

300 Years of Copyright Law?

A Not So Modest Proposal for Reform

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Abstract:

2010 sees the three hundredth anniversary of the U.K.'s Statute of Anne 1710. This paper suggests that with the increased ability of content recipients to re-use works, there is a need to readdress the concerns of stakeholders, namely authors, publishers and content recipients. The paper sets out in detail how this should be achieved. To do so, it utilises the notion of creativity as the benchmark by which to balance the interests of stakeholders. This has been used in early eighteenth century case law in the U.K., and there are also other historical and theoretical justifications. The paper then proceeds to propose two new complementary systems. Purchase of the original work is to be required where the later work is quantitatively substantially similar to the original, and where a work is not quantitatively substantially similar, a system of compulsory licensing is to be instituted. The law will also provide a positive right to content recipients to make copies, and, in certain circumstances, a positive right to access technologically protected works.

I. INTRODUCTION

A. The problem.

“MGM and many of the amici fault the Court of Appeal’s holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favoured, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”¹

U.K. and U.S. copyright law has become heavily focused upon attempting to maintain a balance between the interests of right holders of content and those of content recipients. The balance between right holders and content recipients has been significantly disturbed by

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¹ MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005) (Souter, J.).

the latter's enhanced capacity to commit large scale copyright infringements using digital technology. Increasingly, content recipients can make creatively altered copies - for instance, ripping samples from CDs, or changing the order of scenes in a film to cause a different emotional effect in viewers. Content recipients can then distribute these altered versions to anyone else in the world with an Internet connection.

The ability to distribute altered versions of original works inevitably brings the interests of right holders and content recipients into conflict. Right holders may seek to use the negative rights provided to them by copyright law to restrict *inter alia* reproduction² and in the U.K. adaptation,³ or in the U.S., derivation⁴ of their works. They may also harness developments in technology, for example, Digital Rights Management (DRM) mechanisms which can be used to restrict the access to, and re-use of, content by content recipients. The consequence of this is that re-users are restricted in their re-uses of copyright content. That could be justifiable if it is not possible to reward right holders for such re-uses, or if right holders wish to prevent re-use for non-economic reasons. However, it is suggested that a system can be implemented which will reward right holders, and which can provide them with mechanisms to restrict re-use for non-economic reasons. To this end, the paper proposes two complementary systems. The first applies where a later work is quantitatively substantially similar to an earlier work, and requires purchase of the original work. The second system applies where a later work has re-used part of an earlier work, but is not quantitatively substantially similar to the earlier work. This requires payment of a royalty to the right holder of the earlier work.

² s.17 Copyright, Designs, and Patents Act, 1988 (hereafter 'CDPA') (in the U.K.); 17 U.S.C. §106(1) (2010) (in the U.S.)

³ s.21 CDPA 1988.

⁴ 17 U.S.C. § 106(2).

B. Current copyright law: An over emphasis on the right holder

1. The U.K.

Current U.K. law focuses on the damage to the right holder. Courts do not adequately focus on how a finding of infringement will impact upon access to information, ideas and research of content recipients. The rights provided by U.K. copyright law to right holders include reproduction⁵, the right to issue copies to the public,⁶ the right to rent or lend the work to the public,⁷ the right to perform, show or play the work in public,⁸ the right to communicate the work to the public,⁹ and adaptation.¹⁰ The rules concerning infringement of the reproduction right have been outlined by Lord Millett in the seminal *Designers Guild* case.¹¹ He stated that “once the judge has found that the defendants' design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work.”¹² The tendency is to stress the effort put in to the original work. As Lord Bingham observed in the same case, “anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown.”¹³

The emphasis on the efforts of the original author was more recently stressed in *Sawkins v. Hyperion Records*.¹⁴ Mummery LJ noted that in *Walter v. Lane*,¹⁵ “Lord Halsbury LC held that the law did not permit ‘one man to make profit and to appropriate to himself the

⁵ s.17 CDPA 1988.

⁶ s.18 CDPA 1988.

⁷ s.18A CDPA 1988.

⁸ s.19 CDPA 1988.

⁹ s.20 CDPA 1988.

¹⁰ s.21 CDPA 1988.

¹¹ *Designers Guild v. Williams* [2001] 1 W.L.R. 2416 at 2426 (Eng.).

¹² *Id.*

¹³ *Id.* at 2418.

¹⁴ *Sawkins v. Hyperion Records*, [2005] EWCA (Civ) 565, [2005] 1 W.L.R. 3281 (Eng.).

¹⁵ *Id.* at 3289 (citing *Walter v. Lane*, [1900] A.C. 539. (Eng.)).

labour, skill, and capital of another’.”¹⁶ In relation to music, Mummery LJ stated that “performing indications, tempo and performance practice indicators, if they are the product of a person's effort, skill and time, bearing in mind the relatively modest level of the threshold for a work to qualify for protection.”¹⁷

The assumption in these cases is that without such protection, there is less incentive for an author to create. Though the outcome of *Sawkins* may adversely affect future authors,¹⁸ this is not considered. The same assumption is present within cases concerning infringement of the other rights that make up copyright. For instance, case law concerning the performance right emphasise the importance of protection and equate loss of revenue to creativity. In *Jennings v. Stephens*,¹⁹ Lord Wright stated, in relation to the requirement that the performance be ‘public’, that:

.. if the performance in question is held not to be a performance in public, the rights of owners of dramatic copyright, copyright in music or copyright in lectures all over the country will be seriously prejudiced: their plays will be liable to lose novelty, and the public demand for performance will be affected: the public appetite will be exhausted.²⁰

Lord Greene MR indicates that the purpose of the provision is intended to prevent someone “depriving the owner of the copyright of the public from whom he receives the value of the work of his brain and his imagination.”²¹ Consequently, the same issues that arise with the reproduction right arise with the right of performance. The importance of access to the information, ideas and research of others is not being considered; instead, the emphasis of the courts is upon protecting existing copyrights.

¹⁶ *Sawkins*. 1 W.L.R. at 3294.

¹⁷ *Id.* at 3295.

¹⁸ See A. Rahmatian, *The Concepts of Musical Work and Originality in UK Copyright Law – Sawkins v Hyperion as a Test Case*, 40 INT'L REV. OF INTELL. PROP. & COMPETITION L. 560 (2009) (discussing *Sawkins*).

¹⁹ *Jennings v. Stephens* [1936] Ch. 469. (Eng.).

²⁰ *Jennings v. Stephens*, [1936] Ch. 469, 480 (Eng.).

²¹ *Ernest Turner Electrical Instruments, Ltd. v. Performing Right Soc'y, Ltd.*, [1943] Ch. 167 at 173 (Eng.) (per Lord Greene MR).

2 Infringement actions in the U.S.

The “original works of authorship” covered by U.S. copyright include *inter alia* literary works, musical works including any accompanying words, dramatic works, including accompanying music, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, and sound recordings.²² As in the U.K., the U.S. also has other rights additional to the reproduction right. These are the distribution right, which includes the right to sell, rent, lease or lend the work, the performance right, the right to display the work, and a right over derivatives.²³ There is also, in the case of sound recordings, a right to perform the copyrighted work publicly by means of a digital audio transmission.²⁴ Anyone who violates those rights is an infringer of copyright.²⁵ In the U.S., the test for infringement of the reproduction right is whether:

- (a) [the] defendant copied from plaintiff’s copyrighted work and
- (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation.²⁶

As with the U.K., the U.S. test of infringement emphasises the commercial interests of an existing right holder, and sidelines the impact on content recipients, their potential future works, and their access to ideas. In order to establish infringement, it firstly has to be assessed whether there has been “actual copying,” which can either be established with direct evidence or through the test of “striking similarity.”²⁷ Once that has been demonstrated, then, provided that there is copyright, it must be shown that there has been misappropriation, as

²² 17 U.S.C. § 102(a) (2010).

²³ 17 U.S.C. § 106. (2010).

²⁴ 17 U.S.C. § 106(6) (2010).

²⁵ 17 U.S.C. § 501(a) (2010).

²⁶ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

²⁷ *Ty, Inc. v. GMA Accessories*, 132 F.3d 1167, 1169 (7th (7th Cir. 1997)).

assessed through the eyes of the audience.²⁸ The U.S. has a slightly different approach than the U.K. when considering the importance of the labour of the right holder. In *Feist*,²⁹ the “sweat of the brow” test for originality was overruled because “copyright rewards originality, not effort.”³⁰ Nonetheless, once the requirements of originality are met, it is still the case that the interests of the original right holder are stressed and are considered equivalent to creativity. In *Castle Rock*,³¹ Circuit Judge Walker emphasised that the right holder had been “highly selective in marketing products associated with *Seinfeld*, rejecting numerous proposals from publishers seeking approval for a variety of projects related to the show.”³² Likewise, in *Arnstein v. Porter*,³³ Circuit Judge Frank stated:

But even if we were to disregard the improbable aspects of plaintiff's story, [*sic*] there remain parts by no means ‘fantastic.’ On the record now before us, more than a million copies of one of his compositions were sold; copies of others were sold in smaller quantities or distributed to radio stations or band leaders or publishers, or the pieces were publicly performed.³⁴

In other cases, the focus on the interest of the right holder is less pronounced. In such cases, these courts emphasise the part of the test as to whether there is misappropriation through the eyes of the public or specialised field.³⁵ In *Sid & Marty Krofft Television v. McDonalds*,³⁶ Circuit Judge Carter identified that assessing infringement “raises the particular factual issue of the impact of the respective works upon the minds and

²⁸ MARGARETH BARRETT, *INTELLECTUAL PROPERTY: CASES AND MATERIALS* 505 (Minnesota: West Publishing, 2d ed. 2001);; *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2nd Cir. 1930).

²⁹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³⁰ *Id.* at 364.

³¹ *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132 (2nd Cir. 1998).

³² *Id.* at 136.

³³ *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

³⁴ *Id.* at 469.

³⁵ *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 636-37 (9th Cir. 2007); BARRETT, *supra* note 28; *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, §8 at USA-130 (Paul Edward Geller & Melville B. Nimmer, eds. 1995).

³⁶ *Sid & Marty Krofft Television Productions v McDonald's Corp* 562 F.2d 1157 (9th Cir., 1977).

imaginations of young people.”³⁷ Nonetheless, there is still overriding emphasis on the existing interests of the right holder. All that is occurring is that their interests are being viewed through the eyes of another in terms of infringement – whether there is an adverse impact on creative re-use is irrelevant. The U.S. also provides a right over derivatives. Copyright in derivative works will exist “only to the material contributed by the author of such work, as distinguished from the pre existing material employed in the work.”³⁸ Goldstein refers to it as applying from the “point at which the contribution of independent expression to an existing work effectively creates a new work for a different market.”³⁹ This would suggest that the right is extremely broad and that this therefore encourages courts to focus on the interests of existing right holders. However, Geller and Nimmer stated that “[i]f the right to make derivative works, i.e., the adaptation right, has been infringed, then there is necessarily also an infringement of either the reproduction or performance rights.”⁴⁰ Geller and Nimmer were cited with approval in the *Twin Peaks*⁴¹ case of the Second Circuit. The derivative right would more accurately be characterised as an additional incentive to create derivative work: “[t]he important point is that, by securing exclusive rights to all derivative markets, the statute enables the copyright proprietor to select those toward which it will direct investment.”⁴²

By encouraging right holders to enter into new markets, the right may be said to be extending the scope of copyright protection. It thus is another way in which right holders interests are emphasised to the detriment of the consideration of access to ideas, knowledge, and research by those who may wish to creatively re-use a copyright work.

³⁷ *Id.* at 1166.

³⁸ 17 USC § 103(b) (2010).

³⁹ Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y 209, 217 (1983).

⁴⁰ INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 35.

⁴¹ *Twin Peaks Prods. V. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1373 (2nd Cir. 1993). *See also* *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 787 (5th Cir. 1999).

⁴² Goldstein, *supra* note 39 at 227.

3. Ideas and non-original elements

Copyright does not cover ideas and non-original elements. Both elements could enable some consideration of the access to information and research for the purposes of creative re-use. However, the bar employed for assessing whether a work is original is so low that the issue of originality does not enable this. In the U.K., the requirement of originality merely requires that sufficient skill, labour and capital have been invested into a work.⁴³ The work should originate with the author, and not be copied from another work.⁴⁴ The U.S. has similar rules.⁴⁵ Justice O'Connor put it as follows:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.⁴⁶

In the *Feist* case the “sweat of the brow” test for originality was overridden.⁴⁷ This meant that compilation of facts lost their copyright protection. The facts consequently entered into the public domain. The case refers to *Baker v. Selden*, where Justice Bradley referred to ‘knowledge.’⁴⁸ He argued that “where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and

⁴³ This is so for literary, dramatic, musical and artistic works. See COPINGER AND SKONE JAMES ON COPYRIGHT, INCLUDING INTERNATIONAL COPYRIGHT: WITH THE STATUTES, ORDERS, CONVENTIONS, AND AGREEMENTS THERETO RELATING: AND PRECEDENTS AND COURT FORMS, ALSO RELATED FORMS OF PROTECTION 3-25 (E.P. Skone et al. eds., 13th ed. 1991).

