‘Open Access and the Academy’:

‘An analysis of some salient Copyright and Related Legal Interfaces.’

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Abstract

This thesis offers an holistic approach to Open Access from a legal perspective. It does so by examining a series of interfaces between Open Access, law (especially but not exclusively copyright law), legal concepts and the Academy.

It addresses a number of Conceptual, Management, Compliance and Enforcement issues employing elements of Doctrinal, Theoretical, Historical, Comparative and Interdisciplinary methodologies.

The thesis frames its enquiry within a basic research question: 'Are copyright law and related legal concepts beneficial or disadvantageous in the implementation of OA across the Academy?'

Its findings highlight a range of beneficial contributions of law and legal concepts to Open Access.

Finally it offers a series of suggestions and recommendations for driving forward better Open Access.

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Go raibh maith agaibh uilig.

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Chapter 1: Introduction

1.1. Introduction

Open Access (OA) to information and publications as a worldwide phenomenon has corresponded with the expansion of the internet.

By "Open Access" in this thesis is meant the bundle of users' rights or permissions in the terms embraced by the following three main international declarations:

> Budapest Open Access Initiative, 2002;[1]
>
> Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 2003;[2]
>
> Bethesda Statement on Open Access Publishing, 2003;[3]

Collectively these values are commonly referred to as the BBA-OA principles and that abbreviation is utilised in this study.

The expanse of those principles may be gauged for example from the Budapest Declaration. This defines Open Access to literature as:

> its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing,

[1] *Budapest Open Access Initiative* http://www.budapestopenaccessinitiative.org/read
[2] *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities* https://openaccess.mpg.de/Berlin-Declaration
[3] *Bethesda Statement on Open Access Publishing* http://legacy.earlham.edu/~peters/fos/bethesda.htm

> pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.'[4]

Internationally for instance The World Bank and Organisation for Economic Co-operation and Development (OECD), are keen supporters of the concept. On a regional level, and in the academic sphere, the European Union (EU) is mandating that EU funded research for example be made available on an OA basis.[5] In the United Kingdom following publication and consideration of the Finch Report [6](Finch), the UK Government[7] and the Research Funding Councils[8] are moving towards requiring publically funded academic research to be made available on an OA platform.

To facilitate OA, two genres of delivery models or platforms exist: 'Gold' and 'Green'. Both descriptors were penned by Stevan Harnad.

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[4] http://www.budapestopenaccessinitiative.org/read

[5] Open Access Guidelines for researchers funded by the ERC (European Research Council)
https://erc.europa.eu/about-erc/organisation-and-working-groups/working-groups/working-group-open-access

[6] Working Group on Expanding Access to Published Research Findings, 'Accessibility, Sustainability, Excellence: How to Expand Access to Research Publications' (June 2012) (Finch Report)
https://www.acu.ac.uk/research-information-network/finch-report

[7] Department for Business Innovation and Skills, Policy paper 'Open Access: Economic Analysis of Alternative Options for the UK Science and Research System'
https://www.gov.uk/government/publications/open-access-economic-analysis-of-alternative-options-for-the-uk-science-and-research-system
Letter from David Willetts, Minister, Department for Business Innovation & Skills (BIS), to Dame Janet Finch, 'Government Response to the Finch Group Report: "Accessibility, sustainability, excellence: how to expand access to research publications"' (URN 12/975, 16 July 2012)
http://www.bis.gov.uk/assets/biscore/science/docs/l/12-975-letter-government-response-to-finch-report-research-publications.pdf

[8] For Example Higher Education Funding Council for England (HEFCE), *Open Access Research*
http://www.hefce.ac.uk/rsrch/oa/

[9]'Gold' is essentially access to the version of record[10] of a publication for example on the publisher's own website. 'Green' is access to a publication in an online repository such as that of a University and which may not necessarily have been peer-reviewed nor incorporate full final print quality and features. Two additional expressions (also coined by Harnard) are used to designate the terms on which the publications are made available: *Gratis* and *Libre*. *Gratis* means that the publication is free of monetary charge to view (toll free). *Libre* is not only toll-free but also free of at least some copyright restrictions. Publications on both Gold and Green platforms can be either *Gratis* or *Libre*. [11]Irrespective of whether the platform is Gold or Green the actual *Gratis* or *Libre* terms and conditions for legitimate use of the material so published will normally be covered by a variety of licences.

This movement towards OA publication has sparked debate and division. In general terms this has been between the Science Technology Engineering and Maths (STEM) academic community (largely receptive) and the Arts Humanities and Social Science (AHSS) sector on the other (generally ranging from concerned to hostile). Those arguments are not rehearsed either here or elsewhere in the thesis. However, they are mentioned at this juncture to explain why at certain intervals in this study greater emphasis may be placed on the interface of OA with the AHSS sector as opposed to the STEMS faculties. Further, while many valid points are raised in the position papers, the voluminous literature generated by the OA debate, frequently lacks meaningful constructive interaction with the concerns and interests of other actors in the field. The thesis aims to overcome some of those shortcomings. Nationally, regionally and internationally, the

[9] Suber (2012),53
[10] *Version of Record*: a fixed version of a journal article that has been made available by any organization that acts as a publisher by formally and exclusively declaring the article "published" (Finch 121)
[11] See Suber (2012) Chapter 3 for fuller discussion of these terms.

discourse also raises theoretical, doctrinal and practical concerns for the role of law and legal concepts.

The development of OA to date has largely centred on the main formats of scholarly publications that is the short form literary works (such as articles in learned journals) and longer form literary works such as monographs and textbooks. This thesis maintains that focus.

1.2. The Thesis

This thesis, as such, arises in the context of the CREATe[12] consortium's project and work packages.[13] Work Package 2 of which this study is integral was tasked *inter alia* of identifying and assessing in a legal context, the advantages, disadvantages, problems, solutions, opportunities and barriers in OA publishing. Immediately, the research questions pursued in the thesis emerge from and are structured by the four clusters of Research Gaps identified in a preceding scoping exercise.[14]

Those four groups of Research Gaps were themed under the titles: Historical Perspective; Copyright Protection and Theory; Economics and Business Models; and OA Mandate Policies. Individual gaps

[12] CREATe (Acronym for Creativity, Regulation, Enterprise and Technology). It is the Research Councils UK Centre for Copyright and New Business Models in the Creative Economy. It is a consortium of seven Universities pursuing some 40 different research projects.
[13] CREATe 'Project Background and Work Package Documentation' (January 2013) http://www.create.ac.uk/wp-content/uploads/2013/02/CREATe-WPs.pdf
[14] 'Open Access Publishing: A Literature Review' completed by Giancarlo F. Frosio, Research Fellow. https://zenodo.org/record/8381/files/CREATe-Working-Paper-2014-01.pdf

were identified within those broad themes and specific areas of investigation recommended.

Although the topics highlighted in the Research Gaps are distinct they are not mutually exclusive. They have an unavoidable overlap. Consequently this is reflected in the design of the thesis. The thesis thus develops and interweaves aspects addressing some of the Theoretical, Historical, Management, Compliance and Enforcement issues explored in the Literature Review. Initial consideration was also given to addressing some competition law concerns. However a decision was made to relinquish that pursuit given the overall restraints on the length, depth and breadth of the thesis.

Although the main legal focus of the thesis revolves around copyright law, a realisation emerged that law (not only copyright law) and OA encountered and intersected each other in a variety of modes. This led to the formulation of the title of the thesis: 'Open Access and the Academy: An analysis of some salient Copyright and Related Legal Interfaces.' In developing and unfolding this trajectory the thesis decided to employ the concept of 'law' (in copyright and other references) as a relatively broad sense as 'a regulatory mechanism'. As such the thesis views law, copyright and otherwise, as both hard and soft, public private and semi-privatised, occasionally coherent, occasionally fragmented, and both mandatory and voluntary. Thus it encompasses not only the black letter law on the statute books but also why existing black letter law exists and what the law should be. The matrix of 'interface' has been adopted as the appropriate term to identify the encounters of law, as so defined with OA.

Rather than confine itself to one interface the thesis explores a variety of themes arising out of the Research Gaps in a series of

such interfaces. Not every interface could possibly be explored within the scope of a thesis such as this. Consequently only a series of some (but not all) of those deemed salient (as identified in the Literature Review) will be explored.

It thus maintains that this reflects the reality that there is no one advantage, disadvantage, problem or solution, opportunity or barrier in OA implementation, management and expansion in the Academy. In embarking on this multifaceted approach the thesis aims to provide at least one attempted holistic analysis and assessment to partially fill the existing vacuum of such endeavours.

As the thesis unfolds these interfaces will be assessed in light of an overarching Research Question: Are copyright law and related legal concepts beneficial or disadvantageous in the implementation of OA across the Academy. In seeking answers to this question the enquiry, analysis and assessment unfold over five substantive chapters. The nature and direction of those chapters follows.

1.3. Chapter Outlines

Chapter 2 revisits and assesses a selection of the major established justifications and theories pertaining to copyright. In doing so it endeavours to answer the following sub Research Questions:

1. Are the theories and doctrines behind and around the established economic and moral rights of the (academic) author warranted and sufficiently robust to justify positive copyright law?

It has been deemed essential to address a range of such doctrines and theories at the outset of the thesis for a basic reason. That reason is because, as will emerge in the substantive chapter every positive copyright law is premised on some theoretical basis. The resilience or lack of theoretical undergirding may thus influence how one seeks to assess the interface with OA.

2. What role (if any) are the theories likely to have in the era of OA? In particular the thesis will seek to explore what it considers a novel approach in asking whether any of the traditional copyright theories can assist our understanding of OA itself or indeed justify OA.

This chapter is one of the longest in the thesis. It is submitted that such a length is merited by the nature of the investigation undertaken and the foundational principles established and proposed in so doing.

As OA emerges from a specific theoretical framework, Chapter 3 then moves the interfaces to a major area of practical management of OA. As mentioned at 1.1 above whether OA is *Gratis* or *Libre* access and use of the publication will invariably be subject to some species of licence. Whether law and in particular copyright law is beneficial or disadvantageous here is explored through the following enquiries:

1. An explanation and analysis of the major available open licences.[15]

[15] By 'Open Licences' this author means any online legal agreement for access to and use of copyrighted materials liberated from some if not all copyright restrictions.

2. An assessment of how these licences interface with copyright doctrines and positive law.

3. Whether other legal (for example contractual or consumer) or practical issues arise with the existing licences.

4. Do the licences succeed in facilitating Open Access?

Some of the interfaces arising out of Compliance and Enforcement are assessed in the following two chapters. The thesis maintains that dividing these issues into separate chapters is justified. Chapter 4 undertakes an investigation and assessment of measures external to the Academy which are aimed at securing better OA. Chapter 5 continues the same general theme but from a different perspective, that is possible measures within the Academy which may assist OA.

Chapter 4 probes the following issues:

1. If OA mandates[16] are copyright neutral, are they preferable as drivers of OA?
2. Would changes to copyright law be better in managing and facilitating OA?

In considering the alternatives the chapter offers a number of positive law solutions which may offer a more effective model for OA either on a free standing basis or in tandem with mandates. It will then seek to assess whether in overall terms, law and in particular

[16] At the outset some definition of OA mandate is in order. This author's own definition for the purposes of this chapter embraces all those individual and variegated policies that adhere to the injunction: 'A scholarly author who is the recipient of an external public research grant for any academic research must publish the results of that research on an Open Access platform'. This definition therefore enfolds both Gold and Green OA as explained at 1.1 above.

copyright law operates or could operate in a beneficial or disadvantageous manner with these interfaces.

Chapter 5 embarks on an analysis and evaluation of interfaces arising out of existing legal measures and concepts available to the Academy and academic authors. It endeavours to answer the following sub Research Questions:

1. Would University ownership of copyright in works produced by their employed academics better facilitate Open Access?
2. Would Academic Freedom be compromised by assertion and enforcement of this course of action?
3. Would a more resilient adherence to the 'Teacher/Academic' exception[17] be preferable in better assisting OA?

The Literature Review drew attention to the lack of literature exploring the long pre-Enlightenment tradition in relation to OA. Chapter 6 of the thesis thus aims to populate that vacuum at least in part.

It undertakes to ascertain whether there are any lessons, inspirations, warnings, opportunities or transferrable models relevant to OA and the Academy, from a an age predating positive copyright law.

Given the temporal and geographical span of the pre-Enlightenment period the chapter of necessity selects and explores one region only.

[17] This is the concept that copyrightable works created by an academic author in the course of their employment belong to that author and not to their employing institution.

It choses Medieval Ireland and the Irish Monastic Diaspora within Europe as a case study. This was not a random choice. As elaborated upon in Chapter 6.2. Medieval Ireland exhibited a range of features including the Columcille[18] copyright dispute over freedom to use and distribute what could be deemed a scholarly work; a highly developed and well documented legal system; Law Schools that may be equated with an early Academy and the peculiar circumstances which drove the Monastic Diaspora and its OA type activities. In doing so the chapter identifies a series of both general and specific interfaces that may be of assistance in the ongoing implementation of OA policies and practices.

As with Chapter 2, Chapter 6 is one of the longer chapters in the thesis. Given that Chapters 2-5 address an array of post-Enlightenment issues, the thesis holds that such a substantive treatment of pre-Enlightenment subjects is warranted. In doing so it aims to contribute a degree of balance and wholeness to the endeavour.

1.4. Methodology and Jurisdiction

University library shelves abound with theses structured by one or more established research methodologies, incorporating long sections or even chapters explaining and justifying the mode or modes adopted. This thesis eschews that approach. It does so not out of disrespect, blind dismissal or apathy. Indeed there will be *elements but only elements* of recognisable methodologies as the work unfolds.

[18] This normal Irish rendering of the name is used rather than its anglicised version, Columba.

Indeed the methodology of this thesis could be viewed as almost open ended, at once simple and yet at another level complex. In some respects it is best described by Benjamin:

> For successful excavation a plan is needed. Yet not indispensable is the cautious probing of the spade in the loam…Fruitless searching is as much part of this as succeeding… [digging] its spade in ever-new places, and in the old ones delve to ever deeper layers[19]

In Benjamin's terms, the plan of this thesis is to seek to answer the basic question: whether law and in particular copyright law is beneficial or disadvantageous to the implementation and management of OA. Its major tool is the matrix of interfaces. It digs and delves into the philosophical, legal and historical literature and black letter law searching for any features that may ultimately illuminate this question. In each case the search is not necessarily structured by any given traditional methodology. However any discoveries made or assessments proffered *may* call a particular aspect of one of those methods in aid in presenting the findings. Thus for example Theoretical in Chapter 2, Doctrinal in Chapters 2-5, and Comparative in Chapter 5 and Historical/Interdisciplinary in Chapter 6. To that extent the thesis grew organically, for instance as one inquiry opened an additional line of research or closed off an earlier planned exploration.

The same may be said of the jurisdictional scope of the thesis. Although the thesis is written in the context of English law by a Common Lawyer there is no discreet body of English or other Law that can be readily identified and labelled as a code or package immediately and comprehensively concerned with OA. The legal

[19] Benjamin (1979),314

landscape against which OA interfaces is a large and complex patchwork of international, regional and national laws and concepts. Consequently the thesis chooses those features from whichever source can be located to best illustrate the enquiry made and answers sought.

To some readers such an approach to a thesis may appear to abandon order for disorder, cohesion for confusion, conceptual rigour for formless chaos. On the contrary the methodology employed reflects an ancient Celtic mentality.[20] This mentality was neither discursive nor systematic. It was open to lyrical speculation. It could see a sublime unity in diverse elements where others saw none. It did not separate what ultimately belonged together. It was not burdened by dualism. It was more dialectical. While this thesis does not argue that such a mentality and methodology is the *only* route to structuring a holistic and multifaceted investigation and assessment, it does maintain that it serves that purpose appropriately.

The methodology of the thesis was also inspired by a remark I came across from a philosopher of science who had directed and examined many postgraduate researchers. When asked for advice by a student about to embark on doctoral research, he said that most such projects seek to establish a conclusion or reach verification that no-one else can successfully challenge or undermine. Everyone attempts that: there is nothing new in it. His advice was to take a different approach. That is to try to discover a methodology and a few questions that no one had previously thought of exploring and using. That he said, would be something truly original and important. I took this as an invitation and

[20] Kearney (1985), 9-10

confirmation to novelty, an inspiration to perceive a given situation in a completely new way.

Finally, the thesis emphasises and re-emphasises the importance of context in all it undertakes and advocates that participants in the debate bear in mind that every proposal and each action has retrospective, lateral and prospective contexts. Failure to appreciate and honour context sensitivity can undoubtedly lead to poorly formulated proposals, legislation and almost inevitable unintended consequences.

Chapter 2:Copyright Justifications, Doctrines, Protection and Open Access

2.1. Introduction

The aim and object of this chapter is to revisit and re-assess a wide representative range of the major established justifications and theories pertaining to copyright doctrines and to evaluate their strengths, cogency not only for copyright itself but in relation to (OA). The chapter considers it essential to address such doctrines and theories at an early stage. It holds that every positive copyright law is premised on some theoretical basis. Consequently, the resilience or lack of theoretical undergirding may thus influence how one seeks to assess the interface with OA.

The chapter will be expansive and wide-ranging in engaging with the subject but by force of doing so, cannot be an exhaustive nor a definitive account nor appraisal of the each of selected theories, doctrines and laws resulting from them.

The chapter will endeavour to answer the following sub Research Questions:

1. Are the theories and doctrines behind and around the established economic and moral rights of the (academic) author warranted and sufficiently robust to justify positive copyright law?

2. What role (if any) are the theories likely to have in the era of OA? In particular the thesis will seek to explore what it considers a novel approach in asking whether any of the

traditional copyright theories can assist our understanding of OA itself or indeed justify OA.

The issues investigated will also be assessed in light of the general quest of this thesis: Are copyright law and related legal concepts beneficial or disadvantageous in the implementation of OA across the Academy.

The chapter unfolds first a vindication of copyright theory. Each selected theory is then described, assessed and benchmarked not only in relation to doctrinal copyright law but also against the concepts of OA.

2.2. Some Parameters and Constant Essentials:

2.2.1. Introduction

This chapter and the thesis assumes that the reader will be familiar with the detailed copyrights embodied in international and national instruments. Consequently those rights and the associated exceptions and limitations are not addressed in this chapter. Nevertheless, some preliminary observations on the nature and importance of copyright are deemed essential to the argument of the chapter.

The significance of this bundle of copyrights has been succinctly put by the European Union judiciary as follows:

> …it affords the creator of inventive and original works the exclusive right to exploit such works, … Copyright is of fundamental importance both for the individual owner of the right and for society generally. To reduce it to a purely economic right to receive royalties dilutes the essence of the right and is, in principle, likely to cause potentially serious and irreparable harm to the rightholder.[1]

Those rights have been historically crucial. Thus, from the late 18th century onwards, creators such as authors were liberated from dependence on patronage and empowered with a direct nexus to mass audiences not previously enjoyed.[2] Further studies have shown that this led to a burgeoning professional creative sector.[3]

Moreover contemporary copyright has been lauded as essential to both author and user. It is asserted, for example, that compared to positive copyright law, private ordering by license or other contractual device cannot properly establish and govern a publishing regime whether academic or otherwise. [4]

2.2.2.Context is everything

This chapter and indeed the thesis as a whole is cognisant of the fact that 'context is everything'. None of these rights or theories exists in solitude. There is always a setting for them and interaction with other factors.

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1 Case T-184/01 R,(CFI) *IMS Health Inc. v Commission* [2001] ECR-II 3193 [125]
2 Goldstein (2003)
3 Merges (2011),198
4 Gordon (1989),1419

For example, copyright in literary works arises and operates in a milieu which has an elemental social significance. As such it has been stressed that the context and methods, management and regulation of copyright works is fundamental to other concepts such as a freedom in a society.[5] Moreover, authors rarely create in splendid isolation. In simple terms, many if not all 'new' works regularly draw from and build upon existing works.[6]

2.2.3.Eternally a double-sided coin

Furthermore, copyright is not one sided. True, rights are given to authors (and their assigns) to control what can be done with their works. However excessive protection is balanced by a series of limitations and exceptions, [7] which have been described as 'a number of built in mechanisms to balance the private and public interests'.[8]

Mindful of these points, we now consider the theories justifications and doctrines behind the black letter law.

2.3.Copyright Justifications and Theories: Why?

A sweep of the range of justificatory theories follows. With each, the cases for and against are presented with reference to primary and secondary sources. Further, with each theory, an attempt will be made to assess the relevance of the particular justification to OA.

Some scholars question the usefulness of such exercises. McGowan for example, has said that such attempts to analyse and describe

[5] Benkler (2006),129
[6] Kreutzer (2011),115-116
[7] Kreutzer (2011),107
[8] Torremans (2008),211 (also see Masiyakurima (2008), 245)

copyright law reveal more about the commentator than elucidating the law.[9] Other commentators are more scathing. Rahmatian, for instance, considers justification theories as 'quixotic… morally reprehensible' and ultimately of no practical use.[10]

Conversely, Fisher applauds such an endeavour. He helpfully states that it can be a 'catalyst' between the numerous parties involved in the formulation of copyright law. His implication is that this is an enriching process and that such 'conversations' as he calls them are better served if those theoretical presumptions are made explicit by the parties concerned.[11] In other words, confronting and engaging with copyright theories and justifications is necessary and unavoidable. This is evident when we start to ask questions such as '*why* should a law exist?'; 'what is the basis of this right?' 'do we need this exemption?' and so on. Also terms used in the debate such as 'fairness, equity and justice' do not spring from nowhere.[12] They all have a range of theoretical backgrounds and when discussants employ such phraseology in relation to copyright they are invoking copyright theory.

Such an undertaking as pursued in this chapter is not a mere academic luxury. Scholars such as Lemley and McGowan acknowledge that copyright embodies a variety of theories and that the particular theory one holds determines how one analyses and assesses basic concepts relating to the scope and extent of copyright.[13] Policies are not neutral. They are formulated and structured by any number of presuppositions and even prejudices whether declared or not. For example a debate on whether OA for publically funded research is warranted purely because the public

[9] McGowan (2004),5
[10] Rahmatian (2011),119 (also see Troscow (2003))
[11] Fisher (2007),198
[12] Yen (1990),520
[13] Lemley (2004),131; McGowan (2004),36

pays for the research behind the article or book will involve a plurality of connotations dependent for instance on the social, economic or political views of the user and audience respectively. These theoretical positions will determine the relevant balance one strikes between the copyright of the author and the greater public interest. This chapter agrees with McGowan that those foundational principles and even preferences and prejudices would be better declared than concealed.[14]

This chapter also advocates that such an approach contributes positively to deliberations on copyright and OA. Contributors should therefore declare as clearly as possible their theoretical basis however inadequately expressed, instead of employing apparently objective phrases that may evade meaning and result in obscurity and confusion rather than clarification and effective engagement in the debate.

Further, such open conversations would better assist analysis and assessment of the theoretical underpinnings of the participants. It should also aid a more constructive understanding of the strengths and weaknesses of each theory and of the legal and practical models that emerge from the theoretical standpoints of the proponents.[15] In so doing we may come to a realisation that no one theory is either predominant or preferable. We do not need to be fundamentalist purists. A modern just and pragmatic solution may thus entail a degree of synthesis of existing concepts.

These issues are important as they relate intimately to the question of motivation. Although commentators such as Gordon[16] observe that the incentive and motivation to create and publish are likely to

[14] McGowan (2004),71-72
[15] Fisher (2007),198-199
[16] Gordon (1982),1602

be clearer when financial reward is a feature, others such as Towse have poignantly highlighted the distinct lack of empirical evidence on the correlation and nexus between copyright protection and the motivation of IP creators.[17] Indeed Benkler has noted diverse motives. These include not only material reward but also psychological, self-gratification and social connectedness drivers.[18]

In progressing to the various theories about copyright selected for this chapter, some format of working classification may be of assistance. Lemley for example, helpfully analyses the justifications into *ex ante* and *ex post* categories. *Ex ante* is where the theory seeks to provide a justification and or motivation *before* the piece of intellectual property, in our case a scholarly literary work, is actually produced. On the other hand, *Ex post* is where theories and justifications in essence are centred not so much in proving and undergirding incentive and motivation to create, but in reality more on how the work can best be managed and controlled *after* it has been created. [19] This chapter will therefore at various junctures, refer to these terms (*ex ante* and *ex post*) utilising these meanings.

Another means of classification is to divide the theories into Natural Law (or Non-Consequential) and Non-Natural Law (or Consequential) theories. The collection of 'Naturalist' justificatory theories are based on a general assertion that copyright is a natural right. They are also known as Deontological theories. That is they are theories arising out of some sense of duty or obligation. This class includes the Just Desert, Labour and Personality variants. They are usually associated with the *droit d'auteur* or European continental legal systems. The 'non-naturalist' category embraces theories such as the Economic and Utilitarian justifications. These

[17] Towse (2010),463
[18] Benkler (2006),6 (also see Lunney (1996))
[19] Lemley (2004),129

are more prominent in the Common Law jurisdictions and particularly the USA. The latter are also known as Teleological theories, as they concentrate on the purpose or end sought for an action and in this case copyright law.

Advocates of the Naturalist theories, claim that these theories are more able to explain copyright law protection when no economic motive or reward is involved. In purely economic terms a denial or removal of protection in such cases would lead to an upsurge in economic welfare through increased free access and use for the public. According to Yen, the fact that this course of action is not pursued is indicative of natural law rights in copyright.[20]

Such advocates also highlight the inherent checks and balances in Naturalistic theories which prevent them from underpinning absolutist copyright regimes. Yen for instance, cites application of the Roman law principles of *res communes* and *ferae naturae* in restraining copyright extension. This restraint is at least twofold: the stricture of what is practically achievable; and the Natural Law's inbuilt tendency to ring fence the Public Domain. [21] Thus rights-holders are not at liberty to dictate the substance and scope of copyright.

From these general remarks we transition to a more detailed consideration of most of the major theories.

2.4.The 'Natural Law' theories

[20] Yen (1990),537
[21] Yen (1990),547,and 557

This section addresses Natural Law/Non-Consequential theories. In particular reference will be made to the Just Desert, Personality and Labour justifications.

2.4.1. Just Desert

This justification could perhaps be re-phrased as the case against unjust enrichment. Its importance in the theoretical discourse may be noted from the fact that it has been referenced and approved in judgments of the UK's highest court.[22]

2.4.1.1 The case for

In brief the justification presents as a simple moral argument. That is, that an unauthorised user of a copyright work should not reap what they have not sown. As such it seems to have been incorporated into the copyright theoretical catalogue as an almost self-evident truth not requiring any further analysis and/or argumentation. Spence for one reminds us that this concept emanates from Christian scriptural imagery and rhetoric and thus has a back story of several millennia.[23]

2.4.1.2. The case against

The theory has been variously criticised.[24] Spence though offers a simple and succinct rebuttal. The principle is not absolute as each new literary work for example builds upon the efforts of those who have gone before. No one is entirely original. To stifle reasonable

[22] ' … No one else may for a season reap what the copyright owner has sown' *Designers Guild Ltd v Russell Williams (Textiles) Ltd per* L. Bingham [2001] FSR,11 [2]
[23] Spence (2002),395-6
[24] Hettinger (1989) 37-38; Dibble (1994)

use of previous works potentially creates a sterile world of self-sufficiency.[25] More importantly, he reminds us that the argument is circular. The assertion that it is wrong 'to reap without sowing' depends on someone else having a stronger claim to what has been taken. Apart from asserting the notion that there ought to be some form of rights for authors the proposition neither explains nor justifies why and how that person should have an exclusive or stronger right in the first place.

2.4.1.3. Relevance to Open Access

Does the justification have any relevance in the era of OA? As a copyright justification it is rather weak. It would appear that this theory falls into Lemley's *ex post* category. That is, one more suited as to how a work may be protected and utilised *after creation*, rather than an incentive to create in the first place. As far as providing an incentive and justifiable copyright protection mechanism in the OA arena is concerned, its impact is even less significant. This is because of an inherent defect. Little or no academic literature is likely to be entirely original in the sense of an *ex nihilo* creation. The theory fails to answer the question as to how one differentiates between the importance of what has preceded the work in question and from which the author has benefitted (and arguably from which they could have unjustly gained) on the one hand, from what that author has added to the existing corpus on the other hand.

Conversely, the Just Desert theory provides a very strong justification for OA. This may be seen to arise from an intrinsic element in the OA rationale. That is, because the public has paid for the research behind the publication the public is therefore entitled

[25] Spence, (2002),396

to OA as a 'just desert.' This is because unlike other products of public expenditure say a very expensive aircraft carrier for the Navy which is tangible and rivalrous, an online academic publication is both intangible and non-rivalrous. In brief, the general public (potentially incalculable in number) and the individual academic author can both enjoy and benefit contemporaneously from the publication without the author losing the enjoyment of the work or parting with it.

2.4.2. Personality

This justification is usually associated with Hegel[26] and Kant.[27] However scholars have traced it to an English poet, Edward Young. As noted by Deene, it was Young who in his *Conjectures on original composition* (1795) embraced the idea of originality as being sourced in the writer's 'own genius'.[28]

2.4.2.1. The case for

The Personality justification claims to provide the essential nexus between an individual and their expression and self-realisation.[29] Copyright protection is thus warranted to secure that nexus when their expressions interact with the external world.[30]

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[26] Hegel (1821/2008)
[27] Kant (1785-98/1996)
[28] Deene (2010),141 referencing Young (1795) in ED Jones (ed) (1975), English Critical Essays, Sixteenth, Seventeenth and Eighteenth Centuries (London OUP) 'His works will stand distinguished; his sole property of them; which property alone can confer the noble title of an author; that is one who (to speak accurately) thinks and composes; while other invaders of the press, how voluminous and learned soever, (with due respect be it spoken) only read and write'
[29] Hughes (1988),330
[30] Radin (1982),957

This section will select and concentrate on the ideas of Kant and their significance and impact on OA. This is because concepts such as 'autonomy', 'control', 'impact', 'waiver', 'individualism',' collective/societal rights' all of which are relevant to the OA deliberations are embedded in the Kantian debate. Moreover, Kant has attracted support from across the spectrum of intellectual property lawyers ranging from the proprietarian school through to the free access advocates and even embracing those of a sceptical disposition. Scholars reflecting these positions to which reference will be made in this section include Robert Merges, Anne Barron, Kim Treiger-Bar-Am and Andreas Rahmatian.

Conversely Hegel's theory will not be addressed. In short Hegel is too conceptual and vague. His ideas do not easily metamorphose into concrete copyright terms. [31] For example, it is almost impossible to extrapolate from Hegel any meaningful guidance as to what a third party can do with a copyright work.[32]

2.4.2.1.1. The Kantian 'personality' theories

At its core Kant's theory of copyright/author's rights has an immediate attraction to copyright justification and policies. *Inter alia* it is formulated in clearer legal terms than with say Hegel.[33] Given this, lawyers are more likely to be able to grabble with and adjust the theory to the constant challenges facing copyright, not least digitalisation and the realm of OA. Yet Kant's greater legal precision is deemed to have an inbuilt brake against it being employed as a broad general philosophy for *merely any* purpose.[34]

[31] Rahmatian (2011),84 referencing Hegel (1821/2008), [68-69]
[32] *ibid*
[33] Rahmatian (2011),86-87
[34] Rahmatian (2011),120-121

All that said, Kant's ideas on the creative process have been described as 'complex'.[35] But in simple terms the individual person in Kant's scheme is central and has a primal need to project the self onto external objects. From texts such as his *Critique of Judgment* [36] it can be seen that the crux for Kant is this movement and assertion out from the individual onto the external world. While this desire can entail taking physical possession of an object, Kant envisages a wider type of possession which is vital to human freedom and which could be said to be pertinent to intangible property. 'That is rightfully mine' he writes, 'if I am so bound to it that anyone who uses it without my consent thereby injures me'.[37]

2.4.2.1.2. Merges and Kant

For Merges, Kant's concept of personal autonomy is pivotal to his copyright foundation. This is the means by which one stamps one's unique stamp on a something external. It also embodies a clear demarcation between the interests of the creator and those of third parties.[38]

Thus fairness, justice and balance resonate in Kant. On the one hand the centrality of the individual creator for Kant cannot be underestimated. This is especially pertinent to the digital age and mass online publication. While the digital age is exciting, nevertheless for Merges (drawing on Kant), the people behind the material so published must never be neglected. The content has to be created and those creators deserve rights, recognition and protection. Individual property (also read IPRs) claims must be respected. Yet at the same time, those individuals' rights are valid

35 Merges (2011),17
36 [49]
37 Kant, *Doctrine of Right* (DOR),6.245
38 Merges (2011),17

only if 'the freedom of the will of each…coexist[s] together with the freedom of everyone in accordance with a universal law'.[39] In other words the consequences and impact of those rights on other individuals and society as a whole must be considered.

Even though Kant is more concrete and legalistic than Hegel, Merges rightly points out that Kant is still stronger on concepts and ideas than in offering detailed real life examples and applications.[40]This though as Merges views it, is an inbuilt advantage with Kant's scheme. The degree of generality means that those concepts are open to adoption, adaptation and application in the changing and developing arena of intellectual property related matters, including OA. Taking a broad and fresh look at Kant as Merges does, Kant's philosophy in *Doctrine of Right* is not trammelled by the concentration on tangible things. Nor should there be a particular difficulty over his apparent ambivalence in his 1789 essay on the necessity or not for copyright laws. As Merges notes, that Essay was produced at a time when not every country had copyright laws. Thus Kant was in effect saying: concentrate on the heart of the matter -whatever adversely affects the author's property in his thought expression is wrong.[41]

The challenge Merges poses to us is to use these broad concepts in our own time. Pertinent to this is the fact that Kant's theory is not absolutist. The work is created and legal protection is granted as 'the product of an idealized set of social conventions.'[42] This again illustrates the double sided nature of the right and the reality that context is everything.

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39 Kant, *Metaphysical Elements of Justice*, Intro C
40 Merges (2011),73
41 Merges (2011),78,referencing Kant
42 Merges (2011),96

The possibility of waiving one's property rights is also central to Kant. This again, is an aspect of that individual creator's autonomy. This aspect of Kant is clearly seen in *The Categorical Imperative* and *Universal Principle of Right*. For Merges, this Kantian concept brings about a marriage of proprietorial individualism and the check of what he calls 'a sort of "community conscience"'.[43] This marriage permeates the entire Kantian copyright justification. It is neither peripheral nor supplemental but is integral to Kant's copyright personality theory. For Merges' Kant, this concept of waiver is crucial to the double sided nature of copyright: protection and access.[44] For this reason Merges lauds the principle of the Creative Commons license suite as providing the author with a range of waiver options from which to choose in online publishing of their work.[45]. Drawing on autonomy embracing freedom, Kant through the eyes of Merges means intellectual property rights ought to be rights recognised by law but that waiver must be voluntary. It cannot be imposed on authors.[46]But as the waiver principle is still fundamental it should be made easier.

In short, Kant's theory is proposed as evidencing that although the individual creator is important, the literary work, for example and its protection must take account of the needs of others.

2.4.2.1.2. Barron and Kant

[43] Merges (2011), 90
[44] Merges (2011),115
[45] Merges (2011), 86
[46] Merges (2011),87

Anne Barron links Kant to the sharing culture (such as OA).[47] For her, this nexus flows from Kant's '*1785 Essay*'[48] and '*What is a book'* (in Part I of *The Metaphysics of Morals*).[49]

Contrary to Merges, Barron's Kant advocates speech rights for authors, not property rights.[50] Thus while a book *can* be property, more importantly it is essentially a conduit for the author's speech. It is this crucial action of so speaking which is inextricably linked to the person of the author.[51] Consequently, issuing a literary work without the author's consent is wrong for Kant because it forces the author to speak against their will and so violates those speech rights.[52]

For Barron, Kant's authors' speech rights arise out of personal agency not autonomy (as per Merges). She admits that attempting to unravel this is complicated and that the concepts are closely related.[53]However as the analysis is unlikely to affect the practical outcome it is not discussed further in this chapter.

As with Merges, she highlights the equilibrium to be found in Kant between the interests of the author (in the *Categorical Imperative*)

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47 Barron (2012)
48 *'On the Wrongfulness of unauthorised publication of books'*, Kant, I. (1785-98/1996), [8.79-87]
49 Barron (2012),5 and Kant,I. (1785-98/1996),[6.203-493]
50 Barron (2012),7ff (in essence she argues that Merges has conflated 'conceptions and forms of freedom that for Kant were quite distinct , albeit closely related- agency and autonomy; moral autonomy and intellectual autonomy; expressive freedom and communicative freedom; individual liberty and collective emancipation…a full appreciation of the significance for copyright law of the 1785 Essay requires that these distinctions be kept firmly in mind, which in turn requires that the Essay be read in relation to Kant's philosophical project as a whole, but in particular his vindication of 'the freedom to make public use of one's reason in all matters' referencing Kant (1785-98/1996) '*An Answer to the Question: "What is Enlightenment?* [8.35-42 at 8.36] (her stance is admitted to be influenced by Onora O'Neill's 'Constructions of Reason: Explorations of Kant's Practical Philosophy', (Harvard Univ. Press Cambridge MASS, 1989))
51 Barron (2012),6
52 Barron (2012),6 referencing Kant (1785-98/1996) *1785 Essay* fn.[8.87)]
53 Barron (2012),39

and those of third parties (in the *Universal Principle of Right*).[54] However, whereas Merges emphasises the protection of the individual property rights, Barron accentuates the limits of authors' rights. For her the litmus test is whether any individual's assertion of a right impinges on another's agency. [55] Thus an action is wrong when it either usurps or prevents exercise of another's agency. This is why she views Kant as militating against highly restrictive copyright laws that impede social progress and also the liberal economic view of marketable IPRs as facilitating a free culture.[56]

Barron's Kantian interpretation is also highly relevant as a theoretical and practical contribution to the OA debate. This is because, for Kant, communicating one's ideas to the public is central to the use of reason. As such this would encompass the production, publishing and distributions of one's work, so that the reading public might hear the writer speak. Barron's Kant would therefore have been supportive of a properly legally structured and regulated publishing industry as an intermediary for the author to communicate to the wider public for the benefit of both author and society.[57] Within such a structure, the publisher would receive a commercially essential exclusive but alienable mandate via consensual contract, from the author to convey the author's ideas to the public.[58]

Barron also reminds us that Kant has an additional useful contribution to the question of derivative works. For Kant a work can be so abridged or altered that it no longer maintains the nexus with the author. The derivative work becomes a new work in its own

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[54] *The Metaphysics of Morals*) (Kant (1785-98/1996),[6:230-231]
[55] Barron (2012)14,fn. 41
[56] Barron (2012),40-41 referencing *1785 Essay*
[57] Barron (2012),34 referencing Kant (1785-98/1996),*1785 Essay* [8:81]
[58] Kant (1785-98/1996),*The Metaphysics of Morals*) [6:285-289,] and *1785 Essay* [8:81]

right and not an unauthorised publication of the original.[59] It is the stance of this chapter that this Kantian concept is relevant and applicable to online OA publishing licences such as the Creative Commons CC-BY licence.[60] Such a licence appears to embraces the Kantian waiver promoted by Merges above but would allow the maker of the work derived from the licensed and published academic work to legally have control of their own work as distinct from the original, subject to honouring the requisite attributions and thus preserving the personality nexus with the original licenced work.

Ultimately, Barron admits that whatever foundations Kant may provide for some system of authors' rights, that those texts should not be treated literally. For her (as with Merges) we should be inspired by Kant's concepts and apply them to our contemporary world, updating and reinterpreting them.[61] Her preferred modern approach would be to read Kant in the light of Habermas (and similar critics of what she calls 'information capitalism') [62] and vice versa. This undertaking, would she believes, energise the role of author's rights (because authors are still deserving of 'rights') as opposed to copyright law as it has developed since 1709.[63] She sees this as an integral part of the Kantian principle of 'the continued advance of Enlightenment… a 'cosmopolitan' society of free communicative interactions.'[64] Her Kantian model would be more favourable to OA policies as she would see it removing all impediments including copyright laws if necessary in order to facilitate maximum access to publications.[65]

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[59] Kant (1785-98/1996),*1785 Essay* [8.86]
[60] Where all the economic rights are waived by the author for use of the licensed work, the only restrictions placed on the user being to honour the author's moral rights and specifically to explicitly attribute the authorship of the licensed work now being used by the licensee.
[61] Barron (2012),43-44
[62] Barron (2012),43
[63] Barron (2012),43
[64] Barron (2012),45
[65] Barron (2012),45

2.4.2.1.3. Treiger Bar-Am and Kant

Treiger Bar-Am posits that Kant underpins the Anglo-American copyright system rather than Civil Law personality systems as usually asserted. Like Barron she sees Kant supporting an expression right rather than the traditional understanding of Kant's association with personality. Her interpretation seeks to avoid the difficulties inherent in defining 'personality'. For Treiger Bar-Am the author, need only express their thoughts but not necessarily some profound aspect of their inner selves in a publication.[66]

Additionally, like Barron, Treiger Bar-Am declares that treating personality rights as property is ill fitted to Kant' s theoretical framework. The author's right is more of a personal nature than a property right.[67] Like Barron she sees the author's rights tied up in say a book as '… rights involved in the discourse.'[68] However unlike Barron but similar to Merges, Treiger Bar-Am focuses on the author's autonomy: the right to protect and control if, where, when and how their expression should be communicated.[69] She sees this Kantian concept at the heart of Common Law copyright system.[70]

Concurring with Merges and Barron, Treiger Bar-Am reiterates the double edged features of autonomy. This is the respect due to the autonomous agent who creates such as the scholarly author but also that author's duty to respect others, including the

[66] Treiger-Bar-Am (2008), 1066-1067 quoting Paul Edward Geller (Kant "observed that authors expressed their own thoughts, not necessarily personalities in their discourse"').
[67] Kant (1785-98/1996),*1785 Essay* 8:86;8 & *What is a book* 6:289-901)
[68] Treiger-Bar-Am (2008),1074
[69] Treiger-Bar-Am (2008),1075
[70] Treiger-Bar-Am (2008),1092

transformative author. As with Merges and Barron, she sees this duty at the core and not the periphery of Kant's theory.[71]

She also concurs with Barron's view on Kantian support for derivative works.[72]

2.4.2.2. The case against

While the Personality theory/justification has an immediate intuitive appeal the theory encounters various objections and obstacles. Critics may raise the question as to how to define 'Personality'. For example: how wide or narrow should the concept be?; what counts as 'personality'?;how does one differentiate between 'reputation' and 'personality'? What criteria can be relied upon in assessing personality? There is also what has been termed the 'categorical conundrum'.[73] That is that certain works (literary and musical for instance) are more likely to have a personality nexus than say computer programs.

In illustration, Fisher[74] and Waldron[75] identify a range of at least ten possible candidates for 'personality' protection. These encompass amongst others: peace of mind; self-reliance; self-realisation as an individual and social being; citizenship; privacy; and identity. Fisher concludes that none is persuasive in the personality-copyright nexus. Instead some sort of synthesis of them is more likely to be of practical assistance in formulating policy and legislation.[76] Even

[71] Treiger-Bar-Am (2008), 1101 & 1099-1100 referencing Kant, (1785-98/1996), *Groundwork of the Metaphysics of Morals*. [4:439];.
[72] Treiger-Bar-Am (2008,1080 referencing Kant *Critique of Judgment* [5:318 & 5:309]
[73] Hughes (1988),339
[74] Fisher (2007),189
[75] Waldron (1988),
[76] Fisher (2007),190

so, Fisher views Personality theory as still lacking sufficient robustness to enable it to address specific queries.[77] He thus proffers the need for further investigation of matters such as the psychological significance of creativity and how 'personhood' is assessed in different cultures and époques. [78]

Fisher also concludes that Radin's[79] 'problem of fetishism 'remains unaddressed. [80] This flows from Radin's ideas on personality and property which are based on an idea of pain. Thus if a person experiences pain at the loss of an object which cannot be assuaged by simple replacement of the object she concludes that there is a personhood-object nexus.[81] Conversely, if the object can be substituted by another object of equal value, it is not bound up with personhood.[82] Whilst superficially appealing such an analysis and prescription is largely subjective and its impractibility becomes clear when one attempts to translate it into any form of cogent and universally applicable policy let alone legislation. Similar difficuties are encountered when she develops these ideas into 'fetishism'. In brief this is her assessment that some attachments to personal property are healthy and others are not. She recognises the need to establish objective criteria to facilitate the distinction.Her concept is ,'what is healthy'. Unfortuately her criteria are rather simplistic. She asserts that recognising a fetish is just like recognising a sick person as opposed to a healthy one.[83] She then attempts to translate this to the property sphere by denying personal property claims where ,'there is an objective moral consensus that to be bound up with that category of "thing" is inconsistent with personhood or healthy self-constitution.'[84] But in the real world not all sickness is evident

[77] Fisher (2007),192
[78] Fisher (2007),192
[79] Radin (1982),970
[80] Fisher (2007),192
[81] Radin (1982),959
[82] Radin (1982),959-960
[83] Radin (1982),969
[84] Radin (1982),969

and easily discernible. Nor are such purported ,objective moral consensuses easy to establish and identify.

However, Merges offers a simple but resilient riposte to such criticisms. In short, we do not need to equate 'personality' with the '…author's "innermost selves".[85]He simply reminds us that a person's individuality or personality is multifaceted. It would perhaps be best to accept that the basic choice made by an author as to what to write or not write, and how, when and where they present their work is as much a part of their personality as some profound outpouring of their most treasured thoughts.[86]

2.4.2.3. Relevance to Open Access

The Personality justification brings to the debate a need to recognise and protect a strong nexus between an author and the author's work. This is especially so with Kant's ideas. Kant's theoretical propositions are not only fruitful for justifying copyright but also interaction of copyright with OA. Advocacy of (versions) of Kant by scholars from diverse viewpoints reinforces this. It is asserted that Kant has a sufficiently formulated core which is amenable to flexible and adaptable application in constantly changing and challenging milieu.

Kant's concentration on personal obligations rather than rights against the world is particularly relevant. This is why the theory can resonate with the modern concept of copyright licensing. While literally transposing Kant into today's IP world may be difficult, the scholars cited all see benefit in being 'inspired' by Kant and thus

[85] Merges (2011),358 n.52
[86] Merges (2011),358 n.52

refining, re-working and adjusting it to the contemporary copyright world.

Building on this conceptual link Rahmatian, for instance, sees an application to viral licences [87] If so interpreted, this would be pertinent for example to the 'Share Alike' (SA) licences in the Creative Commons (CC) suite. In such cases, the user is able to access and use the copyrighted material subject to an obligation to honour and also to impose the terms of the original licence on subsequent users for the later access and use of the second work in which the subsequent users incorporate the first publication. However, the CC license suites (and similar licenses) have as yet been the subject of scant judicial attention and guidance. One court in the Netherlands held that defendants who used photographs from the internet subject to a CC license were obliged to honour those terms.[88] But, the case was not one of a chain of succeeding SA licences. Consequently, a degree of uncertainty hangs over such licensing suites in the OA époque. But yet again Kant's foundation ideas could be of assistance. This is because of his waiver principle, championed by Merges which as seen earlier, he recommends should be incorporated into copyright law.[89] Alternatively, as Rahmatian reminds us, a Kantian inspired regime of author's rights would recognise non-contractual liability even in the absence of effectively enforceable licences. Thus, Kant would see someone who has failed to keep the terms of a licence as 'an unauthorised intermeddler'.[90] Tortious liability could lie in both Common Law and Civil Law jurisdictions. At Common Law this could be either as an unauthorised agent, or in interfering in bad faith with the affairs of another. In the Civil Law world the tortfeasor's actions could be 'a

[87] Rahmatian (2011),90 [the term 'viral licence' is credited to Radin (2000) to describe a licence or contract that restricts the rights of subsequent users of the work.
[88] *Adam Curry v Audax Publishing B V* Case 334492/KG 06-176 SR (District Court of Amsterdam) [2006] ECDR 22
[89] Merges (2011),228-230
[90] Rahmatian (2011),115

false '*negotiorum gestio'* (that is, the intervenor knows that he is not entitled to manage another' affairs)'.[91]

Crucially to OA, Kant's personal obligations are always in a relational context, specifically, the rights of others. This is sufficiently conceptual to embrace the public as a legitimate stakeholder.[92] In the debates in and around OA such stakeholders are major players and Kant's inspired personality theories are capable of adjustment to accommodate these apparently competing interests.

In brief, protection of the authorial nexus with the work, author control to freely waive rights, recognition of the public as a stakeholder, and maintenance of the integrity of the original work all flow from a Kantian personality basis and provide a relatively strong case for copyright but also a very important element in attempting to achieve a holistic theoretical underpinning for OA.

From consideration of the Personality theories and justifications we now move to another major 'Natural Law' based theory, that of intellectual labour.

2.4.3. Labour

This justification is most commonly associated with John Locke.[93] Strictly speaking Locke did not propose a theory of copyright but merely tangible property. However, his justification has long been adopted by scholars and a foundation for IPRs.

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91 Rahmatian (2011),115
92 Rahmatian (2011),90
93 Locke (1690/1988), Ch.5 [25-33]

In essence that case posits that every individual has a property right in their intellectual labour. Thus when a person mixes their intellectual labour with something they have taken from the existing 'Commons' of works and ideas, that person has a natural right to claim the resultant work as their own exclusive property.

Attas neatly summarises the theory. It is essentially threefold. The first limb is an explanation and justification for the right to individual ownership of something. The second limb is what he calls 'a positive method of private appropriation' analysing how exclusive private appropriation of something formerly commonly held can be validated. The third limb is labelled by Attas 'a negative requirement': that is the interests of other people are not to be harmed by any private appropriation.[94]

2.4.3.1.The case for

One of the clearest and most passionately argued propositions that Locke's

theory justifies copyright is supplied by Merges.[95] This argument is summarised in the immediately following paragraphs.

First, this taking something from the common/state of nature accords well with how intellectual goods are produced. Authors, for example, invariably draw upon information and ideas (the pre-existing Commons) in producing new works. Moreover, the production of such works eventually replenishes and expands the

[94] Attas (2008),29
[95] Merges (2011),32ff

Commons providing future authors with a wealth of material to draw upon. Hughes and Lametti likewise reiterate how this constantly renewed sphere benefits the whole of society.[96] In Merges' view there is thus a symmetry between Locke's 'Commons' and what today in the IP world is labelled the 'Public Domain' .However, for Merges, Locke also offers a healthier and more balanced view of the Public Domain than many modern exponents. Locke in his view never overlooks the contribution of the individual author and the importance of individual ownership of the work produced by that individual.[97]

Secondly, the question of 'labour' is pivotal to Locke's justification of tangible and intangible property. Copyright is not obtained merely by taking from the Commons. Something has to be applied to that common material to make if different from the common and to create an original work. [98]

Merges also finds a third inspiration in Locke for copyright vindication. He reminds us that Locke described his own intellectual work as 'labour'. As such he asserts that Locke classified the labour involved in research and writing as appropriate 'labour' to justify a property right.[99]

Additionally, Merges highlights that over focusing on the ease and speed of new sharing technologies can lead to a skewered analysis and imbalanced solutions.

[96] Hughes (1988), Lametti (2013)
[97] Merges (2011),35-36
[98] Merges (2011),33
[99] Merges (2011),33

New technology is important. But so is *what* is created to be exchanged; *how* it is created and *why* it is incentivised.[100] Merges emphasises that we must never forget or ignore how much work was necessary to create the authorial work in the first place.[101]

It is against this tableau that Merges sees in Locke, an answer to the 'non-rivalrous' objection. That is that the use by persons B, C and D of an intangible piece of property such as a copyrighted work does not detract from its enjoyment by the creator A. Merges reminds us that while copying by B, C and D may not interfere with A's use and enjoyment of the work, the former can still harm the author for example by depriving them of license fees or other revenue or reward or even of basic controls over how their work is used. For Locke, anything B C or D do, to interfere with the ability of A to flourish (materially or otherwise) by use of the work is wrong.

Locke's justification is not absolutist. It is tempered by his provisos. The first is the 'sufficiency' constraint.[102] This means that appropriation by an individual from the Commons is justified only if that appropriation leaves 'enough, and as good' for others. It is submitted that this proviso, often overlooked and/or underplayed by critics, is easily satisfied in the world of IP. In other words when an author has drawn from the Commons and added his/her labour creating a new copyrightable work, the intellectual Commons is not depleted. The *ideas* utilised by the author still remain in the Commons for others to develop as the basis of their own work. Thus, the proviso has been described as 'an equal opportunity

[100] Merges (2011),37
[101] Merges (2011),37-38
[102] Locke (1690/1988), *Second Treatise,* Ch 5 [27] and following.

provision'.[103] Theoretically, anyone can access what remains in the Commons out of which they can create their own work.

The second proviso is the injunction against spoilage or waste.[104] Consequently, the appropriator cannot be allowed to have an individual property right merely to hoard it. Once more it is asserted that the proviso presents little difficulty in relation to copyrighted works. To run afoul of the proviso the author, after the work has been created and recorded so as to obtain copyright, would have to decide never to publish that work. But once it has been published, even if that is merely one copy and whether gratuitously or at a price, the proviso is met. Moreover, the possibility that a work may not immediately be published and distributed does not offend the injunction. It may after-all be made available at a later date in its original or developed format. Locke's theory accommodates this possibility thus protecting the author but in the knowledge that the Damoclean sword of the proviso is omnipresent. The proviso also has a role as a bench mark against which to check the efficacy and balance of copyright laws. That is if the protection given is over-expansive, say in curtailing the use of an authorial work, so that subsequent authors are discouraged from developing the ideas in the work it could be said that waste is occurring and that the Lockean proviso would dictate a change in the legal protection granted. Specifically, in the world of academic publication, both the scholarly author and any third party publisher are more likely than not to seek to publish their scholarly work at the earliest opportunity rather than secrete it indefinitely. In such cases the proviso will invariably be complied with.

[103] Hughes (1988),297-298
[104] Locke (1690/1988), *Second Treatise,* Ch. 5 [31]

The third proviso is that of Charity.[105] While admitting that the concept may defy exact definition, Merges makes it clear, that nevertheless, it is an inbuilt restraint on property rights.[106] In the copyright sphere he sees it operating in a quasi-parallel function to Kant's waiver: recognition of a right-holder's wider social responsibility. Thus in practical terms a copyright holder may allow liberal use of a protected work to promote culture and education in poor countries and at the same time maintain and rigorously enforce their rights in more developed countries.[107]

It could also be said that the Lockean justification is superior to Consequential theories. Unlike those theories it does not make predictions that may not be true. In fact it makes no predictions at all.[108] This may lead to the theory being accused of lacking boundaries for example as to exactly which of the author's rights discussed in our introduction justify protection and for how long. But, as McGowan goes on to state this is not fatal because in reality empirical knowledge of projected effects of any theory are invariably scant.[109]

2.4.3.2. The case against

Objections exist against this Lockean theory. These largely centre on the nature and extent of 'labour' necessary to justify the right; identifying 'the intellectual commons' and differentiating the author's contribution from the myriad influences impacting the creation of a work. Additionally, it has been argued that the theory's reasoning is circular. In other words if the 'property' in the pre-existing 'Commons' has to be 'cultivated' 'to create an entitlement

105 Locke (1690/1988), *First Treatise,* Ch. 4 [42]
106 Merges (2011),66-67
107 Merges (2011),65
108 McGowan (2004),68
109 McGowan (2004),68

to it, that presupposes that it be first taken into possession to exclude others and make cultivation possible. Such critics see the theory as a right arising out of 'occupancy' or 'possession' hiding behind the declared one of 'mixing one's intellectual labour'. [110] It has also been pointed out that unlike Locke's physical Commons IP does not exist in a natural state-it is created by humans.[111]

These criticisms will now be considered in a little more detail.

On what constitutes labour, Fisher identifies at least four conceptual possibilities (not all of which of course would translate to legal reality, for example in meeting the EU 'intellectual creation' threshold[112]). These are '(1) time and effort (hours spent in front of the computer or in the lab); (2) activity in which one would rather not engage (hours spent in the studio when one would rather be sailing); (3) activity that results in social benefits (work on socially valuable inventions); and (4) creative activity (the production of new ideas).'[113] There is no consensus in the scholarship as to which of these variants fulfils the claim. Fisher himself states that the first may be what Locke had in mind. Hughes however favours the second and third,[114]while Becker supports the fourth as the strongest candidate.[115]Consequently, Fisher concedes that none of the possibilities is an obvious choice.[116] Thus if no agreement can be achieved on the clarification of this concept of 'labour' any subsequent use of the concept to establish the nature and extent of rights is impeded.

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[110] Rahmatian (2011),73 referencing Hume and Kant
[111] Elkin-Koren/Salzberger (2013),121
[112] Such as in Article 1 (3) Software Directive 1991; Article 6 Term Directive 1993;Article 3(1) Database Directive 1996
[113] Fisher (2007),185
[114] Hughes,(1988)
[115] Becker (1993)
[116] Fisher (2007),185

Fisher also attempts to clarify 'the Intellectual Commons'. He identifies several candidates including: (1) facts, (2) languages, (3) our cultural heritage (4) existing but ownerless ideas either understood by someone or readily accessible to the public, and (5) ideas that are yet to be manifested.[117]

As with what constitutes 'labour', the choice of any of the above (or other possible) occupants of the role of 'Intellectual Commons' will affect how one understands and attempts to apply Locke in legislative and/or policy terms. Fisher thus sounds another despairing conclusion: no one knows what the intellectual commons is![118] Unsurprisingly he sees the task of making Locke fit for the modern IP world as 'daunting'.[119]

Attas emphasises two important challenges to the theory's application to copyright.[120] First there is the retrospective problem of 'origination'. That is differentiating the contributions already in the Commons as against the claim of the author who has drawn from the Commons, added labour and created a 'new' work. His critique is that the theory assumes that the originator of all works can be easily identified. Yet given that authorial works for example are produced within a social milieu which gives them input, nourishment and recognition the question is raised as to how one identifies with any certainty the originator of each part that constitutes the whole. He thus concludes that pure *ex ante* Natural Law reasoning cannot answer that question. Thus in attempting to respond, the answers resonate more as Consequential rather than based purely on Natural Law.[121] The second problem is prospective: 'individuation'. That is, how does the theory help us to identify what

[117] Fisher (2007),186
[118] Fisher (2007),187
[119] Fisher (2007),187-188
[120] Attas (2008),
[121] Attas (2008),53-54

later works will be considered as stemming from the present one and thus captured within its ambit of ownership. Once more Locke's Natural Law reasoning cannot establish clear boundaries to establish this on an *ex ante* basis. Consequential reasoning again has to come to the rescue effectively forsaking a natural law basis for the argument.[122]

2.4.3.3. Relevance to Open Access

It is self-evident that an authorial work has to be produced in order for it to be made available in an OA format. It is submitted that the Lockean scheme still has a role to play in this environment. It is not and does not purport to be perfect. But even in the OA world the theory provides an acceptable incentive framework of sorts. It retains the essence that some effort (which may for convenience be termed Labour or Intellectual creation) is necessary to obtain copyright protection. Something has to be added to what previously existed. If the correct 'labour' is applied then legal protection is justified. It thus recognises that research and thought and writing are worthy of recognition and protection. Whether that legal protection unambiguously or consciously motivates and incentivises the academic author is entirely another matter. The fact that the legal protection supported by Locke's theory is there means that it can be invoked or ignored at the behest of the scholarly author. Non reliance by scholarly authors on Lockean copyright does not invalidate the theoretical justification for the right. It is further submitted that Locke's 'enough and as good' and 'charity' provisos are also pertinent to copyright today in the era of OA. As has been seen, the 'enough and as good' proviso is cognisant of and supportive of the need for a healthy and flourishing 'Public Domain'.

[122] Attas (2008),53-54

Even where they draw on existing copyright-free material for new copyright protected scholarly works, the Lockean principle ensures that these do not diminish the Public Domain. In fact such works when they are made available in OA format are playing a vital role in replenishing the Public Domain. Whether they are offered retaining all, some or no copyright protection, they are bound to interact with the existing copyright free domain material and provide further inspiration for new works. Moreover, given copyright's limited duration, all such works will eventually fall into the copyright free domain. So the Public Domain is not depleted even if an author asserts full available copyright protection. It is also submitted that the 'charity' proviso is consistent with and conducive to an OA regime provided that this is at the behest of the scholarly author and is not the result of some imposition. The essence of 'Charity' after-all defies the notion that it can be legislated for or compelled by policy dictates.

Locke is also a counterbalance to obsession with technology-led policies and this is relevant to OA. Digitalisation and the internet may theoretically greatly enhance scholarly publications being made available to all. However residual concerns remain as to how accessible such material is in reality. Accessibility is ultimately dictated by the accuracy and the degree of user-interface friendliness of search engines. In short the publication may be on the web but it does not follow that it can be readily located and searched. The overconcentration on the purported ease of access and a technologically driven or undergirded policy may in reality abdicate control of the process away from the author to those who have control of the search engines.

As has been seen when the theory is disassembled, dissected and its parts analysed, defects and shortcomings are evident. The theory of course is not devoid of its problems and critics. But there

could be a credible argument to say that rather than literal interpretations and criticisms of a 17th century text, the modern world and the OA regime could look to the spirit and essence of Locke and seek to apply those principles in a contemporary fashion. Nevertheless, however appealing (intuitively, philosophically or practically), there is a realisation that Locke's theory is incomplete and needs to be supplemented with elements from other justifications.[123]

After the above review and analysis this chapter would conclude that the Labour theory is still a strong foundational justification for copyright. However in its relevance to the Public Domain and the important provisos to the theory should assist in explaining the concept of OA but at a secondary rather than primary level.

Having attempted to describe, analyse and assess the major 'Natural'/Non-Consequential theories and justifications and their relevance to OA we now continue the same exercise with their Consequential counterparts. The latter are also known as Teleological theories, as they concentrate on the purpose or end sought for an action and in this case copyright law.

