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Copyright, fair dealing and free expression:

A critical analysis of the relationship between copyright, including the fair dealing defence, and free expression

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Introduction

Research aims:

The aim of this dissertation is two-fold. First, to assess the relationship between copyright, as a property right, and free expression in the context of European Human Rights Law. Second, to attune the extent of the fair dealing defence in this.

Background to the study (Literature Review)

When the CDPA became law at the peak of Margaret Thatcher's premiership,[1] it did so, in the words of Kenneth Clarke QC, *"devoid of any party-political controversy"*[2] - including in relation to free expression. Nevertheless, the conception of copyright and free expression having competing interests is supported by the Court of Appeal. Lord Phillips described copyright as *"antithetical"*[3] to freedom of expression. Despite this, Barendt remarked that until recently academics and Judges considered *"it is as if they occupied separate legal worlds"*.[4] However, Mahalwar summarised that though copyright and human rights are *"two distinct and contrary arenas of law"* that they "*intersect each other at various points"*.[5] Lord Phillips' view is predicated on the changes of the HRA and ECHR - which elevated these competing interests to a supranational domain. Post-war,[6] human rights became part of the "*international political agenda"*.[7] Hence, the United Kingdom adopted the UDHR which, though not legally binding, established a *"common standard of achievement for all peoples and all nations"*[8]- including rights to free expression,[9] property[10] and implied intellectual property specifically.[11] The United Kingdom is however legally bound by its regional human rights instrument: the ECHR. This enshrined into law both free expression and (intellectual) property rights, in Article 10[12] and A1P1[13] respectively. Because of this domain, the courts must balance these competing interests. However, this is highly multifaceted. First, because Article 10 and A1P1 and are both qualified rights meaning they may be limited subject to several conditions - one Article does not automatically override the other. Second, because of the way ECtHR doctrine of proportionality which renders A1P1 more flexible than Article 10. Third, because the 'margin of appreciation' which allows member states *"to derogate from the obligations laid down in the Convention"*[14] and is *"particularly wide"*[15] for Article 10. Fourth, because of s12(4) of the HRA which means the courts must have *"particular regard"* to Article 10 where the material is *"journalistic, literary or artistic"*.[16]

Birnhack labelled this ECHR domain as 'external' ways in which copyright is balanced against free expression. He contrasts these with methods 'internal'[17] to copyright law. These align with two

[1] See: Economic boom 1984–1988
[2] HC Deb 28 April 1988, vol 132 cc525-99
[3] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [30]
[4] E. Barendt, "Copyright and Free Speech Theory" in J. Griffiths and U. Suthersanan (eds), *Copyright and Free Speech* (New York: OUP, 2005).
[5] Vandana Mahalwar, *Copyright and Human Rights: The Quest for a Fair Balance* (edn, Springer Singapore 2017) abstract
[6] For clarity, the Second World War
[7] Tony Evans, *Human Rights and Post-War Reconstruction* (Palgrave Macmillan 1996) 48
[8] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) preamble
[9] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 19
[10] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 17
[11] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 27
[12] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10
[13] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) protocol 1, art 1
[14] *Greece v United Kingdom* App no. 176/56 (European Commission on Human Rights, 1958-1959) 176.
[15] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013) § 39
[16] Human Rights Act, s12(4)
[17] Michael Birnhack, 'Acknowledging the Conflict' [2003] Ent. L.R. 24.

objectionable grounds to Lord Phillips' view. First, the idea-expression dichotomy. Second, the fair dealing defence (and the public interest defence)[18]

M.B Nimmer advocated for the idea-expression dichotomy which posited that copyright protects the expression of an idea, not the idea itself.[19] In 'Acknowledging the Conflict', Birnhack wrote that the idea-expression dichotomy enables free expression via the option of "*alternative avenues"*[20] of expression. Justice O'Connor of United States Supreme Court ('SCOTUS' hereinafter) went further. She suggested copyright to be the *"engine of free expression"*[21] - a notion enshrined in the United States Constitution.[22] Angelopoulos concurs that since it is the very intention of copyright law is to promote cultural productivity through the provision of incentives;[23] copyright actually enables expression through the dissemination of ideas. Regardless, the idea-expression dichotomy is apparent in the CDPA,[24] the Berne Convention[25] and the TRIPS Agreement.[26]Though the courts have supported the idea-expression dichotomy, Jacob J complicated this in his statement that copyright *"can protect [against] the copying of a detailed 'idea'"*.[27] Hence, Angelopoulos concedes the idea-expression dichotomy is *"problematic"*[28] due to the *"unmapped boundaries"*,[29] Masiyakurima adds, between the two concepts. Conceptually, however, the idea-expression dichotomy is flawed in application to non-literary works[30] and digital compositions[31] where often, as Marshall McLuhan[32] wrote, *"the medium is the message"*.[33] This is a view also suggested in *Ashdown v. Telegraph Group Ltd.* [34]

Fair dealing, if accepted, is a defence to an allegation of copyright infringement. Prima facie, this suggests it preserves freedom of expression. Though confined to several purposes and subject to the well-known reasonableness test,[35] Lord Denning statement that ultimately 'fairness' "must be a matter of impression"[36] has caused scholarly focus to be less on specific case outcomes, rather on the large degree of judicial discretion.

Clearly, the interaction between copyright, fair use and free expression is highly multifaceted. Even the notion that copyright and free speech are antithetical is challengeable.[37] Accordingly, the views espoused in both primary and secondary sources are diverse.

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[18] The public interest defence which also, if successfully plead, functions as giving effect to free expression in the same manner of fair dealing. However, the focus shall be the black letter of fair dealing.

[19] Melville B. Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 UCLA L. REV, 1180

[20] Michael Birnhack, 'Acknowledging the Conflict' [2003] Ent. L.R. 24.

[21] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)

[22] Constitution of the United States of America (September 17, 1787, effective March 4, 1789) art.I s.8, cl.8 (the copyright clause).

[23] Christina J. Angelopoulos, 'Freedom of expression and copyright: the double balancing act' I.P.Q. 2008, 3, 328-353

[24] Copyright, Designs and Patents Act 1988, s3(2)

[25] Berne Convention for the Protection of Literary and Artistic Works (1886), art 1-2

[26] General Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), art 9.2

[27] *IBCOS Computers Limited v Barclays Mercantile Highland Finance Limited* [1994] 2 WLUK 353 [1994] F.S.R. 275, [84]

[28] Christina J. Angelopoulos, 'Freedom of expression and copyright: the double balancing act' I.P.Q. 2008, 3, 334

[29] Masiyakurima, "Fair Dealing and Freedom of Expression" in Copyright and Human Rights (2004), 87-108

[30] Fiona Macmillan, "Altering the Contours of the Public Domain" in *Intellectual Property - The Many Faces of the Public Domain* (2007).

[31] van Schijndel and Smiers, "Imagining a World without Copyright" in *Copyright and Other Fairy Tales* (2006).

[32] Canadian communication theorist

[33] Marshall McLuhan, *Understanding Media: The Extensions of Man* (1964)

[34] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [39]

[35] *Hyde Park Residence Ltd v Yelland and Others* [2000] 3 W.L.R. 215 [2001] Ch. 143 [158] (per Aldous LJ); Article 5(3)(d) of the Information Society Directive even makes the fact that the work must already have been made available lawfully to the public a prerequisite for the existence of the defence.

[36] *Hubbard v Vosper* [1972] 2 Q.B. 84 [94] (Lord Denning)

[37] by the idea-expression dichotomy.

Hypothesis

The application of the defence of fair dealing in copyright law improperly encroaches on freedom of expression in favour of intellectual property rights.

Methodology

The methodology of this dissertation utilises secondary or 'desk' research only. This is typified in that already existing data is utilised but is collated for synthesis and analysis.[38] The analysis is of the primary sources, meaning the substantive case law and legislation. Secondary sources are used throughout to offer useful analysis of said primary sources.

Chapter breakdown

This dissertation utilises a three-chapter approach. The first chapter delineates intellectual property, copyright, and fair dealing in order to be analysed later. The second chapter explains how human rights - to both property and free expression - underpin the competing interests between copyright and free expression and how the European Convention on Human Rights acts as a domain. The third chapter is spent answering how well these competing interests are balanced against each other – through the idea-expression dichotomy and the fair dealing exception.

