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The "Unpropertizable" Public Domain in the UK and EU

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THE "UNPROPERTIZABLE" PUBLIC DOMAIN IN UK AND EU COPYRIGHT LAW

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The topic of the public domain has a long-standing history in Anglo-American copyright law, which can be traced back to at least the Statute of Anne. However, it was in 1981, when David Lange wrote his seminal article on this topic, that there was renewed academic interest in the public domain. A noteworthy feature of these academic commentaries is the commonly held premise that there is, or there has been, a phenomenon of excessive encroachment by IP upon the public domain. What typically underpins these commentaries is the presumption that there are subject matters in the public domain that are, or ought to be, incapable of propertization ("unpropertizable"). Therefore, this article investigates the public domain's (negative) "non-property" status with the goal of increasing its visibility in UK and EU copyright law amid the risk of such encroachment. It does so by examining the strongest form of "non-property," namely subject matters in the public domain that are "unpropertizable." This investigation is structured into four Parts. In Parts II-IV, this article identifies three possible understandings of "unpropertizable" subject matters in UK and EU copyright law. It then examines one means by which encroachment might be facilitated in practice upon these unpropertizable subject matters. This is where there is flexibility in the legal rules that render certain subject matters unpropertizable which might, in practice, allow judges to circumvent their "unpropertizable" status. In Part V, this article contemplates the implications of its investigation into the public domain's "non-property" status, with particular focus on recent developments in UK law now that the Retained EU Law (Revocation and Reform) Act 2023 is in force.

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INTRODUCTION

The topic of the public domain has a long-standing history in Anglo-American copyright law,[1] which can be traced back to at least the Statute of Anne.[2] However, it was in 1981, when David Lange wrote his seminal article on

[1] *See, e.g.,* Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y U.S.A. 137 (1993). For an historical overview of the public domain in US IP law, *see generally* Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002).

[2] 1710, 8 Ann., c. 19 (Eng.). *See* Samuels, *The Public Domain in Copyright, supra* note 1, at 142 (Describing how, in THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 29–31 (1991), L. Ray Patterson and Stanley W. Lindberg "characterize the original Statute of Anne not as a major expansion in the protection of works, but as actually *creating* a public domain, by limiting the duration of protected works and by requiring formalities.").

this topic,[3] that there was renewed academic interest in the public domain.[4] This renewal originated in US law but has since expanded across other jurisdictions, including the UK and the EU.[5]

For readers who may be unfamiliar with Lange's article, what was seminal about it is that, amongst other things, it highlighted the impact that then-emerging "currents" in US IP law[6] (which Lange describes as entailing an "uncontrolled" growth in IP[7]) were having on the public domain[8] and how courts could counteract this impact by recognizing the public domain "as a matter of public right, rather than simply the negative or obverse" of IP.[9] Subsequently, Lange's article ignited academic debate and theorizing on the public domain which, owing to the limited coverage that it had received, had hitherto been a "dark star in the constellation" of IP.[10]

A noteworthy feature of many post-Lange commentaries is the commonly held premise that there is, or there has been, a phenomenon of excessive "encroachment" by IP upon the public domain[11] (hereafter, "public domain

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[3] David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981) [hereinafter Lange, *Recognizing the Public Domain*].

[4] For later discussions of the public domain in copyright law*, see, e.g.,* Jessica D. Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990); Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389 (2002); Jane C. Ginsburg, *"Une Chose Publique"? The Author's Domain and the Public Domain in Early British, French and US Copyright Law*, 65 CAMBRIDGE L. J. 636 (2006). Lange also revisits his account of the public domain in *Reimagining the Public Domain*, 66 L. & CONTEMP. PROBS. 463 (2003).

[5] Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 132 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) ("The resurgence of interest in the public domain in contemporary copyright scholarship is generally agreed to begin with a provocative article published in 1981 by David Lange."). *See generally* Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, at 5, WIPO Doc. CDIP/7/INF/2 (Mar. 4, 2011), https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf [hereinafter Dusollier, *Scoping Study*] (recommending strategies that may bolster the public domain and enable it to "flourish").

[6] Lange, *Recognizing the Public Domain*, *supra* note 3, at 178.

[7] *Id*. at 150.

[8] *See, e.g., id.* at 158 ("[T]he law of trademarks … has begun to spill over its boundaries and encroach into territories in which trademark protection amounts to trespass."); at 168 ("As access to the public domain is choked, or even closed off altogether, the public loses too.").

[9] Cohen, *supra* note 5.

[10] Lange, *Recognizing the Public Domain*, *supra* note 3, at 151 n. 20.

[11] *See, e.g.,* Valérie-Laure Benabou & Séverine Dusollier, *Draw Me a Public Domain*, *in* COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 161, 162 (Paul Torremans ed., 2007); *id.* at 158 (describing "certain [IP] claims" as making "encroachments … into the public domain"); Dusollier, *Scoping Study*, *supra* note 5, at 22 ("…[A]s each category

encroachment"). We first encounter this premise in Lange's article, which presents an understanding of this phenomenon as involving a growth in "new, or newly extended, property rights" that occurs at the expense of any comparative recognition of "interests" in the public domain.[12]

What is significant about Lange's article, for present purposes, is that he attributes this phenomenon to certain features of the public domain that derive from its "non-property"[13] status within the literature, such as its appearing "amorphous and vague" in contrast to the IP interests that receive recognition.[14] Therefore, in response to the expansion of these IP interests (such as claims of "publicity rights" and of trademark dilution), Lange presses for a strengthening of the public domain through the recognition of two "fundamental principles" (specifically, individual rights in the public domain and a presumption against the finding of IP infringement in "doubtful cases"[15]).

This correlation that Lange draws between certain features of the public domain's "non-property" status and its encroachment by IP is later echoed in academic commentaries that seek to strengthen the public domain against such encroachment by re-defining it so that it emulates certain characteristics of "property."[16] For instance, there have been attempts by some scholars to define the public domain "positively," as entailing "the free use of the elements contained therein,"[17] and to identify substantive "principles" that the public domain serves to match the "exclusivity and rivalry" that we typically associate with IP.[18] However, a recurring feature of these commentaries is that they imply that the public domain may only be strengthened against possible IP

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of public domain elements obeys different mechanisms, it is … open to different threats of enclosure and commodification.").

[12] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37 (2003) [hereinafter Boyle, *The Second Enclosure*].

[13] *See, e.g.,* Carol M. Rose, *Cold Corpses, Hot News, and Dead IP: The Reasons for and Consequences of a Legal Status of No-Property*, 57 HOUS. L. REV. 377 (2019) (describing certain subject matters that are "un-ownable" as being "non-IP," such as subject matters that are per se incapable of IP protection and others whose term of IP protection has expired); *see also* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 38 (2008) [hereinafter BOYLE, THE PUBLIC DOMAIN] (describing the public domain as "material that is not covered by intellectual property rights").

[14] Lange, *Recognizing the Public Domain*, *supra* note 3, at 177.

[15] *Id*. at 150.

[16] *See, e.g.,* Ilanah Fhima, *The Public Domain*, 1 I.P.Q. 1, 1 (2019) (advocating for "a positive conception of the public domain, based on individual uses that should always remain free…"); Dusollier, *Scoping Study*, *supra* note 5, at 68–69 ("As intellectual property is characterised by exclusivity and rivalry, the public domain should conversely operate on the ground of non-exclusivity and non-rivalry.").

[17] Dusollier, *Scoping Study*, *supra* note 5, at 8. *See also* Benabou & Dusollier, *supra* note 11, at 183 (providing an "overview of the possible protection of the 'public domain' through positive rules of delimitation, access and preservation").

[18] Dusollier, *Scoping Study*, *supra* note 5, at 68–69.

encroachment when it emulates core features of "property," thus effectively erasing its "non-property" status.

Against this backdrop, this article will investigate this purported correlation between the public domain's "non-property" status and its encroachment by copyright. However, this investigation will take a direction that is often overlooked within the academic literature.[19] Specifically, instead of focusing on whether the public domain might resist possible copyright encroachment by emulating certain features of "property," this investigation will center on the public domain's "non-property" status and, in particular, on its strongest form (namely, subject matters that are "unpropertizable"[20]). Here, this article will investigate the following issue: whether, amid the risk of encroachment by copyright, there are subject matters in the public domain that are unpropertizable. In so doing, it aims to construct the beginnings of an account of the "unpropertizable" public domain in copyright law.

The jurisdictions that will be the focus of this investigation are the UK and the EU. This is because UK copyright law has been influenced by developments in the EU, both through the enactment of the UK Copyright, Designs and Patents Act 1988 ("CDPA") (which implemented the EU Directives that sought to harmonize aspects of copyright law[21]) and the jurisprudence of the Court of Justice of the European Union ("CJEU"). Furthermore, the coming into force of the Retained EU Law (Revocation and Reform) Act 2023 ("REUL Act") on 1 January 2024 in the UK now opens up the possibility for increasing divergence between both jurisdictions as to the "unpropertizable" status of certain subject matters in copyright law.[22]

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[19] *But see* the discussions in the academic literature on IP's "negative space": Christopher Jon Sprigman, *Conclusion: Some Thoughts about IP's Negative Space*, *in* CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 249-70 (Kate Darling & Aaron Perzanowski eds., 2017); Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary? Evidence from Innovation in IP's Negative Space*, *in* 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (Ben Depoorter & Peter S. Menell eds., 2019); Elizabeth Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011).

[20] *See* Margaret Jane Radin, *Incomplete Commodification in the Computerized World*, *in* THE COMMODIFICATION OF INFORMATION 3, 5 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002) ("[I]n the realm of copyright, expression represents the propertizable, commodifiable aspect of a work (as opposed to nonpropertizable, noncommodifiable 'ideas.')").

[21] NICHOLAS CADDICK ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT ¶ 2-100 (Gwilym Harbottle et al. eds., 18th ed. 2021) [hereinafter COPINGER].

[22] *See* REUL Act § 3(1) ("The principle of supremacy of EU law is not part of domestic law. This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made.)"). This was inserted into the European Union (Withdrawal) Act 2018 in § 5(A1). *See also* REUL Act § 6 (which will introduce changes to judicial interpretation of assimilated case law); E-Accounting Solutions, Ltd. (t/a Advancetrack) v. Global Infosys, Ltd. (t/a GI Outsourcing) [2023] EWHC 2038 (Ch.), [2024] E.T.M.R. 1 ¶

Consequently, the central question of this article's investigation is the following: In UK and EU copyright law, are there subject matters in the public domain that are unpropertizable? Before answering this question, however, we must address three preliminary issues: first, how the constituent elements of this article's question are defined; second, how public domain encroachment has provided the impetus for this question; and third, how this article's investigation will be structured.

A. Defining the Constituent Elements of this Article's Question

Over the last four decades, the academic literature has generated a myriad of definitions of the "public domain," which vary depending on the theoretical framework,[23] jurisdiction, and the area(s) of IP law being considered. In copyright law, we find that both the public domain's composition (such as whether it includes copyright exceptions[24]) and its relationship to copyright will be influenced by different factors.[25] These include, for instance, the normative value(s) that we ascribe to the public domain[26] and the historical development of

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107 (HHJ Tindal) ("[F]undamental change is now on the horizon next year now the Retained EU Law (Revocation and Reform) Act 2023 has been enacted"); EXPLANATORY NOTES: RETAINED EU LAW (REVOCATION AND REFORM) BILL ¶ 92 (June 29, 2023) (Where the UK Government stipulates that "Subsection (A1) ends the principle of supremacy after the end of 2023 in relation to all domestic legislation whenever made. This has the effect of removing the principle of consistent interpretation in relation to all domestic legislation" or, in other words, the *Marleasing* principle.). For the *Marleasing* principle, *see* Case C-106/89, Marleasing SA v. LA Comercial Internacional de Alimentación SA*,* 1990 E.C.R. I-04135 ¶ 8. For an insightful discussion of the likely impact of the REUL Act on UK copyright law, *see* Phillip Johnson, *"Inverted Supremacy", "Weaker Precedent" and Other Uncertainties Brought About by the Retained EU Law (Revocation and Reform) Act 2023*, 45 E.I.P.R. 634 (2023). *See generally* DIGGORY BAILEY & LUKE NORBURY, BENNION, BAILEY AND NORBURY ON STATUTORY INTERPRETATION: 2ND SUPPLEMENT TO THE EIGHTH EDITION (2023); *Recording: Are You Ready for REULA? The Conscious Uncoupling of UK and EU Intellectual Property Law,* UNIV. COLL. LONDON (Jan. 22, 2024), https://www.ucl.ac.uk/laws/events/2024/jan/recording-are-you-ready-reula-conscious-uncoupling-uk-and-eu-intellectual-property.

[23] *See* JUSTINE PILA, THE SUBJECT MATTER OF INTELLECTUAL PROPERTY 8 (2017) (proposing "a theoretical framework for thinking about the subject matter protectable by IP in general…").

[24] *See, e.g.*, 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 O.J. (L 167) ("InfoSoc Directive"), art. 5; Copyright, Designs and Patents Act 1988 ("CDPA") pt. 1, ch. 3.

[25] *See* Boyle, *The Second Enclosure Movement*, *supra* note 12, at 62 ("The public domain will change its shape according to the hope it embodies, the fears it tries to lay to rest, and the implicit vision of creativity on which it rests.").