[123] Hughes (1988),329

2.5.The Non-Natural Law Theories

2.5.1. Utilitarian

The Utilitarian justification is most commonly associated with Bentham, Stuart Mill and their disciples. Specifically it has been labelled 'welfare consequentialism'. That is it is a system that undertakes an ethical look and analysis of a rule, system or action and assesses its consequences using 'welfare' as a yardstick. According to McGowan this term 'welfare' is a kind of short hand for individual preferences.[124] Utilitarianism therefore justifies laws that are socially useful with a view to providing the greatest happiness/benefit to the greatest number in society.[125]

2.5.1.1. The case for

Utilitarianism justifies copyright on an incentive basis. Theoretically absence of protection is a disincentive. Thus without protection authors hesitate to be first movers. Many could simply await someone else risking publication and then freely copy, distribute and create their own derivative works. Consequently, society loses out by the paucity of works produced. Utilitarianism seeks to avoid this socially harmful disaster by granting legal protection to an author in the form of Copyright.[126] This grant is with a view to benefitting creator and user and to ensure that works continue to be created and made available.[127]

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[124] McGowan (2004),8
[125] Afori (2004),502
[126] Hettinger (1989),47-48; Guibault (2002),10
[127] Guibault (2002),11

2.5.1.2. The case against

Utilitarianism encompasses difficulties in general and specifically as a copyright justification. Firstly, it is not monolithic. McGowan identifies at least four variants. The first is 'Act Utilitarianism', focusing on the utility of an action.[128] The second is 'Rule Utilitarianism'. That is whether the particular rule inherently is likely to maximise utility.[129] The third type is Bentham's 'Hedonic Utilitarianism'. This is where 'happiness' is maximised.[130] This raises the related question as to how to convert this concept into concrete and measurable terms. This is usually 'wealth maximisation' or the 'Kaldor-Hicks' criterion.[131] The former states that legislators should fashion laws which maximise a consumer's willingness and ability to pay. The latter is the preference for State of Affairs A over State of Affairs B and so on but requires the gainer in such choices to 'compensate' (which in itself invites a host of sub-questions: what; how; for how long etc.) the loser so that no one is worse off even though someone gains. Further uncertainty arises because these different approaches will yield different outcomes in practice. The fourth variant is Stuart Mill's 'Ideal Utilitarianism' where relatively more "desirable" forms of happiness are prioritised.[132]

So at the outset, the particular form of Utilitarianism needs to be identified before attempting to analyse Utilitarianism's relevance to copyright justification and then OA. That is because each form could be different in analysis, perception and result. That said, McGowan concludes that as copyright is essentially the protection of expression, Utilitarianism fits awkwardly with its focus on welfare.[133]

[128] McGowan (2004),9
[129] McGowan (2004),9
[130] McGowan (2004),10
[131] Fisher (2007), 177
[132] McGowan (2004),10
[133] McGowan (2004),11

Utilitarianism of whatever of the above variants thus appears problematic in explaining and justifying copyright. Within its own terms it would provide protection to the extent and for as long only as it takes to recover the economic outlay in producing the work. In simple terms once the restricted protection granted has sufficiently motivated an author to produce and recoup their outlay, the greater good/utility/welfare demands that that protection be removed and the work falls into the public domain. However the practical application of such a theory becomes almost impossible to implement. There is not for example a standard and universal methodology even within any one national jurisdiction which can accurately or even remotely calculate the costs of producing the infinitive variety of scholarly authored works let alone all other literary (and of course other 'non-literary' works) that could claim protection under any known extant copyright regime.

Moreover, despite research by bodies such as the Society for Economic Research on Copyright Issues (SERCI) there is still a lack of consensus to support the thesis that the existence of legal copyright protection affects the incentives for authors to produce. For instance, Fisher doubts the reliability of existing data to properly assess the theory and consequently finds scant assistance in the theory's interaction with copyright.[134] Utilitarianism states that without copyright protection works would not be produced yet many authors produce written works regardless of the existence of legal protection or financial incentive motivated by other factors such as esteem, academic reputation and the pure love of creating.[135]

[134] Fisher (2007),181
[135] Fisher (2007),180, also see Martin (1998), Moglen (2002),Tushnet (2009), and Zimmerman (2011)

Further, Utilitarianism cannot adequately explain nor cope with an author's right of First Publication and indeed would if the theory was consistently applied, conflict with that copyright doctrine. In other words if an author creates a work and refuses to publish it and yet the 'greater good' of society would be served by publication the Utilitarian would require that publication should be mandated irrespective of the rights of the author. The theory and its variants and developments have little or nothing of practical help in explaining, balancing and resolving this tension.

2.5.1.3. Relevance to Open Access

All this said Utilitarianism is pertinent to OA. Ultimately, Utilitarianism justifies the triumph of social welfare over the protection of expression. Part of the rationale of OA is the maximisation of social welfare in ensuring that scholarly publications are made available on a free to access basis for the whole if not the bulk of society. It could therefore be asserted that OA is a highly Utilitarian concept and thus Utilitarianism of any of the above variations provides a strong theoretical underpinning for OA.

2.5.2. Economic

The Economic case for copyright laws also seeks to address the question of incentives but from the point of view of what is best for the market.

2.5.2.1. The case for

This economic justification emerged out of a growing Law and Economics movement. This movement holds that the social science

of Economics provides a powerful and useful tool for analysing and understanding the advantages and disadvantages of policies and laws. It is alleged, for example, that the approach is valuable because it attempts to simplify the complex and to provide general principles.[136] It also presents itself an objective approach.[137]

However, the school is not uniform.[138] For example it has been subdivided by some scholars into Positive, Normative and Descriptive elements.[139] The leading sub-school is perhaps the Neo-Classicists. This Neo-Classicist school can be further subdivided between the Yale (more complex and less rigid) and the Chicago (less complex but more rigid) versions.[140] Landes and Posner's Chicago school is the more prominent.[141] This section therefore takes Chicago as the subject for assessment.

Neo-Classicism parts company to an extent from the classical Utilitarian approach. While the Neo-Classicists see a role for copyright in providing such an incentive they see an economic analysis of copyright on a larger canvas. The Neo-Classists are not really interested in balancing the rights of creator and user. Instead copyright law is to be driven by what is best for the market.[142] This means ensuring that maximum and highly valued social use will be made of the authored works. For the Neo-Classists broad and strong authors' rights that enable profit-maximisation are most likely to encourage authors to release works to those who value them the most and are willing to pay an appropriate price as a reflection of that value.[143] The school argues that without such protection, works would not be produced and users would not make the best use of

136 Sag (2006),249
137 Elkin-Koren/Salzberger (2013),4
138 Netanel (1996),308
139 Elkin-Koren/Salzberger (2013),22
140 Elkin-Koren/Salzberger (2013),24
141 Landes and Posner (1989); and (2003);
142 Netanel (1996),308
143 Elkin-Koren/Salzberger (2013),48,116

what is already available. Thus in economic terms there would be allocative inefficiency of resources. On the other hand the strong and almost absolutist authors' rights (which ought to be easily transferrable to others) sought by such a theoretical basis will enable the author to negotiate the 'right price' for their work and its uses by the consumer in an open market. Simply put, this approach leads to an efficient market and allocation of resources. Only those works are produced for which there is a market of willing buyers. That is why for them the Public Domain is inefficient. For the Neo-Classicists, it is only when a work is owned and therefore valued and protected that maximum socially valuable use can be made of it. One could say that for them that if something costs nothing then that is what it is worth.[144]

Moreover it is argued that these strong authors' rights ultimately benefit society. This is because the resultant efficient market will lead to more works being purchased and more information put into the hands of the consumer. Ultimately it is asserted the industry will be self-sustained without recall to state subsidy or other call on the public purse. In short, efficient use is made of resources. That is, a greater public good is served.

In a similar vein, Gordon supports an economic justification. She claims that the open market is not always efficient. When left to its own devices the market does not maximise the distribution of authorial works. In her view, legal protection to encourage authors and a reasonable regime of say licences to use the works is then warranted. [145]

[144] Netanel (1996),308-310, 312-315
[145] Gordon (1992),

2.5.2.2. The case against

As Landes and Posner concede, such legal rights should be granted only in so far as they actually provide the requisite incentive.[146] The query has been raised however as to incentives for who (the author or the publisher for example) and for what (to produce, or to improve, or to distribute and so on).[147] This is not a new debate. It was evident for example in the Breyer-Tyerman exchanges of the 1970s.[148]

If the protection extends beyond the necessary incentive then the social cost (lack of availability to users) outweighs the benefit of granting that protection.[149] Consequently, some scholars such as Lemley advocate the 'open market knows best' approach to managing copyright works.[150]This is particularly so in the digital age with the almost negligible marginal cost involved in copying and distribution over the internet. Apart from those conceded limitations on the approach the Law and Economics analysis and justification has faced a number of challenges to its validity and relevance. And it is to those critiques that we now turn.

One of the major criticisms is that the justification is artificial and over simplistic. As such it runs the risk of ignoring, missing or dismissing important and significant complex factors that exist in reality and being of little help to legislators and stakeholders.[151] Rahmatian [152] Benkler [153] Palmer[154] and to an extent, Cohen [155] are

[146] Landes and Posner (2003),19-21
[147] Elkin-Koren/Salzberger (2013),79 ff
[148] Breyer (1970) with response from Tyerman (1971) and rejoinder from Breyer (1972)
[149] Lemley (2004) 130-131
[150] Lemley (2004)
[151] Sag (2006),249
[152] Rahmatian (2011),92,121,
[153] Benkler (2006), 92-93 and 98
[154] Palmer (1988),303-304
[155] Cohen (2000),1817

illustrative of this critique. It is asserted that the theory fails to break down and assess the role and costs incurred by and to each of the individual actors and at the various stages of the publishing industry for example by way of research, writing, review, publishing and the assorted methods of distribution. As Yen has highlighted, some, if not many, of these elements will be non-monetary. As such, they will reflect Natural Law aspects of Just Reward, Personality expression and acknowledgement of Intellectual Labour. He concludes that such factors undermine any claim to justify copyright on the basis of economics alone.[156]

The theory also fails to interact with the 'endowment effect' that is the 'principle that people tend to value goods more when they own them than when they do not.' [157] But even where this is taken into account, Korobian warns that the 'effect' itself is neither simplistic nor monolithic. Amongst other matters his research shows that it is largely context driven and that there are many 'unknowns' and thus caution is needed. Consequently, we must be wary of assigning the principle an unqualified normative role.[158] Although the 'endowment effect' is one of those matters that could very easily upset the Law and Economics simplistic modelling, Korobian's work is a salutary warning and invitation to further research in the whole area of motivation and behaviour in relation to copyright justifications, entitlements and rights.

Compared to New Institutional Economic theory (from which the Neo-Classicists draw inspiration) the Neo- Classicism has an over-simplistic basis. Neo-Classicism could thus be criticised for an over-reliance on formal models that depend on the economic agents (for example authors and consumers) acting as rational maximisers,

156 Yen (1990),539
157 Korobkin (2003),1228
158 Korobkin (2003),1230

which is not always the case in reality. Further, Neo-Classicists appear to have scant regard for (and almost total failure to address) transaction costs (which again are often a very practical barrier in everyday markets).[159] Static models, are produced, say of supply, demand and distribution which fail to take into account the wider context. They can thus resemble a situation which has been snapped and frozen in time like a photograph, when the reality may be more like a movie with a developing plot and infinite and unexpected twists and turns of plot.

In reality the analysis and justification proposed by the Neo-Classists will not always and may not at all produce an efficient market, even if the factors fed into its formulae and models are correct. This is because of the inherent defect pointed out as far back as 1962 by Arrow: 'precisely to the extent that [property] is effective, there is underutilization of the information" [160] That is to say it falls foul of the formula 'maximum revenue equals marginal cost'. This is because the copyrighted work can never be sold at a price greater than zero and at the same time as its marginal cost. Put bluntly, the most efficient way from an overall welfare position would be to give the work away for free (or at most, the cost of production and communication). To accommodate this challenge, the Law and Economics theory has to accept and trade off on the one hand static inefficiency (denying access to the work until someone is willing to pay the price for that access, thus locking up the information, hence the inefficiency) as against dynamic efficiency (the hope that over time willing consumers will emerge and pay the necessary price thus nurturing and sustaining increased production, distribution and communication). The hope and plan of the Law and Economics theorists is that this dynamic efficiency outweighs the static inefficiency.

[159] See Netanel (1996),312-313 for some further elaboration
[160] Arrow (1962), 616-617

The Law and Economics justification also overlooks the network effect/social production and the contribution of ideas in the Public Domain.[161]

Ultimately, the Law and Economics approach fails to address many core copyright issues. In particular it has little or nothing to offer regarding Moral Rights of authors.[162] This is especially relevant in the OA era, when an author may in many cases divest themselves of the Economic rights but will retain their Moral Rights. Economic analysis and questions of allocative efficiency and maximisation suddenly appear totally alien in such a landscape. And yet the significance of IPRs within the world of academic scholarship and publication of which moral rights are an aspect cannot be ignored. Such a nexus has an august history.[163]

2.5.2.3. Relevance to Open Access

A preliminary query imminently arises as to how the Law and Economics rationale sits with OA with which it is apparently in conflict, the latter being economically inefficient.

Nevertheless the school's approach to copyright is a reminder that the production, and use of copyrighted works such as those of scholarly authors does not exist in a vacuum, that is, without a context. It exists in a market, whether payment is involved or not. Scholarly authored works made available on an OA basis are also placed in a market whether that is a simple one of an authored work placed directly and at no charge on an online depository at which it

161 Elkin-Koren/Salzberger (2013),130 and 137
162 Merges (2011),6
163 Helfer and Austin (2011),316

can be accessed by a consumer/reader; or whether a more nuanced model involving further actors, stages and formats is involved. The Law and Economics approach invites us to examine, assess and look for efficient ways to manage that market. It is that principle that could be argued to be relevant to copyright management even under an OA regime. But beyond that it is difficult to see how it can really assist. It does not actually provide a justification for the matters at the heart of copyright: What is it, why have it or core issues of concern as to how to balance the rights of creators and users. Indeed, it could be said to fail within its own terms. Bluntly, if scholarly authors write and publish their works on an OA basis without thought or motivation of any economic gain, the theory fails to explain why they have so acted. Rather the Law and Economics approach could be said to be an *ex post* explanation for managing those rights once they have been brought into existence. Even here, the use of modelling to assist the players involved, whilst admirable in its attempts is fraught with difficulties and can often be inaccurate, unreliable, over-simplistic, and even misleading. That is not to say that such an endeavour should be abandoned, but it requires more work.

The failure to account for, address and manage Moral Rights is particularly defective in relation to OA. For example, there is a large movement towards requiring scholarly articles to be published on line using the Creative Commons Attribution (CC-BY) licence. Under such an arrangement authors in effect divest themselves of their Economic copyrights but retain their Moral Rights of Integrity, Paternity, (and in some jurisdictions) Divulgation and Retraction. The Law and Economics approach to copyright has absolutely nothing to contribute to the debate as to why we have those rights, whether they are justified and should continue or how they should be managed.

Law and Economics may though have a valid contribution to the debate if publication is not on a bare 'Attribution' only level such as CC-BY. If publication of 'short form' works such as articles or research papers or of 'longer form' materials such as books, are made on a CC-BY-NC (Non-Commercial use only) or CC-BY-NC-ND (Non Commercial use and No Derivatives allowed) then given that some of the economic copyrights will be reserved, a consideration of management of those rights may benefit from economic analysis and assistance, provided an vigorous attempt is made to address and correct the manifold shortfalls in the methodology outlined above.

In summary the Law and Economics theory especially that of the Neo-Classicists while relevant to both copyright and OA is not a strong foundational underpinning for either.

The chapter will now transition to consideration of a group of theories and justifications which unlike those addressed so far do not neatly fall into the Consequential/Non-Consequential categories. These include: Human Rights, Social Theories, and Positivism.

2.6.Residual Theories/Justifications

2.6.1. Human Rights

This justification states that copyright is a Human Right and ought to be recognised as such with all the panoply of international respect and enforcement due to such rights:[164]

[164] Derclaye (2008),138; Torremans (2008),214-215

'...copyright is based on human rights and justice and…authors…deserve that their rights in their creations be recognised and effectively protected both in their country and in all other countries of the world.' [165]

This embraces the right to 'achieve their creative potential, control their productive output, and lead independent intellectual lives that are essential for any free society'.[166]

2.6.1.1. The case for

Although the justification has been deemed essentially Naturalistic,[167] it finds its essential embodiment in a number of positive international legal documents. These include Article 27 (2) of the Universal Declaration of Human Rights (UDHR) 1948 (having the status at least of 'international common law'), as elaborated upon in Article 15 (1) (c) of the International Covenant on Economic and Social Rights (ICESR) 1966 and at regional levels by instruments such as Article 1, Protocol 1 (A1P1) to the European Convention on Human Rights,(ECHR) and Article 17(1) of the Charter of Fundamental Rights of the European Union (which are all binding legal obligations on their signatory states). Indeed it has been claimed that the UN corpus reflects the triumph of the Civil Law *droit d'auteur* tradition as opposed to the Common Law

[165] Solemn Declaration adopted by the Assembly of the Berne Union on 9 September 1986

[166] *General Comment No 17*, UN Committee on Economic, Social and Cultural Rights published in 2005 [30]. 'States are under a duty to respect the human right to benefit from the protection of moral and material interests of authors by, inter alia, abstaining from infringing the right of authors to be recognized as the creators of their scientific, literary or artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their productions that would be prejudicial to their honour or reputation. States must abstain from unjustifiably interfering with the material interests of authors, which are necessary to enable those authors to enjoy an adequate standard of living…'

[167] Derclaye (2008),137

mercantile mentality embodied in the TRIPS agreement (Trade-Related Aspects of Intellectual Property Rights) of the World Trade Organisation (WTO).[168]

The justification is lauded by many commentators. Their advocacy underlines the necessity, rationale and importance of this member of the theory family entwining creativity with fundamental human dignity.[169]. Geiger praises it as a necessary rebalancing of the competing interests in an IP system, creaking under the commercial exploitation of rights. For him it restores basic values to the system and returns a human face to the law.[170] His stance is echoed by Gervais who adds that it lays bare the inadequacy of a purely economic theory.[171] This is reiterated by Chapman[172] with particular reference to the UN Committee on Economic, Social and Cultural Rights[173] having characterised IPRs 'as a social product with the social function to the objective of human well-being'.

Additionally, Gervais claims that a Human Rights foundation addresses basic copyright principles.[174] These include an author's freedom to express themselves, the right to be identified as author, to benefit financially from the work and yet recognising the fundamental rights of others 'to participate in cultural life and rights to access information'. Indeed other scholars [175]confirm not only the reality of copyright as a Human Right but also its inbuilt balance given that all human rights have equal status, there is no hierarchy. Afori reminds us that all such rights are in reality relative and that any mention of 'absoluteness' is merely 'a guiding principle and not

168 Dessemontet [5]
169 Helfer and Austin (2011),180; Torremans (2008),212
170 Geiger (2008),131
171 Gervais (2008),15
172 Chapman (2002),878-879
173 November 2001
174 Gervais (2008), 22-23
175 Derclaye (2008),137; Helfer and Austin (2011),191

a specific rule.' [176]The legislation of the EU[177] and the jurisprudence of the CJEU, [178] likewise confirm the relative nature of IPRs.

2.6.1.2. The case against

The argument for copyright as a Human Right is not universally accepted.

Some scholars maintain that copyright cannot be a Human Right because it is not timeless, absolute, personal and inalienable. However, Donnelly provides a succinct but robust rebuttal to such a position, pointing out that many rights recognised as 'human rights' are far from 'timeless, unchanging, or absolute; … and the idea of human rights itself-is historically specific and contingent'.[179]

Other commentators, such as Afori, call for a more nuanced approach, rather than a mere bland assertion that copyright as property is protected under international Human Rights legislation. While accepting that some aspects of copyright (for example the moral and material interests of individual creators including the

[176] Afori (2004),543

[177] For example, Information Society Directive Recitals 31, 38, 44 & Article 2 exclusive right to reproduce but subject to Article 5 Exemptions and Limitations.

[178] For example, Case C-435 *ACI Adam BV and Others V Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding*, Judgment 10 April 2014; and the curtailing of the exclusive right to communicate to the public by development of the 'new public' test in cases such as Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519,Joined Cases C-431/09 and C-432/09 *Airfield NV v Belgische Vereniging van Auteurs, Compositien en Uitgevers CVBA (SABAM)* [2011] ECR I-9363, Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia* [2010] ECR I-37, Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd (FAPL) v QC Leisure* [2011] ECR I-9083 and Case C-135/10 *Societá Consortile Fonografici (SCF) v Del Corso* [2012] Bus LR 1870.

[179] Donnelly (2003),16

control over the making of derivative works[180]) are Human Rights she believes that there should be further investigation to eliminate from the coverage those copyright assertions which lack a real human connection,[181] (presumably publishers and distributors who commercially exploit the creations). She sounds a note of concern. That is if copyright is a human and natural right then it has drifted far from that anchorage. From her perspective a considerable part of today's international copyright law is dictated by powerful lobbyists in developed countries and imposed on weaker parties within those spheres and especially against the underdeveloped and developing world.[182]

Other critics sound a clarion call for the creative industries and their participants to disassociate themselves from the entire resort to a Human Rights element. Rahamatian for instance, is of the view that Human Rights dogma has shifted monumentally from its protection of the individual as against the state and is now trumpeted for almost any conceivable action including the waging of war. In the expansionist Human Rights universe, he wonders whether intellectual property lawyers and those with copyright interests are best served by drinking from this trough.[183]

Moreover, like the Naturalist and Utilitarian justifications beyond declaring that copyright is justified as a Human Right and should be balanced against other such rights, the theory itself gives little guidance on its practical outworking which is its major deficiency.

2.6.1.3. Relevance to Open Access

180 Afori (2004),524-525
181 Yu (2006),740
182 Afori (2004),519
183 Rahmatian (2011),144

Whatever its philosophical origins, neither lawyers nor any other OA stakeholder can ignore the fact that undergirding of copyright as a Human Right as part of the IP family, is subject to a number of international legal instruments. The justification provides, at least in principle, a case for protecting both Moral and Economic rights, although as seen above, there may be a stronger case for the former.

As such any regime utilising OA of whatever hue must take notice of this aspect especially where there may be an element of compulsion involved that could and probably will interfere with authorial rights. Similarly where a state fails to take appropriate and proportionate action to protect the rights of authors .And this could be inadequate protection from commercial exploitation and/or the terms and conditions of funding mandates. To illustrate this point let us consider the case where a scholarly author is required by a public funding body to publish a piece of research on an OA basis using the bare CC-BY licence. In compliance with this requirement authors thereby divest themselves of all economic exploitation rights in relation to that published work. However, the economic loss to the author could far exceed the sum paid to them for the research embodied in the publication. This would be especially so given that users under this CC-BY licence are free to exploit the publication commercially, a reward which the academic author could argue was their human right to receive.

But there is another aspect to the Human Rights contribution to the debate. That is the Human Rights based foundation for access. The same Human Rights instruments (again reflecting the double-sided coin) refer to the rights of *all* in society to participate in the cultural

life of society.[184] Indeed, Article 15 ICESCR uses the singular 'this right'[185] to embrace 1) cultural participation 2) access to science and technology and 3) protection of authorship. Moreover in a UN context, science and technology' are very broad terms and include technology, arts and crafts, science and social science, folk wisdom.[186]

Additionally, jurisprudence for example of the European Court of Human Rights (ECtHR) has also established that freedom of expression and the right to receive information are fundamental rights.[187]

In brief it would be reasonable to assert that an equally strong Human Rights foundation exists for OA as for the protection of author's rights by copyright law.

The strength of this Human Rights argument though is one of high principle and provides foundational underpinning for both copyright and OA at a high level of generality only. Unfortunately the theory has little to offer in establishing the extent and boundaries both of authors' rights and the divesting of those rights whether at the will of the author or at the behest of a third party such as a funding body or administrative agency in support of OA policies. In other words in any practical outworking recourse will have to be made to other copyright justifications and policies. That said unlike many of the other theories, the Human Rights justification is receiving

[184] United Nations Universal Declaration of Human Rights 1948 (UDHR) Article 27; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) Article 15 (1) (a).
[185] Shaver and Sganga (2009), 640-641
[186] UNESCO Constitution Article 1 (2) (c)
[187] *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 [49];also see Article 19 UDHR and Article 10 European Convention on Human Rights (ECHR)

judicial consideration[188] and is likely to be a developing area. One would anticipate that if the jurisprudence grows there will be clearer definitions of the extent and boundaries at least for copyright and increasingly for OA as a Human Right.

2.6.2. Social Theories/Justifications

By Social Theories we mean those concepts which from a societal perspective either justify or seek to deny/limit/ control copyright. As such this definition of 'Social Copyright Theories' is a wide, umbrella and generic. To an extent there is a social dimension to every claimed justification. The work after all is usually made available at some time for some sort of use by others. The social aspect has therefore already been touched upon for example in considering the Labour, Utilitarian, Economic and Human Rights arguments.

2.6.2.1. The cases for and against

A number of scholars remind us of copyright's multifaceted social role. Netanel, for one, points out that while the market is important it is not everything.[189]Left unfettered the market can create inequalities of wealth, opportunity and power. Echoing Dewey, [190] law for Netanel has an important function in promoting a healthy democracy within which the vibrant production of ideas,

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[188] For example the European Court of Human Rights rulings on Article 1, Protocol 1 to the ECHR*: Dima v. Romania*, App. No. 58472/00, para. 87 (2005) (admissibility decision copyrighted works protected by Article 1); *Melnychuk v. Ukraine*, App. No. 28743/03, para. 8 (2005) (admissibility decision intellectual property protected by Article 1); *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [8461, 855-56 (Chamber 2007) (judgment of Oct. 11, 2005) (registered trademarks protected by Article 1); and that of *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden,* Appl. No 40397/12 (19 February 2013) (Defendants had a human right under Article 10 ECHR (which as it was not absolute could be restricted on acceptably justified grounds) to distribute a third party's copyright material on the internet for commercial gain.)

[189] Netanel (1996),345ff

[190] Dewey *Liberalism and Social Action* (1963) 52 (the public must "have access to the rich store of the accumulated wealth of mankind in knowledge, ideas and purposes")

enlightenment and discussion are vital. It is here that the copyright interface is evident. Thus copyright in cooperation with market forces should operate to encourage and protect creativity on the one hand, and on the other, to bolster the democratic process by exchange of ideas freed from the restraints of over-protection.[191] Netanel argues that this societal educative role of copyright should allow not only for access to existing information but also free users to create derivative works.[192] However, he readily admits that translating these high minded principles into practical application may not be easily achieved.[193]

In a similar vein, Fisher posits various copyright social roles. These include the encouragement of 'social welfare; a cornucopia of information and ideas; …a rich artistic tradition;…distributive justice;…semiotic democracy;…sociability; [and]… respect'[194] But he accepts that this composite social function may be deemed controversial particularly as some of its elements, such as distributive justice, have long been hotly contested in the commentaries. And like Netanel, he concedes that the principles are more visionary than of immediate practical guidance and help.[195]

That said two specific manifestations of the social value argument will now be considered. These are firstly, the Public Domain and second, modern philosophical approaches represented by Rawls and Habermas. That is not to say that no other 'social theories' exist. These two have been selected for study by way of illustration and also as helpful demonstrations of their interface with copyright and also OA. In each case the proposition will be described and the case

191 Netanel (1996),347
192 Netanel (1996),349
193 Netanel (1996),369
194 Fisher (2007),192-193
195 Fisher (2007),193-194

for and against summarised. However, the relevance of such social theories to OA is addressed only at the conclusion of the section.

2.6.2.1.1. The Public Domain[196]

The Public Domain (PD) is often considered the antithesis of copyright. However, for our purposes it will be taken as a theory on or about copyright.

The Public Domain has been described as a kind of brake on the advance of copyright.[197] At its core this refers to a realm where copyright should not or does not operate.

One of the major difficulties with the Public Domain is defining it beyond the general outline given above. This is well illustrated in published studies such as those of Pamela Samuelson [198] and Valérie-Laure Benabou/ Séverine Dusollier.[199]

By way of illumination we take the analysis provided by Dusollier.[200] She highlights that the notion of the Public Domain has divergent roots and manifestations in the Common Law and Civil Law worlds. The Common Law notion recalls the physical idea of the Commons in the sense of commonly held agricultural land open for the use by the entire community. The Civil understanding draws on Roman law principles of *res communes* and *res nullius*. *Res communes* are illustrated by Article 174 of the French Civil Code: 'resources that belong to no one and whose use is common to all'. *Res nullius* also do not belong to anyone but unlike *res communes* can be

196 See for example, Boyle (2008)
197 Ginsburg (2007),133
198 Samuelson (2006),7-25
199 Benabou and Dusollier (2007),161-184
200 Dusollier (2013),265-266

appropriated and become someone's exclusive property. In other words, *res nullius* do not constitute a true commons. Dusollier then moves on to categorise three aspects of the modern idea of the public that should in general terms be capable of straddling the Common and Civil law jurisdictions. She calls these the *Structural Public Domain;* the *Functional Public Domain;* and *the Open Domain* (such as Open Source software and Creative Commons). The *Structural Public Domain* covers all those works free of copyright either because they have never satisfied the requirements for protection or because that protection has expired. The *Functional Public Domain* refers to those works which although protected by copyright are subject to exceptions and limitations. Thus anyone who fulfils the conditions for use of the work as defined by those Exceptions and Limitations can do so. The idea of the *Open Public Domain* centres on the notion that 'openness' for use of the creative work is its central characteristic and not merely tangential as with the functional domain.

The Public Domain is not without its critics. Merges, for instance, is of the view that no matter which refinement of the concept one is considering none is sufficient to provide a normative foundation (or as he calls it 'first-order principle' [201]). For example the Public Domain theory does not address resolution of competing claims nor offer any guidance on remedies and compensation when the right-holder has suffered harm.

Even Dusollier's 'Open' category is fraught with difficulties. The Creative Commons Public Domain (CC-0) licence, for example, could be interpreted as a divesting by the right-holder of all copyright claims. But English Law, for one does not easily recognise

[201] Merges (2011),7

'abandonment' as it does not support a bare 'irrevocable' license.[202] Any dedication of a work to the Public Domain would be a general licence to copy and redistribute. A licence after all can be for the benefit of the 'world at large'.[203] Even so it is revocable at will by the copyright owner.[204]

Additionally, Rahmatian assesses the Public Domain as an overblown concept. He sees it as largely a revamp of traditional Lockean justifications: in reality relying very much on the free market and a liberal economic worldview. For him it is not as free and anarchic as seems to appear.[205] From his Positivistic view of law, Rahmatian argues that an author drawing on the existing repertoire of publications and ideas does not remove anything from the 'Commons'. This is because whatever the philosophical (or even factual) arguments, the law views each new authorial work as created *ex nihilo*. Once it fulfils the legal test for copyright protection and comes into existence as a copyrighted work it then both in fact and in law adds to, not subtracts from the Commons, irrespective of how much it may have drawn from pre-existing works. There is therefore a continuous building and enlargement of an Intellectual Commons.[206] From this perspective there is no conflict between copyright law and the Public Domain. In Rahmatian's opinion they are as closely intertwined as the concepts of Freehold and Leasehold. Copyright is dependent on the existing Intellectual Commons and could not exist without it. Rahmatian's assessment would incline to see the Public Domain as similar to

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202 *Fisher v Brooker* [2009] UKHL 41 [2009] 1 W.L.R. 1764. (Abandonment by an implied absolute assignment of a (musical) copyright interest was to be resisted, except under very strict conditions. An implied restricted revocable licence was to be preferred. (Lord Neuberger) [50]-[59])

203 *Mellor v Australian Broadcasting Commission* [1940] AC 491

204 Johnson(2008)

205 Rahmatian (2011), 98-99 and fn 203 calls it ' a reductionist and intellectually constraining model'

206 Rahmatian (2011),111

Dusollier's *Structural* model and the Intellectual Commons as similar to her *Functional* category.[207]

Two further aspects of Social Theories on copyright that hold significant implications for OA are those of Rawls and Habermas as advanced respectively by Merges and Barron.

2.6.2.1.2. Rawls

Merges' interpretation and application of Rawls's *A Theory of Justice* will be considered first. Although Merges admits that Rawls lacked a concrete developed theory of property, it is in Rawls's concepts of justice and fairness that Merges finds a legitimate foundational normative socially structured copyright justification.[208] Merges finds this rooted in Rawls's First and Second Principles.

The First Principle is: that each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all. From this starting point Merges asserts that everyone would be agreeable to a reasonable IP system including copyright. This is because in this 'original position' no one knows what their particular gifts and talents will be. Everyone is potentially a creator whose employment and income and indeed happiness may lie *inter alia* in authorship. IPRs could thus be seen as a basic liberty securing equality of opportunity for all.[209]

The Second Rawlsian principle is that: social and economic inequalities are to be arranged so that they are both: (a) to the

[207] Rahmatian (2011),112- 113 referencing Deazley (2007), 28-29
[208] Merges (2011),103
[209] Merges (2011),110

greatest benefit of the least advantaged, consistent with the just savings principle and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. In other words any deviation from the basic equality of the first principle must be justified.[210]

In applying these two principles to copyright, Merges sees societal fairness being achieved equality of opportunity rather than actual outcomes.[211] It is irrelevant that the outcome may be one of inequality. That is because the same copyright protection available to all, may incentivise A to pursue a creative career and obtain financial and/or status and esteem and in so doing contribute to the knowledge and cultural base of society even if other members of that society are restricted by the same copyright laws in the uses they may be able to make of A's creative work. That said there are also further socially beneficial elements flowing from copyright protection including a certain degree of redistribution of wealth by: (1) society through its legislatures restricting what qualifies for copyright protection in the first place; (2) the monitoring by the judiciary on behalf of society of the operation of the copyright system, its restrictions and exceptions and (3) the taxation of rights-holders.[212]

Merges' broad interpretation and application of Rawls is not universally accepted. Dumitru, for example, denies any assistance in Rawls. She is of the view that as far as IP is concerned, *A Theory of Justice* read strictly, is concerned only with scarce goods and has nothing really to say for non-rival goods such as copyright. Similarly, Rawls's Second Principle because it is satisfied once basic social and economic inequalities are met and adjusted, has no

[210] Merges (2011),105
[211] Merges (2011),107
[212] Merges (2011),228 ff

means of differentiating and addressing subtle challenges in copyright law, say between pirating and serendipitous independent creators.[213]

2.6.2.1.3. Habermas

Anne Barron[214] finds in Habermas an inspiration and at least a putative copyright theory. She admits that these ideas are provisional with a number of unresolved issues. That said it is worth considering those proposals in their current state because of the importance Habermas places on the 'public sphere'.

This 'public sphere' has been summarised as 'a particular set of social practices that are necessary for the functioning of any complex social system that includes elements of governing human beings.' [215] To help understand Barron's ideas a précis of Habermas is in order. Habermas sees society as multi-layered with distinct spheres/worlds. These may be digested in his terms 'lifeworld' and 'system'. The 'lifeworld' embraces Habermas's analysis of humanity viewing and experiencing the world as a 'social world' and as a 'subjective world' of inner and individual perception. The 'system' is the objective world of the existing state of affairs which includes *inter alia* state administration and the economy. Law is integral to 'the system'. As such the law is both a 'steering medium' setting out values and directions and programmes for society and an 'institution' embodying and enforcing those norms. In the Habermas analysis, the 'lifeworld' is the more important but it is constantly under threat and encroachment from the 'system'. The 'system' for example cannot comprehend the social and subjective realms of the 'lifeworld'. Thus economic theory sees individuals only in an

[213] Dumitru (2008),121
[214] Barron (2010),
[215] Benkler (2006),181

objective and instrumentalised way: creators, consumers and so on. As such Law and Economic approaches ultimately fail to engage with how multiple individual subjective and social motivations and perceptions interact. To translate this into concrete terms in the realm of copyright and creativity, the 'system' and 'law and economics' have nothing to offer in respect of understanding and accounting for publishing purely to advance knowledge or encourage debate and democratic participation or just for the simple joy of self-expression.[216]

For Barron, Habermas better explains and justifies a number of copyright norms. These centre largely on Moral Rights, exceptions and defences. She sees these non-economic features as flowing from the 'lifeworld' informing and restraining the encroachment of the 'system'. As such they embrace an integral part of Habermas's theory of 'Communicative Action', the free sharing of subjective and societal norms which enrich and build up a cultural life in society.[217]

Overall Barron commends Habermas for four reasons. Firstly, his tiered view of society is more reflective of reality and the continual tension between the economic and non-economic aspects of copyright law. Secondly, such a scheme allows for the recognition of the economic and the non-economic elements in the fostering of a free exchange of ideas and materials exempted from copyright protection through defences, exceptions, expiry of duration and so on which reflects the 'lifeworld' informing the 'system' as a 'steering mechanism'. Thirdly, the analysis and theory enable us to see concerns over copyright, for example 'the copyright wars' in a larger social context rather than as an incidental phenomenon occurring between rights-holders and users and involving more than just market forces and the protection and recoupment of investment.

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[216] Barron (2010),123-124
[217] Barron (2010),126

Fourthly, and closely related, the view of society held by Habermas sees these tensions and debates as an ever constant aspect of the 'lifeworld' evolving and adjusting to defend and resist 'colonisation' by the 'system' (that is increasing copyright expansionism).[218]

On present information it is difficult to provide a thorough critique of Barron's propositions. For one, her ideas are at most drawn from and inspired by Habermas who did not specifically and systematically set out a distinct copyright and social theory in his writings. Additionally as she admits, her ideas are very much a work in progress. As such in this unpolished state they are unlikely to prove attractive to policy makers, legislators and other stakeholders because as with the Human Rights foundations considered in the preceding section Barron's approach lacks the details and boundaries that such stakeholders may seek. However her reflections are worthy of applause in relating modern social theories to the operation of the copyright system and provide fruitful ground for further development. As with the Human Rights contribution her interpretation of Habermas provides at a high level of generality a valuable and instructive philosophy in the copyright-OA debate which should not be ignored and at that high level of generality encourages if not justifies the concept of OA.

Apart from the above specific objections to Social Theories there is also a generally applicable one. This challenge relates to any societal attempt to limit or control copyrighted material or to free up access to such works. It has been succinctly put by Moore.[219] That is, how and on what basis 'society' can claim to have a right to an authored work that society either did not create or did not pay for? How can society prove what its contribution to the work has been?

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[218] Barron (2010),127

[219] Moore (1997), 107-108 (quoting Lysander Spooner, 'The Law of Intellectual Property: or An Essay on the Right of Authors and Inventers to a Perpetual Property in Their Ideas' in the *The Collected Works Of Lysander Spooner*,103

And even where payment, say for research (but not commissioned on a principal and agent basis) has been made, how can society proportionately correlate that payment to the article or book in question? For such critics, the mere *assertion* that society should have rights is inadequate. That said, in riposte an open question may be posed to such critics as to why society cannot have natural rights if at least a sector of the IP community holds that individuals such as authors can have natural rights.

But as with the other theoretical frameworks, the social dimension is beset with shortcomings and deficiencies. As seen, one of the major problems is moving beyond generalities to detailed structures that can be easily understood, and used by all the stakeholders involved in the production of literary works such as academic publications. While there is a notion that there should be a Public Domain and that this is good for society, there is a distinct lack of consensus as to what the Public Domain is and how it can be managed for the benefit of all stakeholders. Again while there is an inextricable link between copyright and the Public Domain there is also the realisation, that the theory is insufficiently grounded and formulated to be a foundational principle for copyright. It may therefore be more relevant in the managing of copyright once the works have been created and thus seen of a secondary level or an ex post facto 'justification' in Lemley's terms.

2.6.2.2. Relevance to Open Access

The emphasis of the social dimension to copyright is extremely relevant to the OA rationale. These Social Theories are stark reminders that copyright does not operate in a vacuum but has implications well beyond the strictly legal, economic, and commercial. In tandem with the OA *raison d'être*, the social doctrines highlight *inter alia* that an informed public and ease of

access to and use of quality information have vital roles to play in the functioning of a healthy and mature democratic society. Once more we see the 'context is everything' and double-edged nature of copyright in play.

Overall it is submitted that the basket of theories and doctrines that we may conveniently label 'Social' correlate well with OA. The principles of OA *per se* are unlikely to incentivise the production of literary academic works. However the Social Theories on copyright and public access embodying for example the development of Habermas's philosophy by Barron, could be viewed as of primary and essential importance in informing the conscience and motivation of the Academy as a body and of individual academic authors. As such we could say that such theories are relatively strong bedrocks of OA.

It is in this regard that OA and Social Copyright theories are likely to find a more harmonious relationship.

2.6.3.Positivism

For the sake of completion, brief mention will now be made of the Positivistic approach to copyright. This is the position that copyright is not a naturally occurring right. Instead it is exclusively created by a positive piece of legislation passed by a legislature. For Positivists, little or nothing other than historical or intellectual curiosity is served by theorising and philosophising on the subject.

2.6.3.1. The case for

This is well put by scholars such as Rahmatian.[220] That is, whatever the factual position may be (a writer actually composes an article or writes a book) the legal reality is that no copyright exists unless a law is formulated to say what copyright is and how it comes into being. In other words from a legal perspective copyright works are always *ex nihilo* creations.

The attraction of this position is its appealing simplicity. If one wants to know what is copyrightable and protectable one need only consult the relevant statute. The enquirer need not be vexed by thoughts over why have copyright, what should be protected, to what extent and for how long.

2.6.3.2. The case against

However it is the simplicity of the Positivistic viewpoint that is also its Achilles heel. It is basically an evasion. It is in itself a theory and yet at the same time decries the futility of those who otherwise seek to theorise over copyright and its role. In its purest sense Positivism fails to grabble with the underlying rationales for copyright including the reasons for and nature of the very positive laws they espouse.

Further, Positivism too is not a monolithic whole. The concept and its outworking can vary for instance depending on whether a legislature reflects a pluralist, republican or public choice model.[221]

2.6.3.3. Relevance to Open Access

[220] Rahmatian (2011),102-113
[221] See Elkin-Koren/Salzberger (2013), 225ff for further details of these models.

Positivism though is of major relevance to OA. If OA mandates should for the sake of the discussion be deemed to be thwarted by copyright, Positivism offers a simple solution. Given that 'authors rights' are purely the creation of law it is merely a matter of changing those laws to accommodate the requirements of any OA mandate. Any argument from a Naturalistic or other theoretical perspective need not be countenanced.

That said the issue of Positivism in relation to OA depends once more on the level of generality at which the Positivist approach is applied. If taken as a universal and unyielding model (i.e. to facilitate OA merely abolish copyright protection for all academic works) the methodology is open to the justified criticism of injustice and devoid of any grounded framework to which stakeholders can refer. As such it is unlikely to be of any practical aid in the debate. However this chapter and this thesis takes the view that Positivism may be of greater assistance and value and may indeed strongly encourage OA if it is applied in a more focused, limited, evidence based and reasoned manner. This is a subject to which the thesis will return in greater detail at chapter 4.4.

Having surveyed and attempted to assess the major justifications and theories and their OA relevance, one is tempted to agree with Troscow who holds that the time is ripe for a rethink and a completely new theoretical approach.[222] The next section therefore addresses one of the proposed 'new' frameworks.

[222] '…traditional philosophical justifications for copyright all fall short of providing plausible or adequate justification for the expansionary trends we are now witnessing. …requiring a new and theoretical framework rooted in political economy to harmonize the use and dissemination of information with the developing productive forces in society.' Troscow (2003),219

2.7.Composite Theories

All the above copyright theories are imperfect. Each evidences advantages and disadvantages as justifications and also in relation to OA. Given this, some scholars see the answer in a form of synthesis.

Rahmatian, while critical of many of the established theories, concedes that a pragmatic amalgam may be more effective.[223] Gervais too favours 'a federation'.[224] Ghosh though advocates a unifying principle of 'regulatory justice'.[225] His underlying assumption is that is what actually happens daily in the Courts and Intellectual Property Offices of the world. His argument views Copyright solely in descriptive terms and not 'why' it exists. Copyright is thus the regulation of activities rather than of a 'thing' (i.e. an item of property). Furthermore, in his view this would facilitate a more realistic and easier interaction with say property law, tort, contract and competition law because copyright would not then be straight-jacketed by over theorising. However this resembles the Positivistic argument: ultimately over simplistic albeit expressed in a more complex form. Once more it evades theorising which, however imperfect, many scholars have highlighted as helping to formulate, structure, regulate and adjust copyright. Nevertheless his proposals reinforce the stream of commentaries that endeavours are warranted and should be encouraged to draw form the better aspects of individual theories with a view to seeking maximum assent from and participation by stakeholders.

[223] Rahmatian (2011),120
[224] Gervais (2008),13 n.25
[225] Ghosh (2008),107

By way purely of illustration of how a hybrid system might be compiled and operate, this section will consider the reasonably well developed and inviting proposals of Robert Merges.

His scheme has two parts: Foundational or First Order principles; and Secondary or Mid-Level principles. He accepts that difficulties and 'fruitless debate'[226] may continue over the theories which should be deemed Foundational and why. His preferred Foundational principles are themselves a hybrid of Lockean appropriation, Kantian individualism and Rawlsian attention to just distribution, his interpretation of which have already been considered at length earlier in this chapter. As was seen when addressing each of those theories they are not without considerable criticism. A further difficulty arises even in the event of accepting the amalgam, as to how to structure a workable system that clearly and predictably identifies how each of these individual theories meld and interact with the others and in the event of a conflict arising how to accord priority to any particular element and achieve a practical and intelligible equilibrium.

But Merges' proposals make concluding such consensus, while an admirable goal, unnecessary on a day- to- day basis. This is because of what he designates Secondary or Mid-Level principles. Merges identifies four such principles: the Public Domain, Proportionality, Efficiency and Dignity. For him, it is in these Secondary principles that the pragmatic solution lauded by Rahmatian can operate.[227] By focusing on these, a range of stakeholders with differing foundational theories should be able to find a common language and thus co-operate in making the system work.[228]

[226] Merges (2011),145
[227] Merges (2011),7
[228] Merges (2011),145-147

For example, as a Secondary level stakeholders might achieve consensus on the nature and extent of the Public Domain irrespective of their individual Foundational approach to copyright. Similar agreement should be possible with the Proportionality principle in guiding the extent of rights. That is that the rights should reflect and be trammelled by the actual contribution made to the work by a creator.[229] As a Mid-Level principle the Economic/Efficiency approach can function as a management and administrative tool *after* copyright entitlements have been granted (on whatever theoretical basis).[230] His Secondary Level Dignity principle (shorthand for a pure Personality justification) can facilitate discussion on the nature and extent of Moral Rights even for those who reject Personality as a primary justification.[231]

2.7.1. Relevance to Open Access

This chapter proposes that a composite approach could assist in the copyright OA interface on at least two levels. These are in utilising a composite approach first of all to the theoretical justifications behind copyright law, and secondly, in adopting a similar approach to providing theoretical underpinning to OA.

This chapter has demonstrated that no one traditional theory provides a complete and universally accepted basis for copyright law and practice. While defending the need to theorise and work for tighter fundamental foundational concepts including a fine tuning of those classic models, it is salutary to take note of Rahmatian's

[229] Merges (2011),152 and 8
[230] Merges (2011),153
[231] Merges (2011),8-9, 156-157

warning, of the danger of over-theorising and of striving for more legal perfection than is practically necessary.[232]

It is submitted that copyright will always face challenges from evolving technologies and policies. OA is one of those challenges. To adopt and accommodate and yet to preserve what may be considered the heart of the system, sufficient flexibility should be built into to any theoretical underpinning. At first blush, a composite approach such as that suggested by Merges may help. As his proposed model illustrates the core of copyright in its dual function of author- protection and user- access is preserved without having to subscribe to any particular classic or other theory.

Further, the notion of Mid-Level principles and its focus on the pragmatic is motivated to embrace the involvement, consent, co-operation and use by the maximum number of stakeholders. But this is no mere untrammelled pragmatism but rather one structured by application of existing copyright theories. OA should encourage such participation. Invocation of the 'Dignity' principle protects the personal nexus and Moral Rights of the author, and the 'Efficiency' principle facilitates the most effective approach to management of say academic authored works post creation without having to subscribe to either as a principal foundation doctrine. Similar cases exist for his 'Proportionality' and 'Non-Removal' (i.e. Public Domain) elements. The latter in particular, accords with OA concepts and if understood, incorporated and implemented as per Merge's suggestion may assist in extricating some of the heat from the OA debate and by contrast foster enlightened, constructive and practical engagement and solutions.

[232] Rahmatian (2011),120

Nevertheless achieving sufficient agreement on these Mid-Level principles may still be challenging. Fundamental scholarly discord with Merges' scheme is predictable. For example, continuing dissension over the nature, interpretation and application of the classic approaches. Likewise what concepts to include or exclude and the level of priority each theory or approach ought to be accorded. Additionally, some adherents and stakeholders may regard the Mid-Level principle approach as unjustly and unacceptably relegating their prize theory. All that considered, this thesis recommends, that the spirit and example of Merges' approach should be grasped and developed.

It is the stance of this chapter that a similar spirit and composite model utilising many of the traditional copyright theories could provide an extensive if not comprehensive theoretical basis for OA. Inspired by and employing the approach of Merges to copyright we could propose the following example. The Just Desert, Utilitarian, Positivism, and Social theories could be viewed as Foundational or First Order Principles for OA; and the Personality, Labour, Law and Economics, and Human Rights justifications as Secondary or Mid-Level Principles.

2.8.Conclusion

Theorising about copyright and OA is important. Indeed, this chapter maintains that it is a necessary and worthwhile undertaking. With the advent of OA some stakeholders may be tempted to assert that theorising is fruitless and that practical solutions are all that is needed. Practical solutions are of course essential in the developing OA universe. However, it is the view of this chapter that the theory and motivation behind a law or policy including OA must always be investigated and assessed. Otherwise policies whether at regional,

national or at a local level such as Universities run an inherent risk of being erected in isolation from a larger context which could have wide ranging consequences not all of which may be desirable. This chapter therefore advances the proposition that due regard for the theoretical underpinnings of copyright and OA should render pragmatic solutions more transparent and acceptable.

It is submitted that our journey through the major theories demonstrates the relevance of theorising to both copyright and OA, although not all the theories are of equal impact.

In relation to copyright ,of the 'Natural Law'/'Non-Consequential' theories considered, the Just Desert argument is perhaps the weakest justification. Contrariwise, it provides a very strong explanation and therefore justification for the concept of OA: that if the public has paid for research then it is entitled to access the fruits of that research without further payment or restrictions.

The Personality and Labour theories are by contrast more equally weighted in their significance to justifying both copyright and OA. Kant's variant is both attractive and most likely to assist. The range of different viewpoints within the IP world which see the value of Kant's philosophy is striking. While there is a measure of disagreement between the scholarly interpretations, there is also a high degree of consensus that an underpinning of both Moral and Economic rights can be drawn from Kant. They all accept that this cannot be achieved by a literal transplantation of his words and ideas. Instead much can be gained by a Kantian inspired approach to copyright and its management. There is in Kant an appealing balance of individualism for the author and maintenance of the personality nexus with the author's work on the one hand and the importance of the rights of third parties in the context of a wider

society on the other. There is room in Kant to explore concepts such as waiver and licences both of which are at the heart of OA. There is also the importance given to the public as a valid and essential stakeholder in the whole process. It is the conclusion of this chapter following the review undertaken within, that while the Kantian version of the theory (to use Merges' terminology) is an acceptable Foundational or First Order justification for copyright it would be better accommodated as a Secondary or Mid-Level foundation for OA.

Locke's 'labour theory' is similarly still appealing. Once more the value of the theory can be seen if it is not subjected to over-literalistic interpretations. A 'Lockean- inspired theory' is therefore to be preferred in debating this particular concept rather than a strict adherence to Locke's written text. His philosophy undergirds the fundamental principle that intellectual labour deserves protection. It is also argued that Locke's provisos remain pertinent in the age of OA. The sufficiency, charity and waste provisos not only provide a basis for balanced copyright laws (the eternally doubled sided coin of protection and access) but also provide grounding for a healthy Public Domain and an encouragement to publish rather than 'hoard' research. The latter points are particularly apposite to the OA debate. But as with the Personality argument this chapter would place the theory in the Primary Foundational category for copyright but in the Secondary level for OA.

The Consequential theories flowing from Utilitarianism and the Law and Economics school appear to fit less aptly into the copyright sphere particularly if we are looking at fundamental concepts. In general terms Utilitarianism is ultimately concerned with maximising social welfare rather than protecting expression which is a major role for copyright. Conversely such a concept (maximising social

welfare) sits more comfortably as a foundational principle for OA. As indicated, the drive to ensure that publically funded research is then made available on line and freely accessible to all resonates with Utilitarianism. In other words Utilitarianism fails as Primary level foundation for copyright but presents as a strong foundational justification for OA.

The Law and Economics foundational justification for copyright, still has a role to play in the OA era. Although it fails to account for Moral Rights which are crucial elements for authors especially if they publish for non-monetary reasons, the Law and Economics school and its approach to facilitating an efficient market should not be ignored. Once more we are reminded that copyright and publication take place in a context and part of that context is the market for the work. Even where publication is made free of charge to access as with OA, that market still has to be managed efficiently. Economics can help us dissect, analyse and cost if necessary the multiple steps, stages, and organisation of such a process. As such the justification would have to be assessed as a Secondary/Mid-Level theory.

A Human Rights rationale for copyright has insufficient boundaries and details to pass muster as an indispensable Foundational principle. However, this justification has been and is likely to be the subject of judicial assessment as in the ECtHR. A growing body of case law may very well bring clearer boundaries to the operation of the concept. Even in its current state the rationale has a valuable contribution to make to ongoing debates on copyright theories and doctrines and to OA. Although helping to bolster the Economic Rights it is perhaps more so in restoring to copyright the non-economic elements that we see this rationale come into its own. Like the Personality justification it highlights the nexus with the author and the dignity that ought to be bestowed on those authors.

Yet at the same time, the approach is not over-individualistic. It could be argued that according such dignity is in itself good for society. That is, that such a recognition and protection helps to bolster a healthy functioning modern democracy as with the other rights esteemed as 'human rights'. The viewpoint also comes to bear on OA in various ways. For example governments and funders must respect those internationally established authors' rights and must not unreasonably interfere with them. Conversely there is also a human right of access and sharing recognised in the same international legal instruments which seems capable consciously or unconsciously of informing and justifying OA. But many of the same criticisms may be located and directed against the Human Right to Access as the Human Right of the Author. For that reason this chapter would designate the Human Rights justification as of Secondary/Mid-Level importance for both copyright and OA.

As far as OA is concerned the various Social Theories surrounding copyright are likely to provide fertile grounds for innovative development. The role of the Public Domain whilst subject to ongoing debate over its nature and extent is but one of the ever present but still unanswered areas in this regard. However the adventurous interpretations of Rawls and Habermas proposed by Merges and Barron show the willingness of the academic IP community to grabble with these issues. At the heart of the debate in this realm we once again see illuminated the themes set out at the beginning of this chapter that context is everything and that copyright is an eternally double sided coin. While still eluding precise definitions, boundaries and also facing practical applications the efforts of Merges and Barron nevertheless indicate even in their imperfect formulation the realisation that society is an indispensable stakeholder in determining the grant and extent of copyright. Similarly the Social Theories demonstrate the centrality of the rights of wider society in relation to OA. While the theories may fail to provide a Primary foundational role for Copyright, the lack of

precision is less influential in relation to OA and as such the social theories are capable of designation as a Primary level justification.

The Positivist understanding of copyright law remains relevant to the OA-copyright interface. In short copyright is viewed solely as a creation by the positive legal act of a legislature: it needs no further explanation. But as indicated in the body of this chapter so stated the pure Positive position is not only an avoidance of the debate but is devoid of any sound foundational framework with which stakeholders can engage. As far as OA is concerned, the Positivist would say that if existing copyright laws prove a hurdle to the advance of OA the solution is simple: change the law without being burdened by all the theories behind those laws. However such an approach is likely to be confronted with a multitude of obstacles in its implementation which this thesis explores in more detail at Chapter 4.3. That said the implication for OA from a Positivist perspective is capable of a more nuanced application. That is to say that while a broad, universal and inflexible Positive argument that could be employed to abolish all copyright protection on all academically authored works would prove impractical, a limited and judiciously directed application of the Positive argument could legitimately assist in supporting some restrictions on academic copyright with a view to justifying OA. As such this would be of primary relevance and is investigated in greater depth at Chapter 4.4.

This chapter's analysis and assessment of the various copyright theories, doctrines and justifications has shown that each both contributes and lacks important elements. None is complete. It is for that reason, particularly with the challenging and exciting era of OA that composite approaches such as those of Merges summarised within this chapter are worth investigating further and could form the subject of additional research. His two tiered level of First and

Mid-Level principles warrant more reflection. His model is not trammelled by adherence to any individual theory but in its hybrid First- Level principles (Lockean-insprired appropriation, Kantian-inspired individualism and Rawlsian-inspired just distribution) it preserves the core functions of copyright and is generous as to user access. This is reinforced by its focus on Mid-Level/Secondary principles (the Public Domain, Proportionality, Efficiency and Dignity) seeking maximum stakeholder participation which is essential in the OA-copyright interface. The model has a degree of preserving the heart of the copyright system yet with sufficient flexibility to encourage and permit adoption and accommodation of changing technologies and social policies.

Inspired by and adopting Merges the thesis proposes the following levels of relevance of the theories covered in this chapter for copyright. First-Level: Personality and Labour. Secondary-Level: Just Desert, Utilitarianism, Law and Economics, Human Rights, Social Theories and Positivism.

A similar composite model of theoretical justification for OA is also proposed. First-Level: Just Desert, Utilitarianism, Social Theories and Nuanced Positivism. Second-Level theories: Personality, Labour, Human Rights, Law and Economics.

Finally, recalling the overall hypothesis of this thesis, this chapter concludes that it is particularly by advocating such a multi-level, composite model that the positive contribution of copyright theory in its understanding, explanation and justification of OA can be secured.

Chapter 3: Online Licences, Copyright and Open Access: an assessment.

3.1. Introduction and Research Scope

As mentioned at 1.1 above whether OA is *Gratis* or *Libre* access to and use of the publication will invariably be subject to some species of licence. This chapter therefore moves from the theoretical framework explored in Chapter 2 to an investigation, analysis and assessment of what may be considered the more practical end of the scale of interfaces between law, the Academy and OA. Its aim is to determine whether law and in particular copyright law does or can play beneficial or disadvantageous role in the implementation and management of OA.

To some this might appear a rapid departure from the subject matter of Chapter 2. However the thesis deems the placement of the current chapter apt at this juncture as it seeks to build upon the multifaceted and multi-layered nature of OA when it encounters law.

By way of context it has been said that the 'central conflict line of the knowledge society is about controlling access to knowledge and that the core gatekeeping mechanism is the creation of IP'.[1] However such an assertion is always subject to the caveat that copyright law *per se* does not incorporate a right to exclude access merely for the purpose of receiving information, viewing or listening to protected works.[2]

[1] Haunss (2001),134
[2] Dusollier (2007),1392

Nevertheless, OA advocates can cite numerous occasions and instances where that crucial qualification does not correspond with reality. Consequently, access to scholarly publications proves difficult if not impossible and even when secured the freedom to use the protected works is severely restrained. Those accounts are not rehearsed in detail here, but are merely cited as a summary of the background that has given rise to a variety of licensing incentives designed to facilitate access and re-utilisation.

The mission of the chapter follows the following enquiries:

1. An explanation and analysis of the major available open licences.[3]

2. An assessment of how these licences interface with copyright doctrines and positive law.

3. Whether other legal (for example contractual or consumer) or practical issues arise with the existing licences.

4. Do the licences succeed in facilitating OA for the academic author?

Some scholars, such as Dusollier, are of the view that the flurries into the OA publishing arena by many academic journals may be seen as 'mostly ideological manifestos'.[4] This is because they have not as yet produced any boutique licensing platform. Instead they merely rely on the availability of those such as the Creative Commons (CC) suite or individual institutional repositories.

[3] By 'Open Licences' this author means any online legal agreement for access to and use of copyrighted materials liberated from some if not all copyright restrictions.
[4] Dusollier (2007),1406

Given this state of affairs, the main focus of the chapter will be the CC licenses because these are widely used, attracting users across multiple academic and other disciplines and because they are the preferred (albeit not mandatory) licence platform for the publication of many publically funded academic works.[5] Whether such policies particularly if made compulsory are legally valid, is a moot question. A full assessment this allegation is beyond the scope of this particular chapter although it will be addressed in chapter 5 insofar as it concerns the scholarly author. However as far as the publishing industry is concerned it should be noted that Armbruster for one, is of the opinion that a mandatory OA policy may be susceptible to judicial review. The foundation for such an assertion is formulated in terms of basic rights of authors and publishers. For Armbruster, academic authors and commercial publishers should not be deemed to have lesser rights than say musicians and their recording companies. For him the latter would not tolerate a similar interference by governments and other public bodies with copyright entitlements as he sees embodied in such compulsory OA mandates.[6]

Although the chapter will concentrate on the CC suite of licences, the chapter is cognisant that other licences do exist. Some of those will be considered as a comparative preliminary background to the exploration of the CC suite. These invariably arise out of the Open Source (OS) or free computer program movement. The accepted historical narrative for the OS movement is that its founding father, Richard Stallman, frustrated at being unable to access the source code to effect working repairs to his computer desktop printer back in the 1980s was inspired to create a free and accessible software package that worked with the Unix system.[7] This program was the

[5] See for example HEFCE *Policy for open access in the post-2014 Research Excellent Framework* [25]
[6] Armbruster (2008),9-10
[7] Farchy (2009),256

GNU.[8] It was also within this milieu that the term 'Copyleft'[9] described as the 'antithesis' [10]of copyright was coined to indicate a measure of freedom from the perceived restrictions of copyright.

It could be said that similar frustrations led to the development of concepts such as Open Access and the Creative Commons licences. Those licences are assessed from legal, practical and conceptual perspectives.

