek to ensure that 'unnecessary restrictions

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[112] Hargreaves (n 1) 51.

removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception'.[113] This provides some limited evidence to suggest that the aim of the reforms was to ensure that users could take advantage of the exceptions, in the sense of providing a positive right to engage in fair dealing, not merely to provide users with an immunity from contractual terms seeking to restrict their ability to engage in fair dealing uses of a work. This legislative history may be overstated as copyright exceptions are still often conceptualised as defences to infringement in the UK Act, and the fair dealing provisions merely state that the activities they cover '[do] not infringe any copyright in the work',[114] rather than being expressed in the statute as a positive right held by users.

V.B. *An alternative Hohfeldian conception of the amendments*

While the 'exceptions as user rights analysis' is appealing as it provides some form of duty of non-interference on copyright owners, requiring them to allow users to utilise the exceptions, it is difficult to formulate the precise scope of the duty.[115] In part, this may be because it is generally considered that authors are able to control the first publication of their unpublished works. Imposing an expansive duty of non-interference on copyright owners in relation to users' fair dealing exceptions may impact upon copyright owners' ability to choose when and how a work is first published. This section proposes a Hohfeldian analysis of the rights and privileges of copyright owners and users, which distinguishes between whether or not the work in question has been published by the author, in order to avoid that conceptual difficulty.

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[113] Intellectual Property Office, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (n 63) 8

[114] For example, see the fair dealing provision at s29 of the CDPA 1988.

[115] See also Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford University Press, First edition, 2017) 49 on the difficulty of such analysis.

The point for exploring this scenario is an acceptance of the proposition that generally speaking copyright law regulates the use of a work, and not access to that work. Users have no right to access a work which is unpublished by an author, and the author is under no duty to release the work. An author can control access to a work by controlling the first embodiment of that work, and where that copy is unpublished users have no right to insist that a work is published or somehow made available to everyone.[116] In Hohfeldian terms, on this interpretation authors can be considered as having a power in relation to the work – if they chose not to release the work and instead keep it secret, users will be in a practical sense unable to make fair use or fair dealing of it, regardless of whether users are considered to hold rights or mere privileges to make fair dealing uses of a work.

This position has some conceptual parallels to the situation in patent law. Prior to disclosure in a patent specification, an inventor can control an invention by keeping it secret. The public will have no right to require the inventor to disclose their work, but the inventor generally speaking will not have the right to enjoin a competitor who has independently discovered the same invention. Upon obtaining a patent however, the inventor trades disclosure of the invention in the patent specification for the set of exclusive rights granted under the patent statute. This disclosure in exchange for time-limited exclusive rights is often referred to as the patent bargain. In a Hohfeldian sense, prior to disclosure the inventor will have a power to apply for a patent, and once the patent is granted they will have exclusive rights, and individual members of the public will have correlative duties. This similarity between the pre-publication interest of authors and the interest of an inventor prior to obtaining a patent has been noted previously in academic commentary and the courts.[117]

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[116] Randal C Picker, 'Fair Use v. Fair Access' (2008) 31 *Columbia Journal of Law and the Arts* 603, 604.
[117] Ibid 607, noting '[c]opyright creators chose to bring their works within the Copyright Act created by Congress and thereby received a defined monopoly in their works' .

Applying Hohfeld's framework to this conception of copyright law suggests that where an author's work is unpublished, the author can be considered to hold a power to bring the work within the scheme of rights and duties set out in the Copyright Act. Prior to publication, users will have no right to engage in fair dealings with the work. Once the authors' power to publish is exercised, it could be argued that the authors take both the advantages and disadvantages of the copyright bargain, in the sense that they undertake a duty owed to users to allow fair dealing of their works, and also undertake a duty of non-interference in relation to those fair dealing uses. In exchange, their right to prevent copying of the work (outside of fair dealing situations) becomes economically significant, and can be leveraged by them to profit from their work. The advantage of this understanding is that it makes it clear that copyright owners are under no obligation to publish a work or make it available for a user to engage in fair use or fair dealing prior to publication.

Note, however, that the approach set out in this scenario simplifies copyright doctrine, as in some instance's courts do allow users to make fair dealing uses of unpublished works.[118]

In summary then a conventional Hohfeldian analysis provides that even after the recent UK amendments copyright users do not have a right to engage in a fair dealing use of a copyright protected work, and instead have a privilege to engage in fair dealing. Copyright owners owe no general duty of non-interference with user's attempts to make fair dealing uses of works, however after the amendments are more limited about the tools they can use to interfere with fair dealing in practice.

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[118] *Ashdown v Telegraph Group Ltd* [2001] Civ 1142 § 70.

VI. THE RELATIONSHIP BETWEEN COPYRIGHT EXCEPTIONS AND CONTRACT IN THE EU

In this section the chapter moves beyond a consideration of domestic UK law to examine the extent to which elements of EU law address the relationship between copyright exceptions and contract, alongside an examination of recent EU legislative developments.

The EU's Information Society Directive is the most significant EU instrument in relation to copyright exceptions, with Article 5 of the Directive articulating a number of exceptions to the reproduction right which may be adopted by member states. The Directive does not expressly set out rules binding domestic member states' law on the relationship between contract and exceptions - the Directive is expressed explicitly to be without prejudice to the law of contract,[119] and Recital 45 of the Directive notes that the copyright exceptions provided for in Articles 5(2) – (4) 'should not … prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law'. Copyright academics have therefore generally argued that contractual override of copyright exceptions is therefore permitted under the Directive, subject to the flexibility for individual member states to modify this presumption in their domestic law.[120]

The most comprehensive academic analysis of the relationship between copyright exceptions and contract was carried out in 2002 by Lucie Guibault.[121] That analysis concluded that at that time there was 'no definitive guideline to determine whether

[119] Information Society Directive Art 9

[120] See for example Kretschmer et al (n 7) 121.

[121] Guibault (n 8).

limitations on copyright [were] imperative or not'[122] and that within the EUthe vulnerability of copyright exceptions to override would depend on the country's approach to copyright protection and to the principle of freedom of contract.[123]

In contrast to the Information Society Directive, other EU directives relating to copyright have however explicitly addressed the relationship between exceptions and contract. The Computer Program Directive includes exceptions permitting the creation of backup copies of a program, the privilege to observe, study or test the functioning of the program, and decompilation which could not be excluded by contract. Similarly, the 1996 Database Directive includes exceptions which could not be set aside by contract. In her analysis Guibault therefore considered it puzzling that the drafters of the EU Copyright in the Information Society Directive never considered the issue, particularly where mandatory exceptions had already been included in the Computer Programs and Database Directives and the issue had been the subject of significant discussion in the United States while the EU directive was being negotiated.[124]

In the years that followed Guibault's ground-breaking work, a number of cases from the CJEU have shed some limited light on the extent to which copyright exceptions provided for in the Information Society Directive might be subject to contractual override. Of relevance for this thesis, guidance has been given in *Ryanair v PR Aviation*[125] and *VG Wort v Kyocera*[126] on the operation of the exceptions and their relationship with contract.

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[122] Ibid 291 noting the few statutory limitations concerning computer programs that had been expressly declared mandatory.

[123] Ibid noting the few statutory limitations concerning computer programs that had been expressly declared mandatory.

[124] Ibid 304.

[125] CJEU, Case C-30/14, *Ryanair ltd v PR Aviation BV* [2015] Judgment of the Court (Second Chamber). ('R*yanair ltd v PR Aviation BV*')

[126] *VG Wort* (n 96).

For instance, in the context of the EU Database Directive, the 2015 *Ryanair* case[127] held that a database that was neither protected by copyright nor by the *sui generis* database right could be protected by contractual provisions.[128] In such circumstances the Directive 'does not prevent the adoption of contractual clauses concerning the conditions of use of such a database'.[129] As a consequence, the restrictions on contractual override of database right exceptions set out in the Directive did not apply. The approach in this case resulted in the somewhat peculiar outcome that databases which are protected in EU law either 'because the selection or arrangement of their contents, constitute the author's own intellectual creation' or where 'there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents' are subject to mandatory exceptions while databases which do not meet the requirements for protection under the EU Directive may in practice obtain stronger protection under contract law by precluding the operation of the usual exceptions.[130]

The potential for contractual protection to extend beyond the exceptions set out in the Database Directive is a matter for concern, as to allow such contracts may have negative social and economic effects.[131] The approach also risks further fragmentation of the approach across the EU, as competition and contractual law are not fully harmonized in relation to this area of law.[132] Furthermore, if a similar approach to contractual override was taken to the rights and exceptions set out in the Information Society Directive (for

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[127] *Ryanair ltd v PR Aviation BV* (n 125); Matej Myska and Jakub Harasta, 'Less Is More: Protecting Databases in the EU after Ryanair' (2016) 10(2) *Masaryk University Journal of Law and Technology* 170, 170.

[128] *Ryanair ltd v PR Aviation BV* (n 125) 35.

[129] Ibid 39.

[130] Myska and Harasta (n 127) 187.

[131] Maurizio Borghi and Stavroula Karapapa, 'Contractual Restrictions on Lawful Use of Information: Sole-Source Databases Protected by the Back Door?' (2015) 37(8) *E.I.P.R.* 505, 512; See however Myska and Harasta (n 127) 189 emphasising that any contractual restriction would only be effective as between the parties.

[132] Myska and Harasta (n 127) 192.

instance, that it would be possible to contractually restrict a quotation if the underlying work lacked sufficient originality for copyright protection, or that the term of copyright protection had expired) this would give rise to significant concerns about the impact on and protection of freedom of expression.[133]

In comparison to *Ryanair,* the contractual freedom aspects of the *VG Wort* case have received comparatively less attention,[134] but the case has been read as suggesting 'that the default position where contract or licence terms are not expressly allowed to limit the scope of an exception is that the exception will prevail over any rights holder authorisation.'[135] The case discusses the interaction of rightsholder authorisation on national levy schemes which provide fair compensation, but the logic of its reasoning might also suggest that rightsholders lack the ability to contractually preclude the operation of the exceptions in the Information Society Directive, where they have been adopted by the relevant member state.

The relationship between copyright exceptions and contract was also addressed by the EU in 2017 in the context of the implementation of the Marrakesh Treaty,[136] a treaty designed to facilitate visually and print-disabled people's access to copyright protected works. The EU signed the treaty in 2014 and, as required under the Treaty, implemented an exception to facilitate the creation of accessible format copies of copyright protected works. In implementing this exception, the EU arguably went beyond the requirements

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[133] Borghi and Karapapa (n 131) 512.

[134] For an overview of the case see Joao Pedro Quintais, 'On Copyright Levies, Printers, Plotters and Personal Computers (VG Wort v Kyocera and Others)', *Kluwer Copyright Blog* (10 July 2013) <http://kluwercopyrightblog.com/2013/07/10/on-copyright-levies-printers-plotters-and-personal-computers-vg-wort-v-kyocera-and-others/>.

[135] See Voluntary memorandum from the Department for Business, Innovation and Skills to the Statutory Instruments Joint Committee (27 March 2014) at 95 and the issues around this approach to understanding the case at footnote 97 above.

[136] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Signed 27 June 2013, Entered into force 30 September 2016).

of the treaty[137] and specified that 'Member States shall ensure that the exception provided for … cannot be overridden by contract'.[138] This implementation, protecting the new exception against the potential for contractual override, shows a growing interest by legislatures in the relationship between copyright and contract.

In summary therefore it appears to be a settled understanding of EU law that EU member states are generally able to set their own approach to the relationship between copyright exceptions and contract within their domestic law, however the copyright exception for the benefit of the visually and print-disabled must be made resistant to contractual override. This generally default understanding is potentially subject to an assumption that where a Member State has failed to explicitly address the relationship between copyright exceptions and contract, then contract seeking to override copyright exceptions should be set aside as void.

VI.A. *Impact of the 'Copyright in the Digital Single Market Directive'*

In 2015 the European Commission launched its 'Digital Single Market Strategy'[139] to improve access to the online world for people and for businesses. This strategy initially envisaged a substantive modernisation of copyright rules within the European Union, and one that would adapt copyright exceptions to digital and cross-border

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[137] Laurence R Helfer et al, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press, 2017) 77.

[138] *Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on Certain Permitted Uses of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print-Disabled and Amending Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2017] OJ L 242, p. 6–13, Art 3(5) ('Directive Implementing the Marrakesh Treaty').

[139] EU Commission, 'Shaping the Digital Single Market', *Digital Single Market - European Commission* (Text, 25 March 2015) <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>.

environments.[140] In view of the challenges of obtaining the agreement of all member states to a significant modernisation of copyright rules, in time the ambition of the European Commission became more modest. This more modest vision gave rise to the the EU Copyright in the Digital Single Market Proposal, which was first detailed by the European Commission in 2016.[141] Despite its more limited agenda the proposal proved to be controversial, particularly in relation to its proposals for a press publishers' right[142] and its modification of existing approaches to online platform liability.[143]

The Copyright in the Digital Single Market proposal also sought to introduce a small number of new copyright exceptions, to update and expand those available to member states under the Information Society Directive. This included copyright exceptions to facilitate text and data mining (Article 3), digital and cross border teaching (Article 5) and the preservation of cultural heritage (Article 6). Interestingly, the Commission gave explicit attention to the extent to which these copyright exceptions could be set by contract. After significant negotiation, the Copyright in the Digital Single Market Directive was adopted, and it came into force on 7 June 2019.[144]

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[140] European Commission, *Towards a Modern, More European Copyright Framework: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (No COM(2015) 626 final, 9 December 2015) 6.

[141] European Commission, 'Modern EU Copyright Rules for European Culture to Flourish and Circulate', *European Commission* <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3010>; For a detailed overview of the legislative process see CREATe, 'EU Copyright Reform', *UK Copyright and Creative Economy Centre University of Glasgow* <https://www.create.ac.uk/policy-responses/eu-copyright-reform/>.

[142] See for example Lionel Bently, 'Sleepwalking towards a Perpetual (News?) Publishers' Right in Online Publications', *The IPKat* (22 May 2018) <http://ipkitten.blogspot.com/2018/05/sleepwalking-towards-perpetual-news.html>.

[143] Eleonora Rosati, 'The Value Gap Proposal in the Latest Franco-German Deal: What Are the Key Points?', *The IPKat* (5 February 2019) <http://ipkitten.blogspot.com/2019/02/the-value-gap-proposal-in-latest-franco.html>; See also João Quintais et al, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics* (11 November 2019) <https://papers.ssrn.com/abstract=3484968>.

[144] Digital Single Market Directive (n 2).

VI.B. *What does the Copyright in the Digital Single Market Directive say about contractual override of exceptions?*

Article 7(1) of the Directive provides that '[a]ny contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.' On the face of this provision, it seems that those new copyright exceptions introduced by the Directive cannot be rendered ineffective by contract. That a specific copyright override provision has been included in the Directive also suggests that lawmakers are either unaware of the interpretation of *VG Wort* that by default copyright exceptions prevail over contract or that they doubt this interpretation of the case. The inclusion of Article 7(1) also tends to suggest that EU lawmakers are conscious of the risk of contractual override of exceptions and that there is a broad political consensus that in general exceptions should be protected against such override.[145]

A closer analysis of the agreed texts of Articles 3, 5 and 6, however, demonstrates that rather than preventing contractual override, the proposed exceptions allow rightsholders to retain significant contractual control. The text and data mining exception in Article 3(1) operates only where the research organisations and cultural heritage institutions have *lawful access* to the works or other subject matter. Contractual conditions could potentially restrictively define the conditions of lawful access to a database (for example, restricting the number of extractions from a database which were within the scope of the licence; and deeming additional extractions as involving unlawful access), restricting the operation of the contractual override clause.

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[145] The Digital Single Market Directive (n 2) also includes a further exception at Article 4 on Text and Data mining, which is outside the scope of the Article 7 provision on contractual unenforceability. The exception at Article 4 only operates where text and data mining has not been expressly reserved by the rightsholders in an appropriate manner. Reservation can take place though by means including the use of machine readable metadata or unilateral declaration. Article 4 is therefore an example of an exception where the EU lawmakers were willing to permit contractual control on the availability of the exception.

More troubling issues arise with the digital and cross border teaching exception in Article 5 of the Directive. Here Article 5(2) permits a member state to legislate that the cross-border teaching exception *does not apply* either generally or for specific uses 'to the extent that suitable licences … covering the needs and specificities of educational establishments are easily available in the market'. In other words, member states can provide that if the rights holder is offering a cross border teaching licence then the exception in Article 4 does not apply at all and the contractual override provision in Article 7(1) does not operate; effectively educational establishments could face the mirage of an unremunerated exception that operates in national law until a rights holder asks for a licence fee.

Finally, the exception permitting the preservation of cultural heritage in Article 6 applies only where the relevant works 'are permanently in [the cultural heritage institutions'] collections'. As an increasing volume of cultural material is not being sold, merely licenced on a time-limited basis, and therefore never *permanently* in the collection of an institution it might be feared that the exception will do little to allow the preservation of cultural heritage.

VI.C. *'Unenforceable', 'Null and void' or 'cannot be overridden by contract'?*

The drafting choice in Article 7(1) of the Copyright in the Digital Single Market Directive to make contractual provisions 'unenforceable' is a peculiar choice. The term 'unenforceable' contrasts with language used in the Software and Database Directives which make inconsistent contractual provisions 'null and void' and also diverges from the language used in the Directive implementing the Marrakesh Treaty,[146] which provides arguably provides that an exception 'cannot be overridden by contract'. There have been no public statements from the EU bodies justifying the rationale for the differences in

[146] Directive Implementing the Marrakesh Treaty (n 138) Art 3(5).

drafting language. If the legislative intention is that the terms 'unenforceable', 'Null and void' and 'cannot be overridden by contract' should be treated as synonymous, then there seems to be no good reason for the inconsistent drafting. On the other hand, if there is an intention that these terms have distinct legal effects, then clarity on the legal significance of these distinctions would be welcomed.

Finally, it is disappointing that the EU Commission and Parliament have not used the opportunity presented by the review of EU copyright law to revisit the *Ryanair* case. This means that for creations that fall outside the meaning of a work[147] in the Information Society Directive there would be greater contractual scope to restrict activities such as quotation which serve the underlying public policies protected by copyright exceptions. Additionally, the decision not to revisit the relationship between existing exceptions in the Information Society Directive and contact means that core public interest exceptions (e.g. quotations for purposes such as criticism or review under Article 5(3)(d) of the Information Society Directive) remain at greater risk of contractual override than the new, arguably less important, exceptions introduced in this recent proposal.

VII. CONCLUSION

This chapter provided a brief overview of doctrinal developments in the relationship between copyright exceptions and contract the past two decades in selected jurisdictions. The potential for contractual override exceptions first drew widespread academic interest in the US after the judgement in the *ProCD* case. That decision inspired a wave of academic commentary in the years that followed, but despite this the 2000's saw little attention from legislatures on the issue. In contrast, the past five years have seen a number of distinct attempts to modify the relationship between copyright exceptions and

[147] See CJEU Case C-310/17, *Levola Hengelo BV v Smilde Foods BV* [2018] Judgment of the Court (Grand Chamber) considering the extent to which the taste of a food product might constitute a work protected under EU copyright law.

contract. This has included ongoing law reform efforts in Australia, statutory changes in the UK in 2014, and more recent changes in 2019 within the EU. These recent legislative changes have however been piecemeal, with neither the UK nor the EU addressing the relationship between copyright exceptions and contract for pre-existing exceptions.

The recent attention to this relationship between copyright exceptions and contract has been somewhat puzzling in the absence of major reported decisions dealing with the issue. While recent law reform efforts have expressed concern about the risks of contractual override, there has been limited theoretical attention to the relationship between freedom of contract and the rationales for copyright exceptions. The following chapters of this thesis more explicitly explore the justifications for freedom of contract as well as the rationales for copyright exceptions. In doing so they seek to provide deeper theoretical support for recent doctrinal developments, and to provide a guide for legislatures carrying out a review of their existing exceptions.

3. FREEDOM OF CONTRACT WITHIN CONTRACT THEORY

'…if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interference with this freedom of contract'

Sir George Jessel MR

Printing and Numerical Registering Co v Sampson (1875) 19 Eq 462

I. INTRODUCTION

Often when policy makers are considering the relationship between copyright exceptions and inconsistent contractual provisions, they will suggest that exceptions should be set aside on the basis that 'freedom of contract' is a foundational or preeminent value within the legal system, and that a contract excluding the exceptions should therefore be upheld. But is freedom of contract actually such an imperative principle? Given that the foundational normative basis of contract law remains unresolved[1] or incapable of justification,[2] this chapter argues that under the key theoretical archetypal approaches to understanding contract, the scope of freedom of contract can be justifiably limited in certain circumstances. The chapter considers the circumstances under which freedom of contract might be limited under these

1 Peter Benson, 'Contract' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010) 29, 29 noting that 'today there is no generally recognized theory of contract. Indeed, there is widespread skepticism about the very possibility of finding general principles that can account for the rules of positive law or the conclusions that most people regard as fair.'; Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) viii.

2 Smith (n 1) 107.

theoretical approaches to contract, and in doing so makes more explicit the scope for copyright policy or theoretical justifications for copyright to provide a rationale for impinging on freedom of contract.

In order to determine whether or not contractual exceptions should override inconsistent contractual provisions it is necessary to interrogate the rationales for freedom of contract as well as the rationales for copyright exceptions. This chapter therefore elucidates the main normative rationales for contract law, and the place of contractual freedom under various branches of contract theory. The aim is to establish the extent of freedom of contract within contract theories, to enable subsequent chapters to consider whether values underpinning copyright might justify restrictions on freedom of contract. It is argued that such an approach is required, as it is only when the rationales for copyright and contract are both fully and clearly stated that a principled approach can be taken as to which area of law should prevail in the event of an inconsistency or clash.

In view of the breadth of contract theory scholarship, and the lack of a broadly agreed theoretical framework for understanding contract[3], it is impossible to fully outline the role of and limits on freedom of contract within each theory of contract law. The chapter therefore focuses instead on two representative leading theories being, autonomy-based rationales or utilitarian law and economics-based rationales.[4] While addressing common features of these contractual archetypes, the chapter considers Charles Fried's promise theory[5] as an example of a specific autonomy based theory alongside conventional welfare and efficiency based law and economics approaches

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[3] Peter Benson, 'The Idea of a Public Basis of Justification for Contract' (1995) 33(2) *Osgoode Hall Law Journal* 273, 276. Here the author notes that not only is there no widely agreed theory of contract, 'among scholars, there does not seem to be even a shared conception of the very object-contract law-which it is the business of theory to comprehend.'

[4] See Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2013) 49 similarly describing autonomy and welfare theories are the main branches of contract theory.

[5] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981).

to understanding contract law.[6] While variations on these theories might demonstrate a greater degree of 'fit' with contract law doctrines as interpreted by the courts, the theories chosen are well established and are commonly relied upon as a matter of rhetoric when the doctrine of contractual freedom is propounded. As discussed below, the autonomy and law and economics-based rationales for contract are both broadly supportive of freedom of contract, subject to some limitations, and this chapter aims to map those areas of convergence and overlapping consensus on freedom of contract issues.[7]

The contract theories chosen also represent the main archetypal theories used to justify contract law. In addition, the theories provide a pleasing symmetry with the theories of copyright law explored in later chapters of the thesis. An individual with a foundational value of protecting human autonomy might be drawn to theories of contract based on respecting autonomous decisions by contractual parties as well as theories of copyright which provide protection on the basis of furthering autonomy interest. A conflict between the two legal regimes might, in the view of that individual, be best resolved by preferring an approach to resolving the conflict which maximised human autonomy. Similarly, an individual who subscribes to a utilitarian perspective might seek to ensure that both contract law and copyright law were designed to be utility maximising, and that any inconsistencies in the interactions of those regimes would be resolved in a manner which maximised overall utility. Such individuals are likely to support a solution to the conflict between contractual freedom and copyright exceptions which accords with their consistent philosophical view. This is not to say that individuals could not hold distinct fundamental rationales for distinct areas of law – for example, someone may believe that contract should be based on party autonomy, but take a consequentialist view as to the rationale for copyright law. The

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[6] Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer law & business, 9th ed, 2014); Alan Schwartz and Robert E. Scot, 'Contract Theory and the Limits of Contract Law' Paper 275 *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers.*

[7] Péter Cserne, *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach* (Palgrave Macmillan, 2013) 85'To the extent that the convergence thesis is true, one does not have to choose between autonomy and welfare theories. When different modes of analysis converge on the same conclusion, our confidence in that conclusion increases.'

interaction of such pluralistic understandings of freedom of contract and copyright law is considered in subsequent chapters of the thesis.

Finally, this chapter also briefly considers the extent to which these normative theories of contract as related to freedom of contract are capable of explaining a world where instead of the ideal of individually negotiated contractual terms, parties are confronted with boilerplate standard form contracts.[8] As argued in the introduction of the thesis, many of the modern contracts which purport to limit parties' capacity to exercise a copyright exception diverge from the theoretical baseline of freely negotiated bargains made by informed parties unaffected by significant power disparities. Such contractual terms are often instead offered on a take-it or leave-it basis with consumers facing no real opportunity to read or understand the relevant terms. The chapter therefore considers how well freedom of contract can be justified under autonomy or welfare theories in a world of standardised boilerplate contracts.

I.A Defining freedom of contract

Freedom of contract is the ability of parties to freely enter into contractual arrangements with whomever they choose, and on whichever terms and conditions they negotiate.[9] Freedom of contract as commonly understood in legal theory[10] involves three interrelated ideas:

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[8] See generally Radin (n 4).

[9] Richard Epstein, 'Contracts Small and Contracts Large: Contact Law through the Lens of Laissez-Faire' in FH Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press, 1999) 28. Note that Epstein defines this concept alongside the interrelated concepts of security of exchange and sanctity of contract (and indeed notes that one could legitimately believe in sanctity of contract without subscribing to freedom of contract). See also Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press; Oxford University Press, 1979) 330 for the development of the idea that freedom of contract 'was coming to mean, not merely that exchanges should be permitted, but also that executory exchanges should be enforced'.

[10] Hanoch Dagan and Michael Heller, *Freedom of Contracts* (Columbia Law and Economics Working Paper No 458, 12 September 2013) 1 Noting that in common usage 'freedom of contract' often is a 'slogan' of laissez-faire capitalism, and that within theoretical approach the term holds a libertarian flavour.

1. The ability of individuals to freely choose the parties that they do or do not wish to contract with;
2. The ability of individuals to choose the terms and conditions in their agreement; and
3. That parties should be held to those agreements which they have freely entered into on the terms that they have agreed.[11]

This thesis is particularly interested in the extent to which parties are limited in their freedom to set their own terms and conditions, and in particular what terms and conditions might be permitted in contracts relating to copyright protected works. The thesis gives comparatively less attention to the related and important question of when such agreements should be enforced through the courts and the coercive power of the state.[12]

Approaches to freedom of contract may have either descriptive or normative dimensions.[13] A descriptive approach to freedom of contract would look to the positive doctrinal rules within the contract law of a particular jurisdiction, to determine the extent of restrictions on parties' freedom to either enter contracts or set their own terms and conditions.[14] While freedom of contract has been described as a core value of Western legal systems,[15] at a doctrinal level most legal systems do not display a rigid application of freedom of contract[16] and limits exist in most jurisdictions on the scope of freedom of contract – parties 'merely enjoy a "regulated"

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[11] See Péter Cserne, 'Freedom of Contract' in Jürgen Backhaus (ed), *Encyclopedia of Law and Economics* (Springer New York, 2014) 1, 1 where the author describes these related ideas as 'party freedom', 'term freedom' and 'sanctity of contract'.

[12] Atiyah (n 9) 330.

[13] Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Pub, 2003) 118.

[14] See for example Atiyah (n 9) 726 where the author notes that 'The legislation of the past century has carried to great lengths the circumstances in which the individual's freedom of decision is overridden, either in the direction of the interests of the majority, or to give effect to values which a majority believe to be of overriding importance'.

[15] Radin (n 4) 26.

[16] Kimel (n 13) 119.

freedom to… determine the content of their agreement'.[17] By way of example, in most jurisdictions, a contract to enforce a crime will not be enforced. Contracts of prostitution or self-slavery are similarly considered void or unenforceable in most jurisdictions.[18] It has also long been recognised in English law that the Courts may refuse to enforce contracts contrary to public policy and there is no unlimited doctrine of freedom of contract. For instance, writing in 1921, Samuel Williston noted 'The English courts prior to the 19th century had no hesitation, when they deemed a particular kind of contract opposed to public policy, in refusing to enforce it', noting in particular examples concerning contracts in restraint of trade.[19] In modern writing, Atiyah[20] has also documented the historical rise of a rigid liberal conception of freedom of contract. He describes the treatment of freedom of contract as a political ideal reaching a high point in 1870, and its gradual decline since that time as reflected in increasing government regulation and interference with the contractual freedom of the parties.[21] Government interference with freedom of contract is however rarely absolute, in the sense that a contracting party may consider entering into a forbidden contractual term if the penalty for doing so is less than the potential reward of the contract. Where parties have agreed on an impermissible contractual term, they may be unable to seek the enforcement of that term in a court, but that unenforceable

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[17] Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Contract* (Kluwer Law International, 2002) 112.

[18] cf Robert Nozick, *Anarchy State and Utopia* (Basil Blackwell, 1974) 309, who would argue that an individual in a free system should be permitted to sell themselves into slavery. For a contrary view, see John Stuart Mill on self-enslavement contracts, noting the 'principle of freedom cannot require that he [the would-be slave] be free not to be free'.

[19] Samuel Williston, 'Freedom of Contract' (1920) 6 *The Cornell Law Quarterly* 365, 373.

[20] Atiyah (n 9).

[21] Kimel (n 13) 118 noting that in Europe that trend has continued with EU policy reflecting further inroads into freedom of contract. See also Guy A Rub, 'Copyright Survives: Rethinking the Copyright-Contract Conflict' (2017) 103 *Virginia Law Review* 1141, 1167 at footnote 107 quoting an 1875 US case on the scope of freedom of contract: 'Printing and Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, 465 (1875) ("[M]en of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.").'

term may govern the parties' actual relationship in any event,[22] at least where the parties are able to implement the term privately and the term is not litigated.[23]

Within the common law tradition, it is generally a default position that freedom of contract takes priority over mandatory legal provisions, and that as between themselves contractual parties are free to consent to derogate from mandatory legal provisions.[24] This starting principal is expressed in a number of international instruments. For instance, the Draft Common Frame of Reference for the Principles, Definitions and Model Rules of European Private Law provides that individuals should be free to determine the terms of their contracts[25] and UNIDROIT Principles of International Commercial Contracts provides that parties are free to determine the contents of a contract, subject to any applicable mandatory rules, and that freedom of contract is 'the cornerstone… of an open market orientated and competitive international order'.[26] Generally speaking, freedom of contract is considered to lead to economic efficiency and where parties are fully informed and in an equal bargaining position such contracts are just as between the parties.[27] As discussed in the previous chapter, there are also some indications that English and EU law instruments may however be willing to restrict parties' freedom of contract in the specific context of copyright licencing contracts by interfering with the scope of contractual freedom to set aside exceptions – but that these hints are inconsistent and undertheorised.

In the sections below the chapter considers the extent to which various theories of contract law address the scope of freedom of contract from a normative or theoretical perspective. The chapter briefly summarises the key theories of contract, and then

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[22] Cserne (n 7) 60.

[23] Benjamin E Hermalin, Avery W Katz and Richard Craswell, 'Contract Law' in A Mitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (Elsevier, 2007) 3, 19.

[24] Gerhard Wagner, 'Mandatory Contract Law: Functions and Principals in Light of the Proposal for a Directive on Consumer Rights' in Anthony Ogus and Willem H van Boom (eds), *Juxtaposing Autonomy and Paternalism in Private Law* (Hart Publishing, 2011) 14.

[25] Christian Von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR).* 48.

[26] International Institute for the Unification of Private Law (ed), *UNIDROIT Principles of International Commercial Contracts 2010* (UNIDROIT International Institute for the Unification of Private Law, 3. ed, 2010) 8 Article 1.1.

[27] Christian Von Bar, Eric Clive and Hans Schulte-Nölke (n 25) 49.

sketches the extent to which those theories support a robust notion of freedom of contract. This then forms the groundwork to the later chapters, when the thesis considers how freedom of contract rationales relate to specific rationales for copyright exceptions.

II. AUTONOMY BASED RATIONALES FOR CONTRACT LAW

Autonomy is a property held by rational agents reflecting their own capacity to self-govern and act according to their own reasons or motives.[28] As observed by Dori Kimel '*An autonomous life consists in the pursuit of freely chosen activities, goals and relationships*'.[29] An autonomy-based justification for law treats individual autonomy as the preeminent value, and a vital condition to the achievement of human freedom.[30] Such theories of contract law often stem from concepts developed by Immanuel Kant and are bound up with notions of freedom and self-determination.[31] Freedom of contract, in the sense of the ability of individuals to choose the terms and conditions in their agreement, is generally compatible with autonomy values as freedom of contract involves self-determining individuals choosing their own arrangements, free from coercion.[32] A contractual transfer of an entitlement or property is just under an autonomy theory where that transfer is voluntary (and arguably also where the entitlement or property is justly held in the first place).[33]

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[28] Robert Johnson and Adam Cureton, 'Kant's Moral Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Spring 2019 Edition) <https://plato.stanford.edu/archives/spr2019/entries/kant-moral/>.

[29] Kimel (n 13) 126.

[30] Michael J Trebilcock, *The Limits of Freedom of Contract* (Harvard Univ. Press, 1997) 8.

[31] See for example Charles Fried, *Contract as Promise in the Light of Subsequent Scholarship—Especially Law and Economics** (Oxford University Press, 2015) 139 noting that the author's book 'Contract as Promise is Kantian and more or less takes its cue from Kant's The Metaphysical Elements of Justice'.

[32] Trebilcock (n 30) 8.

[33] Radin (n 4) 50.

II.A Fried's contract as promise

Autonomy considerations provide the underlying driving force of a number of liberal contract theories. To take a prominent contemporary example,[34] Charles Fried's approach as described in 'Contract as Promise' starts with the liberal ideal of the non-interference with the property and persons of others,[35] and is driven by an underlying concern for autonomy.[36] Under Fried's theory, the ability to morally bind ourselves with contract law increases individuals' autonomy 'by empowering people to enlist others to their projects', increasing our efficacy and ability to achieve our own ends.[37] The obligation to keep a promise is justified by Fried in Kantian terms – to ensure 'respect for individual autonomy and trust'.[38] By making promises, parties will be able to create obligations which morally bind them, and under Fried's conception these obligations are the foundation of contract law.[39] While the act of promising and thus becoming bound to a particular course of action is, in some senses, a reduction in party autonomy (as the individual is no longer morally free in future to act inconsistently the promise), Fried conceives this limitation on autonomy deriving from a promise as increasing a party's autonomy in the long run, and therefore binding promises are ultimately consistent with the principle of autonomy.[40]

Fried's theory of contract is neither complete nor impervious to critique – particularly on the basis that the theory does not rationalise the movement from a moral obligation to keep promises to a legal duty.[41] The theory also struggles to explain a

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[34] Michael Heller and Hanoch Dagan, *The Choice Theory of Contracts* (Cambridge University Press, 2017) 20. The authors describe the major contribution of Fried as responding to a generation of theorists who had sought to remove contract as a distinct analytical category, instead situating it into tort and restitution; See also Benson (n 1) 41 where Fried's theory is described as the most comprehensive and systematic autonomy-based theory of contractual obligation amongst contemporary theorists.

[35] Fried (n 5) 7.

[36] Fried (n 31) 137 noting that the theory 'was based on a morality of autonomy, respect for persons, and trust'.

[37] Dagan and Heller (n 10) 7 as referring to; Fried (n 5) 8.

[38] Fried (n 5) 17.

[39] Heller and Dagan (n 34) 21.

[40] Trebilcock (n 30) 164; Fried (n 5) 8.