Chapter 1 - Delineating intellectual property, copyright, and fair dealing

Intellectual Property

Though broadly defined as intangible *"creations of the human mind"*,[39] and as a category of property, the Supreme Court recognised 'intellectual property' (hereinafter 'IP') to have "*no general consensus as to its limits."*[40] Regardless, an important facet of IP is that *"rights do not surround the abstract non-physical entity; rather," "surround the control of physical manifestations or expressions of ideas."*[41] As such, IP law allows the content creator to *"produce and control physical instantiations"* [42] of ideas, rather than ideas per se: important in the context of the idea-expression dichotomy, addressed below. Nevertheless, the Supreme Court conceded there to be a *"general consensus"*[43] as to the "*core content"*[44] of these 'physical manifestations.' They recognised this to include patents, registered and unregistered design rights, trademarks and copyright.[45]

Copyright

"Good artists borrow, great artists steal."

– Pablo Picasso[46]

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[38] Question Pro, 'Secondary Research- Definition, Methods and Examples' (*QuestionPro*) < https://www.questionpro.com/blog/secondary-research/#:~:text=Secondary%20research%20or%20desk%20research,research%20reports%20and%20similar%20documents.> accessed 26 April 2021.

[39] World Intellectual Property Organization, 'Understanding Industrial Property' (2016) < https://www.wipo.int/edocs/pubdocs/en/wipo_pub_895_2016.pdf > accessed 9 February 2021

[40] *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2013] 1 AC 1, [20]

[41] Moore, Adam and Ken Himma, 'Intellectual Property' (*The Stanford Encyclopaedia of Philosophy*, 2018) < https://plato.stanford.edu/entries/intellectual-property/> accessed 8 February 2021

[42] Moore, Adam and Ken Himma, 'Intellectual Property' (*The Stanford Encyclopaedia of Philosophy*, 2018) < https://plato.stanford.edu/entries/intellectual-property/> accessed 8 February 2021

[43] *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2013] 1 AC 1, [20]

[44] *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2013] 1 AC 1, [20]

[45] *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2013] 1 AC 1, [20]

[46] Quote Investigator, 'Good Artists Copy; Great Artists Steal' (Quote Investigator, 7 March 2013) <https://quoteinvestigator.com/2013/03/06/artists-steal/> accessed 10 April 2021

In the United Kingdom,[47] the law on copyright is set out in the *Copyright, Designs and Patents Act* 1988[48,49] (hereinafter 'CDPA'), European Union jurisprudence and several international treaties. As a form of IP, copyright grants the originator *"the exclusive and assignable legal right"* to make copies of a creative work,[50] and, as articulated by the World Intellectual Property Organization (hereinafter 'WIPO'), *"enable[s] people to earn recognition or financial benefit from what they [invent or] create"*.[51] This is to protect against others using it without permission.[52] To give effect to this, the civil law doctrine of copyright infringement restricts the copying of a valid work,[53] setting it as actionable by the copyright owner.[54] Further, the CDPA characterises copyright as a property right[55] hence sets the relief available for copyright infringement as the same as *"any other"*[56] property right – including damages, injunctions, or accounts.[57] This has been given further effect in that deliberate infringement of copyright is, in some instances, criminalised.[58]

The Berne Convention mandates that a valid copyright will arise automatically through the act of creation.[59] Thus, unlike other forms of IP, copyright does not require registration.[60] It is a fundamental principle of copyright law that copyright subsists in the expression of an idea, not in an idea itself:[61] fundamental in the context of the idea-expression dichotomy, discussed below. Hence, s1 of the CDPA limits the subsistence of copyright[62] to two categories. First, to 'authorial' works – meaning literary, dramatic, musical, and artistic works.[63] The first three are subject to a fixation requirement, meaning they must be *"recorded, in writing or otherwise"*[64] and all must be 'original'.[65] If valid, the duration of copyright for authorial works is 70 years after the death of the author,[66] at which point it enters the public domain. For example, George Orwell's oeuvre entered the public domain in 2021.[67] The second category is 'entrepreneurial' works – meaning sound recordings, films, broadcasts,[68] and typographical arrangements of published editions.[69] These do not require originality and are not subject to a fixation requirement. The duration for sounds recordings[70] and broadcasts[71] is 50 years, whilst films last for 70[72] and typographical arrangements for 25.[73]

For the purposes of the first category, 'originality' has been widely interpreted by the courts. For centuries, *"skill, judgement and/or labour"*[74] was required as opposed to originality. Post-CDPA, the

[47] The geographical extent of the CDPA is the United Kingdom, not just England and Wales
[48] Copyright, Designs and Patents Act 1988
[49] Though now-repealed earlier Acts will apply to works created or published whilst they were in force.
[50] Lexico, 'copyright' (*Lexico*) <https://www.lexico.com/definition/copyright> accessed 9 February 2021
[51] World Intellectual Property Organization, 'What is Intellectual Property?' (*WIPO*) <https://www.wipo.int/about-ip/en/> accessed 7 December 2020
[52] GOV.UK, 'How copyright protects your work' (GOV.UK) <https://www.gov.uk/copyright> accessed 5 March 2021.
[53] Copyright, Designs and Patents Act 1988, s17
[54] Copyright, Designs and Patents Act 1988, s96(1)
[55] Copyright, Designs and Patents Act 1988, s1(1)
[56] Copyright, Designs and Patents Act 1988, s96(2)
[57] Copyright, Designs and Patents Act 1988, s96(2)
[58] This includes unauthorised copying, importing, possessing, selling, exhibiting, and distribution; Copyright Design and Patents Act 1988, s107
[59] Berne Convention for the Protection of Literary and Artistic Works (1886), art 5(2)
[60] GOV.UK, 'How copyright protects your work' (GOV.UK) <https://www.gov.uk/copyright> accessed 5 March 2021.
[61] See: Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2000] 1 W.L.R. 2416; TRIPS Agreement, art 9(2)
[62] Copyright, Designs and Patents Act 1988, s1
[63] Copyright, Designs and Patents Act 1988, S1(1)(a)
[64] Copyright, Designs and Patents Act 1988, S3(2)
[65] Copyright, Designs and Patents Act 1988, s1(1)(a)
[66] Copyright, Designs and Patents Act 1988, s12(2)
[67] the year of writing
[68] Copyright, Designs and Patents Act 1988, s1(1)(b)
[69] Copyright, Designs and Patents Act 1988, s1(1)(c)
[70] Copyright, Designs and Patents Act 1988, s13A
[71] Copyright, Designs and Patents Act 1988, s14
[72] Copyright, Designs and Patents Act 1988, s13B
[73] Copyright, Designs and Patents Act 1988, s15
[74] See: *Ladbroke v William Hill* [1964] 1 All ER 465 inter alia

courts have read originality widely to require this.[75] The standard of this test is however relatively low since pools coupons, calendars and competition cards have all been deemed sufficient.[76] Hence, this more closely resembles the 'sweat of the brow' doctrine whereby a work may be unoriginal but be protected by copyright if labour and skill have been incurred. The classic example states that if a person compiled a telephone directory, then another did the same that copyright protection is available for both - provided this was through independent research or effort, not copying.[77]Because protection is afforded where effort is incurred, rather than pure originality, it indicates the form to be protected – not the raw idea.