Finally, some conclusions are drawn.

As indicated an initial brief summary and assessment will now be undertaken of a group of licences gathered under the umbrella term 'Open Source'.

3.2. The Open Source Licences

3.2.1. Introduction

This section will focus largely on the licences surrounding free software. This is because those licenses have been the inspiration for later developments such as CC.

[8] The name "GNU" is a recursive acronym for "GNU's Not Unix." https://www.gnu.org/

[9] '*Copyleft* is a type of license that attempts to ensure that the public retains the freedom to use, modify, extend and redistribute a creative work and all *derivative works* (i.e., works based on or derived from it) rather than to restrict such freedoms.'
The Linux Information Project definition
http://www.linfo.org/copyleft.html

[10] Davis (2006),130

A succinct definition of the concept of Open Source (OS) is in order here. A genuine OS program must not only be freely available to the public, that is no payment is required, but also grant the rights of access to the source code and to reuse the program.[11]

Stallman has expanded this definition in the form of four freedoms. These are the freedoms to:

1. Run the program
2. Study how the program works by giving access to the source code
3. Redistribute copies
4. Improve the program and release those improvements to the public[12]

It is crucially important to realise that these four freedoms nevertheless operate within the context of copyright and so have an immediate interface with current positive law. While OS is largely based on copyright the licences are formulated in such a way that no user is able or allowed to generate nor receive financial gain from privatising software created within the system.[13] The movement seeks to achieve these goals through employment of its bedrock licence, the General Public Licence (GPL).The nature of that licence will be briefly described, along with its inspirational and foundational links to similar licences as a prelude to an evaluation of the OS prodigy.

At heart the GPL requires that the released computer software code either in its original form or as amended by the recipient are freely and openly available to all subsequent users. The freedom for additional users to use, copy and amend is integral to this process.

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[11] Farchy (2009),255
[12] Stallman (2015) *The Free Software definition*
[13] See O'Mahoney (2003) and Weber (2004)

That is the terms of the licence are passed on down the chain ad infinitum. In other words the licence is a viral one as described and defined by Radin.[14] Copyrights in all the creations and amendments are retained by the creators but the licence terms permit these subsequent uses.[15] Thus it has been said the OS uses copyright not to exclude but to inspire a larger creative effort.[16]

A sister licence the GNU Free Documentation Licence (GFDL) has also been created. This is in reality the human readable instruction manual for use of the software created under the GPL.

3.2.2. Assessment

The OS GPL succeeds for a number of reasons including: [17]

1. It is based on a modular development where all who have access to the program have the ability to add, build and improve the codes and accompanying documentation.

2. It operates within a community where there are widely accepted behavioural norms which emphasise reliability and integrity.

3. That creator-user community is definable and defined, dictated in many respects by its own technology. That is it is confined only to software development and thus it is relatively easy to set bounds as to what can or cannot be done with the material embraced by the licence.

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[14] Radin (2000)
[15] Stallman (ibid)
[16] Davis (2006),136
[17] Davis (2006),141

These above factors consequently create and encourage strong networking potential where the value of the software 'good' to the individual user increases with the number of users and the improvements and advances that those subsequent users bring to the work. Indeed, it could be said that these OS systems are successful because they are essentially functional. This is not the case with academic works produced within the Arts, Humanities and Social Sciences (AHSS) faculties. Once more we see a salutary example of the proclamation made in chapter 2 that 'context is everything'.

Beyond the world of computer programming, one can immediately see similar and even parallel values and networking potentials to those in OS within scientific academic communities. Scheufen for one has provided evidence of the adoption of Open Access by the scientific community which has many striking parallels to the OS movement.[18] By comparison such openness and potentially infinite later alterations have the capacity to and may actually destroy or deprecate literary, musical or artistic works. Given this an immediate presenting obstacle and challenge arises over any attempt to create one universal licensing platform.

Further, the values which aid the success of the GPL do not necessarily exist in the creator and user communities of artists, authors and musicians.[19] For instance the nature of the innovation is different in the world of Arts, Humanities and Social Sciences. As Farchy acutely notes,[20] writers, musicians, scientists and computer specialists all work under different economic and social conditions

[18] Scheufen (2011)
[19] Davis (2006),141
[20] Farchy (2009),261

and these sector- specific characteristics deserve to be addressed and met with appropriate models and answers. Moreover given the diversity within the non-scientific disciplines she assesses that such divergence does not create the same community feel and spirit as with the software world. Consequently there is not the same *internal* social pressure to adopt free licensing such as the CC licences. This may lead some to justify the application of *external* social or financial pressure such as through funder or institutional policies, mandates or contractual terms to effect such a change. Thus one can see some motivational foundation for OA policies and mandates which may seek to overcome inertia and reluctance within such academic communities.

Nevertheless, even if the application of such external pressure can be explained and/or justified it does not necessarily follow that the OS movement and GPL type licences can provide an 'across-the-board model'.[21] Given this, Scheufen strikes a warning admonition that 'there is not one economic rationale within the system of science that can be applied to all academic disciplines'.[22]This may be illustrated by a brief reference to GPL- inspired licences within the non-scientific/non-software community. Where such licences exist they evidence a narrowness of scope, disciplines and user uptake. By that is meant that while such licences are widely used, their creation and use is within a relatively homogenous group with shared values and established set of social norms.[23] They are in brief 'collaborative concrete efforts'.[24] They function effectively for that simple reason. For example, there is the Choral Public Domain Library (CPDL). This again is internet based. It concentrates on providing free access and use of sheet music for choral music. It is based on the GNU GPL Licence. Likewise a number of open licences exist with the gaming community such as the Open Gaming

[21] Farchy(2009),263
[22] Scheufen (2011),12
[23] Elkin-Koren (2006),344
[24] *ibid*

Foundation's Open Game Licence (OGL)[25] and the Blackburg Tactical Research Center's EABA Open Supplement Licence.[26]

Finally, it is also worth noting that because of the interface of such licences with positive law, that doubts have been cast on the legal implications of some of these OS type licences. For example it has been queried whether licences such as the GPL and Open Content Org's Open Publication Licence (OPL)[27] are compatible with the EU Unfair Contracts Terms Directive[28] or indeed EU Competition Law.[29] Additionally concerns have been expressed as to whether the GPL licence complies with the strong Moral Rights protected in *droit d'auteur* jurisdictions, such as France.[30] An in- depth examination of these Open Source legal interfaces is beyond the scope of both this chapter and overall thesis. However, the issue is spotlighted here merely to establish that these 'foundational' licences are not legally problem- free. Given that these OS licencing platforms were the inspiration for the CC suite it is important to bear that point in mind in any analysis and assessment of the latter. The CC suite will now be considered in the following sections.

3.3. The Creative Commons licences

25 http://www.opengamingfoundation.org/ogl.html
26 http://www.punkerslut.com/copyleft-and-open-source/blacksburg-tactical-research-center-%28btrc%29/eaba-open-supplement-license/version-1-0.php
27 http://www.opencontent.org/openpub/
28 Council Directive 1993/13 On Unfair Terms in Consumer Contracts [1993] OJ L.96/29 (as implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999
29 Gonzalez (2004),335-7 and 338-9
30 Dufay/Pican (2004),480-482

3.3.1. Introduction

Various studies have revealed the multi-layered obstacles, monetary and time costs encountered in seeking to locate appropriate material on the internet, ascertain the identity of the rights-holder and negotiate permissions for use of the copyright protected works.[31]David's research for instance, has exposed what has been termed the 'stack up' costs even of small royalties where requests are sought from various owners, and which are aggravated by the fact that such rights-holders rarely co-operate in the setting of an overall fair tariff.[32] It was against such a backstory that Creative Commons, largely the brain child of US IP Professor Lawrence Lessig, was founded in 2001 with financial support from the Centre for the Public Domain. The organisation then issued its first set of free public licences in 2001which were inspired by the GNU-GPL.[33]

The initial notable impact of the CC suite is that it is much more ambitious than the OS licences, in that it seeks to address diverse groups from miscellaneous backgrounds and different nationalities. To achieve this goal it offers a menu of six basic licenses although Suthersanen has demonstrated that there are in fact eleven valid types of combinations arising out of the six basic formats.[34]Katz has described these licences in attractive terms as 'robust and easy to use legal tools'.[35] That assertion though will be tested in the course of this chapter. However before assessing the licences and their interface with copyright, related legal concepts and OA a brief description of their general and specific features is warranted.

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31 For example David (2010)
32 David (2010),60
33 http://creativecommons.org/about/history
34 Suthersanen (2007),64
35 Katz (2006),392

3.3.2. General Features

Some features are common to all the core and variant licences. That is they are freely downloadable and each grants a bundle of rights/permissions to the user.

Although the exact nature of those rights varies between the licences, the rights/permissions so granted are world-wide, non-exclusive, irrevocable and royalty-free.[36] The irrevocable nature of the licences is crucial. An author for example may, as they have every right to do so, later withdraw their work from the CC scheme. However, the irrevocable clause does not affect the uses granted by the licences issued pre-withdrawal.[37]This therefore avoids the nightmare scenario for instance where derivative works are created from previously CC licensed material, as such a withdrawal would render all the subsequent uses and licences meaningless and the works unusable. Additionally, there are doubts as to whether a rights-holder could seek to limit the duration of a CC licence for a period less than the minimum internationally recognised term of years under the Berne Convention[38] of 50 years *post mortem auctoris*, as to do so would effectively to revoke the licence prematurely contrary to this core licence term.[39]

To facilitate ease of online use, each licence is expressed in a threefold format. These are the Computer Code (that is all the metadata to enable computers on the World Wide Web to locate and read the licence terms); the Legal Code (the legally binding licence terms) and the Commons Deed (a vernacular summary of the licence terms).

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[36] For example (but common to all CC licences) Section 2.a.1 CC-BY Legal Code version 4.0
[37] Dusollier (2006),282
[38] Berne Convention for the Protection of Literary and Artistic Works 1886 [Paris Text,1971](hereinafter 'Berne' 'Berne Convention' or 'BC')
[39] ALAI (2006).7

As with the Open Source licences similar interfaces with copyright law emerge and indeed in general terms are explicitly accepted by the CC organisation.

Specifically the licences cannot and do not purport to address any exception or limitation to copyright rights given to users under any national copyright legislation.[40] Users have the benefit of these simply by virtue of that legislation. Consequently the licences specifically grant advance explicit permission to carry out one or more of the acts that would otherwise be restricted by copyright law.[41] Thus the legal character of the suite has been described by Dusollier as a 'reverse use of exclusivity'.[42] That is the rights-holder positively decides not to engage in all or some of the exclusivity granted to rights-holders by copyright law. In this regard we see the operation of the Kantian waiver principle lauded by Merges and as explored in Chapter 2 of the thesis.[43]

Moreover the licences are concerned only with the rights-holders Economic Rights. CC states categorically, that Moral Rights are excluded from the scope of the suite.[44] However, this is slightly misleading and inaccurate as all CC licences include the requirement of Attribution which *is* a Moral Right. Subject to this, the default position of the CC suite is that any rights not waived by an author under the terms of a license are deemed to have been reserved by the copyright owner. Moreover, the licensor is not allowed to impose any Digital Rights Management systems on a work made available under the CC scheme.[45]

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40 Sections 1.e and 2.a.2. CC-BY Legal Code version 4.0
41 van Eechoud (2011),174
42 Dusollier (2007),1408
43 Chapter 2.4.2.2
44 For example Section 2.b.1 CC-BY Legal Code version 4.0
45 Section 2.a.5.B Legal Code CC-BY version 4.0

In reality therefore the licences have a narrow focus: permissions relating to the Economic Rights of rights-holders not already provided for by national copyright law exceptions and limitations.

A user taking advantage of any of the CC licences must also include a copy of the licence with every copy of the work which is distributed via the CC platform.

Finally, strictly speaking a breach by the user-licensee should deprive the licensee of all rights under the terms of the licence.[46] But whether this will ultimately be practically enforceable remains to be seen, which is why the interface with enforceability is addressed later in this chapter.

3.3.2. Specific Features

The peculiar characteristics of each of the individual licenses may be summarised as follows:

3.3.2.1. CC-BY (Attribution) Licence.

The CC-BY is the most liberal of the licences. It allows users to copy distribute and amend a work provided that the author of the original work is acknowledged. The user is free to commercially exploit the original work. Moreover, if the work is altered it does not have to be made subject to any further CC licence. That is there is no

[46] Elkin-Koren (2005),418

obligation to impose any terms on later users of the amended piece. In other words the CC-BY is not a viral licence.

3.3.2.2. CC-BY-SA (Attribution Share-Alike) Licence.

This licence grants to users the same rights as the CC-BY licence but with the additional 'Share- Alike' restriction. This means that all later users of the work either in its original or amended format must distribute it subject to the same licence terms as the original licenced work.[47] This creates an infinite chain of licences based on the original licence and is a classic example of Radin's 'viral' licence terms.[48] These are not sub-licences. As will be demonstrated immediately subsequent in the section on assessment, they are something much more intricate.[49]

3.3.2.3. CC-BY-NC (Attribution Non-Commercial) Licence.

The CC-BY-NC licence bestows identical rights to the CC-BY but differs from it in that the work cannot be commercially exploited. It can also be differentiated from the CC-BY-SA licence in that there is no viral obligation to impose the same licence terms upon later users when the original/amended work is distributed.

3.3.2.4. CC- BY-NC-SA (Attribution Non-Commercial Share Alike) Licence.

This licence embodies all the rights of the CC-BY-NC just described but in this the licence *does* impose the Share-Alike restriction that

47 Dusollier (2007),1421
48 Radin (2000)
49 Dusollier (2007),1421

subsequent users must distribute the original/altered work subject to the same CC licence terms as the original.

3.3.2.5. CC BY-ND (Attribution No Derivative Works) Licence.

Under the terms of the CC-BY-ND licence, the user is granted all the permissions of the CC-BY licence with the exception that only verbatim copies of the original work can be used.

3.3.2.6. CC BY-NC-ND (Attribution Non-Commercial No Derivative Works) Licence.

This is the most restrictive licence. Users are permitted to freely access, download, and copy and distribute the licensed work verbatim ensuring that the author is correctly identified and acknowledged. They are prohibited from using it for any commercial purpose. Suthersanen has therefore designated it as a 'free advertising' licence. [50]

Having briefly summarised the main CC licences, the interfaces with law especially copyright law and related legal concepts will now be assessed.

3.3.4. Assessment

This section is threefold. First of all it will précis the declared advantages of the suite. It will then consider some legal and practical implications that we class as 'neutral'. Finally legal and practical obstacles and disadvantages are addressed. It is accepted

[50] Suthersanen (2007),65

though that this classification is not hermetic in that legal issues will have practical consequences and practical issues will have legal consequences.

3.3.4.1. Advantages

A number of advantages have been mooted for the CC suite. These include: restoring balance into copyright law; reducing transaction costs; honouring author-centricity and above all, for our purposes, promoting the easy flow of information, embracing and facilitating Open Access.

Kreutzer for one declares that the licences reintroduce 'a sense of balance that copyright and authors' rights legislators have abolished.'[51] Amongst others he claims that licenses such as the CC suite serve both authors and the general public better than reliance solely on copyright law. As far as authors are concerned this assertion is premised on the assumption that authors are also and always users of earlier creative works and so benefit from the freedom to access and use those works. He claims that this is especially so for those such as academics whose generally accepted primary motivation is not to benefit financially but rather purely altruistic of to facilitate reputational enhancement. As for the wider public, he contends that the increased availability and free flow of information and creative works should foster and develop an enriched society.[52] In that respect the Social Theories of copyright law and OA as discussed in Chapter 2 can be seen as an informing and structuring force, for example Netanel's declaration that the free availability of such information as is contained in the OA

[51] Kreutzer (2011),119
[52] Kreutzer (2011),116-118

released works being fundamental to a healthy, functioning democracy.[53]

The availability of the CC licenses has additionally been hailed as overcoming the time consuming and expensive task of locating, contacting and seeking permission from each and every rights-holder for clarification as to the exact use that can be made of a protected work.[54]Surmounting these obstacles is crucial for the Academy which is knowledge based and which builds, feeds, grows and thrives on the expansion of knowledge.[55] At the outset one can thus see the immediate appeal of such a suite to OA advocates and a vital aspect of the OA-Academy legal interface.

Furthermore, commentators such as Haunss see the CC movement as a reflection of the failure of both legislators and the market to resolve the access to knowledge obstacle.[56]This thesis will seek to address some of those shortcomings in chapter 4 by investigating some possible changes in copyright law for certain types of academic authored works and also in reflecting upon the recent Dutch and German copyright law initiatives which seek to improve OA while contemporaneously empowering such authors with additional rights.

In general terms the licences may be viewed as a positive legal interface for the Academy in that they seem to facilitate true Open Access as defined by Velterop that is that:

53 See Chapter 2.6.2
54 Guibault (2011),158 and Suthersanen (2007),59
55 Ola (2014),114
56 Haunss (2011),135

1. The article is universally and freely accessible, at no cost to the reader, via the internet or otherwise, without embargo.
2. The author or copyright owner irrevocably grants to any third party, in advance and in perpetuity, the right to use, copy or disseminate the article, provided that correct citation details are given.
3. The article is deposited , immediately , in full and in a suitable electronic form, in at least one widely and internationally recognized open access repository committed to open access and long term-term preservation for posterity[57]

Beyond Velterop's general definition all six basic licences meet some of the Berlin-Budapest-Bethseda Open Access (BBB-OA) principles which as stated at Chapter 1.1.we took as our key definition of OA. That is they all comply with the requirements of free accessibility, distribution and proper archiving.[58]

Finally, there is also an argument that the licences put control of material back in the hands of creators themselves instead of publishing corporations.[59]

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[57] Velterop (2005),6

[58] The *Budapest Open Access Initiative* states :`By "open access" to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.'
http://www.budapestopenaccessinitiative.org/read

[59] Elkin-Koren (2006),339; Fox/Ciro/Duncan (2005),112,116

3.3.4.2. The neutral position

The term 'neutral position' in this section is taken to mean an impact that is neither a distinct advantage nor disadvantage. It is merely a declaration of the interaction with positive copyright law and in particular the author's Economic Rights. This is because the CC suite (like the OS licences and their progeny) actually relies on copyright law. According to the CC scheme:

> *CC licenses are copyright licenses, and depend on the existence of copyright to work. CC licenses are legal tools that creators and other rights holders can use to offer certain usage rights to the public, while reserving other rights*[60]

It thus follows that using any of the six main licences and their combinations in the CC suite is not necessarily a dedication by the academic author of their work to the Public Domain.[61] As seen in chapter 2 the concept of the Public Domain is not without its own definitional challenges.[62] That said even taking a very broad view of the Public Domain, Boyle confirms that there are philosophical differences between the CC concept and the Public Domain. He reiterates that instead of the Public Domain, the CC suite attempts to create an Intellectual Commons through contract law and technology.[63]

CC does however provide a separate CC0 licence to enable authors to consign their work to the Public Domain. This can be used only if

[60] CC website FAQ 'Is Creative Commons Against Copyright' (also ALAI(2006),1; Davis (2006),134)
[61] Dusollier (2007),1407
[62] Chapter 2.6.2.1.1
[63] Boyle (2007),10

the author has *all* the rights to the entire work. If for example it is a derivative work, the CC0 may be inappropriate unless permission is obtained to the designation of the derivative work to the Public Domain, from the rights-holders to any and all works cited and used in that derivative work. As such its practical use is likely to be confined to works using previous publications that were already free of copyright for example where the term of protection had expired. Such a scenario may still be of assistance to new works produced by current academic authors say for example in using historical sources but will be severely limited in interaction with other current research and copyright extant works. As previously noted the philosophy of the CC0 encounters difficulties with English law which does not readily recognise abandonment.[64] Given these restrictions, the freestanding CC-0 licence *per se* is therefore of little help in fostering and promoting OA.

An appraisal of the interfaces of the six main licences with the right-holder's Economic Rights will now be summarised. For this purpose the Economic Rights are taken as those recognised by and flowing from the foundational international Berne Convention. These foundational rights are then transplanted into other and much later international agreements such as in Articles 9-13 of TRIPS.[65] The use made by the CC suite of the five main rights of Reproduction, Distribution, Translation, Adaptation and Communication to the Public follows.

3.3.4.2.1. The CC suite and Reproduction

[64] *Fisher v Brooker [*2009] UKHL 41 [2009] 1 W.L.R. 1764. (Abandonment by an implied absolute assignment of a (musical) copyright interest was to be resisted, except under very strict conditions. An implied restricted revocable licence was to be preferred. (Lord Neuberger) [50]-[59])

[65] World Trade Organisation's *Agreement on the Trade Related Aspects of Intellectual Property Rights* 1994)

Under Berne, this important core right (the right to copy) is very widely and generally expressed. It covers reproduction of the work in any material form and whether fixed or not.[66] National law then 'fleshes out' the actual rights. Most signatory countries such as the UK, Germany and France maintain the breadth of the Berne clause.[67] By contrast in the USA a rather detailed description is given. The right covers the making of copies being 'material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device'.[68]

The details of the nature and scope of exceptions to the protection right are left to national law subject to the 'three step test'.[69]

By using any of the six main licences a rights-holder is waiving this right to authorise or prohibit reproduction. From an OA perspective this specifically illustrates the general observation made earlier of compliance with BBB-OA principles.

3.3.4.2.2. The CC suite and Distribution

Although the Distribution or Right to Issue copies, was never a strong general right under the Berne scheme,[70] a wide-ranging 'all works' applicable global standard was recognised by the World

[66] Article 9(1) Berne
[67] UK Copyright, Designs and Patents Act 1988, s17;German Act on Copyright and Related Rights (Copyright Act) 1965, Article 16 (1); French Intellectual Property Code 1992 Article L. 121-3
[68] US Copyright Act 1976, s 101
[69] Article 9(2) Berne ('It 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 exploitation of the work and does not unreasonably prejudice the legitimate interests of the author')
[70] von Lewinski (2008),144; Goldstein and Hugenholtz (2013),309-10

Copyright Treaty (WCT) in 1996. This is 'the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership'.[71] Nevertheless, many individual states had a comprehensive distribution right before the WCT.[72] The EU's InfoSoc Directive for instance, expressly mandates the right [73]and this is reflected in the legislation of Member States which did not previously have one such as Belgium.[74]

As with the Reproduction right a rights-holder by using any of the six main licences is waiving this right and specifically accords with the BBB-OA principles.

3.3.4.2.3. The CC suite and Translation

The exclusive right of an author to make and authorise the translation of a literary or artistic work was a given in many bilateral pre-Berne agreements. It was then explicitly recognised by Berne.[75] The right is of course separate to that of copyright in the translated work which attracts its own free standing coverage for both author and translator under Article 2.

The right is waived in employing the following four CC licences:

1. CC-BY (Attribution);
2. CC-BY-NC(Attribution Non-Commercial);
3. CC-BY-NC-SA (Attribution Non-Commercial Share Alike) ;

[71] WCT Article 6
[72] US Copyright Act 1976, s106(3); UK Copyright, Designs and Patents Act 1988, s18;German Act on Copyright and Related Rights (Copyright Act) 1965, Article 17 (1);
[73] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10) Article 4 (1)
[74] Belgium Law on Copyright and Neighbouring Rights 1994 Article 1(1)
[75] Article 8

4. CC-SA (Attribution Share Alike).

Once again, these four licence types are OA supportive and are BBB-OA compatible. This assessment assumes that a translation could be classified as a derivative work.

Under the terms of the two ND (Non-Derivative) licences (the CC-BY-ND and the CC-BY-ND-NC) the academic author will retain this legal right.

3.3.4.2.4. The CC suite and Adaptation

The exclusive right to authorise 'adaptations, arrangements and other alterations' of a work is recognised as distinct under Article 12 of Berne. Adaptation, arrangements and other alterations are not however defined. They are therefore left to each individual national signatory state's national law for embodiment. According to Goldstein and Hugenholtz, Adaptation 'probably means the recasting of a work from one format into another…. [and Arrangement] probably means modification within the same format'[76]

At EU level the right is harmonised only in relation to computer programs and for databases.[77] That said all EU Member States provide for the general Adaptation right in national copyright laws. In some, (for example, France and the Netherlands) it is part of the

[76] Goldstein/Hugenholtz (2013),322

[77] Article 4 (1) (b) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version)(originally Directive 91/250) [2009] OJ L 111/16) (Software Directive); Article 5(b) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996]OJ L 77/20 (Database Directive);

Reproduction right[78] whereas in others such as the UK it is a distinct Economic Right.[79]

In the USA the right is 'to prepare derivative works' that is 'a work based upon one or more pre-existing works' and embraces format changes 'or any other form in which a work may be recast, transformed, or adapted'.[80]

As with Translation all the basic CC licences with the exception of the two Non- Derivative licences (BY-ND and BY-ND-NC) enable academic authors to divest themselves of the control granted by this right and to be BBB-OA compliant.

3.3.4.2.5. The CC suite and Communication to the Public

As far as literary works are concerned the foundational text is Article 11 ter Berne. von Lewinski notes that '[di]versity in this area is particularly high… [and that] 'Communication' may have different meanings even within one national law' and can vary from 'a generic term for all kinds of exploitation in immaterial form' to a specific term for particular types of exploitation.[81] Germane to our topic the relevant feature of this diverse bundle of rights is the right to authorise transmission to a remote place. The Berne right is elaborated on in the WCT[82] and s101 of the 1976 US Act. As far as the EU is concerned this is largely by the InfoSoc Directive[83] particularly in the right to make available online. The Directive as confirmed by the Court of Justice of the European Union (CJEU),

[78] France: Intellectual Property Code 1992 Article L. 121-1; Netherlands: Dutch Copyright Act 1912, Article 13
[79] Copyright, Designs and Patents Act 1988, s16 (1) (a)
[80] US Copyright Act 1976, ss106(2) and 101
[81] von Lewinski (2008),146
[82] WCT Article 8
[83] Article 3 (1)

establishes that this right is not subject to the exhaustion principle.[84]In other words, offering works online in more than one EU Member State will require a separate licence from the rights-holder (s).

As with the Reproduction right, the right will be waived by using any of the six CC licences and in respect of this right will be BBB-OA compatible.

3.3.4.3. Disadvantages

The disadvantages of using the CC suite can be sub-divided into legal and practical consequences. Given the initial caveat to this classification (that the legal and practical are not mutually exclusive) expressed in the opening paragraph of this Assessment section, this chapter maintains that both categories are valid benchmarks in assessing the applicable legal interfaces.

3.3.4.3.1. Legal Obstacles and Disadvantages

Although entitled 'International Public Licence' and purporting to grant 'worldwide' rights to the licensee, all of the CC licences depend on copyright and contract law both of which are national not international. As such, any interpretation and enforcement of the licences cannot avoid persistent issues of Private International Law (PIL). This section will not address the detailed challenges such as which national law applies and which courts in which jurisdiction should be seized of any disputes, as that is a thesis in itself. Instead

[84] Article 3 (3) and *Coditel I (Case C-62/9 Coditel v CineVog Films* [1986] ECR 881[15]-[17]

the section will concentrate on the substantive law uncertainties surrounding the suite.

Dependence on national copyright law.

The interaction of the licence terms with copyright is not as simple and straightforward as may at first be believed from a cursory reading of the licences. As can be gleaned even from the above précis many of the terms and concepts used by the CC suite and upon which successful operation of the licence depends can vary and even be unclear between different nation states as copyright law to how the Public International standards set out in the various Conventions and Treaties are transposed into binding national law. Apart from this general observation some specific issues should be noted.

Communication confusion

In the short summary in the previous section above of the neutral consequences of the licences the Reproduction right and the right of Communication to the Public were identified as two distinct rights. The CC licences though fail to differentiate these distinct rights. One group of copyright academics has therefore highlighted that this merger 'can lead to rather unwanted consequences such as the rights owner's inability to allow audio or video streaming without also permitting downloading.'[85]

[85] ALAI (2006),6

Doubtful Derivatives

In considering the Non-Derivative (ND) clauses in the CC suite it should be remembered that the definition of 'Derivative Work' in the licences is based on the s101 of the US Copyright Act 1976.[86] This is not necessarily shared on an international basis. Given the wide variation that is bound to be encountered in the multitude of individual national legal systems there must necessarily be a serious question over what constitutes a 'derivative work'. Consequently, some scholars such as Dusollier have speculated as to how wide or narrow the concept will be drawn and whether there is a risk that the ND clause may in reality lack sufficient fortitude to protect works issued under this licence term.[87]

Further, if material regulated by Share Alike (SA) licences is used to create derivative works in different jurisdictions even those with shared trans jurisdictional languages such as French or English a real risk still arises over a conflict of laws if the conditions of the SA are valid in one jurisdiction but not another.

Moral Rights

As noted, Moral Rights (apart from the Attribution/Paternity right) are not regulated by any of the CC licences.[88] But it does not

[86] 'work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'.

[87] Dusollier (2007),1417

[88] See 3.3.2. of this chapter

necessarily follow that the licences can ignore these important rights. Use of the licenced work must still be in a manner that is consistent with and complies with these rights where recognised. Once more we see the challenges arising out of the intermesh of the licences with national law. Given that these substantive laws can and do vary as to their acceptance and treatment of Moral Rights this has an inevitable consequential impact on what the CC licences can achieve and also on their enforceability.[89] For example, it has been observed that the Share Alike (SA) clauses may conflict with the right to Divulgation in jurisdictions where this moral right is protected.[90] This tentative criticism arises from the SA terms restricting the absolute freedom of the creator of a derivative work as to how they can divulge their work. In other words the earlier CC-SA licenced work dictates to the subsequent author the terms on which they can release their own work if that subsequent work incorporates material from the CC-SA licenced work.

Beyond the general and specific copyright complications just addressed, the licences also encounter contract law and related challenges

Dependence on contract law

The standard preamble to each CC licence states that the licence 'may be interpreted as a contract'.[91]Like copyright, contract law is national. Given that the actual requirements for validity and enforceability of contracts are non-uniform between jurisdictions this creates an element of complexity no less problematic than that of national copyright law. The exact understanding of essential contractual concepts such as offer, acceptance, consideration and

[89] ALAI (2006),4
[90] Dusollier (2007), 1409
[91] For example CC-BY Legal Code version 4.0

intention to create legal relationships can vary from state to state. Thus as Spindler and Zimbehl remark 'it is no surprise that there are currently no genuinely international licenses that can be applied globally'.[92] While the published licences may prima facie appear simple to understand and use and have an element of transparency which Kreutzer for example alleges is missing from copyright law[93]their actual practical application and effectiveness are no less intricate than the legal systems they purport to critique and circumvent. By way of illustration, some specific contractual interfaces will now be addressed.

According to CC the user by merely 'exercising any rights to the work' agrees to be bound by the terms and conditions of the licence.[94] Once more the real legal situation is more nuanced. Dusollier (who incidentally is a supporter of CC and a project leader for CC in Belgium) for one reminds us that the position is ambiguous and uncertain. This is because in Civil Law jurisdictions acceptance of contractual conditions requires that the licensee had the opportunity to read those conditions and has actively agreed to them.[95]In other words mere access and use does not equate to acceptance. Research reveals that the only Court decision directly touching on this issue as far as the CC licence clauses are concerned (*Adam Curry*) [96]was in a Civil Law country (the Netherlands). In that case the Court upheld that the user would be deemed to have to have accepted and to be bound by the licence terms merely by use of the licensed material. However the decision was extremely fact specific and determined by the defendant being a professional person whom the court ruled ought to have read the licence conditions for use of the CC licensed photograph in dispute. This still leaves the general legal position unclear. It is not certain therefore

92 Spindler/Zimbehl (2011),59
93 Kreutzer (2011),119
94 Preamble of the Creative Commons License
95 Dusollier (2007), 1422
96 *Adam Curry v Audax Publishing B V* Case 334492/KG 06-176 SR (District Court of Amsterdam) [2006] ECDR 22

whether a non-professional would be deemed to be bound by the terms of the licence in every case. A similar query could be raised as to whether an academic author would be so obligated legally in using the work of a fellow academic made available under a CC licence, by application of parallel reasoning to *Adam Curry*. The answer to that question remains vague.

This problem of 'consent by use' or similar behaviour is neither new nor endemic to the CC suite. Similar challenges have arisen with goods and services and the related 'shrink- wrap' 'click- wrap' and 'browse- wrap' licences. This chapter deems that a succinct review of those challenges is required and that it may be enlightening to the interface of the CC suite and contract law.

The 'shrink- wrap' usually accompanies 'off the shelf' software. In such a case the package has some form of seal and the rights-holder asserts that the purchaser by breaking the seal is deemed to have consented to the enclosed licence conditions. English [97]Scottish[98] and US Courts[99] (although some US courts disagree) have ruled that in those circumstances the user *is* bound by the terms even though they are imposed after the contract was concluded at point of sale.

The 'click- wrap' variety is more straightforward. This is an online licence for products or services. At core a user is informed in advance that they will not be able to download a program or use a product without first agreeing to the terms of use. These are invariably made available by a separate link and can normally be read and considered or even downloaded independently so the prospective purchaser/user can read and consider them before

[97] *Microsoft Corpn. v Ling & Ors* [2006] EWHC 1619 [10] (Ch)
[98] *Beta Computers (Europe)Ltd v Adobe Systems (Europe) Ltd* [1996] FSR 367
[99] *Pro CD v Zeidenberg* 86 F 3d 1447 (1996) (7th Circuit)

clicking on the consent button or icon. Given this advance opportunity such clauses are unlikely to fall foul of any national contract law.

The legal position with the 'browse- wrap' license is less clear. It can be differentiate from the 'click wrap' in that while advance awareness of terms and conditions may be made to the user, no independent means is provided to the prospective user to consult and consider those terms and conditions and to give unambiguous advance consent such as clicking on an 'I agree' button/link. Given this state of affairs, US Courts have therefore held such licences to be unenforceable.[100]

Thus it can be seen that there is no universally accepted judicial position on these issues. This chapter proffers the opinion that the CC licences would seem to accord most closely to the 'browse-wrap' variant. This is because while it is possible for a user to consult and read the licence terms before accessing and using the licenced material, there is no inbuilt mechanism such as with the 'click wrap' that requires the user actively to consent as technical and legal prerequisites. In any event it remains unclear and uncertain as to whether and to what extent even the tentative principles embodied in the case law on 'consent by use', 'shrink wrap' and 'browse wrap' just considered could be transplanted to interpretation of the CC licences.

The actual legal nature of the licence terms is also indeterminate. Elkin-Koren in her analysis concludes that CC is unsure whether its licences are 'Property Licences' with rights *in rem* thus not requiring any consent by the licensee to make enforcement effective; or

[100] *Ticketmaster Corpn. v Tickets.com Inc.* (Electronic Business Law, June 2000, 13); *Specht & Ors. V Netscape Communications Corpn. & AOL* (Electronic Business Law, September 2001, 15)

'Contracts' with rights merely *in personam* and requiring the consent of the licensee to the terms to ground enforcement.[101] This is a crucial observation, because if the creators of the licences are ambiguous about the strict legal nature of some of the licence terms this could undermine their legal reliability, interpretation and enforcement. She poses the question as to whether courts would enforce *in rem* copyrights under CC licences that were created ostensibly as *in personam* contracts.[102]

The Share Alike (SA) clauses in particular, demonstrate this awkward dependency on contract law. [103] These clauses have been described as a 'trick' because the viral nature of the clause extends its scope beyond the private licence.[104] As such it could be viewed to be counterintuitive to the underlying philosophy of CC in that it is restraining the freedom of subsequent users as to how they exercise their freedom of exclusivity (or not) in any derivative work. Such a restraint also runs contrary to the BBB-OA principles. However, the Non Derivative (ND) and Non Commercial (NC) clauses would seem to fall short of the desired goal of also allowing the creation of derivative works and the use of works 'for any lawful purpose without financial, legal or technical barriers'.[105]

Drawing again from a wider field of interest, other scholars have reiterated the dilemma and difficulties over the use of contractual arrangements on the online management of copyright. Although some of these are directed at contractual overrides of copyright exceptions and limitations [106] the same fundamental problems over the nature and ability to consent to such terms as well as the lack of clarity over the ultimate enforceability of the terms are equally

101 Elkin-Koren (2005),404-410
102 Elkin-Koren (2005),410
103 Dusollier (2006),277; ALAI (2006),4
104 Dusollier (2007),1394-5
105 Budapest Statement definition of Open Access
106 For example Guibault (2002); Akester (2010)

applicable to the private arranging of copyright by means such as the CC licence suite.

A saving proviso may exist though. Ultimately a Court could rule that the CC licence terms are at least admissible evidence in any litigation. That is to take them as indicative of the basis on which a copyright academic work was made available online even if the licence itself was deemed not to be binding. We could also moot the possibility that the fact that such an academic work was made available to fulfil an OA requirement could similarly be taken into account by a Court.

Commercially vague

In the earlier description in this chapter of each of the CC licences it was seen that some of those licences include provision to exclude commercial exploitation and use of a licensed work: the NC clauses. However what constitutes 'non-commercial' within the context of the CC suite is imprecise. According to Creative Commons' lawyers the exchange of money is not the issue, but whether the user had profit-making as its primary motive.[107] As Grassmuck notes, this places the focus on the *nature of the user* and *not the use made of the copyright work.* The related but essential question is then raised as to how one assesses motive particularly where a user may undertake both profit and non-profit activities. Thus an essentially non-profit organisation such as a charity which reutilises copyright works under such a licence but which occasionally invites financial contributions to support their website could be deemed a non-commercial user even if a particular use is at or above market prices.[108] Guibault for example is of the view that term 'non-

[107] CC General Counsel in April 2005, quoted in Grassmuck (2011),44-45
[108] Grassmuck (2011),44-45

commercial' in the licences 'leaves too much room for interpretation…'[109]a reflection with which Corbett concurs.[110]The ALAI in its position paper on the licences also reinforces this inherent confusion and moots the query as to whether "non-commercial" is synonymous with "non-profit".[111] Similarly the ALAI questions whether a government-funded enterprise is commercial or not.[112] It is suggested that this point would be of particular reference to OA publication of publically funded research. For example many research facilities within academia and elsewhere are funded largely by government sourced money. This situation embodies an as yet unanswerable question as to whether employees of such 'enterprises' are constrained in their use of works published on an OA platform under CC licences incorporating this NC clause. Further, although a recent case the regional court of Hamburg had an opportunity to make a ruling on the meaning of 'commercial' in a claim involving a CC licence[113] the decision was not specifically on interpretation of a CC Non-Commercial clause (the judgment does not specify which type of CC licence was involved but from the judgment appears to have been CC-BY-ND). Instead the interpretation of 'commercial' was in relation to unauthorised Communication to the Public. A summary of the facts should make this distinction clearer. The claimant photographer placed a photograph on Wikimedia Commons using a CC licence. A third party made an unauthorised derivative. The defendant then posted a hyperlink from their own site, (through which they published and sold educational materials) to the derivative. The Court held that as the derivative was made in breach of the CC licence because it failed to acknowledge Attribution and amounted to a derivative made without consent, the CC licence was forfeited. The derivative was therefore an unlawful copy. Linking to it *per se* was not an infringing act of Communication to the Public unless according to

[109] Guibault (2011),166
[110] Corbett (2011),523
[111] ALAI (2006),5
[112] ALAI (2006),5
[113] Case no. 310 O 402/16 (18th November 2016)

the CJEU ruling in *GS Media*[114] there was culpable or negligent conduct on behalf of the defendant which would be presumed if the defendant's link is from a site operated for financial gain. The German Court in the instant case held that it was sufficient to satisfy the test of commercial use of the plaintiff's work if the defendant's site was run for financial gain. It was not necessary to prove specific direct financial gain from the link to the unauthorised copy. A future Court may expand on these points in relation to the meaning of 'Commercial' in the CC-NC clauses or by analogy but until it does the exact interpretation of the term as used in the CC suite will remain vague.

But ultimately there is at least a perception of (the unquantifiable and unqualifiable) sense of fair play or lack of it over improper commercial use. This visceral but significant notion may consciously or subconsciously inform the receptivity of scholarly authors of the NC licences even in the event of the nature and extent of commercial/non-commercial user being more fully clarified. As Elkin-Koren has noted many authors would not wish (in her words) to be 'ripped off'[115] by having their work generate profits for someone else when that work has been released on a NC basis. To this we might add a similar disquiet is likely to be generated if academic authors are required by policy dictates or funders' mandates to release their work on an OA basis via liberal licences such as the Attribution only (CC-BY) which can then subsequently be freely exploited by others for financial profit. The challenges and balancing inherent in formulating such policies are more fully addressed elsewhere in Chapter 4.4 of this thesis in considering some possible positive law changes.

[114] Case C-160/15 (8 September 2016)
[115] Elkin-Koren (2006),339

3.3.4.3.2. Practical Disadvantages

Arising out of the legal issues spotlighted above, the interfaces between law, OA and the Academy reveal that further barriers and obstacles are inherent in actual application of the CC scheme.

Non-exclusivity

An academic author may chose or be required to publish on a CC licence to fulfil an OA requirement. The fact that the CC licence is non-exclusive does not create a legal obstacle to that author later seeking to publish on a commercial basis through a publishing company. However the fact that an authored work has already been released over the internet and free of a paywall restriction (and some or all copyright restrictions) will be commercially unattractive for a profit-making business and therefore pose a practical barrier to publication on that basis. It has therefore been asserted that the licences are suitable only where a rights-holder does not seek any financial reward for their work.[116](It should be noted though that this is the reverse of the Author Empowering Inalienable Right of Secondary (OA) Publication investigated and assessed in Chapter 4.[117] In that case the commercial publication predates the OA publication and has a built-in delay (embargo) period before the OA publication can be actioned).

[116] ALAI (2006) 2
[117] Chapter 4.5

Two further practical unresolved and growing problems with the CC suite have exist: proliferation and incompatibility.

Proliferation

No one disputes that the CC suite has proved very popular amongst multitudes of divergent users. The menu of choice of licences offered by the suite can appear appealing and user friendly and be seemingly customised to a rights-holders requirements. Moreover CC endeavours to evolve and develop the licences in response to user concerns and needs. The current suite for example is now on its fourth 'edition'. Additionally the licences are increasingly being tailored on a national basis to ensure compliance with individual state laws. However the range of licences available has its own inherent challenge. When one takes into account the previous editions of the licences not only of the six basic models but the permitted variants and the national versions multiplied by the numbers of users one can start to imagine the scale of the result. At the very least, this proliferation could lead to user confusion with authors and users struggling to decide which licences are best for them (with consequent increased transaction and time costs).[118] Once more this challenge is not endemic to CC. It has also been encountered in the OS movement.[119]

Incompatibility

[118] Katz (2006),393
[119] See for example 'Open Source Initiative's Report (2006): http://opensource.org/proliferation-report

Perhaps more importantly there is also the obstacle of incompatibility. Two particularly clear and helpful studies on this issue can be found in Katz [120]and de Rosney.[121] Compatibility exists where works released under different licences can be combined for use in derivative works. Conversely, incompatibility exists when the terms of different licences prevent users from creating derivative works from material released under different licences.[122]

The incompatibilities can be 'internal' (that is with other members of the CC suite) and/or 'external' (in their interaction with non CC licences).[123]

To illustrate the 'internal' incompatibility issue, Katz classifies the six licences into three groups: the Non Derivative (ND); the Share Alike (SA); and Non Derivative/Non Share Alike groupings.[124]

He judges those containing Non Derivative clauses as totally 'infertile'[125]that is, they can *never* be combined with works from the other licences.

However it is with those containing Share Alike clauses that the incompatibility issue is most evident. This can be demonstrated where a downstream user wishes to make a derivative work which draws on a number of previous works issued under earlier licences containing SA clauses. In such a scenario those licences containing these more restrictive clauses prevent use being made of them with material from more liberal licences. Thus CC-BY-NC-SA cannot be

120 Katz (2006),
121 de Rosnay (2009)
122 Katz (2006),394
123 de Rosnay (2009)
124 Katz (2006),400
125 Katz (2006),401

combined with CC-BY-SA because the latter does not respect the restriction on commercial exploitation.[126]

Material in works issued with non-SA and non-ND terms can be amalgamated but only with material from works also licenced on non-SA and non-ND conditions. In such a case the licence obligations in the original work's licence will dictate the terms of use for the derivative work. Conversely, if one tries to merge material from an SA licenced work, the more restrictive SA clause trumps the more generous non-SA and prevents integration.[127]

'Internal' incompatibilities also occur when merging material from past, current and future versions of the CC licences as the terms and conditions have changed over the years.[128] Similar obstacles emerge when the terms and conditions of nationally tailored CC licences conflict with each other because of the variations in national copyright law.[129] These internal incompatibilities are then exacerbated when attempts are made to combine material from CC licenced works with those from other open content licences.[130]

That said the issue of incompatibility is not static. CC are aware of some of the obstacles and the organisation should be credited with the positive efforts it is making in seeking solutions. For example since October 2015 Version 4 of the CC-BY–SA is now compatible with Version 3 of the GNU General Public Licence (GPLv3) Open Source licence. However this is not yet full compatibility. Combining materials from both licences is subject to special considerations and restrictions full details of which may be obtained from the CC

126 Katz (2006),401
127 Katz (2006),402
128 de Rosnay (2009),72
129 de Rosnay (2009),83
130 de Rosnay (2009),88

Compatibility web page. The most significant restriction is that compatibility is (as described by CC) 'one-way only':

> which means you may license your contributions to adaptations of BY-SA 4.0 materials under GPLv3, but you may not license your contributions to adaptations of GPLv3 projects under BY-SA 4.0.[131]

Given the challenge of proliferation and limited nature of interoperability and compatibility one could readily agree with Katz that, that the CC licences effectively fail to fulfil CC's mission statement 'to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules'.[132]

In addition to the various legal and practical issues outlined above there remains the continuing difficulty of enforcement of CC licences.

3.3.4.3.3. Enforcement

The challenge over enforceability of the licences is closely linked to the vagueness over the meaning of some of the already considered essential licence clauses as well as the actual nature of the licences themselves.

Crucially CC provides neither advice nor assistance in enforcing the licences. An aggrieved rights-holder-licensor must therefore resort

[131] CC Compatible Licences page https://creativecommons.org/share-your-work/licensing-considerations/compatible-licenses/
[132] Katz (2006),411

to a national legal system where there is an alleged breach of the CC licence. To that extent a rights-holder is not placed in any better position by using the CC suite than if they had merely relied on the rights granted to them by their national copyright law or had used a privately prepared licence. copyright after all offers a choice of control to an author as to how they wish they work to be used.[133]

Regrettably, these enforcement difficulties could potentially impact adversely on one of the clear advantages to the academic author of releasing a work under a CC licence. This is the signalling effect, drawing attention to the academic author's work in the hope of enhancing recognition and reputation. But as Elkin-Koren has observed, the absence of any digital enforcement facility linked to the CC platform may have the unintended consequence of actually diluting that signalling effect of the licensing scheme if licence terms are abused.[134] Further, if the licences end up being unenforceable against subsequent users, say because of the ambiguity and uncertainty of their nature, terms and conditions, this could manifest itself as a demotivating factor for the author to release further works on such terms.[135]

Apart from the legal and practical issues raised, the CC suite as part of the CC movement has a number of conceptual conundrums which this chapter submits are relevant as to how the licences are understood, formulated and used.

3.3.4.4. Conceptual Issues

[133] Dusollier (2006),280
[134] Elkin-Koren (2005),396
[135] Elkin-Koren (2006),339

This thesis not only accepts but actually advocates the importance of conceptual drivers for changing social and legal practices. This is why the initial substantive chapter of the thesis undertook an exploration of theories and justifications for both copyright and OA. Moreover the final chapter of the thesis will revisit some possible pre-Enlightenment concepts that are offered as relevant to the OA-Academy-Law interfaces in assisting better OA. But something different may be perceived in the CC suite.

Although attempting to address some of the practical and legal obstacles raised by its interface with standard copyright law the CC philosophy cannot escape the fact that it is ultimately 'subversive' and a form of political anarchism.[136]

On the one hand it reflects a libertarian sentiment but yet lacks any clear understanding and definition of concepts such as the Public Domain, Moral Rights and exceptions such as fair dealing and fair use of works with over simplified perceptions of them.[137]

Dusollier for one finds the adoption of private ordering such as the CC licences by OA advocates as 'extraordinary'.[138]This is because the suite 'installs the logic of fencing in intellectual assets despite its intent to free such assets'.[139] It thus reinforces the proprietary nature of copyright upon which it is dependent.[140]

Indeed the scheme has been described by Rose as '…a modernist kind of property.[141] This is especially so with the SA licences

[136] Elkin-Koren (2006),332
[137] Corbett (2011),530-531
[138] Dusollier (2007),1 and 394
[139] Dusollier (2007),1413
[140] Elkin-Koren (2006), 334 and Dusollier (2007),1412
[141] Rose (2011),24

because the licence is an integral part of the copyright work the use of which the licence claims to be ordering and runs with that digital asset.[142] As such Elkin-Koren analyses the CC suite as an attempt to change the practices of producing and distributing creative works without actually changing the proprietary regime.[143] Further she asserts that making copyright more user friendly in such a way actually continually reinforces its proprietary nature.[144] That is users can be lulled into accepting copyright with all its proprietary weight because they can see that superficially at any rate, it is not that problematic or socially troublesome because the CC suite renders management of rights and permission accessible, convenient and simple.

Although CC state that they are committed to copyright reform, the licence suite is not so much about changing copyright law but instead of altering social practices and the perception of copyright. For this reason the suite has been assessed, (adopting a phrase from Audre Lorde), as an attempt to use the master's tools (contractual type enforcement provisions) to dismantle the master's house (copyright).[145] In brief it uses copyright to achieve a purpose other than that which copyright itself seeks to achieve.

It has also been pointed out that the CC licence suite is really about users not authors. Dusollier who makes this conclusion, references this assertion to the founding father Lawrence Lessig's book *Free Culture*[146] which has merely one chapter focusing on creators and then only about the problems that such creators encounter in accessing information goods, with the thirteen following chapters addressing users' rights.[147] As such Dusollier sees the movement as

142 Dusollier (2007),1424
143 Elkin-Koren (2005),377
144 Elkin-Koren (2005),401 and Suthersanen (2007),61
145 Dusollier (2006),272 and 283
146 Lessig (2004)
147 Dusollier (2006),288

part of the postmodern consumer society which claims easy availability of commodities with the removal of all barriers to such access.[148]But it has an inherent weakness: its degree of success depends on how much authors align themselves with the ethics of the movement.[149] Additionally it should be realised that the sole act of putting control in the hands of the author (as the CC suite purports to do) does not automatically promote public access to informational materials.[150]*Per se* therefore the CC suite does not ensure increased OA.

It should also be noted that CC is very much Foucaultian[151] in spirit. That is it views the author as someone who by releasing their work merely sets in motion a community discourse that can result in manifold derivatives. This Foucaultian philosophy does not however receive affirmation where a user of the work under the CC licence is merely a user who does not in turn engage in the discourse by creating a derivative and releasing it to the public on similar or more liberal conditions.

All that said this thesis does not criticise the suite solely by virtue of imbibing and being informed by these motives and philosophies. Rather as advocated in Chapter 2[152] all stakeholders would be better served if assumptions such as those incorporated into the CC suite were made explicit.

148 Dusollier (2006),288
149 Dusollier (2007),1411
150 Elkin-Koren (2005),401 and Suthersanen (2007), 61
151 Foucault (1979). Also see Moglen (2002)
152 Chapter 2 Section 2.3

3.4. Conclusion

The multitude of practical, legal and financial obstacles in accessing and using online copyrighted material has spawned a licence movement and inspired advocates for OA to seek and secure changes to the control and management of such works.

The Open Source (OS) movement arising out of the desire to share and develop free computer programs could be said to be a trailblazer in the production and circulation of appropriate licences to overcome the various barriers experienced in that particular milieu. These licenses were the General Public Licence (GPL) and the GNU Free Documentation Licence (GFDL) The OS movement has additionally enthused similar licences ranging from the online gaming community to the provision of classical musical scores via the internet. That said the OS licences and their prodigy are of restricted and limited scope. Their success is inextricably linked to use within clearly defined groups of creators and users and each licence is sector specific. Additionally the sector whether it is computer programmers or gaming enthusiasts generally share an ethos, understanding, and a mode of production. Furthermore, continual alterations and circulation of the work in question largely leads to improvements and a continuous increased value being placed on the mutating work by the specific community. It has been observed that while such OS licences can be adopted by the scientific academic community as they share many of the features and behavioural norms as the free software movement, this cannot be said of other academic communities such as those in Arts, Humanities and Social Sciences. The nature of innovation is different in each of these disciplines and between them compared to the scientific and computer sectors. Furthermore alteration of copyrighted literary, musical or artistic works could (compared to the OS software) deprecate the work rather than improve it. Moreover, doubts have been raised as to the legality of some of

these OS type licences and in particular their compatibility with EU Competition Law, EU Unfair Contracts Terms legislation and the strong Moral Rights provisions of numerous Civil Law jurisdictions. In brief they do not provide a suitable general universal licence platform for Open Academic Publishing. In is the stance of this chapter that law (in particular copyright and contract) highlight those deficiencies and to that extent can be said to make a positive contribution to debates surrounding the Law-OA-Academy interfaces.

By contrast the CC Licence suite while inspired by the OS movement has attempted a much more ambitious and wider appeal. It offers six basic licences although these can be extended to a range of eleven given that some of the licences can be combined. Superficially the suite has an attractive appeal. The platform provides a kind of 'one stop shop' with all the plain, legal and technical language requirements and model licences provided. The range of licence terms purport to allow the author to tailor and customise the licence to their individual needs. As such the suite seems to overcome the various time and financial costs incurred (especially for users) in searching for, finding and negotiating terms for use of a copyrighted work. Furthermore, all six basic licences comply with the Berlin-Budapest-Bethseda Open Access (BBB-OA) principles of free accessibility, distribution and proper archiving. However, the Share-Alike (SA), Non-Derivative (ND) and Non-Commercial (NC) clauses fall short of the BBB-OA standards which should additionally permit lawful use free of 'financial, legal or technical barriers'.[153]

[153] Budapest Statement definition of Open Access http://www.budapestopenaccessinitiative.org/read

Fundamentally, the CC suite uses copyright to achieve social and economic changes. It proposes to be about returning power to authors. But as has been seen it is about shifting the balance of rights to the user. To that extent it is conceptually in harmony with OA. However, the CC licence suite is beset with legal and practical challenges which should at least raise a note of caution against universal adoption of the licences for OA.

From a legal perspective there are copyright and contractual difficulties. Using the licences (with the exception of the severely limited CC-0 licence) is not a dedication by a rights-holder of their work to the Public Domain. Instead the suite is dependent on copyright law. Even then its scope is quite narrow being confined only to management of the rights-holder's Economic Rights and even then only those uses not already permitted by legislated limitations and exceptions. The fact that copyright law is a national creature immediately poses an obstacle to licence use in the international and borderless world of the internet. As noted national copyright law can and does vary on the nature and extent of rights, limitations and exceptions. The difficulty of the CC suite in accommodating this has been illustrated in the cases of the right to Communicate to the Public (which CC has merged with the Reproduction right), the nature of Derivative works, and the interface with Moral Rights (except Attribution) which the suite does not address but which it cannot ignore. This chapter advocates that application of existing copyright and contractual law concepts and legislation can play a beneficial role in advancing OA and the use of licensing platforms not only in identifying the current challenges and shortcomings but hopefully in inspiring and provoking solutions.

As far as contract and related legal conundrums are concerned the licences profess to be contracts but ultimately are unclear as to what sort of contract they really are. Academic analysis has shown

that the nature of the licences are indeterminate as between 'Property Licences' with rights *in rem* without user consent required for validity, or mere *in personam* 'Contracts' where validity presupposes such user prior consent. Additionally like copyright, contract law is also nationally determined. The essential elements of a contract will and do vary as between jurisdictions. This obstacle was particularly highlighted by the apparent conflict of the 'use of the licence equals consent to terms' position set out in the CC licence preambles with the necessity in many Civil Law jurisdictions that a party has had an opportunity to read and actively agree to the terms of a contract before being bound.

Lack of contractual clarity within the suite is not confined to the issues immediately above. CC is similarly indecisive about the meaning of 'Commercial' is relation to its NC clauses. This could undermine confidence within the academic authorial community where a creator releases a work on a NC basis but finds that a licensee has been able to profit financially from use of the work simply because that user' s primary motive was not the generation of financial profit (the CC attempted definition). Such an outcome has the potential to detract from the signalling and 'free advertising' functions of placing an academic authored work on the internet by use of such licence terms.

In practical terms the licences encounter challenges arising out of their proliferation, internal and external incompatibility, non-exclusivity and enforcement.

The popularity, choices available within the menu suite and their mutations are incubating a latent nightmare. This proliferation will increasingly lead to confusion by some authors in deciding exactly which licence terms to employ and by users in understanding from

the cocktail of clauses just exactly what they can do with a particular licence work or a series of works issued under different licence terms. This spotlights the related obstacle of compatibility. It is impossible to mix some of the licence clauses. This is particularly so with those containing Share Alike (SA) clauses. Consequently the incompatible terms prevent the creation of derivative works incorporating material issued under different licences. This problem is then exacerbated when attempting to 'mix and match' material form CC and non-CC licenced works. Circulation and re-use of academic authored works on an OA basis which incorporate terms from different licences could be impeded.

Another practical issue for the academic author is the standard 'non-exclusivity' clause across the suite. As seen while not a legal barrier to an academic author contracting a subsequent contract for publication on a commercial basis, the pre-existence of the free non-exclusive licenced work could be commercially unattractive to a publisher. It is for this reason that the positive contribution made by copyright and contractual laws in Germany and the Netherlands which are addressed more fully in Chapter 4[154] are to be preferred.

But the ultimate obstacle for an academic author seeking to use and rely upon the CC suite for publication relates to their enforceability. The licences are not normal contracts. Moreover, CC offers absolutely no monitoring, help or advice in enforcing their licences. The aggrieved academic author must therefore rely on national copyright and contract law to enforce their rights through national courts.

As far as the CC suite is concerned, Suthersanen believes that the greatest contribution of the licences is a bridge builder between the

[154] Chapter 4.5

various stakeholders involved in the authorial and publishing world.[155] That must surely be a great positive but it does not avoid the legal and practical challenges and obstacles in viewing the suite as 'a one size fits all disciplines' licence model. This thesis does not recommend that academic authors abandon or refuse to use the CC suite but rather in contemplating or continuing to use the licences they should do so in light of the multiple shortcomings elucidated in this chapter.

Given this situation and our earlier observations of the similar unsuitability of the OS type licences maybe the solution lies in boutique suites for individual disciplines or at least for those that share similar modes of innovation and production. Ultimately this may result in an untidy series of solutions (a subject to which this thesis will return in Chapter 6) but it is ventured by this chapter that a series of such tailored platforms may offer the greatest opportunity for individual disciplines to encourage, use and expand OA publication of scholarly works. Such a multiple layered approach to the Legal–OA-Academy interface is a recurring conclusion of this thesis as seen for example in its promotion of a hybrid theoretical model for both copyright and OA as outlined in Chapter 2. It will be recalled that in that chapter we concluded that there was no one theory which justified either copyright law or the concept of OA. As with the theoretical so with the management of OA and specifically licences platforms. There is no one model which fits every situation. Indeed the willingness of the academic community to explore such a variety of bespoke models, some incorporating the CC suite and some not, was evident at a workshop attended by this writer at the EU Commission's DG Connect in October 2015.[156] Such efforts are recommended by this chapter and must continue if OA is to succeed in a balanced fashion.

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[155] Suthersanen (2007),67

[156] 'Alternative Open Access Publishing Models: Exploring New Territories in Scholarly Communication' Brussels 12 October 2015

Indeed the CC suite by offering a series of licences with varying copyright protection exemplifies the practical need for a multi-level approach to OA implementation and management. Further, many of the theoretical bases explored in Chapter 2 may be seen to be reflected in the licence clauses. From a copyright perspective, for example, the Personality and Labour theories which this thesis placed as First Order principles can be seen throughout in the Attribution requirement of each of the basic licences, maintaining the link with and acknowledgement of the intellectual labour of the individual author(s) of the licenced work. Likewise the Non-Derivative and Non-Commercial clauses (for all their imperfections) may be viewed as manifestations of the author-side Human Right of copyright and the Law and Economic theory. Conversely from an OA perspective, the Utilitarian, Social and society-side Human Right of access to copyright material could be said to explain the degree of waiver of copyrights held by the author in choosing the type of CC licence under which they publish their work online.

Chapter 4:External Drivers of OA Compliance: Policy and Positive Law Possibilities

4.1. Introduction

Having surveyed and assessed the doctrinal-theoretical-OA interface in Chapter 2 and the online licensing platform in Chapter 3, this chapter turns to another interface. It undertakes an investigation and evaluation of measures emanating from outside the Academy that are available to drive forward the implementation of and compliance with OA. It divides those instruments into two basic groupings: Policy (by which we mean 'OA Mandates' from governments and other funders) and Positive Law measures. In doing so the chapter seeks to address another aspect of the basic research task of this thesis, that is whether law and in particular copyright law operates or could operate in a beneficial or disadvantageous manner for OA purposes.

It seeks to answer the following questions:

1. Are Policy drivers such as OA mandates preferable on the basis that they are copyright neutral?
2. Would changes to positive copyright law be superior?

Its findings are set out under the themes of Avoidance, Abolition or Adjustment.

4.2. Avoidance: OA Mandates and the interface with the rights of Divulgation, Withdrawal, Publication and Distribution

We have used the term 'Avoidance' to describe the Policy instrument of mandate because at first blush it seems to be copyright neutral. However from a legal perspective such policies might affect the rights of Divulgation, First Publication and Distribution. At the time of writing there is a dearth of literature on how OA and OA mandates may interact with these rights. Consequently an attempt will be made to extrapolate and apply the law and principles relating to those rights as understood, explained and applied in other scenarios to those of OA and OA mandates.