⁴⁴ Univ. of London Press Ltd v. Univ. Tutorial Press Ltd., [1916] 2 Ch. 601 at 608. (Eng.).

⁴⁵ See U.S. Copyright Act 1976 § 102, which states “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

⁴⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁴⁷ *Id.* at 359.

⁴⁸ *Id.* at 350.

given therewith to the public.”⁴⁹ However, the issue remains that in many cases there can still be a creative re-use of a work that is an infringement of a copyright.

As clarified in the U.K. by Lord Hoffmann in *Designers Guild*,⁵⁰ ideas are not protected because a) they have no link to the literary, dramatic, musical or artistic nature of the work,⁵¹ or b) that they are not original, or so commonplace so as to not form a substantial part of the work.⁵² However, the problem here is that, in terms of re-use, this encompasses only certain works. Extending the scope of the non-protection of ideas does not resolve the underlying issue of how to encourage creative re-use of copyright works or repurposing of such works. This problem is highlighted by the U.S. doctrine of *scènes à faire*. This doctrine “permits authors to use scenes, incidents, or elements in their story that ‘flow from a basic plot premise’ even though those elements may come close to elements in existing, copyrighted works.”⁵³ However, as the paper has outlined earlier, if there is to be a creative re-use of a work, this could involve reproduction of more than ideas, or elements under *scènes à faire*. If the law is to encourage, for example, the creative re-use of a DVD, then this may require reproduction of more than mere ideas, scenes or incidents. The rules would have to be stretched beyond credibility to permit this.

⁴⁹ *Baker v. Seldon* 101 U.S. 99, 103 (1880).

⁵⁰ *Designers Guild v. Williams*, [2001] 1 W.L.R. 2416 at 2416 (Eng.).

⁵¹ *Id.* at 2423.

⁵² *Id.*

⁵³ Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 950 (1999). *See also* *Berkic v Crichton* 761 F.2d 1289, 1293 (9th Cir. 1985) (“It is well established that, as a matter of law, certain forms of literary expression are not protected against copying. As noted earlier, the general idea for a story is among these. So too are all situations and incidents which flow naturally from a basic plot premise, so-called *scènes à faire*.” (citing *Jason v. Fonda* 526 F.Supp. 774, 777 (C.D. Cal 1981) regarding the distinction between expression and ideas)).

II. Why should the interests of the re-user be part of the balancing exercise?

A. Why re-use copyright content?

An ongoing debate has been whether authors create their works individually without reference to existing works, or whether authors are reliant upon existing works. The generally accepted view today is that authors do gain inspiration from existing works. As Coombe submits, “the idea of an objective world that can be known with certainty by a subject whose capacity for knowledge is independent of that world has been repeatedly undermined in recent legal scholarship.”⁵⁴ As the Gowers Review in the U.K. stated, “Transforming works can create huge value and spur on innovation. ‘Good artists borrow; great artists steal.’ So said Pablo Picasso, borrowing from Igor Stravinsky, or perhaps from T. S. Eliot.”⁵⁵

Focusing on the interests of those who re-use earlier copyright works in later works was an avenue down which English copyright law could have developed. In the 1774 case of *Donaldson v Beckett*,⁵⁶ Lord Camden referred to conceptions of knowledge.⁵⁷ Although Lord Camden did not refer to the well-known philosopher John Locke to support his views, those views closely mirror some of Locke’s work.⁵⁸ The emphasis of Locke’s analysis is on a combination of present ideas that furthers our knowledge and results in something creative. This is clear when Locke discusses what he considers the purpose of reading, and the knowledge that results: “Reading is for the improvement of the understanding. The

⁵⁴ Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1857 (1991).

⁵⁵ Andrew Gowers, *Gowers Review, of Intellectual Property*, 67 (London: HMSO, 2006), available at http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf.

⁵⁶ *Donaldson v. Beckett*, (1774) 2 Bro. P. C. 129.

⁵⁷ *Id.*

⁵⁸ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (20th ed. 1796); JOHN LOCKE, *Some Thoughts Concerning Reading and Study for a Gentleman*, in LOCKE: POLITICAL ESSAYS, 348 (Mark Goldie, ed., 1997). Note that Locke’s Essay has received limited attention in seminal works such as Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287 (1988), but cf. LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT (Ashgate Publ’g Ltd., 2007).

improvement of the understanding is for two ends: first, for our own increase of knowledge; secondly, to enable us to deliver and make out that knowledge to others.”⁵⁹ This suggests that content recipients should be able to access knowledge and re-use the ideas that they may glean from existing works. Locke writes:

Let us suppose that the Mind to be, as we say, white Paper, void of all Characters, without any Ideas; How comes it to be furnished? Whence comes it by that vast store, which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials Reason and Knowledge? To this I answer, in one word, From Experience: In that, all our Knowledge is founded; and from that it ultimately derives it self.⁶⁰

Under this system of knowledge, content recipients should be given the option of being able to re-use existing works. However, if we were to permit this to the full degree, then clearly the right holders would not receive much in terms of legal protection. There is a need to distil the essence of “knowledge.”

“Knowledge” within the context of the re-use of copyright content is best described as knowledge that could encourage, or spur, future creativity. Furthermore, Locke suggests that such knowledge is best utilised by accessing the original source. If this is not done, content may become inadvertently altered over time and knowledge lost.⁶¹ Naturally, that raises the question of how to resolve the question of reward to the original right holder. But the “knowledge” requirement does not mean that the original work in its entirety be taken out of copyright protection. Indeed, to refer back to a point made earlier, the original right holder can be rewarded by still requiring purchase of the original work, or by the payment of royalties.

If it is accepted that authors do gain inspiration from existing works, it is suggested that this should be treated as an integral part of the balancing exercise. However, the broader

⁵⁹ LOCKE, *Some Thoughts Concerning Reading and Study for a Gentleman*, *supra* note 58.

⁶⁰ *Id.* at Book II, ch 1 at § 2.

⁶¹ *Id.* at Book IV, ch 1 at § 9 (“The memory is not always so clear as actual perception”).

interests of the re-user are marginalised. As highlighted above, there has been considerable emphasis within case law on the existing interests of right holders, rather than on the interests of future re-users. Although copyright law does not protect ideas or non-original elements, in the majority of infringement cases there has simply been an insufficient consideration of the interests of the re-user.

As the interests of re-users should play a role in the copyright balancing exercise, then there is a need to quantify what the needs of re-users are. However, whereas the interests of the publishers and the author of a copyright work can be financial, identifiable, and possibly tangible, the interests of re-users are more difficult to quantify. To start with, it is difficult to even establish who the amorphous group of re-users are. They are a diverse group, and so the argument may run, their interests are similarly diverse. Litman makes a similar point about the role of the public in copyright law, and it is just as relevant for re-users: “The amorphous ‘public’ comprises members whose relation to copyright and copyright works varies with the circumstances.”⁶² However, re-users are, by definition, re-using a work in some fashion. The main point of contention is how to balance the desire for re-use vis-à-vis the right holder. It is suggested that ‘creativity’ can be a useful measuring stick by which to measure re-use.

III. Proposals for reform.

A. Reform: What the paper proposes?

As part of its December 2006 report, the Gowers Review took the bold step of highlighting the importance of re-using copyright works. It referred in particular to how the U.S. transformative use exception has been important in the development of hip hop music:

⁶² Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. OR. L. REV. 275, 312 (1989).

“Such an exception in U.S. law enabled the hip hop industry to develop in the late 1970s and early 1980s, allowing producers to sample older works to create a new genre of music and to develop an entirely new market.”⁶³ The report proposed that: “Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three-Step Test.”⁶⁴

This paper suggests that it is misplaced to focus too heavily on balancing the competing interests of the right holders and content recipients in this way. As technology is permitting ever greater communication of content, yet potentially greater restriction over the re-use of that content, it is increasingly difficult to maintain a balance by merely tinkering with the system. The system the paper proposes is radically different from the current system in that it departs from providing predominantly negative rights. The proposed system provides a set of rules that, once a work is placed into the market, reduces these rights. The reproduction and adaptation rights will be significantly limited. Right holders can claim for royalties where their works have been re-used for financial gain, or reproduced to a level where they are quantitatively substantially similar, but they cannot bring a claim for copyright infringement. It will be argued that this will enable right holders to maintain incentives, but still permit re-use of copyright protected content by recipients, encouraging them to create. There are two complementary systems proposed. The first is for where a work that is quantitatively substantially similar to the original, and the second applies where there is no quantitatively substantially similar re-use but an element of a copyright work has been reproduced. Both systems provide certainty for re-users of copyright content, and both provide a positive right to those who re-use copyright content.

The first system, for quantitatively substantially similar works, requires purchase of the original unaltered work. Where the original work has been purchased, the recipient has

⁶³ Gowers, *supra* note 55.

⁶⁴ *Id.* at 68.

the positive right to make the altered work available to others who have purchased the original.⁶⁵ This is irrespective of the wishes of the right holder.⁶⁶ For instance, a computer game may be modified by a content recipient. The recipient may change code directly or create additional elements, for instance, by inserting an extra game level. He then may sell or give away these changed or additional elements. The original work might then receive wider exposure as the altered version may appeal to a more diverse audience, thus encouraging the audience to investigate the original out of curiosity. In addition, there are two other reasons – first, the original content may have to be loaded to access the modified versions, and second, access to the original could reveal additional content for future modification.

An example may be given concerning DVD films. A recipient could change the content (for example, the character Jar Jar Binks was removed from edited versions of Star Wars that were available on some peer-to-peer networks).⁶⁷ The content could then be sold, either alongside the original DVD or only to those who can demonstrate they held an original DVD of the film. This is not the situation under current laws. In the U.S., a company called CleanFlicks Media Inc. rented out and sold edited DVDs. These were digitally edited to remove profanity, nudity, graphic violence and sexual content. Even though CleanFlicks required the purchase of the original DVDs by customers, thereby compensating the original right holders, CleanFlicks were held to be infringing the rights of various directors and movie studios by the District Court of Columbia.⁶⁸ CleanFlicks ceased operation on August 31, 2006.⁶⁹

⁶⁵ It is for the right holder to establish if a recipient has not purchased the work. *See infra* sec. III, F.

⁶⁶ Subject to moral rights. *See infra* III, I.

⁶⁷ SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* 77-78 (New York: Basic Books, 2004).

⁶⁸ *Clean Flicks of Colo. v. Soderbergh*, 433 F. Supp.2d 1236 (D. Colo. 2006). Directors include Steven Spielberg and Sydney Pollack, and the studios MGM and Time Warner. The purchase of original DVDs on a one for one basis is detailed in *CleanFlicks*, 433 F. Supp.2d at 1238.

⁶⁹ The company has since resumed trading, but only as a seller of films that are “family friendly.” *See* CLEAN FLICKS, friendly, http://www.cleanflicks.com/faqs.php#faq_01 (last visited Aug. 21, 2008).

In some situations a re-use may involve a number of works, for instance as with a piece of music combining together many samples. The paper argues that in such circumstances there should be a second system, a fall-back compulsory licensing scheme.⁷⁰ This also provides content recipients with a positive right to re-use the copyright works. The scheme secures the right holder the income he would otherwise have received. It is proposed that the licence rate should be regulated by the State. While assessing what an appropriate rate should be is likely to be contentious, nonetheless, a system should be able to avoid extreme fiscal over-valuation of content.⁷¹

B. The Law

The main focus of the paper, copyright law, is typically granted for a period of the life of the author plus 70 years.⁷² The rights include the right of reproduction and distribution, and these are exclusive rights negative in character.⁷³ There are different periods of duration for the entrepreneurial rights in the U.K.,⁷⁴ and certain other works in the U.S.⁷⁵ In terms of scope, what is termed by legislation as a “work” might need to be “recorded,” be “original,” have a link to the country concerned and, in the U.K., not be exempted from protection on public policy grounds.⁷⁶

⁷⁰ See *infra* sec. III, F. 3.

⁷¹ In repeating the argument of the U.S. recording industry in favor of compulsory licensing, Bevilacqua states “[i]f the compulsory license were repealed, authors and publishers would band together to extract exorbitant rates from record labels and drive up transaction costs.” Theresa M. Bevilacqua, *Time to Say Good-Bye to Madonna’s American Pie: Why Mechanical Compulsory Licensing Should be Put to Rest*, 19 CARDOZO ARTS & ENT. L. J. 285, 295 (2001). The U.S. has a limited form of compulsory licensing for sound recordings once they are made available to the public. *Id.*

⁷² In the U.K., see s. 12(2) CDPA 1988 as amended by the Council Directive 93/98, 1993 O.J. (L 290) (harmonizing the term of protection of copyright and certain related rights); in the US, see Copyrights, 17 U.S.C. § 302(a) (1998).

⁷³ Compare s.16 CDPA 1988 and 17 U.S.C. § 106; see COPINGER AND SKONE JAMES ON COPYRIGHT 1-31 (K.M. Garnett et al. eds., 15th ed. 2005).