[41] Heller and Dagan (n 34) 22; Radin (n 4) 51; Benson (n 3) 293.

range of contractual doctrines including mistake, frustration and the approach taken by the law to filling gaps in (necessarily) incomplete contract.[42] Furthermore, there are difficulties with reconciling this autonomy focused approach to contractual obligations with the state's role in the enforcement of freely obligations (which can be considered as an autonomy *limiting* act of coercion by the state,[43] noting the distinction between the question of whether parties may enter into a contractual agreements and whether the state will enforce that agreement).[44] Despite these limitations, the promise based account of contract remains one of the key contract law theories and provides a useful exemplar of autonomy based theories of contract.

II.B Autonomy-based theories and the scope of freedom of contract

While Fried's account does not explicitly address the scope of freedom of contract,[45] his approach led to a resurgence of interest in autonomy-based theories of contract, many of which now more explicitly consider freedom of contract. Understanding the implications of Fried's promise based theory of contract for the appropriate scope of freedom of contract requires a consideration of the scope of the conception of autonomy underlying the theory.[46] If a narrow or libertarian conception of autonomy is adopted – requiring the complete absence of constraints on self-determination – then almost any restrictions on freedom of contract should be rejected.[47] Such

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[42] Benson (n 3) 279.

[43] Benson (n 1) 44; Kimel (n 13) 136; Dagan and Heller (n 10) 8; Curtis Bridgeman, 'Liberalism and Freedom from the Promise Theory of Contract' (2004) 67(4) *Modern Law Review* 684, 687.

[44] Hermalin, Katz and Craswell (n 23) 19 noting that 'there are many agreements that cannot be enforced in the courts but that can still be useful as commitment devices if the parties can manage to implement them privately'.

[45] Patrick S Atiyah, 'Review of Contract as Promise: A Theory of Contractual Obligation' (1981) 95(2) *Harvard Law Review* 509, 515 noting that Fried says very little about the extent of statutory interference with freedom of contract.

[46] See Kimel (n 13) 126 noting that autonomy is a starting point for understanding freedom of contract and that it 'can easily be (and has been) misinterpreted, and its implications in terms of the appropriate scope for the freedom of contract can easily be exaggerated or misunderstood'.

[47] Benson (n 3) 279 discussing Craswell's argument that there may be background rules adopted and rationalised by autonomy, which parties should not be free to avoid.

deference to freedom of contract however poses significant theoretical challenges for its adherents. Indeed, Dori Kimel argues that "'[w]hile concern for personal autonomy can lend basic support to the ideal of freedom of contract, it does not entail anything like the extreme conception of this ideal which is often associated with liberalism'.[48]

One difficulty with significant or complete deference to freedom of contract (as justified by strong respect for autonomy) is that such an approach would sanction contracts that most theorists would consider morally repugnant. There are many voluntary undertakings which most people would consider should not be given binding force by the state (for example, autonomy theorists may struggle to endorse the freedom of parties to voluntarily enter into a contract for the murder of a stranger).[49] Strong deference for contractual freedom requires proponents to also engage with the puzzle of contracts for self-enslavement, noted by John Stuart Mill, that is whether an autonomous party should be free to contract away their autonomy and enter into an arrangement surrendering their autonomy?[50] Such contracts are both difficult to justify theoretically and are considered unenforceable at the doctrinal level.[51] Even committed autonomy theorists often therefore argue for limits on the scope of freedom of contract. These limitations may be justified by reference to the impact of certain contract choices on third parties, and might also be justified by a 'thicker' conception of autonomy, attentive to providing parties not only a range of choices, but a range of *valuable* choices.

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[48] Kimel (n 13) 131; See however Bridgeman (n 43) 689–690 arguing that Fried subscribes to a libertarian theory of contract, while Kimel instead shows commitment to a perfectionist liberal conception.

[49] Kimel (n 13) 128.

[50] Stephen A Smith, 'Future Freedom and Freedom of Contract' (1996) 59(2) *The Modern Law Review* 167, 167.

[51] Ibid 169.

II.C Autonomy, freedom of contract and the impact on third party interests

Any theory of freedom of contract must be attentive to the impact of contract on the interests of third parties (referred to in the economic literature below as externalities). Fried, for example, is clear that third party interests should be considered relevant under his promise theory of contract and that a freely entered into contract would only be legitimate if 'the arrangement does not impose on third parties costs that those third parties have any moral right to complain about'.[52] The difficulty in addressing this issue is determining which impacts on third parties are grounds for restricting freedom of contract, in circumstances in which 'almost every transaction one can conceive of is likely to impose costs on third parties'.[53] Fried for example argues that disappointed rivals in a fair competition have no moral grounds to complain, giving the example that 'if Dick and Jane agree to enter into an intimate relationship, this may cause considerable pain to Dick's disappointed rival, but it is not an effect the rival has any moral right to complain of'.[54] Fried does not however continue and articulate a general test for determining when a contract should not be enforced due to its impacts on third parties.

One approach to addressing the scope of legitimate impacts on third parties is to reject any interference which would rise to the level of causing harm, as understood under John Stuart Mill's famous harm principle.[55] Even this approach, however, leaves significant scope for uncertainty as to the kinds of third party impacts which would justify restrictions on freedom of contract.[56] Significant third party harms or restrictions on autonomy (as might arise from a contract to murder a third party)[57]

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[52] Fried (n 31) 139.

[53] Trebilcock (n 30) 58.

[54] Fried (n 31) 139, footnote 21.

[55] John Stuart Mill, *On Liberty* (Walter Scott Publishing Co., Ltd., 4th ed, 1989) 17'That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'

[56] See generally Trebilcock (n 30) 3 engaging with the issue of the harms of pornography.

[57] See Smith (n 1) 251 for an additional argument that a contract to murder would also be objectionable on the basis that 'autonomy has no value when exercised in pursuit of non-valuable ends'. This links to thicker conceptions of autonomy, as discussed later in this chapter.

are a clear violation of the harm principle and a morally unjustified intrusion on the autonomy of third parties,[58] but it is unclear how much further the principle can be taken (for instance, whether a proper conception of harm might also encompass causing offence). Stephen Smith, for example, considers the idea that a declaration elsewhere in the legal system that a specific activity is objectionable should be 'adequate proof that the same activity is objectionable (and therefore unenforceable) from the perspective of contract law.[59] Turning to questions of morality, Smith broadly categorises activities as objectionable on either the basis that they are harmful to others or where the action is non-valuable because it is considered worthless, immoral or degrading,[60] but suggests that courts should be careful when considering the scope of immoral or degrading activities.[61]

For the purpose of this chapter, it is enough to note that under autonomy-based theories freedom of contract should be limited in some circumstances where the parties' contractual agreement would impact the autonomy interests of third parties, but that the degree of impact warranting intervention is contested. At minimum, unrestricted freedom of contract would not be justified where this caused significant harm to third parties. The extent of harm that contracting out of copyright exceptions may cause is a topic taken up in the later chapters of the thesis.[62]

II.D Future freedom and restrictions on freedom of contract

Restrictions on freedom of contract might also be justified by autonomy theories where freely chosen contractual terms unduly limit the future autonomy of a party. The difficulty of this approach is that all contracts provide some restriction on autonomy. Indeed, this is a core feature of contractual obligations. Theorists working in the area focus specifically on those restrictions in agreements which are not

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[58] Trebilcock (n 30) 75.

[59] Smith (n 1) 254.

[60] Ibid 255.

[61] Ibid 258.

[62] See Chapter 7

necessary from the perspective of autonomy or which unduly restrict autonomy - in the sense that they do not make other valuable options available nor serve any other legitimate purpose.[63] Examples of contractual terms which limit future freedom and autonomy of a party range from Mill's example of self-enslavement contracts,[64] through to employment contracts which impose restrictions on an employee's future alternative employment.[65]

The extent to which future autonomy concerns might justify restrictions on freedom of contract depends on the breadth of the conception of autonomy, with a focus on thin individualistic approaches to autonomy based contract theory permitting only limited incursions into the parties' choice of contractual terms (on the basis of the harm principle and the impact of contract on third parties), and thicker conceptions of autonomy justifying greater restrictions of freedom of contract.[66] Fried for example adopts a thin autonomy rationale, suggesting that being able to bind oneself to a non-optimal future conduct is required by a theory of individual liberalism,[67] as it allows others to trust our promises even if in the future it is against our interest to keep those promises.[68] Here the role of the government is to support individuals making their own autonomous value choices,[69] and restrictions on freedom of contract might only be justified on the basis of impacts on third parties, as discussed in the section above.

In contrast, a 'thick' understanding of autonomy is derived from the work of Joseph Raz[70] who argues that personal autonomy is meaningful and valuable when exercised

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[63] Smith (n 1) 259.

[64] See Part I.A above.

[65] Kimel (n 13) 130.

[66] See Bridgeman (n 43) 686 distinguishing Fried's approach as a liberal libertarianism in contrast to Kimel who defends a perfectionist liberalism, concerned with a broader conception of autonomy.

[67] Fried (n 5) 13; Bridgeman (n 43) 687.

[68] See the critique of this argument at Bridgeman (n 43) 687.

[69] Ibid 691.

[70] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).

in pursuit of valuable activities and relationships.[71] This implies that individuals need valuable options to choose from, but the theory does not require that individuals be presented with bad or worthless options.[72] In this conception of autonomy, the liberal state has a role beyond neutrality, and should both ensure the availability of meaningful autonomy maximising choices for individuals and also act to protect parties from choices which would have severe negative consequences.[73] Smith takes this approach further, arguing that for individuals, the value of discrete autonomous decisions is their capacity to contribute to autonomous life choices, and to allow individuals both choose and change their choices about the broader direction of their lives.[74] On this basis Smith, under an autonomy theory, is able to justify restrictions on contracting which restrict a party's future freedom of choice, on the basis of a concern for 'vertical' or future autonomy.[75] This line of analysis is taken further still by Kimel, who suggests that '[t]he emerging picture is of liberalism as compatible with, and often positively requiring, various forms of intervention in the freedom of contract'.[76] Hanoch Dagan and Michael Heller similarly argue that preferences which undermine self-authorship should be overridden.[77] It is however somewhat difficult to consider how future and present autonomy might be measured or compared, and doing so may be an attempt at 'sophisticated consequentialism'.[78] Furthermore, attempts by the state to limit individuals from making harmful or negative choices

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[71] Kimel (n 13) 131; See also Dagan and Heller (n 10) 31 for an autonomy-based theory of contract developed from the approach of Raz.

[72] Kimel (n 13) 132; See also Cserne (n 7) 20 noting that while Raz took the view choosing bad options autonomously is not valuable, he also held the view that freedom from coercive interference is valuable.

[73] Kimel (n 13) 133; Dagan and Heller (n 10) 32; See also related concepts in John Stuart Mill, *Principles of Political Economy: With Some of Their Applications to Social Philosophy* (Longmans, Green, Reader and Dyer, 1871) 584 noting '[An] exception to the doctrine that individuals are the best judges of their own interest is when an individual attempts to decide irrevocably now what will be best for his interest at some future and distant time'.

[74] Smith (n 50) 177.

[75] Ibid 178.

[76] Kimel (n 13) 135.

[77] Dagan and Heller (n 10) 46.

[78] Cserne (n 7) 21.

potentially involve coercive interference with the autonomy of those individuals - such autonomy harms the need to be balanced against the autonomy gains associated with directing individuals to autonomy enhancing choices.[79]

One significant critique of a 'thick' understanding of autonomy is that where the state regulates in a paternalistic manner to ensure that individuals only have access to beneficial choices, this may prevent learning effects and individual self-development.[80] By only presenting individuals with a range of positive choices, individuals will be prevented from making mistakes and making negative, albeit autonomous, choices. This may prevent them develop coping mechanisms or developing their capacities, at least where the negative autonomous choices they do take are not so severe or catastrophic (for example, an autonomous decision to contract into slavery may be so catastrophic for an individual's future freedom that there would be no meaningful learning benefit from allowing them to make that decision).[81] These type of considerations around the value of thick conceptions of autonomy hint toward the links between autonomy and consequentialist accounts of freedom of contract, in the sense that we may need to engage in some weighing of the learning and self-development benefits of allowing negative autonomous decisions against the welfare benefits of individuals making only positive, socially-beneficial decisions.[82]

Turning to the extent to which a 'thick' conception of autonomy permits interference with freedom of contract, this theory suggests that contractual freedom can and

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[79] Ibid 20.

[80] Ibid 53 quoting Mill 'If adults are treated as children, they will in time come to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision. Even children, after a certain point, had better not be "treated as children," else they will never acquire the outlook and capability of responsive adults'.

[81] Ibid 52.

[82] See Michael Treblicock, *The Limits of Freedom of Contract* (Harvard University Press, 1993) 165 writing that 'Buckley argues that though promises made within such conventions may be content-independent, the reason we have collectively adopted a social convention of promise keeping in a broad range of circumstances cannot simply be that the more choices open to individuals the better ; we must justify which kinds of additional choices are better than fewer choices of given kinds, which he claims requires a consequentialist justification'; See also Dagan and Heller (n 10) 40.

should be limited by the state by restricting the availability of bad or worthless contractual options or options which if chosen would have severe negative consequences. As noted above, Smith would also be wary of permitting individuals to enter into contractual arrangements which restricted the future freedom.

II.E The scope of freedom of contract in autonomy rationales for contract law

In light of the above analysis, it can be argued that autonomy theories of contract may impose limits on freedom of contract as between parties where the contract may cause harm to third parties (although the seriousness of the harm which justifies interference with contractual freedom is contested). Where autonomy theories are focused on wide conceptions of autonomy, there may arguably also be further scope to restrict freedom of contract to preserve the future or vertical autonomy of the parties or to restrict the availability of negative contractual options. Chapter 7 of the thesis returns to this question, considering the extent to which contracts which preclude users from relying on copyright exceptions are permissible under these conceptions of autonomy.

III. CONSEQUENTIALIST RATIONALES FOR CONTRACT LAW

Modern law and economics'[83] consequentialist analysis of contract law has its roots in the work of Jeremy Bentham and utilitarianism. This philosophical approach assesses the normative value of any actions by their consequences, and seeks to maximise the aggregate happiness of society.[84] Due to the difficulty in measuring or comparing the relative happiness of individuals, the modern law and economics

[83] See Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge, 2013) 23–27 for a discussion of the various 'generations' in the law and economics movement. Much of this chapter is concerned with the approach of the Chicago School which remains a dominant law and economics paradigm, however some reference is made to more recent insights.

[84] Radin (n 4) 52.

approach instead often attempts to measure the preferences of individuals indirectly, considering the efficiency[85] of the law in maximising party wealth or overall economic welfare.[86] Law and economic approaches have tended to focus on the development of optimal rules,[87] considering how these rules operate as incentives to modify or drive human behaviour.[88]

The utilitarian law and economics approach has increased in importance over time,[89] particularly in the years after the publication of Ronald Coase's 'The problem of social cost',[90] Guido Calabresi and Douglas Melamed's paper on 'Property Rules, Liability Rules, and Inalienability'[91] and Richard Posner's first edition of his treatise on 'Economic Analysis of Law.[92] In the US, constitutional factors[93] as well as international trade law developments, including the TRIPS Agreement,[94] have meant that forms of law and economic analysis have become the dominant framework for understanding copyright policy. At the same time the importance of law and economics in contract scholarship has grown since the 1970s and could now be

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[85] See ibid 54 defining efficiency as a situation in which resources are allocated to the parties who place the highest value upon them and who will create most social value by controlling their use.

[86] David Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (Research Paper, Centre for Copyright Studies Ltd, May 2002) 10; See also Elkin-Koren and Salzberger (n 83) 29 noting that the normative goal of wealth maximisation is exogenous to an economic methodology.

[87] Radin (n 4) 53.

[88] Richard Watt (ed), *Handbook on the Economics of Copyright: A Guide for Students and Teachers* (Edward Elgar, 2014) 9.

[89] For a brief history see Elkin-Koren and Salzberger (n 83) 21.

[90] RH Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 1.

[91] Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) *Harvard Law Review* 1089.

[92] For a more recent edition see Posner (n 6).

[93] See Elkin-Koren and Salzberger (n 83) 11 noting the US constitution's copyright power in Article 1, section 8, clause 8 which authorises law to 'promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.

[94] Ibid 6.

described as the dominant legal academic approach to analysing contract.[95] It is therefore an important area of legal theory for this thesis to investigate.

Law and economics approaches can be either normative, in the sense or trying to describe what law ought to be, or they can be positive in attempting to describe legal rules and modelling the likely economic consequences of those rules.[96] The emphasis in this chapter is on general normative models for contract law, rather than any attempt to survey the growing, yet inconclusive, qualitative economic literature on existing contract law doctrines.[97]

The normative ideal concept of a contract has long been a bargained exchange transaction between two parties in agreement.[98] Private ordering through such contractual exchange transactions has been considered to be welfare maximising under utilitarian or consequentialist approaches.[99] This is because it is assumed at the level of an individual transaction that rational individuals will only enter into a particular transaction if they gain from the exchange and will be made better off overall.[100] Freedom of contract therefore maximises the opportunities for individuals to enter into mutually welfare enhancing transactions, which will therefore be for the good of society as a whole.[101] This approach also suggests that courts should enforce the bargains agreed between parties, as refusing to do so would make it more difficult for future parties to 'use contracts to enhance their joint well-being'.[102] This section of the chapter more formally describes the tools that law and economics scholars use in modelling law, the scope of freedom of contract within the law and economics paradigm, and limitations of the law and economics approach. The thesis returns to

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[95] Eric A Posner, *Economic Analysis of Contract Law after Three Decades: Success or Failure?* (John M. Olin Program in Law and Economics Working Paper No 146, 2002) 1.

[96] Lindsay (n 86) 10.

[97] Posner (n 95) 5.

[98] Radin (n 4) 15.

[99] Guibault (n 17) 115 linking these ideas to those of Adam Smith.

[100] Posner (n 95) 12.

[101] Guibault (n 17) 115.

[102] Posner (n 95) 12.

these law and economics concepts in chapter 5, where the law and economic rationales for copyright law and copyright exceptions are considered.

III.A Economic tools for understanding the scope of contract law

In considering the scope of optimal law, law and economics scholars use a number of approaches to evaluate whether a particular rule or law is welfare maximising or efficient. These include the Pareto criteria, which is a standard which approves of any change to a law or resource allocation which would increase the welfare of any one individual, without decreasing the welfare of anyone else.[103] A situation can be described as Pareto optimal where no further Pareto criteria satisfying adjustments can be made.[104] As noted above, the standard assumption of law and economics is that contracts between parties are Pareto efficient, as they are assumed to make all parties to a contract better off, absent forms of market failure such as a lack of consent or asymmetrical information.[105]

The Pareto criteria are however subject to criticism as they do not take into account distributional concerns, and differing initial distributions of wealth would lead to distinct pareto optimal distributions.[106] Furthermore, a Pareto optimal distribution does not necessarily imply that social welfare is maximised.[107] Finally, it must be noted that when economic tools such as Pareto efficiency are applied to questions of law, the focus is not on whether a particular act may be justified on utilitarian terms, but instead on whether a broader rule or overall practice (such as freedom of contract) is welfare maximising at a societal level.[108] There might therefore be individual

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[103] Trebilcock (n 30) 7.

[104] Lindsay (n 86) 11.

[105] Trebilcock (n 30) 7.

[106] Calabresi and Melamed (n 91) 1096.

[107] See Hermalin, Katz and Craswell (n 23) 22 noting '...any allocation of an indivisible object (other than throwing it out) is Pareto efficient, but only the allocation that awards it to the person who values it most is welfare maximizing'.

[108] Megan Richardson, 'The Utilitarian-Economic Model of Contractual Obligation: Unconscionability at the Frontier' (1995) 20 *Melbourne University Law Review* 481, 483 and 502.

transactions occurring in a marketplace that are not Pareto optimal (for example, due to market imperfections, such as asymmetrical information, as discussed below).

Alternative criteria to Pareto include the Kaldor-Hicks criteria, where the gains of the change to those who benefit are higher than the losses for those who lose out, such that these who benefit could at least theoretically compensate the losers.[109] The Kaldor-Hicks criteria can be more easily deployed when evaluating government policy, as where a policy impacts a large number of people it is very unlikely to be Pareto efficient, as there will inevitably be one individual whose welfare is decreased, even if only to a small degree. Both the Pareto and Kaldor-Hicks criteria fundamentally aim to achieve a more efficient resource allocation, maximising total welfare of the individuals. Each criterion can be utilised to support attempts to calculate a more general measure of overall societal welfare, made up by aggregating the individual preferences of members of society. A general aggregate measure of social welfare can be linked to Pareto efficiency, as any allocation of resources which maximises societal welfare is Pareto efficient[110] and efficient markets are generally considered to be Pareto efficient.[111]

Another of the key tools at the heart of the law and economics approach is the Coase theorem,[112] deriving from the work of Ronald Coase in 'The Problem of Social Cost'.[113] In this article Coase considered the significance of externalities, which are the consequence of an activity which affects other parties which are not reflected in prices.[114] Coase considers the example of a factory producing harmful smoke as an example of an externality which impacts those occupying neighbouring properties.[115] Coase argued that in a world without transaction costs, if a right to produce smoke

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[109] Cserne (n 7) 6.

[110] Hermalin, Katz and Craswell (n 23) 22.

[111] Ibid 23.

[112] But see ibid 24'Despite its formal sounding name, the Coase theorem is not a theorem in the traditional sense (nor did Coase suggest it was).'

[113] Coase (n 90).

[114] Radin (n 4) 54.

[115] Coase (n 90) 1.

could be clearly defined as an entitlement of the factory owner and if the neighbouring occupiers could be identified and could coordinate as group, then the initial legal right to pollute could be forfeited by the factory owner to the neighbours in exchange for a payment if doing so would be pareto optimal.[116] This would occur in Coase's hypothetical society if the entitlement to be free from smoke and pollution was worth more to the occupiers of the neighbouring property than it was to the owner of the factory. In such circumstances a transfer would be expected to occur as doing so would be Parteto efficient[117] on the basis that the 'increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about'.[118]

Coase's insights lead to two conclusions. The first is that in the absence of transaction costs, the market will operate in an efficient way and private contracting will lead to an equilibrium point where overall societal welfare is maximised.[119] This is because in the absence of transaction costs efficient contracting will mean that the relevant resource is transferred to its higher value user, through a chain of Pareto optimal exchanges between individuals.[120] The Coase theorem also implies that again in the absence of transaction costs the initial allocation of entitlements is immaterial for whether there will be a societal welfare maximising equilibrium reached.[121] Attempts to model the impact of the Coase theorem suggest that where there are no transaction costs, and parties are symmetrically informed, then 'there is no reason to believe that restricting the parties freedom of contract will improve efficiency'.[122] Indeed, law and economics scholars including Calabresi have noted that if one '*assumes rationality, no transaction costs, and no legal impediments to bargaining, all misallocations of resources would be*

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[116] Ibid 15.

[117] Ibid.

[118] Ibid.

[119] Hermalin, Katz and Craswell (n 23) 25.

[120] Lindsay (n 86) 16, 65.

[121] Hermalin, Katz and Craswell (n 23) 25.

[122] Ibid 30.

fully cured in the market by bargains'[123] – more interesting law and economics scholarship explores the consequences on the models when these constraints are relaxed.

Coase himself noted that circumstances in which there would be no transaction costs in effectuating market transactions would be a 'very unrealistic assumption'.[124] He identified a range of transaction costs that operate in the real world, which would be sufficiently costly to prevent many transactions in the real world, limiting the extent to which markets might generally be thought to be efficient.[125] These costs are those necessary to carry out a market transaction, and include costs associated with searching for contractual partners, negotiating contractual terms, drafting the contract, ensuring compliance with the agreement and so on.[126] Such transaction costs may be 'inevitable' in relation to copyright contracts,[127] and where the transaction costs are larger than the value of any bargain to the parties they may prevent 'many transactions that would be carried out in a world in which the pricing system worked without cost'.[128] Due to the existence of transaction costs, the decision about which party holds the initial allocation of entitlements is significant and therefore decisions by legislatures or courts in setting initial entitlements have efficiency implications.[129] Coase argued that we should be attentive to these efficiency and welfare implications when designing social structures,[130] and his work has led to greater attention to the tool of using property rights to deal with externalities in place of government taxation or regulation.[131] Limitations do however exist in the level of

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[123] Guido Calabresi, 'Transaction Costs, Resource Allocation and Liability Rules: A Comment' (1968) 11 *The Journal of Law and Economics* 67, 68.

[124] Coase (n 90) 15.

[125] Ibid.

[126] Ibid.

[127] Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (1982) 82 *Columbia Law Review* 1600, 1608.

[128] Coase (n 90) 15.

[129] Ibid 27.

[130] Ibid 44.

[131] See Harold Demsetz, 'Toward a Theory of Property Rights' in *Classic Papers in Natural Resource Economics* (Palgrave Macmillan UK, 1974) 163; Brett M Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law' (2007) 3(3) *Review of Law & Economics* 649, 655.

confidence that can be placed in the abilities of government to appropriately regulate social structures, such as the practice of contract. Governments are not immune to public policy distortions and many economists hold a preference for private decision-making over such governmental decisions.[132]

The transaction cost analysis discussed above has been extended by later scholars who have noted that where high transaction costs do exist one possible response, for example, would be to recognise a liability rule instead of a property rule, which may also be preferred for distributional reasons.[133]

III.B. Limits of the law and economics methodology

The discussion in the sections above noted a number of circumstances in which internal limits to the law and economics tool of analysis suggests that some care should be taken with its insights. For example, if models are developed on the basis of a hypothetical world absent transaction costs or a world where all externalities have been internalised, then those models may have limited normative or predictive value when applied in real-world situations or when used to develop policy. As noted by Eric Posner, '[i]f individuals were rational, with no cognitive limits, and if transaction costs were zero, the role of contract law would be simple and uninteresting'.[134] In reality however, contracts may give rise to a range of externalities, and where transaction costs exist contractual parties may enter into agreements that are not economically efficient at a societal level, once all of the broader third-party interests are taken into account.

In addition to these limitations, the underlying normative commitments of the law and economics movement have been subject to extensive criticism, which urges caution as to the extent to which the analysis can be uncritically adopted. The law and economics mode of analysis is consequentialist and thus subject to the same critiques

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[132] Elkin-Koren and Salzberger (n 83) 156.

[133] Calabresi and Melamed (n 91) 1110; See also Lindsay (n 86) 35.

[134] Posner (n 95) 32.

that may be applied more generally to consequentialist and utilitarian philosophical approaches.[135] Law and economics may indeed be particularly susceptible to these critiques, as its reliance on the purportedly neutral or purportedly scientific[136] tools of economic analysis disguises the underlying normative commitments of the approach.

Other critiques of the law and economics movement look at the extent to which its underlying assumptions accurately reflect actual human behaviour. For example, mainstream law and economics approaches often ignore more recent behavioural and psychological insights around human motivation, 'from assuming self-maximization of utility to assuming self-maximization of wealth, disregarding the decreasing marginal utility of wealth, or the endowment effect'.[137] For example, the insight from behavioural economics that individuals have a difference between the price they would be willing to pay to acquire an item and the price that they are willing to sell the same item undermines the efficiency calculations at the heart of much law and economics analysis.[138] Another critique which is particularly powerful is that, when considering the relationship between law and economics and intellectual property law, classical economics proceeds from an assumption that secure and well-defined property rights are presumed to exist, and are not justified.[139] It is therefore necessary in later chapters examining copyright law to justify the existence of the relevant property entitlement.

Overall, Eric Posner argues that decades of law and economics have provided determinant but wrong recommendations that particular policy options; or

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135 See generally Walter Sinnott-Armstrong, 'Consequentialism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Summer 2019) <https://plato.stanford.edu/archives/sum2019/entries/consequentialism/>.

136 Posner (n 95) 1.

137 Elkin-Koren and Salzberger (n 83) 31.

138 See Wendy J Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' in Niva Elkin-Koren and Neil Netanel (eds), *The Commodification of Information* (Kluwer Law International, 2002) 179 for a particularly powerful example of differences in the value of the right to be free from torture and how that might be priced.

139 Terry L Anderson and Fred S McChesney (eds), *Property Rights: Cooperation, Conflict, and Law* (Princeton University Press, 2003) 13.

indeterminant models that require unobtainable information in order to be useful in making policy recommendations.[140]

III.C. Freedom of contract in law and economics

The tools of law and economics discussed above suggest that, in general, contractual freedom should be encouraged as this will lead to efficient market outcomes. Posner argues that '[t]he premises of economics push in the direction of freedom of contract, and this current can be resisted only with difficulty'.[141] Economists tend to have a greater preference for private decisions of individuals over collective decisions made by government[142] or judgments made by courts[143] because individuals are considered to have more information about their own preferences and are thus better able to freely enter into individually welfare maximising actions and transactions.[144] In addition, governments may be exposed to public policy distortions[145] and Coase himself expressed concerns that legislatures subject to political pressures and operating without a competitive market mechanism may not make efficiency maximising decisions.[146]

Economic analysis does however note some instances where an unregulated market will not lead to efficient or welfare maximising outcomes. These include instances where there are significant externalities,[147] or where transaction costs are in that particular industry too high to permit efficient transactions to take place. Indeed,

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[140] Posner (n 95) 31.

[141] Ibid 12.

[142] Trebilcock (n 30) 7.

[143] Posner (n 95) 27.

[144] Lindsay (n 86) 12.

[145] Elkin-Koren and Salzberger (n 83) 156.

[146] Coase (n 90) 18.

[147] Alan Schwartz and Robert E. Scot (n 6) 5 noting many models will exclude consideration of externalities, suggesting they are better addressed through other kinds of law - for instance that externalities concerning pollution be dealt with under environmental law instead of contract. At p 73 the authors also argue that mandatory contract rules are justifiable to prevent externalities.

Cserne argues that '[t]he efficiency of markets and private contracting is contingent on there being no third-party externalities' and that in some circumstances it will be impossible to identify all of the third parties impacted by a transaction.[148] Additionally, where parties are asymmetrically informed some legal restrictions on private contracting can enhance efficiency.[149] One response to the potential for significant externalities comes from Epstein, who argues that 'any contract that improves the lot of both sides will normally improve the position of third parties as well, by offering them expanded business opportunities with individuals of greater wealth'.[150] It is therefore necessary to be attentive to the scale of the negative externalities associated with particular transaction, as where the externalities are small then the benefits of freedom of contract (such as the expanded business opportunities with individuals of greater wealth identified by Epstein) may on balance provide justification for permitting the contract to proceed.

IV. SIGNIFICANCE OF FREEDOM OF CONTRACT THEORIES IN A WORLD OF BOILERPLATE

The material discussed above in relation to autonomy best rationale for contract law and in relation to law and economics consequentialist rationales has largely been implicitly based on the assumption of an idealised contract negotiation between the parties where the contract terms and price have been the subject of negotiation. While this assumption is helpful in order to understand the various rationales application to contract law in the abstract, in practice there has been an increasing use of standard form contracts or boilerplate terms.

In the modern era, most contracts do not take place as bargained-for exchanges and academics have long identified the substantial increase in the use of standard form contracts. For example, writing in 2002 Lucie Guibault notes that '[t]oday, the typical

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[148] Cserne (n 11) 5.

[149] Posner (n 95) 28.

[150] Epstein (n 9) 59.

agreement used in routine transactions consists of a standard printed form that has been prepared by one party and is agreed by the other with little or no opportunity for negotiation'[151] and that the copyright regime has come under greater pressure by the prevalence of standard form contracts which seek to regulate, amongst other topics, the extent to which users can rely upon copyright exceptions.[152]

The use of standard form contracts in general may have many benefits, perhaps most significantly that their use frees individuals from spending time negotiating contractual terms when they could instead be spending the time engaged in more valuable pursuits,[153] and arguing that the terms and conditions found in standard form contracts are likely to be efficient through the operation of the market.[154] Other academics have expressed concern about the increased use of standard form contracts, including outside the copyright context, including Margaret Radin, in her 2013 treatise 'Boilerplate'.[155]

Radin argues that traditional autonomy and law and economics justifications for contractual freedom are imperilled or weakened in a marketplace characterised by standard form contracts where there is no meaningful scope for negotiation. In discussing the world of boilerplate or standard form contracts, she argues that the ideal autonomy-based conception of a negotiated contract bears little resemblance to modern contracts. She notes that there has been a process of 'devolution or decay of the concept of voluntariness' and that agreement has devolved from consent, to assent, to blanket assent.[156] The move from individually negotiated contractual terms to standard form contracts which may not be read or understood by one of the parties is a challenge to the continued application of the autonomy theory, as it is difficult to

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[151] Guibault (n 17) 119.

[152] Ibid 111.

[153] Heller and Dagan (n 34) 2–3.

[154] See Elkin-Koren and Salzberger (n 83) 157 for a discussion of this argument in the context of copyright licencing contracts.

[155] Radin (n 4).

[156] Ibid 65.

argue that in the absence of choice understanding consumers are making meaningfully autonomous decisions.[157]

Radin's argument against the law and economics understanding of boilerplate contracts engages with the argument that contractual terms form just one dimension of a product characteristics, and that consumers can rely on market mechanisms[158] to ensure that contractual terms to which they agree are efficient.[159] This conception treats products and their associated contracts as a bundle, with competitive market pressure ensuring that sellers offer a bundle combining product characteristics and contractual terms which are attractive to purchasers. One challenge to this view is that there are significant informational asymmetries in connection with the standard form contracts offered by sellers and that it may be unlikely that a sufficient subset of knowledgeable consumers will read and understand the boilerplate contractual terms, bringing to bear contractual pressure on the sellers to ensure those terms are efficient.[160] In addition, sellers who draft their own standard form contracts will have significantly more information about their contents, and there may not be enough consumers in the marketplace who read those terms and can influence their content.

Radin's argument suggests that the idealised contractual theories based on autonomy and law and economics efficiency concerns may continue to have normative force when applied to individually negotiated contracts, but may need to be applied with care when considering boilerplate terms and conditions, as such contractual terms may be neither autonomy enhancing, nor welfare enhancing.

V. SIGNIFICANCE OF THE ANALYSIS

Having reviewed the theoretical rationales for contract law it is clear that the main approaches do not countenance unrestrained freedom of contract. While there may

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[157] Ibid 69.

[158] Ibid 78.

[159] Ibid 76.

[160] Ibid 81.

be differences as to the specific types of contracts found problematic in each theory, all theories do consider some restrictions on the terms chosen by parties in their contracts are legitimate. At a basic level[161] we can consider that consequentialist and autonomy-based justifications for freedom of contract coincide to an extent at the level of individual transactions, as both generally approve of bargained-for exchanges.[162] An autonomy theorist supports such exchanges on the basis that they have been freely chosen by the parties, whereas a welfare theorist would expect that the parties would only enter into such an exchange if they both thought that doing so would make them better off in that they expected the exchange to be welfare maximising.[163] Furthermore, while law and economics approaches might not directly address autonomy or the relevance of consent and free choice, the theory does implicitly assume that the transfer of entitlements between parties is voluntary.[164] Autonomy and law and economics approaches do however diverge in a number of instances, such as where a hypothetical exchange was voluntary but not welfare maximising.[165] A voluntary transaction which reduced the welfare of one or more parties would however be incompatible with the underlying law and economics assumption of rational, self-interested individuals and would not normally occur under those models.[166]

Both autonomy and welfare-based theories of contract impose limits on freedom of contract as between parties where the contract may either cause harm to third parties

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[161] For a more complex account of the relationship between autonomy and efficiency see Heller and Dagan (n 34) 55.

[162] Fried (n 31) 139'that the two [contract as promise and law and economics] should arrive at similar conclusions on many of the main points of contract doctrine is striking; Cf Thomas Gutmann, 'Theories of Contract and the Concept of Autonomy' (Preprints and Working Papers of the Centre for Advanced Study in Bioethics, 2013) 7 who argues 'The two normative principles remain unconnected; at best, they are understood as a trade-off between incommensurable goals'.

[163] Cserne (n 7) 84.

[164] Radin (n 4) 58.

[165] Smith (n 1) 139 noting 'Autonomy theories value increased options because this increases the possibility of autonomous action – regardless of the material or utilitarian consequences of taking up those options'.