However, this standard has been complicated due to the harmonised standard set by the European Court of Justice (hereinafter 'ECJ'). Though in *Infopaq*, this standard was iterated as "*author's own intellectual creation"*,[78] it was subsequently held in *Football DataCo* to require the making of *"free and creative choices"*[79] with a *"personal touch"*.[80] This stands in contrast to the requirement for skill and labour. Hence, Rahmatian described the European Union's standard as putting the 'sweat of the brow' doctrine *"under pressure"*.[81] Owing to the European provenance of this standard, however, Brexit may complicate this further. Though the terms of the European Union (Withdrawal) Act 2018[82] retained EU-derived domestic legislation and case law, because the ECJ is no longer binding on the courts[83] and EU Parliament is no longer supreme[84] the law is more malleable - albeit no more so than any other EU-mandated legislation. Hence, Shorthose explains Brexit will likely have *"little effect on copyright in the UK, as so much of the UK's copyright law has its roots in international treaties and is not dependent on membership of the EU."*[85]

Fair dealing

Fair dealing is a doctrine that provides an exception to copyright infringement – it is effectively a defence. It only becomes relevant when the portion taken from the work is substantial; otherwise, no copying arises in the first place and any defence is without purpose.[86]

Set out in sections 29[87] and 30[88] of the CDPA, it provides that there shall be no copyright infringement where the use of a copyrighted work is *'fair'*. Though created by the CDPA, fair dealing lacks a statutory definition. However, in contrast to the United States' equivalent 'fair use' doctrine of an *"illustrative open list of purposes"*,[89] the CDPA does restrict fair dealing exhaustively to eight purposes. These are: (1) making temporary copies[90] (2) non-commercial research (3) private study,[91]

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[75] *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] EMLR 688
[76] Practical Law, 'Copyright: subsistence, duration and first ownership' (*Thomas Reuters*) <https://uk.practicallaw.thomsonreuters.com/9-583-8805> accessed 3 February 2021
[77] The Column Of Curae, 'Doctrine Of Sweat Of The Brow' (*The Column Of Curae*, 18 August 2020) accessed 19 April 2021
[78] C-5/08 *Infopaq Int'l A/S v. Danske Dagblades Forening* [2009] ECR I-6569
[79] C-604/10 *Football Dataco & others v. Yahoo UK*! [2012], para 38
[80] C-604/10 *Football Dataco & others v. Yahoo UK*! [2012], para 38
[81] Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 International Review of Intellectual Property and Competition Law, 4–34 < https://doi.org/10.1007/s40319-012-0003-4 > accessed 19 March 2021.
[82] European Union (Withdrawal) Act 2018, s6
[83] European Union (Withdrawal) Act 2018, s6(1)(a)
[84] European Union (Withdrawal) Act 2018, s1
[85] Sally Shorthose, 'Brexit: English Intellectual Property law implications' (*Bird & Bird*, January 2021) < https://www.twobirds.com/en/news/articles/2016/uk/brexit-english-intellectual-property-law-implications#Copyright%20and%20database%20right%20s> accessed 27 April 2021.
[86] "*Indeed once the conclusion is reached that the whole or a substantial part of the copyright work has been taken, a defence under (the fair dealing provisions) is unlikely to succeed*"; *Independent Television Publications Ltd v. Time Out Ltd* [1984] FSR 64 [75] (Whitford J)
[87] Copyright, Designs and Patents Act 1988, s29
[88] Copyright, Designs and Patents Act 1988, s30
[89] Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (OUP, 2009) 147
[90] Copyright, Designs and Patents Act 1988, s28A
[91] Copyright, Designs and Patents Act 1988, s29

(4) data analysis for non-commercial research,[92] (5) quotation for purposes such as criticism or review, (6) reporting current events,[93] (7) caricature, parody, or pastiche,[94] (8) incidental inclusion in an artistic work,[95] (8) sound recording, film, or broadcast, including issuing copies, performing or communicating the work containing the source material.

The Court of Appeal in the *Pro Sieben*[96] case constructed these purposes as the first part of a two part-sequential test, both parts of which are to be determined objectively. This meaning through the eyes of the reasonable person - without regard to the defendant's opinions or intentions.

The second part is the determination of whether the defendant's dealing was 'fair'. Since there is no statutory definition of 'fairness', the determination of this is left to the judiciary. In *Hubbard v Vosper*,[97] Lord Denning described the guidance for this. Though Lord Denning is referring to the fair dealing purpose of quotation, it applies to fair dealing generally:[98]

> *"It is impossible to define what is "fair dealing." It must be a question of degree. You must first consider the number and the extent of the quotations ... Then you must consider the use made of them. If they are used as a basis of comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But ... it must be a matter of impression."*[99]

The key factors which emerge from this are, first, the purpose for which a substantial part of the work was copied. It will be an important consideration if the challenged use competes with the exploitation of the copyright by its owner.[100] Second, the proportion of the copied part in relation to the whole work - although this highly depends upon the particular circumstances of the case.[101] Third, the motive for copying; if the motive were to compete with the original work, this is likely to make the dealing with the work unfair.[102] Fourth, the status of the work from which a substantial part is copied. The defence is unlike to succeed if the work is not published or confidential[103] or a 'leak'.[104] The relative importance of any one factor will vary according to the case in hand and the type of dealing in question.[105]

Since fair dealing lacks a statutory definition, these factors are not conclusive nor is there a percentage or quantitative measure.[106] The final assessment is ultimately qualitative. Torremans indicates that because of this, the defence may be unavailable for someone who copies only marginally more than the minimal substantial part of a work, or may be available, in the other extreme case, to someone who copies almost the whole work.[107] Lord Aldous reminds us that the court *"must judge the fairness*

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[92] Copyright, Designs and Patents Act 1988, s29A
[93] Copyright, Designs and Patents Act 1988, s30
[94] Copyright, Designs and Patents Act 1988, s30A
[95] Copyright, Designs and Patents Act 1988, s31
[96] *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 [610]
[97] *Hubbard v Vosper* [1972] 2 Q.B. 84
[98] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP, 2019) 265
[99] *Hubbard v Vosper* [1972] 2 Q.B. 84 [94] (Lord Denning)
[100] *Pro Sieben Media AG v. Carlton UK Television Ltd* [1999] 1 WLR 605, [1999] FSR 610 [619] (Robert Walker LJ)
[101] *Pro Sieben Media AG v. Carlton UK Television Ltd* [1999] 1 WLR 605, [1999] FSR 610 [619] (Robert Walker LJ)
[102] *Newspaper Licensing Agency Ltd v. Meltwater Holding BV* [34]; *England and Wales Cricket Board Ltd and Sky UK Ltd v. Tixdaq Ltd and Fanatix Ltd* [2016] EWHC [575] (Ch).
[103] *Hyde Park Residence Ltd v Yelland and Others* [2000] 3 W.L.R. 215 [2001] Ch. 143 [158] (per Aldous LJ); Article 5(3)(d) of the Information Society Directive even makes the fact that the work must already have been made available lawfully to the public a prerequisite for the existence of the defence
[104] *Beloff v. Pressdram Ltd* [1973] 1 All ER 241 [1973] FSR 33.
[105] Intellectual Property Office, 'Exceptions to copyright' (*GOV.UK*, 4 January 2021) <https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing> accessed 19 February 2021
[106] Business & IP Centre, 'Fair use copyright explained' (*Business & IP Centre*) <https://www.bl.uk/business-and-ip-centre/articles/fair-use-copyright-explained#> accessed 14 March 2021
[107] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP, 2019) 271

by the objective standard of whether a fair-minded and honest person would have dealt with the copyright, in the manner that [the alleged infringer] did".[108] It is unlikely that a statutory definition of 'fairness' would suffice; it would be too blunt to provide a quantitative measure - the point remains that a large degree of judicial discretion exists. Though judicial tampering is an unlikely possibility, it is the flexibility that is significant in the context that fair dealing gives effect to free expression, discussed below.

Directive on Copyright in the Digital Single Market

Though Chris Skidmore MP confirmed the Government had *"no plans"*[109] to implement the Directive into domestic law, owing to the United Kingdom's withdrawal from the EU, a word should be said of it. Broad concerns were highlighted among internet users, specifically with Article 13[110] - which reads that:

> *"online content sharing service providers and right holders shall cooperate in good faith in order to ensure that unauthorised protected works or other subject matter are not available on their services."*

Critics labelled this the "upload filter" provision. This is because said 'online content sharing services' platforms - such as YouTube, Twitter and Facebook would be required to develop a system that had to authorise material uploaded by users if wanting to avoid direct liability for infringements.[111] Because such a system would be unable to account for copyright exceptions (such as fair dealing and parody) German politician Kevin Kühnert argued this is censorship, which presents *"a grave threat to freedom of expression"*.[112] Further concerns were raised that 'internet memes',[113] which often utilise copyrighted material, may have fallen within the scope of this. Hence the Article 13 was dubbed the *"meme ban"*.[114] Consequently, many internet users made reproductions of pre-existing and popular 'meme formats' – such as in Appendix 2. Though these are unoriginal, some '*skill, judgement and/or labour'* has certainly been incurred. Hence, whether these would pass the test in court remains untested – albeit owing to their triviality and the Directive not being part of domestic law.