[26] *See* Pamela Samuelson, *Challenges in Mapping the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW, *supra* note 5, at 22 [hereinafter Samuelson, *Challenges in Mapping the Public Domain*] (identifying "at least eight distinct, if often complementary," social values that the public domain serves).

this notion within the relevant jurisdiction.[27] Such inevitable variability and context-dependence when defining the public domain are captured in James Boyle's statement that "[t]here is not one public domain, but many."[28]

Amid the different factors that are capable of influencing what we mean by the public domain, this article adopts a negative definition of the public domain in UK and EU copyright law that is based on its frequent characterization within the academic literature as being the "opposite" of property[29] or, in other words, "non-property." According to this definition, the public domain in both jurisdictions comprises subject matters that are not protected by copyright.[30] Although it cannot be guaranteed that this negative definition is free from any normative or historical influences,[31] this article's reason for adopting it is that it represents a "traditional"[32] view of the public domain in copyright law that has been the subject of much debate in the academic literature.[33]

Having defined the public domain, this article now turns to the meaning of public domain encroachment. It starts with Lange's article, which, centering on US law, comments on public domain encroachment by IP generally. Here, we find a depiction of this phenomenon as involving "expanding claims" to IP, which thereby "blur, and then displace," important "interests" in the public domain.[34] As

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[27] *See id.* at 12 ("…the public domain has different contents in different jurisdictions"). For a survey of the history of the public domain in US IP law, *see generally* Ochoa, *supra* note 1.

[28] Boyle, *The Second Enclosure Movement*, *supra* note 12, at 62.

[29] Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1343 (2004).

[30] *See, e.g.,* James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS 1, 30 (2003) [hereinafter Boyle, *Forward*] ("The term 'public domain' is generally used to refer to material that is unprotected by intellectual property rights, either as a whole or in a particular context, and is thus 'free' for all to use…").

[31] *C.f., e.g.,* Cohen, *supra* note 5, at 124 (Describing "modern models of the public domain" in US copyright law as sharing "an implicit understanding of the public domain as a geographically separate preserve encompassing the old, the archetypal, and the unproductive," where this understanding is "deeply rooted in the preexisting history of the term 'public domain' in US public land law."); Boyle, *The Second Enclosure Movement*, *supra* note 12, at 58 ("[T]he intellectual property usage of the term ['the public domain'] comes to us from the French *domaine public* which made its way into American law in the late nineteenth century via the language of the Berne Convention.").

[32] *See* Benabou & Dusollier, *supra* note 11, at 165 (Describing "a traditional view," where "[o]nly elements that are not protected by copyright … are deemed to belong to the public domain." According to Benabou and Dusollier, this "traditional view … does not include copyright exceptions or any use of a protected work that is free.").

[33] *See, e.g., id.* at 163 (suggesting that the public domain "should be considered on its own, as a positive notion which needs to be defined and protected"); Dusollier, *Scoping Study*, *supra* note 5, at 7 ("Defining the public domain as what is *not* protected is imposed by copyright law, but any attempts to assess the value of the public domain should go further and focus on what could positively define the public domain…").

[34] Lange, *Recognizing the Public Domain*, *supra* note 3, at 171.

regards EU law, we find that some US commentators, such as Jerome Reichman and Pamela Samuelson,[35] express a similar understanding of public domain encroachment. This can be seen in their response to the EU Database Directive[36] (as subsequently implemented in the UK[37]), which introduced two forms of database protection. These are the following: a sui generis database right,[38] which protects a "collection of independent works, data or other materials,"[39] provided that there has been a "substantial investment" in its development;[40] and the protection of a database by copyright if, "by reason of the selection or arrangement of [its] contents," it constitutes its "author's own intellectual creation."[41] According to these commentators, the recognition of the sui generis database right amounts to public domain encroachment.[42] This is considered to take the form of an "increased scope"[43] of copyright protection where unoriginal collections of materials that would otherwise have been "left to the public domain"[44] are protected by copyright.

What is noteworthy about these understandings of public domain encroachment in the US and the EU, respectively, is that they presume that there are subject matters in the public domain that are, or ought to be, *unpropertized*.[45] Accordingly, this article's investigation takes this presumption a step further by centering on subject matters that are, or ought to be, incapable of propertization ("*unpropertizable*"). This is because, in keeping with its focus on the public domain's "non-property" status, "unpropertizable" subject matters represent the

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[35] J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997).

[36] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) [hereinafter Database Directive].

[37] *See* The Copyright and Rights in Databases Regulations, 1997, S.I. 1997/3032.

[38] COPINGER, *supra* note 21, ¶ 18-02.

[39] Database Directive art. 1(2).

[40] *Id.* art. 7(1).

[41] *Id.* art. 3(1).

[42] Reichman & Samuelson, *supra* note 35, at 164 ("Unlike the other hybrid regimes that have cropped up in recent years … the database laws set a new milestone for mischief by virtually abolishing even the concept of a public domain and by abrogating the public interest components of intellectual property policymaking.").

[43] Boyle, *Foreword*, *supra* note 30, at 12.

[44] P. Bernt Hugenholtz & Lucie Guibault, *The Future of the Public Domain: An Introduction*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW, *supra* note 5, at 4 (describing the sui generis database right as being "introduced … to protect collections of facts left to the public domain by way of copyright's idea/expression dichotomy").

[45] *See* ALEXANDRA GEORGE, CONSTRUCTING INTELLECTUAL PROPERTY 244 (2012) (Describing "intellectual propertization" as occurring when "law-makers apply the core criteria—the concepts of creatorship, originality, and a documented form—together to allow parts of ideational objects to be isolated and converted into intellectual property objects.").

strongest form of non-property and are thus a logical starting point for investigating this status.

However, before this article can commence its investigation, it is important that we acknowledge that the presumption that there are subject matters in the public domain that *are* unpropertizable is different from the presumption that there are subject matters in the public domain that *ought to be* unpropertizable. Whereas the former is a descriptive, and perhaps even metaphysical,[46] presumption about these subject matters (according to which their being "unpropertizable" is an actual, and perhaps even essential,[47] status that they possess), the latter is a normative presumption (that, according to our predetermined value set, these subject matters should be unpropertizable, regardless of whether or not they actually are).[48]

The focus of this article's investigation will just be on the former presumption, namely that there are subject matters in the public domain that *are* unpropertizable. To investigate this presumption, this article will focus on the legal rules within UK and EU copyright law that establish the "unpropertizable" status of subject matters and will examine, in particular, how changes to these rules might impact this status. This investigation will aim to be as descriptive as possible and will thus avoid probing into the normative value(s) or policies that may (or may not) have influenced these rules. In other words, this article will not investigate the latter presumption, namely that there are subject matters in the public domain that *ought to be* unpropertizable. In keeping with this focus, this article limits its investigation to the following type of encroachment: where subject matters in the public domain that are unpropertizable are either rendered capable of propertization ("propertizable") or are propertized.

By "propertization," this article refers to the legal status of a subject matter when it is considered to be an "object" of IP—or, in other words, when one's IPR extends over it.[49] In copyright law, more specifically, such "propertization" occurs when copyright subsists in a "literary and artistic work" under the Berne Convention.[50] What this article means by the (propertized) object of copyright is, in the UK, the "original literary, dramatic, musical or artistic" ("LDMA") work[51]

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[46] For a metaphysical account of the meaning of propertization in IP law, *see* Alexandra George, *The Metaphysics of Intellectual Property*, 7 W.I.P.O.J. 16 (2015) [hereinafter George, *Metaphysics*].

[47] *See id.* at 16 ("Applied to intellectual property law, metaphysics considers the nature and form of intellectual property and the essence of its constituent parts.").

[48] The author is grateful to an anonymous reviewer for this observation.

[49] *See, e.g.*, George, *Metaphysics, supra* note 46, at 95; Pila, *supra* note 23, at 7 (referring to "the nature of the objects to which IP rights attach").

[50] Berne Convention for the Protection of Literary and Artistic Works, art. I, Sept. 9, 1886, *as last amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

[51] CDPA § 1(1)(a). For the "LDMA" abbreviation, *see* Pila, *supra* note 23, at 13.

and, in the EU, the "authorial work."[52] Consequently, a subject matter is deemed to be unpropertizable when it is "immune"[53] from constituting (part of) this object.

To explain this "immunity" in more detail, this article draws upon Arnold LJ's judgment in the UK case of *Wright v. BTC Core*[54] where, in examining the fixation (or "recording") requirement in UK law,[55] he distinguishes between the existence of a "literary and artistic work", on the one hand, and the subsistence of copyright in it, on the other. This distinction can be seen in the following statement: "[I]t is clear from Article 2(2) of Berne that a work may exist before it is fixed (this is even clearer from section 3(2) of the 1988 Act)."[56] Although Arnold LJ speaks about this distinction in the context of the fixation (or "recording") requirement, which is only applicable to LDM works under the CDPA, this distinction can also be applied to artistic works in UK law[57] and to the authorial work in EU law.[58] However, whereas in relation to LDM works, the "work may exist *before* it is fixed,"[59] it is typically the case that, as soon as a subject matter meets the requirements to exist as an original artistic work in UK law or as an authorial work in EU law, copyright will *thereby* subsist in it.[60]

Thus, in this article, "propertization" means the subsistence of copyright in a subject matter that exists as a "literary and artistic work" under the Berne Convention, whether such subsistence occurs contemporaneously with, or subsequently to, the existence of the subject matter as such a work. And, importantly, a subject matter is "unpropertizable" when neither copyright subsists in it, nor does it exist as a "literary and artistic work" under the Convention.

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[52] Pila, *supra* note 23, at 13 (describing the "term that is used in European law to denote … the subject matter protectable by copyright" as the "authorial work").
[53] Benabou & Dusollier, *supra* note 11, at 166.
[54] [2023] EWCA Civ 868 (U.K.).
[55] CDPA § 3(2).
[56] Wright v. BTC Core, [2023] EWCA Civ 868 (Ch) ¶ 59 (U.K.).
[57] *See* SAS Institute Inc. v. World Programming, Ltd., [2013] EWHC 69 (Ch) (U.K.), [hereinafter *SAS Institute*, [2013] EWHC] ("[I]t is important to distinguish between the putative work on the one hand and any particular fixation of the work on the other hand. … [A]n artistic work may be fixed in the source code of a computer program. But the fixation must not be confused with the work.").
[58] *See Wright*, EWCA Civ 868 ¶¶ 59–60 (acknowledging that "the second condition" that a subject matter must satisfy to be a "work" under the InfoSoc Directive "appears to serve essentially the same purposes as the requirement of fixation" in UK law).
[59] *Id.* at ¶ 59 (emphasis added).
[60] *See, e.g.*, Poorna Mysoor, *"Form" in Conceptualizing Copyright as a Property Right*, 67 J. COPYRIGHT SOC'Y U.S.A. 79, 87 (2020) [hereinafter Mysoor, *"Form"*] ("With artistic works … there is no express requirement of recording. However, this does not mean that a record is not required. The CDPA requires that the artistic works are expressed through one or more of the enumerated methods such as painting, engraving, sculpture and so on, which inevitably create a record of the work when the work itself is created."); *id.* ¶¶ 59— 60.

Consequently, this article will omit any consideration of "entrepreneurial works,"[61] which is reflected in its description of the object of copyright as the original LDMA work (UK) and the authorial work (EU). Furthermore, owing to its definition of the public domain as comprising subject matters that are not protected by copyright, this article will exclude from its investigation any exceptions or limitations on the scope of copyright, such as "fair dealing"[62] (characterized as a "permitted act" under the CDPA[63]) and the exclusion of copyright protection on public policy grounds.[64]

B. How Public Domain Encroachment Has Triggered this Investigation

Having defined both the public domain and its encroachment by copyright, we are now in a position to determine how this phenomenon provides the impetus for this article's question (specifically, "In UK and EU copyright law, are there subject matters in the public domain that are unpropertizable?"). Our starting point is the presumption found in primary and secondary sources that, in both UK and EU law, there are subject matters in the public domain that are unpropertizable.[65] However, notwithstanding this supposed "unpropertizable" status, many authors also speak of an ongoing phenomenon of encroachment by copyright upon these subject matters. This article's question is triggered by this paradox: essentially, it calls for an investigation into the practical significance of this "unpropertizable" status amid such encroachment.

However, before we can answer this question, we must address a pressing issue, namely that not all authors agree that there is such a phenomenon as public domain encroachment or with the criticism that is directed towards it. This is often due to their rationale for (not) protecting the public domain.[66] As public domain encroachment has provided the impetus for this article's question, the fact that there are conflicting perceptions surrounding this phenomenon is important for our purposes. This is because these perceptions are likely to influence or even to predetermine our conclusion as to whether there are unpropertizable subject matters in both jurisdictions and/or whether this status has practical significance.

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[61] *Id*. at 83.
[62] CDPA § 29(1).
[63] *Id.* pt.1, ch. 3.
[64] Glyn v. Weston Feature Film Co., [1916] 1 Ch. 261 (U.K.). *See* LIONEL BENTLY ET AL., INTELLECTUAL PROPERTY 134 (6th ed., 2022) ("[T]here is still some doubt as to the exact effect of immorality. It is unclear whether it means that there is no copyright in the work at all or that equity will not enforce the copyright.").
[65] *See* Dusollier, *Scoping Study*, *supra* note 5, at 24 ("Ideas constitute the 'hard kernel' of the public domain, as being per se incapable of benefiting from copyright protection.").
[66] *See* Benabou & Dusollier, *supra* note 11, at 163 ("There is no 'natural state' of the public domain; its composition is fundamentally a matter of political choice.").