[166] Posner (n 95) 27 noting that under some models an individual might enter into a contract which reduced their welfare if suffering from informational asymmetries.

or generate significant externalities. Where autonomy theories are focused on wide conceptions of autonomy, there may also be further scope to restrict freedom of contract to preserve the future or vertical autonomy of the parties. These areas of overlap in the theoretical accounts of freedom of contract permit a degree of theoretical pluralism, and suggest that it is not necessary for an individual to choose between autonomy and welfare theories in this regard, as both theories converge on a similar set of limitations to freedom of contract.[167]

The following chapters draw on this analysis to consider how the public policy and theoretical justifications for copyright exceptions might align within the scope of contractual freedom under each theory.

[167] Cserne (n 7) 85.

4. THE LOCKEAN UNDERSTANDING OF COPYRIGHT EXCEPTIONS

I. INTRODUCTION

This chapter considers the extent to which copyright exceptions may be justified and understood within a secular Lockean theory of copyright. It argues that in order to legitimise the grant of a property right in intangible expression under John Locke's theory[1] it is necessary for copyright exceptions to exist, reflecting the various provisos introduced by Locke. The chapter sets out the disputed understanding of Locke's general labour theory of property in the way that it has been argued that it might apply in relation to intellectual property entitlement such as copyright. In doing so it focuses in particular on the nature of the Locke's physical commons in order to give context to any corresponding intellectual commons from which authors draw their inspiration. The chapter argues that the manner in which the Commons is constituted gives an indication of the permissible scope of copyright entitlements. Part two of the chapter discusses Locke's sufficiency, waste and charity provisos and confront the difficulties of extending their application to intangible goods such as copyright. If these provisos are not met, then there will be no legitimate justification for the grant of a property entitlement. Finally, in part three the chapter draws upon the insights developed in the earlier sections to suggest how Lockean provisos require the existence of copyright exceptions in order for private property rights in expression to be legitimate. This analysis is and built upon in chapter 6 where the thesis considers whether attempts to contract out of the operation of copyright exceptions are permissible in view of the rationales for freedom of contract discussed in the previous chapter and the requirements for the existence of legitimate property entitlement explored herein.

[1] John Locke, *Two Treatises of Government, Second Treatise*, ed Thomas Cook (Hafner Pub. Co., 1947) Ch V ('*Second Treatise*').

II. APPLYING LOCKE'S LABOUR THEORY TO COPYRIGHT LAW

Locke's justification for the private appropriation of property has long[2] been used as an explanation for copyright and other forms of intellectual property.[3] Natural rights theories such as Locke's have also had an influence on international instruments concerning authors' rights.[4] Locke's writings have been construed by modern scholars to lend support to a range of different (and often contradictory) philosophical positions. His text has been invoked as supporting philosophies which range from communitarianism,[5] liberalism,[6] and utilitarianism,[7] to capitalism.[8] Others have argued that Locke's actual meaning can only be properly understood in its (contested) historical context.[9]

At a basic level, Locke's justification for the appropriation of property is captured in an introductory paragraph to the fifth chapter of his Second Treatise:

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then

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[2] See for example Severine Dusollier, 'Scoping Study on Copyright and Related Rights and the Public Domain' (March 1, 2011). World Intellectual Property Organisation Publication CDIP/7/INF/2 at footnote 52 tracing the way that Locke's Treatise of Government has been used in copyright history 'in order to attach a property right to the fruits of intellectual labour', dating back to discussions around the Statute of Anne.

[3] Alfred Yen, 'Restoring the Natural Law: Copyright as Labor and Possession' (1990) 51 *Ohio State Law Journal* 517, 522–531; Benjamin Damstedt, 'Limiting Locke: A Natural Law Justification for the Fair Use Doctrine' (2003) 112 *The Yale Law Journal* 1179, 1179.

[4] Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Contract* (Kluwer Law International, 2002) 10.

[5] Matthew Kramer, *John Locke and the Origins of Private Property* (Cambridge University Press, 1997).

[6] Robert Nozick, *Anarchy State and Utopia* (Basil Blackwell, 1974) 174.

[7] Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Geo. L.J.* 287, 299; Viktor Mayer-Schonberger, 'In Search of the Story: Narratives of Intellectual Property' (2005) 10(11) *Virginia Journal of Law and Technology* 4; Wendy Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102(7) *Yale Law Journal* 1533, 1544; but see Alan Ryan, *Property and Political Theory* (Basil Blackwater Publisher Limited, 1984) 30.

[8] CB MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press, 1962).

[9] See for discussion on approaches to interpreting Locke Richard Ashcraft, *Locke's Two Treatises of Government* (Allen and Unwin, 1987) 1; Edward Harpham (ed), *John Locke's Two Treatises of Government: New Interpretations* (University Press of Kansas, 1992) 1.

he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.[10]

Chapter 5 of Locke's second treatise explicitly addresses the circumstances justifying appropriation of physical items such as land,[11] acorns, apples,[12] water,[13] deer and fish.[14] It does not explicitly mention expressive works and it is unlikely that he intended that his discussion of property in the *Second Treatise* would extend to encompass intangible intellectual property such as copyright or patents.[15] While Locke made some comments about authorial rights in other writings, he did not explicitly link his arguments about the acquisition of property with his arguments concerning author and publishers rights in expressive works.[16] As a result, while Locke's theory of appropriation is commonly invoked in arguments for the justification of copyright, particularly to justify strong authorial rights,[17] there is no consensus on how the details of the theory apply to the acquisition of intellectual property. In such circumstances any application of Locke's theory of property to copyright works will necessarily be somewhat speculative. This thesis describes attempts to extend Locke's views to intangible property as 'Lockean' to maintain a conceptual distinction from Locke's theory. This definition of Lockean is compatible

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[10] Locke (n 1) § 27, Cook at 134.

[11] Ibid § 32, Cook at 136.

[12] Ibid § 28, Cook at 134.

[13] Ibid § 29, Cook at 135.

[14] Ibid § 30, Cook at 135.

[15] Note however the argument by Zemer that Locke did not necessarily exclude intellectual expression from his meaning of property in the second treatise: Lior Zemer, 'The Making of a New Copyright Lockean' 29(3) *Harvard Journal of Law and Public Policy* 891, 896, 907.

[16] See Justin Hughes, 'Locke's 1964 Memorandum (and More Incomplete Copyright Historiographies)' (2010) 27 *Cardozo Arts and Entertainment Law Journal* 555, 557 where the author discusses Locke's other writings and the clues they provide toward his view as to the application of his theory to expressive works.

[17] Seana Shiffrin, 'Lockean Arguments for Private Intellectual Property' [2001] *New Essays in the Legal and Political Theory of Property* 138, 138.

with John Rawls' definition of Lockean as a number of views which 'stipulate various rights of property without the derivation that Locke gives for them'.[18]

II.A. IDENTIFYING A LOCKEAN INTELLECTUAL PROPERTY COMMONS

Before considering the commons from which intellectual property goods are drawn, it is helpful to understand the notion of the commons as applies by Locke to the physical realm as discussed in chapter V of the Second Treatise. Locke believed that the earth was given by God to mankind in common, as evidenced by both natural reason and the scripture.[19] For Locke the commons included all that which 'unassisted nature furnishes us with',[20] including land, 'the fruits of the earth, and the beasts that subsist on it.'[21] Locke's expressly identified commons therefore includes both physical items which already existed (such as land and the seas) and material which continuously comes into existence without the assistance of man (such as wild animals and uncultivated fruit).[22]

Despite God having given the world to mankind in common, Locke identifies that some articles, such as food, cannot be used if they perpetually remain held in common, writing that '[t]he fruit, or venison, which nourishes the wild Indian... must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life'.[23] As a result Locke argues that individual appropriation must be justified, otherwise 'man might starve, notwithstanding the plenty God had given him'.[24] Locke goes further and presents a labour theory of value, suggesting that individual appropriation is necessary as land without labour is 'scarcely worth any thing'.[25]

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[18] John Rawls, *Lectures on the History of Political Philosophy*, ed Samuel Freeman (Harvard University Press, 2007) 121.

[19] Locke (n 1) § 25, Cook at 133.

[20] Ibid § 42, Cook at 141.

[21] Ibid § 32, Cook at 136.

[22] Gordon (n 7) 1558.

[23] Locke (n 1) § 26, Cook at 134; Shiffrin (n 17) 145.

[24] Locke (n 1) § 28, Cook at 134.

[25] Ibid § 43, Cook at 142; Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 191.

Lockean scholars disagree as to the satisfactory meaning of what Locke meant by the world being held by mankind in common. Extrapolating the defining characteristics of the intellectual commons from Locke's description of the material in the physical commons is therefore contested. Wendy Gordon has argued that the central defining characteristics of Locke's commons are 'equality and need', stating 'Everyone has an equal right to use the commons, and everyone needs to use the common for sustenance'.[26] Robert Merges proposes that the defining characteristic of the commons is that 'the resources are available to all in an unowned form, waiting for individual effort to transform them'.[27] He further argues that the key to understanding Locke is less about the nature of the commons and more about 'human prospering through individual appropriation'.[28] Seana Shiffrin argues that greater emphasis should be placed on the fact that the commons is initially owned in common.[29] Others emphasise that the material in the commons is granted by god and that humans have a religious duty to labour.[30]

Because there is controversy about what criteria define Locke's physical commons there is scope for disagreement as to what criteria should define the intellectual commons. The way in which the commons is defined plays a significant role in understanding the extent to which Lockean theory supports propertisation of copyright works and in giving effect to the provisos. This part of the thesis therefore sets out four possible versions of the commons:

1. A commons encompassing all expressive works;
2. A barren commons;
3. A commons constituted by the public domain; and
4. A commons of language, vocabulary, facts and ideas.

Noting that the characteristics of Locke's physical commons are debateable, there are other possible configurations of the intellectual domain. William Fisher has identified seven possible formulations of an intellectual commons, and notes that many of his suggested possibilities could be combined to create even further possibilities.[31] The

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[26] Gordon (n 7) 1559.

[27] Robert Merges, *Justifying Intellectual Property* (Harvard University Press, 2011) 39.

[28] Ibid 38.

[29] Shiffrin (n 17) 143.

[30] Waldron (n 25) 147; James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press, 1980) 95; Locke (n 1) § 32, Cook at 136.

[31] William Fisher, 'Theories of Intellectual Property' in *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 186.

four versions chosen above however demonstrate the range of possible commons and the implications (in terms of the scope of copyright exceptions required) of adopting differing formulations.

II.A.1 A commons encompassing all expressive works

In a version of the Lockean intellectual commons encompassing all expressive works, all possible expressive works pre-exist and authors merely labour to discovery or reveal these works. The difficulty with this conception is that it seems implausible that all expressive works pre-exist in a practically infinite commons, and that authors labour merely to uncover them.[32] Furthermore, a Lockean justification for property law is unlikely to be very persuasive in relation to such a commons, as it does not permit a real role for an individual's labour - the only possible labour engaged in by an author is the non-creative discovery and revelation of the pre-existing expression plucked from the commons.[33] If an individual appropriator merely discovers pre-existing material they have arguably not 'mixed his labour with, and joined to it something that is his own'.[34] While there might be some superficial similarities between the labour involved in discovering a creative work and the labour in collecting acorns, the difference lies in that Locke talks of *gathering* acorns, rather than merely discovering acorns.[35] Shiffrin argues that even though an all encompassing commons might 'implausibly describe intellectual products' it does suggest 'some minimal limitations on the permissible range of intellectual property rights',[36] specifically excluding any broad right to control the production of derivative works.[37]

II.A.2 A barren commons

At the other extreme, it is possible to imagine an empty or barrens commons. In such a characterisation of the commons all expressive works are formed entirely by authors who do not draw upon commonly held material for their production.[38] Such an understanding of the commons is however not very *Lockean*, as it sidelines the role of commonly held resources and the Lockean provisos, emphasising only an individual's labour. Indeed, with its focus entirely on the author, such an approach arguably has

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[32] Shiffrin (n 17) 160.

[33] Ibid 159.

[34] Locke (n 1) § 27, Cook at 134.

[35] Ibid § 28, Cook at 134.

[36] Shiffrin (n 17) 160.

[37] Ibid.

[38] Ibid 164.

more similarities with Kantian or Hegelian property theories than those of Locke (and is vulnerable to the same criticisms directed toward those theories). The version of authorship and creativity suggested by this conception of the Lockean commons arguably does not correspond to the reality of the process of production of expressive works, as they are at least in small part built upon materials drawn from the author's society and the works of other authors.[39]

II.A.3. The Public Domain as an intellectual commons

Gordon has argued that the most obvious component to the intellectual commons is the public domain,[40] which is understood by her to encompass abandoned works, works for which protection has expired and works which were never entitled to protection.[41] Merges has similarly argued that this conception of the Lockean copyright commons 'is obvious at the intuitive level'.[42]

An approach which conflates a Lockean commons with the public domain has however been criticised, on the basis that the material in the public domain is non-rivalrous whereas Locke's commons is not; and that the public domain as understood in positive law contains material created by human labour, which was previously subject to property claims which have since expired.[43]

II.A.3(a) Challenges of a public domain Lockean commons - Non-rivalry of the public domain

A non-rivalrous good is one which can be simultaneously consumed or utilised by more than one person at the same time, without each person interfering with the other's access to it.[44] The material in Locke's physical commons is rivalrous. For example, if I consume an apple gathered from the commons you are unable to consume that same apple. In contrast, a story from the public domain can be read (or

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[39] Yen (n 3) 554; William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (The Belknap Press of Harvard University Press, 2003) 66; Edwin Hettinger, 'Justifying Intellectual Property' (1989) 18(1) *Philosophy and Public Affairs* 31, 38.

[40] Gordon (n 7) 1559.

[41] Ibid.

[42] Merges (n 27) 35.

[43] Damstedt (n 3) 1192.

[44] Carys Craig, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' (2002) 28 *Queen's L.J* 1, 22; Merges (n 27) 37.

laboured upon) by many people at the same time, without reducing the amount of the public domain which is concurrently available for others to use.

Merges argues that the non-rivalrous nature of the public domain is irrelevant to the task of defining the commons. He instead focuses on the importance of labour in creating valuable intellectual property goods, arguing that 'Locke's theory is less about the nature of the objects appropriated - whether they are tangible and rivalrous, or intangible and non-rivalrous - and more about human prospering through individual appropriation.'[45] The flavour of Merges defence against the non-rivalry argument is utilitarian, with a focus on incentives (providing property rights) and consequences (the achievement of human flourishing).[46]

For Merges, the removal of material from the public domain cannot occur in a physical sense, as the public domain is generally non-rival, and instead removal only occurs as a 'necessary convention or shared understanding'.[47] It is not clear how such a convention or shared understanding would arise in the state of nature. Merges also blurs the distinction between the non-rivalrous public domain from which material is appropriated and the (also) non-rivalrous nature of the end product of man's labour as applied to the commons, being the expressive work. While it might be necessary on utilitarian grounds for the copyright work to be privately owned even though it is non-rivalrous, the argument does not establish that the public domain commons material should be privately owned either before or after it has been laboured upon.

It seems unimportant to Gordon and Merges argument whether or not material can be removed from the commons, other than if material can be removed from the commons there is a closer analogy between Locke's theory and Lockean appropriation of intangibles. Shiffrin suggests that the difficulty of this analogy between Locke's commons and the public domain shows that 'no amount of adjustment can make Locke fit the realities of intellectual property'.[48]

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[45] Merges (n 27) 38.

[46] Cf ibid 320 where Merges distinguishes his approach from utilitarianism as it involves individual rights and does not 'adhere to a calculus of preferences'.

[47] Ibid 39.

[48] Shiffrin (n 17) 156; Merges (n 27) 320.

II.3.A(b) Challenges of a public domain Lockean commons - Locke and time limited property rights

The second difficulty of treating the public domain as the copyright commons is that Locke's physical commons consisted of material provided by God in the state of nature, whereas the public domain includes material 'created by human labour... previously subject to ownership claims that have lapsed or expired'.[49]

Merges' response to this difficulty is unsatisfactory. He claims that 'material that was formerly covered by an IP right has much the same status as unowned resources in Locke's state of nature. Both constitute a commons. The public domain, like the state of nature, is available for all to draw on. *No one has a superior claim to it*, as compared to anyone else'.[50] Where material in the public domain was once propertised (and then abandoned or past its legislative period of copyright protection such that it enters the public domain), that work's creator had, at least at one point in time, a superior property claim over that work than the community as a whole.

In order for Merges' argument to be coherent, it is necessary for Lockean property rights to be somehow temporally limited, so that expressive works can eventually form part of the public domain from which future works can be created. Robert Nozick has suggested that a time limited property right for patents might be mandated by the sufficiency proviso.[51] Nozick reasoned that in order to satisfy the sufficiency proviso (discussed in further detail in part III below), Lockean property rights in patents should extend only for the hypothetical length of time it would have taken for the independent discovery of the patented invention, otherwise the grant of property in the patent would not leave enough and as good in the commons for independent future inventors.[52] The difficulty of applying Nozick's reasoning to copyright works is that there is a much lower possibility of independent creation of expressive copyright works as compared to independent invention or discovery of material disclosed in a patent.[53]

An alternative argument has been made that Locke intended that property rights be at least somewhat temporally limited, based on an interpretation of his discussion of

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[49] Merges (n 27) 37.

[50] Ibid 38–39 Emphasis added.

[51] Nozick (n 6) 182.

[52] Ibid.

[53] See for a description of the difficulties of independent creation Jorg Luis Borges, 'Pierre Menard Author of the Quixote' in *Fictions* (Penguin, 2000).

inheritance in the first treatise (I. 89-90).[54] Gopal Sreenivasan argues that for Locke there was no natural right to acquire a gift or bequest, and that the Lockean right of inheritance is limited to dependent children, for the period of their dependency.[55] As a result the duration of Lockean property rights in expressive works should be limited to a maximum of the life of the author, with the possibility of extending that duration for the period that the author's children remained dependent. Sreenivasan's interpretation of Locke's theory of property is however contested as it applies to inheritance.[56]

II.A.4 A commons of language, vocabulary, facts and ideas

The final version of the commons to be discussed is a commons made up of some combination of language, vocabulary, facts and ideas.[57] Such a commons shares similar criticisms of a commons made up of the public domain, in that the material in a commons of ideas is also non-rivalrous.[58] As discussed above, there may be no real justification for permitting private appropriation of material from such a commons (even if the end product expression which has drawn on the commons is entitled to property rights).

Such a commons of ideas does however differ from a public domain commons in that there is no need to provide an argument for time limited property rights and material reverting to the commons. This is because propertising expression does not prevent others drawing upon the ideas underlying the expression, at least where the Lockean property system incorporates an idea-expression dichotomy.

II.B. THE CLEAREST LOCKEAN INTELLECTUAL PROPERTY COMMONS

In the absence of any compelling criteria to identify Locke's physical commons, it is difficult to identify a coherent and reasoned argument for which version of the intellectual commons best represents Locke's own thoughts or is the most compatible with his theory. Some tentative conclusions can however be drawn at this early stage.

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[54] Fisher (n 31) 187.

[55] Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford University Press, 1995) 110–111.

[56] See Waldron (n 25) 241 for a further discussion of rights of inheritance.

[57] Hereafter referring to this commons as a 'commons of ideas'.

[58] Hughes (n 7) 315.

If the commons consists of public domain materials, a Lockean account of the legitimacy of property rights in expression must somehow be able to explain temporally limited rights. A barren or all-encompassing commons might be justified, but not on a Lockean basis. A commons of ideas is less problematic and accords with usual conceptions of the idea-expression dichotomy as understood in western copyright law.

III. THE PROVISOS AND COPYRIGHT

Locke's account of the justice of private appropriation by labour requires labourers to abide by a number of provisos. In chapter five of his Second Treatise Locke sketched out two conditions on private appropriation - that after such appropriation there must be 'enough, and as good, left in the common for others'[59] and that an individual must not appropriate more than he or she 'can make use of to any advantage of life before it spoils'.[60] These provisos are respectively described as the sufficiency proviso and the waste proviso. In addition, a number of commentators argue that Locke's theory is underpinned by a charity requirement derived from the first treatise.[61]

This part of the thesis examines the textual basis for the provisos and their application to Locke's physical commons. It is interesting to note that scholars examining Locke's theory as applied to physical property tend to place much greater significance on the sufficiency proviso whereas scholars attempting to apply a Lockean approach to intangible intellectual property tend to devote a greater portion of their analysis to the waste proviso.

III.A SUFFICIENCY PROVISO AND COPYRIGHT

The sufficiency proviso requires that in order for an appropriation to be legitimate the labourer must leave 'enough, and as good' in the commons for others.[62] There are a number of competing interpretations of the role of this proviso, each with a

[59] Locke (n 1) § 27, Cook at 134.

[60] Ibid § 31, Cook at 136.

[61] See most notably Waldron (n 25) 139.

[62] Locke (n 1) § 27, Cook at 134.

different implication for the scope of copyright exceptions required for legitimate Lockean appropriation.

Nozick's suggestion that the sufficiency proviso requires a time limited property right is discussed above in relation to the public domain as an intellectual commons. For Nozick, the proviso also requires an investigation into whether the appropriation of an unowned object 'worsens the situation of others'.[63] He suggests that the appropriation 'might actually improve the situation of others, counterbalancing their loss'.[64] Justin Hughes suggests that appropriations will tend to improve the situation of others where one person's expression 'expand[s] the field of ideas' available for others to labour upon and create expressive works.[65]

Jeremy Waldron has argued that the sufficiency proviso is not an actual requirement of legitimate appropriation, as 'the textual evidence in favour of interpreting sufficiency as a restriction is mainly implicit and indirect',[66] and it appears in Locke's writing merely as an empirical claim as to the effect of the operation of the waste proviso: 'enough and as good left for other is what happens when a small number of people appropriate land, each by his own efforts, to satisfy simple and uniform needs'.[67] This interpretation is however contested by a number of scholars.[68] As applied to intellectual property it has even been argued that the sufficiency proviso is always met. This argument is summarised by Caterina Sganga as 'creative works do not exist before their expression, once generated they enrich the public domain instead of impoverishing it, hence their appropriation is always complaint with the "enough and as good" condition'.[69]

Gordon has argued that the sufficiency proviso might prevent a creator who has created a work of high cultural significance from withdrawing that work from circulation.[70] She reasons that some expressive works might become so much a part of a person's identity that 'if I cannot use them, I feel I am cut off from part of

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[63] Nozick (n 6) 175; Note that this is a reformulation of Locke's proviso - see Hettinger (n 39) 44.

[64] Nozick (n 6) 175.

[65] Hughes (n 7) 315.

[66] Waldron (n 25) 210.

[67] Ibid 211.

[68] See discussion in Merges (n 27) 50–51.

[69] Caterina Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (Edward Elgar publishing, 2018) 36; Compare however Merges (n 27) 53.

[70] Gordon (n 7) 1567.

myself,[71] and that 'if they are forbidden to use the creation... all they will have to work from will be the now devalued common'.[72] Gordon gives examples of restrictions on the use of the word 'Olympics'[73] or use of Walt Disney's Mickey Mouse character.[74] Gordon's approach has been extended by Merges, who has attempted to 'add the labour of users and consumers [who build on canonical works] into the property rights analysis'.[75] These approaches favour the introduction of a copyright exception permitting users to use culturally significant works, even against the wishes of the work's creator.

Gordon's analysis implies that exceptions to property rights in expressive works should exist where the work has reached some minimum level of cultural saturation or importance. It is unclear in practice how such a property right could exist in the state of nature, as there is no means of determining when the work has become sufficiently important to lose property protection. From an incentive-based perspective of copyright, Gordon's approach would also have the perverse effect of denying property right incentives to the most valuable and successful works.

III.B. WASTE PROVISO AND COPYRIGHT

The Lockean waste proviso limits the extent to which a person may appropriate physical property to '[a]s much as any one can make use of to any advantage of life before it spoils'.[76] In Chapter V Locke gives examples of waste which would run afoul of the proviso, including permitting fruit to perish[77] and leaving land uncultivated.[78] The waste proviso does not create a positive duty for individuals to prevent waste, rather the consequences of a breach of the waste prohibition 'is the loss of exclusionary property rights in the good'.[79] In the event that an individual had

[71] Ibid 1569.

[72] Ibid 1570.

[73] Ibid 1583.

[74] Ibid 1602.

[75] Merges (n 27) 54.

[76] Locke (n 1) § 31, Cook at 136.

[77] Ibid § 38, Cook at 140.

[78] Ibid § 37, Cook at 139.

[79] Damstedt (n 3) 1195.

acquired more goods than he or she could use before they spoilt, those goods 'might be the possession of any other'.[80]

III.B.1 Is the waste proviso a binding Lockean proviso?

Nozick queries whether the waste proviso has an independent operation from the sufficiency proviso, as where there is 'enough and as good left in the commons for others' any waste of resources by one person will not impact upon the ability for others to full appropriate their share from the commons. In such circumstances Nozick queries whether the no waste condition will be superfluous.[81] Some support for Nozick's approach can be found in Locke's text, where he states that a man who gathered apples was only to ensure that 'he used them before they spoiled, else he took more than his share, and robbed others'.[82]

Nozick's reasoning is challenged by other Lockean scholars who argue that the proviso has a distinct moral justification from that of the sufficiency proviso. Alan Ryan,[83] Benjamin Damstedt[84] and Lior Zemer[85] each argue that the no-waste proviso is morally justified by Locke. Locke stated that '[n]othing was made by God for man to spoil or destroy',[86] a statement that has independent moral force. Ryan argues that under Locke's theory 'a man who gathers apples and lets them rot has wasted his efforts, his behaviour is therefore *foolish*'[87] and that for Locke this wasted effort displays ingratitude to God. The waste proviso therefore acts with moral force to constrain behaviour, regardless of whether enough remains in the commons for others.[88]

It is unclear whether the moral justification of the waste proviso remains compelling in a secular interpretation of Locke, as the strongest justifications for the proviso are derived from religious proscriptions. One possible non-theological justification for the waste proviso holds that that 'reason' requires men to make use of the commons

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[80] Locke (n 1) § 38, Cook at 140.

[81] Nozick (n 6) 175.

[82] Locke (n 1) § 46, Cook at 144.

[83] Ryan (n 7) 36.

[84] Damstedt (n 3) 1194.

[85] Zemer (n 15) 921.

[86] Locke (n 1) § 31, Cook at 136.

[87] Ryan (n 7) 36–37.

[88] Ibid 37.

'to the *best* advantage of life, and convenience'.[89] Permitting waste would be a sub-optimal use of labour, and thus a use of the commons which was not directed to the *best* advantage.[90] An argument might also be made that there is a secular natural law duty to labour,[91] and that if the product of labour spoilt it would be a waste of labour and therefore a violation of the natural duty. The balance of this chapter will proceed to analyse waste on the basis that it forms a binding proviso even on a secular Lockean approach, as even if not required, such an approach is at least not inconsistent with a secular Lockean theory.[92]

III.B.2. Does the waste proviso continue to apply once society moves out of the state of nature?

The waste proviso has been described as the 'ugly step-sister' of the sufficiency proviso due to the speed at which it is said to be abandoned by Locke when society moves out of the state of nature and into a money economy.[93] Locke suggests that if individuals can barter or sell excess perishable goods for durable items such as diamonds[94] or money[95] they are able to avoid the waste of their perishable goods. Despite the suggestion that Locke abandons the waste proviso, in a society with currency a breach of the proviso will only be avoided where someone actually exchanges money for the perishable goods – 'If I hoard and let apples rot because I refuse to sell them to someone on the grounds that they are offering insufficient money in exchange, I have presumably still violated the proviso'.[96] Accordingly, it is argued that the proviso continues to operate after the introduction of money, as while money can act to avoid specific instances of waste, it does not prevent waste occurring at all.

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[89] Locke (n 1) § 26, Cook at 134 Emphasis added.

[90] Gordon Hull, 'Clearing the Rubbish: Locke, the Waste Proviso, and the Moral Justification of Intellectual Property' (2009) 23(1) *Public Affairs Quarterly* 67, 68.

[91] Waldron (n 25) 147.

[92] See ibid 189 where the author takes a similar approach to the inclusion of the charity proviso.

[93] Hughes (n 7) 325.

[94] Locke (n 1) § 46, Cook at 144.

[95] Ibid § 47, Cook at 144.

[96] Hull (n 90) 71.

III.B.3. Applying the waste proviso to a physical commons

Drawing on Locke's example of the waste which occurs where collected fruit rots in the possession of a man before it can be eaten,[97] Hughes identifies two ways in which the perishable tangible goods such as fruit can be wasted:

> 1) Rotting fruit is no longer available for the present use of others in society who do not own the fruit (described as 'waste in a social context'); and
>
> 2) The fruit is no longer available for the future potential use of its owner (described as 'waste for the individual organism').[98]

This model of waste invites consideration of several dimensions of waste (present and future, social and individual) to determine if Lockean waste has occurred.[99] Carys Craig has argued that it is unclear from Hughes' account whether the waste proviso will be violated if only one form of waste occurs, or whether a violation of the proviso requires both waste in a social context and waste for the individual.[100]

Utilising this model, Hughes shows that Nozick's dismissal of the waste proviso (that it is irrelevant if the sufficiency proviso is satisfied) applies only to 'waste in a social context', and fails to account for waste for the individual.[101] In response to Hughes it might be argued that (at least for Nozick), waste for an individual is not a relevant harm to be avoided, as the sufficiency proviso will still be met and that the broader societal interests will not be harmed. Ultimately the outcome of this argument turns on whether waste is understood as having a moral dimension.

III.B.4 Applying the waste proviso to an intangible commons

A number of Lockean intellectual property theorists have proposed interpretations of the waste proviso and applied them to the intangible commons, including the view that waste occurs where there is no productive use at all,[102] that waste represents a loss of value,[103] or a loss of all possible uses of a work.[104] This section examines each

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[97] Locke (n 1) § 37, Cook at 139.

[98] Hughes (n 7) 327.

[99] Craig (n 44) 30.

[100] Ibid 31.

[101] Hughes (n 7) 327.

[102] Merges (n 27) 57.

[103] Craig (n 44) 31.

[104] Hull (n 90) 80.

of those formulations of the waste provisos and details the significance of each version of the proviso for the scope of copyright exceptions.

III.B.4(a) Waste where no productive use at all

Merges offers a restricted vision of waste that is firmly focused on waste to the individual creator (as distinct from Hughes' account of waste in a social context). Merges argues Lockean waste occurs only where there has been 'no productive use at all'.[105] In relation to intellectual property goods, Merges argues Lockean waste occurs 'only [if] someone... never embodies [the work] in any tangible medium at all, or who embodies a rough version of [an invention] in a single prototype and just lets it sit somewhere, unused'.[106] Merges understands waste to have a temporal aspect, whereby an intellectual property good may have value to an owner 'because it may preserve the possibility of future development',[107] or alternatively may act as a 'buffer zone' to prevent competitive incursion from another intellectual property good in the initial good's market.[108] This temporal aspect makes this aspect of Merges version of the Lockean waste proviso indeterminate to apply in practice. If value exists merely by holding an expressive work which has a possibility of future exploitation (however remote), then it will not be possible to identify in advance occasions where there will never be a productive use of a good. Accordingly, Merges view of the waste proviso as applied to intellectual property goods does not provide any significant limitations on property rights in practice.[109]

Merges does however concede that the design of legal rules relating to the breadth of intellectual property rights might implicate the waste proviso.[110] To the extent that statutory copyright laws provide creators with a right to control derivative works, they may grant rights to variants of the original embodiment that the original creator never intends to develop nor which act as a buffer zone to protect the creator's original work. In such circumstances Merges suggests the waste proviso might be invoked to limit the breadth of the derivative work right. The difficulty inherent in this approach arises in determining in advance occasions where a creator intends to develop a

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[105] Merges (n 27) 57.

[106] Ibid 58.

[107] Ibid 60.

[108] Ibid.

[109] See ibid 333 where Merges states 'I thus implicitly reject the view that the waste proviso is key to applying Locke to IP'.

[110] Ibid 58.

derivative work at some future time. Merges does not however extend his analysis to explicitly distinguish between legitimate derivative rights and when such derivative rights would constitute waste. Alternatively, understanding the waste proviso as being concerned with derivative works it is possible instead of copyright exceptions such as quotation as a means of ensuring that a work can be reused in a productive manner without the permission of the copyright owner.

Hughes similarly argues that waste of an expressive work will only occur where there has been no productive use at all. He argues that in the case of intangible expressive works waste for the individual creator cannot occur as 'the act of consumption [of an intangible good such as a story] is inseparable from the act of creation'.[111] In other words, there will always be *some* productive use of an expressive work in the form of the value enjoyed by the author from the mere creation of that work.

This argument might be rejected on the grounds that Locke was concerned to ensure the use of the commons to humankind's *best* advantage, not merely to the level of advantage to which an individual might be satisfied.[112] Hughes' argument is also challenged by Craig, who argues that the value of all expression is inherently social, and that the only economic value an individual creator obtains is derived and dependent on the work's social purpose of communication and development.[113] Craig goes on to suggest that the assertion of a property right to prevent dissemination of an expressive work would be wasteful,[114] which suggests that exceptions for socially valuable uses which an author would not permit (such as parody) might be justified as a means of preventing Lockean waste.

III.B.4(b) Waste as the loss of value

Hughes posits that while intangible intellectual property does not perish or rot, the withholding by the creator might lead to a potential decline in the economic value of an idea,[115] but that such a decline in value will be insufficient to trigger the operation of the waste proviso. This view is challenged by Craig, who suggests a number of examples of objects of intellectual property which might be thought to spoil through loss of value, for example '[n]ews stories become old news, literature may become

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[111] Hughes (n 7) 328.

[112] Similar argument made in Damstedt (n 3) 1195.

[113] Craig (n 44) 31.

[114] Ibid 37.

[115] Hughes (n 7) 328.

dated, and criticisms might become irrelevant, out dated or obvious'.[116] Locke's vision of waste arguably encompassed such a loss of value. This argument can be made on the basis that Locke considered that land might go to waste: 'for Locke, a resource that is completely unused over a long period of time can be said to spoil, even if that resource never literally rots away'.[117]

Gordon Hull rejects a superficial or literal interpretation of waste and defines it in a similar manner to Hughes as occurring 'when the product of labor that could improve somebody's life is allowed to irrevocably lose its value before it actually does so'.[118] Hull clarifies that this definition involves three necessary conditions, such that waste occurs where:

> 1) 'there is irrevocably unmet demand;
>
> 2) the goods to satisfy that demand already exist; and
>
> 3) property claims prevent satisfaction of those demands'.[119]

Hull is concerned not with the loss of the object, but the loss of all possible *use* of the object.[120] By focusing on waste caused by property claims, Hull excludes Hughes' second category of waste (waste for the individual organism), as an authors' property entitlements will not prevent them from using the work in any way they desire.[121]

Merges argues that Hull has identified the wrong guiding principle, and that his formulation means that anyone whose 'personal demand for an item led him to value it below the market price- has experienced an episode of Lockean waste.'[122] Extending Hull's analysis to intangible goods (at least to tangible goods without a physical embodiment) is also problematic. Where intellectual property goods are non-rivalrous and have a zero marginal cost of production it is possible to imagine an infinite supply of such goods. Following Hull's reasoning, condition two will never form a restraint in relation to the waste of such goods - the waste proviso will therefore hold only where demand is completely satisfied. If Hull's version of the waste argument is correct, then providing creators of intellectual property goods with

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[116] Craig (n 44) 30.

[117] Merges (n 27) 331.

[118] Hull (n 90) 79.

[119] Ibid.

[120] Ibid 80.

[121] Ibid.

[122] Merges (n 27) 57.

exclusive rights necessarily means that some demand will remain unmet and 'no property regime would be morally legitimate on Lockean grounds'.[123] This is a criticism that Hull does not seek to comprehensively answer.[124] Edwin Hettinger similarly identifies waste unavoidably arising due to the non-rivalrous nature of intellectual property, and states a 'requirement prohibiting waste can never be completely met by intellectual property'.[125]

III.B.5 Waste and the role of exceptions

As discussed above, on an interpretation of waste which holds that there has been waste only where there is no productive use of the expressive work at all, the waste proviso will never provide a real restraint on intellectual property rights, other than perhaps requiring care to be given in determining the scope of rights to control derivative works. In contrast, where any loss of value triggers the waste proviso, no property rights in intangible products can be justified.

