

COPYRIGHT AND THE SOUND BITE SOCIETY

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We live in a sound bite society. The imperatives of marketing and the ubiquitous availability of media technology lead to the ever-increasing production of commercial messages, coined phrases, invented words, and brief opinions expressed instantly. Copyright law, however, originally developed to protect printed books, and is underpinned in Commonwealth jurisprudence by John Locke's 17th century proposition of property rights deriving from applied labour. This article examines how Lockean theory applies to copyright in the sound bite society. It is argued that, while Lockean theory may not be the most socially beneficial of the major theoretical approaches to copyright, it provides straightforward principles that can be usefully applied to the commercialised and truncated language of contemporary discourse.

I INTRODUCTION

The invention of the printing press and the institution of copyright protection for mass produced books are conjoined.¹ Industrial printing both enabled an unprecedented expansion of the market for books, and permitted unauthorised copying on a grand scale. Over time, copyright has accommodated technological change, albeit not always comfortably,² and has been extended beyond the book to encompass all original literary works.³ In addition to numerous issues generated by Internet-based

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¹ J Ginsburg observes that 'almost as soon as there were printing presses there came printing privileges' which were later succeeded by author's rights. See J Ginsburg, "'Une Chose Publique'? The Author's Domain and the Public Domain in Early British, French and US Copyright Law' in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (2007) 132, 135.

² As D Harvey, *Internet.law.nz: Selected Issues* (LexisNexis NZ, 2nd ed, 2005) 589 fn 42 observes, 'one need only review some of the technology-specific sections of the Copyright Act 1994 [NZ] dealing with differing media and the challenges that they present to the so-called technology-neutral provisions of the Act'.

³ A Sims, 'Copyright's Protection of Facts and Information' (2006) 12 *New Zealand Business Law Quarterly* 360, 360 observes 'copyright has gone from protecting a few works narrowly, and for a comparatively short time, to protecting almost everything, against almost any use, for a very long time [footnotes omitted]'. A Christie and E Caine, 'Intellectual Property Law and Policy-Making in Australia: A Review and Proposal for Action' (Occasional Paper No 2/05, Intellectual Property Research Institute of Australia, University of Melbourne, 2005) 4 note that Australian copyright legislation 'starts as a 120-subsection lightweight in 1905, expanding twelve-fold to weigh-in at 1 597 subsections in 2005'.

technology, contemporary copyright law must also engage with challenging socio-economic developments.

These developments include the emergence of marketing's pre-eminent role in a consumption-oriented society.⁴ Indeed, Geoffrey Miller argues that marketing is the most important idea in contemporary business and the dominant force in culture.⁵ Whether or not this predominance is desirable, the law must accommodate the concision and economy of marketing messages.

A second development is a tendency towards truncated communication among language users. As the example of the telegram shows, a technologically determined requirement for compressed communication is not new. However, the truncation of language is a defining feature of many contemporary means of communication: for example, pagers, short message service (SMS), texting and Twitter, which limits the number of characters per 'tweet' (a discreet unit of communication) to 140.

The third, and far broader development, is the proliferation of media made possible, in particular, by Web 2.0 social networking tools: for example, blogging applications, Facebook, LinkedIn, Multiply, MySpace, Twitter, Wikia, and You Tube. Media are now 'global, social, ubiquitous and cheap'.⁶ Non corporate production challenges traditional media, notably how blogs have to an extent usurped newspapers, but may also augment them: for example, the first news of the 2008 Sichuan earthquake was published on Twitter, and, in Iran after the 2009 election, corporate media representatives, whose activities are easily curbed by government, became reliant on individuals' cell phone video footage.⁷ 'The underlying practice of web 2.0 tools is that of harnessing collective intelligence...As users add new content and new sites, they are connected through hyperlinking so that other users discover the content and link to it, thus the web grows organically as a reflection of the collective activity of the users.'⁸ These non-traditional approaches to writing emphasise communal production and use,⁹ but clash and interact with traditional producers of copyright materials. Because 'user-generated content and user-generated distribution combines third-party copyrightable works and trade marks with self-written and published

⁴ N Klein, *No Logo* (Picador, 1999) 3 observes 'the astronomical growth in the wealth and cultural influence of multinational corporations over the past fifteen years can arguably traced back to a single, seemingly innocuous idea developed by management theorists in the mid-1980s: that successful corporations must primarily produce brands, as opposed to products'.

⁵ GF Miller, 'Marketing' in J Brockman (ed), *The Greatest Inventions of the Last 2000 Years* (2000) 121, 121-6.

⁶ C Shirky, *How Social Media Can Make History* (2009) Technology, Entertainment, Design <http://www.ted.com/talks/clay_shirky_how_cellphones_twitter_facebook_can_make_history.html> at 20 June 2009.

⁷ Ibid.

⁸ R Mason and F Rennie, *E-Learning and Social Networking Handbook: Resources for Higher Education* (Routledge, 2008) 2. See Harvey, above n 2, 663-94 for a discussion of copyright and hypertext linking.

⁹ See, for example, L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Content* (The Penguin Press, 2004); Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006); and J Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008).

works that are available for download and further distribution',¹⁰ issues raised by user-generated content primarily relate to breach of copyright.¹¹ Individuals involved in Web 2.0 and social networks typically do not engage in commercial activity.¹² Nevertheless, they are significantly affected by corporate copyright claims. As Brian Fitzgerald observes, 'software is not just code. It is discourse that allows us to see and say things in digital space'.¹³ A consideration of the multifarious social and legal issues raised by Web 2.0 is beyond the scope of this article, but the context is important, and Twitter will be considered as an example of Web 2.0 tools that enable the production of brief writings.

It may be argued, as Jeffrey Scheuer does, that contemporary society is the 'sound bite society', 'one that is flooded with images and slogans, bits of information and abbreviated or symbolic messages – a culture of instant but shallow communication'.¹⁴ This article focuses on copyright in the sound bite society,¹⁵ and considers how Anglo-Australasian copyright law engages with truncated language. Twitter tweets, which 'are quick and instantaneous sound bites',¹⁶ provide a focus for legal theory and judicial practice.

Writing in 1996, Hugh Laddie observed that 'the law reports of the last 90 years are full of trite and insubstantial works being protected by copyright'.¹⁷ Despite the extension of copyright protection to artefacts that few laypersons would recognise as original literary works,¹⁸ brief writings are generally excluded from copyright protection. This article does not argue that the current scope of copyright is desirable or that it should be extended, rather it is argued that basic principles should be applied consistently to all literary artefacts. If the brief writings and short chain of texts that typify the sound bite society meet the criteria of original literary works, their brevity and means of publication should not be a bar to copyright protection.

¹⁰ A Hiaring Hocking, 'Selected Liability Issues: Social Networks and Blogs' (2009) 26(1) *The Computer & Internet Lawyer* 12, 12.

¹¹ See R Latham, J Brown and C Butzer, 'Legal Implications of User-Generated Content: You Tube, MySpace, Facebook' (2008) 20(5) *Intellectual Property & Technology Law* 1, 1.

¹² Hocking, above n 10, 12-13.

¹³ B Fitzgerald, 'Theoretical Underpinning of Intellectual Property: "I am a Pragmatist but Theory is my Rhetoric"' (2003) 16(2) *Canadian Journal of Law and Jurisprudence* 179, 184.

¹⁴ J Scheuer, *The Sound Bite Society: How Television Helps the Right and Hurts the Left* (Routledge, 2001) 8.

¹⁵ The term 'sound bite' often carries a pejorative meaning, but this may be misplaced. Sound bites can be pithy, concise and meaningful, and may represent the product of considerable skill, effort and inspiration. Some, but obviously not all, may be compared to the dogmata (pithy sayings, or philosophical rules of life) of the Classical world. (See M Aurelius, *Mediations* (Meric Casaubon trans, first published 1906, 1949 ed) 180 on dogmata.) It is also noteworthy that Friedrich Nietzsche in his later work preferred epigrams to traditional philosophical treatises. (See RJ Hollingdale, *A Nietzsche Reader* (Penguin Classic, 1977) for examples.)

¹⁶ R Gradeless, *The First Law School Seminar Paper on Twitter: Twitter and Employment Law Issues* (2009) Social Media Law Student <<http://socialmedialawstudent.com/twitter/the-first-law-school-seminar-paper-on-twitter-twitter-and-employment-law-issues/#fn-1792-1>> at 25 June 2009.

¹⁷ Mr Justice H Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated?' (1996) *European Intellectual Property Review* 2, 53 reproduced in D Vaver (ed), *Intellectual Property Rights: Critical Concepts in Law* (Routledge, 2006) 93, 106.

¹⁸ See H Laddie et al, *The Modern Law of Copyright and Designs* (Butterworths, 3rd ed, 2000) 65-6 for a list of mundane writings that have been granted copyright protection.

In part II, an overview of copyright theory is given, with particular emphasis placed on the Lockean theory of property that is most relevant to Anglo-Australasian copyright decisions. In parts III and IV respectively, statutory and judicial approaches to copyright and literary works are explained. In part V, the general grounds for excluding insubstantial works from copyright protection are outlined.¹⁹ In part VI, separate examination of slogans, titles, neologisms, and Twitter tweets, as an example of Web 2.0 tools, is conducted. In conclusion, certain public policy issues that may arise from sound bites attracting copyright are sketched.

II THEORY

Legal theories underpinning copyright in literary works vary greatly between jurisdictions.²⁰ Nevertheless, following William Fisher's classification, the four perspectives that currently dominate theoretical writing about intellectual property are: Utilitarianism, Social Planning Theory, Personality Theory, and Labour Theory.²¹ (Brian Fitzgerald labels the concepts respectively as Economic Rights, Culturally Enriching Rights, Moral Rights, and Lockean Natural Rights.²²) The first two theories are consequentialist, inasmuch as they seek to promote particular ends. The second set is deontological in nature, being predicated on conceptions of natural rights. These theories are outlined below to the extent that they are relevant to original literary works.