Why does the issue merit consideration? For one, scholarly research today is an international affair and it is not uncommon for a scholarly author to publish in co-operation with scholars based in other jurisdictions. Similarly even a UK based scholarly author frequently publishes not only in English in the UK but for example in French to reach jurisdictions in that language or even through French based publishing outlets and so on. For example the German and Spanish copyright codes automatically grant the right of Divulgation to foreign authors even if the Berne Convention reciprocal conditions are not met.[1] Thus the significance of this right in 21st century academic publishing.

A mere summary of the rights is given below. Fuller explanations can be found in the numerous internationally recognised texts.[2]

[1] German Copyright Act 1965 Article 151; Spanish Copyright Act 1965 Article 14
[2] For example: Adeney (2006); von Lewinski (2008); Davies/Garrett (2010); Goldstein/ Hugenholtz (2013);

4.2.1. Right of Divulgation

This is the right of control over when, where, how and to whom to publish a work. Berne however does not create an international obligation to protect this right. Nor is it an EU copyright concept given that Moral Rights are not harmonised at Union level.[3] It is therefore very much a national right albeit with international implications as highlighted in the paragraphs immediately above.

Firstly, a brief historical note is in order here. As asserted by Professor Ginsburg (echoed by her US Supreme Court Judge mother in *Eldred v Ashcroft*[4]) a proper understanding of copyright history can provide for and promote legislative harmonisation.[5] It is the view of the current author that such a position vindicates the emphasis in Chapter 2 of a proper understanding of the philosophies and theories behind copyright laws and doctrines and also the necessity of an historical perspective which this thesis will revisit in Chapter 6. Returning now to Ginsburg, her comparative investigation of the origins of French and US copyright law revealed that the two systems were not originally substantially different: both embraced author-centric and instrumental undercurrents.[6] It is also hoped that such reflection can thus avoid over- simplistic clashes between the different legal cultures.

In relation to the right of Divulgation, while the right is generally considered to be a child of French law, it had earlier echoes in English law which then influenced the development of copyright in the Common Law world. This can be seen in landmark cases such as *Pope v Curl, Millar v Taylor* and *Donaldson v Beckett*[7] albeit not by

[3] Preamble to the InfoSoc Directive [19]
[4] 537 US 186 (2003), 200
[5] Ginsburg (1990),996
[6] Ginsburg (1990),994-996
[7] *Pope v Curl* (1741) 2 Atk. 342; *Millar v Taylor* (1769) 4 Burr. 2303; *Donaldson v Becket* (1774) Hansard, 1st ser., 17 (1774): 953

the term 'Divulgation'. Indeed the right continued to be upheld even after introduction of the various English statutory schemes, for example in *Prince Albert v. Strange* [8] where the Vice-Chancellor concluded that an author had a prerogative to determine where, when, how and to whom their work should be disclosed and published.

Today the right is widely recognised in Civil Law jurisdictions.[9] As the French Code asserts 'the author alone shall have the right to divulge his work'.[10] It is viewed very much as a 'natural right' [11] and is intrinsically tied to the notion that the disclosure of a work unavoidably impacts on the creator's reputation.[12] The right is not subject to the exemptions and limitations that apply to the Economic Rights. According to Dietz, it therefore reflects a Human Rights dimension in the author's copyright.[13]In the French scheme for example it can be seen as a public policy dimension protecting the author even against themselves in divesting themselves of this important feature.[14] For example '[r]espect for this principle takes precedence over the enforcement of contracts and may always be invoked'.[15]Thus again we see the need to understand and embrace the theories behind the right as addressed in chapter 2.

Indeed it has been stated that '[o]ne's conclusion as to the nature of copyright is determined by one's views of its source'.[16] Given this, there is far from universal academic acceptance and recognition of the right and indeed of Moral Rights generally. Patterson for example asserts that while 'superficially appealing' it is too

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[8] (1849) 64 Eng. Rep. 293,
[9] For example: French Intellectual Property Code 1992, Article L. 121-2; German Copyright Act 1965, Article 12
[10] Article L121-1
[11] Da Silva (1980),17
[12] *ibid*
[13] Dietz (1994),204
[14] Lucas BLACA, 1.3
[15] Sarraute (1968),485
[16] Patterson (1993),14

romantically author-centric leading to legal fiction, ambiguity, uncertainty and irrationality.[17] Masiyakurima agrees, viewing such schemes as 'riddled with internal inconsistencies' and dependent on vague *nexa* with Personality theories.[18]

Even where the right is recognised it is also subject to an important caveat in some jurisdictions. For instance, in France the right has practically been eliminated for civil servants in respect of works produced by them as civil servants.[19]

4.2.2. Right of Withdrawal

Closely allied to the right of Divulgation, this empowers an author to withdraw a work from circulation. The situation described by Dietz in his 1993 study[20] which revealed that this right exists in only a handful of Civil Law countries more or less remains the current position. Of these the strongest is in France. Even this is not absolute as it is conditional on advance indemnity to the assignee and right of first offer of exploitation by that assignee in the event of the author later deciding to re-publish.[21]

4.2.3. Rights of First Publication and Distribution

In the Common Law world although a right of Divulgation is not generally specifically recognised or provided for it could be said that the exclusive economic right to control distribution may come close

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17 Patterson (1993),723
18 Masiyakurima (2005),411,413,
19 Article L.127-1 French Intellectual Property Code 1992 (as consolidated 23 February 2015)
20 Dietz (1994),4
21 French Intellectual Property Code 1992, Article L. 121-4

to achieving the same end.[22] This is unsurprising given some of the historical background summarised above by Ginsburg.[23]

In the USA, according to Carter and Damich there is a body of jurisprudence that maintains continuity of the Common Law's Right of First Publication into the 1976 statutory code.[24] However the US Courts seem unclear and lack unanimity on what constitutes 'publication' which has been described as 'a slippery term'.[25]

Moreover, US law appears to merge the concepts of 'Reproduction' and 'Distribution' which are distinct rights under EU law (Articles 2 and 4 of the InfoSoc Directive).[26]This probably arises from the fact that the 1909 US Act used the concept 'publish' whereas s 106 of the 1976 Act refers to 'distribute'.

In a thorough review of US case law, preliminary reports leading to the 1976 Copyright Act, and academic treatises, Menell concludes that the Courts and commentators 'are scattered across the interpretive landscape'.[27] In his view, a proper and holistic reading of the legislative intention was to embrace both the rights to Publish and Distribute.[28]This is reinforced by decisions such as *Salinger v Random House* [29]and *Harper & Row*[30] that unpublished works are protected against exploitation by invocation of the Fair Use Defence. It has been said of this decision that it re-affirms the principle 'that the author generally should be the one to decide whether, when and

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[22] For example, US Copyright Act 1976 s106; UK Copyright, Designs and Patents Act 1988 s18
[23] Section 2.1. above para. 2.
[24] Carter (2008),425; Damich (1988) 41
[25] Linford (2011),607
[26] Linford (2011),587
[27] Menell (2012),229
[28] Menell (2012),259-257
[29] (1987) 811 F.2d.90 (2nd Circuit)
[30] *Harper & Row Publishers Inc. v Nation Enterprises* (1985) 471 US 539 (US Supreme Court)

how he is to go before the public'[31]and that this is close to the Civil Law *droit moral*. As such, it embraces two aspects: personal, the right of creative control; and economic: the right of publishing first.

Landes analyses the rationale of such a right from a purely neo-classical economic perspective.[32] As such he advocates a range of possible protection for unpublished works. These would span from those produced for purely personal purposes (in which case there would be no overriding public interest to 'force' publication); a limited fair use exception for merely reproductive purposes; and a generous approach to allow use of works created with the intention of publication in any event.[33]

Having surveyed the nature of the rights an attempt will now be made to assess any possible relevance to OA mandates.

4.2.4. Possible OA mandate issues for consideration

In this as in any other area of copyright protection and management, clashes of philosophical underpinning emerge. On the one hand there would be those such as Ginsburg who maintain the supremacy of the rights of the author and that argue that 'copyright is a law about creativity; it is not and should not become … a law for the facilitation of consumption'.[34] Thus existing rights should be jealously guarded and not interfered with. Consequently even a policy that risks overriding these rights should be resisted. In other words, such mandates should be treated with great caution and even avoided or resisted. Such position may be termed OA sceptical or even OA hostile. On the other hand there are those such as Patterson who see the role of copyright to encourage the titleholder

[31] Kernochan (1985),330
[32] See Chapter 2.5.2
[33] Landes (1992),112
[34] Ginsburg (1997),20

to make the information available for the public to use in order to learn, which is contrary to the rights of the titleholder to control use of their work'. [35] Accordingly, any policy that enables 'the widest possible …dissemination of literary, musical and artistic works.' is to be encouraged. Thus copyright is maintained but is balanced and often outweighed by the public interest, reflecting the Utilitarian[36], Human Rights[37] and Social[38] theoretical structures discussed in Chapter 2. This position may be termed OA friendly and facilitative. However there will always exist a caveat to that position. Availability is one thing; accessibility is another and is central. The Public must have access to copyrighted material for copyright to function and fulfil its goal (in US terms) of the progress of science and learning.[39] Therefore for OA to operate effectively the public must be empowered and enabled to access scholarly works. It could be said that the policy mandate for example from Research Councils adds this additional essential dimension.

Against this background we attempt to answer the question whether such mandates, as defined, either potentially or actually interfere with the stated copyrights.

The obvious question is whether such mandates force or compel a scholarly author to speak and therefore effectively infringe the rights of Divulgation or Publication. Drassinower (albeit addressing copyright infringement) sees matters through a Kantian lens. This amounts to 'compelled speech'.[40] 'The purpose of copyright law is not to provide incentives for creativity but to affirm the inherent dignity of the author as a speaking being' (thus echoing Barron)[41] .

[35] Patterson (1993),707
[36] Chapter 2.5.1
[37] Chapter 2.6.1
[38] Chapter 2.6.2
[39] Kreiss (1995),10
[40] Drassinower (2012)
[41] Drassinower (2012), 222. Also the earlier section of this thesis *Barron and Kant* in Chapter 2.4.2.1.2

Drassinower also asserts that a correct philosophical and doctrinal understanding leads to practices that facilitate and enrich the Public Domain rather than foreclosing it because it thus treats the writer's audience as dignified 'speaking beings' and not as mere consumers.[42]

So returning to the substance of our enquiry: do mandates inherently and unavoidably amount to 'forced speech' and impingements of these rights of Divulgation or Publication? Initially one would have to ask what exactly this pressure is. In favour of such mandates one could respond simply by stating that if a scholar believes that the terms attached to research funding impinge upon their positive or philosophical rights then as an author are at complete liberty to refuse the funding and keep their control intact. The scenario becomes slightly more complicated and nuanced if the pressure (real or perceived) comes not from an external funder (where the offer can be declined) but internally say from the scholar's academic employers to ensure that irrespective of funding the institution has a wealth of scholarly output offered on an OA basis in order to boost that institution's rating in assessments such as the UK's Research Excellence Framework (REF). Such a situation strays somewhat beyond the scope of this chapter and opens up issues over Academic Freedom, employment law and the latter's interface with copyright. Various aspects and interfaces of this internal management of OA will be investigated further in Chapter 5.

Further issues arise out of the French jurisprudence. First, that of Divulgation and 'ownership' of a scholarly work. Although modern French law resists the Common Law presumption that works produced by an employee belong to the employer,[43] some subtle

[42] Drassinower (2012),223
[43] Law of 11th March 1957 Article 1;and Article L111-1 IPC 1992

and nuanced historical judgments cast an interesting light on the subject of just who owns the copyright when the case is other than the straightforward employer-employee. The case of *The Affair of the Dictionary of the Academie Francaise* [44]is particularly illuminating on this point*.* [45]There the litigation arose over who owned the copyright in the Dictionary given that the *Academie* has been abolished by the revolutionary National Assembly. The defendant asserted that the work was ownerless and that they had the right to publish their own edition with amendments. The Court of Cassation ruled that the concept of 'author' was not restricted to those who wrote a work but also embraced those who had paid to have it written. In this case it was the French state that had paid for the Academicians to compile the Dictionary (on what today would be classed a 'contract for services'). As the state had assigned that ownership to publishers, it was those publishers who had the right to resist the breaches of copyright by the defendants. Today in the context of OA and the right of Divulgation it could be argued that extrapolating and applying this principle an OA funder is placed in a strong position. The possibility therefore exists of a funder being legally entitled to demand OA publication on terms chosen by them without infringing the right of Divulgation, even if the funder fell short of asserting ownership.

The second concerns the French understanding of the right of Withdrawal.[46] This is conditional on an advance indemnity to assignees should the author subsequently seek to withdraw. It could thus be argued that where a scholarly author receives funding for research which is then required to be published on an OA platform should be obliged to reimburse that funding if they later wish to

[44] Judgment of 28 flor. an. 12, Cass. crim., [1791] 1 Dev. & Car. 1.971, 3 J. Pal. 747**;**
[45] See Ginsburg (1990), 1019-1021 for further details.
[46] IPC Article L121-4

withdraw from the OA scheme and for example seek to utilise the work say in an exclusively commercial publication.

The third contribution which may be drawn from the French position relates to the fact that the right of Divulgation has practically been removed from civil servants.[47] This French example may thus provide a basis for at least government funders of research to seek an exception in copyright law to withdraw the right of Divulgation/First Publication from academic authors in relation to their research output which is the fruit of publically research funding.

A challenging prospect draws on Landes' third variant above (that legislatures and courts should look favourably on allowing an exception to author's control where the work was ultimately intended for publication anyway). If such a principle was accepted it could provide a theoretical-doctrinal basis for mandates or even the introduction of an exception to the scholarly author's right to divulge where the work is the fruit of research funding.

Closely allied with this as far as the UK is concerned is s171 (3) CDPA 1988 the so-called maintained 'public interest' clause. Although that existing clause has been interpreted very narrowly by UK courts there is nevertheless the seed of a rationale within it to assert that copyright cannot and should not nullify an exception framed legislatively or judicially that is in the public interest.[48] That said attempting to manage such an exception by policy mandate even where embodied in a contract or by depending on judicial development of the 'public interest' clause lacks the uncertainty of an unambiguous legislative measure. Even then such a construed

[47] IPC Article L111-1and L131-3-1
[48] Carter (2008),422

exception would still have to comply with Berne's Article 9 'Three-Step Test' which is considered in more depth in section 4.4 of this chapter.

Thus although Policy measures such as OA mandates appear to avoid impinging on copyright the enquiry just undertaken shows that there are a series of interfaces which reveal that that preliminary assessment is less certain.

From Policy we move to consider whether positive copyright law changes would be preferable in driving OA forward, embodying Patterson's dictum that 'The most effective way to change the legal culture is to change the law'.[49]

Those Positive Law Possibilities will be considered under two main themes: Abolition and Adjustment.

4.3. Abolition of Academic Copyright

Perhaps the most radical proposal is that copyright protection should be abolished completely for academic works in order to facilitate OA. This is the purely Positivistic approach to copyright theory and doctrine which was assessed in chapter 2.[50] The main proponent of this proposition is Shavell.[51] It is his scheme which will be critiqued in this section. His argument may be summarised as follows:

1. Scholarly authors publish essentially to enhance their reputation and profile.

[49] Patterson (1993), 717
[50] Section 2.6.3
[51] Shavell (2010)

2. Publication on an OA basis attracts more readers and consequently serves the academic's goal of increased scholarly esteem.
3. The cost of author-side publication fees for OA to replace the traditional economic model of 'pay to read' will be met and absorbed by academic institutions and therefore at no personal cost to the scholarly author.
4. Legislative change is essential to ensure a universal and effective uptake of OA publication.

The proposal has been critically appraised from an economic perspective.[52]The details of the economic argument are not repeated here except insofar as they overlap with legal concerns. The accuracy of the economic models used by Shavell has been challenged, thus re-iterating the concerns raised in chapter 2 [53]over use of such economic modelling in copyright issues. From a practical point of view mere exposure of scholarly publications on an OA platform does not guarantee access and actual readership. Further the assumption that OA necessarily results in *increased* readership and a consequent enhanced profile and academic esteem is over-simplistic.[54]*Inter alia* Shavell's argument fails to take account of the possibility and even the probability that a scholarly author may prefer to publish in a highly esteemed journal for example, than in a lower esteemed one even if the former attracts fewer readers. The proposal also fails to address whether the existence of copyright protection may be an incentive in the first place for an author to start publishing, as discussed in chapter 2.[55] For example in relation to the Utilitarian theories of copyright it could be said that there would then be no first- mover advantage in publishing on an OA basis. Instead the possibility of authors 'holding out' awaiting a

[52] For example Mueller-Langer/Watt (2010)
[53] Section 2.5.2.2
[54] Also Nabilou (2010),42
[55] Gordon (1982);Towse (2010);Benkler (2006)

primary copyright free publication which they could in turn liberally use and reformulate.[56]The economists have also indicated that a complete shift to OA may be disadvantageous to institutions with a high publication output as the amount of author –side publication charges could exceed the reduced expenditure for instance on pre-existing journal subscription fees. An outright abolition of copyright for scholarly works could also provoke publishers to eschew on-line publication entirely and to concentrate on quality hard copy publication where the reproduction and distribution costs for readers and copiers could be a significant dis-incentive to do so. Such a scenario could lead to publishers effectively monopolising such markets. This would be 'disastrous for social welfare'.[57] Others have also highlighted that academic works are, from an economic analysis, positive externalities. In other words even with full copyright protection, society benefits more from such publications than the economic cost to society (if any) incurred in producing such works.[58]Abolishing *all* academic copyright could therefore eliminate a positive societal externality.

From a copyright law focus, Shavell struggles to define just exactly what would constitute an 'academic work' which would be embraced in his proposed general abolition clause. He starts with the academic journal article and then attempts to extend this to books but does not differentiate the various forms of long text academic publications such as student textbooks, monographs and doctoral theses to mention but a few.

Shavell's difficulties in advocating a universal Positivist abolition of academic copyright are evident upon further examination of his definition. This definition is analysed and assessed below with the

[56] Section 2.5.1.1
[57] Mueller-Langer/Watt (2010),51
[58] Nabilou (2010),40

original quotation in italics and our observation in parenthesis. Shavell provides a four limbed definition of 'academic publication' (by which he means journal style articles and not long-form publications such as monographs and textbooks):[59]

1. *'whether its authors are usually academics'* (however this assumes but fails to elucidate the core definition of 'academic' that he is attempting to provide).
2. *'whether the readers are mostly academic'* (again the same assumed definition lacking precision and clarity and without any detailed guidance as to how one embarks on identifying and measuring the readership).
3. *'the degree to which its content is academic (displays sophistication and knowledge of prior learning)'*. (But it could be argued that such a definition could equally apply to authors completely unrelated to the Academy); and
4. *'most important, the magnitude of any royalties received by authors'* (for example, low or no royalties would favour classification as academic). (In so doing he espouses an unhelpful nexus between copyright and economic incentive and fails to take account of an author's Moral Rights. Moreover he makes a bold assertion that if copyright is not seen as a requirement to initiate academic publication then it ought to be abolished.[60] However, the Natural Law theories which can explain non-economic motivation and the requirement for copyright protection are ignored.[61] Thus, Nabilou acutely observes that abolition of copyright may in practice adversely affect the motivation of individual scholarly authors even if the author-side costs are borne by academic institutions[62]).

[59] Shavell (2010),337
[60] Shavell (2010),338
[61] Chapter 2 section 2.3 and Yen (1990) 537
[62] Nabilou (2010),31

Shavell also states that theoretically these criteria could also apply to long-form academic publications. However he admits that this may not be practical. He concedes that there are complications in doing so, largely because of the revenue stream from royalties.[63] Consequently he accepts that copyright would have to remain for such texts but not for mere compilations and databases.[64]

It has also been observed that Shavell's proposal fails to accommodate and address derivatives compiled from such academic works.[65] If the author of such a derivative does not fit neatly into the fourfold analysis it would seem that the secondary author could still obtain copyright protection.

Scheufen questions whether the proposal to abolish all academic copyright is both feasible and reasonable.[66]He concludes that it is neither. We agree with his judgment. Such abolition would require international co-operation and amendment of Berne, the WIPO WCT, TRIPS and regional legal corpora such as the EU copyright Directives. Otherwise any national move to do so would render the state involved in breach of these obligations. Further such abolition may from an economic perspective prove to be a dis-incentive to publish in the first place. Indeed one observer, Nabilou, maintains that copyright law has sufficient inbuilt balances (the eternally double edged coin of our theories and doctrines chapter[67]) that allow for the protection of individual creativity and the dissemination of knowledge.[68] The same commentator (echoing Merges[69]) reminds us that under the current regime copyright law allows an author to

[63] Shavell (2010),339
[64] Shavell (2010),339
[65] Nabilou (2010),31
[66] Sheufen (2015),143
[67] See Chapter 2.2.3
[68] Nabilou (2010),31,42
[69] See Chapter 2.4.2.1.2 (Merges on Kant and waiver of rights)

waive rights and enforcement and stresses that this voluntary process is the best model.

This chapter therefore assesses an outright Abolition of academic copyright to enable OA to be fraught with definition and difficulties of scope. As such, given the basic research question of this thesis we would judge such an outright abolition as disadvantageous rather than beneficial to OA.

That said what we term 'nuanced-Positivist' copyright law reform may better serve OA. The chapter will now consider two separate such Positivist channels. These changes are labelled Adjustment (as opposed to the issues of Avoidance and Abolition already addressed). They are subdivided into two categories: Adjustment-Author Restrictive; and Adjustment-Author Empowering.

4.4. Adjustment- Author Restrictive: A new legislative exception for 'funded research' academic publications.

It has been said that rights once given are very difficult to take away.[70] In this section rather than the blunt revocation of all academic copyright advocated by Shavell, consideration will be given to the possibility of a narrower, more focused Positivistic solution by way of a new legislative exception for certain types of academic publication

In considering the possible change we adopt as a working model, Geiger's definition of an exception/limitation as an instrument 'that determines the scope of a right and thus the actual legal range of

[70] Geiger (2010),517

the right'.[71] As such exceptions/limitations are one of the most potent tools available to manage copyright and to maintain the balance, the eternally doubly-sided coin referred to in our opening chapter. As far as a 'legislative fix' for OA publication is concerned it is argued that an internal copyright solution by way of an exception is preferable to using other legal means such as Human Rights, Competition or Consumer laws.[72]

The section unfolds by considering firstly the rationality of exceptions/limitations linking them to the theoretical/doctrinal study undertaken in Chapter 2, then by examining how they can legally be created and finally how they might be specifically used in an OA context.

It could be said copyright exceptions/limitations which liberate and encourage the free flow of information to the public reflect a Human Rights perspective. It will be recalled from Chapter 2 of this thesis that the same Human Rights legislative instruments seek to protect not only the creator and but also members of wider society to participate in the cultural life of that society.[73] In fact rather than two conflicting rights, Article 15 ICESCR uses the singular 'this right'[74] to embrace 1) cultural participation 2) access to science and technology[75] and 3) protection of authorship. , science and technology'.

[71] Geiger (2010),519
[72] See Hugenholtz/Okediji (2008),4
[73] See Chapter 2.6.1 and United Nations Universal Declaration of Human Rights 1948 (UDHR) Article 27; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) Article 15 (1) (a)
[74] Shaver/Sganga (2009), 640-641
[75] In UN terminology these are very broad terms and include technology, arts and crafts, science and social science, folk wisdom (UNESCO Constitution Article 1 (2) (c)

Jurisprudence for example of the European Court of Human Rights (ECtHR) has also established that freedom of expression and the right to receive information are fundamental rights.[76]

Further, some commentators see this right as justifying 'the ability to access, enjoy, engage with and extend the cultural inheritance ; to enact , wear, perform, produce, apply, translate , modify, extend and re-mix; to manifest , share , reinterpret , critique, combine and transform' [77] … and 'freedom to create, transform, share and trade cultural works and techniques'. [78] Such commentators adopt a very Foucaldian standpoint, as they do not view the author in Human Rights instruments as synonymous with the author in IP law. We previously saw such a Foucaldian philosophical inclination in the CC licence suite.[79]

The ICECSR also imposes a duty on signatories 'to take measures to ensure …the diffusion of science and culture'. As such, exceptions/limitations which facilitate dissemination of ideas and information could be seen as a manifestation of freedom of expression and ability to participate in the intellectual life of society'.[80]

Exceptions/limitations also evoke what Senftleben calls 'intergenerational equity'.[81] That is fairness to users to enable them to become creators and authors in their own right. This embraces the previously mentioned assumption that authors always build on what has gone before: that no one creates in splendid isolation.[82] It

[76] *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 [49];also see Article 19 UDHR and Article 10 European Convention on Human Rights (ECHR)
[77] Shaver/Sganga (2009),648
[78] Shaver/Sganga (2009),646
[79] See Chapter 3.3.4.4.
[80] Senftleben(2004),30,31
[81] Senftleben(2004),39
[82] See Chapter 2.4.1

could be asserted that this is especially relevant where an intersection with educational purposes and publically funded research are involved.

Applying these concepts specifically to an OA context there is also the social responsibility (reflecting the various 'Social Theories about copyright' considered in Chapter 2[83]) as put by Willinsky that:

> 'A commitment to the value and quality of research carries with it a responsibility to extend the circulation of such work as far as possible and ideally to all who are interested in it and all who might profit'.[84]

Incidentally the narrower and more restrictive understanding of OA as expressed by Willinsky may be more acceptable to scholarly authors than the more pervasive and invasive wording of the Berlin-Budapest-Bethseda Open Access (BBB-OA) principles.[85]

For Willinsky, a number of objections which can be raised to his argument, are discounted. First the fact that OA for academic works probably may not have an effective meaning for and impact upon most ordinary citizens is not the issue. For Willinsky all measures undertaken to date to facilitate OA are merely a starting point similar to the 19th century public library movement.[86] For him the fact that the public may not be interested in actually accessing the publications is also irrelevant. In other words there should be an automatic right of access which the public does not need to earn.[87] Finally, the risk of 'information overload' is discounted. Willinsky

[83] See Chapter 2.6.2
[84] Willinsky (2006),(xii) and146
[85] See Chapter 1.1
[86] Willinsky (2006),111-112
[87] Willinsky (2006),125

sees this merely a practical challenge and neither a questioning nor rebuttal of the public right to access the information. For Willinsky that challenge must be met by the academic community endeavouring to ensure that OA publications are properly indexed, locatable and searchable.[88]

Throughout this discussion it should of course be remembered that many assumed notions for example of what constitutes 'the public good' and 'public interest' are much disputed and the literature shows that such terms are open to debate, misinterpretation and exploitation.[89]

In addressing the quest set by this section we of course have the benefit of the extensive literature on the general nature and merits of copyright exceptions/limitations. This literature also includes reflections on the possibility of a universal international exceptions/limitations treaty.[90] Many of these commentators conclude that the challenge of seeking such an all embracing treaty is 'monumental' [91] and that the prospects of achieving it is 'are very distant at best'.[92] However this section will mine and draw from this literature and taper it to the peculiarity of publically funded research publications. Consequently the argument develops a confidence that a specific amendment or international agreement to address certain types of academic copyright would probably encounter a relatively smoother passage through the consultative and legislative processes and therefore entail higher prospects of success. The argument proceeds by considering the legal basis for such an exception/limitation and then assesses its merits in an OA milieu.

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88 Willinsky (2006),125-126
89 For example, Mansbridge (1998),5,10
90 For example Geiger (2006),(2009) and (2010); Geiger/Gervais/Senftleben (2014); Hugenholtz/Okediji (2008); Kur (2009); Ricketson (2003) Senftleben(2004) and (2010)
91 Reichman/Okediji (2012),1413
92 Hugenholtz/Okediji (2008),29

The bedrock for any new exception/limitation must be the Berne Convention Three-Step Test. Embodied in Article 9 this was initially applicable to the Reproduction right only. But it has since been embodied and extended to other rights in subsequent international copyright instruments such as TRIPS, [93]WCT[94], WPPT[95], The Beijing Treaty[96], The Marrakesh Treaty[97] and the EU's Software, InfoSoc and Database Directives[98].

Cumulatively the Test as expressed in these instruments reflects at least three major strands of copyright thought. Firstly, the Natural Law theories of European Civil Law (as reflected in the Berne Convention with its protection of the personal author), secondly, the Utilitarian (embodied supremely in TRIPS with its extension of protection beyond the author to 'rights-holders' embracing for example commercial publishers) and thirdly an amalgam of both of these (which can be seen in the WIPO treaties). Again the importance of copyright theory and doctrine to actual legislation and practice as emphasised in our previous chapter is reflected by this point.

Although WTO dispute resolution panels have considered the Test in its TRIPS variants for example in relation to s110 US Copyright Act[99] these panels are not Courts of law. Indeed some commentators such as Kur regard the panel reports as being neither enlightening nor helpful.[100] Even if one does not accept those criticisms the International Court of Justice, which is the only judicial body

[93] Articles 9,13,,26.2, 30
[94] Articles 10(1) and (2)
[95] Article 16(2)
[96] Article 13(2)
[97] Article 11
[98] Articles 6 (3), 9(1) and 6(3) respectively
[99] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm
[100] Kur (2009), 313-340 for critique.

charged with giving a definite ruling on the interpretation of the bedrock Berne Convention[101] has yet to deliver a judgment on the Test. Consequently we rely very much on the academic commentary for fuller insight into the nature and application of the Test.

The commentators note that '[t]he test ….is meant to judge the exception *as a rule* not its application in a specific case to a given author, work or user'.[102] It encompasses both open ended US style 'Fair Use' clauses and also closed systems such as in the EU.[103] It is also widely held that the three elements must be read cumulatively.[104]They are merely individual '...limbs of the same unitary body'[105] 'informing one overall assessment'.[106]

Some commentators in fact advocate seeing the Test as an enabling rather than a restrictive process. That is that an exception/limitation should be permitted unless it can be proven by rights-holders that the proposal fails the Three-Step Test.[107]

The three criteria constituting the Test will now be more closely examined as an indispensable prelude to structuring the case for a limited copyright exception for defined classes of academic works in order to facilitate OA. (Hereafter we use the term 'exception' only, rather than 'exception/limitation' as the proposal which will be examined fits more into the category of excluding some core

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101 Hugenholtz/Okediji (2008),21
102 Geiger/Gervais/Senftleben (2014),586
103 Geiger/Gervais/Senftleben (2014),591, Kur (2009),296
104 Hugenholtz/Okediji (2008),21; Senftleben (2004),125
105 Senftleben(2004),2
106 Kur (2009),340
107 For example Geiger/Gervais/Sentleben (2014),616; also Wittem Group's proposed EU Copyright Code, Article 5 http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf;

copyrights rather than merely restricting the scope of control that can be exercised by the right-holder who retains that copyright.)

4.4.1 Step One: Quantitative, Qualitative and Causal Nexus

The first criterion limits any exception to 'certain specific cases'. By consulting the authoritative French text of Berne, *'certain cas speciaux'*, Senftleben has demonstrated that'….the word 'certain' was not understood to carry a further substantial prerequisite besides the claim for speciality.'[108] He helpfully sees quantitative and qualitative elements to this.[109] Quantitatively the exception must be restricted to a group or class particularised with a high degree of precision. It cannot be an 'incalculable, shapeless provision'.[110] Nor must it be overly broad.[111]In qualitative terms the exception must have a foundational justification.[112] Finally there must be a causal nexus between these two.[113] In other words there should be a clear process showing how the exception was arrived at and a proper weighing of the interests of authors and third parties to show 'why the scales were finally tipped to the side of the users.'[114] To an extent there will therefore be an overlap with the third criterion but a proposed exception will pass the first criterion if not an unacceptable prejudice to *legitimate interests* as constituted by that third step.

While it is preferable that such a process be by legislation, it can also arise out of jurisprudence as in Common Law countries

[108] Senftleben (2004),134
[109] Senftleben (2004),137ff
[110] Senftleben (2004),137
[111] Hugenholtz/Okediji (2008),24
[112] Ricketson (2003),482
[113] Senftleben (2004),146
[114] Senftleben (2004),146

provided it meets the threshold of 'prescribed by law'. In support of this position, Senftleben cites an ECtHR ruling on this term which the Court held was capable of being met by the common law:[115]

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[116]

What is important is to seek a high degree of legal certainty for the proposed exception.[117]

4.4.2 Step Two: No Conflict With Normal Exploitation

The second criterion states that the exception must 'not conflict with normal exploitation of the work'. If such a conflict arises the prohibition is absolute and cannot be rendered acceptable by the

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[115] Senftleben (2004),135 referring to *Sunday Times v United Kingdom* (A/30) European Court of Human Rights, 26 April 1979 (1979-80) 2 E.H.R.R. 245 [47];
[116] *Sunday Times* [49]
[117] Kur (2009),341

payment of equitable remuneration (such this provision is relevant only to the third criterion).[118] It is crucial therefore to delimit what constitutes 'normal exploitation'. In everyday language, 'normal' implies what is regular, usual or standard. In copyright terms this 'cannot be equated with full use of all exclusive rights'[119] otherwise it would be impossible to have *any* restriction. If the wording of the test is to retain any substantive meaning it must envisage that certain cases exist which will not be deemed to conflict with normal use.

Sentfleben finds comparative guidance in this respect in the US Fair Use fourth criteria[120] and concludes that only those exploitative uses which attract major royalties for the copyright owner can count as normal use for this purpose. Consequently, minor sources of income such as royalties or the non-existence of such a revenue flow could safely put such uses outside the ambit of 'normal exploitation'.[121] In assessing any mooted exception there must therefore be an economic enquiry to ascertain whether the proposed measure is likely to severely reduce or eradicate a *major* income stream for the author.[122] This interpretation is supported by Hugenholtz and Okediji.[123] Indeed it is claimed that even an economic loss can legitimately be offset by cultural, social and public interest factors as permitted by Articles 7 and 8 of TRIPS.[124]

4.4.3 Step Three: No Unreasonable Prejudice

[118] Senftleben (2004),131
[119] Senftleben (2004),189
[120] 'the effect of the use upon the potential market for or value of the copyrighted work' (s107(4) US Copyright Act 1976)
[121] Senftleben (2004),188
[122] Senftleben (2004),193; Kur (2009),341
[123] Hugenholtz/Okediji (2008),24
[124] Geiger/Gervais/Senftleben (2014),597ff

The third criterion requires that the exception 'does not unreasonably prejudice the legitimate interests' of authors (Berne) or other rights-holders (TRIPS).

It is crucial to note the narrow scope of this third step.[125] It applies:

1. Only to *interests* not rights
2. Only to *legitimate* interests
3. Only to prevent *unreasonable* interference

Considering the cumulative meaning and effect of this step the inescapable conclusion must be that the forbidden prejudice should be so extensive that it would cause the exception to fail at this step. In other words drawing from the earlier theoretical and doctrinal investigation of Chapter 2 the proposed exception should be proportionate.[126] Yet again we see in this criterion the striving for balance embodied in the double-edged nature of copyright.[127] That is to say that societal or public policy reasons could tip the balance in favour of the exception.

Application of the criteria embodied in this third step should involve an enquiry into the range of available options to meet the stated public policy, societal etc. goal.[128] In order to avoid an unreasonable prejudice the exception should be chosen only if it is overall the least harmful means to proceed.[129] Even then, that prejudice could be offset by payment of equitable remuneration. This is revealed in the review of the documentation of the relevant WIPO Committee by Senftleben.[130] Geiger for one opines that payment of equitable compensation would certainly satisfy the third step.[131]The difficulty

[125] Geiger/Gervais/Senftleben (2014),595
[126] Kur (2009),341
[127] Senftleben (2004),210
[128] Kur (2009),341
[129] Senftleben (2004),236
[130] Senftleben (2004),130
[131] Geiger (2010),546-547

is that no clear further guidance as to when and how payment should be made is given in any of the copyright treaties. There is inevitably bound to be a sliding scale of requirement and amount to correspond to the nature of the exception and the possible unreasonable prejudice. That is the greater the prejudice the higher the remuneration and vice versa. To this extent it could be argued that exceptions which serve social, educational and intergenerational equity that such equitable remuneration should be on the lower end of the scale or even non-existent. It would not necessarily have to equal the market rate. It should be remembered though that this whole process is subject to preservation of the author's Moral Rights.[132]

The above observations may be illustrated from the EU copyright acquis and case law. The Rental Directive uses 'equitable remuneration' in relation to the narrow rights field of renting and lending of copyright works.[133] However, the InfoSoc Directive which applies to a much wider range of works and rights employs the term 'fair compensation'. [134] The two terms may not be synonymous. This may merely reflect the fluid and flexible understanding of the concept. Neither term is specifically defined in the Directives themselves or by the CJEU.

From the jurisprudence of the CJEU the following summation of 'equitable remuneration' may be made. The concept is a fair and just balancing of the rights of the creators on the one hand and of other industries and society as a whole on the other.[135] This is because a simple system of royalties on sales of films and phonograms could not guarantee just recompense to the rights-

[132] Senftleben (2004),239
[133] Article 4
[134] Recital 35 and Article5(2) (a)[photocopying and similar copying] (b) [private copies] and (e) [non-commercial social institutional reproduction]
[135] Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998]ECR I-1953

holders where such works were hired or lend out as opposed to being sold.[136]Further while not precisely defined 'equitable remuneration is an autonomous EU concept and must be interpreted consistently across the Union.[137]Moreover, Member States are not permitted to legislate for sweeping and general exceptions to the right.[138] The latter point is of particular relevance to the acceptability of any exception. The exception we are considering for OA is by contrast much narrower, restricted and focused.

The CJEU has also considered 'fair compensation' under the InfoSoc Directive especially in relation to the private copying levy. For example in the recent cases of *VG Wort*[139]and *Amazon*[140] the court reinforced the application of the levy on blank recording media. Indeed *Amazon* sanctioned the Austrian blanket indiscriminate application of the levy [141] through a rebuttable presumption that blank-media would be used for private copying [142](seemingly in conflict with the earlier *Padawan* decision [143]). The task facing legislators in correctly interpreting and applying the fair compensation/equitable remuneration requirement is poignantly illustrated by the attempted introduction by the UK in 2014 of an exception for format shifting for entirely private copies without

[136] Case C-158/86 *Warner Brothers v Christiansen* [1988] ECR 2605
[137] Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)* [2003] E.C.R. I-1251
[138] Case C-53-05 *Commission v Portugal* (2006); Case C-36/05 *Commission v Spain* (2006) and Case C-175/05 *Commission v Ireland* [2007] ECDR 8
[139] (Joined Cases C-457/11 to C-460/11) *VG Wort v Kyocera and others* (unreported judgement 27 June 2013) http://curia.europa.eu/juris/document/document.jsf?text=&docid=138854&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=922542
[140] (Case C-521/11)*Amazon.com International Sales Inc, Amazon EU Sàrl ,Amazon.de GmbH,Amazon.com GmbH, Amazon Logistik GmbH vAustro-MechanaGesellschaftzurWahrnehmungmechanisch-musikalischerUrheberrechteGesellschaftmbH* (unreported judgement 11 July 2013) http://curia.europa.eu/juris/document/document.jsf?text=&docid=139407&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1716501
[141] *Amazon* [37]
[142] *Amazon* [45]
[143] (Case C-467/08) *Padawan v. Sociedad de Autores y Editores de España (SGAE)* [2011] ECDR 1[52]-[53]

payment of compensation to the rights-holders.[144] The relevant industries (British Academy of Songwriters, Composers and Authors (BASCA), Musicians' Union (MU) and UK Music) successfully mounted a legal challenge to the clause resulting in the UK Intellectual Property Office repealing the provision.[145]

However the nature of these industries and those involved in previous litigation (largely the commercial music and film sectors) draws a stark contrast to the world of the scholarly author producing research output funded by public research grants. As such considerable doubt must exist as to the relevance of these rulings to any proposed exception for OA. Rather the guidance given in Recital 35 may be more applicable:

> …. account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. …In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

Thus legislators may argue that such funded researchers 'have already received payment' or alternatively the prejudice is so minimal that no compensation need be paid.

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[144] S 28B CDPA as introduced by *The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014*

[145] *British Academy of Songwriters, Composers And Authors & Ors, R (On the Application Of) v Secretary of State for Business, Innovation And Skills* [2015] EWHC 1723 (Admin) (19 June 2015)

Finally on this step in relation to the test as a whole it has been suggested that one should actually start at the third step considering at the outset the balancing of competing interests and then moving to the second step as a mere corrective. Some commentators draw inspiration for this approach from the Trade Mark clause in TRIPS where Article 13 refers to one criterion only: the balance of legitimate interests. It should be noted though that such an emphasis as reflected in Article 13 is not without criticism. Commentators such as Reichmann and Okediji for example, see Article 13 lacking any 'normative guidance' for courts and legislators.[146]

In considering an exception for academic works Reichmann and Okediji advocate a removal of the consideration of any possible third party commercial exploitative use as a hurdle to be overcome in any new clause.[147]For them, all academic researched publications have some monetary element involved ranging from funding to various forms of exploitation. Drawing a commercial/non-commercial distinction no longer makes sense, as far as they are concerned. Instead they propose a freedom for third parties to freely use the scholarly work without permission provided proper attribution is given to the author. Such a contribution would contribute substantively to avoiding complications over managing licensing and equitable remuneration in the event of subsequent third party derivatives even on a commercial basis which may not have been foreseen when the exception was applied to the work. We recall that this issue of how to define and manage the concept of 'commercial' was a particular difficulty with the CC licence suite analysed in Chapter 3.[148]

146 Reichman/Okediji (2012),1390
147 Reichman/Okediji (2012),1433-1471
148 See 'commercially vague' Chapter 3.3.4.3.1.

4.4.4 Adjustment: Author Restrictive-the Three-Step Test Applied

How then might all these factors be brought to bear in relation to academic copyright and OA? It might assist the argument if we adopt for the purposes of the discussion a provisional draft clause which could read as follows:

1. The ownership of the Economic Rights of Reproduction, Distribution, Translation, Adaptation, and Communication to the Public in the works of authors and their assignees shall be excluded where such works are financed by public research grants
2. Such works shall (within x months) of completion by the author be made available free of payment and of any Digital Protection Mechanism in an internet accessible repository
3. This exclusion shall apply to all works of such a type as would be ordinarily be considered for publication in a journal or similar format.
4. The exclusion may be applied to works produced in other formats provided that the Exception does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, including his moral interests, nor the legitimate interests of other rights-holders taking account of the interests of third parties.
5. Contracting parties shall, after taking account of the particular circumstances of each case, consider whether rights-holders should receive fair compensation in such cases. The amount of the research grant must be taken into account in determining whether any obligation for payment may arise.

An attempt will now be ventured by way of appraisal to apply the analysis of the three-step test in the previous section to this proposed exception.

While the working clause given above does not purport to be a definitive wording nevertheless it is suggested that this or similarly worded clause would pass the first step. Quantitatively the exception is of a restrictive type. It seeks to apply to a defined class of works, rights-holders and specific Economic Rights only. It is not applicable to *all* academic copyright or to all works, but only to those works which are the fruit of publically funded research. It does not apply to privately funded research as that can be addressed purely on a contractual basis between the parties. Further the proposal is relatively precise within the ambit of acceptability as explained by the ECtHR in the *Sunday Times* case.[149] Qualitatively an adequate foundational principle could be demonstrated with relative ease. This could incorporate the human rights obligations, the intergenerational equity and the social responsibility arguments summarised earlier. Moreover establishing a causal link between these quantitative and qualitative aspects should not present an insurmountable task. This would arguably be reinforced because of the public funding provided.

Turning to the second step would the exception conflict with normal exploitation? If we accept the widely held view that such normal exploitation of the work refers to that which provides *a major source of revenue* for the author, then the clause is likely to traverse the threshold. This is subject to a caveat that arises from the territorial nature of copyright and contract law. The sort of economic enquiry recommended by Senftleben may for example

[149] *Sunday Times v United Kingdom* (A/30) European Court of Human Rights, 26 April 1979 (1979-80) 2 E.H.R.R. 245 [47];

reveal that while scholarly authors receive little or no remuneration for journal format publications in some jurisdictions (such as the UK) this is not the universal case. In other jurisdictions (such as France) payment for such works is more generous. In relation to longer form publications account must be taken of a number of factors. First of all the burden should be on the legislators to establish sufficient nexus between the publication and the research grant to warrant consideration for inclusion in any exception. A legislature may decide for example to establish a threshold of say more that 50% of the book being the direct fruits of the research grants to merit inclusion. Secondly, revenue streams can vary between longer formats. Monographs may produce little income for the author, but student textbooks have the potential to generate a relatively substantial income. This is especially so it the textbook becomes a standard and recommended text in a particular subject especially if the book is used by students in different countries but which share a common language and legal system. The point of course is that a genuine assessment *must* be made by the legislature to ascertain whether such revenue streams and uses amount in all the circumstances to 'normal exploitation' as explained earlier. Moreover it could be borne in mind that even then the impact of the loss or reduction of such revenue streams could be offset by cultural and social reasons.[150]In other words careful and detailed empirical studies should be carried out before any such exception is introduced.

Finally we ask whether such a clause would unreasonably interfere with the legitimate interests of the author and other rights-holders? An argument could be presented against the proposal on the basis that a legislative exception is not the least harmful mode by which to proceed. It could be asserted for example that a Research Council mandate which merely required publication via an institutional

[150] Geiger/Gervais/Sentleben (2014),597ff

repository under a CC-BY-NC-ND (Attribution-Non Commercial-No Derivatives licence[151] which would preserve the bulk of the author's Economic Rights might be preferable. Such a line of argument could conclude that a clause such as that under discussion is therefore an *unreasonable* interference. But such an objection could be neutralised by consideration of payment of equitable remuneration to offset that prejudice. As we have seen there is no obligation to pay at all or to compensate at market value rates. The concept is also a fluid one and open to considerable interpretation. Legislators might well conclude that in light of the public funding of the research which led to the creation of the work that no such payment is required or may deem the provision of such public funding as adequate to counterbalance the interference. There may of course be various practical problems as to whether an individual author actually receives the payment or whether it is claimed and retained by their employer institution but that does not affect the reasoning behind the stance available to legislators in accommodating the conflicting interests under this third step.

Given that an author's Moral Rights would remain intact under the terms of a clause such as that mooted in this section, it would seem that such an exception is legally achievable. That though is not to underestimate the practical hurdles which must be overcome to secure international agreement on the nature, wording and extent of the clause. Ideally such a new exception should be formulated by the WIPO in a new treaty or amendment to Berne. Given the foundational nature of Berne then organisations such as the WTO would have to interpret or amend the TRIPS agreement to accord with the new exception.[152]

[151] See Chapter 3.3.2.6
[152] Hugenholtz/Okediji (2008),39

Inevitably this entire process will take time to conclude. That said, this chapter advances the argument that the length of that delay may well be a much shorter period than that likely to be incurred in seeking to agree an entirely new all-embracing treaty on exceptions/limitations which has been considered in some of the literature under review. Nevertheless the length of the delay involved in obtaining a new exception as sought, is still an unknown factor. As such this scenario may be unacceptable to public funding bodies who wish to see funded research published without inordinate delay. One should not be surprised therefore if in the short-medium term such bodies prefer to rely on the terms of their funding mandates to authors rather than involve themselves in what from their perspective is a protracted process. Incidentally in considering some of the obstacles to a general exceptions/limitations treaty, Hugenholtz and Okediji cite political and strategic hurdles.[153] In brief that is whether governments would have the will and motivation to pursue such a treaty that would be applicable across all copyright works and the absence from the negotiating tables in such councils of interest groups such as consumers. However this chapter argues that those difficulties are considerably reduced in the relation to the type of clause under consideration. Such a proposal will not impact say the entertainment industries with their huge and powerful lobbyists which could derail a general treaty. Moreover one of most important stakeholders, the governments themselves, who will be funding such research, would be in a prime position to seek and to achieve such a provision especially in light of international obligations such as the previously considered ICESCR. Given the monumental struggle that would be involved in achieving a general treaty, the same writers suggest an interim soft law option which is more likely to attract stakeholder participation and ownership rather than an imposed hard law solution.[154] However given the much more

[153] Hugenholtz/Okediji (2008),28
[154] Hugenholtz/Okediji (2008),45

restricted nature of the exception under appraisal this chapter takes the view that such a stepping stone would be unnecessary.

From a legal perspective therefore a clean legislative solution such as that considered is both feasible and reasonable. It is also preferable to the quasi political fix of the policy mandate. Consequently the proposal is a demonstration that in this respect copyright law could be beneficial to better implementation and extension of OA.

All that said the proposal has one fatal flaw: how to manage third party rights. It shares this defect with Shavell's complete abolition argument and also the CC-00 'Public Domain' licence. This is because while it is possible to legislate for restricted copyrights for the work produced by a scholarly author resulting from a publically funded research grant, such a proposal cannot override the copyrights of other authors whose works have been utilised or incorporated into the funded research output unless of course they have themselves been produced under such a regime. In such a scenario the author would have to rely on existing exceptions/limitations that allow for short quotations for example. If unable to avail of such exceptions/limitations (for example for use of a photograph or other whole or substantial copyrighted work) the author will again need to resort to the existing copyright law and to seek the requisite permissions, licences and waivers in order to make use of the previously published material. But again copyright law fulfils a beneficial role by virtue of providing these additional existing exceptions/limitations.

While the issue just discussed is the subject of possibility, some jurisdictions have latterly introduced changes to their national law with a view to specifically manage publically funded academic

copyright in the age of OA. We now turn to reflect on those changes.

4.5. Adjustment- Author Empowering: An Inalienable Right of Secondary Publication

Two recent European national copyright initiatives have approached the challenge from a different perspective. Instead of limiting or restricting currently held rights, these laws empower the academic author by establishing the author's Inalienable Right of Secondary Publication. In brief this means that an academic author, who had entered into a publishing contract with a commercial publisher for a work that has at least been partially funded out of public funds, cannot be prevented from making that work subsequently available on an OA basis. The specific changes are Article 38 (4) of the German Copyright Act and Article 25fa of the Dutch Copyright Act adopted respectively in October 2014 and February 2015.

In order to assess the efficacy of the rights, the clauses are reproduced below:

> **Article 38 (4) German Act**
>
> The author of a scientific contribution which is the result of a research activity publicly funded by at least fifty percent and which has appeared in a collection which is published periodically at least twice per year has the right, even if he has granted the publisher or editor an exclusive right of use, to make the contribution available to the public in the accepted manuscript version upon expiry of 12 months after

first publication, unless this serves a commercial purpose. The source of the first publication shall be indicated. Any deviating agreement to the detriment of the author shall be ineffective.

Article 25fa [open access] Dutch Act

The maker of a short scientific work, the research for which has been paid for in whole or in part by Dutch public funds, shall be entitled to make that work available to the public for no consideration following a reasonable period of time after the work was first published, provided that clear reference is made to the source of the first publication of the work.

There are some important differences between the two Acts which should be highlighted. This is because the Dutch Act being the more recent may serve as an inspiration as to how this concept can be further developed by other legislators as the Netherlands legislature increased the scope of the right from that granted in Germany. The major three differences are: (1) the funding threshold (2) the nature of the publication and (3) the embargo period.

The German Act has a threshold of at least 50% public funding for the clause to be invoked. The Dutch Act has no such threshold. The latter clause is effective once *any* public funding lies behind the publication.

Further, the German clause is restricted to scientific journal articles only and even then on the related basis that the journal in question must be published at least twice a year. The Dutch law is much

wider in scope embracing *any* short scientific article. However the explanatory memorandum to the legislation[155] does not expand any further on what is meant by 'short scientific work'. That said Visser is of the opinion that on the basis of Art. 16 (2) of the Dutch Act the term should be interpreted as works of 8,000 words or less.[156]Moreover, whether this emphasis on 'scientific' publications in both laws can be extended to its more comprehensive definition as per the earlier referenced UN documentation awaits clarification. That said the concept of 'science' (*Wissenschaft*) in German jurisprudence is more than just the natural sciences but includes all branches of scholarship and learning, Research (*Forschung*) and Teaching (*Lehre*).[157]

Another important contrast is the embargo period. That is the time lapse which must pass between the commercial publication and the author publishing on an OA basis. In the German law this is 12 months whereas in the Dutch law the specification is merely 'a reasonable time'. Once more the explanatory memorandum to the Dutch law does not elaborate further on 'reasonable period' except to indicate that the larger the research grant the shorter the embargo period should be.[158]This may provide an opportunity to commercial publishers to impose a period of their choosing and leave it to the author and/or the research fund provider to challenge such contractual terms through litigation. To that extent the possibility exists of this term requiring clarification from the Hoge Raad (Supreme Court).

Two important similarities should also be noted. These are the mandatory requirement to reference the commercial source

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155 NL Parliamentary Document 33 308-No 8 (3 February 2015)https://zoek.officielebekendmakingen.nl/kst-33308-11.html
156 Visser (2015),873
157 Article 5 (3) Basic Law
158 NL Parliamentary Document 33 308-No 8 (3 February 2015)

publication and the prohibition of any contractual override. The requirement in both Acts to attribute the commercial source is very important. Theoretically this could lead to a reader accessing or even purchasing the commercial published version and as such provides a limited form of protection for the publisher. Crucially both legislative provisions render any attempt by contract or otherwise to deviate from this author's right as void [159]thus the concept of the Inalienable Right of Secondary Publication. Indeed the Dutch Act clarifies that the clause shall apply regardless of any different national law that may govern the contract between author and publisher provided that Dutch law would have been the default contractual law in the event of the contract being silent on that point; or the primary exploitation of the work would have been predominantly in the Netherlands.

Publishers may circumvent the Dutch law only if they specify a governing Contract law other than Dutch *and* the primary exploitation of the work does not take place in the Netherlands. So for example if the commercial publishing contract specifies English law (where there is no equivalent provision to Article 25) the Netherlands resident author would still retain the rights over international secondary OA publication if the initial commercial publication was aimed primarily at a readership in the Netherlands. The hope is that the combination of Articles 25 fa and 25 h will prevent powerful international publishers nullifying the new right.

Both these legislative initiatives illustrate that national copyright law can be used in a Berne Convention consistent manner to encourage OA. This is because Berne is a minimum standards Convention and these laws do not reduce the minimum rights granted to authors but rather strengthen them.

[159] Article 38 (4) German Act; Article 25 h Dutch Act

However the inherent defects in such an approach are twofold. Firstly they are merely national and while individually consistent with Berne, they cannot *per se* ensure international cohesive practice. While the combination clauses such as in the Dutch law aim to ensure effective compliance where international publication arises there can be no guarantee of this being applicable in all cases. For example, occasions may arise where a contractual law other than Dutch is specified and the initial commercial publication was not primarily aimed at a Dutch readership. Theoretically this may occur despite a Dutch research grant. The author and publisher may chose English law and English as the publication language in order to reach as extensive as readership as possible. Moreover, other jurisdictions are free to ignore the Dutch and German rights as there is no current obligation under Berne to recognise them as these new legislative measures exceed the minimum mutual standards agreed by the Berne signatories. To ensure harmony between national systems an appropriate amendment to Berne to include a similar clause would be required. Once more this leads us into the challenges of the political will and the time process to achieve such a conclusion. Secondly, while the provisions grant the Right to Inalienable Secondary Publication to the author which can facilitate OA, such a right does not guarantee that the author will actually avail of the right unless some form of mandate also exists from the funder. Thirdly, neither provision dictates that the final commercial published version must be the version which is published on the later OA platform. To that extent the measures provide a legislative underpinning for Green OA [160]as it is likely that the academic author availing of the right will place their own final pre-commercial publishers' script in their employing institution's OA or similar repository.

[160] See Introduction section 1.1 for definition

Not only do these reforms demonstrate that positive copyright law reforms can play a beneficial role in advancing OA they also do so in a very reasonable and balanced fashion.. First of all they strengthen the academic author's rights in relation to publishers who may be tempted for their own economic reasons to prevent or restrict OA use of the contracted publication material and facilitates OA. Secondly, they provide a measure of equity to the commercial publisher who is free to exploit the academic publication on a commercial basis albeit for only a limited exclusive period and even then in the shared sphere of the subsequent OA publication has the benefit of the mandatory signpost to the commercial work. Thirdly, the funders of the research and the general public benefit by the fruits of the labour undertaken with the public research funding being made available and accessible on an OA platform.

4.6. Conclusion

Within the overall task of this thesis (whether law and in particular copyright law and related legal concepts play a beneficial or detrimental role in understanding and advancing OA) a number of sub-research tasks were set at the outset of this chapter. These were:

1. Are Policy drivers such as OA mandates preferable on the basis that they are copyright neutral?
2. Would changes to positive copyright law be superior?

Mandates at first blush present as very attractive and avoiding the copyright interface. They appear to exist without impacting any established rights but at the same time facilitating OA.

Philosophically they could be seen to arise out of the Enlightenment values and also the Utilitarian and Social theories and doctrines addressed in Chapter 2. They can be introduced and managed with relative ease through individual and institutional funding contracts. Moreover they are inherently flexible and mutable capable of being adjusted without undue delay in the face of changing circumstances. They are not however copyright neutral. The legal possibility exists of encroachment on the rights of Divulgation, Withdrawal, First Publication and Distribution. That said copyright law may come to the aid of OA mandates drawing inspiration from some of the Moral Rights in the *droit d'auteur* tradition. Specifically the French jurisprudence and legal guidance on copyright ownership belonging to the funder; development and extension to funded scholarly authors, of the withholding of the right of Divulgation from civil servants; and the requirement to compensate (i.e. refund the research grant) arising out of the right of Withdrawal should the academic author wish to remove funded research publications from OA, are all areas of fruitful possibilities. However any developments in such areas of copyright law are by very nature of the rights considered, likely to be piecemeal, speculative and even unsatisfactory. It is also submitted that an academic author would encounter considerable evidential hurdles in proving compulsion to publish in breach of the Divulgation right certainly if they were the recipient of a public funded research grant. In short if the author disagrees with the terms of the grant offer, the academic author can simply decline to apply for or accept the terms of the grant. The situation may be more nuanced though, when the scenario changes to pressure (real or perceived) from institutional employers where no such external grant is involved. This thesis will revisit that issue in greater detail in Chapter 5. Nevertheless in its interface with OA mandates, copyright law and related legal concepts act at least as a beacon, offering enlightenment on the fact that however policy measures are presented they are not without legal implications and also solutions.

From Avoidance this chapter moved to consider an outright Abolition of academic copyright to better manage OA. This too reflects many aspects of the previously discussed Utilitarian and Social Theories. Such a move is apparently author centred in that it allows the scholarly author to meet the goal of widespread exposure of their work through OA hopefully leading to an enhanced academic reputation. Correspondingly it seems to serve the needs of wider society to access and use the information within the publications free of cost and other barriers. Such a move is of course theoretically feasible at least from a Positivistic point of view. As discussed in Chapter 2,[161] this would be accomplished merely by changing the positive law which has granted the rights in the first place. It may not be practically feasible though. Such a move would undoubtedly attract widespread opposition especially at international level and any attempt to amend Berne and its related and dependent legislation along these lines would unquestionably face a prolonged and contentious struggle. As has been seen reasoned criticisms have been raised over legal definitions, oversimplification, and failure to accommodate long form publications and derivative works. Abolishing all academic copyright could even eliminate a positive societal externality. Moreover, such a move would have to be judged unreasonable. If copyright and its relationship with OA are deemed a nut to crack then it could be said that a sweeping abolition of academic copyright is taking the proverbial hammer to crack that nut. Other feasible and positive copyright law solutions are possible.

As opposed to the polar extremes of Avoidance and Abolition, it could be said that Adjustment evidences an attempt to address the interface of copyright and OA in a more realistic and balanced

[161] 2.6.3

manner. In this chapter we considered two such moves, one Author-Restrictive and the other Author-Empowering.

The Author-Restrictive proposal was a new exception to be introduced into the Berne Convention and then transposed into dependent, regional and national copyright laws. Theoretically this manifests aspects of the Human Rights and Social concepts considered in Chapter 2. It also embraces what Senftleben has called 'intergenerational equity'. Our consideration of such an exception has shown not only that it could play a beneficial role in advancing OA but that such a reform would be both feasible and reasonable. A tailored and particularised clause such as the working model included in our text would in our assessment meet the requirements of the Berne Three-Step Test. It would be confined to 'certain special cases': publically funded research publications; it would not conflict with the normal exploitation of such works as they do not ordinarily constitute a major revenue stream for scholarly authors; and the prejudice to the legitimate interests of rights-holders would not normally be unreasonable. If such unreasonable prejudice was deemed a realistic possibility it could be offset by considering payment of reasonable remuneration. Given that 'reasonable remuneration' is a very fluid concept, national legislators may well consider that payment of the research grant for the research would constitute adequate compensation and may conclude that no further payment would be necessary. In all cases it would remain open to the authorities on a case by case basis to permit or order remuneration if the facts and circumstances so warranted. As such the issue and applicability of reasonable remuneration could be left to national legislatures and courts and thus of itself not require any change at international level.

The major drawback to such a proposed exception is the unknown and unavoidable delay in securing the appropriate amendment to

Berne and the subsequent transposition into national laws. Understandably research funders desirous of seeing OA publications arising from their funding might not consider this option as practical, preferring instead to rely on their mandates. However from the view of achieving a high degree of legal certainty and international harmonisation, such a proposal (that is an amendment to Berne) has substantial merit.

The Author-Empowering adjustment reviewed was the Inalienable Right of Secondary Publication introduced recently by the German and Dutch legislators. While a number of variations between the respective laws was summarised the core essentials are identical. That is that a scholarly author who has entered into a publishing contract with a commercial publisher cannot be prevented by contract or otherwise of subsequently making that work available on an OA basis where the research leading to the publication was the result of public grant funding. As such these laws reflect both a strong author's right tradition (strengthening authors against commercial publishers and contractual overrides) and aspects of the various Social theories previously considered in Chapter 2. This chapter finds those reforms to eminently reasonable as they attempt to balance the interests of all relevant stakeholders. (Indeed they seem to codify one type of Green OA that is, deposit in an OA repository of a previously commercially published work after an embargo.)The commercial publisher is permitted to exploit the author's work (for a limited period), the author retains autonomy over further uses of the work, and the public and funders could see the fruits of that labour revealed on an OA platform. The last point however reveals the inherent weakness of the legislative scheme from an OA standpoint. That is while the clauses liberate and enable the scholarly author to publish the work in OA format there is nothing in the legislation which requires them to do so. Given this lacuna funders will no doubt continue to rely on contractual mandates to ensure OA publication the barrier posed by the

commercial publisher having effectively been removed by the legislatures. It is the stance of this chapter that given this scenario that the only way to guarantee OA publication of publically funded research is to introduce a new exception as canvassed above.