Damstedt argues that if the non-rivalrous nature of intellectual property goods gives rise to waste, a property regime for expressive works should at least attempt to minimise that waste. Damstedt describes a fair use right that permits '[a]ll those persons who value the good above zero but below the laborer's price can justifiably copy the good without reimbursing the laborer' as one means of minimising waste.[126] Damstedt also considers the extent to which price discrimination might act to limit the waste inherent in setting a non-zero price for non-rivalrous goods.[127] To the extent to which the seller can price the intangible good at a price for each buyer equal to that buyer's valuation of the good it will be possible to prevent a violation of the waste proviso.[128] Following Damstedt's reasoning, fair dealings exceptions might minimise waste by providing uncompensated use of the work in circumstances where the user might not be able to afford access.

As discussed in chapters 1 and 2, from a doctrinal perspective or from a Hohfeldian perspective there is no duty on a copyright owner to make a work available, or to make it available at a reasonable price. It might be argued that a Lockean waste

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[123] Hull (n 90) 86.

[124] See ibid.

[125] Hettinger (n 39) 45.

[126] Damstedt (n 3) 1201.

[127] Ibid 1203.

[128] Ibid 1204.

proviso could create obligations on copyright owners to ensure that access to their work is not charged at a rate which makes access impossible. This may provide some limited theoretical support for attempts to frame copyright exceptions as user rights, as it provides a theoretical pathway to imposing access duties on copyright owners.

III.C. CHARITY PROVISO AND COPYRIGHT

A number of Lockean property scholars have suggested that a charity requirements exists within Locke's account of property,[129] to the effect that '...the destitute have title to the goods they need to survive, even when those goods are legitimately held by others'.[130] This charity requirement is not explicitly expressed in the text of Chapter V of Locke's *Second Treatise*,[131] but is said to arise from other statements made by Locke in both the *First* and *Second Treatise*.[132] Others have argued that the requirement is manifested within the sufficiency proviso and that no distinct charitable requirement exists in Locke's property theory.[133] Some interpretations conceptualise the charity requirement as a right to labour for subsistence.[134]

One difficulty undermining the argument for a separate Lockean charitable duty is that its clearest elaboration in the *Second Treatise* is expressed by Locke in negative terms.[135] Locke states that man, after ensuring his own preservation, ought to preserve the rest of mankind 'and may not... take away, or impair the life, or what tends to the preservation of the life, the liberty, health limb or goods of another'.[136] While the obligation is expressed positively in the *First Treatise* – 'As Justice gives every Man a Title to the product of his honest industry... so charity gives every Man a Title to so much out of another's Plenty, as will keep him from extreme want, where he has no

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[129] See most notably Waldron (n 25) 139.

[130] Merges (n 27) 63.

[131] Waldron (n 25) 147.

[132] See Robert Lamb and Benjamin Thompson, 'The Meaning of Charity in Locke's Political Thought' (2009) 8 *European Journal of Political Theory* 229, 231 onwards for an examination of the passages in Locke's treatises in which a charitable obligation might arise.

[133] Karl Widerquist, 'Lockean Theories of Property: Justifications for Unilateral Appropriation' (2010) 2(1) *Public Reason* 3, 8.

[134] Sreenivasan (n 55) 103.

[135] Waldron (n 25) 146; Lamb and Thompson (n 132) 232.

[136] Locke (n 1) § 6, Cook at 124.

means to subsist otherwise',[137] the obligation does not clearly specify how the charity claim is secured against the goods of others,[138] or how in particular charitable claims should be resolved as against claims grounded in 'justice'.

For the purpose of this thesis it is sufficient to note that such a proviso might exist within Locke's property theory (or is at least 'consistent and not unattractive'[139]), but that it will have limited effect on a Lockean *intellectual* property theory focusing on copyright.[140] A lack of access to copyright protected works is unlikely to imperil the survival or sustenance of the destitute in the same way as a lack of food, and is therefore unlikely to support about a viable charity claim.[141] Retaining the proviso within a Lockean intellectual property theory does however serve to highlight that Locke did not straightforwardly support strong property rights.

IV. IMPLICATIONS OF LOCKE'S THEORY FOR COPYRIGHT EXCEPTIONS

As the discussion above has made clear, in order for a legitimate property entitlement to arise under Locke's theory it is necessary for the sufficiency, waste and charity provisos to be met.[142] These provisos provide an important counterweight to those who would blithely treat Locke's theories as justifying strong intellectual property rights in expression without meaningful limitation. This concluding section of the chapter argues that copyright limitations and exceptions fulfil a role in copyright doctrine in implementing those provisos. The challenge is that Locke's theory is not written specifically for copyright law, and the theory's general degree of indeterminacy makes it difficult to identify precisely how the provisos might operate by analogy in connection with copyright law. While attention has been given by academics to considering the extent to which copyright law itself might be justified by Locke's theory, much less attention has been given to the extent to which doctrinal rules such

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[137] John Locke, *Two Treatises of Government, First Treatise*, ed Thomas Cook (Hafner Pub. Co., 1947) § 42, Cook at 34 ('*First Treatise*').

[138] Merges (n 27) 63.

[139] Waldron (n 25) 147.

[140] For a discussion of how a charitable proviso might impact upon other intellectual property rights, see Merges (n 27) 64.

[141] Ibid.

[142] Gordon (n 7) 1606.

as copyright exceptions may play an explicit part in satisfying Lockean provisos.[143] This section of the chapter is therefore somewhat speculative.[144] It is argued here that justifying property entitlements under Locke's theory can only be considered legitimate when communal interests are taken into account in some manner.

In a sense, the Lockean provisos can be conceptualised as 'resolving the conflicts that can arise between a labourer's property claims and the public's entitlements'[145] and in an analogous way copyright exceptions and limitations act to resolve conflicts between the property claims of copyright owners and broader public interests in the reuse and reproduction of a protected work. As discussed above, depending on the conception of the intellectual commons some copyright term limits may be required as Nozick has argued that at least for patents time limited property rights may be mandated by the sufficiency proviso. Alternatively, a common consisting of ideas may require copyright doctrine to include a limitation analogous to the idea-expression dichotomy, again in order to meet the sufficiency proviso.[146]

Both Gordon and Merges have argued that the sufficiency proviso places limitations on the rights of owners of canonical works, potentially permitting reuse exceptions such as parody even against the wishes of a copyright owner.[147] Gordon goes further and suggests that the sufficiency proviso may require the existence of a quotation exception.[148] The scope of exceptions and derivative rights are potentially implicated by the waste proviso,[149] with Craig suggesting that the assertion of a property right to

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[143] See for example Sganga (n 69) 37 arguing that the 'enough and as good condition would support 'broader-ranging limitations in case of productive and transformative uses'.

[144] Inspiration for this speculative approach is taken from Daniel Gervais, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' (2008) 11(4) *Vanderbilt Journal of Entertainment and Technology Law* 841, 844 suggesting exceptions may be consistent with Locke's theory and arguing that if he 'may be allowed a few analytical shortcuts, one could even say that natural rights theory supports reuse. After all, John Locke based his theory of property on transformative labor. Locke was referring to what one takes from "nature," of course, and not from other authors.'

[145] Gordon (n 7) 1562.

[146] Ibid 1574.

[147] Merges (n 27) 54; Gordon (n 7) 1567.

[148] Gordon (n 7) 1568 writing 'Or suppose a politician gives a speech that made promises upon which the public relies; if the promises turn out unfulfilled, it may be necessary to quote the promises in order to mobilize the appropriate political reaction. If quotation is forbidden, the speech-however consensually listened to in the first instance-may do the public irremediable harm. More generally, if someone tells lies, it may be necessary to quote those lies to rebut them more effectively and to protect oneself and one's friends'.

[149] Merges (n 27) 58; Damstedt (n 3) 1201.

prevent dissemination of a work would constitute waste[150] – suggesting here also a role for copyright exceptions. Overbroad copyright entitlements granted to copyright owners may also lead to a degree of waste of the economic value of a work. Finally, Merges also makes some tentative comments in relation to the potential for the charity proviso to operate in circumstances of cultural destitution to allow the reproduction of the works of others.[151]

These restrictions on the breadth of Lockean property entitlements are considered again in chapter 7, which considers the extent to which the rationales for intellectual property law and contract theory interact in relation to the contractual override of copyright exceptions.

[150] Craig (n 44) 37.

[151] Merges (n 27) 62–63.

5. THE LAW AND ECONOMICS UNDERSTANDING OF COPYRIGHT EXCEPTIONS

I. INTRODUCTION

This chapter examines the way in which the field of law and economics understands the role of copyright exceptions. To do so, it is first necessary to understand the way in which the law and economics literature has understood the role of copyright, as justifications for exceptions fit within that broader framework.[1] Part II therefore commences with a critical explanation of the public goods analysis of copyright law. This section of the chapter explains the incentive theory of copyright law, which is the dominant law and economics based understanding of the role of copyright.[2] The key paradox inherent in the incentive theory rationale is that property rights or other incentives are required in order to encourage authors to create new works, but that once created, economic efficiency requires that works be provided more broadly to consumers, including those who are unable to pay for the consumption of the work. Drawing upon this paradox caused by the public good nature of copyright expression, the chapter then turns in part III to an early, leading economic model on the optimal structure of copyright law developed by William Landes and Richard Posner. This model is considered in the thesis as it addresses the impact of raising copyright protection on the costs of creating new works and as it remains one of the

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[1] Indeed, Edmund Kitch has suggested that focus on a single policy variable (such as fair use or copyright duration) is a persistent error in the economic understanding of IP, and that a holistic understanding is necessary. It should however be noted that a focus on a single variable may be justified where law reform bodies are investigating single policy issues Edmund Kitch, 'Elementary and Persistent Errors in the Economic Analysis of Intellectual Property' 53(6) *Vanderbilt Law Review* 1727, 1735.

[2] Note that the incentive theory of copyright protection is not the only theoretical account for intellectual property rights. See for example the strong form propertisation argument: Frank Easterbrook, 'Intellectual Property Is Still Property' (1990) 13 *Harv. J. L. & Pub. Pol'y* 108, 118 Here Easterbrook (who also wrote the judgment in ProCD, discussed in chapter 2) argues that 'except in the rarest case, we should treat intellectual and physical property identically in the law'.

most comprehensive and widely cited accounts of the optimal structure of copyright law, in contrast to other law and economics insights which have been directed toward understanding specific aspects of copyright doctrine.

Alongside this model, the chapter also considers the work of Wendy Gordon in Part IV, who has developed an account of the role of exceptions focused on their ability to allow productive use of works, even in the face of disproportionate transaction costs. Gordon's work has been chosen as it remains the most influential and widely cited transaction cost analysis of copyright exceptions.

The chapter then makes an original contribution by integrating more recent scholarship on positive externalities in relation to copyright law in Part V, examining how both the Landes and Posner model and Wendy Gordon's account transaction costs can be updated to consider the impact of positive externalities. The positive externality analysis is significant, as it reveals limitations in the traditional economic analysis of copyright, and combines well with the earlier writings of Landes and Posner to advance the understanding of the role of exceptions in copyright theory. This thesis argues that copyright exceptions play a vital role in maximising consumer and producer surplus, and that this goes beyond the role envisaged in a transaction cost model of copyright exceptions. Copyright exceptions represent an integral part of the optimal copyright regime, and retaining fair dealing exceptions is economically efficient,[3] even if transaction costs fall in the digital environment.

The discussion on economic rationales for copyright exceptions is extended in chapter 7, where the thesis considers how such rationales interrelate with the autonomy and economic arguments for freedom of contract. That chapter argues that the justifications for freedom of contract are unable to displace the importance

[3] A legal regime will be economically efficient where 'that allocation of resources... could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before' - see Calabresi, G and Melemad, 'Property Rules, Liability Rules and Inalienability: Another view of the Cathedral' (1972) 85 *Harvard Law Review* 1089, 1094.

of copyright exceptions and that economic arguments do not justify copyright exceptions being vulnerable to contractual override.

II. COPYRIGHT FROM A LAW AND ECONOMICS PERSPECTIVE: THE PUBLIC GOODS PROBLEM

Intellectual property regimes, including copyright, have been an area frequently examined and debated by law and economics scholars.[4] Economic approaches to the understanding of copyright law have developed over the years, from basic insights building upon utilitarian understandings of intellectual property to more modern scholarship addressing the public goods nature of copyright or approaches within the proprietary paradigm.[5] This chapter focuses primarily on public goods analysis of copyright, noting the significant critiques associated with the proprietary model.[6]

Copyright law is of interest to law and economics scholars in part because creative expression exhibits characteristics of so called 'public goods'[7] as expression is said to be non-excludable[8] and non-rivalrous.[9] Economists argue that an unaided market

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[4] For what is recognised as the earliest economic analysis of authorship see Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1(2) *Economica* 167; See Nicola Searle and Martin Brassell, *Economic Approaches to Intellectual Property* (Oxford University Press, First edition, 2016) 4 for a recent overview of economic approaches to copyright law.

[5] Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge, 2013) 11.

[6] see ibid 4 tracing the way the proprietary model of IP developed, in part relating to US academic debate concerning the copyright term extension in 1998.

[7] Richard Posner and William Landes, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325, 326.

[8] A good is excludable if a person who has not paid for the good can be prevented from accessing it. In the absence of copyright law, creative works may be somewhat non-excludable. See George Akerlof et al, 'Brief in Support of Petitioners', Submission *Eldred v Ashcroft* 537 U.S. 186 (2003), No. 01-618, 20 May 2002, 5.

[9] A good is rivalrous if use by one consumer prevents simultaneous use by other consumers. See David Lindsay, *The Law and Economics of Copyright, Contract and Mass Market Licences* (Research Paper, Centre for Copyright Studies Ltd, May 2002) 31, arguing copyright protected works are non-rivalrous.

mechanism may inefficiently under-produce public goods such as creative or informational works. This is because expressive works are expensive to create;[10] but once produced, a creative or informational work should be used by as many users as possible to maximise consumer value. Once created it is 'desirable for many people to have access to the benefits of public goods for free'.[11] A copyright owner may incur both fixed and variable costs in the creation of a work and its reproduction for sale (for instance, variable costs incurred in embodying the intellectual work in a physical information carrier such as a book, and associated distribution and sale costs), but that reproducing the intangible work itself is costless.

In the absence of copyright law, a customer who acquires a copy of a creative work from the author could reproduce it and sell copies himself, competing against the original author. The copier may be able to 'undercut' the price of the original author, as the copier will not be required to pay for the fixed costs of production, merely the costs to replicate the original work of authorship and any variable costs connected with the production of copies. These concern about the ability of a copier to undercut an original author are made more pressing as works are distributed digitally online, which makes reproduction much cheaper and where the marginal cost of digital reproduction is reducing toward nothing. In a competitive market without copyright protection, this competition between the original producers and later copiers will drive the price of the work down.[12] As a result of this lower price in the competitive market the original author may not be able to recover the fixed costs of creating the work.[13] Potential authors will therefore face a

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[10] See e.g. Gillian K Hadfield, 'The Economics of Copyright: An Historical Perspective' (1988) 38 *Copyright Law Symposium (ASCAP)* 1, 14–15 discussing early debates around high fixed costs in the publishing industry.

[11] David W Barnes, 'The Incentives/Access Tradeoff' (2010) 9 *Northwestern Journal of Technology and Intellectual Property* 96, 99.

[12] Where entry to the market is free, this competition will lead to a price for copies that is equal to the copiers' long-run marginal cost of production, which may be higher than the marginal cost of the original producer. See Christian Koboldt, 'Intellectual Property and Optimal Copyright Protection' (1995) 19 *Journal of Cultural Economics* 131, 133.

[13] Some suggest that copyright incentives are unnecessary as many works would be created without payment. See Megan Richardson et al, *The Benefits and Costs of Copyright - an Economic Perspective*

marketplace where they may be unable to charge a price high enough to cover their fixed costs and will therefore lack a financial incentive to create informational or creative works and to enter the market.[14] On the assumption that creators are incentivised by financial rewards, this will mean that fewer works will be created than would be socially optimal.[15]

Copyright laws seek to avoid this problem of underproduction by making copying more expensive and difficult, by providing the author with a property entitlement. This means that original creators are able to raise their prices above the marginal cost of potential copiers, cover their fixed costs of creating the work and have the potential to make sufficient profits to incentivise entry into the market for creative works.

From an economic incentive perspective, the higher prices under a copyright system present a problem. Intangible works are 'non-rival' in consumption, meaning that one consumers' use of a work does not interfere with another's. As a result, maximising efficiency requires anyone who has a positive willingness to pay for use of the work to be able to do so.[16] As stated by Koboldt, 'any attempt to reach an efficient allocation with regard to production and dissemination of information goods by using a market mechanism produces a basic dilemma: the incentives necessary for production necessarily imply suboptimal dissemination'.[17] Optimal copyright protection can be seen as an attempt to balance the welfare losses caused

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(Discussion Paper, Centre for Copyright Studies Ltd, 2000) 7 for a summary of the difficulty with this argument.

[14] Koboldt (n 12) 133.

[15] Note that not all individual authors will be necessarily motivated by the financial rewards associated with selling copies of their expression. For example, as early as 1934, Plant noted that some authors such as scholars and poets would create literature without thought of direct remuneration, and indeed may be willing to pay to have their work published. Note however that the modern law and economics understanding of the incentive function is concerned primarily with incentives required to create an optimal level of copyright protection in the aggregate. See Plant (n 4) 168.

[16] Koboldt (n 12) 134. Indeed, to maximise societal welfare, any consumer who derived some degree of consumer value from experiencing the work should be permitted to do so, even if they lack the resources to pay for access.

[17] Ibid 135.

by underproduction of works against welfare losses caused by under-utilisation of works.[18]

Unfortunately, discourse around economic justifications for copyright often lacks an understanding of the nuance of the scope of that protection. Arguments are often made that the role of copyright law is to balance the interests of authors and consumers, without exploring how the balance should be achieved.[19] Other approaches sometimes focus on maximising the extent to which authors are able to capture the full value of the works that they create, or analyse how the status of copyright as a property right should inform the scope of its protection.[20] These approaches fail to engage with either the public goods nature of copyright, or the considerations around whether intellectual property should be treated in an analogous manner to physical property.[21]

III. COPYRIGHT EXCEPTIONS AND THE INCENTIVE MODEL - MODELLING OPTIMAL COPYRIGHT LAW

A number of law and economics scholars have considered the incentive argument for copyright protection in greater detail, and have attempted to model this dynamic in an attempt to discover the optimal strength of copyright protection. This is a

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[18] While some authors argue that copyright policies may play a role in the distribution of economic benefits, this is not a concern which a welfare maximising approach is concerned with - except where two or more solutions are both Pareto optimal and the choice between solutions might then be made on distributive grounds without loss to societal welfare. See Calabresi and Melamed (n 3), 1115.

[19] See Lindsay (n 9) 7 for a similar approach suggesting that such arguments say nothing about why the objective of copyright law should be to balance owner and user interests or what an appropriate balance should be.

[20] See generally Elkin-Koren and Salzberger (n 5) 4 discussing this issue.

[21] See for example Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, 2001) 3 where the author describes the purpose of copyright as 'to stimulate the production of the widest possible variety of creative goods at the lowest possible cost.'; cited in Jeffrey L Harrison, 'A Positive Externalities Approach to Copyright Law: Theory and Application' (2005) 13(1) *J. Intell. Prop. L.* 1, footnote 17 noting that such an approach is not one explicitly designed to maximise social welfare.

difficult task, with one scholar claiming that 'economists could tell lawyers virtually nothing about the appropriate scope of intellectual property rights'[22] and another describing the approach of proposing an optimal copyright system as intractable.[23] The task of modelling optimal copyright law has also arguably become more difficult with the advent of digital technology, which has made reproduction of copyright protected works less expensive and has combined with the Internet and network technologies to increase the distribution of infringing copies of works.

Relatively few comprehensive models for optimal copyright law explicitly address the role of copyright exceptions, however it has been argued that from the very earliest modelling attempts there was some scope for recognising a role for copyright exceptions in reducing the full exclusionary power of copyright rights.[24]

One of the early modern attempts at modelling copyright law by Ian Novos and Michael Waldman in 1984 found that an increase in copyright protection would increase social welfare by virtue of increased production, but that it was uncertain whether decreasing copyright protection would increase welfare from increased utilisation of works by consumers.[25] Building upon this analysis, in 1989 William Landes and Richard Posner published 'An economic analysis of copyright law'[26] in

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[22] See Barnes (n 11) citing George L. Priest, What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung, (1986) 8 *Res. L. & Econ.* 19, 21.

[23] T Randolph Beard et al, 'Piracy, Imitation, and Optimal Copyright Policy' (2018) 84(3) *Southern Economic Journal* 815, 118 referring to the work of Posner.

[24] Wendy J Gordon, 'The Fair Use Doctrine: Markets, Market Failure and Rights of Use' in Richard Watt (ed), *Handbook on the Economics of Copyright* (Edward Elgar Publishing, 2014) 84; For an interesting economic analysis of the role of copyright exceptions see Mark Rogers, Ray Corrigan and Joshua Tomalin, *The Economic Impact of Consumer Copyright Exceptions* (Literature review, Consumer Focus, 2010) 17 and 30 arguing that the existence of copyright exceptions increases demand for a work, shifting the demand curve.

[25] Ian Novos and Michael Waldman, 'The Effects of Increased Copyright Protection: An Analytic Approach' (1984) 92(2) *Journal of Political Economy* 236, 245 Note however the authors conclusion is in part based on an assumption that consumers would not vary their valuation on the quality of the protected work as copyright protection was increased. The authors suggest that if this requirement was relaxed some consumers might stop purchasing the good entirely.

[26] See Posner and Landes (n 7) 325 Note that material from this article was revised and published in The Economic Structure of Intellectual Property Law. Reference in this paper is made to the later work, although the content and structure of the model are the same.

an attempt to explain the major elements of the copyright doctrine from an economic perspective.[27] The Landes and Posner approach represented a development on previous scholarship as it recognised that increasing the copyright protection available to current authors would lead to an increase in future authors costs of creating new works, as past expression may form an input in the creation of new works.[28] As noted below, Landes and Posner in 2003 subsequently published a paper entitled 'Indefinitely renewable copyright', which advocated for an alternative approach to understanding and structuring optimal copyright law, placing a much greater focus on reducing the current duration of protection as a major policy lever.[29] This chapter focuses on the earlier model, which is more comprehensive, has been further developed by subsequent law and economics scholarship, and which is more realistically implementable in view of the existing international framework for copyright protection which requires countries to provide lengthy minimum copyright terms.[30] The earlier model also has the benefit of considering the extent to which an increase in the level of copyright protection not only increases the incentive to create new works, but also increases the cost for authors of creating new works as previous works will often act as inputs in the creation

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[27] A number of authors have offered criticisms and refinements of the Landes and Posner model. Significant examples include Koboldt, who remodels where copies are assumed to be imperfect substitutes for the original authors work (Koboldt (n 12) 138). Koboldt's assumption that copies are of a lower quality than the authors output is debatable where works are distributed electronically and it is possible to make exact digital reproduction. Koboldt recommends that copyright doctrine be implemented with exceptions to copyright existing to reduce the cost of creation of new works. See also Kitch (n 1) and the idea of copyright owners not facing a downward sloping demand curve; Thomas J Miceli and Richard P Adelstein, 'An Economic Model of Fair Use' (2006) 18(4) *Information Economics and Policy* 359 and the response in Kiho Yoon, 'An Economic Model of Fair Use: Comment' (2008) 20(1) *Information Economics and Policy* 67 in which Yoon considers a multi-stage demand curve and the idea of a quality index distinguishing between copies and originals. The idea of a quality index may however be inappropriate when dealing with digital files.

[28] Gordon, 'The Fair Use Doctrine: Markets, Market Failure and Rights of Use' (n 24) 84.

[29] William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 *University of Chicago Law Review* 471.

[30] See for example minimum term requirements in the Berne Convention for the Protection of Literary and Artistic Works (as Amended on September 28, 1979) Article 7.

process[31] – an insight less explicitly addressed in their more recent scholarship on this topic.

The 1989 analysis by Landes and Posner revealed that the goal of optimal copyright policy was *not* to maximise the number of works created, but it instead discovered that there was a lower optimal point of copyright protection that balanced the number of works created against the welfare benefit or value of each work.[32] The authors found that maximising the number of works created would lead to a reduced level of welfare per work, higher costs of expression and greater administrative and enforcement costs – 'strengthening copyright protection [beyond the optimal level] would increase the incentive to create more works, but would not be with the costs in reduced welfare per work, the higher costs of expression (for works that would have been created anyway at a lower [level of copyright protection], and the greater administrative and enforcement costs'.[33] This analysis by Landes and Posner has parallels to more recent US Supreme Court litigation in the *Golan v Holder* case,[34] where the Court discussed the purpose of the US power to make federal copyright laws as being directed toward incentivising the *dissemination and use* of existing and future material, rather than purely incentivising its creation.[35]

As noted above, the distinction that Landes and Posner made from earlier economic models of copyright is that they were cognisant of the effects of raising copyright protection on the costs of creating new works.[36] This aspect of their analysis model is not always replicated in other more recent law and economic approaches to

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[31] Shinya Kinukawa, 'Exploring a Better Design of Copyright Law' (2017) 14 *Review of Economic Research on Copyright Issues* 55, 56.

[32] Posner and Landes (n 7) 343.

[33] Ibid 83.

[34] See *Golan v. Holder* 565 U.S. 302 (2012) and the discussion of the case in chapter 2.

[35] Ibid 325–6.

[36] See Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Contract* (Kluwer Law International, 2002) 83 noting '[e]conomists therefore generally agree that too much protection will result not only in a decline of consumer welfare per existing work, but also a decline in the production of new works because of the under-utilisation of information inputs by producers'.

modelling optimal copyright protection, and it is why their model has been chosen as a focus in this chapter. Landes and Posner emphasise that the creation of a new work usually requires a borrowing or building upon earlier material, and give the examples of new musical works borrowing chord and tempo changes from earlier works, or new literature reworking folk stories.[37] As a result, the higher the level of copyright protection, the greater the cost (in the form of licence fees) authors will face in borrowing or repurposing such material from earlier authors. They suggest that this would raise the cost of producing new works, which would 'paradoxically, perhaps lower the number of works created'[38], and that one of the fundamental tasks of an economic analysis of copyright law is to 'strike an optimal balance between the effect of copyright protection in encouraging the creation of new works by reducing copyright and its effect in discouraging the creation of new works by raising the cost of creating them'.[39] This is referred to as ensuring that copyright protection is dynamically efficient in the sense that it is concerned with efficiency of the copyright regime in producing an optimal quantity of creative works into the future.

III.A. *The role of copyright exceptions in Landes' and Posner's model of optimal copyright law*

The Landes and Posner economic model does not include a specific variable taking into account the existence and strength of copyright exceptions. Instead their model includes an index of the strength of copyright protection which takes into account 'such things as how alike two works must be before infringement will be found, the elements in a work that are protected, the duration of protection and the efficacy and the cost of enforcement'.[40] The extent of any copyright exceptions is modelled within this index, with the absence of exceptions in a legal system leading to a higher strength of copyright law in contrast to the existence of broad permissive

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[37] William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (The Belknap Press of Harvard University Press, 2003) 67.

[38] Ibid 69.

[39] Ibid.

[40] Ibid 71 Here limitations refer to not just exceptions, but other limits to the strength of copyright protection such as the idea-expression dichotomy.

exceptions permitting more coping leading, to a lower strength copyright law. The scope of copyright exceptions also impacts upon the authors cost of expression, being a function of the level of copyright protection. Here, the greater the range and strength of available copyright exceptions, the lower the cost of authorial expression as new authors will not need to pay to include aspects of earlier works in their creations.[41] Finally, in the model, the number of works created in a society is a function of the author's expected revenue and the authors cost of expression, and therefore is affected by the level of copyright exceptions.[42] Here the existence and scope of copyright exceptions acts in opposing directions; the greater the scope of copyright exceptions the less the authors' cost of expression when creating the work; but the greater the scope and operation of copyright exceptions the fewer the uses of the work the author is able to economically exploit after the work has been created.

In the Landes and Posner model, an expansion in the scope of copyright exceptions leads to a reduction in the strength of copyright protection and a reduction in the authors cost of expression. The effect of these changes on economic welfare is however uncertain and dependant on whether the change increases or decreases the number of works created, the cost of creating the work and the consumer and producer surplus of each work.[43] If copyright law currently provides too much copyright protection, then an expansion of copyright exceptions would lower the cost of expression and increase overall economic welfare.[44]

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[41] Ibid 73.

[42] See ibid 73 as to whether an increase in z (their index of the strength of copyright protection) will increase the number of works created ("N"). Landes and Posner conclude that at very low levels of z, an increase in z will lead to an increase in N because fewer copiers will be able to 'free ride' on the authors expression, whereas at very high level of z an increase in z will reduce the number of works created due to increases in the cost of expression for marginal authors dominating.

[43] Landes and Posner (n 37) 81.

[44] The increase of economic welfare in this situation could occur either as a result of lowered costs of expression, leading to more works being created; or an increase in uncompensated uses by consumers leading to a greater consumer surplus.

An optimal copyright system in accordance with the approach of Landes and Posner could be therefore conceived in two steps, firstly by identifying a system which maximised the incentives for the production of copyright protected work by designing the system to grant authors extensive rights in relation to their copyright works, and then as a second step to modifying the system by utilising exceptions (such as a robust quotation exception) to reduce the strength of copyright protection to the optimal level.

III.B. *Problems with the Landes and Posner model*

Before further developing the Landes and Posner model to take into account more recent scholarship and developments in technology, it is useful to first note existing limitations and problems with their model of copyright. The foundations of the Landes and Posner model were developed in an article in 1989, and the model may have lost a degree of relevance in circumstances where since that time digital technologies and network technologies have advanced significantly, making it significantly cheaper and easier to replicate the work of authors. Many commentators have argued that due to digital reproduction technologies, the costs of copying will tend toward zero and it is instructive to consider how Landes and Posner's model responds as copiers' costs decrease. Landes and Posner assume that the copiers marginal costs increase as both the number of copies and the level of copyright protection increases,[45] but that the author's marginal cost is constant. They argue that if copiers' marginal costs were constant or decreasing then the copiers would be able to price the author out of the market, produce all copies and as a result original works would not be created.[46] Accordingly in the Landes and Posner model, the reduction in copiers' costs in the digital environment does not avoid their increasing marginal costs associated with their costs in avoiding

[45] Landes and Posner (n 37) 71.

[46] Ibid 72.

copyright infringement.[47] This is a significant weakness of their model, and may be one of the factors which led them to develop an alternative law and economics approach to copyright scope, placing a focus on optimising the duration of copyright protection is a key lever in resolving the public good paradox at the heart of copyright law.[48] While that alternative model of copyright is of interest to scholars, the policy prescription arising from their more recent analysis suggests significant reductions in the duration of copyright protection, an approach which is unlikely to be implemented at the doctrinal level, in view of the existing international obligations concerning copyright duration.[49]

It is also worth further considering the extent to which the model remains persuasive in circumstances where a decade later Landes and Posner have developed an alternative approach to understanding optimal copyright law and policy.[50] Their more recent work does not explicitly resile from the conclusions that they reached in 1989. Their recent approach continues to view intellectual property as a public good, and continues to identify that copyright protection imposes a range of social costs, for example stating '…as an institution for promoting economic efficiency, the copyright system seeks to balance the incentive gains from pricing expressive works above marginal cost against the deadweight loss and other costs'.[51] The point of divergence in their more recent work is their approach to balancing the incentives of copyright against the social costs. In the more recent paper, they consider a system whereby the copyright duration was modified, such that there would be a requirement for authors to renew copyright protection on an ongoing basis in order to maintain protection. They argue that under such a system there may indeed be an

[47] Ibid. Arguably this aspect of the assumptions underlying the model may be somewhat circular - it seems strange to set out to model whether or not copyright law is efficient and also include an assumption of increasing marginal costs due to copyright law. Note that other authors have attempted to model copiers with decreasing marginal costs.

[48] Landes and Posner (n 29).

[49] See for example *Berne Convention for the Protection of Literary and Artistic Works* (as Amended on September 28, 1979) Article 7 setting a minimum term of protection under the Convention of the life of the author and 50 years after his death.

[50] Landes and Posner (n 29).

[51] Ibid 481.

increase in the volume of material in the public domain, as they argue that only the most valuable of copyright works would be renewed and that therefore most works would very quickly lose their copyright protected status and be available for reuse.[52] While this new approach is worthy of academic discussion, it is of less relevance to this thesis as it provides relatively little insight into the scope of copyright protection on dimensions other than duration of protection. In particular, there is little discussion of the role that exceptions play in reducing the scope of a property entitlement provided to authors.[53] Additionally, while their proposal is interesting to consider as a thought experiment on optimal copyright protection, it is much less capable of application in practice as their suggestions around registration, renewal and reduction of the copyright term are inconsistent with international law requirements in both the Berne Convention and the TRIPS Agreement.[54]

IV. THE TRANSACTION COST RATIONALE FOR COPYRIGHT EXCEPTIONS

In addition to law and economics scholars who have attempted to model the entire operation of copyright law, academics have used the tools of law and economic analysis to consider specifically the role of copyright exceptions. In an influential 1982 article Wendy Gordon argued that copyright exceptions could be understood as a remedy to market failures caused by high transaction costs.[55] Transaction costs in this account include those discussed in chapter 3, such as the search costs in

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[52] See from ibid 475.

[53] Ibid 484.

[54] See for example *Berne Convention for the Protection of Literary and Artistic Works (as Amended on September 28, 1979)* (n 49) Article 7.

[55] Wendy J Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (1982) 82 *Columbia Law Review* 1600; See Hadfield (n 10) 45 for the links between this approach and the material discussed in the previous chapter, with Hadfield concluding that Gordon's approach 'tracks the complete property aspect of the natural rights rationale, differing most essentially in that it grounds the grant of property rights ultimately in economic analysis rather than in natural rights theory.'

identifying contractual parties, bargaining costs in reaching agreement on the terms of any copyright licence, and enforcement costs associated with the copyright owner ensuring that the licence terms are complied with.[56] Gordon argued that under certain conditions the unaided market will not produce value-maximising voluntary transactions, and that copyright exceptions could be used to remedy that market failure.[57] Some academics read Gordon as suggesting that market failure created by transaction costs is the *only* justified basis for interfering with the allocation of rights set by the market.[58] Gordon does however note that there will be occasions where 'the market cannot be relied upon as a mechanism for facilitating socially desirable transactions',[59] and that this social purpose might justify exceptions, particularly where the public interest in a permitted a use is high and the damage to the owner is small.[60] Gordon's more recent writings also emphasise that there will be inherent limitations on the extent to which market norms can provide suitable criteria for resolving a dispute.[61] While the transaction cost rationale remains the dominant economic justification for copyright exceptions, this thesis argues that copyright exceptions provide economic welfare benefits even where the market has not failed, and that the transaction cost rationale is therefore incomplete.

In 'Fair use as market failure', Gordon argued that a user should have the advantage of a copyright exception where they 'could not appropriately purchase the desired use through the market; transferring control over the use to [the user] would serve the public interest; and the copyright owner's incentives would not be substantially

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[56] See Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (n 55) 1608 including as transaction costs those to 'obtain knowledge, ... to locate all persons affected by a transaction, ... to dicker ... over prices and terms, and ... to maintain an enforcement mechanism to ensure that the bargain is adhered to'.

[57] See also Lindsay (n 9) 45.

[58] Hadfield (n 10) 43.

[59] Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (n 55) 1630.

[60] Ibid 1632.

[61] Wendy J Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' in Niva Elkin-Koren and Neil Netanel (eds), *The Commodification of Information* (Kluwer Law International, 2002) 150–151.

impaired by allowing the user to proceed'.[62] This argument was stated to be both descriptive of the approach taken by the US courts in resolving fair use copyright exception disputes,[63] and also said to be economically efficient and therefore a normative guide to reaching decisions where a fair use defence was raised.[64]

Gordon argued that where transaction costs 'outweigh the net benefits that the parties would otherwise anticipate from a transfer, then the presence of the transaction costs may block an otherwise desirable shift in resource use',[65] and identified three factors which must be present before a court should find a fair use copyright exception applied. Under Gordon's approach, before a Court should make a finding of fair use it should firstly identify that a market failure exists in the sense that the parties have been unable to arrive at mutually agreeable voluntary transfer.[66]

In the second step of the test Gordon asks whether the use is more valuable in the defendants' hands or in the hands of the copyright owner.[67] The second aspect of Gordon's test is more problematic as it arguably never provides a binding limit on fair use. In effect, this aspect of Gordon's test requires the court to enquire whether a market transaction would have taken place between the parties, if not for the presence of transaction costs. Gordon explains that 'if the injury suffered by the plaintiff is small, it is likely that the market price he would have demanded is small, and that the transfer to the defendant would have taken place if there had been no

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[62] Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (n 55) 1627.