A *Utilitarianism*

In the Utilitarian view, governments may create and extinguish all property rights, but, to maximise aggregate utility, should take into account incentives to avoid depressing initiative, justice among different classes of persons, and enlargement of choice and security creation.²³ With regard to copyright, authors or publishers are granted protection for the works they produce because such a privilege is for the public good. Since the grant of copyright protection must benefit the broad public, a Utilitarian approach holds the potential for interrupting market-based distributions. Furthermore, since Utilitarianism is founded on the assumption of utility maximisation – a peculiarly human phenomenon²⁴ – it would be possible to discount the interests of incorporeal corporations, if not their shareholders, from the utility calculus. Needless to say, such human-centric radicalism seems currently implausible, and, despite numerous versions of Utilitarianism, Utilitarian analysis of intellectual property rights is generally associated with Welfarist economics,²⁵ which is

¹⁹ The relevant laws of Australia, New Zealand and the United Kingdom are sufficiently similar to enable general observations to be made, with case law from all three jurisdictions being pertinent. Canadian and United States decisions are generally referred to as points of comparison.

²⁰ S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2006) 1.

²¹ Although, not in that order. See W Fisher, *Theories of Intellectual Property* (2000) Berkman Center for Internet & Society at Harvard University [8] <<http://cyber.law.harvard.edu/people/ffisher/iptheory.pdf>> at 27 June 2009.

²² Fitzgerald, above n 13, 180-4.

²³ A Ryan, 'Utility and Ownership' in RG Frey (ed), *Utility and Rights* (1984) 175, 188-9.

²⁴ Some utilitarians extend the utility calculus beyond humans. See, for example, P Singer, *Animal Liberation: A New Ethics for our Treatment of Animals* (Random House, 1975) 1-3.

²⁵ W Landes and R Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press of Harvard University Press, 2003) provides the pre-eminent treatise on an economic analysis of intellectual property rights.

predicated on achieving the social good by maximising aggregate utility,²⁶ where utility is indicated by consumption preferences in a market context.²⁷

Utilitarianism is problematic in many regards. It is unclear ‘what kind of sensations or experiences count as a basis of utility’,²⁸ and even prominent economists admit that utility cannot be directly measured.²⁹ Utility-based theories generally fail ‘to take seriously the differences between persons’,³⁰ and are ‘supremely unconcerned with the interpersonal distribution’ of individual utilities.³¹ As Amartya Sen observes, Utilitarianism is ‘a very limiting constraint even when the utility information is very rich’, but is ‘disastrous when the utility information is poor’.³² Furthermore, Utilitarianism is concerned with the ‘end state’ or ‘current time-slice’ principle of distributive justice, where ‘all that needs to be looked at, in judging the justice of a distribution, is who ends up with what’.³³ Finally, utility-based theories tend to value rights, only to the extent they improve aggregate utility,³⁴ and this is problematic when universal human rights inform governance.³⁵ Utilitarianism provides a broad justification for granting copyright to authors, but is flawed in the detail, and does not indicate with sufficient accuracy which types of artefact should attract copyright protection.

B Social Planning Theory

Like Utilitarianism, Social Planning Theory is consequentialist in nature: the key distinction between the two approaches lies in scope. Whereas Utilitarianism, in its predominant economic form, is aimed at achieving the Welfarist goal of maximum aggregate utility through market distributions, the telos of Social Planning Theory is more ambitious,³⁶ with its proponents being ‘willing to deploy visions of a desirable society’.³⁷ Social Planning Theory is the least well established and recognised of the intellectual property theories,³⁸ but is likely to exert greater influence in the future. How society is imagined is a crucial consideration in an information-based world. As Fitzgerald notes, ‘the process of propertizing information must be seen as being

²⁶ A Gewirth, *The Community of Rights* (University of Chicago Press, 1996) 134.

²⁷ J Stiglitz, *Economics of the Public Sector* (W W Norton & Company, 3rd ed, 2000) 63.

²⁸ I Hampshire-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (Blackwell, 1992, 2003 reprint) 318.

²⁹ Stiglitz, above n 27, 63.

³⁰ M Sandel, ‘Introduction’ in M Sandel (ed), *Liberalism and Its Critics* (1984) 1, 3.

³¹ A Sen, *On Economic Inequality* (Oxford University Press, expanded edition, 1997) 16.

³² A Sen, ‘Personal Utilities and Public Judgements: Or What’s Wrong with Welfare Economics?’ (1979) 89 *Economic Journal* 537, 554.

³³ R Nozick, ‘Moral Constraints and Distributive Justice’, in M Sandel (ed), *Liberalism and Its Critics* (1984) 100, 110.

³⁴ J Bankman and T Griffith, ‘Social Welfare and the Rate Structure: A New Look at Progressive Taxation’ (1986) 75(6) *California Law Review* 1905, 1917.

³⁵ None of Australia, New Zealand or the United Kingdom has an entrenched Bill of Rights, but, as signatories to the major human rights instruments, and having robust common law rights traditions, all can be described as human rights states.

³⁶ See N Weinstock Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106(2) *Yale Law Journal* 283, 363 for a ‘manifesto’.

³⁷ Fisher, above n 21, 6.

³⁸ Indeed, Fisher, a leading proponent of Social Policy Theory observes that commentators with similar views to his own do not agree on a name for the theory. *Ibid.*

inherently concerned with the way we live think, communicate and construct knowledge'.³⁹

C *Personality Theory*

Personality Theory, favoured by civilian jurisdictions, is founded on considerations of the author's dignity or natural rights, and is expressed as *droits d'auteur* or *droit moral*. In the words of Denis Diderot:

What form of wealth *could* belong to a man, if not a work of the mind...if not his own thoughts...the most precious part of himself, that will never perish, that will immortalize him?⁴⁰

Because the Personality Theory motivation for copyright is derived from a conception of 'the Author as Romantic Hero, whose works are an expression of individual personality of peculiarly high order',⁴¹ it privileges creativity and aesthetic value in a way that may appear anachronistic, even historically inaccurate.⁴² Nevertheless, Personality Theory does intimate a marrying of intellectual property rights and human rights.⁴³ While there may have been some reception of Personality Theory in bi-cultural Canada,⁴⁴ generally, Commonwealth countries 'are at odds with authors' rights philosophies of civilian countries'.⁴⁵

D *Labour Theory*

Lockean Labour Theory, which is deontological inasmuch as it views property rights as an inherent good rather than an end, generally informs judicial decisions regarding the existence of a literary work in Commonwealth jurisdictions. The focus here lies with rewarding effort expended in producing a work. Creativity and the aesthetic value of the work produced are not considerations, nor is the inherent dignity of the author.

Locke constructed a narrative to explain how unowned things could first become the property of individuals.⁴⁶ For him, the catalyst for converting unowned, naturally occurring things into individually owned property was the application of labour. Thus he reasoned, 'whatsoever, then, he removes out of the state that Nature hath provided

³⁹ Fitzgerald, above n 13, 184.

⁴⁰ Quoted by S Teilmann, 'Justification for Copyright: the Evolution of *le droit moral*' in F Macmillan (ed), *New Directions in Copyright Law, Vol 1* (2005) 73, 74.

⁴¹ W Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press, 2004) 47.

⁴² Ginsburg, above n 1, 132 observes 'even before the Author became Romantic, he still served as a shill for concentrated industry, then the printing-bookselling complex'. See P Loughlan, 'Moral Rights (A view from the Town Square)' (2000) 5(1) *Media and Arts Law Review* 1, 6-11 for a critique of moral rights.

⁴³ In terms of *Universal Declaration of Human Rights*, 10 December 1948, GA Res 217 A (III) art 27(2) (entered into force 10 December 1948) '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

⁴⁴ A Drassinower, 'Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law' (2004) 1(1) *University of Ottawa Law and Technology Journal* 105, 118.

⁴⁵ Cornish, above n 41, 45.

⁴⁶ J Locke, *Two Treatises of Government* (University of Chicago Press, first published 1690, 1990 ed) 129.

and it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property'.⁴⁷ Using the example of a man who might claim ownership in the acorns he has collected, Locke concluded, 'labour put a distinction between them and common'.⁴⁸ Property came to subsist in things because men applied their labour to make those things 'useful and beneficial'. This idea may be applied to written artefacts. While words are not owned by anyone, application of sufficient labour to selected words, for example, by arranging them into a poem, may render them 'useful and beneficial', and so transform them into property. As property of the creator (or the person at whose instruction the poem was created),⁴⁹ the text deserves protection from unauthorised copying.

A further feature of the Lockean conception of property is the proviso that individual property claims are subject to (unspecified) requirements of distributive justice. Thus Locke posits 'this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, no man but he can have a right to what that is once joined to, *at least where there is enough, and as good left in common for others*'.⁵⁰ As with Utilitarianism, within Lockean theory, there is ample space – but a space rarely occupied by progressive commentators – for strict proscription of individual property claims in order to maintain a fair share for others in the community.

In addition to the explicit requirement of applied labour, there is an implicit requirement that the product of the labour should manifest certain qualities. It is not enough for a copyright claimant to show that a written artefact originates from the application of a degree of labour sufficient to take the words used out of the common stock. The artefact itself must manifest qualities comparable to the usefulness and benefit that Locke indirectly prescribed.

A Lockean approach to copyright has certain advantages. It focuses on easily demonstrable inputs, such as labour and skill, and does not require courts to assess the degree of creativity applied or the literary merit of a work. Unlike Utilitarian or Social Policy approaches, courts need not engage in utility assessment or balance social welfare issues, which properly fall into the domain of the elected legislature. By focusing on production rather than authorship, this approach reflects commercial realities.⁵¹ Furthermore, the idea of literary works as produced texts coincides with currently influential poststructuralist conceptions of literature.⁵²

⁴⁷ Ibid 130.

⁴⁸ Ibid.

⁴⁹ Locke argued 'the turfs my servant has cut...become my property without the assignation or consent of anybody'. Ibid.

⁵⁰ Ibid (emphasis added).