⁷⁴ Entrepreneurial works cover sound recordings, broadcasts, and the typographical format of published editions – s.5A-s.8 CDPA 1988.

⁷⁵ For corporate works or posthumous works, see *e.g.* 17 U.S.C. § 304. (1998).

⁷⁶ In the U.K. s.1 CDPA 1988 contains the categories, s.3(2) requires recording of literary, dramatic and musical works, § 1(1)(a) states that literary, dramatic musical or artistic works need to be original, and Part II Chapter IV of the Act deals with qualification. For public policy see COPINGER, *supra* note 43, at 3 – 25; see *inter alia* A.G. v. Guardian Newspapers Ltd., [1988] All E.R.ER 545. (Eng.); British Oxygen Co. Ltd. V. v Liquid Air Ltd., [1925] Ch. 383 (Eng.); Glynn v. Weston Film Feature, [1916] 1 Ch 261 (Eng.). For

As a result of the development of digital technology, there are an increasing number of technically enforced mechanisms used (i.e. not legal protection *per se*) by right holders to protect their works from the easy reproduction that digital technology can enable. Such mechanisms can extend protection beyond the scope of copyright law. They may prevent access to, and reproduction of, computer code that contains unoriginal elements.

These mechanisms have been given additional protection in the U.K. under s.296-s.296ZF of the CDPA 1988,⁷⁷ which implement the Information Society Directive (EUCD) of 2001,⁷⁸ and in the U.S. there is the Digital Millennium Copyright Act (DMCA) of 1998.⁷⁹ The EUCD and DMCA implement a provision in Art 11 WIPO Copyright Treaty of 1996.⁸⁰ Circumvention mechanisms are prohibited under the CDPA⁸¹ and DMCA.⁸² The result is that if a work is protected by a DRM mechanism, even if that mechanism provides protection beyond the scope of copyright law, it is often not permissible for a recipient to circumvent the mechanism.

This paper advocates that content recipients should be able to distribute altered versions of right holder's content. If a DRM mechanism inhibits this, then knowledge as to how to re-use DRM protected works should also be permitted to be publicly available, even if that would reveal how to circumvent the DRM mechanism.⁸³

the U.S., *see* 17 U.S.C. § 101, § 102, and § 104 (1998).

⁷⁷ s.296-s.296ZF CDPA 1988.

⁷⁸ Directive 2001/29 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 O.J. (L. 167), art. 6 (EUCD), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>; Copyright and Related Rights Regulations, 2003, S.I. 2003/2498 (U.K.), *available at* <http://www.legislation.gov.uk/uksi/2003/2498/contents/made> (implementing the EUCD in the U.K.)

⁷⁹ Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1202 (1998).

⁸⁰ Art 11 states "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997).

⁸¹ s.296ZB CDPA 1988 (implementing Art 6(2) of the EUCD).

⁸² Digital Millennium Copyright Act, §§ 1201-1202.

⁸³ *See infra* at III, J. 3.

C. Implementing the new system

There is a need to move away from the concept of copyright as a negative right, and to move to a system that also provides content recipients with the positive right to re-use copyright content. Content recipients should hold an additional positive right, requiring that access should be granted as far as necessary for a creative re-use.⁸⁴ The proposed reforms to the U.K. and U.S. copyright system will concentrate on two main issues. First of all, there is a need to consider in what manner right holders could be compensated if their work is re-used. Second, there is a need to consider how to ensure the proposed system is encouraging creative re-use. To this end, a set of criteria will be outlined. Having achieved this, the paper will then move on to considering what body would be the most appropriate in administering the proposed system.

D. The importance of key values in balancing.

The ability to re-use content is affected by the nature of the technology in which the work is enshrined. Other factors such as the market, norms and law influence the amount of re-use possible,⁸⁵ but it is ultimately the technology of a work that enables or disables certain uses. For example, a film recorded on celluloid can be edited but is likely to require specific editing skills in cutting film⁸⁶ whereas a digital movie could be edited in more ways using digital technology.⁸⁷ Digital technology has the potential to permit more changes to be made to a reproduction of a work.

As technology has developed content recipients have been able to manipulate existing works in an increasing number of ways. Digital technology allows greater interaction with

⁸⁴ *Id.*

⁸⁵ See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (New York: Basic Books, 1999).

⁸⁶ See *inter alia*, *Video Edit Magic 4.47*, DESKSHARE,

http://www.deskshare.com/Resources/articles/vem_UsefulEditingTechniques.aspx (last visited Jan 7, 2011).

⁸⁷ See DIGITAL VIDEO EDITING, <http://videoediting.digitalmedianet.com/> (last visited Jan 7, 2010).

works, not just as the original creator or right holder intended but also in ways that might provide new experiences or information. For instance, a computer game could be rendered alterable by third party software, changing the manner in which it is played.⁸⁸ The content recipient may access and alter code directly to change their experience, which is entirely consistent with Lockean notions of knowledge. Locke states that it is in experience that all knowledge is founded.⁸⁹ Furthermore, it is consistent with the notion that the work should be accessible, and permit observation of its workings.

It was suggested earlier that the current copyright regimes place too much emphasis on the existing interests of right holders. Copyrights provide right holders with negative rights.⁹⁰ These negative rights include *inter alia* the exclusive rights of reproduction, of distribution, in the U.K. adaptation, and in the U.S., derivation.⁹¹ The courts place too much emphasis on assessing copyright infringement, and the potential effects on the existing interests of the right holders.

The current systems do not adequately consider the interests of content recipients. They are designed to protect existing right holder's interests, which mirrors Lockean conceptions of reward for labour.⁹² The copyright system is not designed to identify the stages involved in the re-use of earlier copyright works.⁹³ The proposed system differs in this respect, in that it provides a framework designed to encourage more creative re-uses. This marks a move away from providing negative rights, to providing positive rights for content recipients.

⁸⁸ Kevin Poulsen, *Hackers Sued for Tinkering with Xbox Games*, SKINNED ALIVE (Feb. 10, 2005, 10:20 GMT), <http://www.theregister.co.uk/2005/02/10/>.

⁸⁹ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 58, Book IV, Chapter 1 at §9. (20th ed. 1796).

⁹⁰ COPINGER, *supra* note 73 at 1-31.

⁹¹ For the rights in the U.K. see s.16 CDPA 1988, and for rights in the U.S. see Visual Artists Rights Act of 1990, 17 U.S.C. § 106A. For discussion see *supra* Section I. B.

⁹² Locke, J., 'The Second Treatise of Government and A Letter Concerning Toleration', *supra* 58 Chapter V.

⁹³ See *supra* Section I.

However, increasing the amount of re-use could, if implemented in a way that does not encourage initial creative works, stifle the creative process. This point has been put forward by Landes and Posner in economic terms.⁹⁴ They suggest that if legal copyright protection reaches a certain level, for instance in the costs of rights clearing, this will reduce the number of works being created. In turn, this will limit the amount of stimuli for future works thereby limiting future creativity. There is therefore a need to consider how to provide a system which compensates existing authors, but which has as its primary aim the encouragement of more creative re-uses.

E. An outline of the proposed systems: Changes and incentives.

The distribution of works that re-use copyright content is where the interests of right holders and content recipients clearly collide. Digital technology, by permitting widespread, cheap and easy distribution, alongside ease of making changes to existing works, means that more content recipients can enter into competition with the right holder of the earlier work. Putting aside questions of intellectual property law and licensing, if a company were to sell edited DVDs in order to remove potentially offensive content, without requiring purchase of the original DVDs, then some individuals would choose those over the originals. The original right holder would not be compensated.

There is a need to consider how to compensate right holders for the re-use of their works, whilst encouraging re-use of those works by others. The paper proposes significant curtailment of the negative rights of copyright holders, and consequently, the property right that copyright provides. It advocates significant reduction in the rights of reproduction, distribution, and in the U.K., adaptation and, in the U.S., derivation.⁹⁵ Right holders will be

⁹⁴ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326-332 (1989).

⁹⁵ In the U.K. s.16 CDPA 1988, and in the U.S., *see*, Visual Artists Rights Act of 1990, § 106A.

unable to bring an action for infringement of the reproduction, adaptation or derivation right against re-users.⁹⁶ Likewise, the performance right will be limited if it inhibits re-uses that are otherwise permitted under the proposed system. The distribution right is reduced in that if a content recipient is unable to purchase a work, a royalty may be paid instead. Although rental of works will remain possible, it cannot be used in any way contrary to the proposed system. It cannot be used in conjunction with licences that restrict content recipients' re-use of a work. The reduction of these rights may result in a breach of international obligations, and that aspect is discussed later in this paper.⁹⁷

Content recipients will be given the positive right to re-use a copyright work. The right will provide greater certainty than the current law as to which re-uses are to be permitted. Another positive right will also allow those content recipients' access to works protected by DRM so far as necessary for a creative re-use.⁹⁸ This paper agrees with the contention of Cohen that "copyright should recognise the situated, context-dependent character of both consumption and creativity, and the complex interrelationships between creative play, the play of culture, and progress, and should adjust its baseline rules – not simply its exceptions – accordingly."⁹⁹

In order to balance the positive rights given to content recipients, right holders may make use of the following rights. The following rights provide certainty both to right holders and to content recipients. These are: 1) financial rights, and 2) moral rights. These basic rights may be described as follows. 'Financial rights' are those that enable right holders to be able to claim money for the re-use of their works. This may be done in a number of ways, such as through requiring purchase of original works, or alternatively through levies and

⁹⁶ See *supra* Section III. C.

⁹⁷ See *infra* Section IV.

⁹⁸ See *infra* Section III. J. 2.

⁹⁹ Julie E. Cohen, *Intellectual Property and Public Values: The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 374 (2005).

licensing. ‘Moral rights’ covers those rights discussed in the U.K. CDPA 1988,¹⁰⁰ and those present in the U.S.¹⁰¹ Moral rights rest with the author, and protect them against derogatory treatment, and provide other rights such as the right to be named as author or not to be named. In the U.K. and U.S. these have had minimal influence, although in continental Europe moral rights are considerably more central to copyright litigation.

A reformed copyright system should encourage creative re-use of copyright works. The reform proposed by this paper consists of two inter-related systems. The systems are designed to apply to both digital and analogue technologies.¹⁰² The proposed systems will apply whenever there is a work in which copyright subsists, and it will not be possible to contract out of them.

The first system is one for quantitatively substantially similar works. A content recipient has the right to distribute a quantitatively substantially similar work, provided that he or she has purchased the original. Where a work is not quantitatively substantially similar, a system of compulsory licensing will be applied. Again, the content recipient has the right to re-use the altered work. The exact dividing line between the systems is discussed later.¹⁰³ If purchase of the original is not possible, the money owed to the right holder will be the right holder’s advertised purchase price at the time of the re-use. The royalty rate for non-quantitatively substantially similar uses will be a percentage of that figure. If there is no such rate, then a standard rate set by an administrative body will be applied. The royalty is only to

¹⁰⁰ Chapter IV CDPA 1988.

¹⁰¹ Limited protection exists through case law (*Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976), the Visual Artists Rights Act 1990, state statutes and through the derivative right in Visual Artists Rights Act of 1990, 17 U.S.C. § 106A .

¹⁰² In terms of ‘technology neutrality’, while the two systems do not explicitly discriminate between digital and analogue technologies, the effect may be different in that more varied re-uses are favoured by digital technology. As Reed argues, it is crucial to take notice of the effects of regulation in assessing technology neutrality-neutrality. Chris Reed, *Taking Sides on Technology Neutrality*, 4:3 SCRIPTED 263, 267 (2007), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-3/reed.asp>.

¹⁰³ *Infra* Section III. G.