[63] " The three-part test proposed here, while not previously articulated in so many words, reveals itself in many of the decisions reached by the courts in the copyright area, and, as will be seen, serves to unify the various factors that courts and the statute have made relevant to fair use determinations." Ibid 1627.

[64] Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (n 55) 1657.

[65] Ibid 1608.

[66] Ibid 1615.

[67] Ibid.

failed market conditions'.[68] However, the incentive theory of copyright holds that once a non-rivalrous creative or informational work is made, it is economically efficient if all persons who have a positive value for the work to have access to it.[69] This second test will therefore not act as a constraint as between the parties, as the fair use exceptions arise by way of a defence to infringement and will therefore only be called upon once a work has been created. It may be argued that consistency and rule of law concerns suggest that the real enquiry here is directed to an abstract question of whether the type of use in question is generally more valuable in the hands of creators or consumers. If, however, the use is one that would not be subject to a market transaction it will not be able to incentivise the creation of works, and therefore the second test will again always be satisfied.

The final element of Gordon's three-part test is the existence of substantial injury to the author that would impair incentives to create. Gordon envisages that this enquiry will encompass not only loss of revenue under the market structure prevailing at the time of suit, but also the possibility that market structures may over time evolve to reduce the transaction costs causing the market failure.[70] Here it is useful to note that in subsequent scholarship Gordon has indicated that her approach here to question a substantial injury is overly restrictive.[71]

Gordon's thesis that the market will evolve and act to reduce transaction costs is echoed by a number of subsequent commentators who have analysed her work.[72] It is unclear on these accounts whether potential future reductions in transaction costs

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[68] Ibid 1616.

[69] Subject to the proviso that the use by the consumer does not damage the value of the authors creation. One example where a use by the consumer damages the authors value even where the work is non-rival is a use by the consumer in a comparative review, which reduces demand for the authors work. Such reviews are however generally considered economically efficient on other grounds.

[70] Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (n 55) 1620.

[71] Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' (n 61) 151.

[72] Robert P Merges, 'Of Property Rules, Coase, and Intellectual Property' (1994) 94(8) *Columbia Law Review* 2655, 2661; Lindsay (n 9) 45.

mean that copyright exceptions should be eliminated now to enable relevant markets to develop, or whether they require the legislator to monitor market conditions and make ongoing changes in the breadth of copyright exceptions as and when such changes become efficient.[73]

As noted above, Gordon acknowledges that copyright exceptions might also exist to achieve legitimate social policy objectives outside of economic efficiency,[74] and in more recent scholarship she gives an example of the quotation exception permitting critical treatments of a work as the type of situation where market mechanisms would be ineffective.[75] However, where digital technology and online exchange is reducing transaction costs, her approach suggests that the scope of copyright exceptions should shrink as the market corrects failures caused by transaction costs, subject to the qualification that in some circumstances exceptions should be maintained where they seek to achieve a legitimate social policy.

I argue that despite the benefits of online exchange, not all transaction costs can be eliminated: consumers must still invest time into selecting which goods (including copyright works), they want to acquire, finding trading partners, negotiating and reviewing terms of trade. These costs persist even if consumers may no longer need to leave their homes to physically acquire copyright protected works and can purchase and receive them over the internet. The expanded online market may also increase some transaction costs for parties, such as the costs associated with identifying the owner of a copyright work found online. As a result, despite some policy and academic suggestions to the contrary,[76] the transaction cost rationale for

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[73] The first approach may be dynamically efficient but involve short term efficiency losses, while the second approach would be efficient in a static sense, but could impair the ability of the market to remedy transaction costs in the longer term.

[74] Lindsay (n 9) 46.

[75] Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' (n 61) 157.

[76] See e.g. Lindsay (n 9) 112 making a nuanced argument that contracts prohibiting copyright exceptions should be enforced: 'In particular, insofar as exceptions to copyright infringement are a response to market failure, then private agreements are desirable to the extent that they indicate that a source of market failure, such as high transaction costs, has been removed. Prohibiting

copyright exceptions will not completely recede as technology changes market conditions.

It is useful to think about how the Gordon model of copyright exceptions interrelates with the later Landers and Posner model of optimal copyright protection. While the Gordon model is justified by the real-life existence of transaction costs, as a simplifying assumption these are assumed not to exist in the Landers and Posner model.[77] While this may suggest that the Gordon model is more useful as an analytic tool, Gordon's model does not provide meaningful guidance as to the optimal scope of copyright protection more generally - for instance it does not address questions around the duration of copyright protection, the idea-expression dichotomy or other aspects of the scope of the copyright proprietary entitlement. The two models could be reconciled by treating the Gordon transaction cost model as one mechanism which might operate in a world influenced by transaction costs to reduce the scope of copyright protection to its optimal level as calculated by Landers and Posner, but they may be better thought of as distinct models operating to serve distinct goals.

V. POSITIVE EXTERNALITIES AND SPILLOVERS

Much law and economics scholarship is either premised on a simplifying assumption of a world free of transaction costs (suggesting an absence of externalities, following the insights of the Coase theorem as discussed in chapter 3), or that where externalities can be identified they should be captured and made subject to market forces in order to maximise economic welfare. A stream of more

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private agreements that exclude or modify exceptions to copyright infringement would seem to lower incentives for curing market failure, such as technologies or arrangements that reduce bargaining costs. On the other hand, to the extent that exceptions to copyright infringement serve non-economic policy objectives, there may be a case for imposing restrictions on the extent to which the exceptions can be excluded or modified'.

[77] But see Landes and Posner (n 37) 158 noting the interesting case of transaction costs in relation to parody.

recent scholarship[78] has however queried whether that approach to positive externalities is appropriate in the context of intellectual property law and whether the existence of positive externalities is a design feature of the copyright legal regime which should be maintained. This section examines these arguments around positive externalities, and considers how such an approach might modify the Landes and Posner model and the Wendy Gordon approach to transaction costs.

V.A. *The spillover argument*

In a series of articles between 2006 and 2009, Brett Frischmann[79] (and one paper co-authored with Mark Lemley[80]) developed an argument around optimal copyright policy, which focused on the idea that the overall welfare of society would be increased with an approach which deliberately did not seek to internalise all positive externalities connected with the development of copyright protected works.[81] Frischmann described these particular positive externalities as spillovers: circumstances in which there is a difference between private valuation of a transaction (the sum of producer and consumer surplus) and the total social returns or welfare impact of a transaction (taking account the additional value created for third parties and the broader society).[82]

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[78] The focus in this section is on the work of Brett Frischmann in this area, however there are earlier scholars working in this field - see e.g. Harrison (n 21); Julie E Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management' (1998) 97(2) *Michigan Law Review* 462, 539 discussing the role of positive externalities.

[79] Brett Frischmann, 'Spillovers Theory and Its Conceptual Boundaries The Boundaries of Intellectual Property Symposium: Crossing Boundaries' (2009) 51 *William and Mary Law Review* 801; Brett M Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law' (2007) 3(3) *Review of Law & Economics* 649.

[80] Mark A Lemley and Brett M Frischmann, *Spillovers* (Working paper No 321, John M. Olin Program in Law and Economics, 2006).

[81] Frischmann, 'Spillovers Theory and Its Conceptual Boundaries The Boundaries of Intellectual Property Symposium: Crossing Boundaries' (n 79) 810; See also Harrison (n 21) 8–9 noting the law's tendency to act when confronted by negative externalities, but not in the face of positive externalities.

[82] Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law' (n 79) 659.

Frischmann's argument was that permitting such positive externalities to persist, particularly in connection to circumstances where a purchaser is using a resource as an input to create their own work, would lead to benefits to 3rd parties. Frischmann and Lemley argued that 'Productive users' demand (willingness to pay) for access to and use of works often understates societal demand because productive users do not capture—and therefore do not take into account—the full social value of their use. Under such circumstances, property rights may skew incentives and create problematic distortions in resource allocation'.[83] As developed by Frischmann, this argument concerning spillovers and positive externalities is not necessarily a distinct comprehensive theory of copyright law or exceptions, capable of providing a unitary account of the optimal scope of copyright law. Instead it 'highlights measurement problems endemic to utilitarian economic theories and conventional approaches to cost-benefit analysis'.[84]

In general, law and economics scholars argue that externalities (both positive and negative) lead to distortions or misallocations in the market.[85] Harold Demsetz, in particular, has argued that private property rights evolve to internalise externalities, and that this is desirable when the benefits of internalisation exceed the costs (including transaction costs associated with internalisation).[86] Here internalisation refers to the process whereby these external costs or benefits are taken into account by the original contracting parties, usually occurring through the development and allocation of a property right.[87]

For Frischmann, spillovers may arise where there are benefits in a transaction which have not been and should not be internalised, and where these benefits are not

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[83] Lemley and Frischmann (n 80) 101.

[84] Brett M Frischmann, 'Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property' (2017) 14 *Review of Economic Research on Copyright Issues* 1, 14.

[85] See Chapter 3, Part III.A. for a discussion on Coase and externalities.

[86] Harold Demsetz, 'Toward a Theory of Property Rights' in *Classic Papers in Natural Resource Economics* (Palgrave Macmillan UK, 1974) 163, 348.

[87] Ibid.

captured by the usual measure of social welfare (being the sum of producer and consumer surpluses). Frischmann argues that market mechanisms may fail to allocate resources efficiently, as consumers' willingness to pay will understate the broader societal demand the use or reuse of the work.[88] Spillovers may arise in circumstances where there is unanticipated consumer surplus arising after the relevant transaction, or where there are benefits from the transaction which flow to third parties who are not privy to the transaction or to society more broadly.[89] An example of a spillover would be the benefits which flow to 3rd parties from a consumer who quotes sections of an original work in order to critique it. The transaction between the original producer of the work and the initial consumer or reuser will be unable to appropriately price the value of that reuse, as there are unknown future social benefits flowing to third parties. For example, if the review of the original work is particularly negative, individuals who read that review may decide against purchasing the original work. This will increase the welfare of those third parties, however this increase in welfare is not something that the original parties will be able to accurately anticipate and price into their transaction.[90] This is particularly the case as copyright protected works operate as experience goods, and it may not be possible to fully understand their value in advance.[91] Other academics have also noted that someone making a fair use of a work may be unable to capture all of the gains associated with that use,[92] and there may inevitably be uncaptured consumer surplus in the transaction.[93] In summary, for Frischmann, permitting spillovers to persist acts to maximise social welfare, as these deliberate benefits of the copyright system are incapable of being taken into account in the initial transaction between the producer and consumer, arguing '[i]t may be the case that letting, or even encouraging, spillovers to flow to third parties may be worthwhile

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[88] Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law' (n 79) 665.

[89] Lemley and Frischmann (n 80) 105.

[90] Ibid 122.

[91] Searle and Brassell (n 4) 19.

[92] Harrison (n 21) 50.

[93] Lemley and Frischmann (n 80) 117.

for society. This is more likely when these third party beneficiaries are productive in ways that generate social benefits'.[94]

V.B. *Using the spillover argument to extend the Gordon transaction cost rationale*

Lemley and Frischmann explicitly critique the traditional transaction cost analysis of copyright exceptions. In particular, they criticise the focus on the producer and the party seeking to rely on a copyright exception, to the exclusion of third parties who may benefit from a productive reuse of the work by the party relying on exception.[95] The spillover approach can however be reconciled with the approach of Gordon, as at least to the extent that spillovers or positive externalities cannot be internalised within the transaction between the original producer and the reuse, then this may in part be explained by transaction costs.[96] We can therefore think of spillovers as a particular example of a transaction cost within the Gordon model, and one in particular that tends to generate significant social benefits and which follows her more recent model of an inherent market limitation, instead of an example of market malfunction.[97] More specifically, these particular spillovers are examples of transaction costs that Lemley and Frischmann would argue should not be internalised as instead they should be left as positive externalities.

The essence of this argument is that the Gordon transaction cost rationale for copyright exceptions can be extended by considering the fact that purchasers who are making productive reuse of a work may be unable to accurately estimate the

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[94] Frischmann, 'Spillovers Theory and Its Conceptual Boundaries The Boundaries of Intellectual Property Symposium: Crossing Boundaries' (n 79) 812.

[95] Lemley and Frischmann (n 80) 130.

[96] In particular, the costs which make it impossible for a consumer to intending to make a productive reuse of a work to negotiate with all unknown potential future beneficiaries of their reuse.

[97] Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives' (n 61) 150.

social benefit of their new work.[98] Barnes notes that 'neither of the negotiating parties… Maybe in a position to foresee the benefits that will flow from the arrangements to the ultimate users of the… copyrighted work'.[99] In particular, while they may be in a position to capture the producer surplus that would be created if they developed a new creative work, they will be unable to capture the consumer surplus connected with that new work. In other words, they will be unable to fully take into account the social value of their creation, and will necessarily undervalue the price that they would be willing to pay the creator of the original work had they been able to capture the full social value of their use.[100] As a consequence, efficient transactions may not take place,[101] and implying a role for exceptions in generating spillovers in order to ensure optimal copyright law.

V.C. *Using the spillover argument to refine the Landes and Posner model of optimal copyright protection*

The spillover argument has parallels to the model developed by Landes and Posner, in the sense that it is built upon a recognition that authors and producers do not need to capture the full benefits of their work, but instead require merely enough

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[98] Lemley and Frischmann (n 80) 130 noting 'This narrow focus [on the transaction between the copyright owner and user]misses spillover effects and fails to consider the possibility that the user may decide not to seek a license or may take a license under conditions or with restrictions that reduce or eliminate benefits that spill over to third parties'.

[99] Barnes (n 11) 97.

[100] It should be noted that this conclusion does not hold in the event that the copyright system permits a producer to engage in perfect price discrimination. In that case there will be no consumer surplus, as all consumers with a positive willingness to pay for the creative expression will pay their marginal valuation for that work and acquire a copy. As a consequence, in that limited circumstance, a purchaser making a productive reuse of the work would be in a position to fully capture the entire social value of their new work. The difficulty is however that perfect price discrimination is both unrealistic and undesirable. Perfect price discrimination would require the creators to have perfect knowledge of the value each purchaser would ascribe to the work, and an ability to perfectly price the work for each of those users. In addition to not being feasible at a practical level, this level of information about consumer preferences would require significant invasions of consumer privacy.

[101] Lemley and Frischmann (n 80) 117.

incentive to create the relevant work.[102] In the Landes and Posner model optimal copyright protection exists at a level below that which leads to the maximisation of producer surplus. This implies that optimal copyright requires some limitations on the scope of the grant of proprietary rights to the copyright owner, and as discussed above these limitations may take the form of limitations on the duration of protection, the extent of copyright exceptions, the idea-expression dichotomy and other restrictions on the scope of protection. Exceptions, explicitly designed to create positive externalities in the form of consumer surplus, would be the ideal manner of achieving optimal copyright protection under the Frischmann model and under the Landes and Posner model by reducing the level of protection which would exist if producer surplus was maximised.

VI. CONCLUSIONS

This chapter argues that under a model for optimal copyright law which seeks to maximise societal welfare, copyright exceptions play important role in reducing the level of protection from a level which maximises producer surplus to a lower level of copyright protection which maximises societal welfare. It is argued that the goal of maximising social welfare is the appropriate goal of copyright policy under a law and economics approach. It also argues that copyright exceptions are justified on an economic basis for reasons which go beyond transaction costs, and that they are vital elements of the copyright system even in circumstances where transaction costs are reduced or eliminated in the online environment.

The chapter further extends Frischmann's analysis on positive externalities and spillovers, and applies it in order to further develop the Gordon transaction cost approach to copyright exceptions, as well as the Landes and Posner model of optimal copyright law. It argues that copyright exceptions play a vital role in a law and economics account of copyright, as they ensure that overbroad proprietary protection is not available (which would be to the detriment of total overall welfare) and to encourage the productive reuse of works. The role of exceptions in

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[102] Ibid 119.

encouraging productive reuse of works is vital, as it has been shown that under the law and economics models it is not possible to fully internalise such values, as third party or social values deriving from the reuse are ignored. As a consequence, it is argued that copyright exceptions which permit the productive reuse of a work should be encouraged, and the chapter makes an argument that optimal copyright law requires copyright exceptions in order to maximise total social welfare.

6. FREEDOM OF EXPRESSION & COPYRIGHT EXCEPTIONS

I. INTRODUCTION

Copyright law is concerned with regulating expression[1] and we can develop insights into the role and structure of copyright law by considering the ways in which it is responsive to, or conflicts with, freedom of expression concerns. This chapter examines the role that copyright exceptions play in accommodating freedom of expression interests.

The chapter begins by elucidating three competing theories of freedom of expression in an attempt to provide clarity in relation to the meaning of freedom of expression, the values implicated within it and their relationship to copyright law. While the chapter addresses the three most common rationales for freedom of expression (autonomy, democracy and truth) it places greater emphasis on the arguments from autonomy. These arguments have interesting resonances with autonomy justifications for freedom of contract, which are also discussed elsewhere in the thesis.

By considering the rationales for freedom of expression the chapter is able to proceed to a discussion about its interactions with copyright in a more nuanced manner, thus eschewing a simplistic and untethered 'balancing' approach between the interests.[2] A discussion of the rationales reveals that freedom of expression encompasses not only the freedom to speak and impart information; but also the freedom to seek and receive a wide range of expression. Indeed, in some accounts of freedom of expression, the interests of the audience to receive expression may be more significant than the interests of the speaker.[3] Considered this way, freedom of

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[1] Neil Netanel, *Copyright's Paradox* (Oxford University Press, 2008) 3. See also Fiona Macmillan, 'Speaking Truth to Power: Copyright and the Control of Speech' in M Bassini, O Pollicino and G M Riccio (eds) *Copyright Versus (Other) Fundamental Rights in the Digital Age: A comparative analysis in search of a common constitutional ground* (Edward Elgar, Forthcoming), 3.

[2] See Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press, 2005) 7'...copyright and free speech cannot simply be "balanced" in an unaccountable manner, but mut be viewed in the detailed contexts of actionable legal rights'. See also Alain Strowel and Francois Tulkens, 'Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation and Access' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 11, 288 arguing that freedom of expression should not be sanctified, as its claims are 'often made by commercial operators in an attempt to veil more mercenary interests.'

[3] Netanel (n 1) 47.

expression has both individual and societal value, which may in some circumstances conflict and which can and should be recognised in doctrinal copyright rules. Freedom of expression may be valued by a society for a number of different and potentially complementary or contradictory rationales, and this chapter considers the ways in which both copyright law and copyright exceptions relate to and are encompassed by each rationale.

The chapter then moves to discuss academic insights into the relationship between freedom of expression and copyright law, including the extent to which copyright might be said to 'internalise' freedom of expression concerns through the idea-expression dichotomy, term limits, limits on the scope of protection or copyright exceptions.[4] Focusing primarily on the role of copyright exceptions, the chapter considers the way these issues have been considered to date in courts in the US and Europe. These jurisdictions have been chosen as illustrative examples, because their courts have identified ways in which copyright is responsive to freedom of expression interests, but have different views on the extent to which freedom of expression might act as an external constitutional limit on the scope of copyright protection. In the US, Supreme Court jurisprudence has noted that their fair use doctrine plays a foundational rule in maintaining the balance between freedom of speech and copyright protection, and has noted that legislation which modifies the scope of the traditional balance may be subject to heightened First Amendment constitutional scrutiny. In Europe there appears to be different approaches taken in the European Court of Human Rights ('ECtHR') and the CJEU, with the ECtHR showing a greater degree of willingness to apply freedom of expression interests as an external constraint on the scope of copyright. In comparison, the CJEU has tended to conceptualise freedom of expression concerns as being relevant only internally to the construction and interpretation of existing copyright exceptions by member states. The CJEU has suggested that setting aside copyright protection on the basis of freedom of expression interests would only be done (if ever) in the most unusual circumstances where there was an infringement of the essential content of a fundamental right.

The issues addressed in this chapter and the approaches currently taken by the courts form the basis for a further examination in chapter 7 on the relationship between contract, copyright exceptions and speech, which considers how private contracting concerns might modify the analysis and be accommodated within the divergent US and European approaches to the relationship between exceptions and freedom of expression.

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[4] See however Laurence R. Helfer, 'Mapping the Interface Between Human Rights and Intellectual Property' in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2016) 6, 13 noting that 'existing IP flexibility mechanisms were not designed with human rights in mind'.

This chapter uses the terms freedom of speech and freedom of expression without drawing a substantive distinction between them.[5] This is not to say that there is no meaningful difference between speech acts and acts of self-expression, but in the relevant copyright context the relevant acts of expression often take the form of the use or repurposing of someone else's copyright protected work and there is less concern with other forms of self-expression which do not fall within the bounds of copyright law.[6] The chapter also does not engage in a detailed examination of the nature of what counts as speech, and the extent to which freedom of speech arguments must or should deal with all speech or merely some subcategory or specific forms of speech[7]- the focus is on the types of speech acts which would typically fall within the scope of doctrinal copyright rules. As argued by Eric Barendt, such an approach is hardly unusual, noting that courts frequently fail to draw a distinction between speech and other forms of expression.[8] While the focus in this chapter is on expression which is protected under copyright law, this is not to say that a broader set of expressive acts are not relevant in understanding the relationship between copyright exceptions and contract. For example, the next chapter discusses conceptualising contractual restrictions on exceptions as a particular example of a decision to contractually bind yourself to silence. Such rights *not* to speak or engage in a particular form of expression are not unheard of within freedom of expression jurisprudence.[9]

I.A. Why consider speech and freedom of expression

The themes tackled in the chapter reflect concerns about the relationship between intellectual property regimes and freedom of speech interests, which while emerging from scholarship from the 1970s[10] have only relatively recently been taken seriously

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[5] This approach is fairly typical in the literature. See for example David Lindsay, 'Copyright and Freedom of Expression' in Kathy Bowery, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 68, 70.

[6] See Netanel (n 1) 31 noting 'Say I like to drive at 150 miles per hour on a remote desert highway. That act is self-expressive in the sense that it manifests my intention and personal identity. But… not every self-expressive act comes within the realm of freedom of speech.' and p 45 on the need to distinguish speech from a more amorphous right of liberty of voluntary action.

[7] Kent Greenawalt, 'Free Speech Justifications' (1989) 89(1) *Columbia Law Review* 119, 124.

[8] Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) 75.

[9] Ibid 94. See also Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 246.

[10] Melville B Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press' (1970) 17 *UCLA L/ Rev* 1180; Paul Goldstein, 'Copyright and the First Amendment' (1970) 70(6) *Columbia Law Review* 983. See Willem Grosheide, 'General introduction' in Willem

at a judicial level in Europe and the US.[11] In some senses however a freedom of expression-focused analysis of copyright reflects very historical concerns, with early copyright legislation in England entangled in a debate about the role of the state in suppressing and censoring speech.[12] While pre-modern copyright rules certainly also played a role in the dissemination of literature by making books more widely available,[13] they were also concerned with the regulation of the book trade and one of their significant impacts in practice was contributing to restricting access to treasonous or heretical writings in England[14] and in other parts of the western world.[15] These links between copyright and censorship had been largely muted in legislative discourse by the time the US incorporated federal copyright protections.[16]

While the historical connections between intellectual property and furthering human rights have been described as 'thin at best',[17] intellectual property obligations are now often expressed in international human rights instruments alongside rights to freedom of expression. For instance, the Universal Declaration of Human Rights provides for rights to the moral and material interests of authors[18] which must be balanced against the right to participate in the culture of a community.[19] Article 19 of the International Covenant on Civil and Political rights also requires states to protect freedom of expression and information. However, even before these formal human rights documents were adopted, the importance of freedom of expression was recognised by the UN General Assembly as both a fundamental human right

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Grosheide (ed) *Intellectual Property and Human Rights : A Paradox* (Edward Elgar, 2010) 3, 21 for a survey on approaches to the relationship between intellectual property regimes and human rights.

[11] See Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe' in Niva Elkin-Koren and Neil Weinstock Netanel (eds), *The Commodification of Information* (Kluwer Law International, 2002) 248 noting that the relationship between copyright and expression is not addressed in most treatises on copyright or that freedom of expression might be mentioned only incidentally.

[12] Lyman Patterson, *Copyright in Historical Perspective* (1st ed, 1968) 6.

[13] Pamela Samuelson, 'Copyright and Freedom of Expression in Historical Perspective' (2003) 10 *J. Intell. Prop. L.* 319, 324.

[14] Lyman Patterson (n 12); Michael Birnhack, 'The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up' (2003) 43(2) *IDEA: The Journal of Law and Technology* 233, 283.

[15] See for instance Peter Drahos, 'Intellectual Property and Human Rights' (1999) 3 *IPQ* 349, 351 discussing the laws in France criminalising 'writings which amongst other things injured royal authority and troubled the tranquillity of the state.'; See also Goldstein (n 9) 983 where copyright is described as the 'uniquely legitimate offspring of censorship'.

[16] Michael Birnhack, 'Copyright Law and Free Speech after Eldren v. Ashcroft' (2003) 76 *Southern California Law Review* 1275, 1296; Goldstein (n 9) 984.

[17] Drahos (n 15) 357.

[18] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 Article 27.2 ('Universal Declaration of Human Rights').

[19] Universal Declaration of Human Rights Article 27.1

and touchstone upon which the UN system was developed.[20] Often however rights to freedom of expression are not expressed in absolute terms, and may need to be balanced against other rights, such as the right to property,[21] including domestic constitutional protection of property rights.

As discussed below, free speech values are explicit in the constitutional arrangements for a number of jurisdictions.[22] For instance, the First Amendment to the US Constitution relevantly provides that 'Congress shall make no law... abridging the freedom of speech, or of the press'. Within the UK, the passing of the Human Rights Act and its protection of freedom of expression has arguably led to an increased interest 'in the intersection between copyright and the fundamental rights and freedoms guaranteed under that Act'.[23] In other national jurisdictions, such as Australia, the absence of explicit constitutional protection of freedom of expression has not prevented the Australian High Court from implying a freedom of political communication within the Australian Constitution, acting as a restriction on the legislative competence of the parliament and executive.[24] Free speech values are however rarely argued to be important solely because they are in constitutional documents or human rights instruments, instead courts recognise that freedom of expression 'is one of the fundamental concepts that has formed the basis of the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of various ideas, depends upon its maintenance and protection'.[25]

Freedom of expression interests also have an international dimension. For example, Article 19(2) of the International Covenant on Civil and Political Rights guarantees freedom of expression and information.[26] The exercise of this right is expressed as being subject to special duties and responsibilities as set out in Article 19(3). Not

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[20] Helfer and Austin (n 9) 228.

[21] Universal Declaration of Human Rights Article 17.

[22] See e.g. Barendt (n 8) 1 noting 'Written constitutions and bills of rights invariably protect freedom of speech as one of the fundamental liberties guaranteed against state suppression or regulation'.

[23] Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 2; Note that even before the Human Rights Act 1998 freedom of expression was considered an important right in England - see Barendt (n 8) 1.

[24] Strowel and Tulkens (n 2) 262 Note that this is a freedom of political communication, is negative in nature and is not a right in a Hohfeldian sense.

[25] Burrell and Coleman (n 23) 41 quoting the Canadian Supreme Court in *RWDSU v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.

[26] *International Covenant on Civil and Political Rights,* Opened for Signature 16 December 1966, 999 UNTS 171 (Entered into Force 23 March 1976) ('ICCPR').

only is this obligation binding on the state, but it 'requires State parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.'[27] Approaches which rely upon human rights values supportive of freedom of expression are sometimes however met with some resistance from academics in circumstances where other human rights (such as the right to property) might then also influence the discourse on the appropriate scope of freedom of expression in the role of copyright law. [28]

One initial objection to the relevance of a freedom of expression account of the relationship between copyright exceptions and contract is the nature of freedom of expression rights as a constraint on governments.[29] In many jurisdictions, rights to freedom of expression predominately act to place duties and constraints on the exercise of government power, rather than acting to limit conduct as between citizens (although constitutional speech guarantees might have a range of points of interface with other private law legal regimes, such as defamation).[30] Consequently it can be argued that private law restrictions on speech fall outside the province of freedom of expression protections, as they concern relationships between individuals, rather than relationships between an individual and the state. [31] However, to the extent that a party seeks to rely on a contract or a statutory copyright property entitlement they may turn to the courts and seek legal remedies. Where such a contract restricting freedom of expression interests (for example, by restricting the exercise of copyright exceptions) is enforced by the courts it becomes to some extent a burden on individuals which is being interpreted and imposed by the judicial arm of the state, and therefore one which can legitimately be subject to free speech analysis.[32] It is also the case that powerful private figures may be able to constrain the freedom of expression interests of individuals just as effectively as the

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[27] Dirk Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2015) 330, 339.

[28] Helfer and Austin (n 9) 187; Netanel (n 1) 120.

[29] Netanel (n 1) 35.

[30] See for example Birnhack (n 14) 270 on the nature of the discourse around US freedom of speech as a negative constraint.

[31] See Melissa de Zwart, 'The Future of Fair Dealing in Australia: Protecting Freedom of Communication' (2007) 4(1) *SCRIPTed* 96, 100 referring to ; Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate/Dartmouth, 2000) 66 suggesting that a contractual restriction on speech would not be a 'burden imposed by law'.

[32] Barendt (n 8) 248–9.

government and individuals may require protection from both governmental action and private restraints on speech.[33]

II. THEORISING FREEDOM OF SPEECH AND EXPRESSION

A range of competing rationales for freedom of expression have been expounded.[34] This chapter addresses three key justifications: autonomy, truth and democracy. In doing so it considers the implications of each rationale from both the perspective of the original author of a creative work and also the perspective of users and those who would repurpose or 're-speak' the work. This is because under most rationales for free speech, the right is not merely individual, but also 'a right that benefits society by ensuring that the general public has uncensored access to a wide range of views and information'.[35] Categorising the justifications for freedom of expression in this manner is only one of a number of alternative theoretical approaches to speech, for example with some other approaches preferring to divide rationales for freedom of expression into consequentialist and non-consequentialist approaches.[36]

The right to freedom of expression encompasses a number of related and often contentious concepts, [37] including the 'freedom to seek, receive and impart information and ideas of all kinds'[38] and freedom of the press from interference from the state.[39] These rights are not absolute and are accompanied by duties and limitations.[40] At the outset it should be noted that, in a Hohfeldian sense, freedom of expression rights might actually constitute privileges rather than true rights. This is because, as discussed in chapter 2, Hohfeldian rights require the imposition of corresponding duties and it may be difficult to identify the nature or identity of the holder of any corresponding duty. This is not to suggest a limit to the significance of

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[33] FM Patfield, 'Towards a Reconciliation of Speech and Copyright' in Eric Barendt (ed), *Yearbook of Media and Entertainment Law* (2nd ed, 1996) 209.

[34] For a discussion of alternative rationales for freedom of speech see Netanel (n 1) 31 suggesting a role in nurturing dissent, fostering tolerance or checking government abuse.

[35] Burrell and Coleman (n 23) 15 This broader conception of the right is also reflected in the text of the ICCPR, which notes not only the right to impart but also to receive information.

[36] See for example Greenawalt (n 7) 125.

[37] Helfer and Austin (n 9) 227; Lindsay (n 5) 69.

[38] ICCPR Article 19

[39] See the U.S. Constitution, Amendment 1 ('the First Amendment'), which explicitly links freedom of expression to freedom of speech.

[40] See for example ICCPR Article 19(3), which provides that the right to freedom of expression 'carries with it special duties and responsibilities. It may therefore be subject to certain restrictions...'

human rights to freedom of expression; they are at least important political values, even if perhaps not considered strictly speaking rights in a Hohfeldian sense.

While it is beyond the scope of this chapter to present a fully realised and comprehensive account of the theories of free speech, an understanding of the existence and general contours of these theories is however necessary in order to appreciate the variety of ways in which free speech interests are entangled with copyright interests,[41] and to understand the approach that has been taken by courts in various jurisdictions in protecting freedom of expression. More generally, discussion of the rationales justifying freedom of speech is of assistance in interpreting the scope and meaning of that protection, with such arguments acutely relevant to constitutional interpretation and elucidation of freedom of expression protections within domestic constitutions and in the jurisprudence of the courts.[42]

II.A. *The autonomy rationale*

Free speech may be justified as contributing to the autonomy or self-fulfilment of individuals. This theory connects to the autonomy enhancing justifications for contract law, which are discussed in chapter 3 of this thesis. Under this justification, restrictions on speech limit the ability for individuals to grow and develop as people.[43] This justification is generally expressed in individualistic terms (and indeed, in some forms, appears indistinguishable from a general libertarian claim for freedom from interference), but can also be considered from the social perspective of developing 'more reflective and mature individuals'.[44] While there is a level of intrinsic appeal to this rationale, it is not clear that freedom of expression plays a more central role in filling the autonomy of individuals than other basic human needs such as adequate housing and education,[45] or that autonomy is such a foundational value that it would be wrong to sacrifice it in favour of other needs such as safety.[46] If the underlying value which is to be promoted using autonomy rationale is individual self-development, then it would be surprising that factors more central to the development of individual self-development are not subject to greater emphasis, such as the role of education or access to cultural goods.[47]

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[41] Burrell and Coleman (n 23) 18–19.

[42] Barendt (n 8) 3.

[43] Ibid 13.

[44] Ibid.

[45] Ibid.

[46] Robert Amdur, 'Scanlon on Freedom of Expression' (1980) 9(3) *Philosophy & Public Affairs* 287, 299.

[47] Barendt (n 8) 13–14.

The autonomy justification is however difficult to apply in relation to copyright protected works. As discussed below, some authors may feel that reuse or repurposing of their creative works may be damaging to their reputation or damage the integrity of their self-expression, and that therefore copyright (and indeed contract) should be strong to permit them to restrict subsequent reuse of their work. On the other hand, subsequent creators (such as parodists) may feel that strong copyright protections act to restrict their ability to express themselves and limit their autonomy. Even literal reproduction of an author's work may be justified under an autonomy justification for some users, who may lack the expressive ability to create certain works themselves but for whom the reproduction of work may further legitimate autonomy interests – for instance where the reproduction of cultural materials is crucial to the constitution or development of their identity, or where reproduction serves an educational value. On this basis Jeremy Waldron concludes that the 'invocation of the value of autonomy settles nothing',[48] as the argument cuts both ways in debates over the strength of copyright protection. Other commentators disagree, arguing that where the use is non-transformative the interests of a user will never outweigh the interests of an author,[49] or that someone 'who pirates the expression of another is not engaging in self-expression in any meaningful sense'.[50] Mere access however to an unauthorised copy of a protected work may however serve freedom of expression values, particularly where that work is educational and access to it is significant for an individual's personal development of self-fulfilment;[51] – 'republished work is materially more valuable to readers than the original that they can't get, that costs too much, or that they don't know about…'.[52] It may also commonly be the case that the author of the copyright protected work is no longer the owner of it, due to an assignment or the operation of statutory rules around material created in an employment context. In such circumstances it is harder to argue that the autonomy interest of the copyright owner should necessarily be preferred over the autonomy interest of a user, as the copyright owner may have merely acquired rights relating to the expression, as

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[48] Jeremy Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1992) 68 *Chi.-Kent L. Rev* 841, 876–7.

[49] Lindsay (n 5) 83 Note however that Lindsay's language of 'outweigh' suggests some form of utilitarian calculus, where the autonomy interests of an individual user are being weighed against the autonomy interests of an individual author. This argument may be open to critique where there are a number of users with low utility, but whose interest cumulatively outweighs that of the copyright owner.

[50] Nimmer (n 10) 1192.

[51] Rebecca Tushnet, 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It' (2004) 114 *Yale L.J.* 535, 546.