Chapter 2 - The human rights backdrop

Both proprietary and free expression rights have a long history in the United Kingdom, predating their recognition in international human rights instruments. Though property rights are an ancient concept,[115] they were propelled into prominence in Renaissance Europe owing to the rise of mercantilism, underpinned by the capitalist Protestant work ethic.[116] In the English Civil War, this led to an argument for property rights in Biblical terms; *"thou shalt not steal"*[117] was read to regard property reaped from one's work as sacrosanct. On copyright, the Court of Appeal has recognised that it *"has its origins in the common law"*.[118] Hence, it is categorised the same as *"any other property*

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[108] *Hyde Park Residence Ltd v Yelland and Others* [2000] 3 W.L.R. 215 [2001] Ch. 143 [158] (per Aldous LJ)
[109] Chris Skidmore, 'Written questions, answers and statements: Copyright: EU Action' (*UK Parliament*, 16 January 2020) <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371> accessed 27 April 2021.
[110] Directive on Copyright in the Digital Single Market, formally the Directive (EU) 2019/790
[111] David Meyer, 'Tech Industry and Activists Still Hope to Sink New EU Copyright Rules' (Fortune, 14 February 2019) <https://fortune.com/2019/02/14/eu-copyright-directive-trilogue-deal/> accessed 27 April 2021.
[112] Im Wortlaut von Petra Sitte, 'Uploadfilter und Leistungsschutzrecht: Ewiges Déjà-Vu' (*Die Linke*, 15 February 2019) <https://www.linksfraktion.de/themen/nachrichten/detail/uploadfilter-und-leistungsschutzrecht-ewiges-deja-vu/> accessed 27 April 2021
[113] A (typically humorous) image, video, piece of text, etc is copied and spread rapidly by internet users, often with slight variations.
[114] Matt Reynolds, 'What is Article 13? The EU's divisive new copyright plan explained' (*WIRED*, 24 May 2019) <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> accessed 27 April 2021
[115] Dating back as far as the Twelve Tables of Rome
[116] Nico Voigtlander and Hans-Joachim, 'The Three Horsemen of Riches: Plague, War, and Urbanization in Early Modern Europe' (2012) The Review of Economic Studies, vol. 80, issue 2, 774
[117] The Ten Commandments
[118] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [29]

right"[119] per CDPA. Similarly, freedom of expression did not have its genesis in this era but did rise to some prominence. After the overthrow of James II, the 1689 Bill of Rights guaranteed absolute freedom of speech for MPs in Parliament[120] – even information subject to injunctions.[121] However, freedom of expression for British citizens generally is apparent as a 'negative right': they are free to say anything that is not prohibited.[122] As the House of Lords highlighted in *James v Common of Australia*:

> *"free speech does not mean free speech: it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth"*[123]

Accordingly, Professor Shapiro contends that the examination of free expression in the United Kingdom, owing to the doctrine of Parliamentary Supremacy, is an inquiry into how *"parliamentary acts, and to a certain extent the common law, restrict free speech"*.[124] Professor Shapiro contrasts this with the United States whereby rather *"one looks at the limits placed on such restrictions"* [125] to free expression. The United States' constitutional arrangements of legislative supremacy – specifically the First Amendment - prevents Congress from *"abridging the freedom of speech"*[126] with limited exception. Professor Shapiro's contention certainly was accurate but has been invariably altered since the United Kingdom became a signatory to said international human rights instruments. Though not identical to the United States' system, the States' ability to curtail certain rights has certainly been limited.

In 1948, following the Second World War, the Universal Declaration of Human Rights[127] (hereinafter 'UDHR') took effect. A product of the newly formed United Nations, this manifested the post-war "*international political agenda"*[128] of human rights through signatories' commitment to universal *"observance of human rights and fundamental freedoms"*[129] and was comprised of thirty Articles total. In Article 19, [130] the right to free expression is contained:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

Article 17 meanwhile contains a limited right to property:

> *1. Everyone has the right to own property alone as well as in association with others.*
>
> *2. No one shall be arbitrarily deprived of his property.*[131]

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[119] Copyright, Designs and Patents Act 1988, s96(2)
[120] Bill of Rights 1689, Art IX
[121] HC Deb 23 May 2011, vol 528, cols 638; 654
[122] Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom:The Democratic Audit of the United Kingdom*, 165
[123] *James v Commonwealth of Australia* [1936] UKPCHCA 4; 55 CLR 1; [1936] AC 578
[124] Stephen J. Shapiro, 'Comparing Free Speech: United States v. United Kingdom' (1989) 19 University of Baltimore Law Forum art.5
[125] Stephen J. Shapiro, 'Comparing Free Speech: United States v. United Kingdom' (1989) 19 University of Baltimore Law Forum art.5
[126] Which reads that *"congress shall make no law [...] prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…"*; US Constitution, First Amendment
[127] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)
[128] Tony Evans, *Human Rights and Post-War Reconstruction* (Palgrave Macmillan 1996) 48
[129] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) preamble
[130] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 19
[131] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 17

The WIPO observed that *"the implication of Article 17.2 is that states do have a right to regulate the property rights of individuals, but that they must do so according to the rule of law."*[132] Additionally, though the UDHR does not explicitly state intellectual property rights specifically, Article 27[133] provides that:

> 1. *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
>
> 2. *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

WIPO further noted that this right being caveated highlights *"the tension between rules that protect the creators of information and those that ensure the use and diffusion of information."*[134] Regardless, property rights – including IP – and free expression are both apparent in the UDHR. However, the UDHR itself is not strictly legally binding. Nevertheless, it was implemented through regional human rights instruments. The United Nations observed that:

> *"The UDHR is widely recognized as having inspired, and paved the way for, the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels"*[135]

For forty-seven European States, this came virtue of the European Convention on Human Rights (hereinafter 'ECHR'), to which the United Kingdom acceded in 1951. Like the UDHR, the ECHR was designed to incorporate traditional civil liberties into law to secure an *"effective political democracy"*.[136] Proponent and then-Prime Minister Winston Churchill described the ECHR as being *"guarded by freedom and sustained by law"*[137] – achieved through the ECHR's corresponding European Court of Human Rights (hereinafter 'ECtHR'). However, the provisions of the UDHR and ECHR were not completely identical. The substance of the latter was initially confined to *"predominantly civil and political rights"*;[138] deemed *"essential for a democratic way of life"*[139] due to the authoritarian regimes of the Second World War.[140] This reflected the ideology of the West: to *"provide a bulwark against communism"*[141] since the Soviet states favoured economic and social protections instead.[142] Hence, 'freedom of expression' was contained in the ECHR from the outset, in Article 10.[143] Rights however which could not be agreed upon in time for the ECHR itself, since

[132] The World Intellectual Property Organization (WIPO) in collaboration with the Office of the United Nations High Commissioner for Human Rights, *Intellectual Property and human rights* (9 November 1998) Access: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_762.pdf

[133] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 27

[134] The World Intellectual Property Organization (WIPO) in collaboration with the Office of the United Nations High Commissioner for Human Rights, *Intellectual Property and human rights* (9 November 1998) Access: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_762.pdf

[135] United Nations, 'Universal Declaration of Human Rights' (*United Nations*) <https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html> accessed 19 March 2021

[136] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) preamble

[137] Winston Churchill addresses The Congress of Europe at The Hague (7 May 1948) Access: http://www.churchill-society-london.org.uk/WSCHague.html

[138] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (4th edn, OUP 2018) 4

[139] M Teitgen, CE Consult Ass, Debates, 1st Session, p 408, 19 August 1949.

[140] Tony Evans, *Human Rights and Post-War Reconstruction* (Palgrave Macmillan 1996) 48

[141] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (4th edn, OUP 2018) 3

[142] Bernadette Rainey, *Human Rights Law Concentrate: Law Revision and Study Guide* (OUP 2017) 22

[143] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10

"stray[ing] into the field of economic, social, and cultural rights",[144,145] were adopted later – with the First Protocol to the ECHR in 1954. This contained the 'Protection of Property' in Article 1 Protocol 1 (hereinafter 'A1P1').[146] Histories aside, both the freedom of expression and indeed property rights have been given a not dissimilar mandatory metric to the American one which Professor Shapiro contested the United Kingdom lacked.