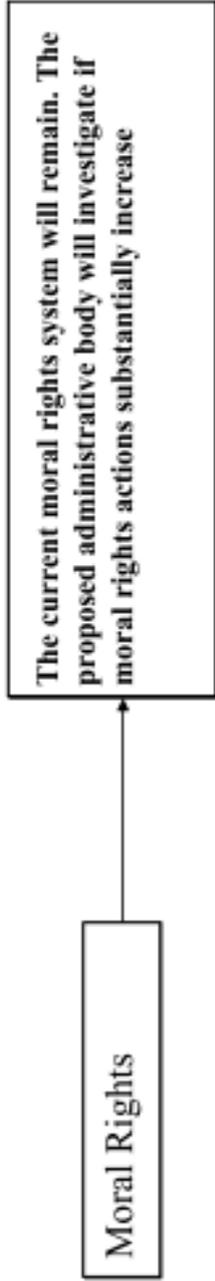
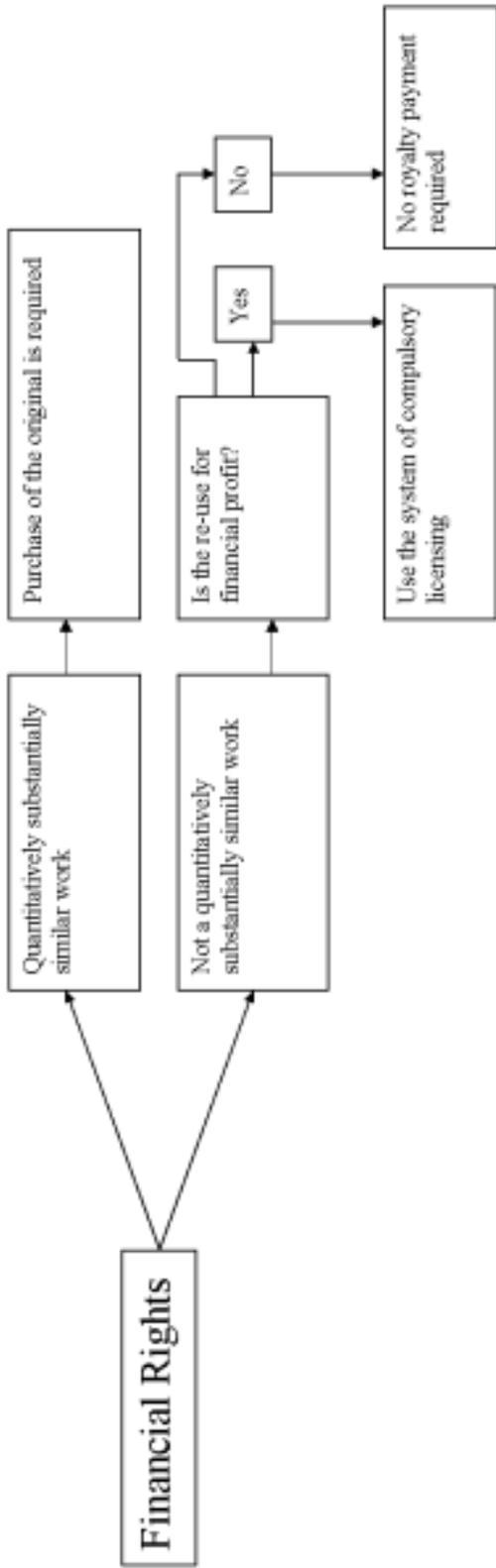


Diagram of the proposed system

be

be paid for non-quantitatively similar re-uses, if the re-use is for “financial gain.”¹⁰⁴

A consequence of the proposed system is that re-users seeking to make a re-use of an earlier work for “financial gain” may try to ensure that their work is substantially quantitatively similar to avoid paying any royalty. There is a chance this will result in less creative re-uses, and cheap copies of elements of existing works. However, if re-use of a quantitatively substantially similar work involves a sale, or rental, of the altered version, then the re-user is under a duty to check that recipients of the altered version have purchased the original. Otherwise, they will be liable to the right holder of the original work for lost sales.¹⁰⁵ This may limit the number of works sold under that system, though the impact may be less for widely distributed original works. Nonetheless, it is suggested that this is an acceptable trade off because current stakeholders will benefit from the proposed system in several ways.

Authors will benefit in that they will have a legally guaranteed income when commercial re-uses of their works are made. It will also be easier for them to know what quantity of an earlier copyright work they can re-use. Publishers will benefit through increased sales of original works, and they will receive more royalties. This is because where works are quantitatively substantially similar purchase of the original is required, and where a work is not, royalties will have to be paid if re-use is for financial gain.¹⁰⁶ There will also be greater exposure of the original work, if it is quantitatively substantially similar. Content recipients will know whether purchase of the original or a licence is required, and they will also have greater certainty as to which acts they can use their positive rights for.¹⁰⁷ Those who produce circumvention mechanisms will also know for what acts they may produce

¹⁰⁴ *Infra* Section III. F. 3.

¹⁰⁵ *Infra* Section III. F. 1.

¹⁰⁶ *Infra* Section III. F. 3.

¹⁰⁷ *Infra* Section III. J. 3.

those mechanisms.¹⁰⁸ File sharing networks will benefit in that the law is more certain, and therefore they can plan their activities around particular uses.¹⁰⁹

However, the proposed systems present some issues. As outlined earlier in this section, authors who hold copyright will lose some control over their works, primarily in terms of reproduction, and in the U.K. adaptation, and in the U.S. derivation. Nonetheless, this paper contends that authors will benefit from increased sales because for quantitatively substantially similar works purchase of the original is required.¹¹⁰ Furthermore, the system guarantees income for commercial re-uses where the work is not quantitatively substantially similar.¹¹¹ Publishers will also lose control over their works, but they benefit in the same way as authors who are also right holders. Re-users will benefit because they will be provided with the positive right to re-use the work, which will provide them with greater certainty.¹¹²

F. The proposed systems.

1 Quantitatively substantially similar works.

One of the key problems for right holders of copyright works is that re-used materials can be widely spread on the Internet without their consent. The Internet has the characteristic of “network effects,” where the use of one particular piece of content results in a greater likelihood of that content being used by others.¹¹³ A content recipient may re-use copyright content in a film – e.g. Star War’s Phantom Edit – and this may spread very quickly across the Internet. This potential threat has led to right holders using DRM mechanisms to prevent such alterations

¹⁰⁸ *Infra* Section III. J. 3.

¹⁰⁹ *See infra* Section III. F. 3 (discussing re-uses where there is no ‘financial gain’).

¹¹⁰ *Infra* Section III. F.1.

¹¹¹ *Infra* Section III. F. 3.

¹¹² *Infra* Section III. J.

¹¹³ For discussion *see* HANDBOOK OF INDUSTRIAL ORGANISATION, AT 1971 (Mark Armstrong & Robert Porter eds., North-Holland, vol. 3, 2007).

Content recipients, who make a quantitatively substantially similar re-use of a copyright work, should have a positive right to re-use that work. This is subject to the re-user having purchased the original work. If the re-use involves a sale (or rental) of the re-used version, then the re-user is under a duty to check that their recipients have purchased the original.¹¹⁴ If a re-user makes a re-use without purchasing the original work, or if in selling the re-used version does not check that the recipients have purchased the original, then a right holder may bring an action before a court or proposed administrative body against the re-user. The right holder can claim for the lost purchases of the work. They can also claim for damages.

This system is designed to increase sales for the original right holder, by taking advantage of “network effects.” However, the proposed system substantially restricts the rights of reproduction, adaptation (in the U.K.), and derivation (in the U.S.). As noted earlier,¹¹⁵ the copyright balancing exercise will move from one that provides right holders with rights of a negative character, to one that also provides positive rights for content recipients. This may run afoul of the Berne Convention¹¹⁶ and the rights it guarantees (for an in-depth discussion, see below).¹¹⁷ Nonetheless, current right holders will still have the right to prosecute individuals for failing to purchase the original work, or for not paying the royalties required. Providing content recipients with the positive right to re-use a work enables them to clearly understand that they can re-use a copyright work, provided they have purchased the original.

¹¹⁴ The ‘financial gain test’ for non-quantitatively substantially similar works (see *infra* Section III. F. 3.) is not used here. This is because the proposed system can be simpler as there is only one original work. Simplicity is important because the penalties involved may be greater.

¹¹⁵ *Supra* Section III. E.

¹¹⁶ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) (The 1979 amended version does not appear in UNTS or ILM, but the 1971 Paris revision is available at 1161 UNTS 30 (1971)), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

¹¹⁷ *Infra* Section IV.

In anticipation of objections from current right holders, it can be noted that there is precedence for such a distribution model within the U.K. and U.S. Many computer games permit alterations of the way in which they work, and this has been put forward as a way to increase sales.¹¹⁸ In so doing, publishers are relying on the network effects of the popularity of their games – the more popular a particular modified version of a game becomes, the more sales of the original will increase.¹¹⁹ This was demonstrated with the Half Life 2 videogame that had consistently strong sales because of modifications that were permitted by the EULA.¹²⁰

2. Case Study.

The Clean Flicks company is one that would have benefited under the proposed laws. CleanFlicks Media Inc. rented out, and sold edited DVDs. These were edited to remove profanity, nudity, graphic violence, and sexual content. For each DVD sold, Clean Flicks purchased, or required purchase by a consumer, a copy of the original work. Clean Flicks were ultimately held to be infringing the rights of certain Hollywood copyright holders.¹²¹

Under the proposed system, Clean Flicks would have the right to distribute edited versions of DVDs, if the original had been purchased. However, customers should purchase a DVD (or Clean Flicks on their behalf). Clean Flicks will need to check whether the customers had purchased the original.

However, in the online context, there are too many situations where it would be unreasonable to expect the non-commercial re-user of copyright content to check whether the original content had been purchased. For instance, in relation to computer games, it could be

¹¹⁸ *Infra* Section IV.

¹¹⁹ *Id.*

¹²⁰ *Id.*, and Steam Subscriber Agreement, http://store.steampowered.com/subscriber_agreement/ (last visited Jan. 8, 2011).

¹²¹ *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

difficult for a content re-user posting edited content on to the Internet to know whether or not the recipient has an authorised copy of that game. If a right holder discovers the original has not been purchased, minor punitive penalties could be imposed.¹²² Such penalties may be increased if commercial piracy is involved.¹²³ The administrative system outlined below¹²⁴ would keep legal costs down to a minimum so that they would not become prohibitive.

3. The second system.

The model just described will only apply to those works that that are substantially quantitatively similar to an earlier original work. The situation is less clear with works that are a result of remixing, where there is no clear single original work.¹²⁵ It would seem excessive that use of a one second sample, no matter how evocative, would require the purchase of an original sound recording.

One manner in which this could be achieved would be through the introduction of levies. Germany, for instance, introduced a system of levies on goods such as blank CDs, the money from which would then be redistributed to right holders.¹²⁶ In relation to p2p, Netanel has put forward the argument of a non-commercial use levy.¹²⁷ The levy would be “imposed on all consumer goods and services the value of which is substantially enhanced by p2p file swapping.”¹²⁸ The goals behind Netanel's levy system is similar to those put forward by the

¹²² Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L. 157), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0045:0086:EN:PDF>. The system paperis designed to prevent content recipients distributing works with minor alterations to benefit from the “not for financial profit” exemption under the proposed compulsory licensing scheme. *Infra* Section III. F. 3.

¹²³ *Id.*

¹²⁴ *Infra* Section V.

¹²⁵ The exception would be for those works where, for example, there is a remix of a South Park episode not based on any particular South Park episode, but which has an identifiable right holder. However, for the sake of certainty the second system should be used.

¹²⁶ Katerina Gaita & Andrew F. Christie, *Principle or Compromise?: Understanding the Original Thinking Behind Statutory Licence and Levy Scheme for Private Copying*, 4 INTELL. PROP. Q. 422, 430 (2004).

¹²⁷ Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1, 21 (2003).

¹²⁸ *Id.*

paper – namely, that it aims to “give non-commercial users and creators freedom to explore, share, and modify many of the expressive works that populate our culture.”¹²⁹ Fisher has also put forward similar arguments – he supports the introduction of a levy or tax which is redistributed to right holders based on quantitative re-use.¹³⁰ However, the largest criticism that such systems have to overcome is that they act as a blanket mechanism. Netanel seeks to refute the key criticisms in relation to his proposed levy, those criticisms being that: “[it] could not yield sufficient funds to compensate copyright holders without imposing unpalatable costs on consumers. The second is that [it] would unfairly and inefficiently require low volume users of copyright protected material to subsidize both copyright owners and high volume users.”¹³¹ Whilst Netanel makes an admirable attempt to refute these criticisms,¹³² it is submitted that the system of compulsory licensing proposed below carries the benefits of a levy system, but without the risk of the above drawbacks.

There is already a narrow form of compulsory licensing in the U.S., under §115.¹³³ This system has had limited impact.¹³⁴ The current system of licensing impedes the re-use of copyright content. For instance, with ‘Paul’s Boutique,’ released in 1989, the Beastie Boys pioneered the use of dense sampling. However, subsequent Beastie Boys albums have not followed this same technique, because of the high transaction costs necessary for a label to clear the work for release.¹³⁵

A different compulsory licensing system could be implemented where a later work is not quantitatively substantially similar to an original work on which it is based. The compulsory licensing royalty rate should be assessed as according to the quantity of the

¹²⁹ *Id.* at 6

¹³⁰ WILLIAM W. FISHER, *PROMISES TO KEEP*, (Stanford, Calif.: Stanford Law and Politics, 2004) Chapter 6.

¹³¹ Netanel, *supra* note 127 at 7.

¹³² *Id.*, at 59-74.

¹³³ 17 U.S.C. §115.

¹³⁴ *See supra* Section I. B.2.

¹³⁵ Eric Steuer, *The Remix Masters*, *WIRED*, (Nov. 2004) available at <http://www.wired.com/wired/archive/12.11/beastie.html>.

copyrighted elements re-used from the original work. In so doing, there will be greater certainty for the re-user of the content than if it is based upon the ‘recognisability’ of the sample. To focus on recognisability, as is the current process, introduces uncertainty into the system.¹³⁶

Under the compulsory licensing system it would be the content re-user who has to pay the royalty once the re-used work is being sold. As a result, the system can still dissuade the recipient of content re-using that work and distributing it. Those seeking to distribute content that re-uses copyright content might feel compelled to base their works upon a single original work, as opposed to mixing in re-used work from a number of original sources, because they have already purchased that work. This could be undesirable as it has the potential to discourage certain types of re-use such as the wide use of samples in musical works.