This chapter's ultimate assessment of the various options considered is that none is the perfect fit to the challenge of managing copyright in the era of OA. Overall the chapter advances the argument that a new exception to exempt the Economic Rights of authors funded out of public research grant is probably the best solution and thus the most beneficial contribution of positive copyright law to guarantying a high level OA. However apart from the unknown delay to be faced in achieving such an outcome it is still unable to address the status of copyright protection for third party works incorporated in such publically funded pieces. Alternatively, the Inalienable Right of Secondary Publication is to be applauded and perhaps comes closest to protecting author's rights while releasing the author to make the funded research outcome available on an OA platform. It too illustrates a highly beneficial manifestation of positive copyright law for OA. But as the right does not compel the scholarly author to publish OA its efficacy depends on supplementary help from funder mandates. In the short-medium term we would suggest that this combination is more likely to be immediately attractive to a wide range of stakeholders and could run in parallel with attempts to agree a new exception as mooted. As Suber puts it 'One of the most compelling arguments for legislated OA policies is that governments should assure public access to the results of publicly funded research'.[162] Thus just as this thesis came to a conclusion in Chapter 2 that a theoretical approach to copyright and OA were best served by hybrid models, and in Chapter 3 that online management and advancement of OA were best served by multiple and bespoke models, the instant

[162] Preface to Eve (2014),ix

chapter advocates a range of external drivers by way of policy and positive copyright law to better assist compliance and enforcement of OA.

Chapter 5: Internal Drivers: University ownership in Academic Copyright, Academic Exceptionalism and Academic Freedom.

5.1. Introduction

Previous chapters considered the interaction of copyright doctrines and theories with OA and the management of OA through licencing platforms such as the Creative Commons suite. In our last chapter we considered a range of copyright and copyright related measures external to the University and assessed their interaction with the academic author and the facilitation of OA. This chapter, by contrast, will focus on interfaces internal to the University. It will ponder the issue of whether OA could be better and more effectively encouraged, facilitated and managed not by imposed direct changes to positive copyright law some of which were addressed in the previous chapter but by utilising existing copyright law and related legal measures where a scholarly author is employed by an academic institution. This chapter's subject is deemed appropriate as it touches upon instruments and doctrines immediately available to academic institutions and their scholars. However whether such measures could enhance OA remains to be assessed, which will be one of the aims of this chapter.

In particular the chapter will endeavour to answer the following Research Questions:

1. Would University ownership of copyright in works produced by their employed academics better facilitate Open Access?
2. Would Academic Freedom be compromised by assertion and enforcement of this course of action?

3. Would a more resilient adherence to the 'Teacher/Academic' exception[1] be preferable in better assisting OA?

The chapter will review a range of applicable positive law on these subjects, consider their advantages and disadvantages and finally assess whether any of them play a beneficial or detrimental role in advancing OA.

A brief review and assessment will also be undertaken of the Harvard Open Access Project. This will be with the aim of illustrating a possible better future model.

As stated in Chapter 2 context is everything.[2] It does well therefore to contextualise this issue. It the widest sense it should be recalled that at least since the Middle Ages copyright has had as one of its main drivers 'the creation and dissemination of works which benefit the public'.[3] Specifically Universities and equivalent institutions have historically existed for the common good and not for themselves or their scholars.'[4] Thus it has been asserted that seeking answers of questions beneficial to society, and sharing those discoveries with the public has been described as 'the life blood of academic institutions and those employed by them.'[5] Indeed Rose has remarked that institutions of higher education have in former times been part of 'the gift economy'. That is despite the fact that Law puts authors 'at the centre of a galaxy of literary commodities' [6] that scholarly authors nevertheless saw their role within the context

[1] This is the concept that copyrightable works created by an academic author in the course of their employment belong to that author and not to their employing institution.
[2] Chapter. 2.2.2
[3] Wadley/Brown (1999),386
[4] Chen (1992),305
[5] Wadley/Brown (1999),387 also Morris/Barnas/LaFrenier/Reich (2013),380
[6] Rose (1993), Ch. 7

of social good with emphasis on making their works freely and widely available rather than on the basis of economic or even the personal concerns of the creator. This observation again reinforces our stance that theories and doctrines behind copyright law as discussed in chapter 2 are pervasive.[7] Such sentiments more or less resonate with the concept of OA. Thus it is claimed that in the midst of debates over the ownership and distribution of scholarly authored works that there should be a return to these roots.[8]

However this model has been complicated by the emergence of 'the Enterprise University' and the associated 'growth of a management culture'.[9] In short this concept is market orientated and peppered with phrases such as the 'knowledge economy' 'knowledge society' and 'knowledge management'.[10] Lametti notes that a realisation of the significant economic value flowing from research output has clouded the previous gift economy model within which the Academy operated.[11] McSherry for instance, has recorded a changed perception amongst academic authors of wanting to be knowledge owners rather than knowledge workers.[12]These observations are illustrative of the interaction of copyright law with further and sometimes multiple concepts, theories and legal schemes.

Thus we have the development of monitoring and auditing by the University management of scholarly output by seemingly objective/standardised and near-commercial manner ('business metrics').[13] However these features are equally transferrable and applicable to OA and its relationship to assessments such as the UK's Research Excellence Framework (REF). Consequently Mc

[7] See Chapter 2.3
[8] Fitzpatrick (2011),82-83
[9] Monotti and Ricketson (2003),38-40; also Rahmatian (2014),710
[10] Rahmatian (2014),710
[11] Lametti (2001),510
[12] McSherry (2001),32
[13] Rahmatian (2014),711

Sherry has observed that the idea of academic vocation has been replaced by such notions as 'excellence'. [14] She sees this term as evasive as it is 'infinitely malleable [as it]….promises quality but frees it from any particular definition.'[15] Indeed where attempts have made at definition they tend to be arbitrary for example the emphasis in the REF standards inter alia of numbers of publications. As Readings put it the notion excludes 'questions about what excellence in the university might be'.[16] As will be seen as this chapter unfolds, the challenge of definition of many of the areas to be addressed remains perennial. Unsurprisingly there is a growing literature questioning the narrow focus on business models with their emphasis on efficiency, targets, outputs, revenue streams and the like with an emerging theme that this *zweitgeist* may actually be harmful in the long term both for the Academy and for wider society.[17]

Against this background, some claims have been made that University (as opposed to individual scholar) ownership of copyrightable works created by employed academics would better serve OA. Our next section will examine and assess these claims.

5.2. University Copyright Ownership and Open Access

Commentators such as Denicola, forward the thesis that Universities should exercise their right to legal ownership of research outcome to accomplish enhanced OA.[18] For him, such institutions should make full use of their legal, economic and other advantages of scale to overcome obstacles to achieving this goal. For example the

[14] McSherry (2001),18
[15] McSherry (2001),18-19
[16] Readings (1996),27
[17] See for example, Berg/Seeber (2016), Nausbaum (2012), Collini (2012)
[18] Denicola (2011),

institutional employer could exercise greater leverage with publishers than can individual authors.[19]Theoretically, the institutional weight and standing of a University embodies the potential to obtain more preferable terms for OA publication of research output already available on commercial platforms. Additionally, Denicola highlights the problems with self-archiving in a repository (so called Green OA[20]) if the work has already been commercially published because of the transfer by the author of their Economic Rights to the publisher which is normal in such cases.[21] As will be recollected from chapter 4 this will no longer be a pervasive obstacle in jurisdictions such as Germany and the Netherlands in light of the recently introduced author's Right of Inalienable Secondary Publication.[22] However, the hurdle will continue to exist in other jurisdictions unless similar rights are introduced on a global basis. It is because of the existence of this lacuna that the topic of University copyright ownership will be investigated in this part of the chapter.

Additionally, it has been observed that such ownership could also overcome prevarication and striving for perfection amongst employed scholars and ensure that works are published and distributed on a timely basis.[23] The University in theory could provide an objective eye and achieve the socially desirable goals of availability and access to employed scholarly productions.[24] But this begs an initial question 'How does the University know when the publication is ready for release and who will make the decision will make that decision on behalf of the institution?'

[19] Denicola (2011),379
[20] See Chapter 1.1 for definition
[21] Denicola (2011),365
[22] See Ch.4.5.
[23] Dreyfuss (1987),615
[24] Dreyfuss (1987),616-617

To that end we move to consideration of the legal cases for and against such assertion of University ownership of Copyright and its applicability to OA.

5.2.1. The case for University ownership of Copyright in works produced by employed scholars

Prima facie the University has statute law on its side. That is reliance upon the so called 'work for hire doctrine'. This wording 'work for hire' is drawn from US law [25]but the essence of the doctrine may be found in other Common Law jurisdictions such as the UK and so the term is used throughout this chapter as a convenient shorthand for that substantive concept. [26] However that fact merely serves to highlight that the doctrine is largely a Common Law creature. It does not generally exist in Civil Law jurisdictions such as France.[27] This is why McSherry concludes that the proposition ('work made for hire') is far from simple.[28] Nevertheless as much academic research is published in English, even by non-native English speaking scholars based in the UK and US, in order to achieve as wide a circulation as possible, it is deemed appropriate to address that issue in some detail and its relationship with OA.

We will therefore draw largely from US and UK legal sources and commentaries to engage with the topic. The treatment will not be exhaustive and will be examined only as far as is necessary to make an assessment for OA purposes. The US and UK have been chosen as benchmarks, as those jurisdictions represent the major parts of

[25] S101 US Copyright Act 1976
[26] For example US s201 (b) 1976; UK s11 CDPA
[27] for example Article L111-1 French IPC prevents an employer automatically becoming owner of the work. However, Article L113-9 of the Code provides an exception to this for computer software where the rebuttable presumption is that the economic rights in the work belong to the employer.
[28] McSherry (2001),65

the Common Law world. Even then the section will rely more heavily on the US material than that from the UK. This is because the US courts have tended to explore and elaborate on the concept in much greater detail than the UK courts. This comparatively greater volume of material from the US may also be explained by the noted observation that copyright ownership is a major bone of contention in US Universities.[29] This chapter thus maintains that reliance on such US material is justified as bringing benefit of at least an enlightening and persuasive value for application of the concept in the UK and other Common Law jurisdictions.

That said some reference will be made to European Civil Law sources usually to spotlight useful comparisons

In the US the actual wording 'work made for hire' is used in the US statue.[30] The term is also referred to as such in the literature. Apart from the brief 'a work prepared by an employee within the scope of his or her employment' it is not fully defined and has 'therefore required judicial interpretation and expansion'.[31]

In relation to the US jurisprudence Priest[32] helpfully considers and analyses the guidance particularly from the US Supreme Court's ruling in *Community for Creative Non-Violence v Reid (Reid).*[33] This evidences a twofold test to assess whether a copyrightable work has been created in circumstances where the employers can claim ownership: first the author must be an employee; and secondly the work must be produced within the scope of that employment. This immediately requires an interaction with contract and employment law. Although substantial areas of contract and employment law are

[29] McSherry (2001),101
[30] S101
[31] Dreyfuss (1987),595
[32] Priest (2012);Also see Wadley/Brown (1999),393
[33] 490 U.S. 730, 752-53 (1989)

beyond the remit of this chapter and thesis, the specific issues in relation to copyrightable works produced by employees will be summarised. This is because such a summary will expose deficiencies in relying on the 'works for hire' doctrine in facilitating better OA.

As to who is an 'employee' *Reid* reveals a non-exhaustive list of factors.[34] These include:

> '1. whether the employer has the right to control the manner and means by which the work was completed;
>
> 2. the skill required to complete the work;
>
> 3. the source of the instrumentality and tools used to perform the work (including the provision of office space , printers and so on);
>
> 4. the location of the work;
>
> 5. the duration of the relationship between the parties;
>
> 6. the method of payment (for example regular salary versus a one-time remuneration);
>
> 7. whether the hiring party has the right to assign additional projects to the hired party;
>
> 8. the extent of the hired party's discretion over when and how long to work;
>
> 9. the hired party's role in hiring and paying assistants
>
> 10. whether the work is part of the regular business of the hiring party;
>
> 11. whether the hiring party is in business;
>
> 12. the provision of employee benefits; and

[34] *Reid* 743-744

14. tax treatment of the hired person…' [35]

The reader in absorbing these guidelines will immediately note that the salient points are contractual and employment law features. However this illustrates the recurring examples in the thesis (for example with the licencing suites[36]) that the issue of OA and copyright is rarely situated in isolation. They frequently overlap with, and in some cases are dependent upon, other legal regimes beyond that of strict copyright.

Further, not all these *Reid* factors have to be satisfied in every case but Priest indicates that cumulatively they are a good guide.[37] Unsurprisingly then it has been noted that 'each case will turn on its facts.'[38] Nevertheless this creates a very wide range of judicial discretion in assessment which is inherently problematic as far as certainty of operation of the doctrine in practice is concerned.

In relation to the second limb, whether the work was created within the scope of that employment, the Court fell back on the general law of agency and in particular s101 US 'Restatement of Agency (Second) 1958 in other words:

1. Was the work of the sort that the hired person had been hired to perform?
2. Was it produced substantially within the authorised time and space?
3. Was it actuated at least in part to 'serve 'the employer?

[35] Priest (2012),401
[36] Chapter 3
[37] Priest (2012),402
[38] Monotti and Ricketson (2003),194

However it has been remarked that the concept of 'scope of employment' is extremely context sensitive' and consequently in reality this again calls for 'some interpretative latitude'.[39] While such an approach may be lauded as permitting the tailoring of the outcome of any litigation to the specific facts of the case it once more casts a shadow of doubt over any attempt to formulate definite and reliable rules and guidelines for everyday use within academic institutions.

Additionally, since *Reid* it should be noted that according to the US Third Restatement of Agency 2006, a work is not a 'work for hire' if it was the result of an independent course of action and was neither motivated nor intended by the employee to benefit any purpose of the employer. By way of observation we may remark that this in itself opens up a multi- layered grey area. For example an academic author may produce a work purely to secure tenure or promotion or to enhance their individual professional reputation which on first glance may appear not to be motivated to benefit their employer. Nevertheless it is always possible that the work actually produced in reality may have at least a dual function, in enhancing the authors own publication portfolio and helping their faculty or university its fulfil OA or other research output targets.

Copyright theory (thus drawing on the subject chapter 2 and its importance) is also relevant to assessment of the work for hire doctrine. Lametti for instance, applies some of the major theories to different categories of scholarly work in an attempt to resolve ownership. For the range of academic output that he designates 'traditional scholarly work' (defined by him as lectures, articles, books and the like) he concludes that Personality theory ('just barely') tips the scales in favour of copyright resting with the

[39] Lametti (2001),505

academic.[40]This is because of the unique nexus/ idiosyncrasies between the author and work. Conversely, he concludes that the Desert/Labour justifications are less relevant in supporting the scholar because as an employee they are rewarded financially by their employing institution.[41] In relation to what he terms 'less traditional' works such as software, and web based teaching resources he views the Labour, Desert and Personality theories as of little or no assistance. For such works he believes that Utilitarianism favours the employer owning or sharing ownership because the employer 'has a legitimate financial stake in the outcome of the creative processes.[42]

Beyond the philosophical context Lametti also posits a much narrower and positive law test to assist clarification of the employment relationship and ultimately the question of ownership of the Economic Rights in a copyrightable work produced by an employed academic author. He calls this process a 'double negative' analysis.[43] This is to ask:

1. Would the employee have broken their contract of employment if they did not carry out the research?
2. Would the academic by retaining copyright be breach in of their duty of fidelity to their employer?

But even then he has to conclude that '…it is difficult to classify any specific piece of scholarship as work that must be done in a specific manner or to characterise failure to produce it, a breach of contract.'[44]

[40] Lametti (2001),501
[41] Lametti (2001),503,527
[42] Lametti (2001),503
[43] Lametti (2001),506
[44] Lametti (2001),508

Some of the nuances and even problems arising from the apparent literal assertion of ownership by the University under the terms of the statutes have been alluded to in the discussion above. The claimed advantages to OA may not be straightforward. The disadvantages of, and objections, will now be considered in further detail.

5.2.2. Disadvantages: The case against University ownership

In brief, easier and more certain facilitation of OA will not be achieved unless the University can be confident that *every* work produced by its employed academics *is* a work for hire and thus provide a solid basis for ownership by the institution. A wide range of objections to such ownership can be found in the Common Law literature a selection of which are catalogued below:

1. Monotti and Ricketson in their study concede that research output by an academic within their designated field has at least the potential to fall within the class of work made for hire. However that initial assertion is less certain when one attempts to define the boundaries and limits within which an individual academic researches, prepares and writes a particular work.[45] A simple contrast illustrating this would be between a scholar who completes the research and writing totally within working hours on the University premises using the institution's facilities (prima facie a work for hire) as opposed to a work prepared by a scholar within their discipline in their home in the evening using their own resources (prima facie not a work for hire, but even this is not a foregone conclusion, as will be seen later in this

[45] Monotti and Ricketson (2003),273

chapter[46]). Matters then become more complex if the work is prepared partially at the University within standard working hours and partially at home outside of those hours. In reality it may be impossible to differentiate between University time and private productive time which may be behind the work in question. This is especially so if the scholar's working hours are non-fixed and flexible. There may also be a case for claiming that the world and culture of the scholarly author has distinct nuances compared to most employed authors.[47] The existence of such features would we assert render futile any attempt at establishing a clear demarcation between the academic author's entirely privately owned work and that which may fall into the category of a work made for hire.

2. When addressing individual cases, account must also be taken of the fact that Terms and Conditions of employment can and do vary within University schools, between faculties of any given University and also between different institutions. Such almost infinite variety could increase the measure of uncertainty as to what works will be considered within the scope of employment. This is especially so if general and broad terms are used which may leave loopholes and grey areas the meanings of which may be open to debate and dispute. Thus if terms and conditions are drafted too precisely and narrowly an inherent risk is created of excluding many academically authored works that may not ultimately correspond with those rigid requirements. Consequently fewer works could fall into the employers' raft of materials that may then be published on an OA basis. Conversely, if contractual terms are overly broad (with a view to capturing ownership of the maximum output of academic research) undesirable, time consuming

[46] See *Missing Link Software v Magee* [1989] FSR 361
[47] Denicola (2011),371ff

and expensive disputes could be generated between the employing institution and its academic authors which would then be a tangential distraction to implementing more effective OA.

3. Even where numerous *Reid* type factors are present such as regular salaries and the provision of all the infrastructure for the study and research behind the academic work (offices, computers, libraries, access to online materials on the institutions subscription etc.), US courts have been reluctant to accept conclusively 'that the University was the motivating force behind the work'.[48] This is because generally speaking academics are free to pursue their own research topics and agenda, and also the format, timing and choice of publication. Even where an academic is required under the terms of their contract to conduct research, Universities do not universally in actuality direct that research and even if there is an obligation to research there is no general obligation to reduce that research to a particular publishable format.[49] As Dreyfuss has remarked '…the University is rarely the genesis of the ideas memorialized in the work.'[50] The University does 'not control substantive work of its academics, nor is any given article or book the business of the University.'[51] This is especially so, as most academically authored work (particularly in Arts, Humanities and Social Sciences) is idiosyncratic, individualistic and peculiar to the scholar. Indeed it could be argued that in such circumstances University ownership would be a mere legal fiction. Consequently this may be a major factor in favour of the scholarly author owning the copyright in the output of that research.[52]

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48 Dreyfuss (1987),597
49 Cornish (1992),15
50 Dreyfuss (1987),603
51 Lametti (2001),509
52 Monotti and Ricketson (2003),273

4. Challenges could also be raised as to whether such an assertion of copyright ownership would effectively equate to a restraint of trade against the employed scholar. There is certainly the germ of an argument here that such an outcome in reality prevents the scholarly author re-using the work produced in institution A if and when that author transfers to further academic posts in institutions B, C and so on.[53] Monotti/Ricketson [54] note that in the Common Law world a claim for restraint of trade could be well founded if the works produced by the academic author are considered their 'tools of the trade' as established for example in the English case of *Herbert Morris Ltd v Saxelby.*[55]

5. If Universities take over control of copyright this could equate to 'forcing' the author to speak not only conceptually within the Kantian terms discussed in chapter 2 [56] but also in conflict with Article 15 (1) (4) ICESCR.[57] This is because that provision does not allow for those rights to be overridden by employment contracts as such contracts are not mentioned as one of the permissible restraints on, or exceptions to the Article 15 right. Conversely the University could suppress works that the institution does not want published but which the scholar desires to disseminate. As such the University would effectively be gagging the academic from bringing before society research findings of potential social benefit running contrary to the concepts embodied in the gift economy, Social Theories on copyright and indeed OA.

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[53] See for example Rahmatian (2014),728
[54] Monotti and Ricketson (2003),493
[55] [1961] 1 AC 688 (HL) 688 at 704
[56] See Chapter 2.4.2.1.2; Barron (2012) 6
[57] (The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields). since Article 15(1) (c) (To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.)

6. Full application of the doctrine has potential drastic consequences at least where US law applies. This is because s201 1976 US Copyright Act then considers the employer as the author and the University owns all the rights *unless* there is a written agreement between the parties to the contrary. This should be contrasted with the position in the UK where by virtue of s11 CDPA 'author' and 'owner' are separate legal entities and the authorship of the academic writer would be retained with ownership of the Economic Rights resting with the employing institution subject to any agreement (not necessarily in writing nor signed by the parties) to the contrary. However that may be of scant realistic assistance to the UK based author because if the doctrine is activated then the combination of s11 (2) and s79 (3) CDPA excludes the operation of the Moral Rights regime including the employed academic's right to be identified as author. That said in practical terms it would be unlikely that a University asserting the doctrine would not wish to name the employed scholar as author to ensure credibility in the eyes of both the public and the rest of academia. Nevertheless the potential would still exist in such circumstances for the employing copyright owning institution to exercise its rights in facilitating OA, in ways which could impact on the author's reputation, integrity and future employment prospects.[58] Given this, Dreyfuss has poignantly highlighted the inherent power in assertion of copyright ownership for the '… employer to interfere with the development of his employees' reputation by disrupting their ability to receive public recognition for their work.'[59]

[58] Denicola (2011),377
[59] Dreyfuss (1987),624

7. In response to the purported advantage from an OA perspective that University ownership could overcome prevarication by the scholar in publishing research, it could be asserted that only the scholarly author is in a position to determine when that work is sufficiently ripe and mature for release by publication. Such a concern from the author's perspective relates back to the positive law right of Divulgation as discussed in Chapter 4[60] and from a theoretical basis, Kant's 'speech' right which was explained in Chapter 2.[61] If the University assumes ownership this has at least the potential of premature publication which could be to the detriment of the scholar's reputation for example if it is incomplete or contains inaccuracies. This could reflect adversely on the academic's standing as an accurate and conscientious researcher. Assertion of University ownership may in practical terms require the employment of additional staff or diversion of existing staff to proof and approve such output for publication. Further it is unlikely that any one member of staff or even a team would possess the required level of skill and understanding to proof the research output from across any institution's multiple disciplines. Once more the solution may lie in contract law. This may be to require the academic author in their contract of employment to ensure that all research output be appropriately checked and edited before hand over to the institution for publication. Even so there is still the potential perception of pressure to release before an author's chosen ideal time in order to meet external (such as the REF) or internal (Departmental or University) OA targets.

8. Questions could exist over the motivation of the institutional employer in asserting ownership.[62] For example is the driver

[60] Chapter 4.2.1.
[61] Chapter 2.4.2.1.2.
[62] Dreyfuss (1987),617

the reputation or standing of the institution rather than a desire to serve the common good and the gift economy. As with all questions of motive, reliable evidence to argue the case either way may prove elusive.

9. There are also consequential issues for the academic institution to address in the event of it asserting such copyright ownership. These could include (but are not limited to) marketing, management, monitoring and enforcing those rights. However, Denicola suggests these might be accommodated by an appropriate clause in contracts of employment giving the institution a 'non- exclusive right' to disseminate/refuse dissemination of research output.[63]This suggestion will be addressed later in this chapter in considering the Harvard Open Access Project.

10. Dreyfuss opines that if Universities claimed authorship and ownership this may serve as a disincentive to scholarly authors to produce works. In other words only those required to strictly comply with employment contracts may be forthcoming.[64] This would create a social welfare disadvantage. That is less research output and other academically authored works would be available to the public. Conversely she argues that knowledge is more likely to expand if the scholar has control and ownership. Among other things the scholarly author is concerned with non-economic interests such as reputation, attribution and quality which Dreyfuss asserts motivates the scholar to produce the best they possibly can.[65]

11. Insoluble dilemmas could also emerge. Consider for instance a joint research paper by an employed scholar and a student. If the work produced by the academic is a work for hire and

[63] Denicola (2011),378
[64] Dreyfuss (1987),592-593
[65] Dreyfuss (1987),605

is owned by the University, Copyright will reside with the University and not the academic. However the student will by default, have copyright because they are not an employee (unless the default position is overridden by the University-student contract). This scenario could arise even if the employed academic was responsible for bulk of the work in the paper.

12. While one could argue prima facie that full time staff are not only employees but that their academic output is within the scope of the designated employment the situation becomes more complicated and uncertain with part time staff. One would have to ask how many of the *Reid*-type elements for example, need to be present and also to speculate as to how a court would resolve these issues.[66]

13. Although this section has drawn largely from US sources, English jurisprudence may also underpin an objection. Once more the issue is contract dependent. The leading English Law Practitioner's textbook Chitty on Contracts provides an insightful and helpful summary of the case law on the subject of 'who is an employee'. Chitty cites eight points many of which are reminiscent of the *Reid* factors above, which is unsurprising given the shared Common Law model between the USA and the UK. The factors are:
    i. The degree of control exercised by the employer
    ii. Whether the worker's interest in the relationship involved any prospect of profit or risk of loss
    iii. Whether the worker was properly regarded as part of the employer's organisation
    iv. Whether the worker was carrying on business on his own account or carrying on the business of the employer

[66] Monotti and Ricketson (2003),195

v. The provision of equipment
vi. The incidence of tax and national insurance
vii. The parties' own view of their relationship
viii. The structure of the trade or profession concerned and the arrangements within it[67]

In utilising these factors, English courts for example have traditionally been restrictive in their interpretation of who an employee is and what duties are considered to be part of the course of employment, when such courts adjudicate on copyright and other IP rights. The foundational case is still the Court of Appeal decision in *Stephenson Jordan & Harrison v MacDonald & Evans.*[68] That decision effectively established a presumption that the employee was both the author and owner of the copyright in a work where the employee evidences a great deal of creative independence and where the work was not 'integral' to the employer's business.[69]. The decision has since been cited with approval for instance in *Noah v Shuba* [70]and in *Greater Glasgow Health Board's Application.*[71] Employing institutions may wish to distinguish the *Stephenson Jordan* precedent however by asserting that in the case of academics (as opposed to the accountant in *Stephenson*)*,* the employee *is* employed to lecture, teach, research and write. While Evershed MR did remark *obiter* that University lecturers *prima facie* should own the copyright in their lectures, he accepted that that presumption could be overridden by contract and even his *obiter* remarks made no reference to publications such as research output, textbooks or monographs.[72] That said it bears reminding that

[67] Chitty (2013) [39-010]
[68] (1952) 69 RPC 10
[69] Denning LJ at page 22 who found that the defendant was employed under a mixed contract of service and services and that his lectures at Universities and other bodies was as 'an accessory to the contract of service and not as part of it'
[70] [1991] FSR 14
[71] [1996] RPC 207
[72] (1952) 69 RPC 18

the academic is not generally obliged to research and publish any particular piece by the employing University or to produce works that are designed primarily to benefit their employers.[73] As far as OA is concerned this scenario could be an impediment. Superficially there could be a more assured and effective OA regime but one with the inherent outcome of more OA but to fewer works.

This degree of uncertainty is reinforced by rulings in other decided cases which demonstrate the judicial struggle to differentiate between a 'work made for hire' and the employee's own copyright. There are for example decisions such as that in the case of *Missing Link Software v Magee* [74]which have indicated that the mere fact that a worker undertakes a creative work away from his employer's premises and on his own time using his own equipment and other resources does not necessarily take that employee outside the scope of employment duties. In *Missing Link* the employee wrote a new software program (a Literary work under s 3 (1) (b) CDPA) outside of working hours at home using his own resources. The Court decided that this program nevertheless was owned by his employers on the basis that as he was employed to write computer programs the work he had so created was inseparable from his employment duties under his contract of employment. This chapter suggests that the lack of certainty as to which factors are conclusive would augment the obstacles of any universal assumption by Universities of the 'work for hire 'doctrine in an attempt to improve OA facilitation.

[73] Barendt (2010),216;Reichman(1989),674
[74] [1989] FSR 361

Indeed in light of such factors and concerns, Dreyfuss concludes that the life, work and output of an academic does not fit neatly into the statutory formula and 'that it may, indeed, be wrong to apply the statue to academics.'[75] Similarly, commentators such as Monotti/Ricketson and Rahmatian assert that it is very difficult to refute the claim of scholarly authors employed by universities to retain copyright in 'traditional scholarly works' such as writing and publishing lectures preparing and publishing specific scholarly papers and books. Indeed Rahmatian is of the view that ALL of these works are outside the scope of employment for the employed academic'.[76] He does though concede that Universities are on stronger ground in regard to pure teaching material materials such as exam papers, tutorial preparation documents and discussion papers. This latter point however is of no assistance to the main issue of ensuring more effective and expansive OA for research articles and similar works.

Interestingly Cornish who is stridently opposed to a general rule of institutional ownership considers limited exceptions. For example he concedes that the University may and probably could assert copyright for works produced by employees such as research officers/fellows who are specifically contracted to undertake an identified piece of research.[77] Given this concession one ponders from an OA perspective if this principle could be extended to embrace all academic staff who produce copyrightable works which are partially or totally the fruits of public research funding.

The degree of insecurity over this issue may be gauged from the ambivalent stance of one of the UK's leading practitioner's handbooks: Laddie Prescott and Vitoria. In the Third edition of 2000

[75] Dreyfuss(1987),602
[76] Monotti and Ricketson (2003),493 and Rahmatian (2014),716
[77] Cornish (1991),15-16

the editors expressed doubts as to whether the traditional view of copyright resting with the academic was correct.[78] However in the Fourth edition of 2011[79] a more nuanced stance is taken with emphasis on the need to scrutinise the terms and conditions of the employment contract in each case. They opine that it is only the custom (with the caveat 'if it exists') that copyright resides with the academic in absence of clear contractual terms. But like Cornish they canvass the possibility that the case may be different where the academic is employed to conduct and publish specific research works. Once more this leaves the possibility open of copyright ownership being viewed differently when say publically funded research grants are contracted for specific research projects.

5.2.3. Provisional Assessment for OA purposes

The proposition under consideration is whether treating copyrightable outputs produced by employed academics as works made for hire could better serve OA. The validity of the proposition and the claimed advantages mooted for example by Priest depend on securing a firm reliable and certain legal foundation for that move. While at first glance there would appear to be a simple and straightforward legal basis both under US and UK law and consequently of benefit rather than hindrance to driving OA, further investigation has revealed that an understanding of the doctrine and its application is far from straightforward and simple. The proposition is also one confined largely to the Common Law world. The Civil Law world is more reluctant to permit such employer ownership assertions. That factor *per se* incorporates an obstacle to asserting the doctrine to accelerate OA where for example there is a collaborative work for instance between for instance UK based researchers (whose institutions may claim ownership of the

[78] Laddie/Prescott/Vitoria para.21.30
[79] *Ibid* para, 22.36

Economic Rights) and French domiciled researchers (where the Economic Rights would remain with the academic author). Given some of these obstacles one could be tempted to propose changes to positive law not only within Common Law jurisdictions but perhaps also at international treaty level as considered in Chapter 4. However such a proposal (an external driver) merely confirms the inadequacy of copyright ownership assertion by Universities as an unreliable and inadequate internal driver of better OA.

The discussion so far has centred on the apparent rights of the employing institution in relation to copyright and by extension to OA. However 'the work made for hire' doctrine does not exist in isolation. The employed academic could claim rights *vis*-à-*vis* their employer in relation to copyright. These rights are the so called 'academic or teacher's exception' the 'exception' here referring to an exemption from application of the works made for hire doctrine for such scholars. This right has been alluded to but not named as such in the immediately preceding section on 'works made for hire'. In the following section we will attempt to ascertain just exactly this concept of 'academic/teacher's exception' is, whether it has any legal basis and finally whether it provides a more secure basis for OA than 'the work for hire' doctrine.

5.3. The claimed Academic or Teacher Exception and Open Access

5.3.1. Introduction

The claim of the scholarly author to the 'academic exception' rests on the academic author *per se* being viewed as a special category of intellectual creator whose output should not be owned by their

employer.[80] Barendt and McSherry therefore correctly pose the question as to why academic professionals should be treated differently than other employed professionals. After all, many other professionals operate in a setting where much of their intellectual output becomes and remains the property of their employer. Such employer ownership endures beyond the duration of an individual's post with that employer so that the employee is not free to use that work in any future career without permission from their former employer. Again to highlight that the 'academic exception' is largely a Common Law conundrum, the situation may be contrasted, for example with Germany where the privilege is not confined to academics. It extends to anyone 'engaged in serious scholarly research and teaching'.[81]

As with the work made for hire doctrine we will draw on US and UK sources for the same reasons. Reference will also be made where applicable to European Civil Law sources for comparisons. The section unfolds with some general background followed by a summary of the cases against and for the doctrine and finally with an assessment for OA purposes.

First of all it should be made clear that this is not a statutory right. That is there is no specific exclusion for academic works from the 'work made for hire doctrine' in either the UK or US Copyright Acts. Nevertheless, there is a 'pervasive and deeply held belief' that copyrightable works created by an academic author in the course of their employment belong to that author.[82] US Court decisions[83] and commentators note though, that on a narrow literal reading of the

[80] McSherry (2001),103
[81] Barendt (2010),4; McSherry (2001),133
[82] Lametti (2001),500
[83] *Weinstein v University of Illinois* 811, F.2d 1091, (7th Cir. 1987) 1094:"The statute is general enough to make every academic article work for hire and therefore vest exclusive control in universities rather than scholars."
Also *Hays* 416

statutes that the works of the typical scholarly author qualify as works for hire.[84]

The doctrine is a pure judicial creation. A brief historical survey of the doctrine is deemed in order here, because as indicated in chapter 4 a proper understanding of such history can help elucidate understanding.[85] It was so named by the New York Southern District Court in *Town of Clarkstown v Reeder* [86] where it was stated that without it all works created by the academic author in such circumstances would be caught by the statutory concept of works made for hire.[87] Its origins however may be found in 19th century English law. For example the 1825 case of *Abernethy v Hutchinson*[88] where it was confirmed that a surgeon (and not his employer) had copyright in his lectures, because giving lectures was not part of his employee duties. The doctrine can then be traced onwards through decisions such as *Caird v Sime*, [89] in which a University lecturer had copyright in lectures confirmed by the Court and could prevent publication by a student of notes taken in lectures. Despite the fact that there was a dissenting judgment by Lord Fitzgerald (reflecting what would now be called the 'gift economy') whereby he took the stance that University professor's output was free in the Public Domain[90] *Caird v Sine* appeared to be left unchallenged and was assumed to be the guiding law throughout the succeeding decades.[91] For example we see expansion of the concept into US and Canadian Common Law. This is may be illustrated from cases

[84] Smith/Zirkel (1991),709-710; also Wadley/Brown (1999),426
[85] See chapter 4.2.1
[86] 566 F. Supp. 137 (S.D.N.Y.) (1983).
[87] Ver Steeg, (1990),406 (Ver Steeg provides and extensive chronicle of the exception)
[88] 47 E.R. 1313, 3 L.J. 209 (Ch.)
[89] (1887), 12 A.C. 326 (H.L. Scot.)
[90] pages 352-355 of the judgment
[91] McSherry (2001),125

such as *Williams v Weisser* [92] in the US with a similar ruling on lecturer's copyright and *Dolmage v Erskine*[93]in Canada.

As with the 'work for hire' doctrine, there is a more fully developed jurisprudence in US law than in the UK and once again we draw on that for the purposes of our investigation. In the US the judicially developed doctrine found a codification of sorts in the 1909 Copyright Act. However the concept of works for hire itself was not defined and so was and has been open to the judicial interpretation and uncertainty addressed in the previous section. That said, in a thorough study of the development of the doctrine, Lape found only two cases between the 1909 and 1976 US Copyright Acts where the issue was at stake.[94] These were *Sherrill v Grieves* [95] and *Williams v Weisser.*[96] *Williams v Weisser* in particular illuminates the complexity of any consideration of the interaction of 'the works for hire doctrine' and 'the academic/teacher's exception'. In that case although the Court referred to the undesirable consequences of allowing Universities to own the copyright in the employed scholar's works, the actual decision turned on a finding of failure by the University to overcome the first hurdle, that is to establish that such works were in fact 'works made for hire', so there was no necessity in the instant case to address the exception to that doctrine.

This complexity and applicability of the exception arise largely because the US 1976 Act makes no reference to it. There is therefore a divided body of judicial and academic opinion in the US as to whether the exception survives into the current copyright

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[92] 78 Cal. R. 542 at 547 (2d Dist. 1969): 'in the absence of evidence the teacher rather than the university owns the common law copyright to his lectures ….university lectures are sui generis …' (i.e. not subject to the general work for hire doctrine) (Judge Krauss)
[93] 29 (2003), 23 C.P.R. (4th) 495 (Ont. Sup.Ct. (Sm. Cl. Div.)) At 521: 'the academic exception is pervasive in the university community. It has been thoroughly understood and accepted for a very long time.'
[94] Lape (1992),233
[95] 57 Wash. L. Rep. 286 (D.C. 1929).
[96] 78 Cal. Rptr. 542 (Ct. App. 1969).

regime. On the one hand there are *obiter* remarks in some US cases indicating that it is no longer extant. For example in *Shaul v Cherry Valley-Springfield Central School District* [97]the exception was denied to a high school teacher for tests, quizzes and homework problems. That said, interestingly and helpfully for our subject matter of authorship and copyright in public research grant funded publications the court distinguished the High School teacher's work from scholarship created for publication. But as the latter point was not the subject matter of the litigation no ruling was proffered on that point. In *Pittsburg State University v Kansas Board of Regents* [98]the court remarked that it was 'far from clear that there is an absolute teacher exception'. This was reinforced in *Molinelli-Freytes v Univ. of P.R.* [99] with the observation that the existence of the exception was still 'a question unanswered and highly debated by the courts and intellectuals ' but as it was not mentioned in 1976 Act grounds for presuming its continuation where unsure. Likewise the exception was doubted post 1976 in the above cited case of *Weinstein v University of Illinois.* [100]

Conversely Judge Posner in *Hays v Sony Corp. of America* [101] reiterated that 'virtually no one questioned that the academic author was entitled to copyright in his writings') a sentiment with which Monotti and Ricketson agree.[102]

Given this state of affairs it may be helpful to summarise the arguments for and against the exception before addressing the relevance of the exception to OA. The case against the exception is

[97] 363 F.3d 177, 180-81 (2d Cir. 2004)
[98] 122 P.3d 336 (Kan. 2005) 346
[99] 792 F. Supp. 2d 150, 159 (D.P.R. 2010),171
[100] 811 F.2d 1091, (7th Cir. 1987),1094
[101] 847 F.2d 412 (7th Cir. 1988),416
[102] Monotti and Ricketson (2003),279

outlined first, followed by the case for as the favourable literature attempts to redress the critiques raised by opponents.

5.3.2. The case against

The case against 'the academic/teacher exception' has been put by a number of commentators including DuBoff, Simon, Smith and Zirkel. In brief this has two bases. First, they maintain that the exception only ever relied on custom and tradition and that the legislative history of the 1976 US Copyright Act shows that it was the intention of Congress to exclude custom and tradition in interpreting 'the work for hire' doctrine.[103]They assert that such reliance resulted in uncertainty which Congress sought to remove.[104] The second basis is that the Congress failed to incorporate the exception, insofar as it existed, into the 1976 Act and so raises an assumption that it was eliminated.[105] Indeed DuBoff notes the academic sector made no representations on this point as the legislation proceeded through the Congress. He then hints at a conclusion that Academia was content to accept this new regime.[106] However, we would have to comment that this would be a dubious conclusion to draw without a detailed investigation of the reasons across the tertiary educational sector for lack of comment. There could have been myriad explanations for this, none of which might support Du Boff's hypothesis. Indeed the same commentator's views are less certain when it comes to confirming the reality of practice within the Academy with remarks such as 'It *appears* (italics added) that most professors are employees under these common law guidelines'[107]although he does admit that the issue of control, supervision and direction are difficult, and that ''the

[103] Packard (2002), 285;DuBoff (1984),33-34;Simon (1983),493
[104] Simon (1983),493
[105] Smith/Zirkel (1991),711
[106] DuBoff (1984),26
[107] DuBoff (1984),30

university *probably* (italics added) owns the copyright'.[108] Nevertheless Garon notes that as academic writing is increasingly becoming an integral part of the scholar's tenure and promotion prospects that any such works produced are therefore central to the employment relationship and are works made for hire, that is there is no teacher exception.[109]

We now move to the case for the academic exception.

5.3.3. The case for

Amongst the academic commentary Lape is adamant that the exception survives intact under the 1976 scheme even though a literalist and narrow reading of the Act may indicate otherwise.[110] She bases this on a number of factors including her review of the legislative history of the 1976 Act which shows continuity with the pre-1976 law.[111] She also highlights judicial continuity at the highest level in that post 1976 the Supreme Court of the US used the same reasoning and agency factors as the pre -1976 cases . She concludes that there is therefore nothing to indicate that the exception 'disturbed' let alone that it was 'eradicated by the Act'.[112]Conversely in her view the Act merely clarified the nature of the evidence required to rebut the presumption of work for hire *after* a work for hire has been found (that is an express written agreement to the contrary: s 201(b)). Lape therefore takes issue with those who doubt the continuity of the exception such as Simon and DuBoff. In her view their 'arguments are logically flawed and therefore fail to support the conclusion drawn from them.' [113] For

[108] DuBoff (1984),25
[109] Garon (2002),152
[110] Lape (1992),237
[111] Lape (1992),237
[112] Lape (1992),246 & 268
[113] Lape (1992),240

example Simon's stance largely assumes that employment *per se* equals a work made for hire and that consequently copyright belongs to the employing institution. Lape then exposes that Simon's conclusion pre-empts the investigation which must be made initially as to whether a work for hire actually exists that is an employment relationship *and* produced in accordance with that employment contract.

Lape's view is reinforced by Wadley and Brown who assert the continuance of the exception by focussing on the *Reid* [114]factors considered above. They take from *Reid* that it is crucial not only to establish an employment relationship but to pay correct and sufficient attention to the nature of the work produced within that relationship.[115]They argue against those who would claim that there is no exception on the basis that the opposing view seems to equate the mere fact of employment with 'works made for hire'.[116] Conversely in properly understanding and applying *Reid* there may be many works produced within the relationship that fall outside of 'the works made for hire' doctrine and it is this which gives grounding to 'the teacher/academic exception'.[117] For them this involves an assessment of the facts and the intention of the parties in individual cases. It is a complex, nuanced and subtle analysis and not merely a one size fits all test for all works prepared by employed academics.[118] For example, in a scenario similar to that considered by Cornish, if the facts show that an academic was employed to research and write a particular piece this may lean towards the institution acquiring copyright, otherwise copyright will rest with the academic.[119] Such reasoning may also provide a basis for a Research Council to assert copyright in parallel circumstances. Theoretically this would enable the funder to have full control of the

[114] 490 U.S. 730 (1989)
[115] Wadley/Brown (1999),393-398
[116] Wadley/Brown (1999),404
[117] Wadley/Brown (1999),403
[118] Wadley/Brown (1999),413
[119] Wadley/Brown (1999),415

publication and distribution process to facilitate OA. In reality considerable doubt would exist over whether Research Councils would wish to claim such copyright ownership. While it would surely be a tempting prospect, they would also inherit the burdens of management and control of any such documentation which could be totally impracticable and undesirable for them if one considers all the output of works funded by grants from the Councils say in one jurisdiction such as England and Wales for any one year across the higher education sector. The cumulative weight of such works over the years would no doubt quickly diminish any claimed advantage of such initial ownership in improving OA.

Wadley and Brown (echoing the point made by Dreyfuss above[120]) also pinpoint the social loss that could result if there was no academic exception and all works were deemed made for hire with the University holding all the copyrights. *Inter alia* this could be for them 'a hammer over the creation of works that may have no readily economic value' [121]or we may add institutional reputational weight. For example academic authors whilst employed at Universities may limit their output to that which is required strictly by their contract of employment and or Research Council mandates. In such a scenario the wider public would be deprived of the knowledge and insight that would otherwise have been made available if the academic author retained the copyrights.[122]

A possible future avenue for academic authors to circumvent these difficulties has been suggested by McSherry. She proffers the possibility of academics concentrating on Personality and Publicity rights in their work rather that the traditional reliance on copyright law. Thus by asserting that their work reflects their individuality and

[120] See 5.2.2 point 10
[121] Wadley/Brown (1999),419
[122] Wadley/Brown (1999),415-417

character (and thus the importance of the Personality justification) they should have the right of control the publication and distribution of their output which should not be commodified, denied or subsumed without their consent. One of the advantages of such reliance is that is 'not subject to the vagaries of the work for hire provisions'.[123] As she notes this possibility, certainly in US law was left open in the *Williams v Weisner* judgment. In that case the Court did not exclude the recognition of such Personality rights. However a reasoned and definite ruling was not possible as the court was not seized within sufficient evidence upon which to provide the necessary adjudication.[124]The possibility of academic authors relying on Personality rights in their work rather than the 'teacher's exception' in order to maintain control over their research publication and the implications of that for OA is not pursued further in either this chapter or thesis but it may be a fruitful subject for additional future research.

The European Civil Law context casts a slightly different light on the exception. The general rule as with the US and UK is that the copyrights in a work are owned by the author except where created under a contract of employment and within the scope of that employment in which case the Economic Rights are owned by the employer, with the employee retaining the Moral Rights. This is reflected for example in Articles 7 and 43 of the German Copyright Act 1965 and Articles 6, 11 and 29 of the Italian Copyright Act 1941. This basic model is followed for employed academic authors. However under Italian law there are some subtle distinctions from the general model. The University is awarded ownership only where the work is prepared at the University's expense and even then the institution retains ownership of the economic rights for a limited

[123] McSherry (2001),134,139
[124] 78 Cal. Rptr. 542 (Ct. App. 1969).733

period of 20 years following which those rights revert to the author. (Articles 11(2) and 29 Italian Act).

Having reviewed the respective arguments for and against the academic exception an attempt will now be made to ascertain any ramifications of the doctrine for OA.

5.3.4. OA implications

A firm acceptance by all parties of 'the academic exception' may actually better serve OA. In such a situation there would be an increased incentive for the employed scholarly author to create over and above the bare minimum that may be demanded by their contract of employment or Research Council targets. If the academic retains copyright in these additional works they at least may not resent making some or all those works available via an OA platform. In such a scenario there is the potential to satisfy to a large extent the needs of multiple stakeholders: the author has their rights and control over their work; the institution benefits from association with the output of their employee; and the wider academic community and even the general public profit from expanded availability of quality research output.

However as the above summaries of the cases for and against the exception have shown its legal foundations are far from sure and the exception may be subject to as many nuances and caveats as with the 'works made for hire' doctrine. For these reasons while maintenance and expansion of 'the academic exception' is more reasonable and feasible than the assertion of institutional copyright ownership in is the view of this of this chapter that it is not

sufficiently robust or reliable to ensure guaranteed and improved OA. This is not merely of theoretical concern. Academics and their employing institutions continue to experience confusion and obstacles in relation to both the 'work for hire' and 'academic exception' concepts. These legal and practical problems are very well illustrated by very recent research conducted in the UK by Rahamatian[125] which we summarise in the next sub-section. While the research was not concerned with OA his work nevertheless provides enlightenment which may be useful to consideration of the usefulness of the work for hire and academic exception for enhanced OA.

5.4. The current UK reality: a 'legal quagmire' [126]

Rahmatian's empirical research involved questionnaires and semi-structured interviews. It is especially beneficial for a number of reasons. Unlike the major work of Monotti/Ricketson which addressed the whole range of IPRs with only a partial treatment of copyright his research was entirely copyright-focused. This is important because copyright embraces a very broad range of output from every sector of the academy whereas patents may emanate merely from the science schools.[127]Moreover, it focused on one jurisdiction and benefits from interaction with those who were held out to be the individual University's copyright or IP officers. The goal of the investigation was to discover how Universities claim ownership as employers.

He approached more than 30 UK Universities which were a mixture of 'old and new' (i.e. former polytechnics). E-mails containing eight questions which were to form the basis for subsequent semi-

[125] Rahmatian,(2014)
[126] Rahmatian (2014),728
[127] Rahmatian (2014),710

structured interviews were sent to each institution's copyright officer. Most recipients did not reply, even to reminders. Eventually eight Universities participated. He draws the reasonable conclusion that reluctance to participate may itself be indicative of the unease about discussing the basis on which their individual University addresses copyright ownership and management over works produced by their employed scholars. Even those who did co-operate disclosed a degree of apprehension in these matters. He discovered that the general default position amongst the interviewees was that in such circumstances the copyright was owned by University.[128] Moreover, a 'Rule of thumb' (his words) seemed to emerge: if the work could be commercially exploited then the university was interested in claiming copyright (the 'business' model University). Conversely if the article for example was purely 'academic' (an implication from the former position), then institutions were content to allow copyright to rest with the scholar (with a least the possibility of honouring the role of Universities in the 'gift economy'). He rightly describes these admissions as 'tortious methods' in managing copyright.'[129] Although he concedes that each case must turn on its facts he has the firm conviction that the very narrow interpretation put on works made for hire, by *Stephenson*[130]and *Noah v Shuba* [131]really excludes from University ownership, the bulk of copyrightable material, especially researched works, produced by academic authors within their employment at Universities.[132]

5.4.1. OA implications reinforced

[128] Rahmatian (2014),725
[129] Rahmatian (2014),30
[130] (1952) 69 RPC 10
[131] [1991] FSR 14
[132] Rahmatian (2014),726

Rahmatian's research once more demonstrates the uncertain waters that must be navigated in attempting to understand and implement these apparently simple legal doctrines. As both the 'works made for hire' and 'academic exception' doctrines are far from clear they fail to provide the sound foundation upon which to base, manage and drive forward OA within the Academy. Even though the 'academic exception' has the potential, as stated above to better serve OA it would require unequivocal and universal acceptance within the Academy in order to do so.

Given the difficulties inherent in these doctrines a brief mention should be made on what purports to be a reasonable working model especially as it has been structured specifically to facilitate OA: The Harvard Open Access Project.

5.5. The Harvard Open Access Project: A way forward?

This scheme has been particularly feted by Priest.[133] The scheme requires Harvard's employed scholars to deposit their output in OA repositories and to grant to the University a non-exclusive copyright licence to archive and freely distribute. This is what has become known as a 'permission mandate'.

5.5.1. The advantages of the scheme

Such a permission mandate grants more powers to the institution than a mere 'deposit mandate' (Green OA).[134] For example it allows the institution to take the initiative in publishing the work online in OA format even if the author is reluctant to take that step. It also

[133] Priest (2012)
[134] Priest (2012),381

allows the institution to grant permissions to the author to enter into commercial arrangements with publishers. The scheme encourages employed scholars to sign an addendum to their contract of employment which allows authors to retain limited rights of Reproduction and Distribution but which states that any grant to a publisher will be subject to the prior non-exclusive right of the University in the mandated licence.[135] The scheme is essentially a compromise on the 'works for hire' and 'teacher exception' doctrines. That is the scholar is recognised as the author and initial owner, not the University, but the bundle of rights flowing from such ownership is by mutual agreement restricted to enable the University to benefit from the work and for our purposes to encourage and expand OA yet at the same time allowing the scholar and any commercial publisher to exploit the research output on a 'shared basis'. Further as the licences are non-exclusive, the University can grant further permissions to the author (springing from its own ownership) to use the material say in teaching, even after the author has transferred their copyright to commercial publishers. The licence is expressly irrevocable so such a request does not revoke the initial default licence in favour of the University. There is also an opt-out regime which allows the Dean or Head of Department to waive the mandate/licence on request by an academic scholar in individual and specific cases.[136]

Following introduction of the scheme in 2008 similar regimes have been introduced at a range of other US Universities.

5.5.2. The disadvantages of the scheme

[135] Priest (2012),397
[136] 'The Dean or the Dean's designate will waive application of the policy for a particular article upon written request by a Faculty member explaining the need.' *Harvard Faculty of Arts and Sciences Open Access Policy,* https://osc.hul.harvard.edu/hfaspolicy

Whilst largely approving of such schemes, Priest helpfully points out that they still have latent potential for challenge and uncertainty.[137] In brief this is because:

1. As seen above in considering 'the works made for hire' and 'academic exception' issues, it remains unsettled under US law whether the scholar or the employer is entitled to claim authorship and/or ownership of the work.
2. The scope of the mandate is not clear
3. It is questionable whether such rights can be granted to the University without positive action by the academic author that is it cannot just be by default.
4. As the licence is non-exclusive its legal survivability is called into question in the event of the scholar subsequently transferring their copyright to a commercial publisher. Under US copyright law the earlier licence is deemed to prevail provided particular essential prerequisite conditions are satisfied i.e. in writing and signed by both parties.[138] Otherwise the defective earlier licence will fail. This may be contrasted with the recent Dutch and German reforms discussed in chapter 4.[139]It will be recalled that where research output is financed at least in part by public funds the reforms grant to the academic author an Inalienable Right of Secondary OA publication even where an earlier valid licence may have been granted to commercial publishers for publication of the article. Indeed it will be recalled that this new author's right cannot be thwarted by the terms and conditions of the prior licence to the commercial publisher.

[137] Priest (2012),382
[138] S 205 US Copyright Act 1976
[139] See chapter 4.5

These observations elicit yet again the absolute necessity of an individual scholar's contract of employment being properly constructed with sufficient detail to enable schemes such as the Harvard one to operate smoothly and thus expand OA. In other words, copyright law alone fails to provide a reliable basis for the operation of these Harvard type models: they are heavily dependent on employment law. But that point also raises the spectre over how free an academic is in negotiating such contractual terms. In particular there must surely be a concern over an imbalance between an individual and a powerful institution such as a University in relation to such contracts. The pressure to accept the terms and conditions as presented and consequently limit one's rights is inherent in such schemes. There is an effective inability to change the situation especially for new and early career academics who lacking a weighty research publication portfolio and reputational aura would have little or no negotiating leverage with the institution as opposed to an established and sought-after professor.

Considering the respective advantages and disadvantages of the Harvard type schemes it is the assessment of this chapter that the use they make of copyright and related legal concepts provide more beneficial models (albeit imperfect) for the better management and expansion of OA than either the 'work for hire doctrine' and the 'academic exception'.

The previous sections have attempted to address ownership concerns in relation to OA and copyrightable works created by employed academics. Transitioning from those issues it is also important to consider the milieu in which such works are created. In particular the subject of Academic Freedom looms in the background and often surfaces when the issue of OA, copyright ownership and management are raised. For example at conferences

attended by this author and in private discussions with academic writers a concern has been expressed that OA mandates and/or attempts by Universities to assert ownership of works such academics have created in the course of their employment would run contrary to the notion of Academic Freedom. In our next section we will attempt to clarify just what this concept is and whether it has any sound legal or other foundations and finally if such institutional ownership claims in the name of facilitating OA would impinge on the claimed Academic Freedom.

5.6. Academic Freedom

As with the above analyses, the subject of Academic Freedom, copyright ownership and OA will be approached by a brief summary of the history and development of the concept, the cases for and against the doctrine and finally any relevance to OA.

Academic Freedom has been described by the American Association of University Professors (AAUP) as the 'breath in the nostrils' of the academy[140] and the 'sine qua non of the research University itself'[141]and 'at the heart of social and economic development'.[142] In essence it claims to promote freedom of enquiry to discover information and knowledge for the good of society. Historically Academic Freedom has been linked to the special role of the University as a place of inquiry free from dictation, manipulation and exploitation by third parties whether political, religious or economic.[143]This means that the 'individual autonomy'[144] of the academic author is reinforced and they are granted a limited

[140] Statement of American Association of University Professors (AAUP 1915),28
[141] McSherry (2001),109
[142] Moscon (2015), 99
[143] Barendt (2010),3-4
[144] Sunstein (1996),117

monopoly on knowledge in order to fulfil this function. However Haskell points out that it is a monopoly which intensifies competition and does not diminish it as in the commercial world. This monopolistic community is a community of the competent where the price of membership is to be continually exposed to critique from one's peers as to what is acceptable research output. It is the function which demands Academic Freedom in order to flourish.[145] Thus in practice it fulfils two functions: inclusion and exclusion. As a professional body academics within a particular field determine on a self-regulatory basis who will be admitted to the privilege and who will be refused.[146]

Moscon has also observed that the protection and maintenance of Academic Freedom requires free and full access to knowledge and research output with the implication that without such access any claimed freedom is essentially curtailed. [147] While this assertion is not *per se* a justification and advocacy of OA the same author links the two concepts, Academic Freedom and OA, by stating that the liberty and ability to re-use knowledge and information is at the core of academic methods.[148]

That said there is no unanimity even within the Academy as to the justification for and definition of this 'Academic Freedom' its rights, limits and responsibilities. [149]

However, the literature discloses two basic Justifications: Consequential and Deontological. We have of course encountered the categories of Consequential and Deontological justifications in considering copyright theories and doctrines in Chapter 2. The

[145] Haskell (1996),46-47
[146] Menand (1996),3-9; Scott (1996),170
[147] Moscon (2015),99
[148] Moscon (2015),100
[149] See for example the edition collections in Pincoff (1975) and Menand (1996)

resurrection of the these theoretical concepts in association with Academic Freedom is ,in the opinion of this thesis, another confirmation that engaging with the underlying theory behind a law or practice is unavoidable and why a range of such theories was addressed at an early stage in the thesis.

The Consequential claim is that without Academic Freedom academics cannot fulfil the task of seeking out and transmitting valuable truth beneficial to society and as a result society will be poorer. The justification echoes JS Mill's Utilitarianism 'that truth emerges best from the marketplace of ideas from which no opinion is excluded.'[150] But the justification is incomplete because it cannot account for cases where constraints or compromises on that freedom actually produce better and more useful outcomes.[151]

The Deontological justification claims that there is an integral imperative on the academic to seek out, find and make available knowledge and truth irrespective of the perceived value of the research as judged by government metrics for example. That is it is an absolute duty and is as fundamental to the academic as saving lives is to medical doctors.[152] Dworkin calls his version of the justification 'Ethical' stemming from his theories on ethical individualism.[153]That is, each individual has a duty/responsibility for making as maximum a success as possible of their life. By extension the academic' s ethical individualism is to continue to exercise his/her skills and abilities as best they can to investigate, discover and disseminate increased enlightenment in their chosen field.

[150] Dworkin (1996),185
[151] Dworkin (1996),186-187
[152] Barendt (2010),52
[153] Dworkin (1996),187-189

However this traditional academic search for 'truth' has increasingly become vulnerable to attacks from post-modernism's claim that there is no such objective truth. A flavour of the debate on this point within the Academy can be gauged from the respective positions of Rorty [154]and Haskell [155]in a collection of essays on the topic edited by Louis Menand.[156]Rorty (with whom Fox Keller agrees[157]) rejects the idea of absolute truth. For him it is merely a species of folk tradition. Thus for him it is preferable to see the desire for truth as 'a search for the widest possible intersubjective agreement'.[158]In his view objective truth is merely the normal practices of the Academy.[159] Academic Freedom rests on pointing out the good that the Academy does. According to Rorty therefore, the obsession with and for objective truth in the Western Rationalistic Tradition may fulfil a deep emotional need but that does not make it a sound argument.[160] Haskell however, takes issue with Rorty's position. He is worried that if the premise of objective truth is weakened within the Academy then the claim for Academic Freedom is unlikely to have any support out in the wider world. In other words, if truth is entirely subjective, then why should the subjective opinion of an academic be worth more than anyone else's subjective opinion?[161]

Moreover the Consequential argument could be undermined further by institutions or funding bodies engaging specific individual academics on an *ad hoc* contractual basis to undertake research and publish on a particular issue for which the researcher is then appropriately remunerated. In such a scenario a wide ranging general Academic Freedom would be unnecessary. Such an

154 Rorty (1996
155 Haskell (1996)
156 Menand (1996)
157 Fox Keller (1996),205,211
158 Rorty (1996),21
159 Rorty (1996),26
160 Rorty (1996),33
161 Haskell (1996),48,73

approach is already undertaken for example with research contracts such as those operated by the UK's Home Office. The Standard Terms and Conditions required of those who tender for such work grant the Home Office a first publication right in the event of independent peer review confirming the acceptable quality of the research. Permissions are also normally required from the Home Office before the academic is allowed to discuss the research or publish extracts. If the Home Office decides not to exercise its publication option, the academic is then free to do so, subject to a reserved right of the Home Office to refuse or condition such publication where the Department believes there are for example national security or economic interests at stake or where business confidentiality would be compromised. Academic Freedom (whatever it may be) is not compromised in such cases as in entering into the contract as the academic will be deemed to have waived or limited their rights. Unlike contracts of employment where an academic may have no choice but to accept the contract, the scholar is under no obligation to tender for such research contracts and would have the freedom to decline the terms if they consider them unacceptable.