[52] Eugene Volokh, 'Freedom of Speech and Intellectual Property: Some Thoughts after Eldred, Liquormart, and Bartnicki' [2003] (3) *Houston Law Review* 697, 726.

opposed to having generated it as an author.[53] On the other hand, where autonomy is considered from the perspective of the recipients of expression, an argument might be made that exposure to a diversity of expression is necessary in order to foster individual autonomy and self-realisation.[54] As will be explored in this chapter, the most significant aspect of this debate is to recall that the autonomy justification for limiting speech can be considered from a range of different viewpoints, including that of the original speaker, the individual who reuses that speech, and society more generally.

II.B. *The truth rationale*

The various free speech theories seek to explain why speech is entitled to special protection from regulation or suppression.[55] The first and one of the most enduring[56] of the rationales is truth or the rationale for the advancement of knowledge.[57] This theory is often associated with the writings of John Stuart Mill and John Milton, and in the words of Mill 'it is only in the collection of adverse opinions that the remainder of the truth has any choice of being supplied'.[58] This formulation by Mill might be considered a consequentialist justification for freedom of speech,[59] subject to the challenge that if the free exchange of expression does not foster the discovery of the truth as a substantiated empirical claim then there is less justification for such a principle. As an empirical consequentialist claim, freedom of expression may be undermined by a number of factors, including the irrationality of humans and disparities in the economic capacity of speakers.[60] As a partially consequentialist approach to the justification of freedom of expression the beneficiary of the freedom of expression under a truth rationale is generally considered to be the broader society, rather than placing a particular focus on the freedom of expression interest of the speaker.

The truth rationale has been powerful in the US context, where Justice Holmes (in dissent in the US Supreme Court case of *Abrams v US*) famously proclaimed that '...the best test of truth is the power of the thought to get itself accepted in the

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[53] Goldstein (n 10) 985.

[54] Netanel (n 1) 38.

[55] Barendt (n 8) 6.

[56] Helfer and Austin (n 9) 223.

[57] See Burrell and Coleman (n 23) 33 for a discussion of why 'the advancement of knowledge' may better describe more modern forms of the theory.

[58] John Stuart Mill, *On Liberty* (Walter Scott Publishing Co., Ltd., 4th ed, 1989) 95.

[59] Greenawalt (n 7) 130.

[60] Ibid 134.

competition of the market'.[61] There are however a number of commonly posed critiques of this rationale: that there may be circumstances where presenting a true statement be less important than the legal system protecting some other value;[62] the implicit idea that free discussion of ideas necessarily leads to the discovery of truth;[63] that an unregulated marketplace of unrestricted speech will result in the discovery of truth[64] or that there is indeed some ascertainable concept of truth. For example, Barendt argues that within the University context and assumption that freedom of discussion will lead to the discovery of truth may be warranted, whereas the same assumptions may not be safe when considered in relation to the broader society.[65]

As applied to the relationship between copyright and free expression, the truth rationale may fail to account for some of the forms of expression which form the central element of the protection given by copyright. For instance, a piece of abstract art or catchy melody may not make claims of truth, but art and music form central categories which are and should be protected by copyright.[66] It might also be argued that absolute truth is not necessarily a foundational value in doctrinal copyright law. For example, within England it is more likely that a fair dealing exception will apply to permit quotations from a published work, as opposed to an unpublished work. In addition, doctrinal intellectual property law often supports the restriction of speech in order to protect confidential information or government secrets, in effect suppressing true statements in favour of other values.[67]

II.C. *The democratic rationale*

A number of courts, theorists and legislative bodies have identified the significant instrumental role of freedom of expression in furthering democracy,[68] and the view is strongly associated with the writings of Alexander Meiklejohn. On this rationale, free speech is required to enable the constituents in a democratic state to make a free and informed choice at an election. This right is understood most significantly as a community right to hear expression under the democratic rationale, rather than

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[61] Abrams v. United States (1919) 250 U.S. 616, 630.

[62] Barendt (n 8) 8.

[63] Ibid 9.

[64] Ibid 12.

[65] Ibid 9.

[66] See for a related argument ibid 10 who notes that the 'status of speech which does not assert any coherent proposition' is 'less clear' under the truth rationale.

[67] Ibid.

[68] See Christoph Graber, 'Copyright and Access - A Human Rights Perspective' in Christoph Graber et al (eds), *Digital Rights Management - The End of Collecting Societies?* (Juris Publishers, 2005) 71, 82.

merely acting as a right to speak.[69] Indeed, under both the democratic and truth rationales for freedom of expression, access to speech and the interests of speech recipients are no less central to freedom of expression than the interests of those making speech.[70]

One puzzle under the democratic rationale is the extent to which a democratically elected body could legitimately legislate to impose a restriction on freedom of expression. If society as a whole was generally in favour of restricting freedom of expression in some specific manner, it would seem to be anti-democratic to prevent them from waving that particular right. In the words of Schaier, 'the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty, and thereby argues against recognition of an independent principle of freedom of speech'.[71] More generally, it might be asked whether the democratic rationale is an end in itself, whether it instead is merely 'a vehicle through which individual self-realisation can be achieved'.[72] In other words, the democratic rationale might be argued at its heart to be a step towards supporting the autonomy interests of individuals and society.

Another difficulty of Meiklejohn's approach and the democratic rationale for freedom of expression is the 'inherent artificiality in categorising expression in principle as political or not'.[73] Meikeljohn's attempt at categorising what speech was political was inclusive, arguing that the category of political material was anything necessary to enable a citizen to intelligently vote, and included novels, dramas, paintings and poems.[74] Even abstract artistic works without explicit political significance might be important in the democratic rationale, as an appreciation of these artworks may help individuals develop their intelligence or sensitivity to human value.[75] This expansive version of what counts as political has informed US jurisprudence, where 'entertainment, comedy and the like [receive] the same level of protection that is given to political speech'.[76]

However, the expansive approach to identifying expressive works as political (and therefore within the remit of a democratic rationale for freedom of expression) is not universal. To the extent that the democratic rationale is persuasive in the

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[69] Goldstein (n 10) 989.

[70] Netanel (n 1) 47.

[71] Barendt (n 8) 18 discussing the theories of Schauer.

[72] Helfer and Austin (n 9) 225.

[73] Ibid.

[74] Ibid 224.

[75] Netanel (n 1) 32.

[76] Mark Lemley and Eugene Volokh, 'Freedom of Speech and Injunctions in Intellectual Property Cases' (1998) 48(2) *Duke Law Journal* 147, 186.

Australian constitutional framework, the category of works which are considered political may be narrower than that proposed by Meikeljohn,[77] and may not extend to protect 'literary and artistic discourse'.[78] The democratic rationale for freedom of expression holds constitutional significance in Australia. Australian courts have held that in order for voting citizens to properly exercise their democratic rights, they require information about the candidates seeking election and a free flow of information about the performance of their elected officials, and political speech is constitutionally privileged.[79] Indeed, political theorist Meikeljohn has suggested that the breadth of information required by citizens in order to properly assess and evaluate the performance of elected officials is quite broad, arguing that individuals require art, entertainment and comedy. Furthermore, it is argued that the flow of information required under the democratic rationale is not merely the flow of information from a candidate to the electors, but more importantly the ability for individuals to discuss politics between themselves. In order to engage effectively in such discussions, voters will often have to re-use the expression of others, particularly political expression.

ECtHR jurisprudence links individual freedom of speech interests with society wide in democracy: 'Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every man and woman'.[80] Furthermore, the freedom of expression jurisprudence of the Court places a greater emphasis on speech which is made in connection with political matters in contrast to expression of a commercial nature, reflecting a democratic rationale for freedom of expression protection.[81]

II.D. *General insights from the various rationales for freedom of expression*

While the three rationales for freedom of expression discussed above each suggest a different scope or area of focus for the operation of freedom of expression, they do suggest some common areas of protection. This includes, for example, the extent to which freedom of expression imposes Hohfeldian duties and upon whom. A

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[77] See Burrell and Coleman (n 23) 36–37 for a discussion of the Australian High Court case of Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104.

[78] Barendt (n 8) 18.

[79] See for example Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 and Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

[80] Graber (n 68) 82 quoting European Court of Human Rights jurisprudence in Barthold v Germany (1985) 7 EHRR 383 § 58 .

[81] Christophe Geiger and Elena Izyumenko, 'The Role Of Human Rights In Copyright Enforcement Online: Elaborating A Legal Framework For Website Blocking' (2016) 32(1) *American University International Law Review* 43, 67.

common theme is also the extent to which the relevant theory of freedom of expression is primarily grounded in an individualistic account, most often focused on the speaker, or a collective account placing greater emphasis on the speech interests of the recipient of information or on the broader society.[82] Indeed, approaches to freedom of expression which are justified on a broader public interest, rather than on the basis of the rights of individual speakers, suggest that communications to a limited group should not be entitled to legal protection (as they may not meaningfully engage with the broader societal interest).[83]

Taking the rationales together, it can also be said that the case for protecting freedom of expression is strongest where the reused material is 'a work of satire comedy or a parody, or reproduces information or images of political or social importance'.[84] The argument for protecting freedom of expression is however more difficult to establish for reproductions which might be described as commercial copyright piracy.[85] Accounts of freedom of expression should apply both to protect information and opinion, and related duties would operate both against governments and private entities.[86]

II.D.1 *Individual or collective understandings of freedom of expression*

It is important to draw out the extent to which the various theories conceptualise freedom of expression as a protection for not only original speakers, but also (or primarily) as a right which benefits the broader society in the context of receiving information and which protects those repeating or reproducing the speech of others. Barendt notes that in general freedom of expression theories often provide greater speech rights to the speakers, rather than the recipients of expression.[87] That general balance between speakers and listeners is however not universal, with Barendt noting that in some instances the nature of the speaker as a commercial entity means that in those circumstances the interests of the recipient of for example

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[82] Barendt (n 8) 23.

[83] Ibid 29.

[84] Gerald Dworkin, 'Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer's Perspective' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 11, 18.

[85] Note however that parody will often also have a commercial dimension - see for example in the US context *Campbell v Acuff Rose Music Inc* (1994) 510 U.S. 569 where the Supreme Court held that '[i]t was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair'.

[86] Patfield (n 33) 216.

[87] Barendt (n 8) 6.

advertising speech may be prioritised.[88] Conceptualising freedom of expression from a collective perspective may also suggest a more lenient approach towards copyright infringers - while the infringer's freedom of expression interest may be outweighed by the freedom of expression interests of the copyright owner, the broader society may indeed benefit significantly by receiving or listening to infringing copies of a work (including where those infringing works are more available or available at a lower price than the original work).[89]

II.D.2. *Expression rights as Hohfeldian duties*

Common to all of these conceptions of freedom of expression are questions of the extent to which they exist as rights in a Hohfeldian sense. For instance, as noted earlier in this chapter,[90]do freedom of speech interests include Hohfeldian rights, imposing positive duties upon states, or is freedom of expression merely a privilege imposing no duty on the state?[91] If we conceptualise freedom of expression as encompassing a positive right for an individual to speak this may suggest a need to conceptualise a narrowly formulated Hohfeldian duty on the part of the state to facilitate that right, perhaps through the provision of opportunities for speech.[92] More specifically, an approach which was attentive to the relative power of different speakers may require duties on the government to facilitate expression rights of minority groups or the underprivileged in society to grant them the opportunity for a more equal exercise of rights in comparison to wealthier members of society.[93]

If under the theories discussed above a copyright infringer could argue for a freedom of expression right in order to reproduce a work, then there may be a corresponding duty on the copyright owner of that work to make it available, or make it available at a price at which the user could afford.[94] However this does not seem to be the doctrinal reality, with Bernt Hugenholtz memorably writing that 'the

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[88] Ibid; But compare Dworkin (n 84) 20 Arguing that we should generally not to be concerned about a speaker's motive for their communication if we are primarily interested in the free-speech interests of the recipient of information.

[89] Barendt (n 8) 258.

[90] See above page 153.

[91] Barendt (n 8) 102.

[92] Ibid 98.

[93] Ibid 106.

[94] See Thomas Dreier, 'Contracting out of Copyright in the Information Society: The Impact on Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 385, 392–3 noting that at the doctrinal level there is no 'right' price for a work and that our society properly leads such questions to the operations of the market. Similarly, an author is not usually considered to be under an obligation to publish a work.

free flow of information does not require the flow of free information'.[95] If on the other hand freedom of expression is conceived of only as a privilege than it is less likely that a duty might be imposed on the copyright owner to make the work available either for free, available under the operation of a copyright exception, or available at a reasonable price.[96] A conception of freedom of expression as merely a form of Hohfeldian privilege would also suggest a greater scope for contracts to be legitimately used to restrict copyright exceptions, as the contract would not be interfering with freedom of expression *rights* of users.

III. THE RELATIONSHIP BETWEEN FREEDOM OF EXPRESSION AND COPYRIGHT

The relationship between freedom of expression and copyright has become an area of increasing interest to courts and to academics,[97] and it is increasingly the case that freedom of expression considerations are influencing judicial determinations on copyright.[98] Copyright is and should be concerned with the regulation of speech and expression – if copyright protection is granted to a work then the exclusive rights of the author will restrict the extent to which users may reproduce or 'speak' that same form of words or expression if they wish to avoid infringement[99] – and it is therefore not surprising to see increasing attention given to this area of overlap.

While academic understandings of the relationship between expression and copyright have a relatively long history in the US, with significant papers exploring the relationship between copyright and the First Amendment being written from the 1970s, the area has received comparatively less attention in the UK and Europe until more recently.[100] This section of the thesis explores the ways in which the relationship between copyright and freedom of expression has been theorized, starting from the earlier US academic commentary before addressing the impact of more recently US and European jurisprudence.

This relationship between copyright and freedom of expression involves both questions of political theory, copyright doctrine and balancing of conflicting human

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[95] Hugenholtz (n 11) 248.

[96] Barendt (n 8) 256.

[97] Burrell and Coleman (n 23) 16. For an extensive overview of literature on the area, see Yin Harn Lee 'Copyright and Freedom of Expression: A Literature Review' (Working paper 2015/04, Centre for Copyright and New Business Models in the Creative Economy, May 2015)

[98] Voorhoof (n 27) 331.

[99] Birnhack (n 14) 294–295.

[100] See for example Hugenholtz (n 11) 248 noting that as late as 2002 'most treatises on copyright are silent on the issue' [of the relationship between expression and copyright].

rights. Copyright is itself conceived of as a form of property, and property has been recognised as a human or fundamental right, guaranteed by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.[101] As a result, the relationship between copyright and freedom of expression arguably involves not only an academic consideration of the value of the two interests, but also a consideration of how conflicting human rights should be balanced.

One of the key unresolved disputes in addressing the relationship between freedom of expression and copyright is the extent to which copyright doctrine has developed a sufficient internal balance between the protection of the interests of the copyright owner and a broader public interest in freedom of expression, and whether the existence of that internal balance should preclude copyright from external freedom of expression scrutiny.[102] Some have argued that a number of copyright doctrines have developed to support free-speech or freedom of expression interests, and that therefore there is no need to consider freedom of expression rights as an external (constitutional) limitation on the scope of copyright protection, but instead copyright rules can 'internally' act to delicately balance the competing interests.[103] Others have argued that freedom of expression interests acting as an internal or external constraint on copyright may be unnecessary, in circumstances where copyright law may pursue a number of different goals, not all of which may be capable of being addressed or understood within a freedom of expression framework.[104]

When considering internal freedom of expression accommodations within copyright doctrine, academic literature on copyright and freedom of expression has identified a number of copyright doctrines which could be considered to reflect freedom of expression interests. These include limitations on the extent of protection such as the idea-expression dichotomy,[105] copyright term limits and the public domain as well as the role of copyright exceptions.[106] For instance, the idea-expression dichotomy could be considered as supportive of freedom of expression, as it permits individuals to express the ideas devised by another speaker so long as they

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[101] Voorhoof (n 27) 340.

[102] See for example discourse in the US context about internal vs external freedom of expression safeguards in Birnhack (n 13) 235; and Birnhack (n 16) 1277.

[103] For a discussion of such arguments see Hugenholtz (n 11) 248–9.

[104] See Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45(3) *IIC - International Review of Intellectual Property and Competition Law* 316, 317 listing a number of academics who have argued against explicit consideration of freedom of expression values.

[105] Barendt (n 8) 249.

[106] Ibid.

do not reproduce the first speaker's expression.[107] On the other hand, even though the idea expression dichotomy does allow subsequent speakers to circulate an idea, it does restrict their use of language, by preventing them from formulating their expression in a substantially similar form of words to the original speaker.[108] Using the exact words of an original speaker may be significant from a freedom of expression perspective under a truth or democratic rationale,[109] as adopting those words may assist in persuasion by adding the authority or imprimatur of the original speaker or be the best and most effective manner of reaching a particular audience.[110] Even an infringer selecting what words to copy may amount to a meaningful editorial task,[111] furthering the autonomy rationale of freedom of expression.[112] It has also been recognised that it may be impossible to distinguish between ideas and expression for some kinds of copyright protected work, such as artworks or newsworthy images[113] - in these cases it may be necessary to reproduce the specific image itself.

Similarly, while copyright exceptions such as UK fair dealing or US fair use may internalise and further freedom of expression interests, at a doctrinal level they may not fully give effect to complete freedom of expression. For example, Hugenholtz has identified that there will be situations where the absence or inflexibility of copyright exceptions or copyright limitations may lead to significant conflict between copyright and freedom of expression.[114] This may particularly be the case within the EU, where even if some exceptions have been drafted with explicit freedom of expression concerns in mind,[115] the Information Society Directive's attempts to harmonise copyright exceptions may leave domestic member states insufficient flexibility to fully accommodate freedom of expression interests.[116] Similarly, Rebecca Tushnet notes that the focus in US fair dealing jurisprudence on transformation as a criterion for fairness may have the effect of narrowing the scope

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[107] Nimmer (n 10) 1192.

[108] Barendt (n 8) 258.

[109] See for example the discussion in Strowel and Tulkens (n 2) 276 arguing that the reproduction of a work may be necessary in order to effectively critique a government policy.

[110] Tushnet (n 51) 566; Compare Nimmer (n 10) 1192 who considered the reproduction of expression might 'add flavour' but that reproducing expression would normally not be required.

[111] Randall P Bezanson, 'Speaking Through Others' Voices: Authorship, Originality, and Free Speech' (2003) 38 *Wake Forest Law Review* 983, 987.

[112] Tushnet (n 51) 572; Compare Nimmer (n 10) 1192 noting 'One who pirates the expression of another is not engaging in self-expression in any meaningful sense'.

[113] Nimmer (n 10) 1199.

[114] Hugenholtz (n 11) 240.

[115] Ibid 252.

[116] Ibid 250.

of the fair use exception, threatening its ability to fully protect freedom of expression, particularly in circumstances where non-critical or non-transformative uses of a copyright protected work may still have significant expressive value.[117] In discussing fair use cases it is important to recognise that where a fair use decision is made this might not primarily be about the actions or interests of the defendant - instead in many circumstances an infringer asserting the fair use exception is in effect given standing to assert the public interest.[118] Christophe Geiger has also written that he is sceptical of the extent to which legislatures are capable of foreseeing all the ways in which freedom of expression and copyright interests might conflict or interact and legislating in advance to resolve them.[119] On that basis he argues that some level of external freedom of expression scrutiny is necessary.

III.A. *Academic understandings of the relationship between freedom of expression and copyright*

Interest in the relationship between freedom of speech and copyright was identified within the American academic community from at least 1970, where two seminal articles on the topic were published - Melville Nimmer's paper 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press' and Paul Goldstein's paper 'Copyright and the First Amendment'.[120] These papers were considered 'path breaking' at the time, opening up new lines of scholarly enquiry.[121] The concerns of Nimmer and Goldstein about the relationship between copyright and freedom of expression were partly inspired by (at the time) recent US copyright fair use jurisprudence such as *Rosemont Enterprises v Random House*,[122] a case in which the court, while avoiding reference to the US First Amendment and its protection of speech, was attentive to the public interest in the obtaining information and the risk of copyright restricting access to information.[123]

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[117] Tushnet (n 51) 537.

[118] Goldstein (n 10) 1007.

[119] Christophe Geiger, '"Fair Use" through Fundamental Rights in Europe' in Wee Loon Ng, Haochen Sun and Shyam Balganesh (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (Cambridge University Press, Forthcoming) 27.

[120] Nimmer (n 10); Goldstein (n 10).

[121] Birnhack (n 14) 241.

[122] Rosemont Enterprises, Inc. v. Random House, Inc. 366 F.2d 303 (2d Cir. 1966), where the plaintiff sought to use copyright as a tool of censorship.

[123] Goldstein (n 10) 985; Nimmer (n 10) 1201; See also Lionel S Sobel, 'Copyright and the First Amendment: A Gathering Storm' (1969) 19 *Copyright Law Symposium (ASCAP)* 43, 53 noting that at the time of these articles the US fair use doctrine was not yet codified in statute.

Both of these groundbreaking academic papers conceived of copyright as not only a potential limit on freedom of expression, but also as an instrumental tool for advancing freedom of expression by providing incentives for the creation of expressive works.[124] Despite the role of copyright in encouraging expression, in his paper Nimmer described the conflict between copyright legislation in speech interests as a 'largely ignored paradox', with copyright law acting as an unrecognised abridgement on freedom of speech.[125]

While academic interest in the relationship between freedom of expression and copyright rules could be said to have commenced in a meaningful way in the US in the 1970s, more recently scholars have also examined the issue and recognised the 'greater potential for disharmony between copyright and freedom of expression principles than their predecessors'.[126] This developing recognition of the impact of copyright on freedom of expression has to some extent been driven by the availability of the network environment and digital copies of works. [127] Historically, copyright took the form of publishing industry regulation[128] and had fairly limited significance for individual readers[129] as infringement by private citizens was beyond the notice of copyright owners. [130] However, in the modern copyright era, technological developments allowing copyright owners to monitor infringement and the ease of individuals copying works has led copyright owners to engage in a greater degree of copyright enforcement against private and non-commercial copying. [131] Indeed, the very existence of copyright licensing fees financially restricting access to copyright protected works may be enough to raise freedom of expression concerns. [132] While largely beyond the scope of this dissertation, the adoption of protection for digital rights management or technological protection measures spurred further analysis of the relationship between freedom of expression and copyright.[133]

In this context academics have often discussed the extent to which particular doctrinal copyright rules may serve to accommodate freedom of expression

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[124] Nimmer (n 10) 1181; Goldstein (n 10) 990.

[125] Nimmer (n 10) 1181.

[126] See e.g. Samuelson (n 13) 320 citing a 'new generation' of scholars including Yochai Benkler, Julie Cohen, Niva Elkin-Koren, Mark Lemley, Lawrence Lessig, Neil Netanel, and Eugene Volokh.

[127] Birnhack (n 14) 242.

[128] Samuelson (n 13) 326.

[129] Tushnet (n 51) 543.

[130] Ibid 586.

[131] Samuelson (n 13) 331.

[132] Tushnet (n 51) 546.

[133] Birnhack (n 14) 243.

interests. As discussed above, academic discussion in this area includes focus on issues such as the idea-expression dichotomy, the duration and scope of protection, and the operation of copyright exceptions.[134] Many academics consider that the operation of copyright exceptions, such as fair dealing or fair use, are an effective means of accommodating freedom of expression interests.[135]

Freedom of speech or freedom of expression interests are not usually however considered to be absolute imperatives,[136] requiring courts to completely set aside traditional understandings of privacy, autonomy and contractual freedom. For example, freedom of expression interests and the First Amendment of the US Constitution do not usually create an entitlement on the part of users to access information held by a private party or to access copyright protected expression.[137] Similarly, the law does not require the distribution of copyright protected work in a form that can be easily copied, at a price that is affordable by an individual user, and the fair use doctrine does not usually guarantee access to copyright protected work to copy it by the user's preferred technique.[138]

III.B. *The relationship between freedom of expression and copyright in the US*

One of the key debates within the copyright and freedom of expression literature and jurisprudence in the United States is the extent to which the First Amendment should legitimately act as an external constraint on copyright law, or the extent to which copyright exceptions should merely be interpreted in conformity with its principles.[139] It is frequently argued that copyright doctrinal rules are capable of fully internalising freedom of expression concerns. In a particularly striking metaphor, Birnhack discusses the way that doctrines such as fair use 'are portrayed as

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[134] See further below at page 168 in the context of the the US Supreme Court case of *Eldred v Ashcroft* 537 U.S. 186 (2003).

[135] Hugenholtz (n 11) 240.

[136] See *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)* Art 10(2) noting the extent to which freedom of expression '...may be subject to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society...' ('ECHR').

[137] Raymond Nimmer, 'First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 359, 369.

[138] Ibid 377.

[139] Neil Weinstock Netanel, 'Copyright and the First Amendment; What Eldred Misses - and Portends' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press, 2005) 127, 128.

ambassadors of good faith, acting within the territory of copyright law and representing the interests of the foreign land of the First Amendment'.[140]

Pamela Samuelson argues that, in a historical perspective, the US legal system has been willing to internally accommodate freedom of expression interests in setting the bounds of doctrinal copyright rules, citing the example of changes to the fair use doctrine over time as an indication of the role of freedom of expression in law reform. Samuelson notes that while there were some initial doubts within the courts as to whether the fair use defence could be invoked in relation to unpublished works, the Congress amended the fair use provision in line with freedom of expression interests to confirm that unpublished works fell within the defence.[141] Copyright doctrine has therefore historically been attentive to freedom of expression concerns, and has in part developed in order to take them into account.

Particularly since the 1970s, copyright decision makers in the US have been required to grapple with the relationship between freedom of expression and copyright ownership. One of the earliest US Supreme Court cases to examine the relationship between freedom of speech and copyright exceptions was *Harper and Row v Nation Enterprises*.[142] This case was the first instance where the US Supreme Court considered the extent to which freedom of speech rights under the US Constitution impacted copyright, holding that (to a limited extent) freedom of speech and exception concerns were relevant in interpreting the fair use doctrine,[143] but that freedom of expression did not act as a separate and external constraint on copyright law.[144] The approach here stands as a progressive development of the law at the time when considered against earlier significant US copyright decision, where often the conflict between freedom of speech and copyright was ignored or considered to have been already taken into account by the existence of the mechanism of fair use.[145] Even in the *Harper and Row* case however the approach to freedom of expression was controversial, with a dissent from Brennan J suggesting that the approach did not given sufficient attention to the freedom of expression

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[140] Birnhack (n 16) 1307.

[141] Samuelson (n 13) 320.

[142] *Harper & Row v Nation Enterprises* (1985) 471 U.S. 539 ('Harper and Row'); Birnhack (n 13) 244. In the case the Nation newspaper had quoted substantially from a forthcoming memoir by President Ford. The newspaper unsuccessfully argued that its quotations from the memoir were fair use, and that First Amendment interests should be considered in applying the fair use doctrine.

[143] Harper & Row, 560: 'In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use …'

[144] Netanel (n 1) 64.

[145] Birnhack (n 14) 248.

argument.[146] Here Brennan J expressed a concern that the narrow approach of the Court to the fair use argument may have permitted the monopolisation of information. More generally, it has been argued that the case represents a fairly narrow doctrinal interpretation of the fair use doctrine, and one which is insufficiently attentive to freedom of speech interests.[147]

This relationship between speech and copyright law was subject to more direct scrutiny in the more recent US Supreme Court case of *Eldred*.[148] This case concerned the constitutionality of an extension to the duration of copyright protection in the *Sonny Bono Copyright Term Extension Act* of 1998, which extended the copyright term within the US jurisdiction by 20 years. The case is unusual, as it represented a direct constitutional challenge to copyright legislation on the basis of First Amendment freedom of expression concerns.[149] Here the Court concluded that 'copyright's built-in free speech safeguards are generally adequate to address' First Amendment concerns,[150] at least where changes to the law made by congress did not alter the 'traditional contours of copyright protection'.[151] A number of academics have seized upon the Court's comments that the copyright first-amendment safeguards (such as fair use) as only *generally adequate* to address First Amendment concerns as '[i]t implies that in some situations, the built-in safeguards might be inadequate',[152] even if the Court did show a general deference to the legislature in implementing the general contours of copyright.[153] For instance, Marshall Leaffer considered that 'the interplay of copyright and the First

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[146] See discussion of the dissent in Eric Barendt, 'Copyright and Free Speech Theory' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 11, 26.

[147] Neil Weinstock Netanel, 'First Amendment Constraints on Copyright After Golan v. Holder' (2013) 60 *UCLA L. Rev.* 1082, 1110.

[148] *Eldred v Ashcroft 537 US 186* (2003) ('Eldred v Ashcroft'). This case was brought by individuals and businesses whose products or services were built upon copyright protected works which had gone into the public domain. The claimants unsuccessfully argued that the 1998 Copyright Term Extension Act was unconstitutional and required strict First Amendment scrutiny in circumstances where the Act lengthened the term of copyright protection for existing works which had fallen into the public domain.

[149] See Birnhack (n 16) 1276 noting 'Eldred is the first facial constitutional challenge to copyright law in 213 years'.

[150] *Eldred v Ashcroft* (n 148) 221

[151] *Eldred v Ashcroft* (n 148) 221; See for a discussion on the history and meaning of that phrase and the way it was subsequently limited in *Golan v. Holder* 565 U.S. 302 (2012) see Elizabeth Townsend Gard, 'A Tale of Two Ginsburgs: Traditional Contours in Eldred and Golan' (2013) 62 *Depaul Law Review* 931, 931.

[152] Birnhack (n 16) 1292.

[153] Ibid 1299.

Amendment' as discussed in the case indicated the existence of 'real constraints on the scope of copyright law'.[154] In the particular context of this thesis and based on the approach in *Eldred*, an argument might persuasively be made that the US fair use exception is necessary to take into account freedom of expression concerns and that it 'cannot be abolished or even narrowed',[155] and that contractual inroads into the operation of the exception should be considered with scepticism.

One controversial aspect of the *Eldred* judgment was the extent to which the Court considered that the focus of the First Amendment was protecting the ability of individuals to make or to decline to make their own speeches,[156] with the Court suggesting that the relevant speech interests were less significant were a speaker was using the language of someone else – '[the First Amendment] bears less heavily when speakers assert the right to make other people's speeches'.[157] This approach has been critiqued by a number of academics. For example, Netanel argues that the ability to quote the language of others lies at the heart of freedom of expression.[158] The theoretical approaches to freedom of expression and speech discussed above would also consider that repurposing the speech of others can fall within the core protection of freedom of expression principles 'speakers regularly express themselves most fully and effectively imparting words others have written'.[159] Rebecca Tushnet similarly makes the argument for the value of using other speech, as such speech 'is of value to audiences who have access through copying to otherwise unavailable speech. It also enhances copiers' ability to express themselves; to persuade others; and to participate in cultural, religious, and political institutions'.[160] Under an autonomy, truth or democratic rationale it is generally the case that the speech of others is also protected. For example, reciting the words of another speaker may be autonomy enhancing for an individual if doing so allows self development, direct quotations from the work of another may be vital in uncovering the truth, and quoting the words of political figures may be necessary in order to support the functioning of democratic institutions.

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[154] Marshall Leaffer, 'Life after Eldred: The Supreme Court and the Future of Copyright Intellectual Property Symposium: The Impact of the United States Supreme Court on Intellectual Property This Millennium' (2003) 30(5) *William Mitchell Law Review* 1597, 1605.

[155] Birnhack (n 16) 1308.

[156] *Eldred v Ashcroft 537 US 186* (n 149) 221.

[157] Ibid.

[158] Netanel (n 1) 42.

[159] Ibid.

[160] Tushnet (n 52) 562; See also Volokh (n 52) 726 arguing 'value of speech to consumers isn't just in its existing somewhere in a bookstore-the value lies in consumers actually hearing or reading it.'

The *Eldred* case was followed by *Golan v Holder*,[161] in which the Court considered whether removing works from the public domain would be consistent with First Amendment protections, in the context of a constitutional challenge to Section 514 of the US Uruguay Round Agreements Act. Here the Court explicitly recognised that US constitutional power to make copyright laws is concerned with incentivising the distribution of works, rather than incentivising their creation,[162] an approach which is somewhat attentive to the role of freedom of expression and disseminating protected material. Many academics have however considered that the approach of the Court in *Golan* acts as a partial 'repudiation of First Amendment limits on Congress's [copyright] power'.[163]

The Court's analysis in this case again explicitly considered the relationship between copyright protection and the First Amendment.[164] The Court recognised that 'some restriction on expression is the inherent and intended effect of every grant of copyright',[165] while also recognising that providing property rights in expression acts as an incentive for the creation and dissemination of ideas.[166] The Court then went on to identify the fair use defence alongside the idea-expression dichotomy as part of the explicit traditional contours of copyright,[167] and one of the key doctrines which act as a speech protective safeguard internal to copyright law.[168] This discussion in the case, considering the fair use exception as a particular way in which First Amendment interests could be balanced against those interests of the copyright owner is reminiscent of the seminal academic work of Nimmer, which focused on the ways in which the merger doctrine and the copyright term limit might act as free-speech accommodations.[169]

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[161] *Golan v. Holder* 565 U.S. 302 (2012).

[162] Ibid 326.

[163] See papers referred to in Netanel, 'First Amendment Constraints on Copyright After Golan v. Holder' (n 147) 1084.

[164] *Golan v Holder* (n 161) 327.

[165] Ibid.

[166] Ibid 328.

[167] See for example Netanel, 'First Amendment Constraints on Copyright After Golan v. Holder' (n 147) 1100 arguing that this approach in effect amounted to a limitation of the Court's earlier broader approach to defining the traditional contours.

[168] See Gard (n 151) 937 arguing that in Golan v Holder the Court further narrows the scope of the traditional contours of copyright to only mean the idea/expression dichotomy and fair use.

[169] Netanel, 'First Amendment Constraints on Copyright After Golan v. Holder' (n 147) 1086 Note here the discussion of Nimmer's subsequent approach, where he 'reasoned 'that the fair use privilege is also a vital safeguard for First Amendment interests within copyright law'.

As the extension to copyright term at issue in the *Golan* case did not interfere with either the idea-expression dichotomy or the fair use exception, it was considered that it did not alter the traditional contours of copyright protection and therefore did not require additional First Amendment scrutiny. This analysis of the Court was in part based on a recognition that while the extension of the copyright term meant that the petitioners were unable to freely use works that were having copyright protection restored, they would still be potentially able to reproduce them with by paying a licence fee to the copyright owner, so the freedom of expression restriction was less absolute.[170] This narrow approach to identifying the traditional contours of copyright doctrine meant that the copyright term extension at issue in the case was outside First Amendment scrutiny, despite the law's recapture of public domain materials. Indeed, it has been questioned whether the subsequently judicially more limited approach to identifying the traditional contours of copyright protection may limit the usefulness of the test into the future.[171]

In the *Golan* case Justice Breyer dissented, in an opinion joined by Justice Alito, explicitly citing the economic analysis of Landes and Posner[172] (discussed in the previous chapter) which focused on the fact that the copyright extension in issue would be unable to incentivise the creation of new works (only reward monetary rewards on the owners of old works), and was on that basis outside the scope of the US constitutional copyright power.[173] The dissent did, however, also make brief mention of the freedom of expression aspects of the term extension, noting that it would abridge the petitioners pre-existing freedom to speak,[174] and concluding that 'the First Amendment interest is important enough to require courts to scrutinize with some care the reasons claimed to justify the Act in order to determine whether they constitute reasonable copyright-related justifications for the serious harms, including speech-related harms, which the Act seems likely to impose'.[175] The approach of the dissent can therefore, in part, be seen as a rejection of the approach in the *Eldred* case where the court was dismissive of any freedom of expression interest in making the speech of another.

The outcome in the *Eldred* and *Golan* cases is perhaps more surprising as even Nimmer's 1970 article highlighted concerns about relying upon the fair use doctrine as a First Amendment safety valve. Nimmer, for example, noted that while the contours of the fair use defence are within the discretion of Congress to modify, the

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[170] *Golan v Holder* (n 161) 333.

[171] Gard (n 151) 1008.

[172] *Golan v Holder* (n 161) 346.

[173] Ibid 345.

[174] Ibid 358.

[175] Ibid 360.