In order to balance this, it is proposed that the compulsory licensing system would only be applied to those works sold for financial profit, or resulting in significant income. The key to preventing discouragement of certain types of creative re-use is to specifically define what is meant by financial profit. The approach used by Justice Souter in *Grokster*¹³⁷ is informative:¹³⁸

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. .. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work.¹³⁹

¹³⁶ See *supra* Section I. B.

¹³⁷ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹³⁸ Recall though that this is for the current copyright tests of infringement, and so is more detriment to creative re-uses than if it were applied under the proposed balancing exercise.

¹³⁹ *MGM Studios*, 45 U.S. at 2774.

However, a subsequent work could become well known without sufficiently compensating the original creator under the proposed system – works could be made for ‘fun,’ not for profit, and therefore not provide any monetary reward for the original artist. As Hughes comments, “some recordings approach or overpower the originals, whether or not the original was propertised. Which had the greater audience over time – New York City’s *I Love New York* song, or Saturday Night Live’s *I Love Sodom* parody – considering the latter still sells on video?”¹⁴⁰ In addition, some works have become well known through only one small part of the work, as in the *Colonel Bogey*¹⁴¹ case, rather than the whole work, which a system based around the quantity of re-use would not compensate to the level of one based around qualitative re-use.

Nonetheless, the paper argues this is an acceptable trade-off. In regard to right holders, it is exposing their works to a greater degree that may increase sales of the original. For re-users of content, it will mean that they are freer to sample and adapt pieces from existing works. There will be greater certainty and clarity as to when works can be re-used. At the same time, the existing right holders are protected from unauthorised reproductions by the requirements to purchase original copies of their works where there is quantitative substantial similarity.

In addition to this, the system of compulsory licences should be implemented in a way that does not discourage the re-use of existing works. If a large quantity of a work is re-used, then a proportionately greater percentage of royalties could be required. It would be for the proposed administrative body to set the rates, but an example could be if 20% of an earlier work’s copyrighted elements are re-used, 20% royalties would be required, whereas a 50% re-use would incur a 70% royalty. A scheme of royalty rates would be made public, so that

¹⁴⁰ Hughes, *supra* note 53 at 962.

¹⁴¹ *Hawkes & Son Ltd. V. Paramount Film Servs. Ltd.* [1934] 1 ChD 593 (Eng).

content recipients know what monies they would have to pay if the re-use is for financial gain. It would have to be stressed that the scheme applies only to those works which are not quantitatively substantially similar to an earlier work. If it is quantitatively substantially similar to an earlier work, then the scheme outlined above in section III F1 will apply. The two systems will complement each other in that a 60% re-use should incur a 100% royalty – above that rate, the quantitatively substantially similar scheme will apply.

In terms of rights and liabilities between re-users, the royalty will be assessed according to the earlier copyright work that is re-used, so the royalty paid will revert back to the previous right holder. If there is a dispute, this will be resolved by the proposed administrative body, or if necessary, a court. There is an exception where there has been re-use which was not for “financial gain” – this is to ensure that those who initially re-used a large percentage of a work for non commercial reasons are not suddenly expected to pay royalties. If that happened, it could discourage many re-uses. For instance, if one re-user copied 90% of a work for non-commercial reasons (bringing it within the quantitatively substantially similar system) he would only need to purchase one copy of the work. However, if his use was to be deemed for “financial gain” because a re-user of his work who copied 25% distributed a commercial version of it, the first re-user would have to purchase one work for every re-use. The royalties the first re-user would receive would not be enough to cover the royalties owed to the original right holder. Consequently, the paper suggests that royalties will pass to the earlier commercial re-user. Thus, the 25% royalties owed by the second re-user will pass directly to the original right holder.¹⁴²

¹⁴² One exception is if the original right holder did not create the work for “financial gain” – royalties will still pass in the instance, since there is no detriment suffered. However, this does assume that the original work does not re-use any elements of earlier works.

4. Case Studies.

A piece of commercial (for profit) music that combines together many samples would be the typical situation where the proposed compulsory licensing system would apply. A musician may decide to combine together, for example, 15 samples. Under the proposed system, he has the right to distribute the resulting work. Each sample would be quantitatively judged against the original work. If one of the samples quantitatively consists of 20% of the original, then 20% royalties may be paid. If another comprises 50% of the original, then it is possible that a 70% royalty is required in order to deter larger reproductions. The royalty rate itself would be dependent on the length, and type, of work so as not to deter re-use of shorter works.¹⁴³ This would also resolve the problem of requiring large royalty payments for works that make use of ‘dense sampling.’ For instance, ‘Paul’s Boutique,’ a piece of music which made use of many samples, could pay a lower royalty rate due to its creative nature.

Another example could involve film. A content recipient produces a reworked version of Star Wars. Again, the content recipient has a right to distribute the altered version. Two main action sequences are reproduced - the attack on Hoth and the Death Star exploding. Minor additions to these sequences are achieved by adding in additional graphics. The text from the introduction and credits has been copied, and 20% of the music has been reproduced, 50% of the plot is the same. The rest of the film does not contain earlier copyright elements. Under the proposed system, the amount of royalties to be paid is directly related to the quantity of the re-used copyright elements. The amount of frame time given to the action sequences and text would be worked out as a quantitative percentage of the original work - as would reproduction of the music and the plot. Provided that the reproduction does not result in the work being considered quantitatively substantially similar

¹⁴³ How the rates would be set is discussed in *infra* Section V.

to any of the earlier works on which it is based, a prescribed royalty would then be paid. If it is quantitatively substantially similar, then the original work will need to be purchased.

G. Deciding whether an original should be purchased or whether the compulsory licensing system should be used.

There are some instances that could arise where it is not clear which system should be used. If an individual has posted a music remix of an earlier song with some other elements from other songs onto the Internet, should this be considered to be based on one single original source or possibly a remix of several? What if, for instance, it was a remix of a well-known song?

In the test of substantial similarity by quantity, if the later work is quantitatively substantially similar to a work on which it is based, then the original work has to be purchased once. This percentage would be determined by the proposed administrative body. However, the paper suggests as a starting point that once 60% (or more) of an original work is reproduced, it is substantially quantitatively similar. If two works are reproduced at 60% each, then the substantial quantitative similarity test would still apply, requiring the purchase of both. The content re-user can nominate what the earlier works were – this is in order to restrict the possibility of right holders using quantitatively smaller, earlier, works to limit creative re-use. If there is disagreement as to what the earlier work was, the proposed administrative body or the courts could try the issue on a case-by-case basis, under the principles of creative re-use discussed below.¹⁴⁴ If a work is not purchasable, then a standard royalty rate set by the proposed administrative body will apply.

The figure of 60% as the point at which a work is quantitatively substantially similar has been chosen because this will deter less creative re-uses. That figure can be changed by

¹⁴⁴ See *supra* Section III. J. 3.

the proposed administrative body, and could be changed subject to further scrutiny.¹⁴⁵ If less than 60% of the original work has been reproduced, the system of compulsory licensing should be applied.¹⁴⁶ Under that system, an individual may distribute an altered version without paying the royalty, provided it is not sold for financial gain, or resulting in significant income.¹⁴⁷ If it is for financial gain or results in financial profit, then the compulsory licensing system should operate so that the more a work is derived from an original, the greater the royalty should be. At a point determined by the proposed administrative body, the combination of royalties could exceed the purchase price of the original work. This is to encourage more creative re-uses, and to discourage minor editing of the original work solely in order to produce cheaper versions.

For example, if a Star Wars film is reproduced and this constitutes 60% of the original work, then this would fall under the quantitative substantial similarity test. If two Star Wars films were reproduced in equal portions, with 50% of each, this would fall under the compulsory licensing test. When the re-used work is sold for profit or resulting in significant financial income, then the royalty rate would be imposed. The royalty rate would be proportionally higher with a 50% re-use than, for example, a 20% re-use. A re-use of 50% of the original work could incur a 70% royalty. In this example, a total of 140% royalties would accrue.

What about works where, for instance, separate re-users have made 20% of a work available in unmodified form? This could conceivably result in a situation where 100% of a work has been made available from five different sources. However, because each re-user has only taken 20%, they would not be liable to make any royalty payments. Consequently, the original right holder would be deprived of revenue. It is suggested that any re-use of a

¹⁴⁵ 60% was chosen as a combination of 50% plus 10% because a) 50% was a figure that represented an easily identifiable portion by a member of the public, and b) the additional 10% was designed to act as a 'safety' buffer.

¹⁴⁶ See *supra* Section III. F. 3.

¹⁴⁷ A p2p system that mosaics parts of works would fall under this definition, *see id.*

work in this manner would, in fact, be considered as resulting in ‘financial gain.’¹⁴⁸ This is because any network allowing such uploads would be, per the *Grokster* test, “[substantively] free access to copyrighted work.”¹⁴⁹ The test for ‘financial gain’ is sufficiently flexible to deal with such situations, and therefore there is no need for any specific rules.

H. How to assess the position of end users in relation to re-use.

Under the proposed systems, content recipients have the right to alter files and then upload them. In turn, other recipients may wish to alter those files again, and then let others upload them. This raises questions as to the legal relationships between the re-users.

All re-users will be treated as non-infringers. The reason for treating them as non-infringers is because to do otherwise could result in the balancing exercise being undermined. It has been outlined earlier that the potential threat of copyright infringement proceedings has been a factor in chilling some creative re-uses.¹⁵⁰ Those who reuse content will be treated as licensees. Right holders can still initiate legal action against content recipients for royalties owed to them under the proposed system, or where appropriate to obtain financial compensation equivalent to purchase of the original work. The proposed system will lay down rules as to how unpaid royalties may be collected, and it is only this system that can be used to gain such monies. Punitive penalties may need to be imposed by an administrative body so that content recipients will actively pay the royalties required and purchase the original work where necessary.

There is the associated question of to whom a content re-user pays royalties. For instance, if two individuals (‘A’ and ‘B’) have commercially re-used 25% of a work each, and another user (‘C’) then combines the two to make a commercial re-use of 50%, does this

¹⁴⁸ See *supra* Section III. F. 3.

¹⁴⁹ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹⁵⁰ See *supra* Section I. B.

mean that either a) royalties are to be paid by C to A and B, or that b) C is to pay royalties to the original right holder ('R')? The proposed system requires that the royalty goes to the last author. This could be a re-user, or the initial creator. It is then for that last author to then pass royalties on to the author whose work they have re-used (or, of course, the initial creator). If there is any dispute, it is for a court or the proposed administrative body to decide who the last author was.

In order to demonstrate the operation of the system, a more complicated situation can be introduced. 'A' has reproduced 90% of a work and distributed it on the Internet without financial gain. Assume that 'B' has, for non-commercial reasons, made a 25% re-use of 'A's reproduction. 'C' has taken that re-use and made insignificant changes (i.e. a 100% re-use), and has commercially sold the work. 'D' has then taken 10% of that work, and re-used it in a commercial work. What royalties are owed? To begin with, it is necessary to exclude any re-uses that are not for "financial gain." 'A' and 'B' are therefore excluded from the analysis. 'D', however, owes royalties to 'C,' because the re-use is commercial. Regarding 'C,' because 'B' and 'A' are excluded, royalty payments will go to the next nearest creator, which is the original right holder. The royalty owed will accord to the percentage taken (in this case, the percent of the original work taken is 22.5% - 25% of 90%).

I. Moral rights.

A different approach towards balancing may impinge upon the territory of moral rights. In the U.K., moral rights are a recent addition:

The term "Moral Rights," introduced into English law by Chapter IV of the 1988 Act, has its origins in the "droit moral" enjoyed by authors in various European countries, notably France, Germany and Italy. It refers collectively to a number of rights which are more of a personal than commercial character and are not normally included in the term "copyright."¹⁵¹

¹⁵¹ COPINGER AND SKONE JAMES ON COPYRIGHT, INCLUDING INTERNATIONAL COPYRIGHT: WITH THE STATUTES, ORDERS, CONVENTIONS, AND AGREEMENTS THERETO RELATING: AND PRECEDENTS AND COURT FORMS, ALSO RELATED FORMS OF PROTECTION, *supra* note 43, at 3-25.

These rights reside with the author and if a court finds a breach of them there will be a statutory sanction.¹⁵² In the U.K., moral rights include the right to be named as author, or not to be so named, and a right against derogatory treatment of a work, as defined by the CDPA 1988.¹⁵³

The U.S. Copyright Act does not specifically refer to moral rights, however, there is a mention of them in the Visual Artists Rights Act 1990¹⁵⁴ and case law.¹⁵⁵ Although they provide a set of rights alongside the traditional economic rights, in both the U.K. and the U.S., the rights have not been widely used.