By extension the same point would be equally applicable to non-governmental research contracts such as those operated by Research Councils requiring publication on an OA basis. In other words Research Council mandates that require published output funded in whole or part by public research grants to be released on an OA platform would not impinge Academic Freedom however that concept is defined. It is the view of this chapter that the argument just made still holds even if an academic is contractually bound to undertake research and seek external funding or is merely 'strongly encouraged' to do so. Such terms and conditions or the 'strong encouragement' are unlikely to specify or restrict exactly what the academic can research or dictate the contents of that research. The academic author is still free to accept or reject the terms and

conditions attached to a particular research grant or alternatively to pursue a subject matter of their own choice albeit without public research grant funding.

A similar observation would also follow in addressing Academic Freedom and assessment procedures such as the UK's Research Excellence Framework (REF). While there may be copyright implications to the REF, effective restraint on *some* of the academic's choice of research topic or pressure to publish on an OA basis, such procedures do not ultimately conflict with Academic Freedom as it has been perceived and practised in the UK. This is especially so as REF does not dictate the topics for research nor value load them in favour of a particular religious, political, economic or cultural perspective etc. Further assessment is via other academics and not government officials.[162]

Given the issues raised in the preceding paragraphs, Academic Freedom has, unsurprisingly been judged as 'inherently problematic… [because]… it requires a willing suppression of disbelief in order properly and efficiently to do its work.'[163] It has thus been assessed as 'ambiguous' [164] carrying 'many meanings'[165] and indeed of being contextually sensitive and responsive within and between different societies.[166] When the issue has been raised before courts it has never been properly clarified and defining the concept 'has turned out to be especially difficult'.[167] In short, the concept, its justifications and criteria for assessing it have been declared far from simple and straightforward.[168] In brief it has been called 'a complex of informal and formal activities…'[169]That said,

[162] Barendt (2010),105
[163] Menand (1996),6
[164] Scott (1996),166
[165] Scott (1996),165
[166] Said (1996),214;and McSherry (2001),220
[167] McSherry (2001),220
[168] Pincoff (1975),(vii)
[169] McSherry (2001),221

Barendt concludes that it may be unhelpful to try to produce a succinct definition because 'it is too complex an idea to allow even the framing of a provisional definition in one or two sentences.'[170] He qualifies that this is not necessarily an undesirable quality nor is it exclusive to Academic Freedom. There are many values in society such as freedom of speech which share these difficulties as to definition, justification and management of nuances, exceptions and restrictions.[171]

One thing is clear though, Academic Freedom is not the same as Freedom of Speech. Free Speech does 'not provide for everyone what Academic Freedom provides for academics.'[172] This also has important legal implications. For example while Freedom of Expression is a right for example under the European Convention on Human Rights (Article 10), there is no such Convention right for the protection of Academic Freedom. Nevertheless it would be negligent to fail to acknowledge that Academic Freedom does bear some relationship to Freedom of Speech. Connolly for example views them as a species of cousin.[173]

The points raised above can be illuminated by a brief consideration of the history of the concept and how it has developed respectively in Germany, Italy, the USA and the UK and then the normative stance of the EU.[174] These jurisdictions have been chosen and presented in this order for several reasons. Firstly, Germany was historically a leader in the field and has a highly developed legislative and judicial understanding of Academic Freedom. This is this contrasted with the Common Law world of the US and UK where there are not only differences between those jurisdictions but also a

[170] Barendt (2010),17
[171] Barendt (2010),72
[172] Dworkin (1996), 184;also Menand (1996),6 and Barendt (2010),128
[173] Connolly (2000),141
[174] For the comparative aspect I am indebted to Barendt (2010) and Moscon (2015)

less mature grasp of the concept. It is asserted that the following summary will demonstrate the uncertainties and difficulties that may be encountered in attempting to assess the interaction of OA, 'the work for hire' doctrine with Academic Freedom.

In the German context there are very clear Kantian roots.[175] That Kantian informing philosophy was then embodied in Article 152 Frankfurt Constitution 1849 and Article 142 Weimar Constitution 1919. It is now incorporated in the Basic Law (the Grundgesetz) and is enforceable against the state and binds the legislature, executive and judiciary. Article 5 (3) Basic Law guarantees Academic Freedom in Science (Wissenschaft) which is more than just the natural sciences but includes all branches of scholarship and learning, Research (Forschung) and Teaching (Lehre).

That freedom is not restricted to University academics but is available to all involved in such activities. On first glance this right is apparently absolute. Its exercise is subject only to not conflicting with the Constitution. Guidance from the German Constitutional Court (BVerfG: Bunderverfassungsgereicht) has clarified that the freedom covers 'all those activities that evidence serious and systematic discourse about what is true'.[176] The same ruling established that this Academic Freedom has two aspects: negative and positive. The negative aspect is to be kept free from political interference and dictate. The positive is duty of the state to safeguard the exercise of Academic Freedom. [177] The Constitutional Court has also made it clear that *all* bodies must respect and be subject to all constitutional rights.[178] In other words there is potential here to argue that institutional or Research Council interference with a researcher's fundamental right may be deemed

[175] "An Answer to the Question 'What is Enlightenment'?"
[176] *Hochschulurteil* (1973 BVerfGE 35, 79), 113
[177] *Hochschulurteil,*114-116
[178] *Hochschulurteil,*114

unconstitutional. For example if an academic author is 'forced' to publish research output by their employing institution or Research Council when the academic believes such publication is unwarranted that could amount to breach of their constitutional rights. As will be seen from the following paragraphs summarising the US position such constitutional rights by contrast bind only the public sector Universities and not the private sector and so would not be available to an aggrieved academic of the latter institutions.

Articles 12 and 14 of the German Constitution are also relevant in this context. Article 12 protects the citizen's right to pursue a trade and profession which could be argued to be a supplemental protection of Academic Freedom as without such freedom the academic author may be able to assert that an unconstitutional obstacle exists to pursuing his or her vocation. Article 14 provides a general constitutional right to ownership by the creator of Intellectual Property. However this general right may be curtailed in certain circumstances within the Academy. That is because since the German Employee Inventions Act was amended in 2002 ownership of the Economic Rights in all patentable inventions created by academics in their role within the Universities, are deemed to be owned by their employer the academic institution if they are judged to be 'job related inventions'. This frees the University to commercially exploit the invention. Nevertheless the German Act recognises a subtle but vital distinction between such commercial exploitation (to obtain and benefit financially from a patent for instance) and the simple right to publish the results of any research related to the invention (the literary work under copyright law). The latter right is retained by the scholar and embraces both the right to publish, not to publish and not to be compelled to publish. Although this German provision relates to patents it does present a genesis of working model for OA publication of general research output in that a two tier scheme is possible. For example if the academic author's sole or main objective is to achieve maximum

distribution of their quality 'job related' research output they could by extension of such a law in other jurisdictions be permitted to retain the rights to choose where and when to publish and to have control over the normal bundle of copyrights such as Reproduction, Distribution and Adaptation but in the event of that research being commercially exploited, the Economic Rights could be transferred to the University as the employing institution.

We now turn to the position in Italy. Article 33 of the Constitution states that: 'The Arts and Sciences as their teaching are free'. Moreover Article 65 of the Italian Property Code recognises the 'professor's privilege' that is confirming ownership by the scholar of certain Intellectual Property Rights. However this Article 65 right is not a general right but is confined to patentable inventions created within an employment at an academic institution. Moreover the 'professor's privilege' does not apply where the research leading to the invention is the result of specific external private or public research funding. This latter restriction on the right is therefore similar to that mooted by Cornish and Lametti outlined earlier in this chapter as an acceptable model for university ownership. In such cases the employing University would be free to publish the research findings on an OA basis although ownership of the economic rights *per se* would not compel them to do so.

In the USA two distinct aspects have emerged in relation to Academic Freedom: that of the individual (as against the state and an employer, which is our primary concern) and institutional (that of the university to freedom from state interference). These are two different concepts with different rationales and practice

The claimed individual freedom flows from 1915 AAUP's statement and has been elaborated on in a joint declaration in 1940 with the

Association of American Colleges.[179] It has been described as 'very soft law' [180] and a lack of litigation and controversy on the issue may be indicative that it is 'accepted' by all stakeholders as the norm.

The Institutional aspect is usually based on the constitutional right of freedom of expression rooted in the First Amendment to the US Constitution. While the right of a University against the state is not the subject of our enquiry, attention will nevertheless be drawn to the jurisprudence to ascertain whether any assistance may be obtained from those rulings for the individual academic as against their employing institution.

Despite being described by Brennan J in the US Supreme Court as 'of transcendent value to all…. a special concern of the First Amendment...'[181] once again clear guidelines are vague. Byrne has therefore remarked that '...lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles'.[182]

In reality the US Supreme Court has not yet developed a detailed and coherent doctrine on Academic Freedom. Nevertheless rulings such as *Sweezy v New Hampshire*[183] *Regents of University of California v Ewing* [184]and *Grutter v Bollinger*[185] indicate that the Court views the constitutional right *solely* as an *institutional* right. As such those judgments are of little value in bolstering an

[179] 'Statement of Principles on Academic Freedom and Tenure'
[180] van Alstyne (1990),79
[181] *Keyishian v Board of Regents* 385 US 589 (1967) at 603
[182] Byrne (1989),253
[183] 354 US 234 (1951)
[184] 474 US 214 (1985)
[185] 539 US 306 (2003)

individual scholarly author's 'freedom' v*is*-à-*vis* their employing institution.

By contrast, cases upholding individual Academic Freedom as against the University (our concern) are all at a level below the Supreme Court. These include cases such as *Cooper v Ross*; [186]*Cohen v San Bernadino Valley College* [187]and *Johnson v Lincoln University.* [188]

In the UK as in the US, the doctrine lacked any firm legal basis either in legislation or case law and unlike the US there is no equivalent constitutional right even to institutional freedom. Indeed up to the late 1980s the concept of Academic Freedom was merely a matter of accepted practice. This was more or less reflected in the 1963 Robbins report where the individual academic's right was described as including freedom to publish, teach their own concept of fact and truth and to pursue whatever personal studies or researches that they found congenial.[189] The practice or doctrine existed in tandem with academic tenure. In brief, this secured employment virtually for life for academics. Consequently they could be dismissed only for some serious or gross criminal behaviour or dereliction of duty. Such a dereliction did not include a failure or refusal to research or publish. This norm changed radically with the Education Reform Act 1988. The then Conservative Government in seeking to achieve a fundamental reform of the higher education sector abolished academic tenure.[190] However, a right to Academic Freedom was (on the initiative of Lord Jenkins) introduced by way of

[186] 472 F. Supp. 802 (1979) (District Court)
[187] 92 F. Supp 968 (1988) (Sixth Circuit)
[188] 776 F2d 443 (1980) (Third Circuit)
[189] Lord Robbins Report 1963 Ch. XVI (Report of the Committee appointed by the Prime Minister under the Chairmanship of Lord Robbins, HMSO Cmnd. 2154)
[190] ss203-204

amendment to the draft legislation when it came before the House of Lords and is now embodied in s202 (2) (a) of the 1988 Act:

> to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions;

This right applies only to the pre-1992 Universities, although the new post 1992 Universities (the former Polytechnics) are required to guarantee Academic Freedom in their institutional statutes.[191]There is also a statutory duty under the Higher Education Act 2004 s32 (2) on the Director of Fair Access to Higher Education,[192] to protect Academic Freedom.

However unravelling exactly what these clauses mean is no easy task. This can be gleaned from the debates in the House of Lords in considering the draft clause that was to become s 202 (a) of the 1988 Act. For example, the Lord Chancellor Lord Mackay claimed Academic Freedom was too imprecise to protect by law.[193] Moreover the 'protected' category of 'academic staff' is not defined in the Act. Additionally there is a case for proposing that whatever the amorphous concept of Academic Freedom has meant in the past that it has more recently been restricted in scope by the increasing dependency of UK Universities on public funding. The exercise of research, teaching and output cannot ignore this dependency and its consequent social responsibilities. Certainly since the Dearing Report of 1997 UK academics are accountable to the public for good

[191] Further and Higher Education Act 1992, ss 71,73
[192] The lead officer of the Office for Fair Access an independent public body to 'promote and safeguard fair access to higher education for people from lower income backgrounds and other under-represented groups'
[193] Hansard HL vol. 497 cols. 453-55 (19 May 1988)

use of the public resources committed to the Universities.[194] Research output arguably must contribute to the nation's economic and social welfare and not just produce a store of knowledge for its own sake.[195]

At EU normative level both the Charter of Fundamental Rights of the European Union (CFREU)[196] and the Treaty on the Functioning of the European Union (TFEU) attempt to address the issues of Academic Freedom and Intellectual Property, both explicitly and implicitly.

Article 17 CFREU expressly protects Intellectual Property albeit in a generalised fashion without any further elaboration or explanation. For example the Charter is silent as to how this right interfaces with other rights which may impinge upon or challenge any absolute understanding of such protection and specifically how such a right relates to Academic Freedom except by taking account of the established EU legal principles of 'proportionality' [197]and also Human Rights obligations such as those under the ECHR.[198]Some indication of the attempts and struggles of the CJEU to apply such concepts and also that of seeking a 'fair balance' (given that the Court is of the view that none of these rights is absolute) may be gauged from rulings such as *Promusicae, Scarlett, Netlog* and *Svenson.*[199]

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[194] Dearing Report (National Committee of Inquiry into Higher Education *Higher Education in the Learning Society: Report of the National Committee*,1997) paras 15.61-63
[195] Barendt (2010),6
[196] Charter of Fundamental Rights of the European Union http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT
[197] Article 52 CFREU
[198] Article 53 CFREU
[199] C-275/06 *Productores de Musica de España (Promusicae) v Telefonica de España SAU* [2008] 2 C.M.L.R. 17
C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] E.C.R. I-11959
C-360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) v Netlog NV* [2012] 2 C.M.L.R. 18
C-466-12 *Svensson v Retriever Sverige AB* [2014] 3 C.M.L.R. 4;

The CFREU in Article 13 also declares the desirability of protecting 'Academic Freedom' albeit in a similarly vague and generalised fashion: 'The arts and scientific research shall be free of constraint. Academic Freedom shall be respected.' Some additional (but still imprecise) clarification may be found in the 'Explanations relating to the Charter of Fundamental Rights'[200]:

> This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1[Respect for Dignity of the Person] and may be subject to the limitations authorised by Article 10 of the ECHR.

Articles 179-190 of the TFEU within Title XIX 'Research and technological development and space' attempt to elaborate on the requirement of the Union to fund and support academic research and to encourage the free and rapid sharing of research output. But again these Articles lack sufficient definitional substance to assist in any clarification in transposing this norm into a clear and predictable working model within the European Academy.

Beyond the legal norms of Treaties, legislation and judicial pronouncements a number of the ancient Universities of Europe have sought to bring some enlightenment on the concept for example in the *Magna Carta of European Universities* (1998): [201]

[200] 2007/C 303/02
[201] http://www.magna-charta.org/resources/files/the-magna-charta/english

> 1. The University is an autonomous institution at the heart of societies ….it produces, examines, appraises and hands down culture by research and teaching
>
> To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power…
>
> 3. Freedom in research and training is the fundamental principle of University life, and governments and Universities, each as far as in them lies, must ensure respect for this fundamental requirement.

While this declaration provides some much needed elaboration it is still not a definitive delineation of the rights, expanse and limits of the notion of 'Academic Freedom'.

5.7. Conclusion

This chapter has surveyed a number of copyright related issues within the daily operation of Universities and attempted to define, delineate and assess the legal foundations for those issues and ultimately their relevance and assistance as drivers of OA. The various themes and interfaces explored manifest elements of our definition of 'law' as hard and soft; public and private; mandatory and voluntary; fragmented; and semi-privatised.

In particular we have addressed the 'work made for hire' and 'academic/teacher exception' legal doctrines and tried to ascertain which best facilitates OA. We have also considered the concept and practice of Academic Freedom and whether that would be affected by OA internal drivers such as the 'work made for hire' concept or

Departmental or University OA policy. A brief review was also undertaken of the feted Harvard OA scheme.

Reliance by Universities on 'the work made for hire' doctrine would theoretically enable Universities to control and better drive OA. However in reality the doctrine suffers from conceptual, legal and practical difficulties. First of all it is an exclusively Common Law notion. This poses complications in interaction with the Civil Law world say where an academic is operative in different jurisdictions or where there are collaborative works produced by a team of Civil Law country domiciled scholars and Common Law jurisdiction resident researchers. More importantly the doctrine is in fact unclear, is ultimately impossible to define and its application is extremely fact and case sensitive. Such factors could create the possibility of litigation between Universities and their scholars if disputes arose as to which of the academic's works fall into the category. It has also been observed that a rigid application of the doctrine by University employers could act as a disincentive to employed scholarly authors to create except insofar as strictly required by the terms and conditions of their employment contract. This would be a social welfare deficit. In other words, while such assertion of ownership could theoretically enable the University to drive and control OA output of its employed researchers this could result in more OA but of less material. The University could also encounter multiple challenges as the copyright owner. Real, practical and potentially costly hurdles may be faced in managing and monitoring the research output of its academics. However there is a possible exception noted in the literature of treating some works as within the fold for example where the researcher has been engaged specifically to conduct research on a particular subject and to publish those research findings. But as far as a general application of the doctrine is concerned, the doctrine and its application lacks the secure and firm foundation which would enable Universities to be confident in each case that every work produced

by their employed researchers is 'a work made for hire'. As such we would have to conclude that universal assertion of the 'work for hire doctrine' is not beneficial in promoting and advancing OA. Despite these uncertainties surrounding the doctrine, recent research conducted by Rahmatian reveals the presumption within the UK Universities interviewed that 'the work made for hire' doctrine is the legal norm.

The chapter also considered the concept of Academic Freedom in relation to the 'works for hire doctrine' as an internal driver of OA. While Academic Freedom is a laudable notion it is an amorphous creature with questionable rationales and boundaries, defying definition. Its understanding and application varies between jurisdictions as illustrated in the short comparison given between Germany, Italy, the USA and the UK. It also has two aspects: protection of the independence of the higher education sector from political and governmental interference; and protection of the individual academic's rights against their employing institution. The latter is of particular concern to this chapter especially in relation to assertion of 'the works made for hire' doctrine. Jurisprudence in the USA, so far as it exists, tends to address only the institutional protection. This is especially so with the Supreme Court of the US. Protection of the individual freedom has found support only a level below the Supreme Court and this may be diluted by the approach of the superior tribunal. The position in the UK is even less secure. Despite the statutory requirement for Academic Freedom to be respected, introduced in the Education Reform Act 1988, it remains an unknown and untested notion, at most a kind of soft law, vitally dependent on practice dictated by a universal acceptance of the principle by all relevant stakeholders. Given the fluid nature of both 'Academic Freedom' and the 'works for hire' doctrine, it could not therefore be said with any reasonable degree of certainty that assertion by Universities of the 'work for hire' doctrine would impinge this 'Academic Freedom'.

The chapter has also demonstrated how the claimed 'academic/teacher exception' to 'the works made for hire' doctrine, whereby the scholarly author retains copyright, is riddled with similar problems to the 'works made for hire' doctrine. For example it lacks a sound legal foundation and the legal community is divided as to existence or if it does exist how to define its boundaries and manage its application. Some doubts have been cast on whether such a concept has any role in modern Universities where there is a high dependence on public funding certainly in the UK and where research publication is increasingly becoming standard features of contracts of employment, tenure and promotion, in other words, an integral part of the employer's business. That said there is considerable weight in the argument that the scholar retaining copyright in such circumstances by operation of the doctrine/practice may be more conducive by way of an incentive to the academic author creating further works than if ownership fell to the employing institution. But even then while such a scenario may render the scholar amenable to making those works available on an OA basis such an outcome is not guaranteed merely on the basis of the exception. As seen in chapter 4 when considering the Inalienable Right of Secondary Publication recently introduced in Germany and the Netherlands, such steps may still require to be supplemented by mandates either from within the University or externally from Research Councils of other funders. In reality the concept is complex, nuanced and subtle and like 'the work made for hire' doctrine is of itself insufficiently robust to be assessed as beneficial to the advancement of OA.

Against that background the celebrated Harvard Open Access Project has much to commend it. While visited only briefly in this chapter and although not problem free, the project and its progeny as adopted by many other US Universities is essentially a

compromise between the conflicting doctrines of the 'work made for hire' and the 'academic exception'. It is certainly a more equitable approach to the management of copyright works produced by employed academics allowing for retention of copyright by the scholar but subject to a licence in favour of the institution to facilitate OA. At the same time the scheme permits the scholar to exploit their research findings through commercial publishers albeit subject to the prior licence to the University. The efficacy of the scheme does not rest on copyright law alone but requires very careful negotiation and management of the scholar's contract of employment. However this point exposes the inherent and real risk of inequality of bargaining power in such contracts. There are concerns for example that early career academics may effectively be left with no choice but to accept the contractual terms as presented in order to secure a post at an institution. That said the compromise between the 'works made for hire' and 'academic exception' doctrines embodied in the Harvard Schemes illustrate that creative and more reliable use can be made by law even of fluid concepts such as these two doctrines. As such although the 'works made for hire' and 'academic exception' legal concepts are of themselves not beneficial to driving OA, the Harvard type schemes demonstrate the benefit of extrapolating legal features from each to produce a workable hybrid in combination with contract law which is beneficial in driving OA within the Academy. This chapter therefore recommends that other Universities looking for internal drivers to advance OA should give serious consideration to implementing similar bespoke schemes in collaboration with their academic staff within their particular institution.

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Chapter 6: Open Access and the Academy: Any light from the pre-Enlightenment Era?

6.1. Introduction

6.1.2. The Research Themes and the Scope of the Chapter

Previous chapters have considered a range of theories, doctrines, practices and positive law (both extant and prospective) in assessing numerous copyright and related legal interfaces. They have all shared a common feature. That is they all post-date the European Enlightenment which for our purpose is taken as dating from the mid-17th century through the 18th century.[1] The idea of Intellectual Property: that an idea and of its expression can be owned is after all 'a child of the European Enlightenment' [2]

By contrast this chapter will explore the pre-Enlightenment era to ascertain whether there are any lessons, inspiration, warnings, opportunities or transferrable models relevant to OA and the Academy, that is to say before positive copyright law. All of this will be with a view to addressing this thesis's overall research question: is law a help or a hindrance to OA implementation and management?

Clearly the historical span of the pre-Enlightenment period is vast and so the scope of this chapter will of necessity be selective. Medieval Ireland and the Irish Monastic Diaspora within Europe have

[1] Stanford Encyclopaedia of Philosophy http://plato.stanford.edu/entries/enlightenment/
[2] Hesse (2002),26

therefore been chosen as a case study in order to identify a series of both general and specific interfaces that may be of assistance in the ongoing implementation of OA policies and practices. It is accepted that there may well be many similar or additional situations in other pre-Enlightenment societies.

6.1.3. Why an historical investigation?

In brief we would seek to justify the investigation by recollecting the importance of historical study generally to our understanding of our current world and more specifically in relation to the development of Intellectual Property Law and for our purposes that of copyright in particular. There is an inherent risk that our contemporary society may view itself as superior to the past and standing at the pinnacle of knowledge. To do so we submit is illusionary. We are products of and successors to the past, inheriting institutions, methodologies and understandings. We exist in a culture in history. This chapter advances the position that knowing how someone or some society approached problems and challenges in the past can ignite ideas and provide a fresh perspective, assisting us in making connections we had not thought of before. In the sphere of Intellectual Property Law the past, present and future are as Sherman and Bently put it 'intimately linked'.[3] Further, as May and Sell poignantly remind us, the same or similar problems and conflicts (for example between private rights and the public good) are recurrent issues throughout history and consequently if we are to provide better contemporary and future policies and practices we must examine the past.[4] Halliday's general observation on IPRs that historically the claim of 'distributive norms' (that is what we may loosely associate with knowledge being circulated for the benefit of society) have weighed 'as heavily on the shoulders of political leaders as efficiency norms'

[3] Sherman/Bently (1999),1-2
[4] May/Sell (2006),5

and that striking an incorrect balance may have negative social welfare consequences[5] could be said to be especially applicable to the debates around OA.

Although this is a thesis within the discipline of law, we agree with May and Sell that an historical review such as the subject of this chapter must draw from additional sources and not just from lawyers.[6] This essential point is recognised for instance by Deazley, Kretschmer and Bently as being 'an integral part of copyright history'.[7] They see various relevant extra-legal sources such as the 'technical, economic, political, social [and] aesthetic' as valuable enlighteners.[8] In a similar vein May and Sell (as political economist and political scientist respectively) identify diverse material, institutional and ideational factors, and 'extensive political and rhetorical processes and strategies' [9]as relevant to the inquiry. Likewise Kostlyo argues that the history of the management of creative output for example by copyright must draw from as wide a perspective as possible taking note of multiple stakeholders.[10] Edelman also recites numerous factors which are active contributors in the law and society debate over what is legitimate, just, fair, and possible with the caveat that these features and the weighting attached to them can and do vary across geographical and time spans.[11] St. Clair goes as far as declaring that any such study most go beyond even these realms to take account of the language used in the discourses and debates and in particular that of metaphor a device which he sees as intrinsic to the history of the control and management of authorial output.[12]

[5] Halliday (2004),216
[6] May/Sell (2006),15
[7] Deazley/Kretschmer/Bently (2010),14
[8] Deazley/Kretschmer/Bently (2010),19
[9] May/Sell (2006),27 and 16
[10] Kostylo (2010),22
[11] Edelman (2004),186-187
[12] St Clair (2010),373-374

Thus in this spirit while the chapter will draw upon primary legal sources (where available) and scholarship it will also invoke the assistance of a range of disciplines across the Arts, Humanities and Social Sciences.

It is submitted that ultimately such an undertaking is valid because as put succinctly by May and Sell 'history matters' and 'forgetting history is not an option'.[13] But it is not a case of studying history merely to record detail. Instead, the chapter aims to reflect the outlook of Deazley, Kretschmer and Bently who indicate that while such studies may not necessarily reveal a single, unbroken narrative that is universally applicable there is always the hope that the investigation may deliver a new narrative because 'law is both a set of rules and a discourse about what those rules should be.'[14]

6.2. Pre-Enlightenment Ireland: A justification

This period has been chosen for investigation and assessment for at least three reasons. First of all, the enduring impact of the Columcille alleged copyright infringement story.[15] Secondly the existence in Ireland at the time this event is claimed to have occurred of a highly developed legal system which the investigation has revealed evidences various elements of interest and relevance to OA-Legal interfaces. Thirdly, the practices of the Irish scholar monks who in the spirit of Columcille are renowned to have culturally re-seeded Europe in the early Middle Ages following the fall of the Western Roman Empire and the advent of the so-called Dark Ages. Linked to the latter is also an evaluation of the possible influence of this monastic scholarly diaspora on the development of the early European Universities. The enquiry will seek to establish

[13] May/Sell (2006),203-204
[14] Deazley/Kretschmer/Bently (2010),20
[15] Sometimes the variants *Colm Cille* and *Colmcille* are found in the literature.

whether this Irish example really was evidence of a 'gift economy'[16] or a prototype Open Access, or what has been labelled 'Copyleft'.[17] It is the assertion of this chapter that all of these characteristics are relevant not only to the overall hypothesis of this thesis, but that these aspects also relate to previous chapters in the thesis and ultimately to the wider consideration of OA and the Academy. Ultimately the aim is to ascertain whether there are any features of the Irish model that may be transferrable to the current debate and to future practices or whether this was merely an historically unique and unrepeatable era?

6.3. The Columcille copyright incident

This section concurs with Masterman's observation that any historical survey of copyright must take note of this incident.[18] As it is almost a given that the incident has lasting copyright significance, this section will investigate whether it had any OA features of note and if so whether those facets have any contemporary resonance or application. The enduring impact of the event on subsequent copyright law and litigation can be gauged for example not only from its mention in the works of modern esteemed copyright scholars such as Goldstein[19] but also from the fact that it is still referred to in contemporary Irish jurisprudence. A notable illustrative case is *EMI Records* & *Others v Eircom PLC.* [20]This was an internet infringement case brought before the Irish High Court at

[16] An economy that can exist alongside the commodity economy. At heart gifts can be viewed as investments in social capital. Such an economy can exist at interpersonal, sectoral or institutional level. See Cheal (1998) 15,86
The gift economy can interact with and facilitate the commodity economy. For example Professor of Economics and History, Mokyr observes that if access costs are low/non-existent 'the search for new knowledge will be less likely to reinvent wheels…new discoveries and knowledge will be added…more knowledge will be cumulative.' Mokyr (2002), 8. He also reminds us that the Industrial Revolution of the 18th century depended upon not just technology but better access to information. Mokyr (2002), 74. To that extent OA may be seen as embodying a facet of the gift economy.

[17] '*Copyleft* See definition fn 3. Chapter 3

[18] Masterson (1940),624

[19] Goldstein (2003),39

[20] [2010] IEHC 108 (16 April 2010)

the instigation of four of the major music recording rights owners against an Irish Internet Service Provider (ISP), to prevent use of the service by music copyright infringers. In his judgment Charleton J ruled:

> There is a fundamental right to copyright in Irish Law. This has existed as part of Irish legal tradition since the time of Saint Colmcille. He is often quoted in connection with the aphorism: le gach bó a buinín agus le gach leabhar a chóip (to each cow its calf and to every book its copy).[21]

Apart from a fundamental error made by the judge (as we shall see later, the famous aphorism is a quotation not from Columcille, but from the judgment of the aphorism as founding a Human and a Natural Law[22] right to copyright in modern Irish law. It was thus seen as part of the informing philosophy for Articles 40.3.2° and Article 43.1 of the Constitution of Ireland, 1937 which protect private property and compel the Irish state to provide appropriate means to seek redress for infringement of those rights.[23] Indeed this causal link was explicitly made by Keane J in an earlier Irish copyright case *Phonographic Performance Ireland Limited v Cody.*[24]

Such reasoning is of course questioned and challenged by some modern scholars such as Vaver who labels the attempt to view such rights as having existed from 'time immemorial' as 'hapless and foolish'.[25]But this contrary opinion merely reflects the ongoing

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[21] [28]
[22] See Chapter 2.4
[23] Article 40.3.2°: The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
Article 43.1: The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
[24] [1998] 4 I.R. 504 [511]
[25] Vaver (2001),123

debate over whether there is any such phenomenon as Natural Law and in particular whether any Natural Law basis can be established for copyright. Elements of this debate have previously been addressed in Chapter 2 on Copyright Theories, Justifications and Open Access.[26] Apart from specific objections raised in the commentaries in relation for example to the Just Desert, Personality and Labour theories, it will be recalled that a number of scholars such as McGowan (who sees such attempts to analyse and describe copyright law as revealing more about the commentator than elucidating the law[27]) and Rahmatian, (the undertaking is 'quixotic… morally reprehensible' and ultimately of no practical use[28]) decry such endeavours.

Returning to the incident itself, an attempt will now be made to ascertain what actually happened (or more accurately what is recorded subsequently as having occurred) in the dispute. An assessment of the incident through the provisions of the Irish legal system of that period will then be undertaken to establish whether a similar or different legal outcome was possible to that of contemporary copyright law. The exercise will also seek to identify any pertinent OA ramifications.

It is generally accepted that Columcille lived from 521 to 597 AD.[29] Our main source for the fullest account of the incident is the 16th century *Beatha Cholm Cille* (1532) by Maghnus Ó Dhomhnaill (Manus O'Donnell).[30]Unfortunately one the earliest written records of Columcille's life by Adomnán of Iona dating from the 7th century,[31] approximately 50 years after Columcille's death while

[26] See Chapter 2 .2.3
[27] McGowan (2004),5
[28] Rahmatian (2011),119
[29] Introduction by Oxford University History Professor Richard Sharpe to his English translation of Adomnán of Iona. *Life of St Columba* (Penguin London, 2nd edn. 1995)
[30] Irish Text Rawlinson B 514 in the Bodelian Library Oxford.
[31] Referring here to the English translation by Sharpe (1995)

recording events subsequent to the judgment contains no account of the incident itself. That said Sharpe opines that the stories about Columcille and his life would have been recited and transmitted orally both during and after his life [32]and it is this oral tradition upon which we must depend up until the accounts were written down.

The account relied upon in this section is from the translation of O'Donnell provided by Lacey.[33] In it we are told merely that in the course of one night Columcille copied a 'book' [no further descriptive supplied] belonging to Finnian of Droma Find without either the knowledge or permission of the latter. The dispute over Columcille's actions was by agreement brought before King Diarmad and because of the significance of the incident to our study and the OA related issues upon which it may touch, extensive quotation from the text is warranted. It is recorded that in putting his case to the court, Finnian said 'Columcille copied my book unknown to me and I say that the "son" [copy] of my book is mine'. Columcille responded:

> 'that Finnian's book that I copied from is none the worse for it, and it is not right that the divine words in that book should perish or that I, or any other , should be hindered from copying or reading them or spreading them among the people; and further I claim that I was entitled to copy it, for if there was profit for me in copying it I would want to give that profit to the people, without any consequent damage to Finnian or his book', Then Diarmad gave the famous judgment: 'To every cow its little cow, that is its calf, and to every book its little book [copy];and because of that Columcille, the book you copied is Finnian's.'

[32] Adomnán/Sharpe (1995),2
[33] Lacey (1998),97-98 (all quotations)

In investigating and reflecting upon the incident this chapter acknowledges that there must always be some doubt over its historicity. But as Stacey (a US based Professor of Medieval Legal History) puts it '…a story does not have to be historically accurate in order to be historically true.'[34] Similarly May and Sell while conceding reservation over the actuality of the event emphasise the enduring power of its mythical quality. For them, its essence is a 'way in which attractive useful ideas can remain in circulation'.[35]Putnam accords with this view. In his opinion the account probably emanates from Adomnán's circle and its significance is that in the 7th century this coterie of Irish monks were reflecting on the nature of property in the copy 'entirely apart from that inhering in the parchment itself' and that the 'possibility of such a conception coming into the mind of a writer of the seventh century, is certainly noteworthy'.[36]

To this comment which is based on the judgment of Diarmad we might add our own reflection on the equally remarkable modern and relevant phenomena displayed in the plea of Columcille. These would include that which we would now recognise as that of the non-rivalrous nature of intellectual property in that Finnian still had his book undamaged and unaltered to use as he so wished.

More importantly for the purposes of this thesis, there are elements of Columcille's plea which resonate with features of basic OA principles and also Copyleft. For example we might benchmark Columcille's claims against the definition of OA from the Budapest Open Access initiative.[37] Leaving aside references to the technology

[34] Stacey (2007),162
[35] May/Sell (2006),49
[36] Putnam (1898*),* Vol.2. 482 (both quotations)
[37] See Definition Chapter 1.1.

of the internet in the definition, and making allowance for the use of different terminology, the rights to have the literature made freely available to the public, and to read, copy, distribute and to produce derivative works without barrier or hindrance subject to the requirement to maintain acknowledgment of authorship and the integrity of the work can all be explicitly or implicitly located within his plea. Thus (with OA resonances in italics):

1. 'Finnian's book that I copied from is none the worse for it': *integrity maintained and authorship acknowledged.*
2. 'it is not right … that I, or any other , should be hindered from copying or reading them or spreading them among the people' : *the right to unhindered reproduction and distribution of the literature expressed and the right to make a derivative work implied.*
3. 'I would want to give that profit to the people,' *the primacy of free public access to the work.*

A similar exercise could also be undertaken in respect of Copyleft,[38] again making similar technological and linguistic allowances. Given these findings it would be reasonable for this chapter to propose that in addition to the traditional enduring myth of copyright protection that is anchored in the Columcille incident we also have what could be termed the enduring myth of OA, ideas that where later to find more detailed elaboration in declarations such as the Budapest Open Access initiative and in OA licensing suites such as Creative Commons, and as such provides a justification for investigating the event from an OA perspective and elucidates the relevance of this section to the overall project of this thesis.

[38] See Definition fn 3. Chapter 3

But what did Columcille copy? Again we are at a disadvantage because of the paucity of facts. Traditionally it has been thought that this was a portion of that part of the Judeo-Christian Scriptures called the Book of Psalms. [39] This tradition appears to be based on the existence of a manuscript (indeed the oldest extant Irish illuminated manuscript) which dates from the 7th century and attributed to Columcille. This document is now in the Royal Irish Academy in Dublin and is known as the Cathach of Columcille.[40] There is also a tradition referred to by Corrigan that the copied work was in fact a copy of the whole Vulgate (a Latin translation of the entire Judeo-Christian scriptures) which Finnian had obtained in Rome and brought back to Ireland.[41]

Given this background a comparative assessment of the claim will now be ventured. First from the current legal system and then that of Columcille's time. From a modern perspective an assumption of fact for the purposes of our assessment of either version of the copied book (the whole Vulgate or merely the Book of Psalms) would place considerable doubt on Finnian's claims. Likewise the judgement of Diarmad and thus the significance and enduring weight attached to the 'rustic'[42]aphorism in that ruling would be undermined. This is because the Vulgate (which would have included the Book of Psalms) was translated into Latin by Jerome.[43] Insofar as there was a work capable of being protected it would be the original literary work embodied in Jerome's translation from the Hebrew and Greek manuscripts. As such Jerome would then be recognised as author for example pursuant to sections 17(2) (a) and 21 of the Irish Copyright and Related Rights Act 2000 (CRRA) and sections 1 (1) (a) and 9 of the UK's Copyright, Designs and Patents Act 1988 (CDPA). Finnian was merely the possessor and

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39 Goldstein (2003),39
40 https://www.ria.ie/cathach-colum-cille-introduction-2
41 Corrigan (2007),5
42 de Montalembert (2015),12
43 http://www.britannica.com/topic/Vulgate

owner of the tangible manuscript and remained so after Columcille's copy was made. Nevertheless given the propensity of the Celtic peoples and the Irish monks in particular to create highly personalised illuminated manuscripts the possibility exists that Finnian may have prepared such a manuscript version of Jerome's work which might well have founded a claim for Finnian's authorship in modern nomenclature of a typographical edition under s 17 (2) (c) of the current Irish Act or s1 (1) (c) of the UK Act. Even then in both jurisdictions there must be a *de facto* facsimile copy made of the typographical edition before an infringement can be found (Section 39 (1) (d) CCRA and section 17 (5) CDPA). If Columcille's copy embodied his very own unique script (the equivalent to a modern-day new typeface for example) he might well have been able to argue originality in his own new typographical edition.

So provisionally we may tentatively conclude that by today's copyright standards the claims of Finnian and the ruling of Diarmad are at the very least questionable if not fatally defective. Conversely an analysis of the controversy is more favourable to Columcille's actions, paralleling a range of OA features as delineated in standards such as the Budapest OA Initiative.

The analysis just undertaken of course concedes that using the templates of modern copyright and OA are to a degree anachronistic. However it is asserted that taking a degree of historical licence reveals that the incident even after centuries of increasing copyright protection on a global scale still contains a powerful inspiration especially in what this chapter section would uphold as a previously neglected OA aspect.

The section now returns to Columcille's time. It should be noted that the incident did not occur in a legal vacuum. A legal system existed

in the Ireland of his time: the Brehon Law. The research for this section was initiated by an inquiry to establish the nature of those laws and the procedure within which Diarmad's judgment was delivered and then attempt to assess the correctness of the ruling and also any lessons, inspirations or other connections with OA. However the enquiry revealed much more about the Brehon Law than may have been immediately applicable to the incident. That is to say further investigation disclosed a number of elements that this chapter maintains relate to OA and as such the endeavour and its findings contribute to the overall task of this thesis in ascertaining whether law helps or hinders OA. Consequently the following sections unfold first by a summary account of the Brehon Law; then how it might have applied to the Columcille case and finally the aforementioned additional OA related aspects.

6.4. The Brehon Law

6.4.1. Introduction

A relatively substantial summary will now be provided on the Brehon Law. We hold that this is warranted for at least two reasons. First of all, because the nature and indeed the existence of that system may not be known to any great degree, or at all, within the Common Law and Civil Law jurisdictions which have been prominent in global law for many centuries. Consequently, the first part of this section will be largely descriptive before transitioning to points of reflection and learning in relation to OA. Secondly, this chapter maintains that it is essential to acknowledge that in studying an ancient society and its documentation that we are involved in a complex act of translation. This translation is not merely that of language but of culture. In doing so we must never dispense with the necessity of seeing a text, such as a legal document, as against its background. So far as we possibly can we should endeavour to

encourage the documents, their context and their accompanying practices to speak to us across the centuries. Such a methodology should ameliorate and help us to resist the risk of 'ransacking' the past merely to extract isolated examples wrenched from their context to support our existing opinions and models.

This portion of the chapter thus aims to demonstrate that the Brehon system and the society in which it operated exhibited a wide range of literary creativity and distribution models. Those features and the principles and practices which propelled the system will thus be pertinent to our understanding of how a pre-Enlightenment society can contribute to our current and future understanding of OA and the Academy.

The system is called Brehon because this is the anglicised version of the old Irish *breitheamhain* for judge/jurist. It has been described as 'the oldest, most original, and most extensive of mediaeval European legal systems.'[44] Further epithets laud its 'extraordinary sophistication'[45] and its 'great…just and beautiful structure. '[46]

The laws themselves and the debates around the legal system in which they operated predate the arrival of Christianity in Ireland (around the 5th century A.D.). Indeed they probably date back to the Common Celtic Period circa 1,000 B.C. Throughout that pre-Christian era the system was entirely oral. However the wealth, consistency and reliability of that oral tradition have been confirmed by historians such as Dillon and Chadwick.[47] The Christian monks brought writing to Ireland and consequently these oral legal collections were eventually recorded in manuscripts from about the

[44] The Brehon Law Project http://ua_tuathal.tripod.com/testdefault.html
[45] Cover note, McLeod (1992)
[46] McManus (1990), 129. Also see McLeod (1982),(1986) and (1987)
[47] Dillon/Chadwick (2000),34

7th century onwards.[48] Those monks did not seek to replace the Brehon laws. Instead syncretism occurred which resulted in an unequalled 'explosion' of literature.[49]

6.4.2. Accessibility

As far as the legal texts are concerned, with the exception of some Ecclesiastical Law texts in Latin, most of these sources are in Irish. A large number of those manuscripts still exist and can be studied. In fact the manuscripts constitute the largest collection of vernacular legal material in pre-12th century Europe.[50]

As neither the thesis nor this chapter purports to be an expansive and in depth analysis of the Brehon system, none of the original extant manuscripts have been consulted although a number of photographic facsimiles have been viewed. The original and copies are all in old Irish script and as such present some difficulties in reading even for those with a knowledge of modern Irish. This would be similar to those who have learned contemporary English seeking to read early Medieval English documents.

The research for this part has therefore depended on utilising the major available modern type face collections of the manuscripts. One of these collections *Ancient Laws Of Ireland,* (ALI) is an English language translation. This work was produced under the remit of a Royal Commission in the second half of the 19th century. But this work has certain drawbacks for the present-day researcher or general reader. That is to say that the motivation in preparing the collection was largely antiquarian and historical. To an extent it was

[48] Cover note, McLeod (1992)
[49] Stacey (2007),135
[50] Stacey (2007),6 & 91; Duggan (2013),35

embracing the pan-European Romanticism of the 19th century and not essentially interested in any relevant application to current society. While the main translators Dr John O'Donovan and Professor Eugene O' Curry were skilled linguists neither was a lawyer and so the translations can lack an appropriate legal empathy.[51] Moreover both died before publication of the work which was subsequently completed by further editors. A much more modern edition of the manuscripts subsequently became available in 1987 prepared by Binchy, a leading Irish legal scholar: the *Corpus Iuris Hibernici* (CIH). Its major disadvantage is that it is available in Irish only. That said, accessing and understanding the CIH has been partially enhanced by a recent companion/guide in English prepared by Breatnach.[52] The corpus is also in the course of being made available online complete with the indexing and referencing tools expected by today's scholar. This undertaking by the CELT (Cork Corpus of Electronic Texts) Project, at University College Cork is very much in its infancy and may take some years yet to complete.[53] Nevertheless an increasing number of English language scholars of both legal and other disciplines who have acquired knowledge of Irish have prepared monographs on various aspects of the Brehon laws and where they are referred to in this chapter this author will be relying on their translations because they provide a much more reader friendliness in a modern idiom.

6.4.3. Contextualising the system

Recalling the stated and repeated emphasis of this thesis on context[54], Stacey contextualises the legal system embodied in the manuscripts by asserting that they were produced within one of the most literate and sophisticated societies of that era.[55]That

[51] Charles-Edwards (1980),143
[52] Breatnach (2005)
[53] The Brehon Law Project http://ua_tuathal.tripod.com/testdefault.html
[54] For example, Chapters 1.4 and 2.2.3
[55] Stacey (2007),6 & 91; Stacey (1994) 2

community has been described by Duggan (a Common Law lawyer) as a 'knowledge based society' in which learning and scholars were revered.[56] One can see immediately from such a judgement a powerful resonance for OA, that is, how knowledge was produced and circulated and interfaced with a legal regime. As such the investigation and reflections are relevant to the modern debate on how today's society interacts with the learned classes in the Academy of which OA management is an integral part. Further, Duggan concludes that the laws evidence ' many modern concepts such as equity, negligence, social mobility, unbiased interests, fair and open process of law and women's rights'[57](in marked contrast in her assessment to the early Common Law and Civil Law which were to emerge from the late Middle Ages onwards). She also highlights that the Brehon system 'demonstrated worldly wisdom, self-confidence, technical advancement and complexity, the very definition of sophistication.'[58] These features can be gleaned from a brief overview of the range of issues addressed in the manuscripts. This summary is included in this segment of the chapter because it provides an indispensable framework from which the investigation will seek to extrapolate elements of significance to OA. Apart from the texts themselves, the milieu in which they were created should be noted.

The law tracts were essentially texts prepared by lawyers for the use of other lawyers.[59] They were not what in today's terms would be recognised as legislation. Nor were the tracts themselves designed for popular use.[60] Neither were they sourced in some central authority such as a King or Parliament as under the European feudal system or ancient legal corpora such as Alfred's

[56] Duggan (2013),3 & 28
[57] Duggan (2013),1
[58] Duggan (2013), 115. Also see Kelly (1997) for a more detailed description and analysis of that sophisticated society.
[59] Charles –Edwards (1999),9
[60] Duggan (2013),10

Anglo-Saxon law, Justinian's code or Hammurabi's Assyrian law.[61] Additionally, Kelly asserts that as far as can be discerned from the source material these lawyers operated nation-wide free of the control of any king or similar authority.[62]

Those lawyers fell into two basic classes. The first the *brithem* (literally maker of judgements) of which the *Uraicecht Becc* knows a threefold hierarchy, in general terms according to Kelly undertook many of the functions as those of modern judges.[63]The second class was the *aigne* which Kelly says 'can be equated with the modern barrister or advocate.'[64]

As far as kings are concerned scholarly opinion varies as to extent of their role in the operation of the Brehon Law. During the first millennium A.D., if not before, Ireland consisted of numerous kingdoms, of different tiers reflecting local, regional and provincial power and importance.[65] Some scholars such as Kelly have assessed the kings' function as important but not one of primacy.[66] Amongst others Thurneysen posits a more crucial and pivotal position similar to a supreme judge.[67] Stacey's view is that as the Christian influence within the Brehon system, with which it syncretised, grew, the importance of kingship as a source of authority was enhanced. She draws this conclusion from a common feature in emerging European Christianity which tended to view the recognition of strong kings as divine agents for the spread of their message.[68] (As revisited later in the chapter, this observation will structure any interpretation and conclusions when scrutinising the role of Diarmad in the Columcille copying dispute). In reality the relative importance

[61] Kelly (1988),21; Stacey (2007),7
[62] Kelly (1988),21
[63] Kelly (1988),56
[64] Kelly (1988),56
[65] Duggan (2013),50
[66] Kelly (1988),21-22
[67] Thurneysen (1972),103
[68] Stacey (2007),148

and hierarchy between those involved in the creation and administration of the law probably varied between regions and the kingdoms.[69]

Nevertheless, Stacey also cautions that regional differences should not be exaggerated.[70] She notes that the high degree of uniformity 'that characterises the early Irish tradition is truly remarkable.'[71] She and Duggan see this as emerging from the common language, a shared culture and the fact that judges and lawyers travelled around the country explaining and building the legal corpus.[72]

Two further important points should also be made here which will be expanded on subsequently. That is that in addition to king and lawyers the system embraced those who in today's copyright terminology would be labelled 'creative types', such as poets. Further, although there was nothing resembling what we would recognise as a jury,[73] acceptance and maintenance of the laws depended fundamentally on the popular consent of the people.[74] Indeed in Stacey's assessment, the law tracts and the society in which they were created are inextricably linked. For her the tracts are 'extended discourses of the structures and practices prominent in Irish society of the period.'[75] Thus the system overall had the objective of being fair, equitable, predictable and transparent.[76] To this end the court procedure was aimed at ascertaining fact and truth and was arguably more akin to the modern inquisitorial legal process rather than an adversarial one.[77]

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69 Stacey (2007),174
70 Stacey (2007),174
71 Stacey (2007),175
72 Duggan (2013), 31 & 57; Stacey (2007),93 & 165
73 Duggan (2013), 97;Stacey (1994),124
74 Duggan (2013),31 and 55
75 Stacey (2007),7
76 Duggan (2013),89-90
77 Stacey (1994),122

Finally the enduring character of this native legal system should be noted. Even after the Anglo-Norman invasion of Ireland in the 11th century and the introduction of what would become the English Common Law, the Brehon Law remained the law of approximately three quarters of the country up to the 16th century, that is, outside of the relatively small geographical area around Dublin known as The Pale.[78] In fact the Brehon model was adopted by many of the Anglo- Norman aristocratic settlers despite attempts for example by Edward III culminating in the Statute of Kilkenny (1367) to repress the system.[79] It may well be though that in some areas of the country and for a period of time, a dual system operated with both regimes being used. For example, Nicholls records that even as late as 1559 the English Lord Chancellor in Ireland resolved a boundary dispute with the assistance of four Brehons from the Ua Deoráin law school.[80] However final abolition of the Brehon regime was achieved by the English Crown in 1603 and in 1612 the Common Law of England became the jurisprudence of the whole of Ireland and first Assize circuits covering the entire country were established.[81]

Against this background we may now return to the texts.

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[78] McManus (1990),131

[79] Statute of Kilkenny Article 4 'no Englishman, having disputes with any other Englishman, shall henceforth make caption, or take pledge, distress or vengeance against any other, whereby the people may be troubled, but that they shall sue each other at the common law; and that no Englishman be governed in the termination of their disputes by March law nor Brehon law, which reasonably ought not to, be called law, being a bad custom; but they shall be governed, as right is, by the common law of the land, as liege subjects of our lord the king; and if any do to the contrary, and thereof be attainted, he shall be taken and imprisoned and adjudged as a traitor; and that no difference of allegiance shall henceforth be made between the english born in Ireland, and the English born in England, by calling them English hobbe, or Irish dog, but that all be called by one, name, the English lieges of our Lord the king; and he who shall be found *doing* to the contrary, shall be punished by imprisonment for a year, and afterwards fined, at the king's pleasure; and by this ordinance it is not the intention of our Lord the king *but* that it shall be lawful for any one that he may take distress for service and rents due to them, and for damage feasant as the common law requires.'

[80] Nicholls (1972),50

[81] Patterson (1989),43-44

6.4.4. The Law Texts

The subject matter of the manuscripts expands over more than 100 different tracts. Some of these are complete. Others are mere fragments or a collection of sections. They fall into two main groups: the *Senchas Már and* the *Nemed* being held to have been created by two different major ancient Law Schools.[82]

The *Senchas Már* (literally 'The Great Tradition') grouping of some 47 different texts, comprises the 'largest and most famous' of the collection[83] and takes up almost the first three volumes of ALI. The collection has been assessed as 'arguably the most impressive legal undertaking in the west since the compilation of the Justinian corpus.'[84] These assessments encapsulate why this chapter has chosen this ancient Irish model as an appropriate study for possible lessons from the pre-Enlightenment era. The texts include the following legal documents:

Cethairslicht Athgabálae on the law of distraint;

Cáin Sóerraith and *Cáin Aicillne* regulating clientship and the supply of goods and services within that relationship;

Cáin Lánamna on marriage and matrimonial property, and extra marital relationships;

Córus Bésgnai regulating the relationships between church and people.

Bechbretha a law on beekeeping;

Coibes Uisci Thairdne on watermills which may be taken as an example of legal regulation of technology;

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82 Kelly (1988),242-246
83 Duggan (2013),13
84 Stacey (2007),181

Slicht Othrusa, *Bretha Crólige* and *Bretha Déin Chécht* covering sick maintenance and injury compensation.

The texts produced within the *Nemed* school are more poetico-legal and include:

Bretha Nemed Toísechon on the roles and status of the church, poets and various other professionals;

Bretha Nemed Déidenach again largely concerned with the status and duties of poets;

Uraicecht Becc another status text but with a much greater breadth in coverage than *Bretha Nemed Déidenach*. In addition to poets the text addresses the status of kings, judges, church officials and commoners;

Cóic Conara Fugill which concerns preparation for and conduct of judicial proceedings.

Many of the other important texts do not fall neatly into either of the above categories and are held out as evidence of additional Law Schools in Ireland during the Middle Ages.[85]Those texts include:

Berrad Airechta on judicial procedure, sureties and contracts;

Críth Gablach ranging over laws on status and grades in society, property, clientship and some information on the duties of kings;

Di Astud Chor a major text on contracts;

Uraicecht na Ríar another text on the status of poets;

[85] Kelly (1988),246-247

Lebar Aicle which addresses matters which in modern legal systems would be considered criminal law but also contains guiding principles for the conduct of business partnerships borrowing and lending and similar transactions.

The manuscripts also contain various glosses and commentaries that emerged from the different Law Schools such as that of the renowned late medieval school of the Uí Dhuibh dá Bhoireann (O'Davoren) family in County Clare. In Kelly's opinion these provide 'considerable assistance towards our understanding of early Irish law…' as those who composed them belonged to the same legal tradition as did the authors of the 7th-8th century law-texts..[and they]…also had access to legal material now lost.'[86]

Some further specific descriptive material on particular points of the Brehon law will follow later in the chapter. But against the above general introduction the chapter will at this juncture seek to extrapolate some potential OA implications.

6.5. Contributions from the Brehon law to the OA debate

While the Brehon system was not lacking in detailed prescriptions it resounded much more with principles and the acceptance of creative and imaginative solutions. From these general observations this section will endeavour to formulate an indication of possible OA implications, first of all in relation to Columcille's copying and then from other aspects of the system.

[86] Kelly (1988),251

6.5.1. The Columcille incident and the Brehon Law

A challenge will now be confronted to appraise the dispute in the light of the Brehon laws that would have applied to Columcille, Finnian and Diarmad back in the 6th century A.D. Specifically this will be with a view to determine as far as possible whether Diarmad's judgement was on the balance of probabilities correct or alternatively if Columcille's claims and the OA implications of those claims as set out above [87]would have received stronger endorsement from the system. But such an undertaking is not without problems or obstacles.

Even if the queries over the historicity of the incident which we have addressed above stood resolved,[88] the information given in Lacey's translation of *Beatha Cholm Cille* by Maghnus Ó Dhomhnaill is far from a transcript of the trial itself; it is merely a summary of the pleadings of the parties and King Diarmad's ruling. But that may not be as unusual or unhelpful as appears on first blush. In fact and regrettably no full trial manuscripts now survive from the Brehon period.[89] But this may miss the point. As Stacey has opined '… to focus on what is missing does considerable disservice to what we have.'[90] For her, the extant material is sufficient to reconstruct to a high degree 'the priorities and principles' around which any trial proceeded. She concludes that this marks the Irish situation as different some other nascent contemporary European systems where it is now impossible to ascertain and reformulate the principles and ideas behind those laws.[91] Thus we can recall the general objectives of the Brehon procedure to seeking fairness,

87 See section 6.3
88 *ibid*
89 Stacey (2007),8; Kelly (1988),237-238
90 Stacey (2007),9
91 Stacey (2007),9

equity, predictability and transparency and ascertaining fact and truth.

First of all the status and procedure of Diarmad's court is worthy of some critique. The primary issue here is whether Diarmad had the appropriate authority and standing to make the judgment. As seen in the preceding summary of the Brehon system the role of kings in the making and administration of the law is a matter of debate. If we follow the argument of scholars such as Kelly considerable doubt could be cast on whether Diarmad could have made such a ruling merely because he was king. Moreover, in such circumstances Diarmad most probably would have lacked authority to have made the judgment sitting alone as the historical evidence on the court system shows that the bench would have consisted of a bench of personnel including a church cleric and probably a poet. Conversely the school of thought embodied in the views of Thurneysen would probably vindicate Diarmad's standing and his right to make the ruling. A case could be constructed to argue that Ó Dhomhnaill's account written in the 16th century may have been influenced by the much more highly developed and centralised authority given to 'Christian' kings in the later stages of the Early Middle Ages and into the High Middle Ages. At the early stages of interaction between the Brehon system and the Christian church such as in the 6th century such centrality, authority and status may have been much more relative.

Apart from the status of the court and procedure there is also what we may approximately designate the positive law embodied in the texts. Those texts reveal a highly developed law of property.[92] There are for instance detailed provisions for the ownership and inheritance of land in the *Críth Gablach* and *Córus Bésgnai* and of

[92] See for example Kelly (1988) Chapter 4

buildings in the *Críth Gablach.* Similar laws governing the ownership and transfer of movable property including livestock, utensils, weapons, clothes, ornamentation can be located in the *Críth Gablach*. Additionally *Bretha im Gata* deals with wrongful tacking of property or theft. However and unfortunately the *Bretha im Gata* manuscript is incomplete. The extant passages concentrate very much on livestock (an unsurprising element given the high dependence of that ancient society on agriculture). Other texts though make reference to improper takings such as in the *Bechbretha* which makes differentiation on the seriousness of the theft based on the place from which the property is stolen for example a taking from a domestic or work premises is deemed more serious than from say a remote field; or whether violence is used. The status of the owner and the value of the object are also taken into account is assessing the penalty to be paid by the taker and could vary from a twofold to a fivefold replacement (usually of the animal taken). There was no unambiguous law text which addressed intangible property such as the claimed copyright in Finnian's book. Consequently we have no alternative but to draw on principles and apply some constructive if not liberal latitude and imagination in an attempt to apply the extant law of his time to Columcille's dispute. Again Stacey assists in this endeavour as she asserts that in studying and assessing those ancient laws we often have to 'read between the lines' and if we do not 'we are missing much of what it has to say.'[93]

By assembling these variegated features some conclusions about the dispute will now be offered with the aim of further assisting the theme of this chapter and the basic research enquiry of this thesis, which is whether law is a help or hindrance to OA. In light of the positive law the litigation could have resolved either way. The only possible positive law which may have come to Columcille's

[93] Stacey (2007),61

assistance was from the texts relating to borrowing. In general, borrowing the property of another without consent was illegal.[94] There were though certain recognised exceptions to this general rule usually arising out of necessity, the commentaries noting matters such as borrowing a horse to travel to warn a neighbour or where flight from fear or danger was involved.[95] There were also permitted borrowings without the owner's consent where that owner was a kinsman or the parties had other binding connections such as fosterage.[96] Given that Diarmad's ruling and reasoning had to proceed by way of analogy and extension ('To every cow its little cow, that is its calf, and to every book its little book'), and it would be fair to say a degree of imaginative and creative law making moving from principle to specifics, this chapter asserts that Columcille's pleas could arguably have had had at least equal validity by analogising and extending the exceptional borrowing principles in a likewise innovative fashion. But in a society that honoured, respected, upheld and sanctioned the ownership of real and personal property by its laws it would not have been beyond the bounds of possibility that the ruling of the court (whether by Diarmad alone or as a member of a judicial bench) applying by correlation the existing property laws and the underlying principles already referred to, could have reached the decision that is recorded in Ó Dhomhnaill's account. On the balance of probabilities this is more likely to have been the outcome. As such the copyright foundation of the case and the aphorism embedded within it stand vindicated leaving Columcille's OA claims resting only on the possible procedural irregularities considered immediately above. That however is not to dismiss the latent OA connections in Columcille's argument. This author adopts the view that both contentions are evidence of the willingness of those operating within the Brehon scheme to look for innovative solutions and to be prepared to take a risk in seeking those answers ultimately with a

[94] ALI I 166.24-25) & ALI I 230.26
[95] Triad 163 ALI v 208.10-2
[96] ALI iii 486.7

view to serving the common good. It is that philosophy and methodology embedded within the Brehon system that reaches out across the centuries to inform any analysis of copyright and related legal interfaces between OA and the Academy. Those who would align with the OA priority of Columcille in the dispute would laud his innovative and approach even if his practice ultimately clashed with the black letter law. He and they would accord with the view of St. Clair who reminds us historically 'many intellectual property practices have been operated for many periods in contravention of the law.'[97]

Beyond this single incident potential fruitful material for OA parallels may be located in other aspects of the Brehon system.

6.5.2. The Brehon Law Schools: A prefigurement of the Academy?

During the life of the Brehon system there were no Universities in the format which today's society would recognise. However there were institutions to which the noun 'Academy' could be applied in that they were institutions for the advancement of knowledge and schools for training in a particular skill or profession.

Reference has already been made to the Law Schools which produced the *Senchas Már* and *Nemed* groups of legal texts and to the Uí Dhuibh dá Bhoireann (O'Davoren)[98]and Ua Deoráin (O'Doran) [99]legal scholars . But there were numerous other schools within which the primary legal manuscripts were prepared and copied, glosses and commentaries produced and lawyers trained.