One such conflicting perception is Anupam Chander and Madhavi Sunder's "postcolonialist critique"[67] of the "romantic public domain."[68] These authors reveal how a romantic view of the public domain (which assumes that it will be "equally exploited by all") endorses placing the resources of often globally disempowered groups, such as traditional knowledge, in the public domain.[69] This view masks how distributional inequalities render certain groups, such as pharmaceutical companies, more likely to exploit these resources and to obtain IPRs over their products. Consequently, in criticizing new IP claims over these resources as public domain encroachment, scholars who adhere to this romantic trope end up reinforcing these inequalities by undermining attempts by disempowered groups to acquire IPRs over such resources.[70]

What is noteworthy is that, unlike scholars who adhere to the romantic view, Chander and Sunder treat the IP claims of disempowered groups over public domain resources as meriting endorsement rather than criticism. Thus, their perception of public domain encroachment (as either being non-existent or as meriting endorsement) influences their conclusion as to whether these resources are unpropertizable. In fact, they are led to conclude that these (public domain) resources are *not* unpropertizable from the standpoint of these groups.[71]

Therefore, given this potential for conflicting perceptions of this phenomenon in the literature, this article will approach its investigation in a set way. Specifically, it will *not* answer its question by seeking to pinpoint the supposed occurrence of public domain encroachment (which is where these conflicting perceptions arise) and then concluding from this that certain subject matters are (not) unpropertizable and/or that this status has (no) practical significance. Instead, its inquiry will center on *how* such encroachment might be facilitated in practice. Here this article focuses on one means by which such encroachment might be facilitated, namely where there is flexibility in the legal rules[72] that render certain subject matters unpropertizable which might, in practice, allow judges to circumvent their "unpropertizable" status.

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[67] Cohen, *supra* note 5, at 165.

[68] Chander & Sunder, *supra* note 29, at 1335; *see also* Benabou & Dusollier, *supra* note 11, at 163 (Criticizing the "romantic view of the public domain, as an open field where everyone can go," for being "appropriate neither to describe the reality of the actual trend of privatisation of the commons, nor to struggle against it.").

[69] *See* Chander & Sunder, *supra* note 29, at 1332 ("[I]n practice, differing circumstances—including knowledge, wealth, power, and ability—render some better able than others to exploit a commons.").

[70] *Id.* at 1335 ("The current habit of critiquing each and every new claim for property rights as an encroachment on the public domain … may … impair efforts by disempowered groups to claim themselves as subjects of property…").

[71] *See id.* at 1353 ("Why cannot companies in the developing world exploit such resources equally with companies in the developed world?").

[72] *Cf.* Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 202 (2004) (describing the "inherent flexibility of intellectual property rights" that R. Polk Wagner identifies in *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1032–33 (2003)).

C. The Structure of this Investigation

This article will answer its question by addressing two issues: first, as formally established by these legal rules, in what way(s) are subject matters in the public domain unpropertizable in both jurisdictions? And second, in the event of such flexibility in these rules, does their "unpropertizable" status have any practical impact on judicial decision-making?

To address these issues, Parts II-IV identify three possible ways in which subject matters are unpropertizable in both jurisdictions by comparing their requirements for copyright subsistence. These are the following: first, subject matters, such as ideas, that are said to be "by their very nature" unpropertizable and so comprise the public domain's "hard kernel"[73] in both jurisdictions (Part II); second, subject matters, beyond this hard kernel, that fail to meet certain additional requirements for subsistence (Part III); and third, subject matters that fail to satisfy certain "material" requirements for subsistence, where "material" refers to the possession of an objective form[74] (Part IV). This article then addresses the second issue by identifying flexibility in the legal rules that render subject matters unpropertizable (in these three ways) which might allow judges, in practice, to circumvent their "unpropertizable" status.

Combining both issues, this article argues that in both jurisdictions there are subject matters in the public domain that are unpropertizable in the first and second understandings, whereas subject matters that are unpropertizable in the third way only feature in the UK. However, their "unpropertizable" status (in all three understandings) is, in practice, circumventable. Consequently, if such circumvention were to occur, this status would have little practical impact on judicial decision-making.

Finally, Part V explores the implications of this investigation on the public domain. It concludes that this investigation has rendered the "non-property" status of the public domain more visible; however, it remains to be seen what the future impact of this might be.[75]

II. UNPROPERTIZABLE BY NATURE? EXAMINING THE PUBLIC DOMAIN'S HARD KERNEL

In this Part, this article will identify the first way in which subject matters in the public domain are "unpropertizable" in both jurisdictions. This is where

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[73] Dusollier, *Scoping Study*, *supra* note 5, at 24.

[74] *See, e.g.*, Case C-310/17, Levola Hengelo BV v. Smilde Foods BV, EU:C:2018:899 ¶ 40 (Referring to the "identifiability" requirement, according to which "the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form."); COPINGER, *supra* note 21, ¶ 3-162 (describing the "requirement of fixation" as being necessary both "to prove the existence of the work and to establish what the work consists of…").

[75] *See supra* note 22 and accompanying text for details about the REUL Act.

they are excluded from copyright protection because they are "by their very nature"[76] unpropertizable. Henceforth, this article will collectively refer to these subject matters as being "unpropertizable by nature." These subject matters are typically described in the academic literature as forming the public domain's "hard kernel" in that they "never really leave…" the public domain.[77]

These unpropertizable subject matters take various forms in the literature. They can range from the more general, such as "ideas, facts, [and] principles,"[78] to the more specialized, such as "raw data"[79] and musical notes.[80] Furthermore, express references to these subject matters include, amongst other things, the exclusion of "news of the day or … miscellaneous facts having the character of mere items of press information" from protection under the Berne Convention[81] and the exclusion of "[i]deas and principles which underlie any element of a computer program" under the EU Software Directive.[82] Due to their typical function as structural components within authors' works, this article will collectively refer to these individually unpropertizable subject matters henceforth as "building blocks."[83]

Within both jurisdictions, we also find that these "building blocks" are often equated with being an "idea." This can be observed in the CJEU's statement in *SAS Institute* that the "functionality of a computer program" is excluded from copyright protection so as not to "monopolise ideas."[84] Consequently, the notion of an "idea" occupies a dual position in both jurisdictions: depending on the circumstances, it may either be a "building block," which is *itself* individually

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[76] Benabou & Dusollier, *supra* note 11, at 163.
[77] *Id.* at 174.
[78] Dusollier, *Scoping Study*, *supra* note 5, at 23.
[79] Yochai Benkler, *A Political Economy of the Public Domain: Markets in Information Goods Versus the Marketplace of Ideas*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 267, 268 (Rochelle Cooper Dreyfuss et al. eds., 2001).
[80] *See* Hayleigh Bosher, *Sheeran Succeeds in 'Shape of You' Music Copyright Infringement Claim*, 17 J. INTELL. PROP. L. & PRAC. 544, 546 (2022) (discussing Zacaroli J.'s judgment in the UK case of Sheeran v. Chokri, [2022] EWHC 187 (Ch.)).
[81] Berne Convention art. 2(8).
[82] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111), art. 1(2) [hereinafter Software Directive].
[83] Matthias Leistner, *Of Football Fixtures, Football Matches, Jeans, Sweatshirts … and a Folded Bike: Functionality in the CJEU's Copyright Case Law*, *in* INTELLECTUAL PROPERTY AND SPORTS: ESSAYS IN HONOUR OF P. BERNT HUGENHOLTZ 193, 193 (Martin Senftleben et al. eds., 2021) (referring to many of P. Bernt Hugenholtz's works as being "concerned with … preserving a public domain of unprotected basic building blocks to ensure free dynamic competition in copyright affected markets"); *see also* Sheeran v. Chokri, EWHC 187 ¶ 206 (U.K.) ("The … rising pentatonic scale is a generic and commonplace building block in many musical genres.").
[84] Case C-406/10, SAS Institute Inc. v. World Programming, Ltd., EU:C:2012:259 ¶ 40.

unpropertizable by nature, or a "meta-category"[85] within which other "building blocks" are located. In this latter position, the "idea" stands for any subject matter that is unpropertizable by nature.

This dual position of the "idea" brings us to the legal doctrine in both jurisdictions that grounds this article's first understanding of "unpropertizable" subject matters: the idea-expression dichotomy. As expressly included in the TRIPS Agreement (specifically, that "[c]opyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"[86]), this doctrine represents an initial hurdle that any subject matter must overcome to receive copyright protection. More specifically, it distinguishes between subject matters (ideas) that are unpropertizable by nature, and so excluded from protection, and subject matters (expressions) that are propertizable by nature.

This preliminary gatekeeping function of the doctrine is reflected in Séverine Dusollier's statement that the idea-expression dichotomy is "what constitutes the notion of the work, even prior to the question of what is a literary and artistic work, or of what is an original work."[87] By using the language of Article 1 of the Berne Convention (according to which the Berne Union protects "the rights of authors in their literary and artistic works"[88]), Dusollier makes it clear that the idea-expression dichotomy operates as a preliminary stage before a subject matter may be deemed to be a "literary and artistic work" under the Convention. More specifically, in distinguishing unpropertizable subject matters (ideas) from propertizable ones (expressions), the idea-expression dichotomy answers the a priori question of whether a subject matter is even a "work" under the Convention.

However, Dusollier's statement also reveals that the status of a subject matter as "propertizable by nature" (such that, in essence, it constitutes an "expression" by operation of the idea-expression dichotomy) is a necessary, but not sufficient condition for copyright protection.[89] Here, in addition to being an "expression" (in the EU) or a "work" (in the UK), the subject matter must satisfy further conditions to become an object of copyright (specifically, an authorial

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[85] Pamela Samuelson, *Evolving Conceptions of Copyright Subject Matter*, 78 U. PITT. L. REV. 17, 17 (2016) (describing "works of authorship" as a "meta-category" that includes the eight categories of works enumerated in 17 U.S.C. § 102(a) (2012)).

[86] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Amendment Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) art. 9(2) [hereinafter TRIPS Agreement].

[87] Dusollier, *Scoping Study*, *supra* note 5, at 23.

[88] Berne Convention art. 1.

[89] *Cf.* Brad Sherman, *What Is a Copyright Work?*, 12 THEORETICAL INQUIRIES L. 99, 103 (2011) ("…[B]efore being in a position to ascertain whether a work is original, it is first necessary to have some sense of what the work is.").

work in the EU and an original LDMA work in the UK),[90] which this article will consider in Parts III-IV.[91]

Before commencing this investigation, it is also important to establish whether, in describing subject matters as being "unpropertizable by nature," this article means that their being "unpropertizable" is a metaphysical status,[92] as opposed to, for instance, a purely political one.[93]

As a metaphysical status, the "unpropertizable" quality of, say, an idea would go to its very identity as an idea, being an essential quality that it must possess in order "to have [this] particular identity."[94] One example of "unpropertizable" being a metaphysical status can be seen in Thomas Jefferson's description of ideas being "like the air in which we breathe, … incapable of confinement or exclusive appropriation."[95] Jefferson used this metaphysical description of ideas to support his argument that, because it is impossible exclusively to possess an idea in nature once it has been disclosed, there can be no natural property rights in an idea.[96] Building upon Jefferson's description of "unpropertizable" as meaning an impossibility of "confinement or exclusive appropriation," one possible metaphysical interpretation of the hard kernel would be that its subject matters are unpropertizable by nature if it is an essential quality of the subject matters' identities that they cannot be exclusively possessed.[97]

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[90] For an outline of these further conditions in both UK and EU copyright law, *see infra* Part III(A).

[91] This Part will focus purely on subject matters that, in being unpropertizable by nature, comprise the public domain's hard kernel in both jurisdictions. This is because the idea-expression dichotomy (which delimits this hard kernel) arguably serves a different purpose from the other requirements for subsistence. This purpose could be described as being innately structural, where these unpropertizable subject matters represent the "raw material" that contemporaneous and consecutive authors may share in their works: Litman, *supra* note 4. Consequently, the possibility of encroachment by copyright upon these subject matters represents a pressing issue, in the form of an existential threat to authorship, which this Part will consider separately from the other requirements (considered in Parts III-IV).

[92] The author is grateful to an anonymous reviewer for suggesting this.

[93] *See* Benabou & Dusollier, *supra* note 11, at 163.

[94] George, *Metaphysics*, *supra* note 46, at n. 2.

[95] *Letter from Thomas Jefferson to Isaac McPherson* (Aug. 13, 1813), *in* XIII THE WRITINGS OF THOMAS JEFFERSON 334 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903). Again, the author is grateful to an anonymous reviewer for suggesting this example.

[96] *See* Oren Bracha, *Give Us Back Our Tragedy: Nonrivalry in Intellectual Property Law and Policy*, 19 THEORETICAL INQUIRIES L. 633, 635 (2018) ("Claims of natural property rights in ideas were often resisted with the objection that intangible ideas, at least once communicated to the public, were no longer subject to this exclusive control relationship that is the 'natural' core of property.").

[97] If this article were to adopt this metaphysical understanding of unpropertizable subject matters, this would inevitably impact what we understand the composition of the hard kernel to be. For instance, although one might argue that ideas are necessarily "incapable of confinement or exclusive appropriation," it is likely that (some of) the subject matters

In contrast to such a metaphysical account of the public domain, we find that some authors, such as Valérie-Laure Benabou and Séverine Dusollier, criticize the "erroneous idea" that the public domain is comprised of "things which, by their very nature, cannot be owned." Instead, they argue that "[t]here is no 'natural state' of the public domain; its composition is fundamentally a matter of political choice."[98] Thus, when understood as a purely political status, the "unpropertizable" quality of an idea would depend on the norms or policies that underpin our system of copyright law. Consequently, in the (unlikely) event that it were to become politically desirable to propertize an idea, the idea's "unpropertizable" status could be removed.