Article 10 ECHR

In full, Article 10 states:

> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 1 Protocol 1

In full, A1P1 states:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

Pertinently, the ECtHR confirmed A1P1 to encompass IP[147] including copyright.[148] They reasoned that although IP is a non-physical asset, it gives rise to financial rights and interests. Therefore, to qualify it must have an economic value[149] or be of a pecuniary nature.[150] This is congruous with domestic law since the CDPA characteristics copyright as a property right[151] and requires any relief for infringement to be treated as *"any other property right"*[152] would.

The Human Rights Act 1998

Forty-five years after the ECHR took effect, the Human Rights Act 1998[153] (hereinafter 'HRA') was passed in the United Kingdom. The HRA aimed to *"give further effect"*[154] to the ECHR by having

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[144] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (4th edn, OUP 2018) footnote 15

[145] These were property, education, and elections by secret ballot.

[146] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) protocol 1, art 1

[147] *Anheuser-Busch Inc. v Portugal* App no 73049/01 (ECtHR, 11 January 2007) § 72

[148] *Anheuser-Busch Inc. v Portugal* App no 73049/01 (ECtHR, 11 January 2007) § 71

[149] *Anheuser-Busch Inc. v Portugal* App no 73049/01 (ECtHR, 11 January 2007) § 58

[150] Council of Europe, 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights - Protection of property' (*Council of Europe*, 31 August 2020) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed 5 February 2021

[151] Copyright, Designs and Patents Act 1988, s1(1)

[152] Copyright, Designs and Patents Act 1988, s96(2)

[153] Human Rights Act 1998

[154] Human Rights Act 1998, long title

"rights brought home"[155] through incorporating the ECHR into domestic law. Then-Home Secretary Jack Straw MP explained the main rationale for this:

> *"The effect of non-incorporation on the British people is a practical one. The rights, originally developed by Britain, are no longer seen as British, and enforcing them takes far too long and costs far too much—on average five years and £30,000 to get an action into the European Court at Strasbourg once all domestic remedies have been exhausted."* [156]

The Human Rights Act 1998 thus had several important effects on the domestic courts. First, primary legislation and subordinate legislation must be read and given effect by the courts in a way which is compatible with the Convention rights *"so far as it is possible to do so"*.[157] This is the not dissimilar mandatory metric to the United States' Constitutional arrangements which Professor Shapiro contested the United Kingdom lacked (correct at the pre-HRA time of writing). The allegation that the CDPA infringed Article 10 was a point litigated (unsuccessfully) in *Ashdown*.[158] Second, any domestic court must *"take into account"* [159] any judgment, decision, declaration or advisory opinion of either the ECtHR or Commission.[160] Third, through s6(1) - which decrees it *"unlawful for a public authority to act in a way which is incompatible with a Convention right"*,[161] expressly stated to include courts and tribunals.[162] This has been described as having *"radically and deliberately"*[163] altered the ECHR's position as an international treaty: solely to prevent State interference with Conventions rights against individuals – known as 'vertical' effect. Instead, s6(1) allows for individuals to enforce Convention rights against each other – known as 'horizontal' effect. The House of Lords clarified in *Campbell v Mirror Group Newspapers* that the HRA:

> *"…does not create any new cause of action between private persons. But if there is a relevant cause of action, the court as a public authority must act compatibly with both parties' Convention rights."*[164]

In the context of copyright and freedom of expression, the horizontal effect of the HRA is significant as allows individuals to allege an individual has infringed their proprietary rights or free expression as opposed to a State's laws.

Chapter 3 - The antithetical nature of copyright and free expression: the ECtHR's 'balancing act'

There are clear competing interests between copyright and free expression. Mentis explains this *"stems from the primary character of copyright as an exclusive legal monopoly granted to an author in relation to the original, literary or artistic expression embodied in his work."*[165] Nevertheless, the mere existence of copyright law does not contravene Article 10: only supposing Article 10 were an absolute right would this be so. On the contrary, IP rights – including copyright – are widely recognised as a permissible restriction to free expression. Even in the United States, this is so, where, as explained above, limited exceptions exist for laws that abridge the freedom of speech. In *Harper & Row v. Nation Enterprises,* the SCOTUS confirmed intellectual property to be among these

[155] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997)
[156] HC Deb 16 February 1998, vol 306, col 768
[157] Human Rights Act 1998, s3(1)
[158] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142
[159] Human Rights Act 1998, s2(1)
[160] Though not strictly binding, the ECtHR's judgements are nearly always followed - 'declarations of incompatibility' may be issued - but there are currently only 12 of these.
[161] Human Rights Act 1998, s6(1)
[162] Human Rights Act 1998, s3(a)
[163] LexisNexis, 'Courts as a 'public authority' and the horizontal effect of Convention rights' (*LexisNexis*) <https://www.lexisnexis.co.uk/legal/guidance/courts-as-a-public-authority-the-horizontal-effect-of-convention-rights> accessed 27 April 2021
[164] *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [132]
[165] Sunimal Mendis, *Copyright, the Freedom of Expression and the Right to Information: Exploring a Potential Public Interest Exception to Copyright in Europe* (Nomos Publishing 2011) 19

exceptions. Though Nimmer labelled this a "*largely ignored paradox*",[166] it illustrates the strength of copyright given the sacrosanctity of free expression in the United States constitutional arrangements. The categorisation of the two as congruous fits the ECtHR's view that the *"Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions"*.[167] Nevertheless, competing interests are still present. As such, in *Ashdown,* Lord Phillips explained the need to balance both rights:

> *The infringement of copyright constitutes interference with 'the peaceful enjoyment of possessions'. It is, furthermore, the interference with a right arising under a statute which confers rights recognised under international convention and harmonised under European law — see the Berne Conventions of 1886 and 1971 and EC Council Directive of 29 October 1993. There is thus no question but that restriction of the right of freedom of expression can be justified where necessary in a democratic society in order to protect copyright. The protection afforded to copyright under the 1988 Act is, however, itself subject to exceptions. Thus both the right of freedom of expression and copyright are qualified. This appeal raises the question of how the two rights fall to be balanced, when they are in conflict.*[168]

The 'balancing act' arises because A1P1 and Article 10 are both qualified rights. Unlike absolute rights,[169] this permits state interference to protect the rights of another or the wider public interest.[170] The jurisprudence of the ECtHR treats both with varying flexibility.

Interference with qualified rights

To determine if a state is justified in interfering with a qualified right, each Article sets out the criteria. Specifically, a deprival of property under A1P1 is only permissible if it is *"in the public interest"* and *"subject to the conditions provided for by law"* and according to the *"general principles of international law"*.[171] The ECtHR have read in that it must also be reasonably proportionate.[172] Meanwhile, an interference with Article 10 must be conducted *"in accordance with law"*, deemed *"necessary in a democratic society"* and satisfy one of the nine listed legitimate aims - "*the protection of the reputation or rights of others"*[173] being the most salient in relation to free expression. The ECtHR elaborated that to be deemed 'necessary in a democratic society', the interference need *"answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued."*[174] This highlights the two key doctrines which have emerged from the jurisprudence of ECtHR: the 'margin of appreciation' and 'proportionality'.