⁵¹ Cornish, above n 41, 43 observes how authors have seldom benefited from copyright, and liberal economists 'have long derided copyright for the disparity between its ideal foundations and the harsh realities of its exploitation' on the subservience in practice of authors' 'natural' rights to the interests of the publishing industry. See also Ginsburg, above n 1.

⁵² J Pila and A Christie, 'The Literary Work Within Copyright Law: An Analysis of its Present and Future Status' (1999) 13 *Intellectual Property Journal* 133, 176 observe 'a comparison...with modern critical and linguistic theory reveals a surprisingly close correlation between the legal category of the literary work and non-legal conceptions of the text'.

However, the Lockean emphasis on individual property rights poorly reflects the necessarily cooperative nature of production, and this blind spot has particular contemporary relevance.⁵³ Like the Welfarist approach, application of Lockean theory may lead to excessive monopolisation of language, which raises acute freedom of speech concerns. While the purpose of this article is to consider whether short items of text may constitute literary works, rather than issues of infringement, the analysis is alert to the broader context of policy and social considerations.

III STATUTE AND THEORY

Ronan Deazley observes that Locke's writings 'loomed large on the political landscape at the same time as the need for a statutory system of copyright protection was being lobbied with Parliament'.⁵⁴ However, although concerns for individual property rights are implicit in the first copyright legislation,⁵⁵ the Statute of Anne 'has a much broader social focus and remit, one that concerned the reading public, the continued production of useful literature, and the advancement and spread of education'.⁵⁶ Similarly, the United States Constitution empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.⁵⁷ Beyond historical antecedents, Keith Garnett et al argue that the purpose of copyright law is to ensure a just reward for just labour, which, in turn, provides stimulus to creativity.⁵⁸ Statutory measures to grant and limit copyright in literary works are, then, it seems, broadly utilitarian in their express motivation. Authors are granted copyright in their works because it encourages forms of endeavour that benefit society in general.

The 'essential source of original works remains the activities of authors' and various provision of copyright statutes 'fix on "the author"'.⁵⁹ The conferral of first ownership rights to the author of a work is consistent with Lockean theory (or, indeed, with Personality Theory),⁶⁰ but the influence of Locke is most evident in judicial engagement with copyright in literary works, rather than in the text of legislation.

The *Berne Convention*, which seeks to extend copyright protection among signatories, provides:

⁵³ See, for example, C Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford University Press, 2006) and Benkler, above n 9 on the cooperative production of knowledge.

⁵⁴ R Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing Limited, 2006) 5.

⁵⁵ *Copyright Act 1710*, 8 Anne, c 9 ('Statute of Anne') noted that unauthorised copying was leading 'very great Detriment, and too often to the Ruin of them and their Families' of authors or the proprietors of books and writings. *The Statute of Anne* (1710) The History of Copyright <<http://www.copyrighthistory.com/anne.html>> at 20 October 2009.

⁵⁶ Deazley, above n 54, 13. The long title of the *Copyright Act 1710*, 8 Anne, c 19 was 'an Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned'.

⁵⁷ *United States Constitution* art 1, 8, cl 8.

⁵⁸ K Garnett, G Davies and G Harbottle (eds), *Copinger and Skone James on Copyright* (Sweet & Maxwell, 15th ed, 2005) vol 1, 27.

⁵⁹ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [96] (Gummow, Hayne and Heydon JJ).

⁶⁰ See *Copyright Act 1968* (Cth) s 32; *Copyright Act 1994* (NZ) s 21; *Copyright Act 1988* (UK) c 48, s 11.

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁶¹

These moral rights are consistent with Personality Theory. Commonwealth countries have been slow to include such rights in copyright statutes. Fitzgerald notes that, while Canada has included moral rights in its copyright legislation since 1931, they have not featured prominently in Canadian copyright law.⁶² Australia,⁶³ New Zealand,⁶⁴ and the United Kingdom⁶⁵ now also include moral rights in their copyright legislation, but since these may be contracted away,⁶⁶ and commonly are, their inclusion seems to be more in the nature of compliance than fundamental principle.

The Statute of Anne protected books and writings: the scope of protection has widened since then in accordance with advances in technology and the growth in the commercial significance of different types of writings. The term 'book' was defined in 1842 United Kingdom legislation as meaning and including 'every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan separately published'.⁶⁷ However, the *Berne Convention*, which the United Kingdom signed in 1886, contemplated a wider definition of 'literary work',⁶⁸ and consequently the *Copyright Act 1911* (UK), which became the model for copyright statutes across the British Empire, provided protection for 'original literary works'.⁶⁹ By virtue of the *Copyright Act 1912* (Cth), the 1911 imperial Act, subject to technical amendments, applied in Australia until 1969. The term 'literary work' was not positively defined, but included 'maps, charts, plans, tables and compilations'.⁷⁰ A similar formulation was followed by a 1956 statute,⁷¹ which provided copyright protection to any original literary work. Once more, 'literary work' was not defined but included 'any written table or compilation'.⁷² The current, 1988 United Kingdom Act defines a 'literary work' as 'any work, other than a dramatic or musical work, which is written, spoken or sung' and includes '(a) a table or compilation, and (b) a

⁶¹ *Berne Convention for the Protection of Literary and Artistic Works* (Paris text 1971) signed 9 September 1886, art 6bis(1) (entered into force 5 December 1887).

⁶² Fitzgerald, above n 13, 183.

⁶³ *Copyright Act 1968* (Cth) pt IX.

⁶⁴ *Copyright Act 1994* (NZ) pt 4.

⁶⁵ *Copyright Act 1988* (UK) c 48, ch IV.

⁶⁶ *Copyright Act 1968* (Cth) ss 195AW, 195AWA; *Copyright Act 1994* (NZ) s 107; *Copyright Act 1988* (UK) c 48, s 87.

⁶⁷ *Copyright Act 1842* (UK) 5 & 6 Vict, c 45 reproduced in C Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press, 2003) 259.

⁶⁸ *Berne Convention for the Protection of Literary and Artistic Works* (Paris text 1971) signed 9 September 1886, art 2(1) (entered into force 5 December 1887), defines 'literary and artistic works' as including 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature.'

⁶⁹ *Copyright Act 1911* (UK) 1 & 2 Geo 5, c 46, s 1(1). The requirement for originality was a statutory novelty. See R Burrell, 'Copyright Reform in the Early Twentieth Century: the View from Australia' (2006) 27(3) *Legal History* 239 for an analysis of early Australian copyright legislation.

⁷⁰ *Copyright Act 1911* UK 1 & 2 Geo 5, c 46, s 35(1).

⁷¹ *Copyright Act 1956* UK 4 & 5 Eliz 2, c 74, s 2(1), s 48.

⁷² Maps, plans and charts, along with diagrams, were included in the definition of 'drawing' and protected as artistic works. See *Copyright Act 1956* UK 4 & 5 Eliz 2, c 74 ss 48, 3(1)(a).

computer program'.⁷³ The *Copyright Act 1968* (Cth) is based on the 1956 Act, but has been updated to accommodate technological developments so that the definition of 'literary work' currently includes '(a) a table, or compilation, expressed in words, figures or symbols; and (b) a computer program or compilation of computer programs'.⁷⁴ All New Zealand copyright legislation has been derived from the United Kingdom,⁷⁵ with the current *Copyright Act 1994* (NZ) being based on relevant parts of the 1988 Act.

IV JUDICIAL APPROACHES

Copyright legislation confers copyright protection on original literary works but typically defines the relevant terms vaguely, if at all. No definition is provided for 'original', and the words used to define 'literary work',⁷⁶ 'do not really constitute a definition'.⁷⁷ A crucial judicial function, therefore, lies with imbuing these terms with practical meaning. There is broad curial consensus on certain issues. The expression of an idea, not an idea itself, constitutes the 'work' that may attract copyright protection,⁷⁸ and if the idea and expression cannot be distinguished, no copyright will subsist.⁷⁹ Although many literary works will manifest literary merit, 'literary' refers to the manner of written production or possible capture in writing, not the work's aesthetic qualities.⁸⁰ Furthermore, no element of novelty akin to the inventiveness necessary for the grant of a patent is required for a literary work to be considered original.⁸¹ Finally, the work must originate from the author's efforts and not be copied from another work.⁸² Views diverge on what the author must invest in the work in order to claim originality: is the application of labour sufficient, as Lockean theory implies, or is something more needed?

In the common law world,⁸³ judicial engagement with originality is commonly distinguished between a Lockean 'sweat of the brow' and a broader natural rights

⁷³ *Copyright, Designs and Patents Act 1988* (UK) c 48, s 3(1).

⁷⁴ The inclusion of computer programs was effected by the *Copyright Amendment Act 1984* (Cth) and a new definition provided by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

⁷⁵ P Sumpter, *Intellectual Property Law: Principles in Practice* (CCH, 2006) 5.

⁷⁶ See *Copyright Act 1968* (Cth) s 10; *Copyright Act 1994* (NZ) s 2; and *Copyright, Designs and Patents Act 1988* (UK) c 48, s 3(1).

⁷⁷ Laddie et al, above n 18, 63.

⁷⁸ *Hollinrake v Truswell* [1894] 3 Ch 420, 424 (Lord Herschell). Sims, above n 3, 362 argues 'copyright is being used to protect facts and information, so that the idea/expression dichotomy (as it relates to facts and information) is simply a myth, and a dangerous myth at that [footnotes omitted]'.
⁷⁹ *Autodesk Inc v Dyason* (1992) 173 CLR 330, 345 (Dawson J).

⁸⁰ *Football League Ltd v Littlewoods Pools Ltd* [1959] Ch 637, 651 Upjohn J; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [33] (French CJ, Crennan and Kiefel JJ).

⁸¹ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608-9 (Peterson J); *Feist Publications Inc v Rural Tel Service Co* 499 US 340, 345 (1991) (O'Connor J); *Henkel KgaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577, 589 (Tipping J); *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [33] (French CJ, Crennan and Kiefel JJ).