First Amendment protection for speech is a constitutional principle which imposes limits upon Congress itself. On that basis he argued that a distinction should be drawn between fair use and what he describes as an 'emerging constitutional limitation on copyright contained in the First Amendment'.[176] It is also puzzling that the approach to freedom of expression in these copyright cases also departs from analogous areas of US First Amendment case law, where a greater degree of freedom of speech scrutiny is applied.[177] Some academics have however identified a middle ground here – an approach whereby the enforcement of copyright should generally be subject to free speech scrutiny, but not in all cases. Barendt for example considers that a standard case of commercial copyright infringement or piracy would not require free-speech scrutiny, however satirists, appropriation artists, and news reporters may be able to assert freedom of expression arguments which should be considered when scrutinising the enforcement of copyright rules.[178]

Arguably, the degree of deference given by the US Supreme Court in the *Golan* case suggests that lower courts may be reluctant to set aside legislation modifying or restricting copyright exceptions out of deference to the copyright system set up by the US legislature.[179] However, it is a more open question as to whether inconsistent contracts may be set aside.[180] Central to the outcome of that analysis is the extent to which a court might consider that inconsistent contractual provisions might 'disturb' the operation of fair use as a built in First Amendment safeguard within the copyright legislation.[181] More generally, it might be thought that while the *Eldred* and *Golan* cases have suggested that fair use may ameliorate the tension between copyright and speech it has been 'an exceedingly feeble, inconsistent check on copyright holders' proprietary control'.[182] This may particularly be the case where risk averse individuals may self-censor reproducing others' speech despite arguable fair use or First Amendment grounds based on a concern about potential liability and the uncertainty of the litigation process.[183]

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[176] Nimmer (n 10) 1200.

[177] Netanel, 'Copyright and the First Amendment; What Eldred Misses - and Portends' (n 139) 132.

[178] Barendt (n 8) 260–261; Compare however Barendt (n 146) 25 where he argues that the 'speaker's motive does not generally matter' and that 'recipients are not generally troubled if the speaker has something to gain financially from publication'.

[179] Kathleen Olson, 'Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims' (2006) 11(1) *Communications Law and Policy* 83, 129.

[180] Ibid 130.

[181] Netanel, 'First Amendment Constraints on Copyright After Golan v. Holder' (n 147) 1083.

[182] Netanel (n 1) 63.

[183] Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24(1) *Harvard Journal of Law & Technology* 171, 189.

III.C. *Freedom of expression in Europe and the relationship with copyright*

Europe has a long tradition of protecting freedom of expression,[184] with the right being protected in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[185] The right has also been protected within Article 11 of the EU Charter of Fundamental Rights, and these provisions place the protection of freedom of expression in a privileged position in the European constitutional order, with some going as far as describing the provisions as a European equivalent to the US First Amendment.[186]

Article 10 protections guaranteeing freedom of expression are not restricted to speech that is original to the speaker, and the protection of that right may extend to unoriginal expression.[187] In this sense then the European courts are much more open to the freedom of expression interests of those reproducing the words of another, in contrast to the approach seen in the *Eldred* case. The ECtHR has however also extended human rights protection to copyright owners, on an interpretation that places copyright within the protection of the broader right to property in Article 1 of the First Protocol.[188] This approach is controversial, noting

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[184] Voorhoof (n 27) 332.

[185] *European Convention for the Protection of Human Rights and Fundamental Freedoms* (n 135) Article 10 provides as follows: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[186] Geiger and Izyumenko, 'The Role Of Human Rights In Copyright Enforcement Online: Elaborating A Legal Framework For Website Blocking' (n 81) 42.

[187] Hugenholtz (n 11) 260.

[188] Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (n 104) 331; See also Geiger and Izyumenko, 'The Role Of Human Rights In Copyright Enforcement Online: Elaborating A Legal Framework For Website Blocking' (n 81) 96 discussing the protection of copyright holders under Article 1 in the Pirate Bay case. See also CJEU, Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] Opinion of the Advocate General, 52 noting that copyright 'is comparable ... to the right to property guaranteed under Article 1 of the Additional Protocol to the ECHR' ('*Opinion of the Advocate General in Funke Medien*').

the various restrictions on the scope of the right to property,[189] and can be contrasted with the approach by the CJEU which recognises that the right to property is not absolute and inviolable.[190]

Restrictions of the right to freedom of expression are permitted under the ECHR to the extent that they meet the three requirements of Article 10(2) – that are 'prescribed by law', have a 'legitimate aim' and finally and most decisively, must be 'necessary in a democratic society'. European civil law jurisdictions have also tended to place a greater emphasis on protecting the rights of the author in comparison to the US copyright law with its constitutional utilitarian imperative to secure benefits for the public, and on that basis some care must be taken applying US approaches to the copyright exception/freedom of expression overlap in Europe.[191]

Turning specifically to copyright exceptions, Bernt Hugenholtz has argued that exceptions in the EU are often inspired by freedom of expression concerns, either explicitly or implicitly.[192] This is not to say however that the exceptions *fully* account for freedom of expression requirements or that there is no scope for further freedom of expression scrutiny of domestic copyright exceptions. This may particularly be the case in the EU where many exceptions in the Information Society Directive are optional in the sense that they do not express an obligation on domestic member states to implement in their national laws. As a consequence there is a different range of copyright exceptions in each member state – if all exceptions were required in order to balance freedom of expression and property rights then implementation of the exceptions would be expressed as mandatory, instead of left to the discretion of the member states.

III.C.1. *Recent European cases*

Both at a national[193] and supranational level, a number of courts within Europe have recently considered the relationship between copyright and freedom of expression. This section of the thesis focuses on the recent jurisprudence of the ECtHR and the CJEU. Recent cases in these courts are interesting as they show that the relevant courts are willing to go beyond the approach in the US, which often

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[189] Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (n 104) 331.

[190] Ibid 334.

[191] Dworkin (n 84) 155.

[192] Hugenholtz (n 11) 252.

[193] See for example Kevin Garnett, 'The Impact of the Human Rights Act 1998 on UK Copyright Law' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press, 2005) 171, 180 discussing the impact of Ashdown v Telegraph Co Ltd [2001] EWCA (Civ) 1142.

sees freedom of speech concerns being dealt with internally to the copyright system, and instead at least entertain the possibility that freedom of expression may act as an external constraint on copyright doctrine. Indeed, such an approach may be required in Europe to fully give effect to freedom of expression interests, in circumstances where EU exceptions permitted under the Information Society Directive are narrower than the US fair use doctrine. The cases discussed also demonstrate a split between the ECtHR and the CJEU, with the Human Rights Court being more attentive to freedom of expression concerns and being more willing to wield freedom of expression interests as an external limitation on copyright.[194]

III.C.2. *The approach in the ECtHR*

Turning first to the jurisprudence of the ECtHR, it appears from recent case law that the Court is willing to accept that copyright may constitute an interference with the right of freedom of expression, and that copyright protection should be restricted in certain circumstances.[195] This conclusion can be drawn particularly from two 2013 cases in the Court, the judgement in the *Ashby Donald and others v. France*[196] case, and the other in the Swedish '*Pirate Bay*' case. While, as discussed below, the CJEU has also in some decisions recognised that copyright may interfere with the right of freedom of expression, the CJEU has been less progressive in how it accommodates freedom of expression interests.[197]

The *Ashby Donald* case, delivered by the ECtHR in January 2013, was the first occasion where the Court clarified that a conviction under copyright law could amount to an interference with the right to freedom of expression under the ECHR.[198] In this case the applicants had been held to have infringed copyright in

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[194] Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (n 104) 318.

[195] Ibid 322.

[196] *Ashby Donald and others v France,* Application Nr 36769/0810, ECtHR Judgment of January 2013 ('Ashby Donald').

[197] Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (n 104) 323–4 discussing CJEU, Case C-360/10, SABAM v. Netlog [2012], Judgment of the Court (Third Chamber) of 16 February 2012 and CJEU Case C-70/10, Scarlet Extended [2011], Judgment of the Court (Third Chamber) of 24 November 2011.

[198] Dirk Voorhoof and Inger Høedt-Rasmussen, 'Copyright vs Freedom of Expression Judgment', *ECHR Blog* (22 January 2013) <http://echrblog.blogspot.co.uk/2013/01/copyright-vs-freedom-of-expression.html>; Henning Ruse-Khan, *Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights* (Research Paper No 13–18, Max Planck Institute for Intellectual Property and Competition Law, 18 November 2013) 20.

pictures they had taken the at fashion shows by publishing them online without the permission of the fashion houses. While the ECtHR concluded on the merits of the case that there had not been a violation of Article 10, in doing so it addressed the Article 10(2) criteria, concluding that the 'interference was prescribed by law, pursued the legitimate aim of protecting the rights of others and was to be considered necessary in a democratic society'.[199]

What is interesting about the *Ashby Donald* case is that unlike the approach in the US Supreme Court, the ECtHR shows a willingness to go beyond an argument that the copyright owner and users' rights are best weighed internally within copyright doctrine. Instead, in considering whether the interference with freedom of expression was proportionate to the legitimate aim pursued,[200] the ECtHR goes on to engage in a secondary balancing exercise, considering the balance between rights protected by Article 10 of the Convention and rights to (intellectual) property protected under Article 1 of the First Protocol to the Convention.[201] This balancing exercise is in addition to the one which occurs at the legislative level in the domestic legislature when designing or implementing doctrines such as the idea/expression dichotomy or in setting the scope of exceptions to copyright.

In carrying out the balancing exercise in an individual case, the ECtHR did, however, allow considerable discretion to the national court, acknowledging that the balancing of rights and freedoms set out in the Convention is difficult, and that the national legislature should have a wide margin of appreciation when carrying out that task.[202] Where there has been a restriction of freedom of expression relating to an area of general interest for society or an area of political speech, the ECtHR will give a narrower space of discretion to the national legislature.[203] In the *Ashby* case however the ECtHR considered that the publication online of pictures of models taken at fashion houses was not an issue of general interest to society, and applicants were considered to have engaged in commercial speech,[204] and on that

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[199] Voorhoof and Høedt-Rasmussen (n 199).

[200] *Ashby Donald and others v France* (n 197) 38.

[201] Paul LC Torremans, 'Ashby Donald and Others v France, Application 36769/08, EctHr, 5th Section, Judgment of 10 January 2013' (2014) 4(1) *Queen Mary Journal of Intellectual Property* 95, 97.

[202] *Ashby Donald and others v France* (n 197) 40. See also Henning Grosse Ruse-Khan, 'Overlaps and conflict norms in human rights law: Approaches of European courts to address intersections with intellectual property rights' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2015) 70, 85-6 noting that an additional reason for providing the domestic court wide discretion was that the case concerned commercial, rather than political speech.

[203] Ibid 39; Torremans (n 202) 97.

[204] *Ashby Donald and others v France* (n 197) 39.

basis provided a wide margin of discretion to the national legislature.[205] It is interesting to note that the ECtHR's conception of freedom of expression underlying this judgment reflects a democratic style rationale for freedom of expression, and one which seems to have a somewhat constrained conception of what may constitute political speech.

The *Ashby Donald* case was shortly followed by *Neij and Sunde Kolmisoppi v. Sweden*[206] in February 2013. In this case the two applicants were involved in the operation of the Pirate Bay, the world's largest file sharing website, and were convicted in a Swedish court of criminal copyright violations. The applicants complained to the ECtHR, arguing that Article 10 provides a right to operate a service of communicating unprotected material on the internet, according to the basic principles of communication on the internet. As in *Ashby*, the ECtHR agreed that the actions of the applicants came within the purview of Article 10 and that their conviction interfered with their right to freedom of expression and would be a breach of that right unless falling with Article 10(2). As in *Ashby*, the EctHR dealt quickly with the first two elements of the Article 10(2) test, focusing its analysis on the necessity of the interference.[207] Here the Court considered that the dispute involved a weighing between the Article 10 right to freedom of expression and the protection afforded to intellectual property under Article 1 of the First Protocol to the Convention.[208] In carrying out this balancing exercise the Court also emphasised that the 'safeguards afforded to the distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate',[209] and again provided the national legislature with a wide margin for appreciation when holding that the convictions were consistent with Article 10. Indeed, '[w]here the balancing exercise between two Convention rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, it requires strong reasons for the European Court to substitute its view for that of the domestic courts'.[210]

In summary then, the ECtHR cases discussed above demonstrate that the Court will apply external freedom of expression scrutiny in relevant copyright cases, and will

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[205] Torremans (n 202) 97.

[206] *Fredrik Neij and Sunde Kolmisoppi v Sweden* Application Nr 40397/12, ECtHR Judgment of February 2013 ('*Fredrik Neij and Sunde Kolmisoppi v Sweden*')

[207] Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (n 104) 321.

[208] *Fredrik Neij and Sunde Kolmisoppi v Sweden* (n 207) 11.

[209] Ibid.

[210] Voorhoof and Høedt-Rasmussen (n 199) referring to *Axel Springer Verlag AG v. Germany*, Application Nr 39954/08, ECtHR Judgment of February 2012 § 88.

consider the way in which the copyright framework impacts upon the enjoyment of human rights to freedom of expression. The Court has also shown a willingness to consider these issues on a case-by-case basis, rather than setting firm rules as to how the relationship should be mediated.[211] The ECtHR is, however, somewhat deferential to the approach in domestic courts and shows a willingness to afford a wide margin of discretion to national legislatures.[212] In such circumstances it will perhaps be a rare instance where the ECtHR jurisprudence will provide an operative limitation on copyright exceptions. Finally, judgments from the ECtHR consistently consider or make reference to the political or apolitical nature of the expressive conduct in issue, aligning their approach with a form of democratic rationale for freedom of expression.

III.C.3. *The approach in the CJEU*

The CJEU has discussed the relationship and balance between copyright and freedom of expression in a number of cases over the years.[213] The starting point for much of this analysis in copyright law has been the *Promusicae*[214] case in 2008.[215] That case, concerning the disclosure of personal data and the Information Society Directive, confirmed that fundamental rights could be applied in a horizontal manner, requiring Courts to consider those rights when interpreting and implementing domestic legislation which transposed EU Directives.[216] The Court also considered that when member states are implementing EU copyright directives

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[211] Geiger and Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (n 104) 339.

[212] See for example *Fredrik Neij and Sunde Kolmisoppi v Sweden* (n 206) 11 where the Court noted that where the State was balancing two competing interests protected under the convention and that '...[i]n such a case, the State benefits from a wide margin of appreciation'. See also Ruse-Khan (n 203) 87 on the deferential approach to national balancing decisions.

[213] Note however Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 41(11) *EIPR* 683, 696 arguing that this balancing approach has been incomplete due to a failure to articulate fully the underlying rationale of copyright as a property entitlement- 'Once clearly articulated, the social function framework may assist the court in filling most of the gaps that are still left uncovered by its case law, and bring some clarity into the fair balance doctrine piecemeal'.

[214] CJEU, Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] Judgment of the Court (Grand Chamber).

[215] See generally Sganga (n 214) 684 charting the development of the CJEU's approach to balancing fundamental rights in the field of Intellectual Property.

[216] *Productores de Música de España (Promusicae) v Telefónica de España SAU* (n 215) 68; Sganga (n 214) 683.

they should attempt to strike a fair balance between any competing fundamental rights.[217]

The fundamental right of freedom of expression has since been considered in a number of copyright cases, including in the disputes over intermediary responsibility in *Scarlet Extended v SABAM*[218] and *SABAM v Netlog.*[219] These cases concerned requests by a Belgian association representing authors, composers and editors of musical works for injunctions requiring ISPs and online social networking forums to implement filtering technology.[220] In each case the CJEU recognised that the right to intellectual property being safeguarded by the injunctions was protected in Article 17(2) of the Charter of Fundamental Rights of the European Union, but that the right was not necessarily inviolable,[221] and must be balanced against other fundamental rights and interests.[222] In these cases, the proposed injunctions supported the right to intellectual property, but had to be balanced against the ISPs' or hosting service providers' freedom to operate a business[223] and users' right to protection of personal data and freedom to receive and impart information under the Charter.[224] It is interesting to note for the purpose of this chapter that the freedom to operate a business has previously been identified by the CJEU as encompassing the freedom of contract, including the freedom to choose with whom to do business and to determine the price of a service.[225] While the freedom to operate a business is found in Article 16 of the Charter, it is not expressed as a right (unlike the right to property in Article 17 or the Article 11 right to freedom of expression[226]) and cases have endorsed the Court's ability to constrain freedom of contract to meet societal interests.[227]

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[217] Sganga (n 214) 684 noting the significance of Recital 31 of the Information Society Directive.

[218] CJEU, Case C-70/10, *Scarlet Extended* [2011], Judgment of the Court (Third Chamber) of 24 November 2011 ('Scarlet Extended').

[219] CJEU, Case C-360/10, *SABAM v. Netlog* [2012], Judgment of the Court (Third Chamber) of 16 February 2012 ('*SABAM v. Netlog*').

[220] Ruse-Khan (n 199) 5.

[221] *Scarlet Extended* (n 219) 41.

[222] *Scarlet Extended* (n 219) 44; *SABAM v Netlog* (n 220) 42; Ruse-Khan (n 199) 5.

[223] *Scarlet Extended* (n 219) 44.

[224] *Scarlet Extended* (n 219) 48.

[225] CJEU, Case C-283-11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] Judgment of the Court (Grand Chamber) 42–43 (*'Sky Österreich GmbH v Österreichischer Rundfunk'*).

[226] Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10(1) *European Review of Contract Law* 180.

[227] Ibid 171 referring to *Sky Österreich GmbH v Österreichischer Rundfunk*.

The CJEU subsequently considered the relationship between copyright exceptions and fundamental rights in 2014 in the context of parody in the *Deckmyn* decision.[228] Here the Court explicitly linked the parody exception under Article 5(3)(k) of the Information Society Directive to freedom of expression, harmonizing the exception and the meaning of parody in EU law and arguably making a national implementation of a parody exception mandatory.[229] The case also represents a departure from the position that copyright exceptions and limitations should be restrictively interpreted,[230] and a recognition that in some circumstances this may prevent courts from achieving a fair balance in copyright law between conflicting fundamental rights.[231]

Much more recently the Court of Justice had been asked to consider a trio of copyright referrals from the German Bundersgerichtshof, which explicitly required the court to address the relationship between copyright doctrine (in the context of exceptions) and freedom of expression. The Court handed down judgement in each of the decisions in mid-2019. These more recent cases represent the most explicit consideration of freedom of expression interactions with copyright law within the EU. The balance of this section discusses the three decisions in detail, including both the decision of the CJEU as well as the opinions from the Advocate General. This jurisprudence is particularly interesting, as Opinions in each decision were drafted by the same Advocate General, the cases were decided by the Court in a Grand Chamber composition and the relevant Judgments were all prepared by the same Judge Rapporteur.[232] While the analysis of the Advocate General was not fully adopted in the relevant cases, it remains valuable to examine his approach in detail because it reflects an approach to freedom of expression scrutiny of copyright which better reflects the concerns expressed by academics. Furthermore, it might

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[228] CJEU, Case C-201/13, *Deckmyn v Vandersteen* [2014] Judgment of the Court (Grand Chamber). For background on this decision see Eleonora Rosati, 'Just a Laughing Matter? Why the Decision in *Deckmyn* Is Broader than Parody' (2015) 52(2) *Common Market Law Review* 511.

[229] Sganga (n 214) 687.

[230] CJEU, Case C-201/13, *Deckmyn v Vandersteen* [2014] Judgment of the Court (Grand Chamber) § 27 ('*Deckmyn v Vandersteen*').

[231] Lionel AF Bently et al, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union: Opinion on The Judgment of the CJEU in Case C201/13 Deckmyn* (Opinion, European Copyright Society, 2014) 5. See also CJEU, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH* [2011] Judgment of the Court (Third Chamber) where the Court similarly indicated that the quotation exception was 'intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors'.

[232] Eleonora Rosati, 'The CJEU Pelham Decision: Only Recognizable Samples as Acts of Reproduction?', *The IPKat* (4 August 2019) <http://ipkitten.blogspot.com/2019/08/the-pelham-decision-only-recognizable.html>.

provide an approach for the Court to adopt if confronted with a case where even their flexible approach to the interpretation of copyright exceptions was unable to properly account for freedom of expression interests. All three cases have generated significant academic commentary and it is expected that they will continue to have repercussions on the relationship between freedom of expression contract for years to come.

III.C.3.(a) *Funke Medien v Germany*[233]

The Funke Medien case arose from a reference from Germany, in a case relating to military status reports about the movements of the German Armed Forces.[234] The applicant, who operated the website of the daily newspaper acquired a number of these confidential military status reports and published them online. The German government took the view that this was a violation of their copyright in the reports, brought an action seeking an injunction to have them removed from the website.[235] The referral to the CJEU asked the court to consider whether the fundamental right to freedom of expression could justify exceptions or limitations to the rights of an author beyond those provided in the Information Society Directive,[236] and in answering this question the court took the opportunity to provide guidance more generally about the relationship between the exceptions in the Information Society Directive and the scope of fundamental rights protection within the EU.[237] Here the Court noted that the Information Society Directive sought to provide a fair balance between the interests of copyright owners and the rights and interests of users of protected subject matter,[238] and that the quotation exception in particular is 'specifically aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter'.[239] The Court concluded however that freedom of expression rights would not be capable of justifying a derogation from the exclusive rights of the authors beyond those exceptions and limitations provided for in the Information Society Directive.[240]

Despite this, the CJEU did go on to explain that when member states transpose the provisions of the Information Society Directive and when national courts interpret

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[233] CJEU, Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] Judgment of the Court (Grand Chamber) ('*Funke Medien*') .

[234] Ibid 9.

[235] Ibid 11.

[236] Ibid 15.

[237] Ibid 55.

[238] Ibid 57.

[239] Ibid 60.

[240] Ibid.

those provisions they must do so in a manner consistent the Directive, but must also not adopt an interpretation of the domestic laws which would be in conflict with those fundamental rights or with the other general principles of EU law.[241] The Court also described a number of exceptions or limitations in the information society directive as providing positive rights to the users of particular works,[242] and held that when striking a balance a member court must 'rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter'.[243] This approach of the Court, adopting a view that freedom of expression considerations can be fully internalised within an interpretation of the exceptions within the information society directive is more limited than the approach adopted in the jurisprudence of the ECtHR. It also represents a departure from the approach of the Advocate General, who advocated for a greater degree of protection for freedom of expression interests. Indeed, the Advocate General's opinion in this case represents the furthest that a member of the Court of Justice has been willing to extend protection for freedom of expression in the copyright context,[244] and his approach is worthy of further analysis.

As is typical, the Advocate General's opinion in this case is more wide-ranging and detailed in its analysis than the decision finally adopted by the court itself. For example, the Advocate General started his analysis seriously doubting whether the military report at issue involved sufficient originality to be protected under copyright law,[245] and was much more willing than the broader court to conclude that the reports were outside the scope of copyright protection.[246] He also adopted as a starting point for the analysis the freedom of expression interest of Funke Medien, rather than the copyright law of Germany;[247] and was willing to accept a principle frequently asserted by academics that at times it may be impossible to communicate

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[241] Ibid 68.

[242] Ibid 70.

[243] Ibid 76.

[244] Christophe Geiger and Elena Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way* (Research Paper No 2018–12, Center for International Intellectual Property Studies, 29 November 2018).

[245] *Opinion of the Advocate General in Funke Medien* (n 188) 14.

[246] Compare ibid 22; with the Court in *Funke Medien* (n 240) 25 who were much more willing to return that question to the referring Court.

[247] *Opinion of the Advocate General in Funke Medien* (n 188) 33; Geiger and Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (n 251) 7.

certain ideas without also at the same time communicating at least partially a copyright protected work of expression created by another person.[248]

Turning specifically to the relationship between copyright exceptions and freedom of expression, the Advocate General reasoned that copyright 'already incorporates mechanisms designed to reconcile [itself] with respect for fundamental rights' and that as '*a general rule*, those mechanisms should be sufficient…'.[249] He did however go on to suggest that while the internal limits of copyright allow a reconciliation of copyright and freedom of expression in the usual case,[250] there may be other exceptional cases where a further external balancing between copyright and freedom of expression must be carried out on a case-by-case basis[251] to enable an accurate assessment of the proportionality of any copyright based restriction on freedom of expression.[252] Here, in a footnote, the Advocate General explicitly made reference to the ECtHR cases of *Ashby* and *the Pirate Bay* discussed above, noting the approach of that court in recognising freedom of expression as providing an external limitation on copyright. This represents a significant difference from the approach of the CJEU, which considered that copyright rules already provided a fair balance between the rights and interests of users and the owners of copyright protected works, so long as the exceptions were interpreted by the national court in a manner consistent with their wording but also fully adhering to the fundamental rights set out in the Charter.[253] While the Advocate General's approach was not taken up by the Court of Justice itself, the suggestions made by the Advocate General that if required by the facts and on a case-by-case basis, any judicial implementation of a copyright law provision should be subject to a freedom of expression scrutiny is the furthest that the Court of Justice jurisprudence has moved to restricting the immunity of copyright law from freedom of expression scrutiny.[254] The final paragraphs of the opinion did however suggest that some caution might need to be taken in applying the principles from the case more generally in copyright disputes, with the Advocate General noting that '[i]t is one thing to give precedence to freedom of expression over copyright in a specific and very particular situation. It is quite another to introduce into the harmonised copyright system, outside the

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[248] Note the similarities between *Opinion of the Advocate General in Funke Medien* (n 188) 35 and Nimmer (n 10) 1197.

[249] *Opinion of the Advocate General in Funke Medien* (n 188) 30 (emphasis added).

[250] Ibid 40.

[251] Sganga (n 214) 689.

[252] *Opinion of the Advocate General in Funke Medien* (n 188) 31.

[253] *Funke Medien* (n 240) 76.

[254] Geiger and Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (n 251) 4.

provisions of substantive EU law governing that area, exceptions and limitations which, by their nature, are intended to apply generally.'[255]

In summary, in his Opinion, AG Szpunar reasoned that freedom of expression rights might in some circumstances be considered as an external limitation to copyright, going beyond the set of copyright exceptions permitted to member states in the Information Society Directive.[256] As will be discussed below however, the Advocate General expressed this principle in a more circumspect manner in his two subsequent opinions in the *Pelham* and *Spiegel Online* cases, where it was considered that recourse to external human rights limitations would only be appropriate in exceptional circumstances where the essence of a fundamental right is at stake.[257] Jonathan Griffiths has suggested that if the Advocate General's opinions are read in sequence '…the latter two might be viewed as a slightly horrified response to a full realisation of the potential consequences of the structure of reasoning employed in Funke Medien'.[258]

In any event, this particular aspect of his Opinion opening up the potential for freedom of expression as an external limitation on copyright was not taken up by the Court, which instead held that when transposing the Directive the relevant member state must 'rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order'.[259] While the Court itself did not adopt the reasoning of the Advocate General that freedom of expression rights provided a general external limitation on copyright, their approach was attentive to freedom of expression interests, and it might be argued that in a case where a domestic implementation of a copyright exception was inconsistent with freedom of expression they may have been more willing to set that exception aside.

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[255] *Opinion of the Advocate General in Funke Medien* (n 188) 71.

[256] But see Geiger and Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (n 251) 12 arguing that there is some confusion as to whether the Advocate General was advocating for a modified interpretation of existing exceptions to account for freedom of expression, or a distinct additional external freedom of expression based copyright exception. See also Tito Rendas, 'Advocate General Szpunar in Spiegel Online (or Why We Need Fair Use in the EU)' (2019) 14(4) *Journal of Intellectual Property Law & Practice* 265, 266 discussing the approach to this issue by the AG in the *Spiegel* case. and Jonathan Griffiths, 'European Union Copyright Law and the Charter of Fundamental Rights—Advocate General Szpunar's Opinions in (C-469/17) Funke Medien, (C-476/17) Pelham GmbH and (C-516/17) Spiegel Online' (2019) 20(1) *ERA Forum* 35, 36 noting that reference to external freedom of expression constraints might 'disturb the stability of established rules and arrangements in copyright law'.

[257] Geiger (n 119) 3.

[258] Griffiths (n 263) 47.

[259] *Funke Medien* (n 240) 53.

Overall, however, following this case it can be argued that the European jurisprudence is slightly more attentive to human rights concerns than the approach in the United States, where freedom of expression scrutiny is primarily focused on the extent to which the US copyright provisions have departed from their traditional contours. It remains the case however that the level of freedom of expression scrutiny of the copyright regime is significantly curtailed both in the US and in the European Union.

III.C.3.(b) *Pelham v Hütter*[260]

The Pelham case concerned the scope of exceptions to be implemented by a EU member state in conformity with the requirements of the Information Society Directive, and whether a member state could implement a copyright exception which was not on the enumerated list of exceptions within the Directive.

In the case a short, two second musical sample[261] was extracted from a recording of the song 'Metall auf Metall' by the musical group Kraftwerk.[262] That extracted two second rhythm sequence sample was taken by Mr Pelham and Mr Haas and played on a loop in a new musical composition they had created.[263] In determining whether this act of sampling was an infringement a number of questions were referred by the German court to the CJEU, relevantly including the extent to which fundamental rights under German law could be taken into account in interpreting national legislation implementing the Information Society Directive. This question was particularly pertinent from a freedom of expression perspective, as the German court had considered that the sampling could be permitted without the prior authorisation of the rights holder when justified by the German constitutional right to artistic freedom.[264] Interestingly here the Advocate General conceptualised the German institutional right to artistic freedom as constituting one element of a broader European charter right to freedom of expression[265] and the approach of the

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[260] CJEU, Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] Judgment of the Court (Grand Chamber) ('*Pelham*') .

[261] See CJEU, Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] Opinion of the Advocate General, 1 Where the Advocate General defined sampling as 'Sampling is the process of taking, by means of electronic equipment, a portion or sample (hence the name of the technique) of a phonogram for the purpose of using it as an element in a new composition in another phonogram' ('Opinion of the Advocate General in *Pelham*').

[262] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* (n 267) 14.

[263] Ibid 16.

[264] Bernd Justin Jütte and João Quintais, 'Advocate General Turns down the Music – Sampling Is Not a Fundamental Right under EU Copyright Law' (2019) 41(10) *European Intellectual Property Review* 654, 654.

[265] *Opinion of the Advocate General in Pelham* (n 267) 91.

Advocate General again directly considered freedom of expression and whether it could act as an external constraint on the scope of copyright exceptions or rights.

The Court itself confirmed that when a provision of EU law was being transposed into the national legal order of a member state there must be protection of European Charter fundamental rights in that transposition.[266] The court held however that in this case the relevant EU Directive constituted a measure of full harmonisation and that there was therefore no scope for the German constitutional right to artistic freedom to operate as an additional limitation on copyright beyond those exceptions permitted under the EU legal order.[267]

The Advocate General's opinion in the case did address some interesting arguments about the scope of freedom of expression and copyright exceptions in the European legal order. For example, the Advocate General suggested that a domestic member state may be acting incompatibly with the Charter where they fail to provide for certain copyright exceptions which implement freedom of expression interests.[268] The Advocate General however did not go as far as subjecting the requirements of the Information Society Directive at issue in the case to freedom of expression scrutiny, arguing that an individual wishing to reuse another's expression would be able to either draw inspiration from pre-existing works without copying expression, rely on the exceptions set out in the Information Society Directive which are designed to give effect to freedom of expression interests, and/or obtain authorisation of the rights holder for the proposed use of a work[269] – with the right to artistic freedom not 'guaranteeing free and unlimited access to artistic source material'.[270] This approach does suggest that if copyright exceptions set out in the Directive were curtailed by inconsistent contractual provisions there may be some scope for review of their consistency with the EU acquis.

The Advocate General concluded that the freedom of expression interest expressed in the Charter would not justify a departure from the provisions of the Information Society Directive except 'in cases of gross violation of the essence of a fundamental right'.[271] This is a conservative[272] or more restrictive interpretation of the circumstances which must exist before freedom of expression scrutiny can be applied to the application of exceptions within the Information Society Directive, and relies on the implicit assumption that the European legislator has carried out the

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[266] *Pelham* (n 267) 79.

[267] Ibid 85.

[268] *Opinion of the Advocate General in Pelham* (n 268) 77.

[269] Ibid 95.

[270] Jütte and Quintais (n 271) 656.

[271] *Opinion of the Advocate General in Pelham* (n 268) § 98.

[272] Sganga (n 214) 691.

proper balance between freedom of expression and copyright protection when drafting the Directive.[273] Such a conclusion shows parallels to the deference taken by the ECtHR to the wide margin of appreciation usually afforded to member states when balancing between colliding rights.[274] It is also a more restrictive approach than that which the Advocate general argued for in *Funke Medien*, where it was suggested that freedom of expression scrutiny may be required more frequently and where there was less of a willingness to proceed on the assumption that European legislator had already carried out the appropriate balancing exercise.

III.C.3.(c) *Spiegel Online v Volker Beck*[275]

The *Spiegel online* case concerned the interpretation of the quotation exception within the Information Society Directive. A German online news portal, Spiegel Online, published an article with hyperlinks to a manuscript written by Mr Beck, a member of the German Federal Parliament.[276] The online news portal argued that Mr Beck had misled the public when stating that the publisher of the work had changed the meaning of the article.

The case has significance in interpreting the scope of the European quotation copyright exception, as set out in the Information Society Directive, and it is for that reason also discussed in chapter 2 of the thesis. Significantly, the Court in *Spiegel Online* reiterated that copyright exceptions within the Information Society Directive provide not only defences against infringements but also constitute rights for users.[277] The case is discussed again here as the Court also specified that EU member states should strike a fair balance between conflicting fundamental rights when transposing copyright exceptions into national law.[278] The case also discusses the extent to which freedom of expression interests may justify a restriction on the exclusive rights of the author going beyond those exceptions listed in the Directive.[279] In this regard the Court ultimately concludes that to do so would not be permissible as it would interfere with the harmonisation of the EU copyright law,

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[273] Jütte and Quintais (n 271) 657.

[274] *Opinion of the Advocate General in Pelham* (n 268) 94; Jütte and Quintais (n 271) 657; Geiger and Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (n 251) 6.

[275] CJEU, Case C-516/17, *Spiegel Online GmbH v Volker Beck* [2019] Judgment of the Court (Grand Chamber) ('*Spiegel Online*').

[276] Ibid 12.

[277] Ibid 54 stating 'it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter'.

[278] Ibid 38.

[279] Ibid 40.

reducing legal certainty and that to do so would have a negative effect on the functioning of the internal market.[280] The judgment is also interesting because the court gives explicit consideration to the ECtHR *Ashby Donald* case discussed above.[281]

Again, in this case, reference to the opinion of the Advocate General is illustrative, showing once more a reluctance to adopt in full his own reasoning in the earlier *Funke Medien* case and instead following his more restrictive approach to the role of freedom of expression in *Pelham*.[282] Referring to his earlier Opinions, the Advocate General argued that 'since copyright law already contains limits and exceptions intended to reconcile authors' exclusive rights with fundamental rights, in particular freedom of expression, it is *usually* appropriate to respect the choices made by the legislature in this regard'.[283] In deferring to the EU legislator, the Advocate General noted that judicial intervention into the balance between copyright and freedom of exception would be required only exceptionally, 'in the event of *an infringement* of the essential content of a fundamental right'.[284] This approach is a moderation of the standard set out in the *Pelham* case, which required a 'gross violation' of the essence of freedom of expression to justify judicial intervention.[285] The Advocate General added that providing external freedom of expression scrutiny of copyright exceptions might call into question the effectiveness of EU copyright law and efforts at harmonization, running the risk of indirectly introducing a 'fair use clause' into EU law.[286]

In summary then, after the trio of recent cases in the CJEU the Court has confirmed that copyright exceptions should be interpreted in a manner consistent with freedom of expression rights, even if this requires a departure from a strict reading of the provisions of the Information Society Directive.[287] The Court has

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[280] Ibid 47; Tatiana Synodinou, 'Reflections on the CJEU's Judgment in Spiegel Online: Is There a Golden Intersection between Freedom of Expression and EU Copyright Law? Part I', *Kluwer Copyright Blog* (23 September 2019) <http://copyrightblog.kluweriplaw.com/2019/09/23/reflections-on-the-cjeus-judgment-in-spiegel-online-is-there-a-golden-intersection-between-freedom-of-expression-and-eu-copyright-law-part-i/>; Sganga (n 214) 693.