The margin of appreciation

The ECtHR explained this allows signatories "to derogate from the obligations laid down in the Convention"[175]and justified it in *Handyside v UK*:[176]

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[166] Melville B. Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 UCLA L. REV, 1181
[167] *Stec and Others v UK* App nos. 65731/01 and 65900/01 (ECHR, 6 July 2005) § 48
[168] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [28]
[169] Such as the freedom from torture per art 3 ECHR, no punishment without law per art 7 ECHR and the prohibition of slavery and forced labour per art 4.1 ECHR
[170] Council of Europe, 'definitions' (Council of Europe) <https://www.coe.int/en/web/echr-toolkit/definitions> accessed 20 March 2021
[171] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) protocol 1, art 1
[172] *Beyeler v Italy* App no 33202/96 (ECHR, 5 January 2000) §§ 108-114
[173] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.2
[174] *Nada v Switzerland* App no 10593/08 (ECHR, 12 September 2012) § 181
[175] *Greece v United Kingdom* App no. 176/56 (European Commission on Human Rights, 1958-1959) 176.
[176] *Handyside v United Kingdom* App no. 5493/72 (ECHR, 7 December 1976)

> *"By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements."*[177]

Though applicable to all provisions of the ECHR, the margin of appreciation is particularly relevant concerning Article 10. The ECtHR held in *Ashby Donald and Others v France*[178] that signatories, when interfering with Article 10, enjoy a *"particularly wide margin of appreciation"*[179] if the impugned measure is *"aimed at protecting [other] rights safeguarded by the Convention or its Protocols"*;[180] meaning A1P1 in its application to IP.[181] The ECtHR illustrated that "*the domestic court had therefore not overstepped its margin of appreciation in privileging respect for the fashion designers' property over the applicants' right to freedom of expression."*[182] This point was embellished in *Neij and Sunde Kolisoppi v Sweden*.[183] This concerned the copyright infringement convictions of the founders of Swedish-based file-sharing copyright-protected material - 'The Pirate Bay.' Though the ECtHR unanimously rejected the defence claim that their copyright conviction violated their right to freedom of speech, it was noted the Swedish authorities enjoyed a *"wide margin of appreciation"*[184] given the material did not involve political expression and debate. These cases underscore that Article 10 is a qualified right and the margin of appreciation, where the material is not political, shows Article 10 to be more flexible than A1P1 in that proprietary rights triumph.

Proportionality

Proportionality meanwhile was explained by Jowell and Lester to mean that the level of State interference with a qualified right must be *"no more than is reasonably necessary to achieve [the] legitimate aim"* - they illustrate this with the commonsensical example of not using a sledgehammer to crack a nut.[185]

More flexibility is found for A1P1 than Article 10, with regards to proportionality, Though the text of A1P1 only refers to interferences being permissible if it is lawful, in the public interest and in accordance with the general principles of international law,[186] the ECtHR has held interferences must additionally be reasonably proportionate.[187] The courts utilise the *"fair balance"* test to answer this. [188] Though equivalent to the *"necessary in a democratic society"* test for Article 10, the Council of Europe admit it to be *"less stringent"*.[189] This is because it only requires States to show they have struck a fair balance between the person's right and the public interest,[190] as opposed to being proportionate to the legitimate aim. Further flexibility is apparent since the margin of appreciation gives States a wide discretion over what is *"in the public interest"*. For example, the Council of Europe cite a public interest as wide as 'social justice' as permissible[191] - provided a legitimate aim is

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[177] *Handyside v United Kingdom* App no. 5493/72 (ECHR, 7 December 1976) § 48
[178] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013)
[179] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013) § 39
[180] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013) § 40
[181] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013) § 40
[182] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013) § 40
[183] *Neij and Sunde Kolmisoppi v Sweden* App no. 40397/12 (ECHR, 13 March 2013)
[184] *Neij and Sunde Kolmisoppi v Sweden* App no. 40397/12 (ECHR, 13 March 2013)
[185] A. Lester and J. Jowell, 'Beyond Wednesbury: substantive principles of administrative law' [1987] Public Law 368, 375
[186] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.2
[187] *Beyeler v Italy* App no 33202/96 (ECHR, 5 January 2000) §§ 108-114
[188] *Beyeler v Italy* App no 33202/96 (ECHR, 5 January 2000) §§ 108-114
[189] Council of Europe, 'PROTOCOL NO. 1 TO THE CONVENTION' (*Council of Europe,* 2017) <https://www.coe.int/en/web/echr-toolkit/protocole-1> accessed 25 February 2021.
[190] Council of Europe, 'PROTOCOL NO. 1 TO THE CONVENTION' (*Council of Europe,* 2017) <https://www.coe.int/en/web/echr-toolkit/protocole-1> accessed 25 February 2021.
[191] Council of Europe, 'PROTOCOL NO. 1 TO THE CONVENTION' (*Council of Europe,* 2017) <https://www.coe.int/en/web/echr-toolkit/protocole-1> accessed 25 February 2021.

pursued. Collectively, this would suggest A1P1 to be weaker than Article 10, in terms of proportionality.

Section 12(4) of the Human Rights Act 1998

Section 12(4)[192] of the HRA finds significance as another part of the courts' balancing act. This applies if *"a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression."*[193] In full, s14(4) reads:

> *"the court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material)"*[194]

The phraseology of *"literary, dramatic and artistic"* works echoes s1 of the CDPA[195] categorisation of 'authorial' works (excluding musical works – as well as 'entrepreneurial' works). This renders these indisputably relevant to s12(4). However, in *Ashdown,* the Court of Appeal rejected that s12(4) requires the courts to *"place extra weight on the matters to which the subsection refers"*. Instead, that it *"does no more than underline the need to have regard to contexts in which that jurisprudence has given particular weight to freedom of expression"* and to draw *"attention to considerations which may none the less justify restricting that right"*[196] – such as copyright. Hence, in terms of the balancing act, s12(4) does not give extra weight to free expression, rather merely highlights the competing interests.

Competing interests?

Though in *Ashby*[197] no Article 10 violation was found, Voorhoof argued the decision proves *"copyright law ultimately can be regarded as interferences with the right of freedom of expression and information."*[198] This view is predicated on free expression and copyright being diametrically opposed - a view which also found favour in the Court of Appeal in *Ashdown v Telegraph Group Ltd*. Lord Phillips stated that, in the wake of the HRA, that: *"copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright."*[199]

This assessment, in categorical terms, appears sensical but is objectionable on two grounds. First, the more cardinal notion of the idea-expression dichotomy. Second, the exceptions to copyright, namely 'fair dealing', aptly gives effect to free expression.

First objection: the idea-expression dichotomy

In 1970 in his seminal article,[200] M.B. Nimmer[201] coined the 'idea-expression dichotomy'. He outlined that copyright protects the expression of an idea, not the idea itself - a common misconception.[202] Nevertheless, Lord Phillips conceded that *"it is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form of words*

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[192] Human Rights Act 1998, s12(4)
[193] Human Rights Act 1998, s12(1)
[194] Human Rights Act 1998, s12(4)
[195] Copyright, Designs and Patents Act 1988, s1(1)(a)
[196] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [27]
[197] *Ashby Donald and Others v France* App no. 36769/08 (ECHR, 10 January 2013)
[198] Dirk Voorhoof, 'ECHR: Copyright vs. freedom of expression' (*Kluwer Copyright Blog*, 25 January 2013) <http://copyrightblog.kluweriplaw.com/2013/01/25/echr-copyright-vs-freedom-of-expression/> accessed 21 March 2021
[199] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [30]
[200] Melville B. Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 UCLA L. REV, 1180
[201] renowned as an expert in freedom of speech and United States copyright law
[202] The UK Copyright Services, 'Top 10 copyright myths' (*The UK Copyright Services*) <https://copyrightservice.co.uk/copyright/copyright_myths> accessed 20 March 2021

devised by someone else".[203] Indeed, Lord Phillips is persuasive in that copyright restricts the exact expression, but *"freedom of expression is guaranteed by the option to express the same idea differently",*[204] Torremans argued. Birnhack dubbed this "*alternative avenues"*[205] of expression. Though Nimmer was an American author, the idea-expression dichotomy has found favour not just in academia but in the legislation, judiciary, and international treaties of the United Kingdom. Legislative support for the idea-expression dichotomy is implicit throughout the CDPA, specifically in s3(2):

> *"Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise."*[206]

Further, as outlined in Chapter 1, the CDPA limits copyright to several categories.[207] This favours the idea-expression dichotomy in that copyright may only subsist in exhaustively prescribed non-abstract formats. Nevertheless, the idea-expression dichotomy is not stated explicitly, nor does any domestic legislation contain any further reference to it. However, the idea-expression dichotomy has found support at an international level. Notably, in the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter 'TRIPS agreement') - a World Trade Organisation Agreement.[208] Article 9.2 expressly states *"copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"*.[209] Further, Article 9.1[210] requires signatories' compliance with Articles 1-21 of the Berne Convention,[211] which includes the identical definition of the idea-expression dichotomy.[212] Moreover, the same definition is found in Article 2 of the World Intellectual Property Organisation Copyright Treaty.[213] However, none of these treaties provides insight into how to differentiate between an idea and an expression.[214] Therefore, the courts have been left with this role.