⁸² *Feist Publications Inc v Rural Tel Service Co* 499 US 340, 358 (1991) (O'Connor J); *Sawkins v Hyperion* [2005] 3 All ER 636, 643 (Mummery LJ); *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [33] (French CJ, Crennan and Kiefel JJ).

⁸³ See Teilmann, above n 40 for a discussion of French cases based on *droit moral*. A Drassinower, 'Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law' (2004) 1(1) *University of Ottawa Law and Technology Journal*, 105, 118 intimates that Canada's bi-culturalism may makes its courts more receptive to the civilian conceptions of copyright.

‘creativity’ approach. This distinction is most obvious in compilation cases. Not all literary works ‘are of the same kind and one must identify and keep in mind the particular kind of work within the Act in which copyright is claimed to exist’.⁸⁴ Nevertheless, while this article concerns brief writings and not compilations of data, the originality tests applied to compilations are relevant.

The doctrinaire Lockean test may be characterised as assessing whether a work originates from an author and is more than a mere copy of another work.⁸⁵ In contrast, while recognising that the ‘the originality requirement is not particularly stringent’, the United States Supreme Court held in *Feist Publications Inc v Rural Telephone Service Co Inc* that the work must ‘display some minimal level of creativity’.⁸⁶ Where ‘the creative spark is utterly lacking or so trivial as to be virtually nonexistent’, a compilation will not, under the creativity approach, attract copyright.⁸⁷ After a comprehensive analysis of English and Australian authorities, a requirement of creativity was roundly rejected in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*,⁸⁸ which, like *Feist*, concerned the originality of a telephone directory.

While Canada may have moved towards a *Feist*-style creativity test in *Tele-Direct (Publications) Inc v American Business Information Inc*,⁸⁹ in *CCH Canadian Ltd v Law Society of Upper Canada*, the Supreme Court of Canada concluded that ‘the correct position falls between these extremes’ of sweat of the brow and creativity, that is:

What is required to attract copyright protection in the expression of an idea of an idea is an exercise of skill and judgement. By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgement, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible option in producing the work.⁹⁰

However, it is not obvious that a hybrid test is necessary or helpful. What seems necessary and helpful is clarity on what the Lockean test requires.

In *Sullivan v FNH Investments Pty Ltd t/as Palm Bay Hideaway*, the Federal Court of Australia used a test of ‘judgment, effort *and* skill’ in deciding whether copyright subsisted in the slogan ‘Somewhere in the Whitsundays’,⁹¹ and, in the immediately following paragraph, held that ‘the Resort that Offers Precious Little’ ‘did not involve the required degree of judgment, effort *or* skill’.⁹² Similarly, in *Computer Edge Pty Ltd v Apple Computer Inc*, the High Court of Australia held:

⁸⁴ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491, 532 (Lindgren J).

⁸⁵ *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13, [15] (McLachlan CJ).

⁸⁶ 499 US 340, 358 (1991) (O’Connor J).

⁸⁷ *Ibid.*

⁸⁸ (2002) 119 FCR 491, 532 (Lindgren J).

⁸⁹ 154 DLR (4th) 328.

⁹⁰ 2004 SCC 13, [16] (McLachlan CJ).

⁹¹ [2003] FCA 323, [112] (Jacobson J) (emphasis added).

⁹² *Ibid.*

Originality is a matter of degree, depending on the amount of skill, judgment *or* labour that has been involved in making the work...There is no doubt that the production of the source programs in the present case involved sufficient skill, labour *and* experience on the part of the authors to satisfy the requirement of originality.⁹³

In *Sunlec International Pty Ltd v Electropar Ltd*, the Auckland High Court identified the proper test as the application of ‘more than minimal skill *and* labour’,⁹⁴ but then applied a test of ‘independent skill, labour *and* judgment’.⁹⁵ In *Ladbroke (Football) Ltd v William Hill (Football) Ltd* each of the Law Lords used different words or combinations of words to identify originality. Lord Reid referred to ‘skill, judgment *or* labour’,⁹⁶ Lord Evershed to ‘skill, labour *or* judgment’,⁹⁷ Lord Hodson to ‘work, labour *and* skill’,⁹⁸ and Lord Pearce to ‘labour *or* skill *or* ingenuity *or* expense’.⁹⁹ In *Football League Ltd v Littlewoods Pools Ltd*, the criterion of ‘labour, judgment *or* literary skill *or* taste’ was approved,¹⁰⁰ but a test of ‘some labour, skill, judgment *or* ingenuity’ applied.¹⁰¹ In sum, numerous decisions, which all ostensibly follow Lockean doctrine, in fact, propose distinctly different tests. However, despite this confusion, and although *Desktop Publishing* employed a narrow applied labour (and money) test – perhaps an unduly narrow approach¹⁰² – there is a clear tendency for modern cases to require the application of skill and labour.¹⁰³

In *Ice TV*, the High Court of Australia observed that the sweat of the brow and creativity tests:

have been treated as antinomies in some sort of mutually exclusive relationship in the mental processes of an author or joint authors. They are, however, kindred aspects of a mental process which produces an object, a literary work, a particular form of expression which copyright protects. A complex compilation or a narrative history will almost certainly require considerable skill and labour, which involve both “industrious

⁹³ (1986) 161 CLR 171, [11] Gibbs CJ (emphasis added).

⁹⁴ (2008) 79 IPR 411, [44] (Wylie J) (emphasis added).

⁹⁵ Ibid [62] (Wylie J) (emphasis added). This latter test is consistent with the approach of the High Court of Australia in *Data Access Corp v Powerflex Services Pty Ltd* [1999] 202 CLR 1, 42 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁹⁶ [1964] 1 All ER 465, 469 (emphasis added).

⁹⁷ Ibid 472 (emphasis added).

⁹⁸ Ibid 475 (emphasis added).

⁹⁹ Ibid 480 (emphasis added).

¹⁰⁰ Used in *Macmillan & Co Ltd v K & J Cooper* (1928) 40 TLR 186 (Lord Atkinson) (emphasis added).

¹⁰¹ [1959] 1 Ch 637, 651 (Upjohn J) (emphasis added).

¹⁰² In *IceTV*, which concerned television schedules, while The Court’s analysis of originality and subsistence of copyright was limited because *IceTV* had admitted that Nine Network’s weekly schedule was an original literary work, but noted ‘the need to treat with some caution the emphasis in *Desktop Marketing* upon “labour and expense” per se and upon misappropriation’. See *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [196] (Gummow, Hayne and Heydon JJ).

¹⁰³ See *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, 701 (Lord Bingham of Cornhill); *Ultra Marketing (UK) Ltd v Universal Components Ltd* [2004] EWHC (Ch) 468, [51] (Lewison J); *Henkel KGaA v Holdfast New Zealand Limited* [2007] 1 NZLR 577, 589 (Tipping J); *State of Victoria v Pacific Technologies (Australia) Pty Ltd* (2009) 177 FCR 6, [18] (Emmet J).

collection” and “creativity”, in the sense of requiring original productive thought to produce the expression, including selection and arrangement, of the material.¹⁰⁴

University of London Press Ltd v University Tutorial Press Ltd,¹⁰⁵ which concerned copying of papers for maths exams, is commonly cited as an archetypal sweat of the brow case.¹⁰⁶ However, in his decision, Peterson J observed that the authors have ‘proved that they had thought about the questions which they set, and that they made notes or memoranda for future questions and drew on these notes for the purposes of the questions they set’.¹⁰⁷ Clearly then, the authors engaged in an intellectually demanding process. They may not have shown traditional, literary creativity but the nature of the mental labour they applied was cognitively comparable to creativity, both requiring ‘some independent intellectual effort’.¹⁰⁸ Likewise, in *Desktop Marketing*, while focus was placed on ‘Telstra’s substantial labour and expenses in performing those activities’,¹⁰⁹ ‘originality in the compilation could be founded on the process of gathering and ordering the data’.¹¹⁰ Decision making with regard to the research to be conducted or how data are to be ordered requires considerable intellectual effort.¹¹¹ The Court’s conclusion in *IceTV* is, therefore, persuasive, viz:

It may be that too much has been made, in the context of subsistence, of the kind of skill and labour which must be expended by an author for a work to be an “original” work. The requirement of the Act is only that the work originates with an author or joint authors from some independent intellectual effort.¹¹²

In sum, the Lockean originality test, in its traditional expression, requires a literary work to originate from its author and be the product of more than minimal skill and labour. *IceTV* usefully generalises the test by requiring the application of ‘some independent intellectual effort’.

The discussion so far, has focused on the requisite inputs for copyright to subsist. The quality of the output is also important in the Lockean scheme. In *Sawkins v Hyperion*, Mummery LJ said a protected work may lack ‘novelty, usefulness, inventiveness, aesthetic merit, quality or value ... [and] may be complete rubbish and utterly worthless but copyright protection may be available for it’.¹¹³ But a unique regard for inputs, without consideration of the artefact produced seems misplaced. Locke implied that certain qualities (usefulness and benefit) should be manifest in the output of applied labour if property rights are to accrue. This requirement is otherwise seen

¹⁰⁴ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [47] (French CJ, Crennan and Kiefel JJ) (footnotes omitted).

¹⁰⁵ [1916] 2 Ch 601.

¹⁰⁶ See, for example, *CCH Canadian Ltd v Law Society of Upper Canada* 2004 SCC 13, [15] (McLachlan CJ).

¹⁰⁷ *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601, 609 (Peterson J).

¹⁰⁸ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [33] (French CJ, Crennan and Kiefel JJ).

¹⁰⁹ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491, 536 (Lindgren J).

¹¹⁰ C Golvan, *Copyright Law and Practice* (Federation Press, 2007) 64.

¹¹¹ In *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491, 507, Lindgren J found the language of ‘labour and research’, as used in *Ager v Peninsular & Oriental Steam Navigation Co* (1884) 26 Ch D 637, to be appropriate for compilations.

¹¹² *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [48] (French CJ, Crennan and Kiefel JJ).