[97] St Clair (2010),370
[98] Section 3.4.3
[99] *ibid*

The most prominent of these was that of the Mac Aodhagáin (Mac Egan) family. The extensive extant literature shows that they had establishments throughout what are now the modern-day counties of Galway and Tipperary and they were both academic lawyers and practitioners. In the latter role the manuscripts reveal that they advised and represented a high proportion of both the native Gaelic and Anglo-Norman ruling families.[100] The Mac Fhlannchadha (McClancy) Brehon family are also recorded as academic lawyers, judges and advocates (including for major Anglo-Norman lords) with some of their number noted for their skills in non-legal literature and poetry.[101]

There is evidence that these Brehon lawyers sought and accepted payment for the *services* they rendered, for example in connection with court proceedings. The advocate (*aigne)* for instance operated on the basis of what today would be recognised as a contingency or conditional fee agreement in that he was entitled to one third of his client's award.[102] The payment rendered to the *brithim* (judge) was likewise contingent on the value of the successful award being the equivalent of one twelfth of that award which was paid by the losing party.[103]However there is no evidence in the literature that the lawyers sought payment for sharing the wealth of the legal knowledge itself. Similarly there is no manuscript substantiation that they asserted ownership over the *content* of the laws and legal material they had produced as opposed to the tangible media in which that content was embodied. There was certainly no primitive equivalent of today's Crown or Parliamentary copyright.[104] Conscious of the inherent risks of constructing an argument from silences and gaps in the literature, this author nevertheless concludes from what is available that no such claims over the

[100] Kelly (1988),252-254
[101] Kelly (1988),254-256
[102] Kelly (1988), 56
[103] Sharp (1986),184
[104] As for example under sections 163-168 UK CDPA or s23 of the Irish Copyright and Related Rights Act 2000

content of the legal material were made. Among the reasons for asserting this is the evidence of the arrangements for payment just immediately described. Given that there were such detailed rules for remuneration and also the esteem in which ancient Irish society held real and personal property, and the almost encyclopaedic range of law establishing positive ownership of property the absence of such claims of ownership over knowledge content is striking. It is therefore the stance of this chapter that such absence is not merely an oversight but was a deliberate choice of the Brehon legal community.

Whether payment was required, by those who attended and were trained in the law schools, and the nature of any such payment must be open to speculation. But it would not be unreasonable to concede that the labour of providing that education and training were recompensed in some way given that they were well established guidelines for remuneration of the services of advocates and judges as summarised above.

As the Law Schools satisfied the basic definition of 'Academy' as given in the opening sentence of this section we can locate principles and practices that should be noted in today's Academy when considering OA implementation and management. That is as academic authors in the Academy are employed by their University or similar institution to research and teach then given that remuneration is provided to them for those services (as with the Brehon Law School teachers) then the primary motivation of both author and the employing institution should be to explain and distribute that learning without the need to assert control over the content itself. If this lesson was drawn from the Brehon lawyers it would alleviate considerably the tensions and uncertainties which arise when attempts are made to assert or deny 'the work made for hire' and 'academic exception' doctrines and also the amorphous

concept of 'Academic Freedom' which were analysed and considered at some length in Chapter 5. That is not to say that questions of copyright law should be ignored. It is merely to assert that such ownership by either the academic author or the institution should not be the primary motive. This chapter therefore proposes that a greater informal driver for knowledge sharing and OA may be imbibed from the milieu and mind-set as evidenced in the 'Academy' of the Brehon Law Schools than an over reliance on positive law and or policy regulation.

6.5.3. Public confidence and acceptance and stakeholder involvement

Ginnell (an Irish Common Law practitioner), while admitting that the Brehon laws were not perfect, concludes that they were nevertheless accepted by the native population as 'priceless treasures'.[105] Consequently, the laws were readily accepted and obeyed, as they were not perceived as emanating from an exterior authority or as an imposition that bred dissent and resentment. These were local community laws that came to be viewed as for the benefit of the nation as a whole. They were accumulated history, wisdom, sayings, rulings, principles then applied in the assembly.[106] They were thus a 'bottom up' approach rather than the 'top down' legislative model that became prominent with the growth of the nation state after the sixteenth century.[107] In Stacey's opinion it is the centrality of this community involvement and 'shared action' which renders the Brehon system such a stellar example of the making and administration of law.[108] For instance the public *airecht* (court) was essential. Not only was justice done and seen to be done but the onlookers in the form of a local assembly were

[105] Ginnell (2012),6
[106] Ginnell (2012),57
[107] Duggan (2013),121; Ginnell (2012),27
[108] Stacey (2007),48-49

involved to associate with and own the process.[109] This high degree of consensus was all the more remarkable as it pertained in a society that was not egalitarian. Ancient Irish society was hierarchical and largely patriarchal (even with some of the more enlightened rights accorded to women previously noted). But it was also a society in which there was a high social mobility factor which was usually achieved through the attainment of knowledge.[110]

The strength and power of this community involvement and ownership may be gleaned from a critique drawn from what may be considered an unsympathetic and even hostile source. The English Attorney-General in Ireland, Sir James Davies, who claimed credit for ultimately subjugating the Brehon system, made the following insightful observation:

> There is no nation of people under the sun that doeth love equal and indifferent justice better than the Irish, and will rest better satisfied with the execution thereof, although it be against themselves so as they may have the protection and benefit of the law, when , upon just cause they do desire it.[111]

Ireland under the Brehons was of course a network of rural kingdoms and local communities where personal relationships and other *nexia* had an especially important and crucial role in the ordering of society. The 21st century world of the Academy and OA is far removed from this and time cannot be reversed. Nevertheless, this chapter maintains that given the success of the Brehon scheme, some timeless principles and practices applicable to today's implementation and management of OA. Specifically those Brehon

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[109] Stacey (2007),93-94
[110] Duggan (2013),40-49
[111] Davies (1612/1969),224; (see also biographical entry History Of Parliament Online :http://www.historyofparliamentonline.org/volume/1604-1629/member/davies-sir-john-1569-1626

principles should inform the debate. Thus stakeholders must have a confidence that they are stakeholders in more than name and that they really do have a genuine stake in the world of OA. Consultation for example must not be a mere formality acting as a veneer to conceal or obscure already decided policies and procedures. The fears, concerns, hopes, aspirations, recommendations, reservations and proposals from across the spectrum of all parties involved in the progressive implementation of OA across the Academy need to be addressed and used to inform any change. This genuine stakeholder participation and ownership is therefore as applicable to a new possible limited exception to the Berne Convention for the academic author's economic rights in short form journal type productions which are the fruit of public research funding as considered in Chapter 4;[112] as it is to the formulation of mandates whether at institutional, sector, national or international strata. Such stakeholder views should be rejected only on the basis of a sufficiently robust evidence base. Adopting the words of Ginnell there must not be any occasion 'for the imperative, none for coercion.'[113] This chapter's investigation of the Brehon system contributes to the OA-Academy-Legal Interface deliberation the fact that stakeholder participation and ownership of law and or policy is not a modern concept even if the nomenclature and associated methodologies are. They were deeply ingrained and fundamental precepts of that pre-Enlightenment Irish model.

6.5.5. Creators valued

It will be recollected that Ireland under the Brehon system has been labelled 'a knowledge economy/society within which the learned classes were held in high esteem.[114] Apart from the lawyers whose role has been expounded upon above, the Brehon regime was also

[112] Chapter 4.4
[113] Ginnell (2012),27
[114] Duggan (2013),3 & 28

notable for the degree in which poets were integrated into the legal sphere.

Given this peculiar situation some additional elucidation and description is warranted in order to understand any OA implications that this chapter part seeks to propose.

Poets (the *filidh*) were seen as custodians of the oral tradition. They were highly regarded and had undergone what we would now consider a meticulous academic education and they were also the repositories of accumulated knowledge.[115] Breatnach states that it was these qualities that distinguished the judicial poet *filidh* from the ordinary bard although the relationship may have been more fluid than this.[116] He has also prepared a thorough (and by his own admission not the definitive) work on the main Irish manuscripts on the subject: *Uraicecht na Ríar* and associated texts such as the *Bretha Nemed* and *Miadslechta* incorporating his contemporary English translations.[117]

Scholarly opinion agrees that the *filidh* were actively involved in the creation and administration of the Brehon system although it diverges on the extent of that involvement. On the basis of *Uraicecht Becc, Bretha Nemed Toísech* and *Bretha Nemed Déidenach,* Binchy for example, traces the jurists as having evolved and developed from the orders of *filidh* and of the *filidh* participating in the public court.[118] Kelly largely agrees with this, highlighting passages from the *Senchas Már and Córus Bésgnai* which equates the origins of the law on distress to 'the advice of the Church, the customs of the *túatha*, **the true laws of the poets**, the opinion of

[115] Breatnach (1990),4; Stacey (2007),207
[116] Breatnach (1987),99-100
[117] Breatnach (1987)
[118] Binchy (1955),4-6 and Binchy (1958),45

lords and the advice of judges' and the legal system of the judges …**and the poets**' (this author's emphasis).[119]

Moreover the *Críth Gablach* law manuscript also contains a poem which follows immediately on the prose text. The poem is addressed to the king advising on interpretation of the law. Breatnach for one accepts this as integral part of the legal text itself.[120] Large portions of the laws in *Bretha Nemed Toísech* and *Bretha Nemed Déidenach* are similarly also in verse.

Stacey summarises the scholarship on the historical significance of the *filidh* which is largely in favour of accepting that they held a monopoly on legal knowledge up until further specialists emerged.[121] Thereafter she indicates a degree of fluidity and overlap between the legal and poetic professions. There was no strict dichotomy between the roles and in reality the manuscripts amount to historical, political and social documents in addition to being law and reflections about law.[122]Not only did she source in the documentation instances of the lawyers imbibing the arts and aesthetics [123]but she is persuaded from the annalistic evidence that the *filidh* had an active role in court proceedings 'presiding with the king and bishop over the court.'[124] She provides a range of examples, citing the Irish text along with her parallel English translation, of such occurrences in the legal literature, coupled with her analysis of the specialised language utilised by the poet to effect efficacy of the curial pronouncement.[125] Her study of the Irish legal texts reveals a complexity of language, meters, rhythms and registers evidencing a deep familiarity with the multi levelled and

[119] Kelly (1988),48 (also see Stacey (2007),56)
[120] Breatnach (2005),242-243
[121] Stacey (1994),15
[122] Stacey (1994),22
[123] Stacey (2007),53
[124] Stacey (2007),57
[125] Stacey (2007),68-74

multi-layered nature of language as a communicative device.[126]For her such findings are unsurprising given the history of Ireland compared to other European histories and of the role that poetry has played in the life and narrative of the nation from time immemorial.

Her research promotes the thesis that beyond the texts the verbal art of the creation, administration and transformation of the Brehon system had an elevated if not paramount status: thus the subtitle of her book *'The Performance of Law in Early Ireland.'*[127] In other words this verbal art itself was not just performance of the law metaphorically as in 'courtroom drama' but was integral to the 'actualisation' of the law.[128] She warns that this may be difficult for modern readers and lawyers to comprehend because of our preconceptions as to what constitutes law, although such preconceptions are being challenged by the research of legal anthropologists. Indeed the modern propensity to differentiate 'law' and 'literature' for example, is for her 'but a chasm of our own making'.[129]For the Brehon system there was none of the modern dichotomy between say art, poetry and drama on the one hand and the entirely different realm of 'black letter law' seen as dispassionate, solid and reliable on the other.[130] The performance 'created a framework for action…not only informed, but demanded a response from those who witnessed it…' in ways that the written word alone could not evoke.[131] Stacey acknowledges that there are risks and disadvantages in such a thesis but drawing on the findings of historians of social memory she nevertheless concludes that 'performance can function as a constraining device, and it does, moreover, actively solicit the involvement of the community within which it occurs. To give an audience a stake in a particular drama is

126 Stacey (2007),96-98
127 Stacey (2007),2
128 Stacey (2007),5
129 Stacey (2007),61
130 Stacey (2007),13 and 52
131 Stacey (2007),51

to invite their participation in ensuring that the matter reaches its desired end. Performance-by definition emergent and quixotic –can help paradoxically to script a stable outcome. '[132] For her, such features allowed change to evolve yet at the same time maintaining 'continuity'.[133]To this extent we once more see the overlap and integration with the previous point on the public acceptance of and confidence in the legal system.

In relation to relevance to OA we must once again be cognisant of the distinct differences between our own society at least in the First World and Second Worlds to that of Medieval Ireland. The possibility of poets as such, occupying judicial benches and dispensing justice are frankly remote. But the features of the Brehon system discussed immediately above remind us on the need and desirability of holism within the Academy and in its relationships with larger society. In other words it is the totality of the learning and research undertaken within such institutions that benefits the wider world. The spirit of the Brehon system sounds a warning to the modern Academy not to fragment that contribution and to over-emphasis the contribution of Science, Technology, Engineering and Mathematics in enlightenment and advancement, however important they are. As noted by Kearney: 'The Irish mind remained free, in significant measure, of the linear, centralising logic of the Greco-Roman culture which dominated most of Western Europe.' [134] Ancient Irish legal practices should be an encouragement to those within the Arts, Humanities and Social Sciences and a benchmark to those tasked with progressing OA across the Academy to work for and develop effective OA platforms for these disciplines. That is to realise and act upon the reality that there is no single model of knowledge and research, and that while STEMS has its own peculiar and indispensable variety it is no more valuable than the intuitive

[132] Stacey (2007),28-29
[133] Stacey (2007),52
[134] Kearney (1985)

knowledge of the Arts, and the critical knowledge of History, Philosophy and the Social Sciences. Indeed the modern Academy and those charged with OA implementation and expansion should take note of the ancient Irish proverb 'Ní neart go cur le chéile' (there is no strength without combination).

Additionally, at risk of stretching a point, it could be asserted that the Brehon Law recollects for us the social compact: creatives within the Academy are not there primarily to commercially exploit or be commercially exploited but to be respected, honoured, and appreciated in return for which their knowledge should be made willingly available to serve, enrich and enlighten the society that has bestowed those privileges. This undoubtedly is at the heart of the gift economy and as such is pertinent to the spirit in which OA ought to be engaged with across the Academy.

In addition to many general principles, the Brehon law also embraced detailed rules when necessary. This was particularly evident in Ancient Irish contract law which contained elements and features that are instructive to OA in the Academy in the 21st century.

6.5.6. Private ordering and gratuitous irrevocable giving

Even though Ireland in the era of the Brehons had numerous local and regional kings there was no regal or other institutional enforcement of the laws. Honour and respect for and enforcement of the law were entirely a private law matter.[135]

[135] Kelly (1988),167;Duggan (2013), 81

Contract law was central to this.

About this contract law, Kelly states that it was 'the commonest legal act in early Irish society'.[136] To use modern parlance it could be said that 'private ordering'[137] was the norm. Stacey confirms that it was 'of tremendous significance'; [138] and Duggan indicates that its importance 'cannot be overstated'.[139] Such comments are founded on the legal texts themselves within which there is repeated mention of this pre-eminence:

For instance in Senchas Már (similar phraseology can also be found in Córus Bésgnai): 'The binding of all to their good and bad contracts prevents lawlessness of the world'.[140] And in Uriacht Bec: 'law is founded on contracts and legal recognition'.[141]

Before exploring the significance of all of this to OA a further short descriptive discourse is warranted given the centrality of private contract to the system and the detail and precision it employed when necessary. In order to reinforce its relevance to the 21st century and to concepts such as OA mention will be made of some strikingly modern features which were incorporated into this ancient system.

The vast majority of these contracts were oral and known as the. '*cor bél* (lit. 'putting of lips').'[142]The basis was the exchange of

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136 Kelly (1988),158
137 The term 'Private Ordering' is frequently used in the OA debate to describe the use of contractual and licence arrangements in the management of OA. See for example Elkin-Koren, N.,(2005)' referred to in Chapter.3 above on Online Licences and OA.
138 Stacey (2007),118
139 Duggan (2013),79
140 ALI Volume I. 51
141 ALI Volume V.6.22
142 Kelly (1988),158

obligations (*féich*) by the parties (*féchem)* to render consideration *(folud)* which created an entitlement (*dliged)* to the counterpart consideration (*frithfolud)* offered by the other party.[143] *Di Astud Chor* evidences the solemnity of the contract-making by providing details of involvement of four of the five senses in the process. As Stacey summarises it, '[t]he tongue recites the terms of the agreement while the ear listens to them; the hands touch to confirm those terms while the eye watches and records the event.'[144]Given the oral nature of the transaction there was a highly elaborate and sophisticated process all 'designed to safeguard against default'.[145]

At the heart of this procedure was an intricate scheme of sureties and witnesses. McLeod has analysed the variety within the arrangements. Generally the sureties were appointed by the parties and they were from the upper echelons of local society who stood to lose status if he failed to pay the surety he had offered on behalf of his party and who because of that status would invariably be in a stronger position to ensure compliance by his party.[146] There were a number of exceptions to the general rule. For example in certain cases, paying-sureties could be replaced by the giving of sacred oaths invoking a deity or other spiritual being as witness to the contract. McLeod records instances of such incidents in *Coibes Uisci Thairdne, Berrad Airechta,* and *Di Astud Chor.* One of these *Coibes Uisci Thairdne* places the responsibility of enforcement on church officials as agents of the deity.[147]

Moreover, the entire ancient Irish contractual process, while at core an essentially private law matter, nevertheless became a public event and fact. In addition to the various sureties, the contracts

143 McLeod (1992),14 and *Berrad Airechta*, 46
144 Stacey (1994),36
145 Duggan (2013),81
146 McLeod (1992),16
147 McLeod (1992),22

were invariably concluded before an audience of witnesses from the community thus ensuring that the terms were clearly known and recorded in the memories of all present who were then custodians of those truths and whose witness ensured compliance and fulfilment.[148] Indeed it could be claimed that such procedures were examples of the 'bottom up' approach to ancient Irish law-making in that private practices were expanded to community level and thereafter into inter-communal and even regional practices which tended to be applied with a high degree of consistency across this nation of multiple kingdoms.

To the modern mind some of these rituals and methods may seem alien. But there were aspects of Brehon contract law that were enlightened forerunners of legal concepts that in some cases did not realise recognition in modern law until relatively recent times. It is for such reasons that it is important for 21st century scholars and practitioners to take past societies and practices into account. Not everything in the past was imperfect and not everything in the present is perfect. As with individuals, each culture and each epoch is limited. The point that this chapter section wishes to convey is that in what may appear to the 21st century lawyer as a primitive economy and society, advanced and sophisticated ideas can and did exist and as such they invite us humbly to take cognisance of them. Some examples merit citation.

In this ancient Irish scheme, for instance a further exception to the requirement of sureties was located in the case of contracts of service where there was a continuing relationship were failure would entail drastic consequences for the continuity of that relationship.[149] It could be said that in a primitive sense this situation foreshadowed the reluctance of modern legal practice to order specific

[148] Stacey (1994),37 & 43
[149] McLeod (1992),18-19

performance of contracts of service. McLeod points out that the *Di Astud Chor* tract contains many aspects which modern law began to see reflected in the UK and Irish Sale of Goods legislation only from the 19th century onwards.[150]

Further from the *Di Astud Chor, Gubretha Caratniad* texts we learn that contracts were not immediately binding. There was what McLeod terms the equivalent of the modern 'cooling off 'period in consumer legislation in that the contract bound the parties only at sunset on the following day.[151]

The system also knew of the equivalence to the modern day limitation period for the instituting of an action for alleged breach. *Di Astud Chor* provides for a general period of ten days from claimant's discovery of the defect/default, although there was a certain degree of variation dependent on the nature of the property involved. For example in *Córus Iubaile* the periods are: a year for claims concerning horses, nine months in the case of cattle, and four months were lesser livestock were in issue. If one transcends the agricultural setting of a large portion of these contracts and instead engages with the principle the modernity of the approach should emerge.

Similarly the fact that contracts after the 'cooling off period' were for the most part binding for good or bad in that a party could not subsequently seek to abrogate their responsibilities merely because they perceived the agreement as disadvantageous.[152] Again an enlightened and thoroughly modern provision was provided for rescission where the agreement was concluded under fear,

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150 McLeod (1992),12
151 McLeod (1992), 24-25 & endnote 70 p 31
152 For example: *Di Astud Chor* 23

ignorance or duress. [153] Stacey notes that this flexibility was in marked contrast to the rigidity of the Roman law of *stipulatio* [154]where strict literal compliance was required with 'little opportunity for maneuver or review' even in the face of lack of consent, fear, ignorance or duress.[155]

Further, the Brehon laws incorporated a concept known as *cert* which corresponds with the modern notion of an implied covenant of good faith. The *cert* itself was a procedure to have the contract rescinded or seek compensation if it transpired that the other party had not acted in good faith. [156] The texts then reveal a detailed and structured remedial scheme. For example rescission could be refused:

1. where the complaining was party aware of the default at the time of making the contract (*Di Astud Chor.)*
2. where *restitutio in integrum* was not possible (*Do Thuaslucad Rudrad*)
3. or where the contract was unsecured, that is where no sureties existed. (*Do Thuaslucad Rudrad)*

Di Astud Chor then establishes a variegated method for assessing damages in lieu of rescission. McLeod helpfully tabulates these as follows:[157]

153 *Berrad Aireachta* 37
154 See Borkowski/du Plessis (2005) chapter 9 and especially pp 291-297
155 Stacey (1994),29
156 McLeod (1992)34-43 and Duggan (2013),88
157 McLeod (1992),40-42

No knowledge (of defect), no sureties appointed: fully recoverable

No knowledge, but sureties appointed: half recoverable

Knowledge, sureties appointed: nothing recoverable.

Knowledge, but no sureties appointed: two thirds recoverable

So what is the relevance of all of this to OA? In general terms: inspiration and example.

For example in Chapter 3 of this thesis we proposed multiple bespoke OA licensing platforms attuned perhaps to individual academic disciplines given that no universal model is currently applicable, even with the wide use of the CC licensing suite. Such bespoke platforms would require their own peculiar and relevant detailed licensing terms as to use, revocation etc. Likewise in Chapter 5 we advocated similar bespoke contracts to adapt and develop Harvard style OA projects. We hold that such meticulous private ordering would not strike the Brehons as unusual. Indeed as stated a few paragraphs above, such private ordering became a public standard for the public good. To that extent advocates of better OA can draw inspiration and assurance from the Brehon model that contractual ordering has been and can be a most successful approach to a societal need or challenge such as OA.

But it is in its provision for gratuitous contracts that Irish contract law may resonate more closely with some OA models and practices. According to the Brehon laws a contract could be totally unilateral. As McLeod describes it `in such cases the beneficiary , by doing what he has promised to do –namely nothing –easily fulfils his

obligations '[158]and is entitled to the benefit of the contract. For example in *Gubretha Caratniad* a judge (Caratnia) is recorded as ruling 'a contract without consideration to be legally enforceable.'[159]Moreover, once a gratuitous contract alienates the property the donor cannot revoke the gift provided the donor was fully aware at the time of granting that he was in effect giving away the property without reciprocal consideration:

> 'A contact is not actionable though it be without consideration provided every competent person knows his obvious overpayment.'[160]

Stacey highlights the boldness of this ancient Irish legal concept. She reminds us that for gift and sharing economies and societies the idea of detailed legal contracts may not only seem incongruous but even 'abhorrent'. Yet the Brehon provision seemingly accommodated both ideas: gift and contract.[161]

This legal principle would appear to have considerable empathy with for example the CC-0 license (and similar 'donations' to the Public Domain) and may be contrasted with current English law. It will be recollected that when considering the CC licence suite in the context of the Public Domain in the theoretical and doctrinal chapter, that certain difficulties were identified with the CC-0 licence under English law. That was that English law does not readily recognise 'abandonment' as it does not support a bare 'irrevocable' license.[162] Any dedication of a work to the Public Domain would be a general

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158 McLeod (1992),20
159 McLeod (1992),21 and his translation
160 McLeod (1992),21 and his translation
161 Stacey (1994),28
162 *Fisher v Brooker* [2009] UKHL 41; [2009] 1 W.L.R. 1764. (Abandonment by an implied absolute assignment of a (musical) copyright interest was to be resisted, except under very strict conditions. An implied restricted revocable licence was to be preferred. (Lord Neuberger) [50]-[59])

licence to copy and redistribute. A licence after all can be for the benefit of the 'world at large'.[163] Even so it is revocable at will by the copyright owner.[164]

From the ancient Brehons we see that a wide range private ordering by variegated contracts is nothing new and that a comprehensive and flexible approach is warranted. In brief there is no one perfect 'fits all' solution. That of course may raise concerns of cohesion both for this thesis and for OA. But such a search or even demand for cohesion may be a false premise. We learn from the Brehon scheme that cohesion is not necessarily the desirable goal. It should be sought (and never imposed) only if obtains the approval of and serves the maximum number of stakeholders.

The possible contribution of Medieval Ireland to today's OA arena is not confined to the Columcille copyright dispute and the Brehon Law. The following section maintains that Columcille initiated and inspired a movement of like-minded Irish monks who were instrumental in creating what could be termed an Academy on the Gift Economy model.

6.6. The Irish Monastic Diaspora

6.6.1. Introduction

As previously mentioned the Ireland of Columcille was a knowledge and scholarly rich society.

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163 *Mellor v Australian Broadcasting Commission* [1940] AC 491
164 Johnson (2008)

The 19th century German professor of Celtic, Sanskrit and Comparative Linguistics and Member of the Prussian and Bavarian Academies of Sciences, Heinrich Zimmer writes of this period that Ireland was 'the birthplace and abode of high culture in the fifth and sixth centuries…' and as a result of the Irish monastic diaspora spreading learning on the European Continent up to the 10th century when the culture and learning of the Western Roman period had effectively been destroyed laid 'the actual foundation of our present continental civilisation.'[165]

Similarly the English poet Edmund Spencer who in the service of the English crown's Lord Deputy in Ireland was endeavouring to eradicate the Irish language and the Brehon legal system to ensure assimilation with Elizabethan England [166]conceded:

> For it is certain that Ireland hath had the use of letters very auntiently and long before England …for the Saxons of England have their letters and learned men from the Irish..[167]

McManus draws on other European sources such the French Medievalists Darmester and D'Arbois de Jubainville. Darmester concluded that 'The renaissance began in Ireland seven hundred years before it was known in Italy.' [168] D'Arbois de Jubainville notes that the Irish monks were unique in their time period in Europe in possessing a high level of competency in classical Greek.[169]

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165 Zimmer (1891),3-4 (all quotations) and also 130-131
166 Burlinson/Zurcher,(2009), Introduction xv-xxxii
167 A Veue of the present state of Irelande (1596) (Spenser (2010),600)
168 McManus (1990),212
169 McManus (1990),222

Addtionally,Zimmer remarks that even the learned Pope Gregory the Great lacked this skill.[170]

6.6.2. Extensive in geography and material

Again further description and historical recital are deemed warranted before seeking to draw learning points.

Historians are generally agreed that in the wake of the copyright dispute Columcille left Ireland to found a monastery on Iona off the Scottish coast. However, the exact reasons for his doing so are uncertain.[171] While there is no evidence in the historical records to indicate that he undertook this endeavour specifically in order to pursue the OA style activities in relation to literary production and distribution as discussed and analysed in the previous sections of this chapter, neither is there any evidence to discount such a proposition. Certainly the subsequent actions of Columcille and those who imbibed his spirit provide some *post facto* support for this claim even when we properly take account of the truism that coincidence is not *per se* conclusive of causation. We concede that this is a matter of interpretation and that any conclusions drawn from the available evidence are determined by the interpretation of that evidence that one is prepared to accept. That said this author takes the view that that available evidence favours a Columcille Open Access spirit and inspiration structuring the behaviour and practices of the Irish monks [172]in their creation and distribution of knowledge.

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[170] Zimmer (1891),10

[171] Adomnán/Sharpe (1995),12-15

[172] The term 'monks' is used throughout this chapter as the literature evidences that this was largely a male enterprise. That is not to say that females such as nuns were not involved. The preponderance of male activity may be historically accurate or it could be that female activity was not so well recorded for posterity.

As summarised by Putnam, Colmcille's monastery at Iona possessed the richest store of manuscripts both in quantity and subject range than could be located elsewhere at that time in England or Scotland.[173] Moreover there is no evidence that Columcille and his followers ever attempted to assert ownership over this wealth of information and material in the same manner in which Finnian as vindicated by Diarmad had done. Rather we see evidence emerging of Columcille's OA spirit in the management of all of this material in that from Iona a network of centres of learning and scholarship developed.[174]

In England for example, the existing Christian monasteries were intellectually and culturally revitalised by the practices and knowledge sharing of the Irish monks or completely new centres of learning created.[175] One could for example, cite Aidan an Irish follower of Columcille who came from Iona and founded Lindisfarne monastery. Lindisfarne in turn nourished iconic figures of early English Christianity such Cuthbert of Northumbria and the early English historian Bede and Hilda of Whitby who established perhaps the first school for children in England.[176]

Likewise with the great centre of learning of the early English church at Malmesbury which was established by an Irish monk, Maeldon.[177]

The expansion of the Irish scholarly monasteries also extended to many regions of Western Europe. These centres included Luxeuil in the Vosges Mountains, Corbie on the Somme and St Gall in modern

[173] Putnam (1898) Vol I,45
[174] Putnam (1898) Vol I,48
[175] Putnam (1898) Vol I,90
[176] Putnam (1898) Vol I,93
[177] Zimmer (1891),37-38

day Switzerland and Würzburg in Bavaria,[178] Pavia, Liège, Cambrai, Rheims, Soissons, Laon, [179]the Faroe Islands in the seventh century and Iceland in the eighth.[180]

Putnam concludes that there is sufficient evidence to infer that there was also a wide system of circulation and exchange of manuscripts between these monasteries.[181] He further concludes that from the extant writings including the literary styles employed by the monks that they were conscious that their works were not confined to one nation or region but were undertaken for humanity as a whole and was not only for their immediate setting but also for posterity.[182] If we were to adopt a generous definition of these scholastic monasteries as the equivalent of the Academy of their time we could conclude that what was produced was not entirely for the Academy itself whether present and future but for society at large. In other words this was in the spirit of Columcille and of the modern day concept of OA.

But the monks wrote 'under exceptional advantages' which enabled them to maintain a high degree of intellectual independence (what perhaps today we could call 'Academic Freedom' in a general sense) and that they dared 'to speak the truth to those in power' as they 'had neither family nor property to endanger'.[183] They wrote, taught and distributed their literary output not only without asserting copyright controls but also liberated from coercion by the governments of their day or the need to court contemporary popular approval or what today would be termed 'ratings'.[184] There is evidence to confirm that such establishments were endowed and

[178] Zimmer (1891),62,87
[179] McManus (1990),258
[180] Zimmer (1891),56-57
[181] Putnam (1898) Vol I,58-59
[182] Putnam (1898) Vol I,58-59
[183] Putnam (1898) Vol I,59 (all quotations)
[184] Putnam (1898) Vol I,59

enriched by local princes and nobles. In return the monks certainly by their practices even if they had not developed a fully formulated concept of a gift economy or social compact, freely gave back to their surrounding societies the fruits of their intellectual labour. Similarly there is no evidence to suggest that they were under an explicit or even an implied compulsion from outside authorities to do so. One could thus say they were not subject to any mandate. That said the monks clearly had a driving motivation in all that they undertook to do so for the glory of their God.[185] In brief they had no army, and no force other than their intellectual acumen and the power of persuasion. They were an elite group, highly educated and imbued with a passionate zeal.

This wealth of knowledge sharing was not confined to Biblical and Theological materials. The range of subject matter studied and distributed by the Irish monks also embraced astronomy, medicine, rhetoric, arithmetic, music and writing as well as the re-issue and distribution of many Greek and Latin classical works.[186]We argue that this is a further manifestation of the Irish Mind identified in the Brehon system earlier in this chapter which refused to succumb to compartmentalise knowledge or to imbibe the linear, centralising logic of the Greco-Roman world.[187]

In the library of Laon France for instance, there is a manuscript dating from the 9th century written by an Irish monk containing glossaries of Greek, Latin and Greek grammars.[188] Indeed Oxford historian David Howlett has highlighted that it is to the Irish monastic diaspora that we owe the modern European method of writing of actually separating the words as previous Hebrew, Latin and Greek manuscripts for example had continuous script *(scriptio*

185 Putnam (1898) Vol I,59; Masterson (1940),623
186 Zimmer (1891),116
187 6.5.5.
188 McManus (1990),222

continua). Charles –Edwards[189] has pointed out that Canon Law one of the components of the European Civil Law tradition[190]really first found crystalisation as a recognisable system of law (probably because of continental scholars seeking refuge in Ireland following the barbarian invasions at the end of the Western Roman Empire) and was then returned by the Irish monastic diaspora in its mature form back to continental Europe.[191]

Mention should also be made of Fergal of Aghaboe (also known as Vergilius). He was an Irish monk who became Bishop of Salzburg in the latter half of the 8th century was a noted astronomer. In fact he taught the rotundity of the earth and its rotation around the sun many centuries before Gallileo.[192]

The monks also developed critical reflections and analysis of the texts they were handling and did not merely accept their authenticity and slavishly copy and distribute them.[193] On that basis this author holds that the OA spirit exhibited by the monks not only reproduced and distributed existing knowledge but that the availability and dispersal of that knowledge in their primitive OA model led directly to the creation of new knowledge (those critical reflections and analyses). This is the power for the wider good of OA.

The importance of the wealth of this knowledge base may be illustrated from the 11th Century dispute between Pope Gregory VII and the German secular Imperial power. Here the intellectual battle was won by the papacy drawing from the rich resources of the

189 Professor of Celtic, University of Oxford
190 Merryman/Pérez-Perdomo (2007),11
191 Charles-Edwards(1999)
192 McManus (1990),262-263; Zimmer (1891),62-63
193 Putnam (1898) Vol I,112

learning and manuscripts accumulated and made available by these Irish monks and their disciples.[194]

The contribution of the Irish monastic diaspora across Europe in the OA spirit of Columcille additionally impacted educational and intellectual development in Charlemagne's Holy Roman Empire (790-824 AD). For example in seeking to create a programme of national schools in France, Charlemagne employed the services of Alcuin an Anglo-Saxon Benedictine monk who founded an educational centre at Tours from which efforts were then made to establish a school in every parish of Charlemagne's kingdom. It should be noted that Alcuin had received his own education from Irish monks.[195] In his writings Alcuin confirmed that the most learned scholars in Britain, Gaul and northern Italy were Irish.[196]Alcuin was succeeded in the role by the Irish scholar John Scottus Eriugena [197] whom the Stanford Encyclopaedia of Philosophy states ' is generally recognized to be both the outstanding philosopher (in terms of originality) of the Carolingian era and of the whole period of Latin philosophy stretching from Boethius to Anselm.'[198]This is an apt illustration of the conclusion made above that an OA spirit leads to the production of new knowledge beneficial to wider society. Amongst the features and personalities of this era the case of Columbán, his companions and successors is of particular note.

6.6.3. Columbán

[194] Putnam (1898) Vol I,82
[195] Putnam (1898) Vol I,107
[196] Zimmer (1891), 30
[197] Not to be confused with the later John Duns Scottus (1266—1308)
[198] Stanford Encyclopaedia of Philosophy http://plato.stanford.edu/entries/scottus-eriugena/

Columbán (also known in English as Columbanus) lived approximately 110 years after Columcille (c550-615AD). It may be more than coincidence that his name is a variant of his esteemed predecessor Columcille, meaning Columba the younger or 'little dove'. Certainly his actions would lend support to the assertion that the choice of name reflects a Columcille spirit in open sharing rather than assertion of ownership of knowledge and scholarship.

Evidence of this OA/Open Sharing spirit and practice may be gleaned from the fact that centres of learning were established by Columbán inter alia at Luxeuil, Annegray and Fountaine in France and at Bregenz in Austria. The monastery at Bobbio founded by him in Italy in circa 590 AD is judged to have had one of the greatest libraries in Europe in the Middle Ages. [199]

In this expansion we see several interrelated dynamics: knowledge, motivation and patronage. While the knowledge and motivation possessed by the monks was crucial the expansion nevertheless required external funding. To this extent it could be argued that patronage (particularly of the Merovingians in France[200]) was crucial:

> they were an elite who could appeal to an elite….the new Frankish warrior aristocracy of western Europe. It was the Frankish aristocracy who, in tandem with the Frankish monarchy, became the drivers in the new wave of monastic foundations that spread throughout the Frankish kingdoms during the seventh century. Columbanus was the catalyst for this dynamic movement.[201]

[199] Putnam (1898) Vol I,154
[200] O'Hara (2015),21
[201] O'Hara (2015),24

His work across Europe has left a lasting legacy. Robert Schuman, a founding father of the European Union and the first President of the European Parliamentary Assembly, considered him an inspiration for modern Europe. At a congress at one of Columbán's foundations in Luxeuil, France, on 23 July 1950 he revealed the inspiration of Columbán behind his earlier and more famous Schumann Declaration of 9 May 1950 on the then nascent EU:

> St. Columbán, this illustrious Irishman who left his own country for voluntary exile, willed and achieved a spiritual union between the principal European countries of his time. He is the patron saint of all those who now seek to build a United Europe.[202]

Given that Columbán was an advocate of unity and dialogue in the church and his contemporary European society[203] he has been seen as an exemplar of the unity in diversity of the EU motto: 'one of the fathers of Europe'.[204]

History though demonstrates that the actual model adopted by the Irish Monastic diaspora did not endure and was plagued by increasing scandals and problems in the late Middle Ages leading to the European Protestant Reformation. The details of such decline are beyond the scope of this chapter. However while the model itself did not endure it is possible to extrapolate from the centuries of practice from Columcille onwards a number of lessons and inspirations.

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[202] http://www.columbans.eu/index.php/news/general/649-st-columban-patron-of-europe
[203] O'Hara (2015),23
[204] Pope Benedict XVI quoted by O'Hara (2015),19

For one it could be argued that the Irish monks laid the foundations of many of the early European Universities. But a degree of caution must be expressed in accepting this assertion as a universal truth. Further empirical research would need to be undertaken to support this claim and to account for other explanations such as coincidence and pragmatism for example in building upon existing institutions such as those founded by the monks. But two observations are worthy of note as indicating some semblance of continuity: the necessity of patronage and the informing philosophy of '*scientia donum dei est unde vendi non potest*' (the idea that knowledge was a gift from God and was not to be owned and treated as a commercial commodity).

Studies for example by Holzknecht and Rashdall[205] show that through the High Middle Ages onwards the foundation colleges of the early European Universities such as Oxford were dependent on royal, aristocratic or papal patronage which would appear to be a development from the previous Irish monastic model.

These same interrelated dynamics of knowledge, motivation and patronage may also be located in a basic modern OA model for example if we replace the notion of 'patronage' with external funding such as from Research Councils.

In addition to these features, the Irish monastic diaspora and the scholarly institutions they founded were certainly exemplars of the dictum '*scientia donum dei est unde vendi non potest*'. Although Columcille, Columbán and their followers were pre-eminent practitioners of the dictum they could not claim any novelty in the

[205] Holzknecht (1923),228; Rashdall (2010/1895)

concept. Within their own tradition (Christianity) the philosophy could be said to predate them in Biblical texts such as Matthew 10.8: 'freely you have received freely give'. Indeed comparable practices pre-existed Christianity such as in the ancient Greek city states where the Aristotelian schools adopted a similar philosophy as opposed to the Sophists who sought to control and commercialise knowledge.[206] But what was significant about the Irish monastic phase was the extent to which the dictum was followed, extending through many parts of Western Europe of their time and encompassing an extensive range of subject matter as opposed to confinement to elite groups of philosophers within small ancient cities addressing a very narrow array of issues. Even so we argue that such a widespread practice would not have been possible without the essential patronage already highlighted.

Further studies have also shown that the monks (and in succession the early Universities) adopted pragmatic solutions to funding by accommodating an apparently conflicting biblical text, 1 Timothy 5.18: that the labourer is worth his hire.

Post *et al* record a spectrum of conceptual bases and actual practices ranging from that of absolute 'divine' duty to share knowledge through to accepting payment from students for teaching skills employed and to be paid according to their ability to pay.[207] It will be recollected that similar observations were made earlier in this chapter in considering the role of the Brehon Law Schools in Ireland. Similar concepts and practices have persisted to current times with some OA publishing platforms seeking to comply with the BBB-OA principles but inviting funding from users on the basis of Pay What You Think It Is Worth (PWIW).

[206] Hesse (2002),26; Masterson (1940),621
[207] Post/Giocarinis/Kay(1955),196

In reality a compromise was reached if not by specific consensus then by practice: payment of fees for the skills and labour involved in the teaching was permitted rather than laying ownership claims to the knowledge itself and the consequent rights to control any subsequent distribution of that knowledge.[208] Such fees could be received but not demanded.[209] This compromise was formulated by the legal scientists of Canon and Roman law.[210] And if we are to accept the theory of Charles-Edwards previously alluded to as to the mature formulation of Canon Law in Medieval Ireland we once again see the Irish monastic instrumental influence. However, developments such as these have led Davis to reformulate the dictum that the gifs of God may be sold depending on the circumstances.[211]

Nevertheless, Post *et al* emphasise that while pragmatic solutions were found and accommodated 'that the ideal was constantly held in mind and transmitted to the Renaissance.'[212] To an extent Davis agrees and offers a judgment which we argue should conceptually be transferrable and applicable to the 21st century Academy and Open Access: The issue is not whether the idea of the dictum persists 'but the strength of its critical function.'[213]In other words can the spirit itself generate change? Additionally can the spirit of the dictum and of Columcille, Columbán and the Irish Monastic Diaspora in Europe endure in an age of positive copyright law protection?

208 Post/Giocarinis/Kay(1955),197-207
209 Post/Giocarinis/Kay(1955),209
210 Post/Giocarinis/Kay(1955),223
211 Davis (1983),73
212 Post/Giocarinis/Kay(1955),210
213 Davis (1983),88

The possibility of the continuity of such a spirit/attitude undoubtedly exists and may be illustrated from one simple instance: that of Alice Milligan.

6.7. Alice Milligan

The case of Alice Milligan (1865-1953) has been selected for a number of reasons. First she was Irish and so the Irish theme of this chapter is maintained, and secondly she published in the late 19th and early 20th centuries when Ireland as a whole was still part of the United Kingdom and she would have had the benefit of the Copyright Amendment Act 1884 and the Copyright Act 1911. Thirdly we can detect in her *modus operandi* an Open Access spirit predating the formulation of that concept later in the 20th century. She was not an academic author in the sense that we might use that term today as she lived in an era where the few extant Universities rarely admitted women or if they did, did not confer degrees upon them, let alone employ them as teaching and research staff.[214] Nor did she write in an era of peer review as a moniker of assured quality. However, she was a leading figure in the Irish Cultural Revival of the period which has been described as 'Ireland's velvet revolution'.[215] Like the monks she was highly motivated in her mission, although in her case this was for the revival of the Irish language and culture as a bedrock for the recovery of national identity and of unity across the confessional

[214] She was however a trained secondary-level school teacher and had taken third-level but non-degree conferring courses at Magee College Derry (now part of the University of Ulster), Queens College (now University) Belfast, Kings College London and the Royal Irish Academy. Morris (2013),25-28
Incidentally, it should be noted that the National University of Ireland and Queens University starting conferring degrees on women in 1909 : Harford (2008), 53

[215] Morris (2013), 16. The Revival spanned a wide spectrum of creativity and innovation in agriculture, art, commerce, language and education, literature, natural history and science, sport and recreation: see for example O'Leary (1994), Matthews (2003) and Kiberd/Matthews (2015)

divisions within Ireland. She published four novels, eleven plays, a biography and numerous short stories, poems and articles.[216] Her play *The Last Feast of the Fianna* (1900) staged by the National Literary Theatre (the forerunner of the Abbey Theatre), has been assessed by literary scholar Professor Declan Kiberd as indispensable to further cultural development: 'without it there may have been no national theatre as we know it'.[217] Although not so well known by today's society in contrast to some of her illustrious contemporaries she has been acknowledged as an inspiration to many of them and their successors such as, George William Russell aka *AE,*[218] WB Yeats, Samuel Beckett and Brian Friel. She also helped found teaching colleges, and set up Irish language classes.[219] Her contributions and significance to Irish culture were ultimately crowned with the award of an honorary Doctor of Literature degree by the National University of Ireland in July 1941.

Three particular features arise out on Milligan's creative practices which warrant the finding of parallels with those of the monks just described: her innovative streak; her goal of maximum rapid distribution and her gift mentality. According to Catherine Morris 'The success of Milligan's cultural practice resided in its radical modernism: in the nuanced way in which she fashioned ideas of community out of what was at once familiar and new'.[220] In other words she utilised what would have been in the Public Domain by way of the existing stock of histories, stories, legends etc. and forged them into something new. But this was not confined to textual works. She experimented with the non-textual for example in her dramatic productions and found ways to involve and include her audiences in the productions and in the non-proprietary sense of 'owning' those productions[221] which very much like the Brehon

[216] Morris (2013),18
[217] Foreward to Morris (2013),12
[218] *Irish Statesman* , 2 Jan. 1926
[219] Morris (2013),286
[220] Morris (2013),288
[221] Morris (2013),286

legal system depended on community involvement and ownership. Indeed Kiberd has remarked that she'… saw herself less as named author than a practical facilitator of scripts open to negotiation and change.'[222] To this extent we believe that we can confidently assert that were she alive in the age of OA, the internet and the CC licence suite she would have had no reservation about using the very basic CC licence (the CC-BY where a user is free to copy, distribute, produce derivatives and even commercially exploit the work, subject to acknowledging authorship of the original work. She may even be unconcerned about such attribution. Freely she had received and freely she gave both in terms of distribution and copyright assertion. Milligan desired the widest possible circulation for her works beyond the confines of the Universities, learned societies and theatre companies of the major urban centres such as Dublin and Belfast.[223] To this end she often chose newspapers as a platform for publication because in her time this enabled rapid, widespread and cheap dissemination.[224] It could be said that she used her 'human capital' that is her knowledge, skills, competence, capabilities, expertise and creativity, to mobilise 'social capital' that is the vast reservoir of other 'human capital' that arises out of relationships between people and their interactivity to enrich the nation's 'cultural capital'.

Finally, fully aware of her copyright entitlements she gifted those rights to the Gaelic League to enable society at large to benefit freely from her output.[225] This final aspect is an apt reminder that copyright law and OA are not conceptually in conflict and can co-exist and that abolition of copyright is not necessary to facilitate OA. Rather the practice of authors such as Milligan provide an illustration of the point made in our chapter on theories and justifications and re-iterated by Merges that the copyright owner

[222] Foreward to Morris (2013),13
[223] Morris (2013),19
[224] Morris (2013),19
[225] Morris (2013),286

can always waive their rights. It will be recollected that Merges saw a strong Kantian basis for the exercise of that right by an author, thus evidencing an essential link between copyright philosophy and practice and in relation to this chapter an ancient spirit flowing from Columcille, the Brehons, the Medieval Irish Monastic diaspora throughout Europe onward into the 20th century. The Kantian basis located by Merges arose out of Kant's *The Categorical Imperative* and *Universal Principle of Right* synthesising proprietorial individualism with a community conscience. For both Kant and Merges the crucial element in this waiver exercise was its voluntary nature driven by that social and community conscience and not as the result of any imposed law, policy or mandate. In such instances author recognition and dignity are preserved and yet wider society can benefit from free access, distribution and use of the work.[226]

6.8. Conclusion

Drawing these various revelations and reflections together in light of the research tasks set out in the opening paragraphs of this chapter a number of conclusions may be proffered.

From the record we have of Columcille's plea when accused of primeval copyright infringement we can detect a number of concepts that have over a millennium and a half later found formulation in principles such as the BBA-OA standards. These include:

1. The primacy of free public access to the work.

[226] See Chapter 2.4.2.1.2

2. The right to unhindered reproduction and distribution of the literature expressed and the right to make a derivative work implied.
3. The acknowledgement of authorship (the attribution-paternity right) and the maintenance of integrity of the work.

As far as the Brehon law is concerned the chapter argues that, the system had lessons and inspirations for OA and the Academy. Those lessons and inspirations may be less tangible and less specific than the material addressed by this thesis in other chapters. However those features arise from the historical approach of the chapter, and from the nature of the Brehon system and the legal texts themselves. As Stacey has commented, the texts could be likened to teaching and educational materials and so were inherently ambiguous in parts.

The texts and the system were not captivated by norms but also considered exceptions to the norm. For the Brehons rules were important but so were ideas and 'a general understanding of how things ought to be'.[227] But what was important was that Ireland under the Brehons was a knowledge society and it had an Academy. Creative types were highly valued and integrated into the legal process. The holism of the Brehon administration challenges the 21st century Academy and those charged with OA policies and management to transcend fragmentation between disciplines. The refusal of this ancient Irish legal regime to departmentalise knowledge professionals has the potential to restraint and also propel positive action in today's Academy for example in refusing to relativise importance between STEMS and AHSS academics. Not only should the contribution that each discipline brings be valued

[227] Stacey (1994),24-25

but sharing that contribution via OA may require adopting different approaches, platforms and licencing arrangements.

From the Brehons we learn that a multi-level and multi-faceted approach may be needed. Such an approach accords with other themes and threads in this thesis. A similar perspective was canvassed for example in the chapters on Theories, Doctrines and Justifications;[228] and on Online Licences.[229]For instance, in Chapter 2 we concluded that no one theory justifies and underpins either copyright law or Open Access. The investigation in the chapter concurred with the philosophy of Robert Merges that a multiple level and faceted approach to copyright justification (in his case a synthesis of Lockean Labour, Kantian Personality and Rawlsian Just Distribution at a primary level and the perspectives of the Public Domain, Efficiency, Proportionality and Dignity at a secondary tier) is to be preferred. Inspired by Merges' compound model for copyright, the thesis concludes that some of these traditional copyright theories and justifications could be refocused on a pluralistic basis to justify Open Access. In particular it identifies the Just Desert, Utilitarian, Positivist justifications and the Social Theories of Rawls and Habermas as providing strong primary conceptual underpinning for Open Access. The Labour, Personality, Law and Economics, and Human Rights theories are assessed as providing secondary level support or strong influential impact which should not be ignored by legislators and policy makers. That chapter proclaimed the advantages of such an approach to the copyright-OA interface in that it allows copyright to adapt to and accommodate OA, and contemporaneously preserving the heart of the system in its eternal double-sided dimension of author protection and public access while seeking to engage and obtain the consent of the maximum number of stakeholders. It is the stance of the current chapter that such the willingness to explore such models coincides

[228] Chapter 2
[229] Chapter 3

with what we can reliably ascertain about the nature of the Brehon law and the principles with structured that system.

We also see some of the features just mentioned in connection with the copyright–OA theory interface repeated in other aspects of the Brehon regime. That era was one which exhibited a willingness to take risks, to be imaginative and seek creative evolution within continuity for the greater good. In particular what was striking about the Brehon system was that every stakeholder was crucial to the acceptance and operation of the regime. The success of the Brehon laws depended on community acceptance and ownership. Imposition of proposals from an outside body would have been viewed as a burden, yoke or even anathema. And as seen in the section examining the Brehon Law, the concept of the gratuitous contract has resonances in general terms with that of the Academy operating as a gift economy and specifically in empathy with publishing platforms such as the CC-0 Public Domain licence.

This investigation would have to admit certain caveats though. We must steer clear of a temptation to romanticise the Brehon system. It was not perfect and neither can it be re-invented nor re-introduced *en bloc*. As such it is not a readily transferrable model for the Academy and OA. However even with those qualifications it is still possible to conclude that ideas and practices can and do transverse both time and geography. It teaches us that situations arise where we cannot be overly prescriptive. Ultimately, progress and implementation of OA may be ambiguous. There may be some or even many uncertainties but the Brehons remind us that we cannot legislate or mandate for every eventuality. A degree of untidiness may be the reality and may have to depend on the safety net of a variety of private ordering as opposed to a universal and inflexible model.

It could be said that a retrospective analysis of the control, protection and distribution of creative works within the Academy (in the widest general meaning of that term) could be classified under three phrases: pre-positive copyright law, the era of positive copyright law and finally the current interface with the OA regime. In basic terms the era of positive law brings a strong element of certainty with it: all parties know or should know their rights and privileges. But this has not always been so and a lauded certainty does not always best serve the range of interested stakeholders. The Brehon system for one illustrates that in the pre-positive law pre-Enlightenment era such certainty did not exist and yet a mentality and methodology flourished that enabled novel situations to be addressed and a just and socially acceptable workable solution to be found. This was probably because Brehon law whether by intention but certainly in reality could be judged as 'law as a regulatory mechanism': hard and soft, public and private, fragmented, semi-privatised, and both mandatory and voluntary. In brief the Brehons were at ease in not being held captive to the need to impose a universal unitary narrative. And it is this Brehon legal model which this chapter holds is relevant to the basic enquiry of this thesis: that is whether law can assist or hinders OA.

The chapter additionally advocates a view of the Irish Monastic diaspora throughout Western Europe as being at least in the OA spirit of Columcille. It maintains that that spirit was nurtured by and emerged out of the social and holistic values which were reflected in and regulated by the Brehon legal system. However an interrelated dynamic was also at work with this group of scholars including a richness of knowledge, a high degree of motivation in wishing to freely share that knowledge and the crucial need for outside funding by way of patronage to liberate the monk-scholars to concentrate on their mission. Given these factors there was no need for an externally imposed mandate requiring them to share their knowledge. The latter point indicating that in theory at least the

Academy is more than capable of adopting and expanding OA facilities *provided* the requisite motivation exists in the management of the institutions and within the academic authorial community. Reluctance and hesitancy by contrast incur the risk that governments and funders may wish to overcome any inertia by insisting on Mandates. From the brief consideration of the '*scientia donum dei est unde vendi non potest*'. dictum we learn that the monks were open to flexible and pragmatic solutions.

From the example of Alice Milligan we see that the spirit of Columcille and those who were inspired by him in the diaspora of scholar–monks across Europe in the Middle Ages can exist and be practiced in the post Enlightenment age of positive copyright law. Abolition of academic copyright is not necessary to ensure OA. Rather from Milligan we see an apt illustration of the waiver of rights principle explored in Chapter 2.

With the exception of the contractual-private ordering example, ultimately none of these reflections, lessons and inspirations can be translated into specific legislation or even into detailed policy. But that is not the point. What is important is the creation (or the recovery) of a mind-set within the community of academic authorship and publishing. That is to move towards a 'de-commodification' of academic knowledge, [230]to realise that OA publications can have value far beyond the economic, that they can have 'symbolic capital' for the author and can be an integral part of cultural capital for wider society. [231]

Indeed it has been observed that such a re-adjustment requires a 'deep-seated cultural adjustments within the Academy.'[232] This

[230] Nentwich (2001),21
[231] Eve (2014),45,66
[232] Atkinson (2000),64

chapter therefore maintains that the various aspects of pre-Enlightenment Ireland explored in the investigation have a worthwhile informative, instructive and inspirational contribution to make to the dynamic of that adjustment. These elements may thus be part of the informing philosophy in relation to any policy or future legislation in a similar fashion to the theories and justifications for both copyright law and OA considered in Chapter 2 which structure those laws and policies without specific reference being made to them.

This chapter does not claim that the pre-Enlightenment Ireland and the Irish monastic diaspora provide a comprehensive justification for or parallel with OA. But the investigations and analyse undertaken conclude that there are multiple interfaces and on the available evidence the chapter concedes that that is as far as the historical record can take us. However the chapter invites stakeholders to revisit the lessons learned and to imagine and be inspired as to where and how far such models could take the law-OA interface in the future. True innovation after all is essentially a state of mind and arises out of attitudes and commitment. As the word 'entrepreneur' is an amalgam of 'entre' (to penetrate between) and 'prendre' (to take) it could be asserted that the real innovator, entrepreneur is the one who penetrates the spaces between existing established boundaries and sees and seizes opportunities to which the existing mind-set is either blind or resistant. In broad terms this chapter holds that that is the lesson to be drawn from the pre-Enlightenment Ireland study.

This may therefore be part of the 'new narrative' spoken of by Deazley, Kretschmer and Bently at the outset of the chapter. That is that there may not be a single, unbroken, universally applicable approach. But always we need to be reminded that in their words,

which we repeat again: ‘law is both a set of rules and a discourse about what those rules should be.’[233]

[233] Deazley/Kretschmer/Bently (2010),20

Chapter 7: Conclusion

This thesis set itself the primary research question: are law (particularly copyright law) and related legal concepts beneficial or disadvantageous in the implementation of OA across the Academy? It sought to interrogate and obtain answers to that question by examining, analysing and assessing a sequence of interfaces between OA, law and legal concepts. It adopted a broad and liberal understanding of law and legal concept as both hard and soft, public, private and semi-privatised, occasionally coherent, occasionally fragmented, and both mandatory and voluntary. Such an understanding informs the analysis undertaken by the thesis as enfolding not only the black letter law but also 'why a law exists' on the statute books as well as the debate on 'what the law should be'. The matrix of 'interface' was utilised as the appropriate term to identify the encounters between this understanding of law and legal concepts with OA and the Academy.

In employing a methodology which reflected an ancient Celtic mentality (which was neither discursive nor systematic but was open to lyrical speculation) the thesis sought to look for a sublime unity in diverse elements where others might see none. As such it does not separate what ultimately belongs together.

Thus the thesis endeavoured to reflect the reality that there is no one advantage, disadvantage, problem or solution, opportunity or barrier in OA implementation, management and expansion in the Academy. In offering a multifaceted approach across a range of these salient legal interfaces, embracing Theoretical, Historical, Management, Compliance and Enforcement issues the thesis

proposes itself as at least one attempted holistic analysis and assessment in this field of OA and law.

As a result, the findings of this thesis established an array of beneficial roles that law and legal concepts offer and play in their interfaces with OA and the Academy. In some cases that role is a very positive one informing, provoking and encouraging solutions to understanding OA and in its management and expansion across the Academy. In other cases the beneficial role is one of spotlighting imperfections and drawbacks in existing OA attitudes and practices.

7.1. A compound theoretical model for OA

At a theoretical level, copyright law can make a positive and beneficial contribution to our understanding of OA. Just as copyright theory seeks to justify and explain why copyright law exists, likewise an understanding of theoretical bases for OA is a valuable and necessary undertaking.

When examining copyright theories and doctrines in Chapter 2 this thesis concluded that none provided a full and complete justification and explanation. Eight major theories were explored: Just Desert, Personality, Labour, Utilitarian, Law and Economics, Human Rights, Social Theories and Positivism. While each contributed helpful concepts and elements, each lacked important features.

Consequently, composite approaches to copyright theories was considered as the preferable mode. In particular the model proposed by Merges was summarised and held out as worthy of further research and development. His two-tiered level of theories consisting of First (or Foundational) and Mid-level (or Secondary)

principles is particularly attractive and in the view of this thesis, practical. Such a model is not trammelled by over enthusiastic adherence to any individual theory. His hybrid model of First-Level principles (Lockean-inspired appropriation, Kantian-inspired individualism and Rawlsian-inspired just distribution) conserves the core functions of copyright and contemporaneously offers a munificent stance on access for third party users. These features are reinforced by its focus on Mid-Level principles (the Public Domain, Proportionality, Efficiency and Dignity). Such a combination of the traditional theories seeks maximum stakeholder participation which is essential in the OA-copyright interface. The model also has inbuilt sufficient flexibility to facilitate adoption and to accommodate to changing technologies and social policies.

This thesis then sought to contribute to the current knowledge on OA by ascertaining which of those same eight traditional copyright theories could also be understood as an explanation and justification for OA. As with copyright no one of the theories was perfect. Consequently, adopting Merges' copyright example, the thesis applied the same analytical and evaluation model to the concept of OA. In doing so it placed the Just Desert, Utilitarian, Social and nuanced Positivist understandings at Foundational/First-Level. The remaining four theories considered (Personality, Labour, Human Rights, Law and Economics) are placed at Secondary/Mid-Level. In this compound theoretical model of OA justifications, based on copyright theories, we see a beneficial contribution of copyright law to the law-OA-Academy interface.

It proposes the Just Desert, Utilitarian, Social and nuanced Positivist theories at a Foundational/First-Level order for the following reasons.

The theory of Just Desert provides a very strong explanation and therefore justification for the concept of OA. At a basic level of generality it states that if the public has paid for research then it is entitled to access the fruits of that research without further payment or restrictions.

Again at a broad level of generality Utilitarianism resonates well with the concept of OA. Utilitarianism in its simplest formulation seeks to ensure the maximisation of social welfare. Within these terms OA is a very Utilitarian concept. As such it aims to ensure that publically funded research is liberated from some if not all copyright restrictions and made available and accessible on line, free of payment, for anyone in society who has access to the internet. In theoretical terms OA seeks maximisation of social welfare. It justifies the triumph of social welfare over the protection of expression.

While numerous Social theories surrounding copyright exist this thesis had of necessity to be selective. In particular it explored the adventurous interpretations of Rawls and Habermas proposed by Merges and Barron. Although these theories lack sufficient definitions and boundaries to be of a First Order principle, the lack of precision is less influential in relation to OA Consequently such theories are more easily accommodated at a First Order level. This is because the social dimension emphasis is extremely relevant to the OA rationale. The Social theories poignantly remind us that copyright does not operate in a vacuum but has implications well beyond the strictly legal, economic, and commercial. In tandem with the OA *raison d'être*, the Social doctrines highlight *inter alia* that an informed public and ease of access to and use of quality information have vital roles to play in the functioning of a healthy and mature democratic society. The theories could also designated as of primary

and essential importance in informing the conscience and motivation of the Academy as a body and of individual academic authors.

Positivism is of major relevance to OA. But again this depends on the level of generality at which the Positivist approach is applied. If understood as a universal and unyielding model which would argue that to facilitate OA one need only abolish copyright protection for all academic works, the theory is justifiably susceptible to criticism of injustice and of being devoid of any grounded framework to which stakeholders can refer. As such it is unlikely to be of any practical aid in the debate. However this thesis proposes that Positivism may be of greater assistance and value and assessed as a First Order theory for OA if it is applied in a more focused, limited, evidence based and reasoned manner. It labelled such an approach as Nuanced Positivism and returned to a practical illustration of the theory in Chapter 4 in considering a possible new limited legislative Exception to copyright for certain types of academic publication.

In the compound theoretical model for OA advocated by the thesis the Personality, Labour, Human Rights, Law and Economics theories are placed at Secondary/Mid-Level.