To date the U.K. has restrictively interpreted moral rights. To begin with, there is a system of consent and waiver within the CDPA 1988.¹⁵⁶ This puts authors in a weak bargaining position vis-à-vis publishers when seeking publication of their works. An author may have to waive his rights or consent to certain uses of his work. Even if he can, and does, decide to exercise his moral rights, they have been construed restrictively by the courts. In the U.K. case of *Tidy v. Trustees of the National History Museum*¹⁵⁷ resizing of a cartoon with different colour backings was insufficient to be considered derogatory treatment; likewise, “what the plaintiff must establish is that the treatment accorded to his work is either a distortion or a mutilation that prejudices his honour or reputation as an artist. It is not sufficient that the author is himself aggrieved by what has occurred.”¹⁵⁸ Trivial changes are also insufficient.¹⁵⁹

¹⁵² s.103(1) CDPA 1988. In the U.K., it is actionable as a breach of statutory duty. *Id.* In the U.S., 17 USC § 301(f)(1) applies for works of visual art, otherwise state level sanctions apply. 17 U.S.C. § 301(f)(1) (2010).

¹⁵³ s.77-85 CDPA 1988.

¹⁵⁴ Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.

¹⁵⁵ *See, e.g., Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2nd Cir. 1976).

¹⁵⁶ COPINGER AND SKONE JAMES ON COPYRIGHT, *supra* note 73, at 626-27, 661.

¹⁵⁷ *Tidy v. Tr. Of the Nat'l History Museum*, [1995] Ch. D. 29, [1996] E.I.P.R. D-86 (Eng.).

¹⁵⁸ *Pasterfield v. Denham*, [1999] F.S.R. 168 at 182 (Eng.).

¹⁵⁹ *Id.*

In the U.S., the *Gilliam v. ABC*¹⁶⁰ case applied the right of integrity. When discussing the “actionable mutilation” of Monty Pythons work, Judge Lumbarde stated, “[t]his cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of *droit moral*, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it.”¹⁶¹

The development of moral rights was piecemeal. There is the right to be named author in some state statutes,¹⁶² and statutory protection exists through the Visual Artists Rights Act of 1990, which inserted 17 USC §106A into the US Code. Under that provision, authors of a “work of visual art” have the rights of attribution, integrity,¹⁶³ and the right to prevent destruction of works of “recognised stature.”¹⁶⁴ There is also protection provided with the derivative right.

This paper proposes a system that is designed to increase creative re-uses of copyright works. The question this raises is whether moral rights have the potential to undermine the proposed system. There are two possible outcomes, either that: a) the system of moral rights remains peripheral; or b) authors assert their moral rights more regularly.

Under scenario (a), moral rights may remain peripheral because publishers could insist on authors waiving their moral rights. Publishers might desire this because it will enable a greater level of control over the copyright of the works that they own. The proposed system is also designed to generate increased levels of revenue for right holders, and so this may be an incentive for publishers to request waiver of an author’s moral rights.

¹⁶⁰ *Gilliam*, 538 F.2d at 24.

¹⁶¹ *Id.*

¹⁶² California Art Preservation Act, CAL. CIV. CODE § 987 (Deering 1979). N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1990). Note the latter was pre-empted by the Federal Visual Artists Rights Act of 1990.

¹⁶³ Visual Artists Rights Act of 1990, 17 USC § 106A(a)(1)-(2).

¹⁶⁴ Visual Artists Rights Act of 1990, 17 USC §106A(a)(3)(B).

However, under scenario (b), authors might bargain to keep their moral rights. Reasons for this may include an attempt to obtain damages for breach of their moral rights, or because they wish to restrict certain uses of their works for personal reasons.

Since the system proposed in this paper does not necessitate change to the system of moral rights, it is expected that there will not be concerns in relation to the protection of moral rights at the international level. Likewise, it is not anticipated that there will be an increase in the number of moral rights actions. However, it should be re-iterated that the proposed administrative body needs to closely monitor the situation, in order to ensure that the use of moral rights does not result in a detrimental impact on creative re-use.

Once the proposed system enters into force, the use of moral rights should be monitored by an administrative body.¹⁶⁵ If the body considers that moral rights are being used in a manner that is restricting the re-use of copyright content, then it should be given the option of lobbying for a more restrictive system.

Instituting a narrower system may introduce problems in relation to international obligations,¹⁶⁶ such as that under the Berne Convention.¹⁶⁷ Art 6*bis* requires that moral rights be given sufficient protection. It is possible that this would require some renegotiation of Berne, although the U.S. only recently signed up to Art 6*bis*,¹⁶⁸ and the U.K. has often had to amend its laws to ensure compliance.¹⁶⁹ Consequently, it is suggested that there is scope for discussion as to how the U.K. and U.S. can implement a moral rights system.

¹⁶⁵ See *infra* Section V.

¹⁶⁶ See *infra* Section IV.

¹⁶⁷ Berne Convention for the Protection of Literary and Artistic Works, *supra* note 116.

¹⁶⁸ Berne Convention Implementation Act, 102 Stat. 2853-2861 (1988).

¹⁶⁹ E.g., International Copyright Act, 49 & 50 Vict., c.33 (1986) (U.K.) (following the Berlin revisions to Berne, the Copyright Act 1 & 2 Geo., 5 c.46 (1911). Only with the CDPA 1988 has the U.K. generally been considered to be fulfilling all its requirements in relation to moral rights (which were introduced with the Rome (1928) and Brussels (1948) revisions of Berne). COPINGER AND SKONE JAMES ON COPYRIGHT, *supra* 73, at 626-27.

J. How to ensure that those who re-use content continue to have their interests considered

1. Types of re-use.

In order to ensure that the proposed system guarantees creative re-uses, as opposed to merely laying down a system that should encourage them, it is necessary to outline some principles to which the administrators and judges of the system may adhere. This section will outline how this could be done.

Once a content recipient has either paid for a copyright work, or paid an appropriate royalty, he has the positive right to re-use the copyright work. However, in addition, those content recipients will also have the positive right to access a work protected by DRM provided it is necessary for a creative re-use. It is suggested below¹⁷⁰ that the courts be required to follow certain guidelines. In addition, the proposed administrative body will have the power to draw up lists of acts that content recipients can carry out. Content recipients have the positive right to access a copyright work so far as necessary for a creative re-use – the list does not affect that positive right. The lists are primarily designed to provide guidance for content re-users.

2. How far should re-use be permitted?

A content recipient should be able to access a work at a number of levels. At first blush, this would appear to mean that a work should contain all the source code that would reveal all of its inner workings – something required, for instance, by the Open Source software GNU GPL. The paper is not advocating an approach as wide as that of the GNU GPL. What the paper argues is that a content recipient in certain circumstances should be able to access the source code – but *only* if it is necessary for a creative re-use.

¹⁷⁰ See *infra* Part V.

There are many benefits to the proposed system. The proposed system overcomes some of the issues with DRM mechanisms. It has already been detailed that these mechanisms may restrict the ability to reproduce an earlier work, or limit the ability to edit existing content.¹⁷¹ Such mechanisms furthermore restrict the ability of other software to interface or interoperate with them. It is suggested that a consideration of creative re-use in legal reasoning would influence the implementation of such mechanisms, and further their use in a manner that would encourage creative re-use. However, such a broad approach to reverse engineering may clash with the EU Software Directive¹⁷² and also the existing reverse engineering law in the United States.¹⁷³ Nonetheless, this paper outlines how right holders have benefited from encouraging alterations to their work.¹⁷⁴

Ensuring that a work is as accessible as is necessary for a creative re-use requires, therefore, at the least a set of statements or principles that should be followed. It necessitates a consideration of how works are re-used by content recipients. This is not simply limited to *whether* a content recipient can gain any access to an earlier work, but also the degree of access.

It is argued that there needs to be explicit consideration, in a statute, of the needs of content recipients to re-use a work. Digital technology provides access to increasing amounts of content but can limit the ability of the content recipient to re-use that content. Digital technology therefore changes the nature of the balancing exercise. The courts need to address the re-use of content to ensure that they consider the wider balancing exercise between right holders and content recipients.

¹⁷¹ See *inter alia*, James G.H. Griffin, *The Changing Nature of Authorship: Why Copyrights Law Must Focus on the Increased Role of Technology*, 2 INTELL. PROP. Q. 135 (2005).

¹⁷² Council Directive 91/250, 1991 O.J. (L122) 4291/250/EC.

¹⁷³ See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 526-540 (2002).

¹⁷⁴ See *supra* Section I. B.

3. How far should access be provided to a work? Court guidelines and public lists.

The paper proposes that there should be a system that will require the courts and the legislature to consider the stages involved in creative re-use of copyright works. This will require a consideration of reverse engineering, in a manner similar to that used by the Ninth Circuit in *Sega v. Accolade*.¹⁷⁵ To recall, Judge Reinhardt looked at the stages involved in reverse engineering a work:

Accolade used a two-step process to render its video games compatible with the Genesis console. First, it “reverse engineered” Sega’s video game programs in order to discover the requirements for compatibility with the Genesis console. As part of the reverse engineering process, Accolade transformed the machine-readable object code contained in commercially available copies of Sega’s game cartridges into human-readable source code using a process called “disassembly” or “decompilation.”¹⁷⁶

If a content recipient wishes to creatively re-use a menu system in a DVD, then they should be able to observe how this operates. This will extend their knowledge, and, following the Lockean doctrine of knowledge, thereby encourage them to be more creative.¹⁷⁷ It is for this reason that the paper proposes that content recipients who re-use copyright content should be provided with the positive right to access copyright content. Courts will have to consider the component elements of that right, namely the stages involved in reverse engineering.

However, there should be limits to the positive right of the content recipient to be able to access copyright content. If the right is to be given an extremely liberal and broad reading, this would require that all works be fully accessible. The right has already been qualified in that it will provide access only ‘as far as necessary for a creative use.’ It is hoped that court

¹⁷⁵ *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir.,1992).

¹⁷⁶ *Id.*

¹⁷⁷ *See supra* Section I. B.

judgments will build up a precedent of acts covered by that phrase. Furthermore, the proposed administrative body will have the power to make a list of acts that come within that phrase. Consequently, it will become clearer both to right holders and circumventors what sort of creative re-uses are likely to be accepted for the purposes of circumventing DRM.

It is submitted that many creative re-uses share common characteristics, such as the combination of samples or extracts from films and music. Remixing of content should therefore be permissible. It is expected that these principles will have to be fleshed out on a case by case-by-case basis, thus, and so two case studies are provided below¹⁷⁸ demonstrating how this system could develop. In doing this, there will develop a list of circumstances will develop where re-users can be certain of their rights, and be able to point to clear precedent. The list will be drawn up by the administrative body detailed below,¹⁷⁹ and will apply to both analogue and digital works.

This list will allow those who produce circumvention mechanisms to know with greater clarity which acts are permitted by the law. However, if their mechanisms allow acts that are not ‘necessary for a creative re-use’, then they may be liable in for an action for damages. The same principle can be applied to file sharing networks. It must be recalled that under the proposed system, content recipients are not to be considered infringers, but that recipients will be liable for any royalties owed and possibly additional damages. This substantially limits the scope of an action for secondary infringement, but right holders still have the option of taking action, where appropriate, against the end user for royalties.

However, should an individual be able to aggressively argue that access to protected code is ‘necessary for a creative re-use’, and that not allowing access to do so would be an infringement of his positive right to be able to access the work? What about where highly complicated DRM has been used that nobody can circumvent? In this situation, it is

¹⁷⁸ See *infra* Section IV. 1.

¹⁷⁹ See *infra* Section V.

suggested that the proposed administrative body may make a ruling to allow certain content to be accessible. Such rulings could become preferable to circumvention, but they could result in complete loss of control over the content. A ruling should thus only be a last resort, and so a certain period of time will need to elapse before a ruling may be sought. The proposed administrative body will set that period after examination. Another situation where content may be difficult to access could be where a developer does not use DRM, but hides code deep inside computer hardware. In such situations, the same rule should apply.

However, the question remains whether such rulings are extending beyond the boundaries of the proposed copyright balancing exercise. U.S. case law suggests that if a contract provides for copyright style reproduction rights, then it should be considered to be within the “general subject matter”¹⁸⁰ of copyright law. The result, if that is found, is that federal copyright law could overrule state contract law.¹⁸¹ A similar rule could be applied to the situation where re-use is being inhibited. If anything is inhibiting creative re-use of a copyright work then it will be within the proposed balancing exercise. Whether that re-use is commercial or not will be deemed irrelevant – creative re-use is the central balancing criteria.

IV. Impact on associated laws.

It has already been outlined that if the proposed scheme were to be adopted, right holders’ copyrights would be reduced.¹⁸² However, there are a number of potential knock-on effects on other associated areas of law. It has been suggested in the previous paragraph that the scope of the proposed balancing exercise would be determined by the “general subject

¹⁸⁰ ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640 (W.D. Wis. 1996).

¹⁸¹ *Id.*

¹⁸² *See supra* Section III. E.

matter” test.¹⁸³ Whenever a creative re-use is inhibited, a re-user of copyright content can rely on his positive right to access a work ‘as far as necessary for a creative re-use.’ This naturally raises concerns as to conflicts with other laws.