¹¹³ [2005] 3 All ER 636, 643 (Mummery LJ).

in case law. Thus, a ‘grossly immoral’ original literary work may not enjoy copyright,¹¹⁴ and a compilation of facts must supply ‘intelligible information’, so that ‘a totally random collection of listings of unrelated pieces of factual information would not be a compilation under the Act’.¹¹⁵ Generally, to attract copyright, an original literary work must manifest certain communicative qualities: these are commonly taken to be ‘either information and instruction, or pleasure in the form of literary enjoyment’.¹¹⁶

Once copyright in an artefact has been established, the next practical issue is whether that bundle of rights, notably the right to reproduce the work in material form, has been infringed. Infringement occurs when a substantial part of a work is taken,¹¹⁷ and is decided on the facts of each case.¹¹⁸ Cornish observes that infringement ‘turns as much on what makes the work sell as on any aesthetic criterion’,¹¹⁹ but the key consideration is the quality of the part copied, not merely the extent of copying,¹²⁰ and this requires further consideration of originality. An analysis of infringement lies beyond the scope of this article, nevertheless, it is noted that infringement is a crucial practical concern in relation to brief writings because, if granted copyright protection, phrases and individual words, ‘the building blocks of culture [c]ould be entombed for many, many years’.¹²¹

V INSUBSTANTIAL ARTEFACTS

Certain written artefacts – titles, slogans and single words – have traditionally been denied copyright protection. (Twitter ‘tweets’ may be expected to be treated similarly.) The grounds for denying copyright may correspond to basic principles. Insufficient inputs might be applied in producing the artefact,¹²² or the artefact may not originate from the claimant’s labour. For example, a proverb or cliché, coming from the common stock of language, cannot be said to originate from a particular person.¹²³ An artefact itself may fail to attract copyright protection because it lacks the usefulness and benefit Locke required in an item of property, that is, in relation to literary works, either information and instruction or pleasure in the form of literary expression. Furthermore, the writing may not express an idea or may be indistinguishable from an idea. However, insubstantial artefacts may be denied copyright on grounds inconsistent with basic principles. Before considering specific artefacts, these grounds will be outlined.

¹¹⁴ *Glyn v Westin Feature Film Company* [1916] 1 Ch 261, 269 (Younger J). See O Morgan ‘Copyright, the Public Interest and Content Restrictions’ (2003) 8 *Media & Arts Law Review* 213 for a discussion of different judicial approaches to obscene works and copyright protection.

¹¹⁵ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491, 532-3 (Lindgren J).

¹¹⁶ The *Hollinrake v Truswell* formulation approved in *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 143 (Stephenson LJ).

¹¹⁷ See *Copyright Act 1968* (Cth) s 36; *Copyright Act 1994* (NZ) s 29; and *Copyright, Designs and Patents Act 1988* (UK) c 48, s 16. See *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2000] 4 All ER 239, 246 (Gibson J) for a discussion of substantial copying.

¹¹⁸ *Football League Ltd v Littlewoods Pools Ltd* (1959) 1 Ch 637, 657 (Upjohn J).

¹¹⁹ Cornish, above n 41, 46.

¹²⁰ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [30] (French CJ, Crennan and Kiefel JJ).

¹²¹ Sims, above n 3, 362.

¹²² See Laddie et al, above n 18, 87.

¹²³ *Dicks v Yates* (1881) 18 Ch D 76, 92 (Lush LJ).

A *De Minimis Rule*

In the recent case of *State of Victoria v Pacific Technologies (Australia) Pty Ltd*, the High Court of Australia observed that ‘short phrases, single sentences and the like’ are ‘too short to qualify as a literary work’ despite ‘skill and labour having been expended in their creation.’¹²⁴ While not inconsistent with previous decisions,¹²⁵ the argument that an artefact may consist of too few words to attract protection is, in general, unpersuasive. The proper focus lies with the qualities of an original literary work, not on the quantity of its constitutive words. A well-constructed haiku is no less worthy of copyright protection than an epic novel. Laddie et al suggest that where ‘the courts appear to be denying protection on the grounds that the resulting matter is too short [,][i]t is better to say that a very short phrase (eg “Splendid Misery”) is not a literary work at all regardless of any skill or labour’.¹²⁶ This may be so, but it is not clear from basic principles why such an artefact ‘is not a literary work at all’. As Justine Pila and Andrew Christie observe, ‘the courts tend to apply the de minimis principle as a matter of course in cases involving words, titles and phrases without exploring the conceptual basis for such application’.¹²⁷ While a quantitative de minimis approach provides insufficient grounds for exclusion, exclusion on qualitative grounds is persuasive in principle, if difficult to pin down in practice. Thus Pila and Christie propose a ‘test of metaphysical triviality’,¹²⁸ but this does not seem to fit well with the pragmatism of the applied labour approach.

B *Lack of Inventive Originality*

The originality requirement for a literary work is low.¹²⁹ And yet, where courts have denied copyright to insubstantial artefacts on the grounds of a lack of originality, ‘they have applied a much higher standard than in other areas, one that comes close to requiring “inventive originality”’.¹³⁰ The proper query should be whether the artefact manifests requisite communicative qualities. Denying an artefact copyright protection because of the absence of creativity as a component of applied labour is inconsistent with the bulk of Anglo-Australian precedent.

C *No Idea Expressed*

In *Exxon Corporation*, the Court of Appeal held that a single word such as ‘Exxon’ ‘could not be regarded as a literary work because the latter meant something which was intended to afford the reader either information and instruction or pleasure in the form of literary enjoyment’.¹³¹ Pumfrey J plausibly criticised this approach in *Navitaire Inc v easyJet Airline Company*, and, dismissing such an archaic test, suggested that ‘in the end, the question is merely whether a written artefact is to be

¹²⁴ (2009) 177 FCR 6, [20] (Emmet J).

¹²⁵ See S Ricketson, *The Law of Intellectual Property* (LBC Information Services, 1984) 100 for a discussion.

¹²⁶ Laddie et al, above n 18, 87.

¹²⁷ Pila and Christie, above n 52, 145.

¹²⁸ Ibid 146.

¹²⁹ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [33] (French CJ, Crennan and Kiefel JJ).

¹³⁰ Ricketson, above n 124, 110. *Dicks v Yates* (1881) 18 Ch D 76 is the leading novelty case.

¹³¹ *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 143 (Stephenson LJ).

accorded the status of a copyright work having regard to the kind of skill and labour expended, the nature of copyright protection and its underlying policy'.¹³² (*Exxon Corporation* concerned the 1956 Act and *Navitaire* the 1988 Act.)

The concept of written words expressing an idea is fundamental to a protected literary work. Without independent meaning, an artefact does not express an idea, and all copyright works are founded on the expression of an idea by the author.¹³³ Therefore, whether one considers the Court of Appeal's reasoning in *Exxon Corporation* or Pumfrey J's reasoning in *Navitaire* to be correct, without the expression of an idea, there can be no original literary work. This is the most persuasive ground for finding an artefact inadequate. Even so, the lack of communicative qualities is the determinative ground for exclusion, not the brevity of the writing. A thousand pages of gibberish, which fail to express an idea, should also be denied copyright protection for lacking communicative quality.¹³⁴

VI DIFFERENT ARTEFACTS

Sam Ricketson cautions against arbitrary categorisation of artefacts,¹³⁵ and yet slogans, titles and neologisms are commonly grouped as 'insubstantial works' despite their radically different natures. It is therefore instructive to consider each type of artefact separately, and to apply Lockean principles to each.

A Slogans

Advertising may be defined as 'the sharing of information about a specific product in the most dramatic, compelling, persuasive and memorable fashion possible'.¹³⁶ 'The task of devising advertising slogans often requires a high level of skill and judgement',¹³⁷ and 'it should not be assumed that an advertising slogan, or a title, is incapable of protection as a matter of principle'.¹³⁸ Despite copyright claimants often expending labour, sufficient in quantity and quality, in the creation of advertising copy, slogans are traditionally denied copyright protection. This may be attributable, in part at least, to modern practices being different from the practices considered by old authorities.

Kirk v Fleming featured an artefact that manifested none of the qualities associated with modern advertising. It is understandable, then, that the court should have observed that the advertising copy – 'Good sight is your most valued asset. Avoid the predicament of being without your glasses. Let us make you a spare pair. Broken lenses promptly and accurately repaired' – was nothing more than the stringing together of four ordinary and commonplace sentences.¹³⁹ Copyright protection was denied, it seems, principally because the artefact was prosaic and dull: this may imply insufficient applied labour or skill, but may also indicate an unnecessary assessment

¹³² [2004] EWHC 1725 (Ch) [80] (Pumfrey J).

¹³³ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, 706 (Lord Hoffmann).

¹³⁴ See *Dicks v Yates* (1881) 18 Ch D 76, 92 (Lush LJ) for a contrary opinion.

¹³⁵ Ricketson, above n 124, 99.

¹³⁶ R Harding, *Making Creativity Accountable: How Successful Advertisers Manage Their Television and Print* (Quorum Books, 1991) 1.

¹³⁷ Garnett, Davies and Harbottle, above n 58, 992.

¹³⁸ Laddie et al, above n 18, 87.

¹³⁹ *Kirk v Fleming* (1929) MacG (1928-35) 44, 50.

of the literary merit of the output. The slogan ‘Beauty is a social necessity, not a luxury’ was denied copyright protection on similar grounds.¹⁴⁰ Presumably, if the advertising copy had been extraordinary and unusual, or structured in a striking and memorable way – as many slogans are today – the courts’ objections to finding a work worthy of protection would have been overcome.