This article will be describing as "unpropertizable by nature" those subject matters whose exclusion from copyright protection is typically presented in the literature as being fundamental to the very possibility of authorship.[99] Although sources often disagree as to whether the "unpropertizable" status of these subject matters is a metaphysical one, this article will use the description "unpropertizable by nature" merely to reflect this fundamental role that these subject matters are typically deemed to serve, remaining open to the possibility that this status may be metaphysical or purely political, and so on. However, any detailed examination or potential endorsement of these possibilities is outside the scope of this article.

This Part will address two issues: first, whether there are subject matters in the public domain that are unpropertizable by nature in both jurisdictions; and second, whether their "unpropertizable" status has any practical impact on judicial decision-making. It will ultimately argue that there are subject matters in both jurisdictions that are unpropertizable by nature; however, their "unpropertizable" status is, in practice, circumventable. If such circumvention were to occur, this status would have little practical impact on judicial decision-making.

A. Connecting the Hard Kernel: What Do Ideas, Facts, Keywords, and Musical Notes Have in Common

To address the first issue (specifically, whether there are subject matters in the public domain that are unpropertizable by nature), this article will focus on the legal rules in both jurisdictions that exclude subject matters from copyright protection. These rules are twofold: the idea-expression dichotomy; and the context-specific rules that apply to certain individual "building blocks."

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that this article has described as "building blocks," such as raw data and musical notes, would not possess this quality. Therefore, on this understanding of "unpropertizable by nature," one might determine that the hard kernel comprises just ideas or perhaps ideas and only some of the building blocks that this article identifies in Part II. The author is thankful to an anonymous reviewer for this observation.

[98] Benabou & Dusollier, *supra* note 11, at 163.

[99] Litman, *supra* note 4, at 967 (describing the public domain as "the law's primary safeguard of the raw material that makes authorship possible").

Firstly, as regards the idea-expression dichotomy, we find that this exclusion of ideas from copyright protection arises in two ways. The first is where a subject matter is excluded because it is equated with, or categorized as being, an idea, as can be seen in Dusollier's assessment of whether "[m]oves … would belong to the category of ideas."[100] Here we find the idea being used as a "meta-category" (or label) to denote that an individual subject matter (or "building block") is unpropertizable. The second is where individual ideas, as "building blocks" that are themselves contained within subject matters, are excluded, as is reflected in the CJEU's statement that "to the extent that logic, algorithms and programming language comprise ideas and principles, those ideas and principles are not protected."[101] From these two examples, we see that the idea-expression dichotomy operates to exclude both ideas per se, as individual "building blocks," and ideas as a "meta-category" for other "building blocks."

Secondly, we also find that, across the range of "literary and artistic works"[102] in which copyright is capable of subsisting, there are specific rules that exclude individual "building blocks" from protection. In both jurisdictions these rules are predominantly found in statute and case law, as well as in international agreements, such as the Berne Convention[103] and the TRIPS Agreement.[104] However, these rules are also expressed and/or implied in the academic literature. Examples of such individually excluded subject matters include the "keywords, syntax [and] commands" used in creating computer software,[105] the "scale[s]"[106] in a musical composition, as well as facts and scientific principles.[107]

Having identified both the idea-expression dichotomy and the context-specific rules that apply to individual "building blocks," this article will now consider how these rules typically interact in both jurisdictions. To do so, it will draw upon Lewison LJ's judgment in *SAS Institute*, which concerned the issue of whether there was copyright infringement when, in creating a computer program, a developer emulated the functionality of a competitor's computer program.[108]

To begin with, we may identify within Lewison LJ's judgment a context-specific rule that excludes an individual "building block" from copyright protection. This can be seen in his inference that the functionality of a computer

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[100] Séverine Dusollier, *Get a Move On: Copyright in Movement*, *in* INTELLECTUAL PROPERTY AND SPORTS: ESSAY IN HONOUR OF P. BERNT HUGENHOLTZ, *supra* note 83, at 35.
[101] *SAS Institute*, C-406/10 ¶ 32.
[102] Berne Convention art. 1.
[103] *Id.* art. 2(8).
[104] TRIPS Agreement art. 10(2) ("Compilations of data or other material … which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection … shall not extend to the data or material itself…").
[105] *SAS Institute*, C-406/10 ¶ 66.
[106] *Sheeran v. Chokri*, EWHC 187 ¶ 206 (Zacaroli, J., opinion).
[107] Samuelson, *Challenges in Mapping the Public Domain*, *supra* note 26.
[108] SAS Inst. Inc. v. World Programming, Ltd., [2013] EWCA Civ 1482, *aff'd,* [2015] E.C.D.R. 17 (U.K.) [hereinafter SAS Institute [2013] EWCA].

program (as one of "the elements of a computer program"[109] or, in other words, a "building block"), cannot be protected by copyright either as a "form of expression" of a computer program under the Software Directive or as a "work" under the InfoSoc Directive.[110]

What Lewison LJ's judgment also reveals is that, while these context-specific rules identify certain "building blocks" as being excluded from protection, such exclusion typically occurs by operation of the idea-expression dichotomy (where the "idea" serves as a "meta-category" for these "building blocks"). This can be seen in his statement that "the functionality of a computer program does not count as a[n] … expression [but rather] … falls on the *ideas* side of the line."[111]

Therefore, what connects both individual "building blocks" (such as the functionality of a computer program) and the "idea" as a "meta-category" for such "building blocks" when applying the idea-expression dichotomy is that they are automatically and permanently excluded from copyright protection. Consequently, this article addresses the first issue in this Part by determining that, in both jurisdictions, there are subject matters in the public domain's hard kernel that are unpropertizable *by nature*, where "by nature" reflects this automatic and permanent exclusion.

It is also important to note that, when applying the idea-expression dichotomy, these "building blocks" are typically equated with being "*like* ideas"[112] and thus excluded on this basis, rather than being excluded because they *are* ideas. Therefore, although "building blocks" bear the same status of being "unpropertizable by nature," they do not lose their distinct identities (as the functionality of a computer program or as "mere information,"[113] for instance) within the public domain's hard kernel.

In sum, this article adopts the following conclusion to the first issue: in both jurisdictions there are subject matters in the public domain's hard kernel that are unpropertizable by nature. These subject matters include both individual "building blocks" (such as the functionality of a computer program) and ideas which occupy a dual position within both jurisdictions. Specifically, depending on the circumstances, ideas may be either individual "building blocks" themselves or a "meta-category" within which other "building blocks" may be located when applying the idea-expression dichotomy.

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[109] *SAS Institute*, C-406/10 ¶ 39.
[110] SAS Institute [2013] EWCA ¶ 51.
[111] *Id.* ¶ 74 (emphasis added).
[112] Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 572 (1990) (emphasis added) (stating that "[f]acts, like ideas, are not copyrightable…").
[113] Dusollier, *Scoping Study*, *supra* note 5, at 23.

B. Discovered, Not Created? Examining the Practical Significance of the Assertion That Ideas "Never Really Leave"[114] the Public Domain

Having identified subject matters that are unpropertizable by nature in both jurisdictions, this article will now address the second issue: whether the "unpropertizable" status of these subject matters has any practical impact on judicial decision-making. To address this issue, this article will begin by identifying whether there is flexibility in the legal rules that determine that subject matters are unpropertizable by nature which might enable judges, in practice, to circumvent their "unpropertizable" status.

To investigate this issue, this article will focus on the idea-expression dichotomy because, in addition to the meaning of "unpropertizable by nature" identified in Part II(A), this legal doctrine introduces a second aspect to this status. And, importantly, this aspect opens up the possibility for flexibility in determining that a subject matter is (or is not) unpropertizable by nature. Unlike the meaning of "unpropertizable by nature" in Part II(A), which focused just on individually unpropertizable subject matters themselves and their automatic and permanent exclusion from copyright protection, this second aspect relates to the *relationship* (or dichotomy) between, on the one hand, subject matters that are unpropertizable by nature (ideas) and, on the other, those that are propertizable by nature (expressions).[115]

According to this aspect, the "unpropertizable" status of ideas is "discovered," as if in nature, rather than "created"[116] by judges. More specifically, this aspect holds that the identification of a subject matter as being (equivalent to) an unpropertizable idea, and as thereby distinguished from a propertizable

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[114] Benabou & Dusollier, *supra* note 11, at 174.

[115] *Cf.* ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 4 (2015) (describing the idea-expression dichotomy as "a representative instance of the distinction between wrongful copying and lawful copying that pervades copyright law as a whole").

[116] Jones, *supra* note 112. The origins of this distinction "between creation and discovery" can be found in Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 347 (1991), where the US Supreme Court determined that original compilations of facts may qualify for copyright protection, but that the "facts themselves" remain unpropertizable on the basis that "facts are found rather than authored": Wendy J. Gordon & Sam Postbrief, *On Commodifying Intangibles*, 10 YALE J.L. & HUMAN. 135, 143 (1998). In *Feist Publications*, the US Supreme Court determined that originality (in the sense of originating from an author) "is a constitutional requirement" because of the reference to "authors" and "writings" in Article I, § 8, cl. 8, of the US Constitution, which authorizes Congress to secure "for limited times to authors and inventors the exclusive right to their respective Writings and Discoveries." 449 U.S. at 346. Such terms were said to "presuppose a degree of originality," which thereby excludes facts from copyright protection because facts, in being discovered as opposed to created, "do not owe their origin to an act of authorship." *Id*. at 346–47. Notwithstanding the US origins of this distinction, this article will employ the language of "creation" and "discovery" to highlight two different interpretations of the idea-expression dichotomy.

expression, does not require the application of additional criteria. In essence, ideas are "already there" and merely "stumble[d] upon" by judges.[117]

To explain this further, the distinction "between creation and discovery"[118] that is central to the second aspect of this status concerns the placement of the "line"[119] that formally separates an unpropertizable idea from a propertizable expression. According to this aspect, this line is already drawn (or *discovered* ex ante) as opposed to being drawn by judges (or *created* ex post) through the application of additional criteria, such as "originality."[120]

The second aspect of this status can be identified predominantly from the academic literature, where it is often implicit in discussions of the public domain. For example, it can be identified in the assertion that "the idea never really leaves the public domain,"[121] which implies that there already exists a fundamental distinction between "substance" (idea) and "form" (expression). As such, no additional criteria must be applied to create this distinction.

1. A Necessary Fiction: Identifying Flexibility in the Idea-Expression Dichotomy

What is noteworthy about this second aspect of "unpropertizable by nature," however, is that it is fictional.[122] This is captured in Richard Jones's account of the idea-expression dichotomy as involving "the same type of entities", where "inside each expression is another expression."[123] According to Jones, ideas, being "human conceptions," cannot possibly exist without expression because the very act of conceptualizing, whether it be purely internal (in one's thoughts) or external, necessarily involves representations (or expressions).[124] In other words, such representations are required in order for ideas to be formed or

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[117] Litman, *supra* note 4, at 996 (commenting on the "fallacy" of "the Platonic fact precept," which Jane C. Ginsburg describes in *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after Hoehling v. Universal City Studios*, 29 J. COPYRIGHT SOC'Y U.S.A. 647, 658 (1982)).

[118] *Feist Publications*, 499 U.S. at 347.

[119] Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 198 (1990); *see also* Jones, *supra* note 112 (referring to an apparent "line" that separates an "idea" from an "expression").

[120] *See* Jones, *supra* note 112 ("Facts are considered to be discovered, not created, and therefore are not original works of authorship.").

[121] Benabou & Dusollier, *supra* note 11, at 174.

[122] *Cf.* Jonathan Griffiths, *Dematerialization, Pragmatism and the European Copyright Revolution*, 33 OXFORD J. LEGAL STUD. 767, 779 (describing an "expression" as a "fictional construct").

[123] Jones, *supra* note 112, at 586.

[124] *Id*. at 564.

conceptualized. As such, Jones reveals that, in practice, "there are no unexpressed ideas."[125]

Consequently, Jones asserts that, rather than *discovering* the existence of a dichotomy between "substance" (idea) and "form" (expression), a judge in fact *creates* a distinction between two types of form, namely "protectible" and "unprotectible" expressions. They do so by applying the additional criteria of "originality and creativity" to assess these expressions and then reaching an ex post judgment that only those expressions that "exhibit originality and minimal creativity" are deemed protectible.[126] Because Jones considers US law, the additional criteria ("originality and creativity") that he identifies as distinguishing "protectible" from "unprotectible" expressions are based on the US originality requirement where, to qualify for protection, a work must be "an independent creation" and display "a modicum of creativity."[127] Applying this to UK and EU law, the additional criterion that would distinguish "protectible" from "unprotectible" expressions is "originality."

Therefore, Jones's account conflicts with the second aspect of "unpropertizable by nature," according to which the line that distinguishes an unpropertizable idea from a propertizable expression is discovered by judges. Instead, Jones demonstrates that a judge's identification of an unpropertizable idea is merely a "label" that has been applied "*after* protectibility has been decided" on the basis of additional criteria.[128] Consequently, the line that distinguishes an unpropertizable idea from a propertizable expression is, in practice, created by judges.