One area where there is conflict is in relation to provisions dealing with interoperability. The EU Software Directive,¹⁸⁴ for instance, provides that, subject to various qualifications, interoperability should be possible between computer programs.¹⁸⁵ This provision has been implemented in the U.K. by s.50B CDPA 1988.¹⁸⁶ The U.S. DMCA also provides a provision that outlines there should only be program-to-program interoperability when it is applied.¹⁸⁷ However, the proposed system considerably extends beyond this, potentially requiring interoperability not just between computer programs, but also between any file so long as it is ‘necessary for a creative re-use.’ A similar issue arises in relation to the EU CD, which requires protection of DRM mechanisms.¹⁸⁸ Similar law exists in the U.S. in §1201 of the DMCA.¹⁸⁹ If the proposed system is to allow access to works protected by DRM mechanisms ‘as far as necessary for a creative re-use,’ then this will run counter to those laws. In relation to the U.K., this raises the issue that EU law might need to be breached, and consequently various actions may be brought against the U.K.¹⁹⁰ In the U.S, the DMCA needs to be amended, which may be difficult considering bearing in mind the lack of success of reforms that have been proposed for it.

Patent law may be in issue where a patent is being used to protect a copyright work. For instance, a patent may exist over a piece of hardware which contains a copyright work.

¹⁸³ See *supra* Section III. E.

¹⁸⁴ Council Directive 91/250, 1991 O.J. (L 122).

¹⁸⁵ *Id.*

¹⁸⁶ s.50B CDPA 1988.

¹⁸⁷ Digital Millennium Copyright Act, 17 U.S.C. § 1201(f)(1) (1998).

¹⁸⁸ 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, *supra* note 78.

¹⁸⁹ Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998).

¹⁹⁰ The European Commission could bring an action under Article 226 EC, or an individual may bring an action against the state, see *Joined Cases 46 & 48/93, Brasserie du Pêcheur, S.A. v. Ger. & U.K. v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-6025.

The patent may be infringed because an element has been re-used in a competing product. By applying the “general subject matter” test, any re-use which inhibits creative re-use of a copyright work will be permitted under the proposed balancing exercise. That does not preclude infringement proceedings under patent law. Nonetheless, it is suggested that the proposed administrative body should keep the situation under review.

If the proposed system is implemented in the U.S., then there might also be issues in relation to the Constitution. This is because the Constitution emphasizes the current interests of authors, as it states that protection is “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.”¹⁹¹ Passing an amendment could be difficult, considering that two thirds of both Houses of Congress have to vote in favour of amendment, or alternatively two thirds of states have to call a Constitutional Convention.¹⁹²

In addition, provision of positive rights to content recipients allowing them to re-use copyright works could be problematic in terms of compliance with the Berne Convention¹⁹³ and TRIPS.¹⁹⁴ The paper proposes restricting right holders’ abilities to bring an action for infringement of, notably, the reproduction right, the adaptation right (in the U.K.) and the derivative right (in the U.S.). The Berne Convention states that member states will protect these rights.¹⁹⁵ However, in relation to the reproduction right, article 9(2) states, “[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal

¹⁹¹ U.S. CONST., art, § 8.

¹⁹² U.S. CONST, art. 5.

¹⁹³ Berne Convention for the Protection of Literary and Artistic Works, *supra* note 116.

¹⁹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, December 1993, 33 I.L.M.ILM 81.

¹⁹⁵ Berne Convention for the Protection of Literary and Artistic Works, *supra* note 116, at Articles 2, 9, and 12.

exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹⁹⁶

Can the level of reproduction allowed by the proposed system be called a “special case?” Initially it would seem not, but Senftleben argues that such “special cases” have been added for specific policy reasons.¹⁹⁷ It is possible, therefore, to argue that any state seeking to implement the proposed system should seek to have a “special case” amendment made to its legislation. However, it might be stretching the phrase “special cases” to turn it into the main rule. An alternative line of argument could be that the proposed system does provide for remuneration of right holders, and that they can take legal action if they are not remunerated for certain uses of their works.¹⁹⁸ Nonetheless, could the proposed system be construed as not being consistent with the “normal exploitation of a work?”

The three step test found in Article 13 of TRIPS states that, “[m]embers shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”¹⁹⁹ The proposed system does provide right holders with the rights to obtain financial reward for the re-use of their work. This is important, because a WTO Panel in relation to the “normal exploitation of the work” part of the test, “considered that a conflict arises when the exception or limitation enters into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprives them of significant or tangible commercial gain.”²⁰⁰ It is arguable that under the proposed system, normal exploitation of the work will be through a combination of requiring purchase of the original work by content recipients, and the

¹⁹⁶ *Id.* at Article 9(2).

¹⁹⁷ MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 156 (2004).

¹⁹⁸ *See supra* Section III. E.

¹⁹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 81.

²⁰⁰ COPINGER AND SKONE JAMES ON COPYRIGHT, *supra* note 73, at 24-142.

payment of royalties. However, there could be an issue with the positive rights given to the recipients of content, in that is not likely to be characterised by a WTO Panel as an exception to the rights given to the copyright holder. This is especially apparent, bearing in mind the above WTO Panel decision. In relation to the third part of the test, the panel stated that “there is unreasonable prejudice where an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright holder.”²⁰¹ In particular, the Panel stated that there will be a breach, if uses, that in principle are “covered by that [copy]right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work.”²⁰² The Panel noted that they would look at the potential impact on economic competition.²⁰³ Furthermore, the Panel referred with support to a suggestion made at the 1967 revision conference in Stockholm that “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.”²⁰⁴ This appears to be a likely conflict with the positive rights given to content recipients, as but under the proposed system, the normal way for right holders to gain economic reward would be through either purchase of their the authors’ copyright works, or through provision of royalties. Although there will be no royalties if the re-use of a work that is not quantitatively substantially similar is not for commercial gain, it could be suggested that such re-uses are not in economic competition with the right holder.²⁰⁵

In summary, to follow the proposed system could result in an adverse finding by a WTO Panel. However, there are counter arguments that the system does provide economic

²⁰¹ *Id.*

²⁰² Panel Report, *United States-Section 110(5) of U.S. Copyright Act*, WTDS160/R, 6.183 (June 15, 2000).

²⁰² *Id.*

²⁰³ *Id.*

²⁰³ *Id.* at 6.184.

²⁰⁴ *Id.* at 6.179.

²⁰⁵ Note that re-users who make available for non-commercial reasons, parts of a work that, together, can combine to make 100% of the original will be liable for royalties as if they were acting for ‘financial gain.’ See Section III. G.

reward for authors, and consequently that their economic interests are not endangered by the proposed positive rights for content recipients.

1. Case Studies.

Two case studies reveal the inadequate approach of current courts to creative re-use, and demonstrate how a reformed approach could be beneficial. First of all, one may consider a student who wishes to capture the interactive element of a DVD, such as the menu structure. In *Corley*,²⁰⁶ Judge Newman argued that a DVD could be copied by camcorder for Fair Use purposes, because Fair 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.”²⁰⁷ However, this might not be able to capture all the elements of the menu, such as its interactivity or underlying code. If the student is unable to invoke his or her positive right to access the content, the student can then go either to the proposed administrative body or a court. Under the proposed system, they would be required to look at the wider interests of the creative re-user. In so doing, a court could adopt an approach similar to that used by Judge Reinhardt in *Sega v Accolade*.²⁰⁸ He looked at the manner in which Accolade had re-used the content for the purpose of reverse engineering. In this case study, what this would mean would be that the court would consider how a user would also be able to capture the interactive elements of a DVD. A court may or may not conclude that circumvention of the DRM mechanism is necessary, but it would result in a greater level of legal certainty. There would also be more clarity as to how a DVD interface should be reproduced for the purposes of creative re-use.

²⁰⁶ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

²⁰⁷ *Id.* at 459.

²⁰⁸ *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

²⁰⁸ *Id.*

For the second case study, we can consider a content recipient who wishes to alter the operation of a computer game protected by a DRM mechanism. In order to change the physics engine in the game, to make the game appear more realistic, it might be necessary to download an unencrypted version of the executable file. However, this could be a breach of the CDPA,²⁰⁹ EUCD²¹⁰ or DMCA,²¹¹ because it will require circumvention of an access mechanism. To distribute the altered unencrypted file could also be a breach of the reproduction and distribution rights.

Under the proposed system, the work would be a quantitatively substantially similar work, if it reproduces 60% or greater of the earlier work. If it did, it would then require purchase of the earlier work, and it has to be considered whether the re-use is impeded by the DRM mechanism. If the re-use is impeded, then the administrative or judicial body concerned will need to grant permission to allow circumvention ‘as far as necessary for a creative use.’²¹² This permission could also be granted if reproduction of less than 60% of the original is attempted. This can then form part of a list that indicates to right holders and content recipients the sorts of re-uses that are permissible.

The proposed system would state establish that content should be as fully accessible as necessary for the purposes of creative re-use. It will be laid down in statute that courts or administrative bodies would have to consider the impact of their decisions upon creative re-use. It would not be sufficient, as in *Reimerdes*, for a judge to state that “[the DMCA] is a tool to protect copyright in the digital age”²¹³ and not look at the impact on re-use.

²⁰⁹ s.296 CDPA 1988.

²¹⁰ 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, *supra* note 78.

²¹¹ Digital Millennium Copyright Act, 17 U.S.C. §1201(a)(1)(A) (1998).

²¹² *See* Section III. J. 2.

²¹³ *Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp. 2d 211, 222 (S.D.N.Y. 2000) (original interim hearing).

V. Structural Change.

The proposed reforms suggest that emphasis upon re-use may be achieved by statute requiring:

- That content recipients have the positive right to re-use copyright works.
- That right holders should be compensated for re-use.
- That content recipients should have the positive right to access a work so far as necessary for creative re-uses.

The paper has argued that it has been the legislative history of the copyright statutes that has resulted in insufficient focus upon creative re-use. This has in large part been due to the lack of involvement of representatives of the casual re-user of copyright content in the legislative drafting process. It is suggested that, as content recipients will have the positive right to re-use copyright works, there is a need for a legal body to be able to enforce their rights.

As a group, re-users of copyright content are in many respects, a disparate group. Cohen reminds us that “the category of ‘users’ is highly heterogeneous, and by the fact that individual users themselves will often have conflicting interests.”²¹⁴ Furthermore, as a group they have no particular representative body. Any bodies that do represent them do so not as copyright users, but in some other capacity. For instance, in relation to the Library of Congress exemptions made under the DMCA, the interests have again been for specific groups – such as the visually impaired or computer programmers.²¹⁵ Alternatively, copyright collecting societies do not represent the interests of content recipients, but the interests of those content recipients who are able to disseminate works under the current copyright regime. In the U.K., the ‘Authors’ Licensing and Collecting Society’ represents authors,²¹⁶ but not those who may wish to creatively re-use a book in a way which would result in

²¹⁴ Julie E. Cohen, *Intellectual Property and Public Values: The Place of the User in Copyright Law*, *supra* note 99.

²¹⁵ Librarian of Congress, *Statement of the Librarian of Congress Relating to Section 1201 Rulemaking* (Nov. 22, 2006), available at http://www.copyright.gov/1201/docs/2006_statement.html.

²¹⁶ *See About Us*, ALCS, <http://www.alcs.co.uk/About-us> (last visited Jan. 9, 2011).

copyright infringement. Voluntary co-regulation, put forward as a proposed method of regulating p2p copyright infringements in the U.K.,²¹⁷ is not therefore an option.

There is a need for a specific body to represent the broad interests of the re-users of copyright works. To do so would safeguard against any technological developments changing the assumed balance of copyright law as has occurred with the development of digital technology. It is suggested that in the U.K., a Tribunal could fulfil this role, and in the U.S., a body similar to the Copyright Royalty Board. As to who should comprise the proposed administrative body, it will be necessary to consider the various mechanisms through which specific re-users of content may seek specific redress under the current legal systems.

Prominent among the approaches used at the moment are those relating to exceptions from the DRM provisions that result from the WIPO Copyright Treaty. As mentioned earlier in this section, the U.S. has the Library of Congress rule-making procedure that can recommend certain exemptions from the DMCA provisions.²¹⁸ The Library of Congress method can be criticised as not having any particular body representing content recipients. The U.K. has s.296ZE²¹⁹ implementing Article 6(4) of the EUCD,²²⁰ which allows the Secretary of State to make a determination when private parties have been unable to come to an agreement that allows the fulfilment of an implemented exemption in the EUCD. This approach is subject to the same criticism.

Other countries' attempts at dealing with implementing the anti-circumvention provision of the EUCD have been similarly limited. In Ireland, there is a procedure where

²¹⁷ DEP'T FOR BUS. ENTER. & REGULATORY REFORM (BERR), CONSULTATION ON LEGISLATIVE OPTIONS TO ADDRESS ILLICIT PEER-TO-PEER (P2P) FILE-SHARING (2008), *available at* <http://www.berr.gov.uk/files/file47139.pdf>. (the regulation would be between ISPs and right holders, both of whom have a "common interest ... to come to a voluntary solution").

²¹⁸ Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1) (1998).