In contrast to the commonly cited cases above, in *Cotton v Frost*,¹⁴¹ a dentist’s advert, which linked four phrases and pictures relating to desirable teeth with the slogan ‘You get all four in one dental plate’, passed the applied labour test. Using the terminology of *IceTV*, it may be said production of the work required some independent intellectual effort. More recently, in *Sunlec International Pty Ltd v Electropar Ltd*,¹⁴² the Auckland High Court was required to determine, inter alia, whether copyright subsisted in the slogan “‘Field Friendly’ – the best choice for field work’. The Court followed a doctrinaire Lockean approach and conducted an inquiry into the ‘circumstances in which the slogan was evolved and has been created’, based on the premise that, provided ‘independent skill, labour and judgment have been involved in its creation such that it satisfies the requirement of originality’ and ‘conveys information, instruction or pleasure’, the artefact may attract copyright protection.¹⁴³ In reaching his conclusion that the slogan did indeed attract copyright protection, Wylie J found that ‘independent skill, labour and judgment’ had been applied; the artefact originated with the plaintiff.¹⁴⁴

The words ‘Help-Help-Driver-in-Danger-Call-Police-Ph.000’ (the Help Words) were the subject of a recent copyright claim heard by the Federal Court of Australia. The Court denied the existence of copyright in the Help Words, on several grounds, the most persuasive being that they were no distinguishable from the idea they expressed and they did ‘no more than state the obvious words for use in drawing attention to a taxi driver requiring urgent attention’.¹⁴⁵ Unlike the slogan considered in *Sunlec*, it cannot be said that independent intellectual effort had been applied.

B Titles

Book titles and similar artefacts do not generally attract copyright protection in their own right.¹⁴⁶ They may be properly excluded from insufficiency of applied labour, but, other, less persuasive grounds may be given. In *Francis Day & Hunter Ltd v 20th Century Fox Corporation Ltd*, the song title ‘The Man Who Broke the Bank at Monte Carlo’ was denied copyright protection because ‘break the bank’ was considered to be

¹⁴⁰ *Sinanide v La Maison Kosmeo* (1928) 139 LT 365.

¹⁴¹ [1936] NZLR 627.

¹⁴² (2008) 79 IPR 411.

¹⁴³ *Ibid* [62] (Wylie J).

¹⁴⁴ *Ibid*. However, it seems the Court could not resist passing comment on the literary worth of the slogan, with Wylie J unnecessarily observing ‘although the language used is taken from the common stock of the English language, the slogan uses language in a succinct and relatively memorable way’ and was not hackneyed.’

¹⁴⁵ *State of Victoria v Pacific Technologies (Australia) Pty Ltd* (2009) 177 FCR 6, [22]-[3] (Emmet J).

¹⁴⁶ Garnett, Davies and Harbottle, above n 58, 985. In *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [27] (French CJ, Crennan and Kiefel JJ), the High Court of Australia observed ‘generally speaking, no copyright could be claimed in a programme title alone’.

a hackneyed expression, and Monte Carlo an obvious place for this to happen.¹⁴⁷ Reversing the argument, provided other criteria were met, presumably the Court would have found the title to be capable of attracting copyright if it had been novel and non-obvious. Even so, a requirement of novelty is inconsistent with basic principles.

Lord Hodson noted in *Ladbroke (Football)* that, a situation where headings were elaborate and given each case in English, French, German and Spanish, provided precedent for titles attracting copyright protection.¹⁴⁸ In a more recent decision, the Scottish Court of Sessions granted an interim interdict to prevent hypertext linking to unexceptional headings on a newspaper's website, partly on the grounds that the headings constituted literary works.¹⁴⁹ However, it is doubtful whether this case represents a radical shift in the judicial approach to titles. The decision was influenced by a concession by the defence that a headline could constitute a literary work.¹⁵⁰ Internet technology may raise particular issues that militate against drawing general conclusions,¹⁵¹ and David Harvey concludes 'the question of copyright in a hypertext reference itself, either as a literary work or as a cable programme has not arisen'.¹⁵²

Unlike, slogans and single words, titles may be excluded because they are not considered discrete artefacts. This may be a legacy of pre-1911 legislation, which protected 'books', rather than literary works. However, a similar perception – a title is not a discrete work worthy of copyright protection – may inform both the omission of titles from the definition of book before 1911 and the judicial exclusion of titles from original literary works when interpreting later legislation.

In the contemporary entertainment world, it is implausible to suggest that significant skill and effort do not go into creating titles. Like advertising slogans, titles convey information in an immediate way; they must, for example, suggest genre, and catch the attention of the causal observer. Being capable of constituting discrete units of communication, a title may plausibly express an idea without the need for further

¹⁴⁷ [1940] AC 112, 123 (Lord Wright). *Francis Day* was a Canadian case heard by the Judicial Committee of the Privy Council. The Canadian legislation was based on the *Copyright Act 1911* (UK) 1 & 2 Geo 5, c 46. Dismissing the scenario of breaking the bank in Monte Carlo as obvious appears to be based on the judgment of an idea, rather than its expression.

¹⁴⁸ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465, 476, discussing *Lamb v Evans* [1893] 1 Ch 218. However, Garnett, Davies and Harbottle, above n 58, 62 plausibly suggest that *Lamb v Evans* may have been a compilation case, rather than a pure title case.

¹⁴⁹ *Shetland Times Ltd v Dr Jonathan Wills* [1996] ScotCS CSOH_6 (24 October 1996) <http://www.bailii.org/scot/cases/ScotCS/1996/1997_SC_316.html> at 25 June 2009.

¹⁵⁰ In *Shetland Times Ltd v Dr Jonathan Wills* [1996] ScotCS CSOH_6 (24 October 1996) Lord Hamilton said: 'I was not referred to any authority on this aspect. While literary merit is not a necessary element of a literary work, there may be a question whether headlines, which are essentially brief indicators of the subject matter of the items to which they relate, are protected by copyright. However, in light of the concession that a headline could be a literary work and since the headlines at issue (or at least some of them) involve eight or so words designedly put together for the purpose of imparting information, it appeared to me to be arguable that there was an infringement, at least in some instances.'

¹⁵¹ J Connolly and S Cameron, 'Fair Dealing in Webbed Links of Shetland Yarns: Shetland Times Ltd. v. Dr. Jonathan Wills and Another' (1998) 2 *Journal of Information Law & Technology* [5] argue 'the technology of the Internet is sui generis and does not fit easily onto the existing copyright structure'. <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/connolly/#a5> at 1 March 2009.

¹⁵² Harvey, above n 2, 668.

contextual information.¹⁵³ Reuben Stone observes ‘in the motion picture industry, titles have been treated as commodities to be bought and sold like any other. It is not unknown for a film company to purchase what it regards as the rights to a title alone quite independent of the work from which it is derived’.¹⁵⁴ So, at least with regard to film titles, the law seems to be incompatible with commercial practice.¹⁵⁵ While basic principles should be applied to any putative literary work, titles are, in practice, distinguishable from other artefacts inasmuch as they normally form part of a greater work ‘and the issue here may be whether the copying of the title amounts to the taking of a substantial part of the whole work’,¹⁵⁶ and this ‘will almost invariably not be the case’.¹⁵⁷ But this is a matter of infringement, not subsistence of copyright.

C *Single Words*

1 *Existing Words*

Words in the common stock of language are analogous to natural objects in the Lockean original state in the sense of not being individually owned. But, unlike the bounty of nature, words result from countless human interactions and forms of cooperation over generations and between different linguistic groups.¹⁵⁸ Language radically informs human ontology: as Ludwig Wittgenstein observed, ‘commanding, questioning, recounting, chatting, are as much part of our natural history as walking, eating, drinking, playing’.¹⁵⁹ It seems, therefore, language is of such social importance, that sufficient labour could never be applied to a word in common currency to create an individual property right.

Use of a common word (or phrase) cannot be said to be original either in the technical sense of having originated with the claimant or in the layperson’s understanding of being novel. In sum, other than meeting the requirement of being written, it seems that a property claim over an existing word in the common stock of language will comprehensively fail on every ground, and even the remotest possibility of copyright protection must be dismissed.¹⁶⁰

¹⁵³ M Gladwell, *Blink: The Power of Thinking without Thinking* (Little Brown & Co, 2nd ed, 2006) may provide an example of a book whose underpinning thesis is fully captured in the title.

¹⁵⁴ R Stone, ‘Copyright Protection for Titles, Character Names and Catch-phrases in the Film and Television Industry’ (1996) 7 *Entertainment Law Review* 178, 178.

¹⁵⁵ As far as book titles are concerned, there seems to be little commercial concern for copyright infringement. Among many citations of blatant aping of book titles, P Cohen, ‘Titlenomics, or Creating Best Sellers’, *The New York Times* (New York), 16 June 2009, C1 provides the example of Steven D Levitt’s ‘Freakonomics’ being followed by books titled, ‘Womenonomics’, ‘Obamanomics’, ‘Slackonomics’, ‘Invent-onomics 101’ and ‘Scroogenomics’.

¹⁵⁶ Garnett, Davies and Harbottle, above n 58, 61.

¹⁵⁷ *Ibid* fn 1.

¹⁵⁸ See, for example, B Bryson, *Mother Tongue* (William Morrow & Company, 1990) on how words evolve.

¹⁵⁹ L Wittgenstein, *Philosophical Investigations* (GEM Anscombe trans, Blackwell, first published 1953, 1983 ed) 12 [trans of: *Philosophische Untersuchungen*].

¹⁶⁰ Questions might remain: for example, is there a temporal aspect to the common stock of words? Thus could a word that has been used before but has fallen into such desuetude, that may is no longer considered part of the common stock of words, be revived and claimed?

2 Commercial Neologisms

Commercial neologisms, such as ‘Exxon’ or ‘LePacer’,¹⁶¹ may meet the applied labour criterion and originate with the copyright claimant. However, when read alone, the words lack meaning; they fail to express an idea, and so may not attract copyright protection. In other cases, the neologism may amount to nothing more than the unimaginative conjunction of two commonplace words, along with upper case midway through, for example, ‘ClickHere’. However much application of labour and skill or judgment is claimed, the insubstantial nature of the output implicitly refutes those claims. Despite these hurdles, if an invented word were able to express an idea, (other requirements having been met) it should, in principle, attract copyright protection.