Having revealed that the second aspect of "unpropertizable by nature" is a fiction, it is worth noting that many commentators claim that this fiction is necessary. This is because of the structural purpose that is served by the subject matters within the public domain's hard kernel where they are typically recycled across "works of authorship." So, the argument goes, this fiction is necessary, lest we restrict the availability of the "raw material" that authors use.[129]

Nevertheless, this article contends that this fiction generates flexibility in how judges apply the idea-expression dichotomy because of the conflict that this fiction entails between, on the one hand, its formal portrayal of unpropertizable "ideas" as being discovered and, on the other, the practical reality that their distinction from propertizable "expressions" can only be created. This flexibility might enable judges to elide both the "creation" and the "discovery" views in determining that a subject matter is (or is not) "unpropertizable by nature."

An example of this flexibility can be seen in Lloyd LJ's judgment in the UK case of *Baigent v. The Random House Group, Ltd.*, which involved a claim that

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[125] *Id*. at 565.
[126] *Id.* at 593.
[127] *Feist Publications*, 499 U.S. at 346; *see also id.* at 592 ("[T]o be protectible, a work needs independent creation and minimal creativity.").
[128] Jones, *supra* note 112, at 587 (emphasis added).
[129] Litman, *supra* note 4.

copyright in a literary work (a book entitled *The Holy Blood and the Holy Grail* ("HBHG")) had been infringed because the author of a later book (*The Da Vinci Code*) had reproduced a substantial part of HBHG. The core issue in this case was whether the copying of "elements" of HBHG (said to be a "central theme" of this literary work) amounted to infringement.[130] As part of this assessment, Lloyd LJ considered whether the elements that were alleged to have been copied from the literary work were, in fact, protected by copyright.[131]

In determining that these elements of the literary work were not protected by copyright, Lloyd LJ seemingly elided the "creation" and the "discovery" views of the idea-expression dichotomy. This can be seen in his statement that the combination lay "on the wrong side of the line between ideas and their expression" (which echoed the "discovery" view) because the elements, in not being "the product of the application of skill and labour," were of "too high a level of generality and abstraction."[132] In other words, they were unoriginal (which echoed the "creation" view).

Consequently, this flexibility in applying the idea-expression dichotomy produces a lack of clarity in Lloyd LJ's judgment as to whether the identification of a propertizable expression occurs independently of the "originality" criterion (like under the "discovery" view) or is dependent on this criterion (like under the "creation" view).

2. Unpropertizable by Nature or Artefact?[133] Investigating How Judges Might Circumvent this "Unpropertizable" Status

Having identified flexibility in the idea-expression dichotomy, this article will now consider one way in which judges might circumvent the "unpropertizable" status of subject matters. This is where they cherry-pick different aspects from each of the two conflicting views of this dichotomy (specifically, the "creation" and the "discovery" views) without fully committing to either view. In so doing, judges might render propertizable a subject matter that, had they fully committed to either view, would be unpropertizable.

This article describes this type of circumvention by judges as producing a subject matter that is "(un)propertizable by artefact." Here, "artefact" captures the

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[130] Baigent and Leigh v. The Random House Grp., Ltd., [2007] EWCA Civ 247, [2008] E.M.L.R. 7 ¶ 14 (U.K.).

[131] *See id.* at ¶ 92 ("[E]ven if it were right to examine what was left of the Central Theme after deleting that which … was not found in HBHG, the elements remaining were of too high a level of generality and abstraction to qualify for copyright protection: they were ideas, not the expression of ideas.").

[132] *Id.*

[133] *See* Mario Biagioli, *Nature and the Commons: The Vegetable Roots of Intellectual Property*, *in* LIVING PROPERTIES: MAKING KNOWLEDGE AND CONTROLLING OWNERSHIP IN THE HISTORY OF BIOLOGY 241, 241 (Jean-Paul Gaudillière et al. eds., 2009) ("the logic of intellectual property posits a dichotomy between nature and artifact and then attaches IP rights to new humanly-produced artifacts…").

artificial selectiveness with which judges might interpret the idea-expression dichotomy and thereby identify a propertizable "expression."

This circumvention can arguably be seen in Lord Hoffmann's judgment in the UK case of *Designers Guild, Ltd. v. Russell Williams, Ltd.*, which concerned the issue of whether a "substantial part" of a fabric design had been copied when the "overall impression" of the designs was "very similar,"[134] but there were differences in their respective details. Although this case concerned copyright infringement, as opposed to subsistence, we can use it to illustrate this circumvention. This is because, in the UK, the identification of a "work" (pursuant to the idea-expression dichotomy) is a necessary part of the infringement assessment as a judge must determine that an act restricted by the copyright in a work has been done "in relation to the work as a whole or any substantial part of it."[135] Given that it is a necessary, but not sufficient condition for a subject matter to receive copyright protection that it is a "work" (or an "expression") pursuant to the idea-expression dichotomy, there can be no infringement if this subject matter is already excluded from copyright protection because it is (equivalent to) an idea.

To begin with, Lord Hoffmann appeared to adopt the "creation" view of the idea-expression dichotomy when he stated that "every element in the expression of [a work] … is the expression of an idea."[136] Here, he seemingly determined that the distinction between "protectible" and "unprotectible" expressions requires the application of additional criteria.[137] According to these criteria, an idea "expressed by a copyright work [must be] … original" to be protectible, an assessment that is based on "the contribution of the author's skill and labour."[138]

However, Lord Hoffmann then demonstrated how judges might circumvent the unpropertizable status of a subject matter by cherry-picking different aspects of the "creation" and "discovery" views of the idea-expression dichotomy. This can be seen in his statement that the copying of "original elements in the plot of a play" might constitute infringement, although one has not "reproduce[d] a single sentence of the original," and that, when asked "what is being protected" here, it suffices to say that "it is an *idea expressed* in the copyright work."[139]

In the latter part of this statement, Lord Hoffmann appears to adopt different aspects of the "creation" and "discovery" views, without fully committing to either view. So, his assertion that what has been copied is "an *idea expressed* in the copyright work" echoes one aspect of the "creation" view, according to which

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[134] Designers Guild, Ltd. v. Russell Williams (Textiles), Ltd., [2000] 1 W.L.R. 2416, 2429 (U.K.).
[135] CDPA § 16(3)(a).
[136] *Designers Guild*, 1 W.L.R. at 2422.
[137] *Cf.* Jones, *supra* note 112, at 598 ("In sum, the relevant dichotomy in copyright law is not between the form (expression) and substance (idea) of a writing, but between two types of forms (expressions): protectible and unprotectible. The only relevant criteria for distinguishing unprotectible from protectible expressions are originality and creativity of the expressions in a work.").
[138] *Designers Guild*, 1 W.L.R. at 2423.
[139] *Id.* at 2422 (emphasis added).

the idea-expression dichotomy involves "the same type of entities," namely "unprotectible" and "protectible" expressions.[140] Thus, to say that one has copied "an idea expressed" in a work is just another way of saying that one has copied an expression. However, what is crucially lacking in this statement is an indication of what *kind* of expression one has copied, specifically whether it is "unprotectible" or "protectible."

Therefore, to commit fully to the "creation" view, a judge would further need to identify the criteria that enabled them to distinguish between an "unprotectible" and "protectible" expression. However, in merely offering, as an explanation for the finding of infringement, the assertion that what has been copied is "an idea expressed" in the work, Lord Hoffmann omits any reference to the additional criteria that would have been applied to distinguish "protectible" from "unprotectible" expressions. As such, he seemingly adopts one aspect of the "discovery" view, according to which no additional criteria are applied by the judge to distinguish between unpropertizable ideas and propertizable expressions.

Although, in Lord Hoffmann's example, the copying was done in relation to the "*original* elements in the plot" (which, in satisfying the additional criterion of "originality," would amount to "protectible" or protected expressions), his statement that it would be sufficient, in this circumstance, to explain the finding of infringement on the basis that "ideas expressed" in the work had been copied omits any reference to this criterion.[141] Consequently, Lord Hoffmann's cherry- picking of different aspects of the "creation" and the "discovery" views in this explanation opens up the possibility for judges to circumvent the "unpropertizable" or "unprotectible" status of subject matters under either view. For instance, a judge might, in principle, assert that there has been infringement when one has copied *unoriginal* expressions because they are "ideas expressed" in the work. This would enable them to circumvent the "unprotectible" status of these elements under the "creation" view.

Consequently, these examples demonstrate how judges might, in practice, circumvent the "unpropertizable" status of subject matters. If such circumvention were to occur, the status of these subject matters as "unpropertizable by nature" would have little practical impact on judicial decision-making. Although this article has not referred to EU cases in Part II(B), its analysis with respect to these UK cases is equally applicable in the EU because the idea-expression dichotomy operates in both jurisdictions. In both jurisdictions, the identification of an "expression" (EU) or a "work" (UK) is necessary in both the copyright subsistence and infringement assessments.[142]

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[140] Jones, *supra* note 112, at 579.

[141] *Designers Guild*, 1 W.L.R. at 2422.

[142] *Cf.* Dusollier, *Scoping Study*, *supra* note 5, at 23 (The idea-expression dichotomy "serves as a criterion for determining a possible copyright infringement, as only copying expression, and not idea, will amount to a copyright violation.").

C. Contemplating the Implications of this Investigation on the Hard Kernel

Having identified both flexibility in the idea-expression dichotomy and one way in which judges might circumvent the "unpropertizable" status of subject matters, this article will now contemplate the implications of its investigation on the public domain.

This article argues that the flexibility in the idea-expression dichotomy (reflected in the conflict between the "creation" and the "discovery" views) has potentially serious ramifications for the hard kernel. This is because the formal, "discovery" view (according to which the line that distinguishes an unpropertizable idea from a propertizable expression is drawn without applying additional criteria) holds that the identification of a propertizable expression is undertaken *independently* of other criteria, such as "originality." By contrast, the "creation" view (according to which this line is drawn through applying these criteria) seemingly bypasses the independent and anterior identification of an "expression"; instead, the distinction between "protectible" and "unprotectible" expressions is created by applying additional criteria alone, such as "originality."

Consequently, this article argues that the "creation" view erodes the hard kernel by removing a limiting criterion that delimits its border, namely the independent identification of a propertizable expression as distinct from an unpropertizable idea. In so doing, it arguably introduces within the public domain a presumption of "private-property-to-be,"[143] according to which all public domain subject matters (both within and beyond the hard kernel) are automatically propertizable by nature as "expressions." What then separates them into their respective categories of "protectible" and "unprotectible" is whether they have satisfied the additional criterion of "originality," for instance.

By establishing this presumption, the "creation" view risks copyright encroachment upon the hard kernel. This is of particular concern in both jurisdictions due to the structural purpose that these subject matters serve in sustaining the "enterprise of authorship."[144]

III. BEYOND THE HARD KERNEL: DISTINGUISHING BETWEEN UNPROPERTIZABLE AND PROPERTIZABLE SUBJECT MATTERS IN UK AND EU COPYRIGHT LAW

Following its examination of the public domain's hard kernel in Part II, this article will now identify a second understanding of "unpropertizable" subject matters by considering the additional requirements for copyright subsistence in both jurisdictions, beyond the requirement of an "expression" (EU) or a "work" (UK). This second understanding refers to subject matters that, beyond the hard kernel, fail to meet certain additional requirements for subsistence.

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[143] Benabou & Dusollier, *supra* note 11, at 168.
[144] Litman, *supra* note 4, at 970.

This Part will address two issues: first, whether in both jurisdictions there are subject matters in the public domain that are unpropertizable (in this second understanding); and second, whether their "unpropertizable" status has any practical impact on judicial decision-making. It ultimately argues that, in both jurisdictions, there are subject matters in the public domain that are unpropertizable in this second understanding. However, their "unpropertizable" status is, in practice, circumventable (albeit less so now that the REUL Act is in force). Nevertheless, if such circumvention were to occur, this status would have little practical impact on judicial decision-making.

A. Beyond the Hard Kernel: Comparing the Copyright Subsistence Requirements in Both Jurisdictions

To address the first issue (specifically, whether in both jurisdictions there are subject matters that are unpropertizable in this second understanding), we must consider the following: first, what are the additional requirements for copyright subsistence in both jurisdictions, beyond the requirement of an "expression" (EU) or a "work" (UK)? And second, does the failure of a subject matter to satisfy (any of) these requirements render it unpropertizable?

This article begins by identifying the additional requirements for subsistence in both jurisdictions. In EU law, a subject matter must satisfy the following requirements[145] to be a "work" under Article 2(a) of the InfoSoc Directive: it must be original; it must be the "expression of the author's own intellectual creation";[146] and this expression must be "in a manner which makes" the subject matter "identifiable with sufficient precision and objectivity"[147] (hereafter, "the identifiability requirement"[148]). Thus, beyond an "expression," the additional requirements for subsistence in EU law are "originality" and "identifiability."

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[145] The CJEU has described the "originality" and the "expression" requirements as being "*two* cumulative conditions" that must be satisfied for a subject matter to be a "work": Case C-683/17, Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV, EU:C:2019:721, ¶ 29 (emphasis added). The CJEU then treats the identifiability requirement as though it were a supplement to the "expression" condition, at ¶ 32 ("As regards the second condition … the concept of a 'work' … necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity…"). However, so that we can examine all of the components that make up the "work" under the InfoSoc Directive, this article will be treating them as three requirements. This approach has also been adopted in BENTLY ET AL., INTELLECTUAL PROPERTY, *supra* note 64, at 64 ("[T]he Court [of Justice] has defined a work as having three components (though it insists on referring to these as two)…").