From the range of Personality theories that of Kant or rather the interpretations of Kant as forwarded by Merges and Barron have much to commend them as justifications for both copyright and OA. In brief there is in Kant (even across the range of his interpreters) appealing equilibrium of individualism for the author and maintenance of the personality nexus with the author's work on the one hand and the importance of the rights of third parties in the context of a wider society on the other. Kantian Personality theory also permits the exploration of concepts such as waiver and licences both of which are at the heart of OA. Likewise with the recognition

of the public as a valid and essential stakeholder in the whole process.

While Locke's 'Labour theory' (or a Lockean- inspired theory' rather than a strict adherence to Locke's written text) provides strong, albeit imperfect, justifications for copyright, it is less well suited to act as First Order principle for OA. The fundamental principle that intellectual labour deserves protection thus contributing to the undergirding of copyright contemporaneously acts in a secondary 'influential' capacity in the age of OA as a reminder of the need for balance. Locke's provisos also remain pertinent in the age of OA. The sufficiency, charity and waste provisos not only provide a basis for even- handed copyright laws (the eternally doubled sided coin of protection and access) but also provide grounding for a healthy Public Domain and an encouragement to publish rather than 'hoard' research. The latter points are particularly apposite to the OA debate.

The thesis concluded that the Law and Economics approach is of secondary Mid-Level importance only, for both copyright and OA. Despite its shortcomings (which are identified in Chapter 2) especially in relation moral and non-monetary authorial motivation, this school of thought still has a valid contribution to make to the debate, for example in its emphasis on efficient markets. A market exists even where publication is made free of charge to access as with OA. The success of any OA policy and implementation must be managed efficiently. Economics can help us dissect, analyse and cost if necessary the multiple steps, stages, and organisation of such a process. In doing so such efficient management will make a valuable contribution to a healthy and democratic society.

A Human Rights rationale has insufficient boundaries and details to be classified as a First Order principle for either copyright or OA. Its copyright strengths are akin to those of the Personality justification in that the approach reinforces the nexus with the author and the dignity that ought to be bestowed on those authors. The Human Right perspective also interfaces with OA in various ways. For example governments and funders are obliged to respect internationally established authors' rights and must not unreasonably interfere with them. Conversely there is also a human and societal right of access to and the sharing of knowledge which are recognised in the same international (largely UN) legal instruments. The thesis argued that it is these latter Human Rights which are capable of consciously or unconsciously informing and justifying OA.

7.2. The inevitability of boutique OA licensing platforms

This thesis established that it is not only in the theoretical sphere that copyright law and related legal concepts offer a beneficial role in the interface with OA and the Academy but also in the area of practical management of OA.

As confirmed at Chapter 1.1 whether OA is *Gratis* or *Libre* access and use of the publication will invariably be subject to some species of licence.

It is in investigating and assessing existing licencing platforms such as pursued in Chapter 3 that the double edge beneficial role of law can be seen. That is, some of the contributions of law highlight problems and shortcomings with the status quo and in this case, extant licensing models. For example, not only did the thesis

conclude that for a variety of reasons (such as the differences between the subject matters, creative methodologies and ethos of the Science, Technology, Engineering and Mathematics sector of the Academy as opposed to those of the Arts, Humanities and Social Sciences community) that the licences arising out of the Open Source (OS) movement were unsuitable as a universal model for OA but also that the OS licences may also be incompatible with EU Competition Law, EU Unfair Contracts Terms legislation and the strong Moral Rights provisions of numerous Civil Law jurisdictions. It is the finding of the thesis that such scenarios are not obstacles to OA management and advancement. Instead this 'problem shooting' should be viewed not as a hindrance but as a provocation and platform from which to seek better solutions.

Our investigation also found a similar critical but beneficial role for copyright law and related laws and legal concepts in their interface with the Creative Commons (CC) licensing suite.

On the face of it the CC suite is conceptually in harmony with OA. To reflect this harmony all six basic licences comply with the Berlin-Budapest-Bethseda Open Access (BBB-OA) principles of free accessibility, distribution and proper archiving. However, the Share-Alike (SA), Non-Derivative (ND) and Non-Commercial (NC) clauses fall short of the BBB-OA standards which should additionally permit lawful use free of 'financial, legal or technical barriers'.[1]

Nevertheless, a series of legal and practical disadvantages exist with the CC licence suite which render it currently unacceptable as a universal platform for OA publication.

[1] Budapest Statement definition of Open Access http://www.budapestopenaccessinitiative.org/read

Legally, the suite encounters copyright and contractual challenges. The suite is very much dependent on positive national copyright law can and does vary on the nature and extent of rights, limitations and exceptions. As such it faces an inherent challenge in international use and in the borderless world of the internet. Furthermore, it does not *per se* offer the possibility of complete liberation from copyright as the so called Public Domain (CC-0) licence is of very limited use. The suite addresses and manages only the author's Economic but not Moral Rights and had difficulty accommodating the right to Communicate to the Public (which CC has merged with the Reproduction right) and in in its comprehension of the nature of Derivative works.

Contractual related interfaces expose further challenges and difficulties. For example although the licences profess to be contracts, in reality it is uncertain whether they are 'Property Licences' with rights *in rem* without user consent required for validity, or mere *in personam* 'Contracts' where validity presupposes such user prior consent. A similar ambiguity exists in relation to the term 'Commercial' is relation to its Non-Commercial (NC) licence clauses. This situation has the potential to undermine confidence within the academic authorial community. For instance an author may be aggrieved that a work released on a NC basis is later used by a licensee to profit financially from use of the original work simply because that user' s primary motive was not the generation of financial profit (the CC attempted definition). This scenario is likely to detract from the signalling and 'free advertising' functions of placing an academic authored work on the internet by use of such licence terms. Finally as with copyright, contract law is also a national creature. Contract essentials will and do vary as between jurisdictions. This obstacle was illuminated by the conflict of the 'use of the licence equals consent to terms' position set out in the CC

licence preambles, with the widespread Civil Law jurisdiction requirement that a party becomes contractually bound only after they have had a prior opportunity to read and actively agree to the terms.

A series of practical interfaces with the CC suite, closely related to and in some respects inseparable from the strict legal, were also identified. These included proliferation, internal and external incompatibility and enforcement. Proliferation results from the popularity and widespread use made of the suite and the licence mutations. However this is incubating a latent practical nightmare. That is authors will increasingly face confusing choices over the cocktail of licence and understanding just exactly what they can do with a particular licence work or a series of works issued under different licence terms. Additionally, internal and external incompatibility of some of the licences became evident. In short it is impossible to mix some of the clauses especially those containing Share-Alike (SA) requirements. This effectively operates to prevent the creation of derivative works even where such a derivative works would advance the knowledge repository which would benefit other members of the Academy and also the wider public. The external incompatibilities arise in attempting to combine works licenced under the CC scheme with non-CC licenced material. Although CC have made some improvements on interoperability these advances have to date been extremely minimal. This scenario likewise is an impediment to the OA goal of wider circulation and re-use of academically authored works. Moreover the academic author is not placed in any advantageous position in protecting their works by using the CC suite. As the CC organisation offers absolutely no monitoring, help or advice in enforcing their licences the aggrieved academic must therefore resort national copyright and contract law to enforce their rights through national courts.

This thesis maintains that such the application of existing copyright and contractual law and related concepts to the CC suite nevertheless provides a positive role in managing OA. Identifying the current challenges and shortcomings of the platform should not be seen as law amounting to an obstacle to OA. Instead the interface between copyright and related legal concepts with the CC suite should be taken as an inspiration and provocation to finding compatible solutions. This may lead to a realisation that the preferable model is a series of boutique suites for individual disciplines or at least for those that share similar modes of innovation and production. This may produce an untidy solution. However this thesis proposes that a series of such tailored platforms may offer the greatest opportunity for individual disciplines to encourage, use and expand OA publication of scholarly works and indeed may be inevitable. Such a multiple layered approach to the Legal–OA-Academy interface is a recurring conclusion of the thesis as seen for example in its promotion of a hybrid theoretical model for both copyright and OA as outlined in Chapter 2.

However, as the issue of licensing suites is only one of the series of interfaces over which this thesis ranges, the details of such individual models are best left to further specific dedicated research on this issue. This thesis seeks only at this juncture to point the way forward spring-boarding from its adjudged beneficial role of law to the debate.

7.3. Policy and Positive Solutions

Beneficial contributions from external drivers, namely policy and positive law, to Law-OA-Academy interfaces were also identified and rated in this thesis.

These interfaces were grouped and assessed under the headings Avoidance, Abolition and Adjustment.

Policy mandates are very attractive in driving forward OA and in the view of this thesis remain valid and essential tools in securing greater OA. This is because they are relatively simple to formulate and implement and can be used imaginatively, flexibly and creatively in different and evolving situations. They are also attractive because at first blush OA policy mandates appear not to affect any established rights. Thus the nomenclature Avoidance coined in this thesis in its assessment.

However, they are not copyright neutral. In the interface with copyright law OA mandates may impinge on the rights of Divulgation, Withdrawal, First Publication and Distribution. Nevertheless existing copyright law could bolster OA mandates in drawing assistance from some of the Moral Rights in the *droit d'auteur* tradition. For example, inspiration may be found in French jurisprudence and legal guidance on copyright ownership belonging to the funder by developing and extending this concept to funded scholarly authors. Similarly the removal of the right of Divulgation from civil servants could likewise be viewed as a parallel to publically funded research outputs. A comparable analogy arising out of the author's right of Withdrawal which is linked to the obligation to compensate the funder may also require an academic author to refund the research grant should that author wish to no longer comply with a mandate requirement to publish on an OA basis. That said any wider extension of these Civil Law principles to the arena of OA are most likely to be piecemeal, speculative and even unsatisfactory.

Two species of positive law external drivers, that is changes to existing copyright law were investigated and assessed. These were: outright Abolition of academic copyright; and Adjustment of extant copyright law.

This thesis would not recommend Abolition of all academic copyright. Indeed it finds such a proposal a hindrance to improved and extended OA.

Superficially such an Abolition appears both to be author centred (enabling the scholarly author to achieve widespread exposure of their work through OA) and of serving the needs of wider society to access and use the information within the publications free of cost and copyright restrictions. While theoretically possible (merely change the positive law which granted the rights) the thesis assesses any such proposal as practically infeasible likely to encounter widespread stakeholder opposition rendering agreement at international level to change the Berne Convention and dependent legislation nigh impossible. Reasoned criticisms were also identified in respect of legal definitions, oversimplification, and failure to accommodate long form publications and derivative works. Furthermore abolishing all academic copyright could even eliminate a positive societal externality. Outright Abolition was also judged unreasonable as being unbalanced, and failing to render justice to the academic author particularly when other feasible and reasonable solutions are possible. Those beneficial solutions could be found in Adjustment to existing law. Two sub-types of Adjustment were identified and recommended for consideration: one Author-Restrictive and the other Author-Empowering.

The Author-Restrictive proposal was a new exception to be introduced into the Berne Convention and then transposed into

dependent, regional and national copyright laws. This would effectively amount to a removal of economic copyrights protection from a limited category of academic works. This thesis evaluated such a proposal as reasonable, feasible and beneficial. The proposal is reasonable because it would be a tailored and particularised clause and would on the balance of probabilities meet the requirements of the Berne Three Step Test. It would be confined to 'certain special cases': publically funded research publications; it would not conflict with the normal exploitation of such works as they do not ordinarily constitute a major revenue stream for scholarly authors; and the prejudice to the legitimate interests of rights-holders would not normally be unreasonable. If any unreasonable prejudice was deemed a realistic possibility this could be offset by payment of reasonable remuneration. However, given the fluidity of this concept, national legislators may conclude that payment of the research grant for the research would constitute adequate compensation and that consequently no further payment to the academic author would be necessary. The concept would also embrace the possibility of national authorities paying additional compensation were the individual case so warranted. Moreover, achieving such an adjustment was assessed as highly feasible and likely to incur much less opposition in passing through the necessary procedures to amend Berne and then the dependent international, regional and national copyright *corpora*. The thesis holds that in the long term such a proposal has substantial merit and could achieve a high degree of legal certainty and international harmonisation in the promotion, extension and management of OA across the Academy, thus its ultimate assessment as a beneficial contribution and our recommendation that it be given serious consideration. Nevertheless those procedures would incur an unavoidable and unknown period of delay. Given this research funders would be advised to rely on the terms of their mandates and research contracts to achieve better OA in the interim.

The Author-Empowering adjustment was the Inalienable Right of Secondary Publication. Such a legal empowerment of authors was introduced recently by the German and Dutch legislators. While a number of differences exist between the German and Dutch versions the essential rights are identical. That is that a scholarly author who has entered into a publishing contract with a commercial publisher cannot be prevented by contract or otherwise of subsequently making that work available on an OA basis. Given these two examples such adjustments to existing positive copyright law are clearly feasible. They are also reasonable as they attempt to balance the interests of all relevant stakeholders. For example, a commercial publisher can monetise the academic author's work (for a limited period), and yet the author retains autonomy over further uses of the work, and within a short time span the wider public and funders see the research funded publication available on OA. All that said, the existing such schemes have an inherent weakness. That is such Author-Empowerment Adjustment does not compel the academic author to publish on an OA platform. In view of this, the chapter recommended that funders should once again rely on contractual mandates to ensure OA publication. Further, it for this reason that this thesis holds that the only mid-long term legislative avenue to guarantee OA publication of publically funded research is to introduce the focused and limited type of Author-Restrictive new legislative exemption summarised immediately above. In the short-medium term the thesis recommends the continued use of mandates and were possible coupled with the type of Inalienable Right of Secondary Publication trail blazed by the Netherlands and Germany, given that the latter can be introduced much more simply and quickly at national legislative level than at international treaty level..

7.4. Internal Drivers: largely problematic

A number of legal (mainly contractual) interfaces can be located within the Academy which are relevant to driving forward improved OA. These include the 'work made for hire' and 'academic/teacher exception' doctrines and the concept and practice of Academic Freedom.

Assertion by employing Universities of the 'work made for hire' doctrine would theoretically enable those Universities to control and better facilitate OA. But such an assertion would be impeded by the reality that the doctrine suffers from conceptual, legal and practical obstacles. These include the fact that the doctrine is unclear, defies precise definition and can be extremely fact and case sensitive in application. Such uncertainties could result in disputes and even litigation between academic authors and their employing institutions as to which of their works are captured by the 'work for hire' doctrine. Additionally, assertions of the doctrine may amount to a disincentive to scholarly publication output with employed academics releasing only those pieces that are strictly required by the terms and conditions of their employment contract. This result of more OA but of less material would be a social welfare deficit. Further as the copyright owner an employing University faces potentially costly hurdles in the external management and monitoring of the OA research output of its academics. While some works for example where the researcher has been engaged specifically to conduct research on a particular subject and to publish those research findings are more easily susceptible to the doctrine a general application lacks the secure and firm foundation which would enable Universities to be confident in each case that every work produced by their employed researchers is a work made for hire.

This uncertainty is further complicated by the fact that the doctrine is a purely Common Law concept and may create complications in

international collaborative works. This thesis therefore concluded that universal assertion of the 'work for hire doctrine' is not of great benefit in the service of OA.

Similar difficulties, uncertainties and obstacles emerge in assessing whether the claimed 'academic/teacher exception' to the 'works made for hire' doctrine, whereby the scholarly author retains copyright would enable the Academy to better manage and extend OA. The 'exception' likewise lacks a sound legal foundation and fails to attract universal acceptance amongst legal scholars. That said as compared to the 'work for hire doctrine' the 'exception' may incentivise an academic author to create more works for OA publication although such an outcome would not necessarily follow. In reality the concept is complex, nuanced and subtle and like the 'work made for hire doctrine' is not a beneficial contribution to better OA

Given this assessment this thesis recommends building upon the model of the Harvard Open Access Project. This model (and its progeny) is essentially a compromise between the conflicting doctrines of the 'work made for hire' and the 'academic exception'. It embodies greater equity in the management of copyright works produced by employed academics allowing for retention of copyright by the scholar but subject to a licence in favour of the institution to facilitate OA. The scholarly author can also commercially exploit their research findings subject to the prior licence to the University. However the efficacy of the scheme, while building on copyright law, ultimately depends on employment contract law. As such the scheme is open to greater leverage and exploitation by the employing institution against early career academics. All that said, the Harvard type model illustrates the beneficial role that law can play as an internal driver across the Academy to ensure better OA.

As with 'works for hire' and the 'academic exception', the notion of 'Academic Freedom' which interacts with them, lacks sufficient rigour either to reliably promote OA or be impeded by OA mandates. For example the understanding of 'Academic Freedom' and its application varies between Germany, Italy, the USA and the UK. At a high level of generality it seems to have two aspects: protection of the independence of the higher education sector from political and governmental interference; and protection of the individual academic's rights against their employing institution. Among major Common Law jurisdictions the USA has a more highly developed (and therefore persuasive for other common law countries) jurisprudence than say the UK. But the higher courts of the US such as the Supreme Court have concentrated only on the protection of the institution from the state. The protection of the individual academic *vis-à-vis* the employing institution has been less well developed and even then only by inferior courts of less international persuasive and informative value. Further, in the UK despite the requirement in the Education Reform Act 1988 for 'Academic Freedom' to be respected, it still remains an unknown and untested notion, at most a kind of soft law, vitally dependent on a universal practical acceptance of the principle by all relevant stakeholders. Whatever the term means though, this thesis holds that OA mandates and related assessment procedures (as distinct from copyright concerns) do not impinge upon it. In brief, an academic author remains free to research and publish on their preferred subject. But they will not necessarily be granted public funds to do so. Even where a research grant is available with OA conditions a scholar remains free to accept or refuse the conditions and even if accepted their intellectual integrity is not compromised by the funder dictating the contents of their publication.

7.5. History matters.

In exploring the pre-Enlightenment era and specifically medieval Ireland we located a series of helpful lessons for OA today. These lessons were clustered around the Columcille copying controversy; the ancient Irish legal system and the medieval Irish monastic diaspora across Western Europe following the Fall of the Western Roman Empire.

The thesis maintains that in the Columcille copying dispute we can identify a number of features which would later see modern formulation in standards such as the Budapest, Berlin and Bethesda OA principles. These include:

1. The primacy of free public access to the work.
2. The right to unhindered reproduction and distribution of the literature (expressed) and the right to make a derivative work (implied).
3. The acknowledgement of authorship (the attribution-paternity right) and the maintenance of integrity of the work.

Our findings show that Columcille case was not an isolated illustration of ancient lessons for the 21st century world of OA. This is because the dispute took place in the context of what was for its time a sophisticated and comprehensive legal system: the Brehon Law. The thesis sees some exciting lessons and inspirations to be drawn from this system for OA and the Academy. The thesis accepts that those lessons and inspirations may be less tangible and less specific than issues explored elsewhere in the thesis. But this is not a deficiency but rather an advantage. This is because ideas about law, procedure, regulation, and the nature and cohesion of the society in which they operated were as important as the positive

laws themselves. This is crucial because Ireland under the Brehons was a knowledge society and it had an Academy. Creative types were esteemed and indeed were an integral part of the legal system. The thesis holds out the holism of the Brehon administration as a challenge to the 21st century Academy and those charged with OA policies and management to transcend fragmentation between disciplines for instance in valuing equally the unique contributions from both STEMS and AHSS academics. Further, the Brehons were at ease with exploring and accepting a multi-level and multi-faceted approach to law, process and regulation. To that extent they provide historical encouragement and indeed precedents, for example, for the sort of hybrid copyright theory/justification model explored by Merges and OA model recommended by this thesis in Chapter 2.

Also pertinent to OA advancement, the Brehon regime exhibited a willingness to take risks, to be imaginative and seek creative evolution within continuity, for the greater good. In particular it accepted that every stakeholder was crucial to the acceptance and operation of the regime. Community acceptance and ownership of the laws and procedures were essential for its success. Imposition of proposals from an outside body would have been viewed as a burden, yoke or even anathema. The thesis holds that emulating such features and principles are vital to OA success. Moreover for an ancient legal system strikingly modern features were identified relevant to OA. These included the concept of the gratuitous contract and the vision of the Academy operating as a gift economy which the thesis maintain resonates with publishing platforms such as the Creative Commons Public Domain licence.

While accepting that the Brehon system was not perfect and is not readily transferrable *en bloc* to the challenge of OA in today's Academy, a narrative is maintained that ideas and practices can and

do transverse both time and geography. The Brehon law also teaches us that some situations defy carefully prescribed solutions whether by way of legislation or mandate. A degree of untidiness may be the working reality and may have to depend on the safety net of a variety of private ordering as opposed to a universal and inflexible model. This should provide a degree of comfort and relief for those charged with the progress and implementation of OA.

The lessons and beneficial contributions from Medieval Ireland, of the law interface with OA and the Academy, extend beyond the shores of that island and time. Specifically the Western European Irish Monastic diaspora is heralded by this thesis as being an extension of the OA spirit of Columcille and the mindset of the Brehon lawyers.

Although that OA spirit and consequent practices were nurtured by and emerged out of the social and holistic values of the Brehon legal system, an interrelated dynamic was identified embracing: a rich knowledge base; a high degree of motivation to freely share that knowledge and funding by way of patronage which liberated the scholar monks to concentrate on the former two elements. This meant that no externally imposed mandate was necessary to ensure an open sharing of their knowledge. The thesis argues that this example shows that the Academy should be capable of adopting and expanding OA facilities *provided* the requisite motivation exists within both the management of the institutions and the academic authorial community. Like the Brehons the monastic diaspora (as seen in their manipulation of the *Scientia* dictum) challenges the modern Academy to be open to investigating flexible and pragmatic solutions.

Although Chapter 6 of this thesis focused on pre-Enlightenment Ireland, the chapter took the liberty to referring to the late-nineteenth/early twentieth century example of the Irish scholar Alice Milligan to illustrate that the OA spirit of Columcille and the Irish monastic diaspora can exist and interface beneficially in the post Enlightenment age of positive copyright law. From her example we see that abolition of academic copyright is not necessary to ensure OA but can be managed and extended by principles such as that of waiver of rights the Kantian concept explored in this thesis' theoretical study in Chapter 2.

The overarching lesson for OA and the Academy drawn from investigation and assessment of the Irish system was the creation/recovery/ re-adjustment of a mind-set within the community of academic authorship and publishing. That is to move towards a 'de-commodification' of academic knowledge, to value OA publications far beyond the economic, as an integral part of cultural capital for wider society and to be adventurous and open to risk in seeking models and practices that best fit that goal.

7.6. A final closing reflection

Given that the task of the thesis was set in one question: are copyright law and related legal concepts beneficial or disadvantageous in the implementation of OA across the Academy?, it seems reasonable to offer a single sentence answer drawing on the thesis's salient points of investigation, assessment and discovery. That is, that the role of law (especially copyright law) and related legal concepts are more beneficial to the implementation and extension of OA than a hindrance. Those advantages are summarised below by way of recommendations.

OA is neither one-dimensional nor mono-level. Consequently there is no one response nor approach to addressing it, particularly from a legal perspective. Thus the thesis undertook a multifaceted investigation and advocates for a multidimensional series of answers. It holds out those answers and recommendations under the overall term 'drivers' and subdivides its offerings under 'internal' and 'external'.

In Chapter 5 we used the term 'internal driver' to refer to opportunities available within the Academy to drive forward OA. But we can also use the term to apply to other facets of our recommendations. Our recommended 'internal drivers' for better OA therefore would consist of those that may be labelled cerebral or attitudinal on the one hand and those that are institutional on the other.

The cerebral/attitudinal is our plea for acceptance of a hybrid theoretical model for OA justification building on Merges's copyright model. The internal attitudinal driver are those features arising out of our historical study of Medieval Ireland, the spirit of Columcille, the lessons of the Brehon legal system and the Irish monastic example.

Our recommended institutional internal drivers are also twofold. These are firstly, to build on the Harvard OA project model of amalgamating the better features of the 'work for hire' and 'academic exception' doctrines and practices. Secondly, to encourage the development of boutique licensing platforms say within departments or across similar disciplines in the Academy to address the shortcomings of attempting to use an apparent universal platform such as Creative Commons. In passing we do not

recommend abandoning use of the CC suite provided the licences are employed in full light to the problems highlighted in Chapter 3.

Our recommended external drivers are threefold revolving around policy and positive law. Policy mandates should continue but need to be carefully managed to avoid impinging on authors' copyright. Legislators may consider combining such mandates with our second external driver that is building on the recent Dutch and German laws of Inalienable Right of Secondary Publication. Ultimately legislators may wish to embark on the radical path encompassed in our third external driver that is a new exception in the Berne Convention to economic copyrights for limited species of publication arising out of research from public grant funding.

It is the hope of this thesis that by combining as many of these features as possible the Academy, its academic authors, public funders and wider society may more fully appreciate, understand and enjoy the fruits of better OA practices.

Bibliography

Primary Sources

All primary sources (International and European Treaties and legislation and cases) referred to have been noted as appropriate, either in the body of the text or in footnotes. They are not separately listed here. This Bibliography lists all secondary sources consulted in researching and writing this thesis.

Websites

All web addresses are referred to in the text or footnotes and were last accessed on 31 January 2017.

Textbooks and Articles

Adeney, E., (2006) *The Moral Rights of Authors and Performers* (OUP, Oxford);

Adomnán/Sharpe., (1995) Adomnán of Iona., *Life of St Columba (*tr. Richard Sharp) (Penguin, London, 2nd edn.);

Afori, A. F., (2004) 'Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Law' 14 Fordham Intell. Prop.Media & Ent.L.J., 497;

Akester, P., (2010) 'The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture' 32 EIPR, 372;

Armbruster, C., (2008) 'Cyberspace and the knowledge-based economy, open access and trade publishing: from contradiction to compatibility with nonexclusive copyright licensing' 12 International Journal of Communications Law and Policy;

(ALAI) (2006) Association Littéraire et Artistique Interationale 'Memorandum on Creative Commons Licenses';

Ancient Laws of Ireland, Volumes 1-6, Commissioners for Publishing the Ancient Laws and Institutes of Ireland, (R. Atkinson, N. Hancock, W. M. Hennessey, T. O' Mahoney, and A.G. Richey, (eds.)) (HMSO, Dublin, 1865-1901, Nabu Press Reprint, 2014);

Atkinson, R., (2000) 'A rationale for the redesign of scholarly information exchange' 44 Library Resources and Technical Services 2:59;

Arrow, K., (1962) 'Economic Welfare and the Allocation of Resources for Invention' in R.R. Nelson, *Rate and Direction of Inventive Activity: Economic and Social Factors,* (Princeton University Press, Princeton, NJ), 609;

Attas, D., (2008) 'Lockean Justifications of Intellectual Property' in A. Grossieres, A. Marciano, and A. Strowel, (eds.), *Intellectual*

Property and Theories of Justice (Palgrave Macmillan, Basingstoke), 29;

Barrendt, E., (2010) *Academic Freedom and the Law (A Comparative Study)* (Oxford University Press, Oxford);

Barron, A., (2010) 'Copyright infringement, 'free-riding' and the lifeworld' in L. Bently, J. Davis and J. Ginsburg, (eds.), *Copyright and Piracy An Interdisciplinary Critique* (Cambridge University Press, Cambridge), 93;

--- (2012) 'Kant, Copyright and Communicative Freedom' 31 Law & Philosophy, 1;

Becker, L., (1993) 'Deserving to Own Intellectual Property' 68 Chi-Kent L. Rev., 609;

Benabou, V.L., and Dusollier, S., (2007) 'Draw me a public domain' in P. Torremans, (ed.), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, Cheltenham), 161;

Benjamin, W. (1979) *One Way Street* (Verso, New York);

Benkler, Y., (2006) *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, New Haven);

Berg, M., and Seeber, B. K., (2016) *Slow Professor: Challenging the Culture of Speed in the Academy* (University of Toronto Press, Toronto);

Berry, D., (2005) 'On the "Creative Commons": A Critique of the Commons without Commonality' (*Free Software Magazine*, May) http://fsmsh.com/1155 ;

Binchy, D. A., (1955) '*Bretha Nemed'* 17 Ériu;

--- (1958) 'The Date and Provenance of *Uraicecht Becc'* 18 Ériu;

Borkowski, A., and du Plessis, P., (2005) *Textbook on Roman Law* (3rd edn. Oxford University Press, Oxford);

Boyle, A., and Chinkin, C., (2007) *The Making of International Law* (Oxford University Press, Oxford);

Boyle, J., (2007) 'Cultural Environmentalism and Beyond' 70 Law & Contemp. Probs., 5;

--- (2008) *The Public Domain* (Yale University Press, New Haven);

Breatnach, L., (1987) *Uraicecht na Ríar: the Poetic Grades in Early Irish Law* (Dublin Institute of Advanced Studies, Dublin);

--- (1990) 'Lawyers in Early Ireland 'in D. Hogan and W. N. Osborough, (eds.) *Brehons, Serjeants and Attorneys, Studies in the History of the Irish Legal Profession* (Irish Academic Press, Dublin) ;

--- (2005) *A companion to the Corpus Iuris Hibernici* (Dublin Institute of Advanced Studies, Dublin);

Breyer, S., (1970) 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' 84 Harvard Law Rev., 281;

--- (1972) 'Copyright: A Rejoinder' UCLA Law Rev., 75;

Byrne, J.P., (1989) 'A Special Concern of the First Amendment' 99 Yale Law Journal, 251;

Burlinson, C., and Zurcher, A., (eds.) (2009) *Edmund Spenser*, *Selected Letters and Other Papers* (Oxford University Press,Oxford);

Carter, E. L., (2008) 'Reclaiming Copyright from Privacy: Public Interest in Use of Unpublished Materials' 85 Journalism & Mass Communication Quarterly, 417;

Chapman, A. R., (2002) 'The Human Rights Implications of Intellectual Property Protection' J Int. Econ. L. 861;

Charles-Edwards, T., (1980) 'The Corpus Iuris Hibernici '20 Studia Hibernica, 141;

--- (1999) *The Early Mediaeval Gaelic Lawyer* (Quiggin Pamphlets on the Sources of Mediaeval Gaelic History 4 (University of Cambridge, Cambridge) ;

Cheal, D., (1988) *The Gift Economy* (Routledge, London);

Chen, P., (1992) 'Faculty –Generated Inventions: Who Owns the Golden Egg' Wisc. L.Rev. 259;

Chitty., (2013) *Chitty on Contracts* (31st edn. H.G. Beale, (ed.) Sweet and Maxwell, London);

Cohen, J. E., (2000) 'Copyright and the Perfect Curve' 53 Vand. L.Rev., 1799;

Collini, S., (2012) *What are Universities For?* (Penguin, London);

Connolly, J., (2000) 'The Sovietization of higher education in the Czech Lands, East Germany and Poland during the Stalinist period (1948-54)' in G. Péteri and M. David-Fo, (eds.) *Academia in Upheaval* (Greenwood Publishing Group, London);

Corbett, S., (2011) 'Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?' 74 MLR, 503;

Cornish, W.R., (1992) 'Rights in University Innovations: The Herchel Smith Lecture for 1991' 14 EIPR, 3;

Corpus iuris hibernici Volumes 1-6, (1978), Binchy, D.A., (Dublin Institute of Advanced Studies, Dublin);

Corrigan, R., (2007) 'Colmcille and the Battle of the Book: Technology, Law and Access to Knowledge in 6th Century Ireland' Conference Paper: Workshop on the intersections between law, technology and popular culture at University College London, September 19th 2007;

Damish, E. J., (1988) 'The right of personality: A common law basis for the protection of the moral rights of authors.' 23 Ga. L. Rev., 1;

Da Silva, R.J., (1980) 'Droit Moral and the Amoral Copyright: A comparison of Artists' Rights in France and the United States' 28 Bull. Copyright Soc'y U.S.A. 1;

David, P., (2010) 'Mitigating "anticommons" harms to research in science and technology: new moves in "legal jujitsu" against unintended adverse consequences of the exploitation of intellectual property rights on results of publicly and privately funded research' 2 WIPOJ, 59;

Davies, G., and Garrett, K., (2010) *Moral Rights* (Sweet and Maxwell, London);

Davies, J., (1612/1969) *Historical relations, or, A discovery of the true causes why Ireland was never intirely subdu'd nor brought under obedience of the Crown of England until the beginning of the reign of King James of happy memory* (1969 reprint J.P. Myers (ed.), Washington);

Davis, L., (2006) 'Should the Logic of 'Open Source' Be Applied to Digital Cultural Goods? An Exploratory Essay' in H. Porsdam, (ed.), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity (*Edward Elgar, Cheltenham), 129;

Davis, N.Z., (1983) 'Beyond the Market: Books as Gifts in Sixteenth-Century France' 33 Transactions of the Royal Historical Society, 69;

Deazley, R., Kretschmer, M., and Bently, L., (eds.) (2010) *Privilege and Property Essays on the History of Copyright* (Open Book Publishers, Cambridge);

Deazley, R., (2007) 'Copyright' Public Domain', in C. Waelde and H. MacQueen, (eds.), *Intellectual Property: The Many faces of the Public Domain*, (Edward Elgar, Cheltenham), 21;

Deene, J., (2010)'The influence of the Statue of Anne on Belgian copyright law' in L. Bently, U. Suthersanen, and P. Torremans, (eds.), *Global Copyright: Three Hundred Years Since the Statute of Anne from 1709 to Cyberspace* (Edward Elgar, Cheltenham), 136;

Denicola, R.C., (2011) 'Copyright and Open Access: Reconsidering University Ownership of Faculty Research' 85 Neb. L. Rev., 351;

Derclaye, E., (2008) 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating 'in P. Torremans, (ed.), *Intellectual Property and Human Rights (Enhanced Edition)* (Kluwer Law International, Alphen aan den Rijn), 133;

Dessemontet, F., 'Copyright and Human Rights' <http://www.unil.ch/webdav/site/cedidac/shared/Articles/Copyright%20&%20Human%20Rights.pdf>

Dibble, W., (1994) 'Justifying Intellectual Property' UCL Jurisprudence Rev., 74;

Dietz, A., (1994) 'Moral Rights and the Civil Law Countries' 19 Colum.-VLA J.L. & Arts, 199;

Dillon, M., and Chadwick, N., (2000) *The Celtic Realms, The History and Culture of the Celtic Peoples From Pre-History to the Norman Invasion* (Orion, London, 2nd Impression);

Donnelly, J., (2003) *Universal Human Rights in Theory and Practice* (2nd edn. Cornell University Press, New York);

Drassinower, A., (2012) 'Copyright Infringement as Compelled Speech' in A.Lever, (ed.), *New Frontiers in the Philosophy of Intellectual Property* (Cambridge University Press Cambridge), 203;

Dreyfus, R.C., (1987) 'The Creative Employee and the Copyright Act of 1976' Univ.Chi. L.Rev., 590;

DuBoff, L. D., (1984) 'An Academic's Copyright: Publish and Perish', 32 J. Copyright Soc'y, 17;

Dufay, J., and Pican, X., (2004) 'The erosion of the moral right: comparison France-United States' IBLJ, 461;

Duggan, C., (2013) *The Lost Laws of Ireland* (Glasnevin Publishing, Dublin);

Dumitru, S., (2008) 'Are Rawlsians Entitled to Monopoly Rights?' in A. Grossieres, A. Marciano, and A. Strowel, (eds.), *Intellectual Property and Theories of Justice* (Palgrave Macmillan, Basingstoke), 29;

Dusollier, S., (2006) 'The Master's Tools v. The Master's House: Creative Commons v. Copyright' Colum. J.L. & Arts, 271;

--- (2007)'Sharing access to intellectual property through private ordering' 82 Chicago-Kent Law Review, 1391;

--- (2013) 'The Commons as Reverse Intellectual Property' in R. Howe and J. Griffiths, (eds.), *Concepts of Property in Intellectual Property Law* (Cambridge University Press, Cambridge), 258;

Dworkin, R., (1996) 'We Need a New Interpretation of Academic Freedom' in L. Menand, (ed.), *The Future of Academic Freedom* (University of Chicago Press, Chicago), 187;

Edelman, L., (2004) 'Presidential Address: Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality', 38 Law and Society Review, 181;

van Eechoud, M., (2011) 'Friends or Foes? Creative Commons, Freedom of Information Law and the European Union Framework for Reuse of Public Sector Information' in L. Guibualt and C. Angelopoulos (eds.), *Open Content Licensing from Theory to Practice* (Amsterdam University Press, Amsterdam), 169;

Elkin-Koren N., (2005) 'What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons' 74 Fordham L Rev, 101;

Elkin-Koren N., (2006) 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in L. Guibault and P.B. Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons In Information Law* (Kluwer Law International, Alphen aan den Rijn, Netherlands), 325;

Elkin-Koren, N., and Salzberger,E. M., (2013) *The Law and Economics of Intellectual Property in the Digital Age: The limits of analysis* (Routledge, Abingdon, Oxford);

Eve, M.P., (2014) *Open Access and the Humanities Contexts, Controversies and the Future* (Cambridge University Press, Cambridge);

Fisher, W., (2007)' Theories of Intellectual Property' in S.R. Munzer, (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, Cambridge), 168;

Fitzpatrick, K., (2011) *Planned Obsolescence* (New York University Press, NY, 2011);

Farchy, J., (2009) 'Are free licences suitable for cultural works?' 31 EIPR, 255;

Foucault, M., (1979) 'What Is an Author?' in *Textual Strategies: Perspectives in Post-Structuralist Criticism,* J*.V*. Harari, (ed). (Cornell University Press, Ithaca), 141;

Fox, M., Ciro, T., and Duncan, N., (2005) 'Creative Commons: an alternative, web-based copyright system 16 Ent. L.R., 111

Fox Keller, E., (1996) 'Science and Its Critics' in L. Menand, (ed.) *The Future of Academic Freedom* (University of Chicago Press, Chicago), 199;

Garon, J., (2002). 'The Electronic Jungle: The Application of Intellectual Property Law to Distance Education', 4 Vand. J. Ent. L. & Prac., 146;

Geiger, C., (2006) 'Copyright and Free Access to Information for a Fair Balance of Interests in a Globalised World' 28 EIPR, 366;

--- (2008) 'The Constitutional Dimension of Intellectual Property' in P. Torremans, (ed.), *Intellectual Property and Human Rights*

(Enhanced Edition) (Kluwer Law International, Alphen aan den Rijn), 101;

--- (2009) 'The future of copyright in Europe: Striking a fair balance between protection and access to information' CEIPI 2009;

--- (2010) 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' 12 Vanderbilt Journal of Entertainment & Technology Law, 515;

Geiger, C., Gervais. D., and Sentleben, M., (2014) 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' Am. U. Int'l L. Rev., 581;

Gervais, D., (2008) 'Intellectual Property and Human Rights: Learning to Live Together' in P. Torremans, (ed.), *Intellectual Property and Human Rights (Enhanced Edition)* (Kluwer Law International, Alphen aan den Rijn), 3;

Ghosh, S., (2008) 'Intellectual Property and Regulatory Justice' in A. Grossieres, A. Marciano, and A. Strowel, (eds.) *Intellectual Property and Theories of Justice* (Palgrave Macmillan, Basingstoke), 106;

Ginnell, L., (2012) *The Brehon Laws A Legal Handbook* (Fisher Unwin, London, 1894, Forgotten Books Reprint);

Ginsburg, J.C., (1990) 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' 64 Tul. L. Rev., 991;

--- (1997) ‘Authors and Users in Copyright’ 45 J. Copyright Soc'y U.S.A, 1;

--- (2002) ‘The Exclusive Right to Their Writings: Copyright and Control in the Digital Age’ 54 Me. L. Rev., 195;

--- (2007) ‘Une chose publique? The author’s domain and the public domain in early British, French and US Copyright law’ in P. Torremans, (ed.), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, Cheltenham), 133;

Goldstein, P., (2003) *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press,);

Goldstein, P., and Hugenholtz, P B., (2013) *International Copyright: Principles, Law and Practice* (3rd edn. Oxford University Press, Oxford);

Gonzalez, A G., (2004) ‘Viral contracts or unenforceable documents? Contractual validity of copyleft licences’ 26 EIPR 331;

Gordon, W.J., (1982) ‘Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors’ 82 Colum. L. Rev., 1600;

--- (1989) ‘An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory’ 41 Stan. L. Rev., 1343;

--- (1992) ’Asymmetric Market Failure and Prisoner’s Dilemma in Intellectual Property’ 17 U. Dayton L. Rev., 853;

Grassmuck, V., (2011) ‘Towards a New Social Contract: Free-Licensing into the Knowledge Commons’ in L. Guibualt and C. Angelopoulos (eds.), *Open Content Licensing from Theory to Practice* (Amsterdam University Press, Amsterdam), 21;

Guibault, L., (2002) *Copyright Limitations and Contracts: An analysis of the contractual overridability of limitations on copyright* (Kluwer Law International, Alphen aan den Rijn, Netherlands);

---(2011) ‘Owning the Right to Open Up Access to Scientific Publications’ in L. Guibualt and C. Angelopoulos (eds.), *Open Content Licensing from Theory to Practice* (Amsterdam University Press, Amsterdam),137;

Habermas, J., (1989) *The Structural Transformation of the Public Sphere: An enquiry into a Category of Bourgeois Society* (Polity, Cambridge);

-- (1998) *Between Facts and Norms* (Transl. W Rehg) (MIT Press, Cambridge, MASS.);

Halliday, T., (2004) ‘Comment on the Presidential Address: Crossing Oceans, Spanning Continents: Exporting Edelman to Global Law-making an Market-Building’ 38 Law and Society Review, 213;

Harford, J., (2008) 'Admission of Women to the National University of Ireland' 35 Education Research and Perspectives, 44;

Haskell, T. L., (1996) 'Justifying the Rights of Academic Freedom I the Era of "Power/Knowledge"' in L. Menand, (ed.), *The Future of Academic Freedom* (University of Chicago Press, Chicago, 1996), 43;

Haunss, S., (2011) 'The politicisation of intellectual property: IP conflicts and social change', 31 WIPOJ, 129;

Hegel, G.W.F., (1821/2008) *Outlines of the Philosophy of Right* (T.M. Knox trans.) (Oxford University Press, Oxford);

Helfer, L. R., and Austin, G W., (2011) *Human Rights and Intellectual Property* (Cambridge University Press, Cambridge);

Hesse, C., (2002) 'The rise of intellectual property, 700 B.C.–A.D. 2000: an idea in the balance', 131 Daedalus, 26;

Hettinger, E. C., (1989) 'Justifying Intellectual Property' 18 Phil. & Publ. Affairs., 31;

Holzknecht, K. J. (1923) *Literary Patronage in The Middle Ages* (Collegiate Press, Philadelphia, Hard Press Publishing reprint, 2012);

Hugenholtz, P.B. and Okediji, R., (2008) 'Conceiving An International Instrument On Limitations And Exceptions To Copyright' (IViR Amsterdam);

Hughes, J., (1988) 'The Philosophy of Intellectual Property' 77 Geo. L.J., 287;

Johnson, P., (2008) '"Dedicating" Copyright to the Public Domain' 71 MLR, 587;

Kant, I., (1785-98/1996) *Practical Philosophy* (the Cambridge Edition of the works of Immanuel Kant, M. J. Gregor, ed. and transl.) (Cambridge University Press, Cambridge);

Katz, J., (2006) Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing' 46 Idea, 391;

Kearney, R., (1985) 'Introduction: An Irish Intellectual Tradition? In R. Kearney (ed), The Irish Mind: Exploring Intellectual Traditions (Wolfhound Press, Dublin,) 7;

Kelly, F., (1988) *A Guide to Early Irish Law* (Dublin Institute of Advanced Studies, Dublin);

--- (1997) *Early Irish Farming: A Study Based Mainly on the Law-texts of the 7th and 8th Centuries AD* (Dublin Institute of Advanced Studies, Dublin);

Kernochan, J.M., (1985) 'Protection of Unpublished Works in the United States before and after the *Nation* case' 33 J. Copyright Soc'y U.S.A., 322;

Kiberd, D, and Matthews, P. J., (eds.) (2015), *Handbook of the Irish Revival: An Anthology of Irish Cultural and Political Writings 1891-1922* (Abbey Theatre Press, Dublin);

Korobkin, R., (2003) 'The Endowment Effect and Legal Analysis' 97 Nw.U. L. Rev., 1227;

Kostylo, J., (2010) 'From Gunpowder to Print: The Common Origins of Copyright and Patent' in R. Deazley, M. Kretschmer, and L. Bently, (eds.), *Privilege and Property Essays on the History of Copyright* (Open Book Publishers, Cambridge), 21;

Kreiss, R.A., (1995) 'Accessibility and Commercialization in Copyright Theory' 43 UCLA L. Rev., 1;

Kreutzer, T., (2011), 'User-Related Assets and Drawbacks of Open Content Licensing' in L. Guibault and C. Angelopoulos, (eds.), *Open Content Licensing from Theory to Practice* (Amsterdam University Press, Amsterdam), 107;

Kur, A., (2009) 'Of Oceans, Islands, and Inland Water-How much Room for Exceptions and Limitations under the Three-Step Test? 8 Richmond J of Global Law and Business, 287;

Lacey, B., (1998) *The Life of Colum Cille* (translation of Maghnus Ó Dhomhnaill's *Beatha Cholm Cille (1532)* (Four Courts Press, Dublin);

Lametti, D., (2001). 'Publish and profit?: Justifying the ownership of copyright in the academic setting'. 26 Queen's Law Journal, 497;

Lametti, D., (2013) 'The concept of the anticommons: useful, ubiquitous and unnecessary?' in R. Howe, and J. Griffiths, (eds.), *Concepts of Property in Intellectual Property Law* (Cambridge University Press, Cambridge), 232;

Landes, W. M. and Posner, R. A., (1989) 'An Economic Analysis of Copyright Law' J. Legal Stud.,325;

--- (2003) *The Economic Structure of Intellectual Property Law* (Harvard University Press, Cambridge, MASS.);

Landes, W.M., (1992) 'Copyright Protection of Letters, Diaries and other Unpublished Works: An Economic Approach' 21 J. Legal Stud., 79;

Lape, L.G., (1992) 'Ownership Of Copyrightable Works Of University Professors: Interplay Between the Copyright Act and University Copyright Policies', 37 Vill. L. Rev., 223;

Lemley, M A., (2004) 'Ex Ante versus Ex Post Justifications for Intellectual Property' 71 U Chi. L. Rev., 129;

Lessig, L., (2003) 'The Creative Commons' 55 Florida L Rev., 763;

---(2004) *Free Culture* (Penguin, London);

von Lewinski, S., (2008) *International Copyright Law and Policy* (Oxford University Press,Oxford);

Linford, J., (2011) 'A Second Look at the Right of First Publication' 58 J. Copyright Soc'y U.S.A., 585;

Locke, J., (1690/1988) *Two Treatises of Government* (ed. Peter Laslett) (3rd edn. Cambridge University Press, Cambridge);

Lucas, A., 'Moral Right in France: towards a pragmatic approach? BLACA

Lunney, G S., (1996) 'Re-examining Copyright's Incentives-Access Paradigm' 49 Vand L. Rev., 483;

Mansbridge, J., (1998) 'On the contested nature of the public good' in Private action and the public good W.W. Powell, and E.S. Clemens, (eds.) (Yale University Press, New Haven) 3;

Martin, B., (1998) *Information Liberation: Challenging the corruptions of information power* (Freedom Press, London);

Masiyakurima, P., (2005) 'The Trouble with Moral Rights' 68 MLR, 411;

--- (2008) 'The Free Speech Benefits of Fair Dealing' in P. Torremans, (ed.), *Intellectual Property and Human Rights*

(Enhanced Edition) (Kluwer Law International, Alphen aan den Rijn), 235;

Masterson, S., (1940) 'Copyright: History and Development' 28 Cal. L. Rev., 620;

Matthew, P.J.. (2003) Revival: The Abbey Theatre, Sinn Fein, the Gaelic League and the Co-operative Movement (Cork University Press, Cork);

May, C., and Sell, S. K., (2006) *Intellectual Property Rights A Critical History* (Rienner, London);

Mc Gowan, D., (2004) 'Copyright Nonconsequentialism' 69 Mo. L.R., 1;

McLeod, N., (1982) 'The concept of law in ancient Irish jurisprudence.' 17 Irish Jurist 356;

--- (1986) 'Interpreting early Irish law: status and currency Part 1.' 41 Zeitschrift für celtische Philologie (ZCP), 46;

--- (1987) 'Interpreting early Irish law: status and currency. Part 2.'42 Zeitschrift für celtische Philologie (ZCP) 41;

--- (1992) *Early Irish Contract Law* (Centre for Celtic Studies, University of Sydney);

McManus, S., (1990) *The Story of the Irish Race* (Devin-Adair, Old Greenwich, Connecticut);

Mc Sherry, C., (2001) *Who Owns Academic Work* (Harvard University Press, Cambridge MASS.);

Menand, L., (1996) 'The Limits of Academic Freedom' in L. Menand, (ed.) *The Future of Academic Freedom* (University of Chicago Press, Chicago), 3;

Menell, P.S., (2012) 'In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age' 59 J. Copyright Soc'y U.S.A., 201;

Merges, R. P., (2011) *Justifying Intellectual Property* (Harvard University Press, Cambridge MASS and London);

Merryman, J. H., and Pérez-Perdomo, R., (2007) *The Civil Law Tradition* (3rd ed. Stanford University Press, Stanford);

Moglen, E., (2002) 'Anarchism Triumphant: Free Software and the Death of Copyright' in N. Elkin-Koren and W. N. Netanel (eds), *The Commodification of Information* (Kluwer Law International, Alphen aan den Rijn), 107;

Mokyr, J., (2002) *The Gifts of Athena Historical Origins of the Knowledge Economy* (Princeton University Press, Princeton);

Monotti, A. and Ricketson, S., (2003) *Universities and Intellectual Property* (Oxford University Press, Oxford);

de Montalembert, C. F. R., (2015) *Saint Columba Apostle of Caledonia* (Aeterna Press, New York);

Moore, A. D., (1997) 'A Lockean Theory of Intellectual Property' 21 Hamline L. Rev.65;

Morris, C., (2013) *Alice Milligan and the Irish cultural revival* (Four Courts Press, Dublin);

Morris, S., Barnas, E., La Frenier, D., and Reich, M., (2013) *The Handbook of Journal Publishing* (Cambridge University Press, Cambridge);

Moscon, V., (2015) 'Academic Freedom, Copyright, and Access to Scientific Works: A Comparative Perspective' in R. Caso and F. Giovanella, (eds.) *Balancing Copyright in the Digital Age (*Springer, London), 99;

Muller-Langer, F., and Watt, R. (2010) 'Copyright and Open Access for Academic Works', 7, Review of Economic Research on Copyright Issues, 45;

Nabilou, H., (2010) 'A. response to Prof. Shavells "Should copyright of Academic Works be abolished?" 7 Review of Economic Research on Copyright Issues 31;

Nussbaum, M., (2012) *Not for Profit: Why Democracy Needs the Humanities* (Princeton University Press, MASS.);

Nentwich, M., (2001) '(Re-)De-Commodification in Academic Knowledge Distribution?' 14 Science Studies, 21;

Netanel, N.W., (1996),'Copyright and a Democratic Civil Society' 106 Yale L. J., 283;

Nicholls, K.W., (1972) *Gaelic and Gaelicized Ireland in the Middle Ages* (Gill and Macmillan, Dublin);

O'Hara, A., (ed.) (2015) *Saint Columbanus Selected Writings* (Veritas, Dublin);

Ola, K., (2014) 'Fundamentals of Open Access' 36 EIPR.112;

O'Leary, P., (1994) *The Prose Literature of the Gaelic Revival, 1881-1921: Ideology and Innovation* (Pennsylvania State University Press, PA.);

O'Mahoney, S.O., (2003) 'Guarding the Commons: how Community Managed Software Projects Protect their Work' 32 Research Policy, 1179;

Packard, A., (2002) 'Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work' *7* Comm. L. & Policy 275;

Palmer, T. G., (1988), 'Intellectual Property: A non-Posnerian Law and Economics Approach' 12 Hamline L. Rev. 261;

Patterson, L R., (1993) 'Copyright and "the exclusive right" of authors' 1 J. Intell. Prop. L., 1;

Patterson, N., (1989) 'Brehon Law in Late Medieval Ireland: Antiquarian and Obsolete' of 'Traditional ad Functional'?' 17 Cambridge Medieval Celtic Studies, 43;

Penner, J., (1997) *The Idea of Property in Law* (Clarendon, Oxford);

Pila, J., (2010) 'Who owns the intellectual property rights in academic work?' 32 EIPR, 609;

Pincoff, E.L.S., (1975) (ed.) *The Concept of Academic Freedom*, (Univ. Texas Press, Austin);

Post, G., Giocarinis, K., and Kay, R., (1955) 'The Medieval Heritage of a Humanistic Ideal: "Scientia Donum Dei est, Unde Vendi non Potest"' 11 Traditio, 195;

Priest. E., (2012) 'Copyright and the Harvard Open Access Mandate' 10 NW.J. Tech. & Intell. Prop., 377;

Putnam, G. H., (1898*) Books and Their Makers, During the Middle Ages, A Study of the Conditions of the Production and Distribution of Literature From the Fall of the Roman Empire to the Close of the*

Seventeenth Century Vol. I (2nd edn. Forgotten Books Reprint, London, 2015);

--- (1898) *Books and Their Makers, During the Middle Ages, A Study of the Conditions of the Production and Distribution of Literature From the Fall of the Roman Empire to the Close of the Seventeenth Century Vol. II* (2nd edn. Forgotten Books Reprint, London, 2015);

Radin, M.J., (1982) 'Property and Personhood' 34 Stanford L. Rev., 957;

--- (2000),'Humans, Computers, and Binding Commitment' 75 Ind. L.J. 1125;

Rahmatian, A., (2011) *Copyright and Creativity: The Making of Copyright in Creative Works* (Edward Elgar, Cheltenham);

--- (2014) 'Make the butterflies fly in formation? Management of copyright created by academics in UK universities' 34 Legal Studies, 709;

Rashdall, H., (2010/1895) *The Universities of Europe in the Middle Ages Vols 1-3* (Clarendon Press Oxford, 1895, Cambridge University Press re-issue 2010);

Rawls, J., (1999) *A Theory of Justice* (Harvard University Press, MASS. Rev. edn.)

Readings, W., (1996) *The University in Ruins* (Harvard University Press, MASS.);

Reichman, J.H., (1989) 'Computer programs as applied to scientific know how: Implications of copyright protection for commercialized university research '42 Vanderbilt Law Review, 639;

Reichman, J. H. and Okediji, R., (2012) 'When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale' 96 Minnesota L Rev, 1362;

Ricketson, S., (2003) WIPO Study On Limitations And Exceptions Of Copyright And Related Rights In The Digital Environment;

Rorty, R., (1996) 'Does Academic Freedom Have Philosophical Presuppositions?'
in L. Menand, (ed.), *The Future of Academic Freedom* (University of Chicago Press, Chicago),21;

Rose, C., (2011) 'Ostrom and the Lawyers: the Impact of Governing the Commons on the American Legal Academy' 5 International Journal of the Commons' 28;

Rose, M., (1993) *Authors and Owners* (Harvard University Press, MASS.);

de Rosnay, M.D., (2009) *Creative Commons Licenses Legal Pitfalls: Incompatibilities and Solutions* (IViR Amsterdam);

Sag, M.J., (2006) 'Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency' 81 Tul L. Rev. 187;

Said, E.W., 'Identity, Authority, and Freedom: The Potentate and the Traveller' in L. Menand, (ed.), *The Future of Academic Freedom* (University of Chicago Press, Chicago), 214;

Samuelson, P., (2006)'Challenges in Mapping the Public Domain' in L. Guibault, and P. Hugenholtz, (eds.), *The Future of the Public Domain: Identifying the Commons In Information Law* (Kluwer Law International, Alphen aan den Rijn),7;

Sarraute, R., (1968) 'Current Theory on the Moral Right of Authors Under French Law' 16 Am. J. Comp. L., 465;

Scheufen, M., (2011) 'What Scientists Can Learn from the Penguin: Open Access and Open Source' (Annual Conference of SERCI, Bilbao, Spain, 2011) http://www.serci.org/2011/Scheufen.pdf;

--- (2015) *Copyright Versus Open Access: On the Organisation and International Political Economy of Access to Scientific Knowledge* (Springer International Law and Economics, London);

Scott., J. W., (1996) 'Academic Freedom as an Ethical Practice' in L. Menand, (ed.) *The Future of Academic Freedom* (University of Chicago Press, Chicago),163;

Senftleben, M., (2004) *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-step Test in International and EC Copyright Law* (Kluwer Law, Alphen aan den Rijn);

--- (2010) 'Bridging the differences between copyright's legal traditions – the emerging EC fair use doctrine' 57J. Copyright Soc'y U.S.A., 521;

Sharp, R., (1986) 'Dispute Settlement in Medieval Ireland: a Preliminary Enquiry' in *The Settlement of Disputes in Early Medieval Europe* (W. Davies and P. Fouracre, (eds.), (Cambridge University Press, Cambridge), 169;

Shavell, S., (2010) 'Should Copyright of Academic Works be abolished?' 2 Journal of Legal Analysis, 301;

Shaver, L., and Sganga, C., (2009) 'The Right to take part in cultural life: On Copyright and Human Rights' 27 Wisconsin International Law Journal, 637;

Sherman, B., and Bently, L., (1999) *The Making of Modern Intellectual Property Law* (Cambridge University Press, Cambridge);

Shiffrin, S.V., (2007) 'Lockean Arguments for Private Intellectual Property' in S.R. Munzer, (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, Cambridge), 138;

Simon, T.F., (1983) 'Faculty Writings: Are They "Works Made for Hire" Under the 1976 Copyright Act?' 9 J. Coll. & Univ. L., 485;

Smith, M. D., and Zirkel, P. A., (1991) 'Implications of CCNV v. Reid for the
Educator-Author: Who Owns the Copyright?' 63 Educ. L. Rep., 703;

Spence, M., (2002) 'Justifying Copyright' in D. McClean, and K. Schubert, (eds.) *Dear Images: Art, Copyright and culture* (Ridinghouse, Manchester), 389;

Spenser, E., (2010) The Works of Edmund Spenser (Kessinger Publishing, Montana);

Spindler, C., and Zimbehl, P., (2011) 'Is Open Content a Victim of Its Own Success? Some Economic Thoughts on the Standardization of Licences' in L. Guibualt and C. Angelopoulos (eds.), *Open Content Licensing from Theory to Practice* (Amsterdam University Press, Amsterdam),51;

Stacey, R. C., (1994) *The Road to Judgment, From Custom to Court in Medieval Ireland and Wales* (University of Pennsylvania Press, Pennsylvania);

--- (2007) *Dark Speech: The Performance of Law in Early Ireland* (University of Pennsylvania Press, Pennsylvania);

Stallman, R., (2015) The Free Software definition, http://www.gnu.org/philosophy/free-sw.html

St Clair, W., (2010) 'Metaphors of Intellectual Property' in R. Deazley, M. Kretschmer and L. Bently, (eds) *Privilege and Property Essays on the History of Copyright* (Open Book Publishers, Cambridge) 369;

Suber, P., (2012) *Open Access* (MIT Press, Cambridge MASS, 2012);

Suthersanen, U., (2007) 'Creative Commons – the other way?' 20 Learned Publishing, 59;

Sunstein, C. R., (1996) 'Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems' in L. Menand, (ed.) *The Future of Academic Freedom* (University of Chicago Press, Chicago), 93;

Thurneysen, R., (1973) 'Celtic Law' in D. Jenkins (ed.), *Celtic Law Papers Introductory to Welsh Medieval Law and Government* (Brussels, 1973) 49;

Torremans, P., (2008) 'Copyright (and Other Intellectual Property Rights) as a Human Right' in P. Torremans, (ed.), *Intellectual Property and Human Rights (Enhanced Edition)* (Kluwer Law International, Alphen aan den Rijn), 195;

Towse, R., (2010) 'Creativity, Copyright and the Creative Industries Paradigm' 63 Kyklos, 461;

Treiger-Bar-Am, K., (2008) 'Kant on Copyright: Rights of Transformative Authorship' 25 Cardozo Arts & Ent. L.J.,1059;

Triggs, C., (2005) 'Academic Freedom, Copyright and the Academic Exception' 7 Workplace: A Journal for Academic Labor., 60;

Trosow, S. E., (2003) 'The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital' 16 Can. L. J. & Jurisprudence, 217;

Tushnet, R., (2009), 'Economies of Desire: Fair Use and Marketplace Assumptions' 51 William & Mary L. Rev.,522-527;

Tyreman, B., (1971) 'The Economic Rationale for Copyright Protection for Published Books' 18 UCLA Law Rev., 1100;

van Alstyne, W., (1990) 'Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried View' 53 Law and Contemporary Problems,79;

Velterop, J., (2005), *Open Access Publishing and Scholarly Societies –A Guide* (Open Society Institute, New York);

Ver Steeg, R., (1990) 'Copyright and the Educational Process: The Right of Teacher Inception' 75 Iowa L. Rev., 381;

Visser, D., (2015) 'The Open Access provision in Dutch copyright contract law' JIPLP, 872;

Waldron, J., (1988) *The Right to Private Property* (Clarendon, Oxford);

WIPO *Guide to the Berne Convention* 1978;

Wadley, J. and Brown J. L., (1999) 'Working Between the Lines of Reid: Teachers, Copyrights, Work-For-Hire and a New Washburn University Policy', 38 Washburn L.J., 385;

Weber, S., (2004) *The Success of Open Source* (Harvard University Press, MASS.);

Willinsky, J., (2006) *The Access Principle: The Case for Open Access to Research and Scholarship* (MIT Press, MASS,);

Yen, A.C., (1990) 'Restoring the Natural Law: Copyright as Labor and Possession' 51 Ohio St. L. J., 517;

Yu, P K.,(2006-2007) 'Ten Common Questions about Intellectual Property and Human Rights' 23 Ga. St. U.L. Rev.,709;

Zimmer, H.F., (1891) *The Irish Element In Medieval Culture* (Putnam, London);

Zimmerman, D.L., (2011), 'Copyrights as Incentives: Did We Just Imagine That?' 12Theoretical Inquiries in Law, 29;