In *Brodel v Telstra Corporation*, the Federal Court of Australia, having regard to various decisions,¹⁶² held ‘there is no tenable claim that the word “SmartFax” constitutes an original literary work in which copyright is capable of subsisting’.¹⁶³ While it is not proposed that ‘SmartFax’ should attract copyright, the relevance of the authorities cited may be questioned. As noted, in *Francis Day*, the song title in dispute failed to attract copyright protection because it was considered hackneyed and obvious. The artefact itself was insufficient because it was a cliché, and individuals may not claim clichés anymore than they may claim single words in the common stock.¹⁶⁴ The same reasoning seems to apply to the television programme ‘Opportunity Knocks’ in *Green v Broadcasting Corporation of New Zealand*. In contrast, as an invented word, ‘SmartFax’ is not hackneyed. In *Sullivan*, copyright did not subsist in ‘Somewhere in the Whitsundays’ and ‘The Resort that Offers Precious Little’ because insufficiency of inputs.¹⁶⁵ This may also be true of the authorship of ‘SmartFax’, but the court did not expressly assess the sufficiency of the labour applied. Besides, in the corporate world, it is plausible that a great deal of labour may be invested in creating an unimpressive written output.

Exxon Corporation was most relevant in *Brodel* because, in the former case, copyright was denied on the grounds that the artefact lacked requisite communicative qualities (‘either information and instruction, or pleasure in the form of literary enjoyment’). But, unlike the word ‘Exxon’, which manifests no obvious communicative qualities, it is arguable that ‘SmartFax’ may communicate an idea to the extent that it connotes a facsimile machine that performs supranormal functions. When Lockean principles are applied to ‘SmartFax’, as they were to a slogan in

¹⁶¹ Denied copyright protection in *Kinnor (Pty) Ltd v Finkel* 352 JOC WLD. In *South African Football Association v Stanton Woodrush (Pty) Ltd* [2002] ZASCA 142, [19] fn 32 (Harms JA) the South African Supreme Court of Appeal noted that ‘*Copinger and Scone* (sic) *James on Copyright* 14ed p 59 n 26, incorrectly, mentions that a South African court had held differently in *Kinnor (Pty) Ltd v Finkel*’.

¹⁶² *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd* [1940] AC 112; *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119; *Green v Broadcasting Corporation of New Zealand* (1983) 2 IPR 191; and *Sullivan v FNH Investments Pty Ltd* (2003) 57 IPR 63.

¹⁶³ [2004] FCA 505, [17] (Kenny J).

¹⁶⁴ Lord Hoffmann observed in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, 706 an artefact may be denied copyright protection because it is ‘not original, or so commonplace as not to form a substantial part of the work’.

¹⁶⁵ *Sullivan v FNH Investments Pty Ltd t/as Palm Bay Hideaway* (2003) 57 IPR 63, [112]-[13] (Jacobson J).

Sunlec, the possibility of commercial neologisms attracting copyright protection is intimated. A general problem, however, seems to lie with that fact that commercial neologisms are often proxy or quasi-trade marks.

In principle, the availability of trade mark registration is no bar to concurrent copyright protection.¹⁶⁶ Nevertheless, in practice, literary works do not qualify as trade marks, and vice versa, although it is eminently plausible that copyright protected *artistic* works may also be registered as trade marks.¹⁶⁷ Certain writings may not be protected under either copyright or trade mark legislation,¹⁶⁸ but trade mark law may allow short phrases, and even a phrase that is a component of a longer mark, to be registered.¹⁶⁹ Literary works and trade marks are normally incompatible because they perform different communicative functions. Trade marks signal associations with products that ‘facilitate the identification of merchandise by members of the public’.¹⁷⁰ Unlike an original literary work ‘a trade mark is not protected for its own intrinsic worth, but for the intangible values surrounding the product and attaching to the mark’.¹⁷¹ While a trade mark will perform an advertising function, its principal functions are to identify and distinguish, not to communicate an idea. This is why invented words may be registered as trade marks. Following TRIPS,¹⁷² a trade mark is typically defined in legislation in terms of a ‘sign’, but the traditional ‘mark’ better implies the rudimentary nature of a trade mark as a communicative device that originated in pre-literate societies. Literary works are discrete artefacts, which must independently communicate an idea, and therefore may be said to operate at a ‘higher’ cognitive level than trade marks.

Trade mark monopolies do not endanger the common stock of words. If a word from the common stock, such as a person’s family name, is granted trade mark registration, only the particular form of the graphical representation is monopolised, not the word itself. Despite using language, such a trade mark is properly seen as an artistic work, rather than a literary work. The crucial distinction between artistic and literary works lies with the infinite ways in which a message may be expressed by different artistic

¹⁶⁶ See, for example, *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 144 (Stephenson LJ); *Navitaire Inc v (1) Easyjet Airline Company Ltd (2) Bulletproof Technologies Inc* [2004] EWHC 1725 (Ch) [80] (Pumfrey J).

However, M Davison, A Monotti and L Wiseman, *Australian Intellectual Property Law* (Cambridge University Press, 2008) 196 are persuasive when they suggest that policymakers may consider ‘there is no need for copyright protection to be given to single words as they adequately protected by trade mark law, passing of and artistic copyright’.

¹⁶⁷ *Roland Corporation v Lorenzo & Sons* [1991] FCA 617, [24] (Pincus J).

¹⁶⁸ S Frankel and G McLay, *Intellectual Property in New Zealand* (Lexis Nexis Butterworths, 2002) 412 fn 46.

¹⁶⁹ See *Société des Produits Nestlé v Mars UK Ltd* Case C-353/03 [2006] All ER (EC) 348, where the European Court of Justice ruled that a mark can obtain a distinctive character even though the mark is used as part of a wider mark. Thus, ‘Have a break’ was found to have its own distinctive character, as contemplated by art 3(1)(b) Trade Marks Directive, 89/104/EEC and so could be separately registered from ‘Have a break – Have a Kit Kat’.

¹⁷⁰ M Gabay, ‘The Role of Trademarks in Consumer Protection and Development in Developing Countries’ (1987) *Industrial Property* 102 cited in S Ricketson, *Intellectual Property: Cases, Materials, and Commentary* (Butterworths, 1994) 894. Compare with *Trade Marks Act 1995* (Cth) s 17, definition of ‘trade mark’.

¹⁷¹ J McGrath, ‘The New Breed of Trade Marks: Sounds, Smells and Tastes’ (2001) 32 *Victoria University at Wellington Law Review* 277, 281.

¹⁷² *Trade-Related Aspects of Intellectual Property Rights*, WTO Doc WT/GC/W/302 (1999).

techniques, but the finite ways in which a particular meaning may be communicated by a word.

The essential purpose and qualities of a trade mark are, then, generally incompatible with the purpose and qualities of an original literary work. An invented word, such as 'Exxon', while eminently suited for trade mark registration, does not meet the requirements for copyright protection. To generalise, a neologism is only likely to qualify for copyright protection if it is not a trade mark substitute.

Without losing sight of copyright law's emphasis on origination, rather than invention, neologisms are distinguishable from existing words inasmuch as they constitute potential additions to the common stock of language. Thus people Hoover their carpets, use a Kleenex when they sneeze, and Google to find information. While it may seem niggardly to expect to own a word, in the commercial context, it is unlikely that a firm would seek to prevent everyday use of its name since acceptance into the common stock of words appears to be the ultimate in free advertising.¹⁷³ Presumably, then, the ExxonMobil Corporation would not be moved to litigation if it were common parlance to 'put Exxon in one's tank'. But, adoption of commercial neologisms by ordinary language users is exceptional. Normally, a firm seeks to assert copyright over a neologism against competitors in lieu of or in addition to trade mark or passing off protections. The pressing issue is not monopolisation in order to exclude ordinary language users,¹⁷⁴ although this should not be discounted, rather it is preventing other firms from benefiting from the claimant's efforts. Where the only persons interested in the use of an invented word are rival firms, public policy concerns are less urgent. However, when corporations aggressively protect their valuable brand identities, freedom of expression may be a real concern. Stone observes:

The fear is that invented words could, in both a metaphorical and literal sense, be banned from the dictionary and that even existing words might, in effect, be rendered unusable through inclusion in newly protected literary phrases.¹⁷⁵

3 *Creative Neologisms*

Creative neologisms are more likely to attract copyright protection than words invented for purely commercial purposes, since they are not generally trade mark substitutes. Furthermore, being ill equipped to assess the quality of literary inputs, courts may be reticent to deny the communicative qualities of a creative neologism.

Aram Saroyan, a critically acclaimed avant-garde poet, specialises in creating minimalist artefacts, including the one word poem 'light'.¹⁷⁶ The word originated with the poet, and could not be considered hackneyed or commonplace. Indeed,

¹⁷³ However, Klein, above n 4, 181 observes that such brands 'have always walked a fine line between wanting to be ubiquitous but not wanting to be so closely associated with a product category that the brand name itself becomes generic – as easily invoked to sell a competing brand as their own'.

¹⁷⁴ In *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 144, Stephenson LJ suggested an implied licence.

¹⁷⁵ Stone, above n 152, 180.

¹⁷⁶ For a biography of Saroyan, see <<http://www.aramsaroyan.com/html/bio.html>> at 25 January 2009.

Saroyan won a National Endowment for the Arts poetry award for the poem. This single, invented word expresses an idea, however inaccessible that idea may be to the non-poet. (The limited scope of an audience capable of understanding the word does not appear to be an issue,¹⁷⁷ provided some form of ‘interpretative community’ for his work exists.¹⁷⁸) Given the critical acclaim of his peers, it is highly unlikely that a court would deny copyright protection to Saroyan’s minimalist artefacts. Despite his work reducing concision to what some may regard as its point of absurdity, it appears to satisfy Lockean requirements for copyright protection.

If it is plausible that a word invented in the pursuit of high art may attract copyright protection, could a less elevated, and hence more commercially significant, neologism attract copyright? This possibility has been presented in a recent reprise of a *Francis Day* style dispute. ‘Californication’ is the title of a song and album released by the Red Hot Chilli Peppers, an alternative rock band, in 1999.¹⁷⁹ It is also the title of a comedy drama first broadcast in 2007.¹⁸⁰ The Red Hot Chilli Peppers have sued the producers of the television show for breach of trade mark and, inter alia, for passing off – but, not copyright infringement.¹⁸¹ It is submitted that a claim for copyright infringement based on Lockean principles would also be plausible.