²¹⁹ s.296 CDPA 1988.

²²⁰ 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, *supra* note 78.

beneficiaries of the exemptions can apply directly to the Irish High Court. In the Irish Copyright and Related Rights Information Act, s.374(3) states:

[i]n the event of a dispute arising, the beneficiary may apply to the High Court for an order requiring a person to do or to refrain from doing anything the doing or refraining from of doing of which is necessary to ensure compliance by that person with the provisions of this section.²²¹

Germany and Luxembourg have similar provisions enabling them to seek injunctive relief. An alternative approach is followed in Greece, Lithuania, and Slovenia, whereby mediation is encouraged.²²² However, there is no specific representation of those re-using content as a group.

The closest that a system specifically aimed at representing those who re-use content is in France, with the implementation of the EUCD in the *Droit d'auteur et droits voisins dans la société de l'information*. Article L.331-5 states that DRMs “must not have the effect of preventing interoperability.” The Act also introduces a committee to enforce this – the Regulatory Authority for Technical Measures – the *Autorite de Regulation des Mesures Techniques* (ARMT). Interestingly, during the legislative history of the act several methods of regulation were suggested. The use of the civil courts was proposed (as in Ireland) but this was disliked due to the risk of lack of knowledge by the courts and the possibility that sensitive DRM information could be leaked; likewise the use of the Council on Competition was not accepted, due to the Council agreeing with what the lawmakers considered to be restrictive use of DRM by Apple in *i-Tunes*.

The ARMT has three main goals, the third of which is especially relevant to encourage re-use of copyright content:

²²¹ Urs Gasser, *Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39, 79 (2006).

²²² *Id.* at 78.

- Ensure that DRMs “because of a lack of interoperability, do not create, in the use of a work, additional and independent limitations to those expressly chosen by the rightholder” (Art L.331-6)
- Monitor technological protection methods and identification methods for copyright works (Art L.331-17)
- Ensure that DRM does not prevent users benefiting from the copyright exemptions (L.331-8)

A number of independent individuals comprise the ARMT,²²³ and impartiality is attempted by also stating in Art L.331-19 that those who were or are involved with Collecting Societies, or the production or distribution of music and films, are not to be allowed to be members of the ARMT. However, the system becomes of less use to re-users of copyright content because the only bodies who may refer a case to the ARMT are “software publishers, manufacturers of technical systems and service providers.”²²⁴

There is therefore no clear precedent as to how the reforms proposed by the paper could be administered and monitored by an external body. The paper will now consider how this could be achieved in the U.K. and the U.S.

A. The U.K.

In the U.K., could a body such as the U.K.'s Copyright Tribunal be able to administer and monitor the proposed system? The Copyright Tribunal is currently responsible for administering and monitoring licensing bodies,²²⁵ and has powers to vary or approve schemes, hold that applicants should be granted a licence, or vary approved licence terms. The Tribunal decides cases upon the basis of “reasonableness” – in doing so, it may look to

²²³ These are the Chairman of the Committee on Private Copying; a member of the Supreme Court in administrative matters; a member of the Supreme Court in civil and criminal matters; a member of the Auditor-General's Court; a member assigned by the president of the Academy of Technological Science; and a member of the Higher Council on Copyright.

²²⁴ Nicolas Jonder, *La France v Apple: Who's the Davdvi in DRMs?* 3:4 SCRIPTed 473, 483 (2006), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol3-4/jondet.asp>.

²²⁵ For details see M. Freegard, *40 years on: An appraisal of the UK Copyright Tribunal, 1957-1996*, 177 REVUE INTERNATIONALE DU DROIT D'AUTUER 2 (1998).

the availability of the work, the proportion copied, and the use to which the works will be put. It should also look to whether there would appear to be “discrimination” between the scheme in dispute and other schemes. However, there have been issues raised as to the effectiveness of the body – namely for being costly and lengthy in its deliberations.²²⁶

Whilst it is a body that claims to be impartial,²²⁷ membership of the body comprises of:

... a Chairman and two deputy Chairmen who are appointed by the Lord Chancellor after consultation with the Scottish Minister, and not less than two, but no more than eight ordinary members appointed by the Secretary of State for Trade and Industry. The Tribunal operates on a panel basis and its members have wide expertise in business, public administration, and the professions.²²⁸

The Copyright Tribunal does not therefore resolve the issue as to the representation of the recipients of content. In an attempt to remedy this, a House of Commons Committee has suggested that users should be able to have easier access to the Tribunal.²²⁹ However, this does not deal with the broader question of how to ensure that creative re-use is considered by the Tribunal.

B. The US.

In the U.S., the Copyright Royalty Board “determines rate and terms of the copyright statutory licenses and makes determinations on distribution of statutory license royalties

²²⁶ Univ. UK Ltd v. Copyright Licensing Agency Ltd., [2002] R.P.C. 693 (Eng.). See also INNOVATION, UNIVERSITIES, SCIENCE SKILLS COMMITTEE, THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL, 2008, H.C. 245 at 30 (U.K.) available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmdius/245/245.pdf>; INNOVATION, UNIVERSITIES, SCIENCE SKILLS COMMITTEE, THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL, GOVERNMENT RESPONSE TO THE COMMITTEE’S SECOND REPORT OF SESSION 2007-08, 2008, H.C. 637 at 8-9 (U.K.) available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmdius/637/637.pdf>.

²²⁷ INNOVATION, UNIVERSITIES, SCIENCE SKILLS COMMITTEE, THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL, *supra* note 226, at 35.

²²⁸ *Membership*, THE COPYRIGHT TRIBUNAL, <http://www.ipo.gov.uk/ctribunal/ctribunal-about/ctribunal-about-membership.htm> (last visited Nov. 12, 2010).

²²⁹ INNOVATION, UNIVERSITIES, SCIENCE SKILLS COMMITTEE, THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL, *supra* note 226 at 13 and 24-25.

collected by the Copyright Office.”²³⁰ The Board has six copyright royalty judges, who are full time employees of the library. That system is potentially open to the same criticism as the U.K. Copyright Tribunal, as again they do not necessarily represent the wider interests of the re-users of copyright content.

C. Proposed reforms to the existing bodies.

Notwithstanding these shortcomings, it is suggested that the proposed system would need to be administered by reformed versions of, in the U.K., the Copyright Tribunal and in the U.S., the Copyright Royalty Board. However, the reformed body should have individuals who are appointed to explicitly consider the interests of creative re-users. Membership may consist of authors, publishers and creative re-users in a tripartite structure. Whilst proposing a body that could regulate the use of DRM in the U.K., the U.K.’s All Party Internet Group in 2006 stated in a report:

We ... see an important role for an independent ‘stakeholders’ body with representatives from rights holders, the creators of content, the libraries and also consumers’ in fact, just the types of people who have taken the time and trouble to advise us in this inquiry. This body should be specifically attempting to ensure that domestic legislation, and pan-European legislation developed in Brussels, strikes an appropriate balance between competing interests.²³¹

In the U.K. chairing of the group, and appointment of members, would be done under the discretion of the Secretary of State or through a representative of the British Library because of their “middle-ground position between consumers on the one hand and the rights holders on the other.”²³² In the U.S., the judges of the Copyright Royalty Board could take this role. The appointment of representatives of creative re-users could be more problematic. It is

²³⁰ See COPYRIGHT.ORG, www.copyright.org/carp (last visited on Jan. 9, 2011).

²³¹ DEREK WYATT ET. AL., DIGITAL RIGHTS MANAGEMENT: REPORT OF AN INQUIRY BY THE ALL PARTY INTEREST GROUP, 21 (2006).

²³² *Id.*

suggested that what could occur is the appointment of authors who have been on record as having previously obtained a licence from right holders. Such information could be obtained from clearing houses. In any event, the body would have to be bound by rules that emphasise the need to consider creative re-use. These rules would mirror those put forward in *Sega v Accolade*,²³³ the principles of knowledge and re-use such as those argued for by Locke,²³⁴ and those discussed by Lord Camden in *Donaldson v Beckett*.²³⁵ They would be matched to a system of royalties that would be set by the administrative body.

In terms of legal function, the reformed body would operate similarly to the U.K.'s Copyright Tribunal or the U.S. Copyright Royalty Board, in that it could make decisions that can be appealed to the domestic courts. It is suggested that the administrative body would set the royalty rates. Although this removes the ability of right holders to effectively bargain their own rates, this does mean that exorbitant rates are avoided.²³⁶ In any event, works that are popular will sell more and therefore obtain more royalty than less popular works.

D. How the proposed administrative body would operate.

The manner in which works would have their royalties set would be as open as possible. As the proposed system concerns re-use which results in financial profit, and is based upon quantitative re-use, it would be possible to provide guidelines as to the percentage of fees likely to result. For instance, the re-use of a specific piece of film could be placed on a sliding scale, so that reduced re-use would attract a smaller percentage fee, and a larger re-use a higher percentage fee. These could be set out in a table.

²³³ *Sega Enters. v Accolade Inc.*, 977 F.2d 1510 (9th Cir. 1992).

²³⁴ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *supra* note 58, book II, chapter I § 86.

²³⁵ 14 PARL. HIST. ENG., H.L. (1st ser.) (1774) 3 (Eng.).

²³⁶ *See supra* Section III. F. 3.

It has to be remembered that these royalties would only be payable by those who seek to make financial profit from the work. For such re-users, the fees would be easy to predict. With the rise of DRM and CMI, it is possible that the use of DOIs (Digital Object Identifiers – this is identifying CMI) could be used as a way of creating an automatic e-payment system.

As regards enforcement, the proposed system will be enforced in the same way as the current system. In other words, it will be the responsibility of existing right holders to begin an action to obtain royalties if they are not being paid. Right holders may use existing methods to obtain the details of those using p2p services to distribute copyright works without permission. It has to be recalled that the proposed reforms would not require royalties from content recipients who have not altered content for financial gain. Actions against p2p users would only be against those who have downloaded content identical with, or quantitatively substantially similar to, the original work when that original work has not been purchased. This should encourage creative re-uses. Such a self-enforcing system also keeps running costs down; enforcing a system of licensing could be extremely expensive.²³⁷ In the U.K., one of BERR's²³⁸ alternative systems in its consultation paper was for a “third party” to regulate p2p file sharing, but they suggested that it could also be slow, as well as having “e-privacy issues and data protection issues.”²³⁹

In terms of providing funding for running such a system, there are a number of possible revenue streams. As William Fisher notes in relation to his proposed system, it would be desirable to fund an administrative agency through direct taxation.²⁴⁰ That would be the preferred approach here. As the system is designed to operate as effectively as possible without intervention, most of the running costs would involve setting royalty rates

²³⁷ For a discussion of costs involved in enforcement by agencies, *see* ROBERT BALDWIN AND MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 110 (1999).

²³⁸ BERR, *supra* note 217.

²³⁹ *Id.*

²⁴⁰ FISHER, *supra* note 130.

and administering disputes. The current U.K. Copyright Tribunal, and the U.S. Copyright Royalty Board, both do this. Ensuring that these bodies can cope with an increased workload does not need to be expensive. For instance, the Copyright Tribunal, in its current guise, has only marginal running costs.²⁴¹ However, as a recent report noted, funding for the Tribunal is nonetheless in need of improvement.²⁴² The proposed U.K. and U.S. bodies are not a considerable step beyond the current bodies, so additional funding would mainly be in dealing with the possibility of a greater case load when determining disputes. Such additional funding could comprise of a marginal tax on royalties provided through the system.

VI. Concluding comments.

The proposed system would provide considerably greater certainty for the re-users of copyright content. The system would also provide additional exposure to existing copyright content, and the requirement of purchasing of the original, along with the compulsory licensing system, could increase revenue to existing right holders. The proposals specifically are:

- That content recipients should be given the positive right to re-use copyright works.
- That right holders should be compensated for re-use.
- That content recipients should have the positive right to access a work so far as necessary for creative re-uses.

Compensation of right holders is to be achieved by:

- Requiring the purchase of the original work that is re-used, if the re-use is

²⁴¹ INNOVATION, UNIVERSITIES, SCIENCE SKILLS COMMITTEE, THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL, *supra* note 226, at 14.

²⁴² *Id.* at 30. *See also* UK INTERNATIONAL PROPERTY OFFICE, REVIEW OF THE COPYRIGHT TRIBUNAL, 18, <http://www.ipo.gov.uk/ctribunalreview.pdf>.

quantitatively substantially similar to that work.²⁴³

- Where a work is not quantitatively substantially similar, the institution of a compulsory licensing scheme based upon quantitative similarity. This will apply where there is, or has been, ‘financial gain’ for the re-user of the original work.²⁴⁴

In so doing, the copyright system will be taking into account the interests of creative re-users of copyright content. The rise of digital technology has provided more opportunities for content recipients to re-use content, but the copyright balancing exercise has continued to focus on creativity being equivalent to protecting the existing interests of right holders. It is suggested that the proposed reforms will remedy this shortcoming in the current copyright balance.

²⁴³ See *supra* III. F. 1.

²⁴⁴ *Id.*