[146] *Levola Hengelo*, C-310/17 ¶ 37.

[147] *Id.* ¶ 40.

[148] Shazam Prods., Ltd. v. Only Fools The Dining Experience, Ltd., [2022] EWHC 1379 (IPEC), *aff'd*, [2022] E.C.D.R. 21, ¶ 97 (John Kimbell QC, J., opinion).

In UK law, a subject matter must, in addition to being a "work," meet the following requirements to be an original LDMA work under the CDPA: this "work" must fall within one of the LDMA descriptions; and it must be original.[149]

1. Identifying Unpropertizable Subject Matters in EU Law

This article will now consider whether, beyond the hard kernel, the failure of a subject matter to satisfy the originality and/or identifiability requirements in EU law renders it unpropertizable.

Firstly, as regards the originality requirement, this article begins with the CJEU's determination in *Cofemel* that "two cumulative conditions" must be satisfied for a subject matter to be a "work" under Article 2(a) of the InfoSoc Directive. The first condition is that there should "exist an *original* subject matter."[150] The second condition (namely, an "expression") ostensibly builds upon the "originality" condition by holding that only those "elements" of a subject matter "that are the expression" of such originality[151] are propertizable. If a subject matter is unoriginal, it will fail to satisfy the first of two requirements that together must be met for a subject matter to be *propertizable*. Consequently, under Article 2(a) of the InfoSoc Directive, the failure of a subject matter to meet the "originality" requirement renders it unpropertizable.

However, this article now turns to Justine Pila's suggestion that the "implication of the Term, Software, and Database Directives is that it is possible … to distinguish a work from its originality" in the EU.[152] Thus, while "originality" is one requirement that must be satisfied for a subject matter to be a "work" under the InfoSoc Directive, these other Directives suggest that, as regards photographs,[153] computer programs,[154] and databases,[155] the "originality" requirement is *not* embedded within the definition of a work. Instead, it is distinguished from the work, as is reflected in the fact that EU law recognizes a distinction between "original and non-original photographic works,"[156] for instance.

To determine whether a *non-original* photograph, computer program, or database would be unpropertizable, because they fail to meet the originality requirement, this article will now consider the reference to the "literary, scientific and artistic domain" in the Berne Convention. This is because this domain

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[149] CDPA § 1(1)(a).
[150] *Cofemel*, C-683/17 ¶ 29 (emphasis added).
[151] *Id.*
[152] Pila, *supra* note 23, at 144.
[153] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006 O.J. (L 372).
[154] *See* Software Directive, *supra* note 82.
[155] *See* Database Directive, *supra* note 36.
[156] Pila, *supra* note 23, at 144.

represents an outer limit[157] on the subject matters that may receive copyright protection in both jurisdictions (as "literary and artistic works"[158] within the meaning of the Convention). More specifically, as is apparent from Article 2(1) of the Convention, a subject matter must be inside of the "literary, scientific and artistic domain" to receive protection as a "literary and artistic work." Consequently, a subject matter is unpropertizable if it is outside of this domain, but *propertizable* if it is inside.

Therefore, this article determines that a photograph, computer program, or database would be *propertizable* because they fall inside of the "literary, scientific and artistic domain" by virtue of meeting the description of a photograph, computer program or database. However, these propertizable subject matters would ultimately be *unpropertized* on account of failing to meet the "originality" requirement. This "unpropertized" status of these unoriginal subject matters can be seen in the Software Directive where a computer program, by virtue of meeting the description of a "computer program," is already *propertizable* as a "literary work" under the Berne Convention; however, it will only be propertized (or "protected" by copyright) "if it is original."[159] An unoriginal computer program would thus be unpropertized.

Therefore, the failure of a subject matter to meet the originality requirement in EU law renders it *unpropertizable* under Article 2(a) of the InfoSoc Directive; however, under the Term, Software, and Database Directives, this failure renders an already-propertizable photograph, computer program, and database ultimately *unpropertized*.

Secondly, as regards the identifiability requirement, this article determines that the failure of a subject matter to satisfy this requirement does *not* render it unpropertizable. Instead, this requirement distinguishes between, on the one hand, *already-propertizable* subject matters that are (yet-)unpropertized (on account of failing to satisfy this requirement or, in other words, "non-identifying expressions") and, on the other, subject matters that are fully propertized (because they meet this requirement and thus qualify as a "work" under EU law).[160]

This role of the identifiability requirement in distinguishing *already*-propertizable, but (yet-)unpropertized subject matters from propertized ones in EU law is demonstrated in *Cofemel*. After specifying the "two cumulative conditions" that a subject matter must satisfy to be *propertizable* in EU law (specifically, the "originality" and "expression" conditions), the CJEU then treated the third, "identifiability" requirement as a necessary, though subsequent,

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[157] *Cf.* Lionel Bently, *The Football Game as a Copyright Work*, *in* INTELLECTUAL PROPERTY AND SPORTS: ESSAYS IN HONOUR OF P. BERNT HUGENHOLTZ, *supra* note 83, at 223 ("[T]he most obvious way to exclude football from copyright protection would be to hold that it falls outside the domain of copyright – football is not within what Article 2(1) of the Berne Convention refers to as 'the literary, scientific and artistic domain.'").
[158] Berne Convention art. 2(1).
[159] Software Directive, *supra* note 82, art. 1(3).
[160] *See Levola Hengelo*, C-310/17 ¶ 40.

appendage to the "expression" condition. Essentially, to become propertized, an *already-propertizable "*expression of the author's own intellectual creation" must, in addition, satisfy the identifiability requirement.[161] Consequently, a *non-identifying* expression of such creation would be "propertizable, but (yet-) unpropertized," rather than unpropertizable.

This "propertizable, but (yet-)unpropertized" status is supported by the CJEU's approach to determining whether the "taste of a food product" could be protected by copyright in *Levola Hengelo*. What is noteworthy is that the CJEU did not address the referring court's question[162] of whether the expression "literary and artistic works" in the Berne Convention is limited "only to creations which can be perceived by sight and/or by hearing."[163] By omitting any consideration of whether there are inherent sensory limits to the "literary, scientific and artistic domain" (such that subject matters that fail to meet these limits are unpropertizable), the CJEU seemingly implied that the taste of a food product is propertizable[164] and that the only issue is whether an already-propertizable expression of the author's own intellectual creation satisfies the identifiability requirement (and is thus a propertized "work").

Having examined the originality and identifiability requirements in EU law, this article addresses the first issue by determining that *only* the failure of a subject matter to meet the originality requirement under Article 2(a) of the InfoSoc Directive renders it unpropertizable.

2. Identifying Unpropertizable Subject Matters in UK Law

This article will now consider whether, beyond the hard kernel, the failure of a "work" to fall within one of the LDMA descriptions under the CDPA and/or to meet the originality requirement in UK law renders it unpropertizable.

Firstly, as regards the requirement that a work must fall within the CDPA's "closed list,"[165] this article determines that the failure of a work to satisfy this requirement renders it unpropertizable. This is because the LDMA categories serve a gatekeeping role in delimiting the subject matters that may be protected

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[161] *Shazam*, EWHC 1379 (IPEC) ¶ 97.

[162] Jani McCutcheon, *Levola Hengelo BV v Smilde Foods BV: The Hard Work of Defining a Copyright Work*, 82 MOD. L. REV. 936, 944 (2019) ("The CJEU judgement is frustrating in its disregard of question 1(b) which required the court to expressly consider whether the illustrative list de facto limits copyright protection to creations which can be perceived by sight and/or by hearing.").

[163] *Levola Hengelo*, C-310/17 ¶ 25.

[164] *See* McCutcheon, *supra* note 162 ("[T]he CJEU's failure to … set any limits to what might be conceived as the literary, scientific or artistic domain … may have been deliberate. This tends to confirm that the CJEU is of the view that the only operative constraints on the boundaries of the work are originality, and objective identifiability. This would leave the door open to copyright protection for any number of intellectual creations, including a future sensory copyright.").

[165] For a reference to the "closed list" under the CDPA, *see, e.g., Shazam*, EWHC 1379 (IPEC) ¶ 121.

under the CDPA, which the legislature "must have intended" to conform with the Berne Convention.[166] Thus, although a subject matter must be a "work" (specifically, an expression) to be "propertizable by nature" (Part II), this is a necessary but not sufficient condition for the subject matter to receive protection under the CDPA and the Berne Convention, as an LDMA work and a "literary and artistic work," respectively.

Secondly, as regards the "originality" requirement, the failure of an LDMA work to meet this condition does not make it unpropertizable. Instead, it renders a subject matter (that is already-propertizable) ultimately *unpropertized*. This is because, by virtue of falling within the CDPA's closed list, an LDMA work is already propertizable. Consequently, the "originality" requirement distinguishes between the propertized (because original) and unpropertized (because unoriginal) parts of the LDMA work.[167]

Therefore, this article addresses the first issue by determining that, in UK law, the failure of a "work" to satisfy only *one* of the additional requirements for subsistence renders it unpropertizable, namely the requirement that it fall within the CDPA's closed list as an LDMA work.

B. Examining the Practical Significance of these Unpropertizable Subject Matters

Having identified subject matters in both jurisdictions that are unpropertizable (in this second understanding), this article now addresses the second issue: whether the "unpropertizable" status of these subject matters has any practical impact on judicial decision-making. It will do so by identifying flexibility in these additional requirements for subsistence which might enable judges, in practice, to circumvent the "unpropertizable" status of these subject matters.

1. Using "Creativity" as a "Catch-All": The Flexibility in Eliding "Originality" and "Expression"

In EU law, we can identify one instance of flexibility in the originality requirement: where judges are capable of eliding the "originality" and "expression" requirements to be a "work" under the InfoSoc Directive. In so doing, they might determine that both requirements have been satisfied when, in fact, only the latter has, thereby circumventing the "unpropertizable" status of this unoriginal subject matter. Here this article describes this flexibility as involving the use of "creativity" as a "catch-all,"[168] where "creativity" embodies the amalgamation of "originality" and "expression."

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[166] COPINGER, *supra* note 21, ¶ 3-07.
[167] *See* CDPA § 1(1)(a).
[168] Mireille van Eechoud, *Voices Near and Far: Introduction*, *in* THE WORK OF AUTHORSHIP 7, 15 (Mireille van Eechoud ed., 2014).

This flexibility in eliding the "originality" and "expression" requirements can be observed in *Cofemel*, which concerned the issue of whether a design that generated an aesthetic effect, "over and above" its "practical purpose," could be protected as a "work."[169] Despite emphasizing an apparent chronology in considering these "cumulative conditions" (according to which the "originality" requirement is considered first, *before* the "expression" requirement), the CJEU stated that "to be … *original* … the subject matter [must be] … an *expression*" of the author's "free and creative choices."[170] In so doing, the CJEU seemingly elided both requirements by indicating that, if a subject matter satisfies one requirement, this presupposes its satisfaction of the other.

At this point, two questions arise: might a subject matter satisfy the "expression" requirement and yet fail to meet the "originality" condition? And, if so, could a judge circumvent the "unpropertizable" status of this unoriginal subject matter by eliding the "expression" and the "originality" requirements? To answer these questions, we can draw upon *Cofemel* again. Here, the CJEU determined that the design's aesthetic effect, in being "intrinsically subjective," did not "in itself, permit [the design] to be characterised as … identifiable with sufficient precision and objectivity."[171] From this determination it is apparent that the design would fail to meet the "identifiability requirement" if it were assessed on the basis of its aesthetic effect alone.

What is noteworthy about this is that, following the CJEU's determination that there are "two cumulative conditions" for subsistence (namely, "originality" and "expression"), it treats the identifiability requirement as an adjunct to the "expression" condition. In other words, it is not a standalone requirement. Consequently, by focusing on the identifiability requirement, it seemingly implied that there already exists an "expression" (under the second condition) and that our concern is now about assessing whether this *expression* is "in a manner which makes" the subject matter "identifiable with sufficient precision and objectivity."[172]

At the same time, however, the CJEU held that, although a design may generate an aesthetic effect, this does not, "in itself, make it possible to determine whether" the design meets the originality requirement (the first condition).[173] Thus, *Cofemel* arguably opens up the possibility (which depends on the particular facts of a case) that a subject matter might (implicitly) satisfy the "expression" requirement, while simultaneously failing to meet the "originality" condition. At this point, however, we must recall the flexibility that we also identified in *Cofemel* where the "originality" and "expression" requirements are elided. We thus encounter a tension in *Cofemel* between, on the one hand, an elision between the "originality" and "expression" requirements (where meeting the latter

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[169] *Cofemel*, C-683/17 ¶ 49.
[170] *Id.* ¶ 30 (emphasis added).
[171] *Id.* ¶ 53.
[172] *Levola Hengelo*, C-310/17 ¶ 40.
[173] *Cofemel*, C-683/17 ¶ 54.

presupposes the satisfaction of the former) and, on the other, a separation of these requirements (where the CJEU seemingly opened up the possibility that only the latter might be satisfied).

Building upon this apparent tension in *Cofemel*, we can consider whether this flexibility in eliding these requirements might enable judges to circumvent the "unpropertizable" status of subject matters that fail to meet the "originality" condition. For instance, might a judge determine that an unoriginal subject matter, by virtue of meeting the "expression" requirement (as we saw implicitly in *Cofemel*) is thereby propertizable by eliding the "originality" and the "expression" requirements?