The first two criteria of labour and origination are not problematic. It seems likely that the band members applied skill, labour and judgment, and the word originated with them. The artefact cannot be described as hackneyed, and, although it is derived from two words in the common stock, is memorable. Crucially, unlike ‘Exxon’, the word ‘Californication’ possesses communicative qualities. It effectively expresses the idea of California being a place of sexual licence, a central motif of the band’s oeuvre. Likewise, the television shows features a character who moves from the East to the West Coast of the United States and engages in promiscuous behaviour. It may be assumed that title was chosen because it immediately conveys ideas of place and behaviour. Of course, the traditional aversion to titles might undermine any argument for copyright protection.

D *Single Words in Computer Programs*

So far, this discussion has considered words as units of communication between human beings, ‘signs’ in the terminology of semiotics. Signs comprise the ‘signifier’ (the name given to a thing or phenomenon) and the ‘signified’ (the thing or phenomenon signified).¹⁸² Based on previously established social convention, a sign stands for something else.¹⁸³ In a computer program, a particular configuration of letters (word) may be a sign in this sense, that is a socially agreed means of denoting a

¹⁷⁷ *Contemplating Anderson (DP) & Co Ltd v Lieber Code Co* [1917] KB 469; Garnett, Davies and Harbottle, above n 58, 63 observe ‘the argument that nothing could qualify as a literary work which did not involve an appreciation of the meaning of the words was rejected’.

¹⁷⁸ For a discussion of interpretative communities, see generally S Fish, *Is There a Text in This Class? The Authority of Interpretative Communities* (Harvard University Press, 1980).

¹⁷⁹ R Rubin (prod), *Californication* (1999).

¹⁸⁰ D Duchovny, T Kapinos and S Hopkins (prods), *Californication* (2007).

¹⁸¹ The band’s argument may be viewed at <http://www.aolcdn.com/tmz_documents/1119_rhcp_lawsuit_wm.pdf> at 1 March 2009.

¹⁸² W Leeds-Hurwitz, *Semiotics and Communication: Signs, Codes, Cultures* (Lawrence Erlbaum Associates, 1993) 23.

¹⁸³ U Eco, *A Theory of Semiotics* (Indiana University Press, 1976) 16.

thing or phenomenon, but, alternatively, it may be a command to the machine. William van Caenegem argues ‘where a word is not part of a known language, ie is invented by an author, there seems little doubt that it may be original in copyright terms’.¹⁸⁴ However, invention is not the appropriate consideration here. As with any other neologism, which performs the function of a unit of human language, the fundamental question is whether the item manifests sufficient communicative qualities; and, invariably, invented words do not have independent meaning.

As an instruction from a programmer (or computer) to a computer, the principal question is whether the configuration of letters, which has the appearance of a word, constitutes a computer program, an artefact which has, perhaps bizarrely, been included as a literary work.¹⁸⁵ A discussion of this issue is beyond the scope of this article. Nevertheless, as a general rule, a single ‘word’ instruction, because it is unlikely to constitute a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result, will not constitute a computer program.¹⁸⁶

E *Tweets*

Twitter is a free social networking and micro-blogging service that enables its users to send and read each other users’ updates (tweets). Tweets are text-based posts of up to 140 characters, displayed on the author’s profile page and delivered to other users (followers) who have subscribed to them. Users can send and receive tweets via the Twitter website, Short Message Service (SMS) or external applications.¹⁸⁷ While there is increasing awareness of Twitter’s social and political impact,¹⁸⁸ little discussion has taken place about its copyright impact. In a blog, Jonathan Baily argues:

Twitter’s 140 character limit makes it difficult, though not impossible, to post a work that reaches the standard for copyrightability...the majority of items posted to Twitter would not likely be seen as “original works of authorship”. They are simply too short and don’t usually reach the requisite level of creativity.¹⁸⁹

Baily concedes that ‘some tweets could be copyrighted if they met the description and, almost certainly, a collection of tweets from the same person could be copyrightable if they could be seen as one large work broken over many entries’.¹⁹⁰

¹⁸⁴ W van Caenegem (1998) Case Note: *Data Access v PowerFlex 4 High Court Review* 15, [10].

¹⁸⁵ *Copyright Act 1968* (Cth) s 10 defines ‘computer program’ as ‘a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result’. A definition of ‘computer program’ is not provided in New Zealand or United Kingdom copyright Acts.

¹⁸⁶ See *Data Access v Powerflex Services* (1999) 202 CLR 1, 17 (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [159] (Gummow, Hayne and Heydon JJ) for a discussion on the distinction between the functionality of computer programs and compilations.

¹⁸⁷ See B Huberman, D Romero and F Wu, ‘Social Networks that Matter: Twitter Under the Microscope’ (2008) <<http://ssrn.com/abstract=1313405>> at 20 June 2009.

¹⁸⁸ See, for example, T Rutten, ‘How Twitter Became the Tyrant’s Nightmare’, *The Dominion Post* (Wellington) 27 June 2009, B5; ‘Exploring the Disruptive Nature of Twitter’, 140 Characters at a time’, 140 Characters Conference <<http://www.140conf.com/>> at 27 June 2009.

¹⁸⁹ J Baily, *Copyright and Twitter* (2009) The Blog Herald <<http://www.blogherald.com/2008/05/05/copyright-and-twitter/>> at 27 June 2009.

¹⁹⁰ *Ibid.*

However, from the discussion presented so far, it should be clear that, in a Lockean world, neither brevity nor lack of creative spark are barriers to copyright protection. In practice, given the motivation of those involved in social networks, it is unlikely that many Twitter users would have an interest in asserting copyright over their tweets.¹⁹¹ However, users whose reputations are derived from their ad-libs and improvisations would almost certainly have such an interest.¹⁹² Comedian, Stephen Fry, whose tweets are described as ‘the quintessential British wit, full of pithy one-liners and bags of personality’,¹⁹³ has more than half a million followers.¹⁹⁴ There can be little doubt that his tweets meet the requirements for copyright protection from a Lockean – arguably, from any – theoretical perspective.

VII CONCLUSION

Lockean labour theory provides the analytical basis for ascertaining whether an artefact is an original literary work. Refining the Lockean test that has unfortunately been expressed in many different ways, it may be said that any written artefact, whose creation involves the application of independent intellectual effort, should attract copyright, provided the artefact sufficiently expresses an idea. The brevity of the writing is not, in itself, a proper consideration, and the general aversion for copyright to subsist in short texts is misplaced. However, this argument that certain truncated communications, such as tweets in which intellectual effort has been invested, ought to attract copyright, does not imply that copyright should subsist in all brief writings. Clichés, thoughtless advertising copy, neologisms that lack independent meaning and sentences that are indistinguishable from the ideas they purport to express have all been rightly denied copyright in the past and should continued to do so. But, in the age of the sound bite, copyright must take cognisance of the different ways in which intellectual effort may be applied to language.

Although Locke’s applied labour proposition principally relates to the justification of individual property rights, his proviso that enough of the same should be left for others, subjects such rights to distributive justice imperatives, and may be seen as anticipating the public policy considerations that loom large when the potential for monopolising words and phrases is raised. This is essentially an issue of infringement, which lies beyond the scope of an article concerning subsistence of copyright. However, some points for further exploration may be made.

If the law is to accommodate copyright claims for the sound bites that are ubiquitous in contemporary society, then, a clearer statement needs to be made regarding maintenance of freedom of speech. It is insufficient for the courts to dismiss such

¹⁹¹ Andrew Sullivan, an influential writer and blogger, has collated tweets from users caught up in post-election turmoil in Tehran. While Sullivan asserts his own copyright in the ‘anthology’, no obvious consideration is given to copyright in the component tweets. See A Sullivan, *Live-Tweeting The Revolution* (2009) The Daily Dish <http://andrewsullivan.theatlantic.com/the_daily_dish/2009/06/livetweeting-the-revolution.html> at 27 June 2009.

¹⁹² Laddie et al, above n 18, 74 use the example of a comedian’s ad libs or improvised humour as speech that enjoys copyright protection.

¹⁹³ *Top 10 International Twitter users* (2009) Telegraph.co.uk <<http://www.telegraph.co.uk/scienceandtechnology/technology/twitter/5611858/Top-10-international-Twitter-users.html>> at 27 June 2009.

¹⁹⁴ *Stephen Fry*, Twitter <<https://twitter.com/stephenfry>> at 27 June 2009.

concerns on the grounds of an implied licence as the Court of Appeal appeared to do in *Exxon Corporation*, suggesting ‘I attach little weight to the first submission [of the amicus curiae regarding freedom of speech], because...the plaintiffs have clearly impliedly licensed the world to use this word properly’.¹⁹⁵ But freedom of speech implies the right to use a word *improperly*, not only as its ‘owner’ prescribes or permits. Besides, any such licence might be prone to revocation at short notice, for example, in response to criticism.¹⁹⁶ A licence to use a word or phrase should be construed as irrevocable as far as ‘proper’ use is concerned. This further requires a delineation of what might constitute improper use: this might include competing with the author or appropriating the work for a direct commercial benefit.

It may be ‘impossible to define what is “fair dealing” ... after all is said and done, it must be a matter of impression’,¹⁹⁷ nevertheless, the courts should also define fair use of a work that is comprised of one or a few words. For research or study, criticism or review, parody or satire, reporting news, and, more generally, for public discourse, the curial impression gained should be that quoting the full work is inevitable and fair. Authors (or producers of text) should not be denied copyright simply because their works are brief, but, in granting such rights, the courts must establish robust means of protecting freedom of speech.

¹⁹⁵ *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119, 143-4 (Stephenson LJ).

¹⁹⁶ Stone, above n 152, 181.

¹⁹⁷ *Hubbard v Vosper* [1972] 2 QB 84, 94 (Lord Denning MR) cited in Ricketson, above n 168, 307.