Support for the idea-expression dichotomy in the courts predated Nimmer by over three decades. In the Chancery Division, Farwell J stated: *"the person who has clothed the idea in form, whether by means of a picture, a play or a book"*[215] owns the copyright. Some sixty years later, in *Designers Guild v Russell Williams Textiles*,[216] Lord Hoffmann confirmed this and outlined two distinctions between expressions and ideas:

> 1. *"...a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. . . However striking or original [the idea] may be, others are (in the absence of patent protection) free to express it in works of their own."*

[203] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [31]
[204] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP, 2019) 267
[205] Michael Birnhack, 'Acknowledging the Conflict' [2003] Ent. L.R. 24.
[206] Copyright, Designs and Patents Act 1988, s3(2)
[207] Copyright, Designs and Patents Act 1988, s1(1)
[208] General Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)
[209] General Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), art 9.2
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[211] Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended, 1971), art 1-21
[212] *"Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."*
[213] WIPO Copyright Treaty (WCT), art 2
[214] Ted Cook, 'THE DEATH OF COPYRIGHT LAW'S IDEA/EXPRESSION DICHOTOMY' (*keepcalmtalklaw*, 2 February 2019) <http://www.keepcalmtalklaw.co.uk/the-death-of-copyright-laws-ideaexpression-dichotomy/> accessed 10 February 2021
[215] *Donoghue v Allied Newspapers Limited* [1938] Ch. 106, [109]
[216] *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC)* [2001] E.C.D.R. 10

2. *"…certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work."* [217]

Clearly, 'originality' is the qualifier for a work to be rendered an expression of an idea and thus protected by copyright - be it the sweat of the brow or the ECJ standard, as outlined in chapter 1. Moore and Himmer illustrate the epitome of the idea-expression dichotomy in that:

> *"someone may read Darwin's original writings on evolution, express these ideas in her own words, and obtain a copyright in the new expression. This individual may be guilty of plagiarism, but so long as her expressions are not copied from Darwin's original or substantially similar to the original, she can obtain a copyright."*[218]

This would pass the test of originality since it is only the idea that is copied – the form is original. However, in *IBCOS Computers v Barclays*[219] the High Court complicated the idea-expression dichotomy when Jacob J stated that *"copyright cannot prevent the copying of a mere general idea but can protect the copying of a detailed 'idea,'"* ultimately, it is *"all a question of degree"*.[220] Smith argued that this decision recognised that *"all expression, however original, owes something to what has gone before"* but that the way in which Jacob J's reasoning may *"fuzzily"* be applied *"engages freedom of expression more intensely towards… ideas"*, as opposed to expression;[221] certainly disfavourable treatment for the idea-expression dichotomy. Cook labelled this the *"death"*[222] of the IED. Though raw ideas ultimately remain unprotected by copyright, *IBCOS* has invariably altered the idea-expression dichotomy to more of a continuum - the Moore and Himmer example may no longer pass the test.

Since the courts are free to overrule this decision, however, the more fundamental critique of the idea-expression dichotomy is its limitation to written works. Angelopoulos explains *"circumstances are conceivable in which the form of expression is as important as the information conveyed."*[223] The old adage that "*a picture paints a thousand words"*[224] applies but is impossible to express the same precise message behind a picture in different 'terms.' Or, in the words of Marshall McLuhan, "*the medium is the message"*.[225] For example, the visage of Marxist revolutionary Che Guevara, *'Guerrillero Heroico'* (Appendix 3) became a countercultural symbol of rebellion as *"the most famous photograph in the world"*[226] and in a certain twist of irony became history's most reproduced photo – found on merchandise ranging from t-shirts to vodka to condoms.[227] If regarded as 'expression' of (Marxist) ideas, it cannot enable their dissemination in the same way authorial works in a rewritten form can – virtue of being an image.

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[217] *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC)* [2001] E.C.D.R. 10, [6]
[218] Moore, Adam and Ken Himma, 'Intellectual Property' (*The Stanford Encyclopaedia of Philosophy*, 2018) < https://plato.stanford.edu/entries/intellectual-property/> accessed 8 February 2021
[219] *IBCOS Computers Limited v Barclays Mercantile Highland Finance Limited* [1994] 2 WLUK 353 [1994] F.S.R. 275
[220] IBCOS Computers Limited v Barclays Mercantile Highland Finance Limited [1994] 2 WLUK 353 [1994] F.S.R. 275, [290]
[221] Graham Smith, 'Ten ways in which copyright engages freedom of expression, Part 1, Sliders one to five' (*Inforrm's blog*, 2 May 2013) <https://inforrm.org/2013/05/02/ten-ways-in-which-copyright-engages-freedom-of-expression-part-1-sliders-one-to-five-graham-smith/> accessed 20 March 2021
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[223] Christina J. Angelopoulos, 'Freedom of expression and copyright: the double balancing act' I.P.Q. 2008, 3, 328-353
[224] Frederick R. Barnard, *Printer's Ink* (1921)
[225] Marshall McLuhan, *Understanding Media: The Extensions of Man* (1964)
[226] BBC NEWS, 'Che Guevara photographer dies' (BBC NEWS, 26 May 2001) <http://news.bbc.co.uk/1/hi/world/americas/1352650.stm> accessed 14 February 2021.
[227] Michael J. Casey, 'Che's Afterlife: The Legacy of an Image' (*Penguin Random House*, 7 April 2009) <https://penguinrandomhousehighereducation.com/book/?isbn=9780307279309> accessed 25 February 2021.

The engine of free expression?

In the United States, the jurisprudence of the SCOTUS went further than the idea-expression dichotomy. Justice O'Conner argued that copyright is in fact *"an engine of free expression"*[228] on the basis that copyright is a *"marketable right to use one's expression"* that therefore *"supplies the economic incentive to create and disseminate ideas"*[229] – but through distinct means. Perhaps it is the sacrosanctity of free expressions in the United States Constitution which has forced the SCOTUS to reconcile these competing interests. Netanel queries the validity of this argument with the example of the Alice Randall novel *'The Wind Done Gone'* – an alternative account of *'Gone with the Wind'*. A Georgia district court preliminarily enjoined the Randall novel's publication due to 'unabated piracy'. Though later voided, Netanel highlighted this proves copyright *"may also prevent speakers from effectively conveying their message and challenging prevailing view"*.[230] The SCOTUS' reasoning that copyright creates discourse, therefore, does not fully reconcile the competing interests.

Second objection: fair dealing

Lord Phillips noted there to be *"42 circumstances in which copying material does not infringe copyright"* which *"in effect they were circumstances where freedom of expression trumped copyright protection."*[231] He noted the fair dealing exception to attract *"particular consideration"*.[232]As outlined in Chapter 1, the fair dealing exception, if accepted, functions as a defence to an allegation of copyright infringement. Fair dealing allows for the use of the expression, not just the idea.[233] Lord Phillips agreed this gives effect to free expression in that it *"displaces the protection that would otherwise be afforded to copyright."*[234] Masiyakurima claims fair dealing even aims at advancing public interests, such as *"transformative uses of copyright works, curing market failure and promoting freedom of expression"*.[235] Though the purposes for which fair dealing are delineated exhaustively and an objective test is utilised, it ultimately lacks a statutory definition. As such, Angelopoulos posits:

> *"...the assessment of fairness is still very much an ad hoc business, a fact which conceivably undermines freedom of expression: without a definite defence to fall back upon, users may be discouraged from exercising their rights"*

Masiyakurima goes further: *"this nebulous concept is also a cosmetic façade that conveniently hides the reluctance of judges to allow unauthorized uses of copyright works."*[236] Though Griffiths[237] rejects this lack of flexibility, he concurs for the pragmatic need to preserve judicial discretion. Indeed, the outcomes of the cases are often uncontroversial as in the '*Cacoa Reports'* case.[238] There, the court held it to go beyond fair dealing (to report the current events as described) when the defendant had copied substantial parts of the plaintiff's reports concerning cacao crops around the world; a clear example of the courts balancing proprietary rights over free expression rights where the use of a copyrighted work is audacious. Though the permitted purposes for fair dealing are limited by statute, with the definition of fairness in the hands of the judiciary, freedom of expression is potentially in-flux should the definition be too loose. Burrell is more critical:

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[228] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)
[229] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), [127]
[230] Neil Weinstock Netanel, 'Copyright's Paradox' (first published 2008, last amended 2012) UCLA School of Law Public Law & Legal Theory Research Paper Series Research Paper No. 08-06 <https://ssrn.com/abstract=1099457> accessed 22 January 2021
[231] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [32]
[232] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [32]
[233] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [45]
[234] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [33]
[235] Masiyakurima, "Fair Dealing and Freedom of Expression" in Copyright and Human Rights (2004), 87-108
[236] Masiyakurima, "Fair Dealing and Freedom of Expression" in Copyright and Human Rights (2004), 87-108
[237] J Griffiths, 'Preserving Judicial Freedom of Movement—Interpreting Fair Dealing in Copyright Law' [2000] IPQ 164
[238] *PCR Ltd v. Dow Jones Telerate Ltd* [1998] FSR 170

> *"case law, in the United Kingdom at least, shows that courts have systematically closed off a number of avenues which could have been used to constrain copyright and all too often commentators have inadvertently aided this process."*[239]

However, Birnhack views judicial discretion as fitting. This being because freedom of expression is concerned, as part of the 'constitutional arena', where the *"courts are in charge of protecting human rights [and] such an a priori deference is undesirable"*.[240] Birnhack however categorised fair dealing, the idea-expression dichotomy (and the public interest defence)[241] as an 'internal'[242] methods within copyright law where free expression is given effect. He distinguishes between 'external' methods, where the ECHR is relevant.

External methods
The Court of Appeal recognised these external conflicts in *Ashdown v. Telegraph Group Ltd* - where Lord Phillips made his 'antithetical' statement.[243] The conflict arose when the Sunday Telegraph had used substantial quotes from a confidential memo of a meeting between then Liberal Democrat leader Paddy Ashdown and the Prime Minister. The Sunday Telegraph relied upon the fair dealing exception, the public interest defence and freedom of expression.[244] Thus, the court had to consider whether freedom of expression could justify the verbatim publication of the copyrighted work at issue. Though the court ultimately answered in the negative, credence was given to the idea-expression dichotomy as the court observed free expression is protected if individuals maintain the *"right to publish information and ideas set out in another's literary work, without copying the very words"*.[245] More pertinently, the Court of Appeal recognised Strasbourg jurisprudence to show that "*freedom of expression will only be fully effective if an individual is permitted to reproduce the very words spoken by another"*[246] and that *"on occasions, indeed, it is the form and not the content of a document which is of interest."*[247] This echoes Marshall McLuhan[248] sentiment that *"the medium is the message"*.[249]

Though Mr Ashdown won, the fair dealing defence was rejected for the reason of the Sunday Telegraphs' motivations for commercial value: intending to enhance the loyalty of their readership.[250] Instead, Lord Phillips explained post-HRA it *"essential"* that to balance a public interest in freedom of expression against the interests of owners of copyright the courts must *"[not] apply inflexibly tests based on precedent, but to bear in mind that considerations of public interest are paramount"*[251] 5RB Barristers echo Birnhack's classification of external methods of control in that Ashdown's significance is that it shows "*Article 10 considerations might, in an appropriate case, require the Court to grant a public interest defence beyond the protection offered under s.30 of the [CDPA] for fair dealing"*. [252] Further, they argue it shows *"there would be cases – albeit this was not one – where*

[239] Burrell, "Reining in Copyright Law" (2001) 4 I.P.Q. 361.
[240] Michael Birnhack, 'Acknowledging the Conflict' [2003] Ent. L.R. 24.
[241] The public interest defence which also, if successfully plead, functions as giving effect to free expression in the same manner of fair dealing.
[242] Michael Birnhack, 'Acknowledging the Conflict' [2003] Ent. L.R. 24.
[243] That copyright and free expression are antithetical
[244] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [13]
[245] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [39]
[246] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [39]
[247] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [43]
[248] Canadian communication theorist
[249] Marshall McLuhan, *Understanding Media: The Extensions of Man* (1964)
[250] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [72]
[251] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [71]
[252] 5RB Barristers, 'Ashdown v Telegraph Group Ltd' (5RB Barristers) <https://www.5rb.com/case/ashdown-v-telegraph-group-ltd/> accessed 28 April 2021

the republication of the form would be as, if not more, important than the contents"[253] – another nail in the coffin for the idea-expression dichotomy.

Conclusion

Copyright, as a property right, and free expression have clear competing interests. This is a conflict which has been made explicit post-war through litigation in the domain of the ECHR. However, the reconciliation of these competing interests is lukewarm at best. Nimmer's five-decade-old label this as a "*largely ignored paradox"*[254] remains accurate today, transcending jurisdiction. Perhaps because criticism levied at interferences with free expression usually concern more controversial topics such as hate speech. Simultaneously, copyright is a vital economic tool for creators. Indeed, in 2015 47% of intangible investment was protected by IP rights,[255] with £25.9 billion of this being copyright.[256]

The idea-expression dichotomy represents an argument to nip any notions of competing interests between copyright and free expression in the bud. However, this tenet - that ideas and expression are distinct - has been shifted to more of a continuum by the High Court. On the other hand, the Court of Appeal has recognised the publication of copyrighted material verbatim to be, albeit rarely, lawful – undercutting the idea-expression dichotomy entirely. The idea-expression dichotomy was flawed already due to its limitation to authorial works.

Though fair dealing, where successfully plead, gives effect to free expression, in being subject to judicial discretion uncertainty remains as to whether the defence would be successful – being on case-by-case basis. Consequently, the consistent presence of free expression remains uncertain also. Therefore, the initial hypothesis is partially correct. Though the 'black letter' law for fair dealing is not too intrusive for free expression, on the contrary its purpose is the opposite, the judicial discretion creates uncertainty as to freedom of expression. Though a quantitative statutory definition of fairness would resolve the uncertainty issue, it would be too crude and likely intrude on free expression more so. Hence, the Court of Appeal's decision to allow (rarely) the publication of copyrighted verbatim is likely the best solution. Further, the public interest defence represents a failsafe where the internal controls for copyright may fail.

[253] 5RB Barristers, 'Ashdown v Telegraph Group Ltd' (5RB Barristers) <https://www.5rb.com/case/ashdown-v-telegraph-group-ltd/> accessed 28 April 2021
[254] Melville B. Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 UCLA L. REV, 1181
[255] Sam Turnock, 'IP and the intangible economy' (*Intellectual Property Office blog,* 20 March 2018) <https://ipo.blog.gov.uk/2018/03/20/ip-and-the-intangible-economy/> accessed 27 April 2021.
[256] Sam Turnock, 'IP and the intangible economy' (*Intellectual Property Office blog,* 20 March 2018) <https://ipo.blog.gov.uk/2018/03/20/ip-and-the-intangible-economy/> accessed 27 April 2021.

Appendix 1: Ethics approval

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School of Law

17 April 2021

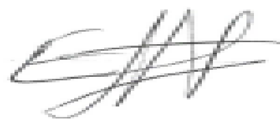
Dear Chris,

I am pleased to inform you that your ethics application has been approved by the Schools Course Lead for Law.

Ethics Reference: LWD001

You may now proceed with the project and we wish you good luck.

Yours sincerely,

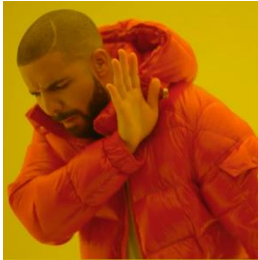


Dr Ernestine Gheyoh Ndzi,
Course Lead
School of Law.

Est.

Appendix 2

Original image (LEFT) and recreated (RIGHT)



Source: https://cheezburger.com/8041733/article-13-has-inspired-some-hysterical-knockoff-memes

Appendix 3

'Guerrillero Heroico', taken by Alberto Korda on 5 March 1960

Table of legislation, table of cases and bibliography

Table of legislation

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