Given that the "expression" requirement presupposes the satisfaction of the "originality" condition, because it must be an "expression of the intellectual creation of the author"[174] (rather than a standalone expression), such circumvention would not occur. However, this is crucially because the elision of the "cumulative conditions" that we identified in *Cofemel* does not envisage the possibility that there may be a standalone expression, and *not* because a case involving a standalone expression would not arise in practice. In fact, the separation between these requirements that *Cofemel* implies (where the "originality" condition would have been unsatisfied if assessed on the basis of the design's "aesthetic effect" alone, but the "expression" condition was implicitly met) arguably demonstrates the possibility that a case may involve a standalone expression.

In such a case, a judge would then have to decide whether to acknowledge this (unoriginal) standalone expression (which the elision of the "cumulative conditions" does not envisage) or to circumvent the "unpropertizable" status of this (unoriginal) expression by presupposing the satisfaction of the "originality" requirement. If such circumvention were to occur, this "unpropertizable" status would have little practical impact on judicial decision-making.

2. *Not So Closed Off? The (Pre-REUL Act) Flexibility in Interpreting the CDPA's Closed List*

Before the REUL Act came into force on 1 January 2024, we could identify flexibility in the UK law requirement that a "work" must fall within the CDPA's closed list. This is where, under the then-applicable[175] "two-stage approach"[176] to determining if a subject matter (other than a database, computer program, and photograph[177]) qualifies as a copyright work in the UK, a judge could expansively

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[174] Case C-5/08, Infopaq Int'l A/S v. Danske Dagblades Forening, ECLI:EU:C:2009:465 ¶ 39.

[175] For the likely impact of the REUL Act on this "two-stage approach," *see infra* Part III(B)(3).

[176] *Shazam*, EWHC 1379 (IPEC) ¶ 92; *see also* COPINGER, *supra* note 21, ¶ 3-15.

[177] COPINGER, *supra* note 21, ¶ 3-15.

interpret the closed list in accordance with the *Marleasing* principle[178] to accommodate a "work" under EU law. In so doing, they could render propertizable a subject matter that, on an ordinary interpretation of the closed list, would not have fallen within any of the LDMA descriptions[179] and would have thus been unpropertizable.

Before this article examines this flexibility in interpreting the closed list, it is important to note that the *Marleasing* principle (which requires courts to interpret domestic legislation so far as possible consistently with EU law, "unless to do so would be *contra legem*"[180]) has now been abolished in the UK.[181] This is because the REUL Act has abolished the "principle of the supremacy of EU law" in the UK "in relation to any enactment or rule of law (whenever passed or made)."[182] The *Marleasing* principle, being a core part of the principle of supremacy, is therefore no longer applicable in UK law.[183]

For the purpose of its investigation into the "unpropertizable" status of subject matters in UK copyright law, this article must examine the influence that the REUL Act might now have on how judges interpret the CDPA's closed list. This is because, by abolishing the *Marleasing* principle, the Act will now likely affect the flexibility with which judges have been able to interpret the closed list (under the then-applicable "two-stage approach") and thereby circumvent the "unpropertizable" status of a "work" that does not fall within it.

To examine the likely impact of the Act, this article will begin by investigating the (pre-REUL Act) flexibility with which judges could interpret the LDMA descriptions under the "two-stage approach." The following section will investigate how such flexibility has been affected now that the Act is in force and what impact this might have on the ability of judges to circumvent the "unpropertizable" status of a "work" that does not fall within the closed list.

To begin with, before 1 January 2024, the "two-stage approach" in UK law required a judge firstly to consider whether a subject matter qualified as a "work" under EU law and secondly to assess if it also fell within one of the LDMA descriptions under the CDPA (interpreted so far as possible consistently with EU

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[178] *Marleasing*, E.C.R. I-04135 ¶ 8.

[179] *See* COPINGER, *supra* note 21, ¶ 3-09 ("Where an issue arises in a UK court as to whether a work is protected, the first question will be whether it falls within a particular category as defined in the 1988 Act and the case law on the 1988 Act. If it does, there will be no need for the court to go further. If it does not, the court will have to consider whether the definition of that category as defined in the Act and the case law can be expanded to cover the work in accordance with the *Marleasing* principle."). *But see* note 22 for the likely impact of the REUL Act.

[180] Johnson, *supra* note 22, at 635.

[181] *Id.* at 638; *see also* BAILEY & NORBURY, *supra* note 22, at 11 ("[T]he *Marleasing* principle is abolished…").

[182] REUL Act § 3(1). This was inserted into the European Union (Withdrawal) Act in § 5(A1).

[183] Bailey & Norbury, *supra* note 22, at 11.

case law under the *Marleasing* principle). Only if a subject matter satisfied these two stages would it be a copyright work in the UK.[184]

At this point, however, this article draws attention to the assumption of the editors in *Copinger* that "a UK court would not … apply the *Marleasing* principle, so as to sweep away" the … 'closed list' of works altogether" as this would go against the grain of the legislation.[185] Consequently, this article describes the (pre-REUL Act) flexibility in the requirement that a "work" must fall within the "closed list" as involving a shift in the judge's interpretation of these categories, from an interpretation that was closed off (under UK law alone) to one that became open (pursuant to *Marleasing*), albeit without eradicating the closed list entirely.

We can identify this flexibility by comparing how a helmet that was "an element in the process of production of" a film[186] would likely be interpreted under EU law with how it was, in fact, interpreted as a purported sculpture (an artistic work[187]) in the UK case of *Lucasfilm, Ltd. v. Ainsworth*. To begin with, when interpreting the "sculpture" description under the CDPA, Mann J stressed that one important "guidance factor" was that, to be a sculpture, an object must "have, as part of its purpose, a visual appeal," notwithstanding that it might have "another purpose as well."[188] However, Mann J's application of his guidance factors (and their subsequent endorsement in the UK Supreme Court[189] ("UKSC")) demonstrates the "closed off" approach to interpreting the CDPA's closed list.[190]

For example, Mann J emphasizes that, because the "primary function" of the helmet was "utilitarian," it thereby lacked "artistic purpose."[191] What is noteworthy about this focus on the helmet's "primary function" is that it seemingly conflicts with his earlier determination that a sculpture might have multiple simultaneous purposes and yet still be a sculpture, provided that it had "the *intrinsic quality* of being intended to be enjoyed as a visual thing."[192] Thus, one might argue that the sculpture, because it was intended to contribute "to the artistic effect of the finished film,"[193] had the "*intrinsic quality* of being intended to be enjoyed as a visual thing," although this "intrinsic quality" was not its primary function because, in fact, it had multiple intrinsic qualities or functions. Consequently, Mann J demonstrates the "closed off" approach to interpretation

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[184] *See* COPINGER, *supra* note 21, ¶ 3-09.
[185] *Id.* ¶ 3-14.
[186] Lucasfilm, Ltd. v. Ainsworth, [2011] UKSC 39, [2012] 1 A.C. 208 ¶ 44 (U.K.).
[187] CDPA § 4(1)(a).
[188] Lucasfilm, Ltd. v. Ainsworth, [2008] EWHC 1878 (Ch.), [2008] E.C.D.R. 17 at 357 (U.K.).
[189] *Ainsworth*, UKSC 39.
[190] *Id.*
[191] *Ainsworth*, EWHC 1878 at 358.
[192] *Id.* at 357 (emphasis added).
[193] *Ainsworth*, UKSC 39 ¶ 44.

by overlooking the possibility that the helmet might simultaneously or ultimately have multiple intrinsic purposes (both utilitarian and artistic).

This article will now compare this approach to how the helmet would likely be interpreted if a judge were considering the requirements for subsistence under EU law. Here it is likely that the helmet would meet both the "expression" and the "originality" requirements. This is because, notwithstanding that the helmet's design might have been dictated by its "utilitarian" purpose, it is arguable that there was still "room for creative freedom" and that the author had expressed their "creative ability in an original manner by making free and creative choices" in its production such that the helmet reflected their personality.[194] An example of such "free and creative choices" could be the designing of the helmet's facial features to "portray something about that character—its allegiance, force, menace… ."[195]

Consequently, the application of the *Marleasing* principle would require that Mann J's "closed off" approach to interpreting the LDMA descriptions be adjusted to accommodate the helmet as a "work" under EU law. In so doing, a judge might render propertizable a subject matter that, on Mann J's interpretation of the closed list, would have been unpropertizable because it was not a sculpture.

This example demonstrates how, prior to the coming into force of the REUL Act, judges might have circumvented the "unpropertizable" status of subject matters that did not fall within the CDPA's closed list. If such circumvention had occurred, this status would have had little practical impact on judicial decision-making.

3. Revisiting Such Flexibility in Interpreting the Closed List Post-REUL Act

Now that the REUL Act has come into force, the *Marleasing* principle no longer applies to judicial interpretation of the closed list (although only concerning works that have been created on or after 1 January 2024, as the Act stipulates that the abolition of the supremacy principle does "not apply in relation to anything occurring before the end of 2023"[196]). Given that this principle has been abolished, no UK court is required to interpret the CDPA consistently with EU law. Consequently, the first stage of the "two-stage approach" to determining if a subject matter qualifies for copyright protection in the UK (which requires

[194] Case C-833/18, SI and Brompton Bicycle, Ltd. v. Chedech / Get2Get, EU:C:2020:461 ¶ 34.

[195] *Ainsworth*, EWHC 1878 ¶ 121.

[196] REUL Act § 22(5); *see also* BAILEY & NORBURY, *supra* note 22, at 13 ("This provision clarifies that … the abolition of the supremacy of EU law – whilst applying in relation to enactments whenever passed or made – does not have retrospective effect, ie does not affect the law in relation to times up to the end of 2023."); Johnson, *supra* note 22, at 639 ("[O]nce *Marleasing* no longer applies, the 1988 Act should be read in the conventional sense and the list of copyright works becomes closed again—at least in relation to new works.").

judges to consider whether a subject matter qualifies as a "work" under EU law[197]) has likely been removed.[198]

As a consequence of the Act, UK judges will arguably be less inclined to circumvent the "unpropertizable" status of a subject matter that does not fall within the closed list. This is because judges are no longer required, under the second stage of the "two-stage approach," to interpret the LDMA categories expansively to accommodate a "work" under EU law. Therefore, the likely effect of abolishing the *Marleasing* principle is that, if a subject matter does not fall within the closed list on an ordinary interpretation of the CDPA, it will be deemed unpropertizable in UK law, notwithstanding that the same subject matter might qualify as a "work" (and thus be propertizable or indeed propertized) under EU law. So, whereas in the previous section, this article described the closed list as having become open (pursuant to *Marleasing*), the likely consequence of the REUL Act is that the CDPA "should [now] be read in the conventional sense," with the result that "the list of copyright works becomes closed again… ."[199]

To illustrate the impact that the REUL Act might now have on judicial interpretation of the closed list, we can draw upon the purported irreconcilability between EU law and UK law on the issue of whether national legislation can require that a subject matter must have "aesthetic appeal" to receive copyright protection.[200] This irreconcilability can be described as follows: whereas, in

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[197] *Shazam*, EWHC 1379 (IPEC) ¶ 92.

[198] *Cf.* Johnson, *supra* note 22, at 639 ("Strictly speaking a *new* statutory rule for reading all statutes has been adopted. This means that courts of any level should not apply *Marleasing* to a statutory provision even if a higher court had done so in the past."). *But see* n. 91 ("There is an argument that requirement to grant exclusive rights in relation[] to the author's 'work' in TCA art.225 retains the requirement in domestic law by reason of the general implementation…"). For a discussion of the potential relevance of the general implementation of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, L 149/10 (2021) ("TCA") in European Union (Future Relationship) Act 2020 § 29(1), see the section entitled, "The general implementation," in Johnson, *supra* note 22, at 638.

[199] Johnson, *supra* note 22, at 639.

[200] *See, e.g.*, Response Clothing, Ltd. v. Edinburgh Woollen Mill, Ltd., [2020] EWHC 148 (IPEC) ¶ 63 (U.K.) ("The issue I have to resolve is … whether it is possible to interpret s.4(1)(c) of the 1988 Act in conformity with art.2 of Directive 2001/29 such that the Wave Fabric qualifies as a work of artistic craftmanship. … In my view it is, up to a point. Complete conformity with art.2, in particular as interpreted by the CJEU in *Cofemel*, would exclude any requirement that the Wave Fabric has aesthetic appeal and thus would be inconsistent with the definition of work of artistic craftmanship stated in *Bonz Group.*"); Riana Harvey, *The Copyright Protection of Makeup in the UK*, *in* DEVELOPMENTS AND DIRECTIONS IN INTELLECTUAL PROPERTY LAW 229-42 (Hayleigh Bosher & Eleonora Rosati eds., 2023) (commenting that Response Clothing "did confirm that complete conformity with the understanding of Article 2 of the InfoSoc Directive would exclude any

Cofemel, the CJEU determined that national legislation is precluded from requiring that a subject matter must have "aesthetic or artistic value" to receive copyright protection,[201] in the UK case of *Response Clothing, Ltd. v. Edinburgh Woollen Mill, Ltd.*, HHJ Hacon seemingly imposed such a requirement when defining "a work of artistic craftmanship"[202] (an artistic work under the CDPA[203]). Here, the definition of "a work of artistic craftmanship" that HHJ Hacon employed requires, inter alia, that the author "produce[] something which has aesthetic appeal."[204]

Consequently, if (prior to the coming into force of the REUL Act) a UK judge were to apply the "two-stage approach" to determine whether a subject matter that qualifies as a "work" in EU law, but which nevertheless *lacks* aesthetic appeal, may be protected as a work of artistic craftmanship, they would face potentially insurmountable difficulty. Such difficulty would arise at the second stage of the two-stage approach, where, pursuant to *Marleasing*, the judge would have to determine if they could interpret the "work of artistic craftmanship" description (in particular, the meaning of "artistic") expansively to accommodate a subject matter that lacks aesthetic appeal, without such an interpretation being *contra legem* (or effectively contradicting "the very wording" of the CDPA).[205] In the event that such an interpretation were not possible, it is likely that UK law would be incompatible with EU law and that this subject matter, in lacking aesthetic appeal, would be deemed unpropertizable in the UK, but propertizable (or indeed propertized) in the EU.