[281] *Spiegel Online GmbH v Volker Beck* (n 282) 58.

[282] Sganga (n 214) 692.

[283] CJEU, Case C-516/17, *Spiegel Online GmbH v Volker Beck* [2019] *Opinion of the Advocate General* 62 (emphasis added) ('Opinion of the Advocate General in Spiegel Online').

[284] Ibid (emphasis added).

[285] Daniel Jongsma, *AG Szpunar on Copyright's Relation to Fundamental Rights: One Step Forward and Two Steps Back?* Available at SSRN https://papers.ssrn.com/abstract=3328100, 15.

[286] *Opinion of the Advocate General in Spiegel Online* (n 290) 63.

[287] Sganga (n 214) 694.

also held that copyright exceptions and limitations constitute use rights, but has not gone as far as holding that fundamental rights can operate as an external limitation on copyright (despite suggestions from the Advocate General that this would be permissible at least where copyright would otherwise lead to an infringement of the essential content of a fundamental right). It is however still unclear how the CJEU might rule in the event of a referral where on the facts of the particular dispute the assertion of copyright was acting in a manner which impaired the core protection of the right to freedom of expression.[288]

These approaches from the CJEU to the relationship between freedom of expression and copyright will be developed in the subsequent chapter, when consideration is extended to also consider the impact of contractual provisions which seek to restrict the operation of copyright exceptions.

IV. CONCLUSIONS

This chapter has explored the various rationales for freedom of expression and for freedom of speech, and considered how these rationales have been taken into account in copyright disputes by courts in the US and in Europe.

One insight arising from this chapter is that European copyright jurisprudence seems slightly more willing to take into account freedom of expression considerations as either an external constraint on copyright law or as an interpretative tool in interpreting exceptions than the approach in the US. At a constitutional level, copyright in the US is explicitly consequentialist, with a constitutional imperative not to reward authors for their own sake, but instead to provide them a limited reward in order to promote the progress of science and the useful arts. The US constitutional focus on broader societal values is however not reflected at a doctrinal level at the level of external freedom of expression scrutiny applied in copyright cases. In contrast, within Europe, encompassing a number of states with very strong authors' rights histories, there seems to be a greater degree of scope for freedom of expression concerns to act as an external constraint on copyright. This is particularly evident in the approach in the ECtHR, however the recent trio of cases in the CJEU has shown that the Court is also willing to take more seriously the importance of freedom of expression and copyright disputes, even if refusing to allow it to act as an external constraint on copyright law. In

[288] See for example ibid 695 criticising the Court for its failure to provide more general guidance - 'As is typical of the court's jurisprudence, however, no attempt is made towards the construction of a less fact-specific framework which could offer general interpretative guidelines, particularly for national courts'.

recent cases the CJEU Advocate General has made suggestions for the development of the law which extend even further than the CJEU, accepting the possibility of freedom of expression acting as an external constraint on copyright protection in an appropriate case. However, neither the US courts nor the CJEU have gone as far as some academics have advocated in their level of protection for freedom of expression in copyright disputes, by providing a full external freedom of expression constraints on copyright interests.

The following chapter takes this analysis further, considering how the impact of contracting out of the various exceptions might be considered, in view of both the academic commentary, theories of freedom of contract, the theories of freedom of expression as discussed in this chapter, and the approach evident in the jurisprudence of US and European courts.

7. COMBINING FREEDOM OF CONTRACT THEORY AND THE RATIONALES FOR COPYRIGHT EXCEPTIONS

I. INTRODUCTION

This chapter is built upon the work in chapter 3 exploring the nature of freedom of contract within the confines of contract theory and combines these insights with the rationales for copyright exceptions explored in chapters 4, 5 and 6. In doing so, the chapter seeks to provide theoretical clarity on the question of whether copyright exceptions should be capable of being set aside or overridden by inconsistent contractual provisions. It argues that, once the underlying theoretical rationales for both contract and copyright are fully considered, it is clear that copyright exceptions are required under each of the underlying copyright rationales and that freedom of contract rationales do not justify permitting private parties to modify these copyright exceptions in their contractual dealings. This is the case even if private contractual arrangements are welfare enhancing for the individual contractual parties, due to the significant risks that contracting around the operation of copyright exceptions will lead to overbroad protection and may negatively impact the interests of third parties.

Part II of this chapter recaps the arguments from the earlier analysis in the thesis and notes the significant commonalities in copyright theories discussed above in connection to the role of copyright exceptions. All three theories are attentive to the significance of third-party interests beyond those of the copyright owner and user, and the scope of a copyright property entitlement is not absolute and under any theories. In Lockean theory the award of copyright must include exceptions to be consistent with the Lockean provisos for a property entitlement to be morally justified; under law and economics approaches there is a significant role for intellectual property law in the generation of positive externalities; and in freedom of expression theories core copyright exceptions must be interpreted in accordance with freedom of expression principles. This broad consensus on the importance of

exceptions amongst the theories is unusual when considering copyright theory, as is often the case that the divergent rationales for copyright suggest differing solutions to the proper doctrinal scope of copyright.[1]

Parts III to V of the chapter consider the specific rationales elaborated earlier in the thesis and their interaction with freedom of contract theory. Part III considers the way in which contract theory interrelates with a Lockean labour justification for intellectual property. It argues that under autonomy-based rationales for contract, which focus on the impact of contractual agreements and third-party interests, Lockean theory requires exceptions to be mandatory. This section of the chapter more generally considers the differing roles of property law (providing a justification for the existence of a property entitlement) and contract (used to transfer the property entitlement). Here it argues that Lockean provisos must be met in order for the existence of a property entitlement to be considered just, and therefore contractual attempts to modify exceptions which give effect to those provisos should be considered ineffective.

Part IV considers law and economics understandings of copyright exceptions, alongside law and economics understandings of freedom of contract. It considers whether permitting unrestrained freedom of contract would allow a greater level of incentives for the creation of copyright protected work or whether permitting individuals to modify the scope of copyright exceptions would be economically efficient.

Part V focuses on freedom of expression-based justification for copyright exceptions, in particular those which arise from a concern about the role of autonomy. It considers how an autonomy-based contract theory might interrelate

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[1] See for example Robert Merges, *Justifying Intellectual Property* (Harvard University Press, 2011) 147 who turns to midlevel principles where the foundational justifications for intellectual property are unable to converge on consistent normative policy prescriptions. For Merges, mid-level principles such as efficiency or preserving the public domain lack the explanatory power or are insufficiently robust to fulfill the role of foundational or normative principles (p 6), and do not depend on a particular set of foundational values for their validity (p 140). They do however permit normative debate at a level above doctrinal rules without requiring deep agreement about ultimate foundational normative commitments.

with autonomy-based justifications for freedom of expression and copyright exceptions and in doing so argues that those adopting autonomy-based rationales for contract law are required to accept exceptions designed to give effect to individual autonomy and contract.

Part VI makes some initial suggestions for how theorists may deal with the situation where an individual endorses a rationale for freedom of contract which is distinct or conflicting with that individual's chosen rationale for copyright law. Here, the chapter makes reference to the concept of incompletely theorised agreements as a way of potentially resolving the conflict, in place of the more frequent attempts by scholars to resort to the language of balance.

Finally, the thesis concludes in part VII, emphasising some of the insights drawn from the preceding analysis and identifying fields for further research in which this analysis may be productively applied.

II. OVERLAPPING THEORETICAL CONSENSUS ON THE ROLE OF EXCEPTIONS

The thesis has considered Lockean, law and economics and freedom of expression-based justifications for copyright and for copyright exceptions. These are three of the most commonly deployed arguments deployed to justify copyright protection, and it is interesting to note the extent that, when fully theorised, all three have commonalities in the extent to which they seek to protect or enshrine the importance of copyright exceptions.

For example, despite a Lockean approach often being considered as supporting strong-form propertisation approaches to copyright, this thesis has demonstrated that the theory provides space for the operation of exceptions through the Lockean provisos and that in the absence of copyright exceptions it may be difficult to justify property rights in expression.[2] For example, the sufficiency proviso in Locke's

[2] See Chapter 4, Part IV.

theory may suggest a requirement for reuse exceptions such as parody or quotation,[3] and the waste proviso has a role in ensuring the dissemination of protected works.[4] Similarly, while legislators or interest groups may argue that law and economic approaches suggest providing copyright owners with extensive rights in order to maximise the incentives for creation of copyright protected works, the analysis in chapter 4 has shown that, properly theorised, the law and economics approach to copyright instead seeks to maximise the dissemination and use of copyright protected works.[5] Furthermore, the existence of positive externalities or spillovers arising from the operation of copyright exceptions is a key design feature of the copyright legal regime when considered from a law and economics perspective.[6] Finally, freedom of expression rationales emphasise the importance of expansive copyright exceptions to ensure that copyright doctrine in both the EU and in the US is consistent with constitutionally protected freedom of expression rights.[7] Freedom of expression theory has also emphasised the importance of interpreting freedom of expression interests in their social dimensions, noting that the copyright owner, user and the broader society all possess significant freedom of expression interests, and that a narrow focus on the property entitlements of the copyright owner is misplaced.[8] All three theories therefore feature copyright exceptions as required core elements, whose operation is needed in order to justify the grant of property entitlements.

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[3] See Chapter 4, Part III.A.

[4] See Chapter 4, Part III.B.

[5] See Chapter 5, Part III.A. and Part V.C.

[6] See Chapter 5, Part V.A.

[7] See Chapter 6, Part III.

[8] See Chapter 6, Part II.C.

III. LOCKEAN APPROACHES TO COPYRIGHT AND FREEDOM OF CONTRACT

As discussed above, a proper understanding of Lockean theory reveals that property entitlements require much more than a mixing of one's labour with material and commons.[9] Locke's theory is richer, and holds that complying with the Lockean provisos is a necessary prerequisite in order for the grant of a property entitlement to be morally justified. This requirement to comply with the provisos operates in relation to physical property, which was the focus of Locke's treatise, but also applies to the justification of property rights in expression. The challenge, as explored in chapter 4, is that intellectual property scholars have been unable to reach a concluded agreement on the interpretation of the Lockean provisos or on the extent to which they require countries to include specific exceptions in their national laws.

To the extent that property and freedom of contract theories are conceptualised as carrying out distinct functions in relation to intellectual property law (with property theories focusing on justification for the grant of the property entitlement and freedom of contract theories justifying a liberty to reallocate that property entitlement between parties free from constraint) then the Lockean natural rights theory will be resistant to contractual freedom only to the extent such freedom poses challenges to the underlying moral justification for the initial grant of property. The challenge for a Lockean theorist is the extent to which contract can potentially be used in modern digital age to replicate the functions of a property entitlement, without being burdened by the range of limitations and exceptions to that entitlement required either by the doctrinal rules or by Lockean theory. If, through the operation of digital contracts and clickwrap licensing, it is possible for the owner of a work to require the user to forgo their ability to make use of copyright exceptions before accessing it, then the owner will have created a *de facto*

[9] See Chapter 4, Part II.

property entitlement.[10] That entitlement will then operate without constraint from copyright exceptions as between the parties, in circumstances where those exceptions embody the requirements of the Lockean provisos.[11] In such circumstances, Lockean theory would hold the *de facto* property entitlement morally unjust, and on that basis Locke's theory must require a minimal limitation on freedom of contract to prevent parties creating such *de facto* property entitlements via contracts. While similar arguments around digital contracting can be made in relation to law and economic and freedom of expression theories, the argument is the clearest within the Lockean natural rights approach which explicitly links moral claims to property entitlements to compliance with the provisos.[12]

Turning to the interface of Lockean copyright theory and the rationales for freedom of contract, it is interesting to note the extent to which both autonomy[13] and consequentialist[14] rationales of contract theory share interesting similarities with Lockean provisos. For example, the focus within autonomy theories of freedom of contract on protecting the interests of third parties[15] overlaps with the limitations on property entitlements arising under the sufficiency and waste provisos, which are attentive to the impacts of private appropriation of the interests of third parties.[16] Similarly, law and economics understandings of contractual freedom are attentive to the interests of third parties, and find that efficient markets require the absence of significant unaccounted for externalities such as third-party interests.[17]

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[10] For a discussion of the manner in which at a doctrinal level contracts might replicate the function of copyright see Chapter 1, Part II.B.

[11] See Chapter 4, Part III.

[12] See Chapter 2, Part III.A. noting in particular the manner in which the sufficiency proviso is explicitly linked in Locke's Second Treatise § 27 to the moral justification for property entitlements from labour mixing.

[13] See Chapter 3, Part II.

[14] See Chapter 3, Part III.

[15] See Chapter 3, Part II.C.

[16] See Chapter 4, Part III.

[17] See Chapter 3, Part III.C.

In addition, the Lockean waste proviso arguably creates moral obligations on copyright owners to make their work available.[18] As discussed in chapter 2, doctrinal copyright rules are generally not considered to require a copyright owner to make a work available to the public at affordable price or in a format which would permit reuse, as in Hohfeldian terms there is no right on the part of users to access copyright materials.[19] Lockean arguments therefore may be promising for those scholars seeking to build upon this analysis and identify a theoretically justified account of copyright which treats copyright exceptions as user rights.[20]

IV. LAW AND ECONOMICS APPROACHES TO FREEDOM OF CONTRACT AND COPYRIGHT

Chapter 3 of this thesis discussed the extent to which limitations should exist on parties' freedom of contract and, noted that restrictions on freedom of contract may be justified on the basis of consequentialist law and economics rationales where an unregulated freedom of contract may not lead to efficient or welfare maximising outcomes. This might occur in the presence of significant third-party externalities, or where transaction costs would otherwise be too high to permit efficient transactions to take place. In chapter 4 the thesis examined law and economics understandings of copyright exceptions, with particular focus on the Landes and Posner model,[21] Gordon's transaction cost approach,[22] and the role of positive externalities and spillovers as identified by Frischmann.[23] This section attempts to reconcile these approaches in an attempt to understand whether copyright

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[18] See Chapter 3, Part III.C.

[19] See Chapter 1, Part II.E. and Chapter 2, Part IV.

[20] See Chapter 1, Part II.D.

[21] See Chapter 5, Part III.A.

[22] See Chapter 5, Part IV.

[23] See Chapter 5, Part V.A.

exceptions should be subject to contractual override under a law and economics approach.

As noted in chapters 3 and 5, some advocates of contractual freedom argue that negotiated agreements between authors and consumers are more efficient than intellectual property rights.[24] Their argument is premised on the basis that individual bargaining parties are better informed about their own interests, and are able to enter into voluntary contractual arrangements which are welfare maximising and superior to the approaches which are facilitated under copyright legislation which incorporates a range of exceptions and limitations to the scope of protection.[25] That chapter noted that in practice this analysis may be further complicated, as in the modern era most contracts involve standard boilerplate terms which may not be understood by consumers.[26] In either event, permitting contractual parties the freedom to override copyright exceptions will only be efficient in the absence of significant externalities.[27]

As discussed in chapter 3, economic theory suggests that in relation to physical, rivalrous goods the state should merely establish property rights, and then allow markets to assist parties reaching an economically efficient equilibrium in the absence of transaction costs.[28] There are a number of difficulties with this approach when applied to intellectual property law. To begin with, copyright protected expression is non-rivalrous and, as discussed above in chapter 5, an overall social-welfare maximising law and economics approach requires that a work be made widely available, rather than an approach which focuses on maximising producer

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[24] See Chapter 3, Part III.A and Chapter 5 Part II.

[25] Niva Elkin-Koren and Eli M Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (Routledge, 2013) 156.

[26] See Chapter 3, Part IV.

[27] See Chapter 5, Part VI.

[28] Elkin-Koren and Salzberger (n 25) 156. See also Chapter 3, Part III.C.

surplus.[29] As a consequence, the economic logic which suggests that contractual freedom will be welfare maximising does not operate in the same manner in connection to copyright protected works as it does for physical goods.

To the extent that copyright is justified as a means of incentivising the creation of new speech and expression, it is possible that unrestricted freedom of contract may also act in a manner to incentivise the creation of expression. If contracts can be drafted in such a way as to replicate the features of copyright law then they will similarly provide an incentive to authors to create new works. However, to the extent that such contracts do not permit users to make use of copyright style exceptions they may provide a greater incentive to create new works than copyright law would consider optimal. Where copyright exceptions are not mandatory and there are no legal restrictions on authors imposing contractual terms on users, the only limits on contract may be the operation of the market or social norms. This could potentially lead to a situation where copyright owners use contract to maximise their own producer surplus, but that at an overall societal level this could create a level of protection which is too high and which does not maximise the distribution and consumption of copyright protected works.[30] It remains an unresolved empirical question about the size of potential impacts on overall welfare of over-protecting expression.

Here law and economics advocates of private ordering might argue that governmental rule-making processes are imperfect and that 'governments are unable to determine the requirements of different owners and users of creative works, and lack reliable means to ascertain the appropriate level of protection should be assigned to each work', to argue that unrestricted private contracting would be preferred.[31] Two important responses to this argument are that government policy-

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[29] Mark A Lemley and Brett M Frischmann, *Spillovers* (Working paper No 321, John M. Olin Program in Law and Economics, 2006) 115. See also Chapter 5, Part III.A.

[30] See Chapter 5, Part VI.

[31] See Elkin-Koren and Salzberger (n 25) 156 summarising the arguments of private ordering advocates such as Easterbrook and Merges.

making is (at least intended to be) responsive to third-party interests, not just the interests of the two contractual parties, and it is therefore at theoretically capable of considering the impact of contractual externalities.[32] As shown in chapter 5, the interests of the contractual parties are distinct from the broader societal goal the government should be seeking to achieve with copyright law.[33] Optimal copyright protection under the law and economics framework is about maximising the overall utility generated by the copyright system, which requires incentivising the dissemination and use of copyright protection material, rather than purely incentivising the creation of works.[34]

V. FREEDOM OF EXPRESSION APPROACHES TO FREEDOM OF CONTRACT

Chapter 6 of this thesis discussed the protection of freedom of expression and its relationship with copyright exceptions, noting the role of autonomy-based freedom of expression interests in protecting against harm for third parties or preserving the future autonomy of the parties.[35]

Under the principle of freedom of contract, parties are generally given the freedom to bind themselves under contractual obligations as they see fit. This can include undertaking obligations to limit their own speech, including the freedom to enter into non-disclosure obligations and other obligations of confidentiality. This section considers the extent to which parties are permitted to contractually limit their own speech. Such limitations (sometimes taking the form of contracts of silence) have implications for freedom of expression, and this section considers the extent to which contractually excluding the operation of copyright exceptions might be

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[32] See ibid 163 arguing that contractual parties may not reflect the public utility and benefits to society as a whole from the transaction.

[33] See Chapter 5, Part V.C.

[34] See Chapter 5, Part VI.

[35] See Chapter 6, Part II.C.

considered a permissible speech restriction in view of both autonomy rationales for freedom of contract[36] and freedom of expression rationales for copyright exceptions.[37]

A contract where a user agrees not to engage in activity covered within the scope of a copyright exception can be analogised to contracts of silence, 'a contract in which a party has made an enforceable promise to keep quiet about something'.[38] Where the operation of a copyright exception has been contractually excluded, the user will be unable to engage in specific kinds of expressive conduct which would normally be permitted by the exception, for example being unable to quote from the original work. This is a narrow form of a contract of silence, as it will allow the user to speak and generate expression related to the copyright protected work, they will only be precluded from specific forms of reproduction of the original text, but even these narrow restrictions on quotation may be problematic from a freedom of expression perspective.

Contracts of silence are regularly enforced by the courts in a number of different regulatory areas – for instance, contracts of silence are common in relation to restricting an employee or investor's ability to disclose trade secrets, to protect the confidentiality of legal settlement agreements, or used by governments to protect state secrets. Similar contracts have also been used by companies in an attempt to prevent a party from disparaging a good or service.[39] In the US, parties are generally considered free to enter into such contracts as '[i]n a legal regime that provides for freedom of contract, parties are generally free, absent public policy or first amendment restraints, to commit to being silent about almost anything'.[40] The use

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[36] See Chapter 3, Part II.

[37] See Chapter 6, Part III.

[38] Alan Garfield, 'Promises of Silence: Contract Law and Freedom of Speech' (1998) 83 *Cornell Law Review* 261, 268.

[39] Lucille M Ponte, 'Protecting Brand Image or Gaming the System? Consumer "Gag" Contracts in an Age of Crowdsourced Ratings and Reviews' (2016) 7 *Wm. & Mary Bus. L. Rev* 59, 67.

[40] Garfield (n 38) 268.

of such contracts may however be controversial where there is a public interest in the access to that information, and when contracts of silence are challenged in court, the judiciary is often called upon to balance the interest in holding parties to their contractual promises against the public interest in access to the supressed information. As a consequence, many courts have refused to enforce contracts of silence in particular contexts, particularly where those contracts are designed to protect illegal actions or are in furtherance of objectives against the public interest.[41]

Contracts of silence are frequently entered into in the area of obligations of confidence owed by an employee to an employer. Here, employees will often be subject to both implied and explicit contractual duties of confidence, including not to use or disclose confidential information owned by the employer.[42] The law will, however, refuse to enforce such obligations in a number of instances, including where the duties amount to a restraint of trade[43] or where there is a public interest in the disclosure of the information.[44] For example, the ECtHR has recently held that the state has a positive obligation to protect freedom of expression even in the sphere of contractual relations between individuals, and has overruled contractual restrictions on employees speech, relating to articles the employee published online.[45]

The analysis in chapter 5 of this thesis identified the very significant autonomy-based freedom of expression rationales for exceptions and linked these rationales to

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[41] Ponte (n 39) 74.

[42] Tanya Frances Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) 431.

[43] Ibid 473.

[44] See ibid 476 where a court may refuse to enforce a contractual duty of confidentiality in the UK under specific whistleblower legislation, or under a general public interest defence.

[45] *Herbai v Hungary* [2019] Application nr 11608/15, ECtHR Judgment of November 2019, § 37; Eleonora Rosati, 'Can an Employee's Freedom of Expression Trump Their Confidentiality Obligations? The ECtHR Weighs in (in a Case Concerning an Employee's Personal Website)', *The IPKat* (12 November 2019) <http://ipkitten.blogspot.com/2019/11/can-employees-freedom-of-expression.html>.

the human rights framework protecting freedom of expression.[46] The thesis explored the way in which courts in the US, ECtHR and CJEU associate significant freedom of expression public policy interests with copyright exceptions. Jurisprudence in the US and the CJEU show that copyright exceptions must be interpreted consistently with freedom of expression rights. Jurisprudence from the ECtHR and academic opinion has gone further and suggested that freedom of expression interests must constitute an external check of the approaches of courts and legislatures when dealing with copyright cases.[47] On that basis, it is argued that the rationales for copyright exceptions would operate as strong public policy grounds for setting aside contractual terms which sought to exclude the operation of exceptions.

For those theorists who take a more robust or thicker approach to the concept of autonomy, copyright exceptions may play an even more important role. Under a thicker concept of autonomy, the state should aim to provide *valuable* choices to its citizens, and is justified in restricting contract choices where those choices are bad or worthless options.[48] In such circumstances where copyright exceptions exist for public policy reasons, the state has a legitimate role in setting copyright policy to prevent contractual override of exceptions.

VI. DEALING WITH CONFLICTING THEORETICAL APPROACHES

As noted in the sections above, there are clear theoretical commonalities between some justifications for copyright and for contract. For example, it would not be unexpected if some theorists had a comprehensive consequentialist view and were committed to both consequentialist rationales for contract law as well as law and

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[46] See Chapter 6, Part III.

[47] See Chapter 6, Part III.C.

[48] See Chapter 3, Part II.D.

economics style rationales for copyright. Similarly, a theorist with an underlying comprehensive commitment to autonomy may be persuaded by autonomy-based rationales for contract law alongside autonomy-based rationales for freedom of speech and expression. In such circumstances it may be straightforward for those with consistent normative commitments across different areas of law to reach theoretically consistent and well-reasoned positions on the relationship between copyright exceptions and contract.

There is, however, nothing intrinsically wrong with a theorist whose approach to the justifications of contract law and copyright law adopts distinct theoretical perspectives. For example, some may take the view that copyright law is justified on a Lockean natural rights basis, but believe questions about contract doctrine should be resolved by reference to the consequentialist insights of law and economics. It is of course much more difficult for this thesis to provide concluded answers as to how theorists with distinct theoretical approaches to the two areas of law should approach the question of contractual override of copyright exceptions. One approach would be for such a theorist to decide whether to prioritise their justification for copyright or the justification for contract, and resolve any conflicts or inconsistencies between the theoretical justifications for the distinct areas of law in accordance with their priorities. While this thesis has identified that all of the theories studied herein concerning copyright exceptions and freedom of contract are attentive to third-party interests and the role of copyright exceptions, it may be that a theorist approaches either contract law or copyright law from a different theoretical perspective. In view of the consistency of theoretical views demonstrated in this thesis about the relationship between copyright exceptions and contract, it is argued that it is incumbent on those taking an alternative theoretical perspective to justify their understanding of the relationship between copyright exceptions and contract. In the absence of such a justification it is reasonable that the more fully theorised approach described herein should drive legislatures and courts when considering the relationship between copyright exceptions and contract.

As an alternative, in the absence of agreement on the theoretical foundations of copyright law, academics may wish to turn to incompletely theorised agreements[49] or the mid-level principles adopted by Merges in his book 'Justifying Intellectual Property'.[50] While the approach set out in the book to produce an agreement on the specific doctrinal questions or outcomes in the absence of agreement on fundamental principles can be successful, it may be that such reasoning offers an inadequate account that is unable to clearly resolve uncertainties. For instance, it is unclear how an approach based on the mid-level principle of proportionality[51] would provide clear and specific guidance on resolving tensions between copyright exceptions and inconsistent contracts and the approach in practice may amount to little more than a return to under theorised-accounts of the balance of interests between copyright owners copyright users.

VII. CONCLUDING REMARKS

VII.A. *Contribution of this thesis*

This thesis has made a number of original contributions to copyright scholarship. Material in chapters 1 and 2 on the understanding of copyright exceptions in Hohfeldian terms represents an important attempt properly to conceptualise legislative restrictions on contractual override in terms of the duties that such legislation places on copyright owners. The analysis in chapter 2 on inconsistencies in the approach to contractual override in the recent Copyright in the Digital Single Market Directive are also novel and likely to inform national implementations of that Directive.[52] Chapter 3 provides a rare account of the role of copyright

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[49] Cass Sunstein, 'Incompletely Theorized Agreements' (1994) 108 *Harv. L. Rev* 1733.

[50] Merges (n 1) 139. See 10 for a discussion on the relationship between Merge's approach, John Rawl's concept of overlapping consensus and Sunstein's incompletely theorized agreements.

[51] See ibid 159.

[52] Parts of the author's analysis on contractual override in Article 7 of the Directive have been incorporated by the COMMUNIA International Association on the public domain into national implementation guidelines Communia Association, 'Our Guidelines for the Implementation of the

exceptions in giving effect to the Lockean provisos; and the material in chapter 4 is an original approach to synthesising Frischmann's spillover analysis with comprehensive law and economics accounts of the broader structure of copyright law. The material in chapter 5 is one of the first to examine the recent 2019 CJEU decisions on copyright exceptions and freedom of expression, and the link drawn between this analysis and the relationship between copyright exceptions and contract is novel.

The analysis in this thesis has also identified surprising theoretical consistencies in the approach to a particular aspect of copyright doctrine, the importance of copyright exceptions. It is hoped that the thesis sets out a pathway that will allow agreement on resolving the relationship between copyright exceptions and contract, even if participants in the debate about copyright law have been unable to agree on the best underlying general theory justifying copyright law.[53] Adopting a similar approach in analysing other areas of copyright law may similarly identify additional areas either of overlapping consensus.[54] This may be a productive way of identifying commonalities, allowing legislative development in circumstances where the underlying theoretical rationales for copyright are not agreed.

The final sections of this thesis provide guidance on how the analysis set out in the chapters above be productively applied by legislatures and courts when considering the relationship between copyright exceptions and contract. They also set out future research areas where the analysis in the thesis may provide a useful input in progressing law reform or in understanding particular topics.

DSM Directive', *International Communia Association* (2 December 2019) <https://www.communia-association.org/2019/12/02/guidelines-implementation-dsm-directive/>.

[53] Sunstein (n 49) 1737.

[54] Ibid 1735.

VII.B. *Contracts that extend users' freedom beyond that permitted under copyright law*

An interesting example of contracts which modify the scope of copyright exceptions are the so-called copyleft licenses, which operate particularly in the context of computer software. These licenses and their relationship with contractual override have been considered briefly by Thomas Dreier[55] and they raise particularly interesting issues in relation to the core research question of this thesis as they seek to loosen the standard proprietary grip of copyright law. Take for example the GNU-General Public License.[56] This licence 'acknowledges' fair use exceptions and similar exceptions to copyright[57] while also imposing an unusual requirement for a copyright licence, that the user is free to redistribute the software on condition later recipients 'receive or can get the source code' and that derivative works must be licenced under the GNU-General Public Licence.[58] The philosophical commitments behind this approach to copyright licensing and freedom of contract are laudable, however the requirement to license derivative works poses interesting questions for the legitimate scope of freedom of contract. Should the requirement to license derivative works be considered a restriction on the autonomy interests of users and are such contractual terms are efficient under a law and economics model? While answering that question is outside the scope of this thesis, it is important to note that despite their aims of increasing access to information and expression, and their potential for the creation of spillover externalities, copyleft licenses such as the GNU-General Public License still pose difficult questions about their impact on

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[55] Thomas Dreier, 'Contracting out of Copyright in the Information Society: The Impact on Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech* (Oxford University Press, 2005) 385, 387.

[56] The Free Software Foundation, 'GNU General Public License Version 3', *GNU Operating System* (29 June 2007) <https://www.gnu.org/licenses/gpl-3.0.en.html>. GNU is a recursive acronym for 'GNU's Not Unix', which is a reference to the GNU operating system to which the licence is applied.

[57] Ibid § 2 'This License acknowledges your rights of fair use or other equivalent, as provided by copyright law.'

[58] Ibid §5(c).

freedom of expression interests of third parties or the extent to which under a law and economics understanding the licence terms appropriately take into account externalities. Even if copyleft licenses are more generous to an individual user they still may involve contractual modification of the scope of exceptions set out in copyright law with potential for negative impacts on third parties.

VII.C. *Resolving the relationship with copyright, contract and TPMs*

The insights developed in this thesis have particular importance in considering the extent to which digital locks or technological protection measures should be able to restrict the ability of users to make use of copyright exceptions. Where in the past the relationship between copyright exceptions and contract was under-theorised there was more scope for rights holders to argue for legislative protection of TPM tools as a means of dealing with the increased possibilities and infringement in the digital network environment. However, a proper appreciation of the importance of exceptions in legitimising the initial grant of a property entitlement under copyright law suggests that there may be scope to reconsider extents of protection given to technologies. It is hoped that the theoretical insights developed in this thesis may be drawn upon by others to reinvigorate critiques of the protection of TPMs.

VII.D. *Applying the theoretical insights to the question of whether a specific exception should be subject to contractual override*

While it is outside the scope of this thesis to carry out a full review of the broad range of copyright exceptions within EU law or within the UK's CDPA 1988 and to consider the extent to which such exceptions should be subject to contractual override in view of the theoretical analysis carried out herein, it is useful to set out some preliminary thoughts on how such a task might be attempted.

This thesis has not engaged in detail with prior academic attempts at creating categories or hierarchies of copyright exceptions[59] to determine which exceptions should incapable of being modified by contract.[60] While such hierarchies could be developed for use as a starting point in identifying which copyright exceptions should be made resistant to contractual override, such approaches are not without difficulty. By considering the purpose of exceptions abstractedly from the justification for the grant of copyright, these projects can draw attention to the external social justifications of specific exceptions but may downplay their vital internal role in justifying the initial grant of a copyright entitlement. In doing so, any categorisation of a specific exception as being capable or incapable of contractual override may insufficiently address the extent to which the operation of an exception is vital to the legitimacy of the grant of copyright rights to an author. To be rigorous, such hierarchies may also need to be jurisdiction specific, and make explicit the underlying theoretical rationales for freedom of contract and for copyright which inform the analysis. Distinct hierarchies may therefore emerge in different jurisdictions.

One of the key insights of this project is that the starting point for any analysis of contractual override of exceptions is not an attempt to balance the interests of copyright owners against the interests of users. This thesis has demonstrated that under the various theoretical accounts to freedom of contract into copyright law, exceptions play a vital role in legitimising the grant of any copyright entitlement and moreover that it is key in any analysis to consider not only the interest of parties to a particular contract seeking to set aside exceptions, but also consider the broader

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[59] See for example Bernt Hugenholtz and Ruth Okedigi, *Conceiving and international instrument on limitations and exceptions to contract* (Open Society Institute Report, 6 March 2008), 43, Daniel Gervais, 'Making Copyright Whole: A principled approach to copyright exceptions and limitations' (2008) 5(1) *University of Ottawa Law and Technology Journal* 1, Daniel Gervais, 'Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright' (2010) 57(3) *J Copyright Soc'y USA* 499, Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions' in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017), 12. Arguably these approaches provide a taxonomy of the justifications for copyright exceptions, while this project attempts to internalise the role of exceptions in justifying copyright entitlements.

[60] See Bernt Hugenholtz, 'Fierce creatures: Copyright exemptions: Towards extinction' (Conference Paper, IFLA/IMPRIMATUR 30 October 1997) noting that such unwaivable user rights represent an extremely complex legal issue. A noteworthy attempt at considering these issues is Estelle Derclaye and Marcella Favale, 'Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda' (2010) 18 *J. Intell. Prop. L.* 65, 95.

societal interests. When considered under a law and economics approach this requires attention to be paid to the externalities associated with a particular transaction, or under a freedom of expression approach a consideration of the expressive interests of third parties, noting that many copyright exceptions benefit not only the user of the work but also benefits for society more broadly. Any analysis should therefore proceed by explicitly identifying the underlying theoretical interests in issue and considering the extent to which the specific exception is designed to give effect to the interests. Taking the UK's quotation exception as an example, this provision gives effect to clear third-party freedom of expression interests under either a autonomy, truth or democratic rationale for expression. There are also significant spillover positive externalities generated by the exception under a law and economics approach, and the operation of the exception is also justified by the Lockean provisos. While there may be autonomy or efficiency-based arguments that the contractual parties may make about the benefits of freedom of contract, these can also be more carefully weighed at the theoretical level, noting the extent to which significant limitations to parties' contractual freedom exist under the key contract theories. Proceeding from this starting point is likely to require legislatures and courts to take much more seriously the dangers of permitting contractual override and a much stronger argument for making inconsistent contractual provisions unenforceable or void can be made. It is also important to note that the arguments made in this thesis around the importance of copyright exceptions concern freely negotiated contractual override, and legislatures or courts may wish to take a more restrictive approach to freedom of contract when considering mass market boilerplate contractual terms.[61]

This is not to suggest that all copyright exceptions should always be unable to be set aside by contract. Indeed, there may be copyright exceptions that have been designed by the legislature to act merely as default rules. For example, a number of exceptions within the new EU Copyright in the Digital Single Market explicitly

[61] See Chapter 3, Part IV.

endorse the possibility of contractual override[62] and there may be more scope to accept contractual limitations in such areas.

At a doctrinal level, the analysis in chapter 2 has shown inconsistencies in the current approach by the UK and EU in dealing with the relationship between copyright exceptions and contract. Within the UK a number of core public interest copyright exceptions were overlooked in the 2014 amendments and remain potentially subject to contractual override despite being arguably much more important from the public policy perspective.[63] Similarly, while it is desirable that the EU's Copyright in the Digital Single Market Directive explicitly considers the relationship between copyright exceptions and contract and protects the new copyright exceptions and contractual override, chapter 2 has identified a number of limitations in the approach.[64] It is hoped that this thesis will provide a guide to legislatures when reconsidering or updating their copyright exceptions to encourage a proper reflection on the relationship between copyright exceptions and contract.

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[62] See Chapter 2, Part VI.

[63] See Chapter 2, Part IV.A.

[64] See Chapter 2, Part VI.C.

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