Thus, before the REUL Act came into force, commentators frequently suggested that this (insurmountable) irreconcilability between UK law and EU law "would appear to need to be resolved at some stage, by Parliament or the higher courts."[206] However, now that the Act has abolished *Marleasing*, UK judges likely have greater freedom to determine, through ordinary statutory interpretation of the CDPA, that this subject matter fails to meet the description of "a work of artistic craftmanship" given its lack of aesthetic appeal, with the result that it would be unpropertizable in UK law.

This example reveals how the circumvention that this article identified in the previous section where, pursuant to *Marleasing*, a judge interprets the "closed

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requirement of aesthetic appeal, as required for works of artistic craftmanship under CDPA 1988…").

[201] *Cofemel*, C-683/17 ¶¶ 24, 56.

[202] CDPA § 4(1)(c).

[203] *Id.* § 1(1)(a).

[204] *Response Clothing*, EWHC 148 (IPEC) ¶ 36 (adopting Tipping J.'s description of a work of artistic craftmanship in the New Zealand case of Bonz Group (Pty) Ltd. v. Cooke, [1994] 3 N.Z.L.R. 216 (N.Z.)).

[205] Ampleaward, Ltd. v. Revenue and Customs Comm'rs, [2021] EWCA Civ 1459 ¶¶ 95–96 (U.K.) (drawing upon Advocate General Bot's phrasing in Case C-441/14, Dansk Industri (DI) v. Estate of Rasmussen, EU:C:2016:278 ¶ 68).

[206] Waterrower (UK), Ltd. v. Liking, Ltd. (t/a Topiom), [2022] EWHC 2084 (IPEC) ¶ 77 (U.K.).

list" expansively to accommodate a subject matter that would otherwise have been unpropertizable on an ordinary interpretation of the CDPA, will be unlikely to occur in the UK following the REUL Act. As a result, it would appear that the "unpropertizable" status of these subject matters will now have practical impact on judicial decision-making in the UK.

Despite this conclusion, however, it is also important to consider the broader impact that the Act might have on judicial interpretation of the copyright work. This is because, whereas it would appear that the flexibility with which judges might interpret the closed list (pursuant to *Marleasing*) has now been removed, the abolition of this principle as well as the changes that the Act will bring about to judicial interpretation of assimilated case law[207] have also introduced uncertainty (and possible flexibility) into how UK judges might interpret other legal rules relating to subsistence and infringement. These rules include, inter alia, the "originality" requirement[208] and the "substantial part" test of infringement.[209] Thus, taken "in the round," the REUL Act might have removed one means by which UK judges can circumvent the "unpropertizable" status of subject matters (through abolishing *Marleasing*), while simultaneously introducing flexibility into (and potentially lowering) the other requirements that must be satisfied for a subject matter to be propertizable or propertized. In other words, while reinforcing the "unpropertizable" status of certain subject matters in the public domain, the Act might also simultaneously reinforce the "propertized" status of the copyright work.

As regards the abolition of *Marleasing*, Phillip Johnson recently drew attention to this risk when he stated that "a *new* statutory rule for reading all statutes has been adopted," with the result that "courts of any level should not apply *Marleasing* to a statutory provision even if a higher court had done so in the past."[210] Given that "precedent builds upon precedent," Johnson predicts that there may be "an unravelling effect" because "Judgment A may have relied upon *Marleasing*, and Judgment B relies upon Judgment A and so forth… ."[211] This possible "unravelling" of existing precedent might affect, not just the "two-stage approach" which we discussed earlier, but also the "substantial part" test of

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[207] *See* REUL Act § 6. *See generally* Johnson, *supra* note 22, at 642–44.

[208] CDPA § 1(1)(a); *see* Yin Harn Lee, *United Kingdom Copyright Decisions and Legislative Developments 2023*, 55 ICC - INT'L REV. INTELL. PROP. & COMPETITION L. 422, 440 (2024) ("[T]he REULA has introduced uncertainty into this position. Will the UK courts revert to the traditional test of 'labour, skill and judgment', or will they seek to retain the 'author's own intellectual creation' test?").

[209] CDPA § 16(3)(a); *cf.* Johnson, *supra* note 22, at 639 ("Takings will need to be substantial once more.").

[210] Johnson, *supra* note 22, at 639.

[211] *Id.* at 639–40.

infringement, which was, at one point in time (effectively, in Judgment A[212]), interpreted consistently with EU law pursuant to *Marleasing*.[213]

As regards the "substantial part" test, one consequence of *Marleasing* was that, to ensure conformity with EU law, the requirement of "substantiality"[214] was effectively "read out" of the CDPA.[215] This is because, whereas "substantiality" required judges to consider "the qualitative importance of the part that [had] been copied, assessed in relation to the copyright work as a whole,"[216] the CJEU determined in *Infopaq* that the reproduction of any "part[] of a work,"[217] *however "insubstantial,"*[218] would constitute an infringement (i.e. a "reproduction in part"[219]) provided that the part "expresse[d] the author's own intellectual creation."[220] As such, by interpreting the "substantial part" test in conformity with EU law, UK judges were able to undertake the infringement assessment without considering "the boundaries of the protected work as a whole"[221] (which had previously been required by the reference to "substantiality" in the CDPA).

Now that *Marleasing* has been abolished, it is uncertain whether the long-standing influence of EU law on UK precedent will be unravelled, to use Johnson's expression, and what such "unravelling" will entail, particularly given the emphasis that UK courts continue to place on maintaining "legal certainty."[222]

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[212] An example of Judgment A is Lewison LJ's judgment in SAS Institute [2013] EWCA, where he interpreted the reference to a "substantial part" in the CDPA pursuant to "the court's duty to interpret domestic legislation, so far as possible, so as to conform with European Directives" (at ¶ 38). Consequently, Lewison LJ determined that the *Infopaq* test of infringement in EU law (which involves asking whether "the parts in question … contain elements which are the expression of the intellectual creation of the author." *Infopaq*, C-5/08 ¶ 39) was "now the test" for assessing whether "a restricted act had been done in relation to a substantial part of a work" in UK law: SAS Institute [2013] EWCA ¶ 37.

[213] *See, e.g.*, SAS Institute [2013] EWCA ¶ 37 (Lewison LJ opinion) ("[i]f the Information Society Directive has changed the traditional domestic test, it … has raised rather than lowered the hurdle to obtaining copyright protection.").

[214] *See Baigent*, EWCA Civ 247 ¶ 144 ("The 1988 Act does not define 'a substantial part' or even indicate what factors are relevant to substantiality.").

[215] *Cf.* Griffiths, *supra* note 122, at 787 ("Under the … CDPA 1988 … [n]o liability arises in relation to the reproduction of an 'insubstantial' part of a work (even where that part embodies elements of the labour and skill or originality of the work). By contrast, *Infopaq* leaves no apparent scope for a defendant to reproduce any of a work's 'creativity' without infringing copyright.").

[216] *Designers Guild*, 1 W.L.R. at 2431 (Lord Scott opinion).

[217] *Infopaq*, C-5/08 ¶ 39.

[218] Griffiths, *supra* note 122, at 787 (emphasis added).

[219] *Infopaq*, C-5/08 ¶ 51 (referring to Article 2 of the InfoSoc Directive).

[220] *Id.* ¶ 48.

[221] Griffiths, *supra* note 122, at 784.

[222] *Cf.* Indust. Cleaning Equip. (Southampton) Ltd. v. Intelligent Cleaning Equip. Holdings Co. Ltd. and others, [2023] EWCA Civ 1451, [2024] Bus. L.R. 103 ¶ 86 (Arnold LJ) ("One of the main reasons why the Supreme Court is cautious about departing from its own precedents is that doing so risks undermining legal certainty."); Warner Music UK, Ltd. and another v. TuneIn Inc., [2021] EWCA Civ 441 ¶ 202 (Sir Geoffrey Vos M.R.) ("It

One possibility might be that judges re-introduce the "substantiality" requirement (and thus consideration of the "boundaries of the protected work"[223]) when assessing infringement, which may result in judges determining that the copying of certain parts of a work "is too [in]substantial"[224] to amount to infringement. It is now uncertain how the re-emergence of "substantiality" might affect the "propertized" status of the copyright work, such as whether it might raise[225] (or, indeed, have no effect on[226]) the required threshold for the copying of a "part" of a work to constitute an infringement in the UK.

However, to form a complete picture of the likely impact of the REUL Act, this article must examine the changes[227] that the Act will bring about to judicial interpretation of assimilated case law, in addition to the abolition of the *Marleasing* principle.[228] This is because these changes might, in fact, *lower* both the "substantial part" and the "originality" thresholds in UK law and thereby strengthen the "propertized" status of the copyright work.

Section 6 of this Act is of particular relevance here. Although not yet in force,[229] section 6 will amend the test for departure from assimilated case law in the European Union (Withdrawal) Act 2018,[230] so that, in England and Wales, the UKSC and the Court of Appeal ("EWCA") may depart from this case law having regard to several factors, including, inter alia, "the extent to which the assimilated

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would … be both unnecessary and undesirable for this court to depart from retained EU law in this case. To do so would create legal uncertainty for no good reason.").

[223] Griffiths, *supra* note 122, at 784.

[224] Francis Day and Hunter, Ltd. v. Twentieth Century Fox Corp., Ltd., and Others [1940] A.C. 112, 121 (P.C.) (U.K.) (Lord Wright opinion).

[225] *Cf.* Griffiths, *supra* note 122, at 787; Hyperion Records v. Warner Music (1991, unreported) (Judge Laddie Q.C. stated that, "if the copyright owner is entitled to redefine his copyright work so as to match the size of the alleged infringement, there would never be a requirement for substantiality.").

[226] *See* BENTLY ET AL., INTELLECTUAL PROPERTY, *supra* note 64, at 227 (describing Lord Hoffmann's judgment in Newspaper Licensing Agency, Ltd. v. Marks & Spencer Plc [2001] UKHL 38, [2003] 1 A.C. 551, 559–60, as "offer[ing] up a … restrictive logic: copyright would be infringed by any use of a part that was qualitatively 'substantial,' in … that it reproduced protected 'labour, skill, and judgement' of the author. In so doing, he steered British law towards an understanding of 'substantiality' based on a logic that is close to that deployed by the Court of Justice in *Infopaq*.").

[227] *See* Lee, *supra* note 208; *cf.* Johnson, *supra* note 22, at 639 ("[assimilated] domestic case law will start to flap in a wind of uncertainty").

[228] "Assimilated case law" (which includes both "assimilated domestic case law" and "assimilated EU case law") is defined in REUL Act § 6(7).

[229] LEIGH GIBSON, HOUSE OF COMMONS LIBRARY RESEARCH BRIEFING, THE END OF REUL? PROGRESS IN REFORMING RETAINED EU LAW ¶ 3.3 (Feb. 2, 2024).

[230] *See, e.g.*, European Union (Withdrawal) Act § 6(5); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 reg. 5. For a discussion of the changes that the REUL Act will introduce to judicial interpretation of assimilated case law, *see* Johnson, *supra* note 22, at 642.

… case law restricts the proper development of domestic law."[231] What is significant about this section is that, as noted by Johnson, these factors are "presented in a way which encourages a court to depart from [assimilated] … case law."[232] As such, it is open to question whether these judges will begin to depart from the standards of originality and of infringement in UK law that have been long impacted by EU law.[233]

Therefore, one possible (though unlikely[234]) consequence of the REUL Act might be that UK judges interpret these legal rules so as to (re)introduce the traditional standards of originality and infringement that applied in the UK prior to the *Infopaq* decision. For instance, we might see a return to the "labor, skill and judgment" threshold of originality[235] and the re-emergence of a "substantial part" test of infringement that is satisfied by the doing of a restricted act in relation to a substantial part of the *labor, skill and judgment* that went into the work.[236] What is significant about the (unlikely) possibility that UK judges might interpret these legal rules in this way is that, as confirmed by Arnold LJ in *THJ Systems, Ltd. v Sheridan*, "the European test" of "author's own intellectual creation" is "more demanding" than the traditional "skill and labour" test.[237] Therefore, a return to the latter test in the UK would effectively (re)introduce both a lower threshold of "originality," which is required for an already-propertizable subject matter (an LDMA work) to be propertized (as an original LDMA work), and also a lower threshold for infringement upon a (propertized) copyright work.

So, returning to our earlier example of a work of artistic craftmanship, if a subject matter were the product of "labor, skill and judgment" (as opposed to

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[231] REUL Act §§ 6(3), 6(4). *See also* Johnson, *supra* note 22, at 643–44.

[232] Johnson, *supra* note 22, at 643.

[233] An example of the impact of EU law on the "originality" requirement in UK law can be seen in HHJ Birss QC's judgment in Temple Island Collections, Ltd. v. New English Teas, Ltd., [2012] EWPCC 1, [2012] E.C.D.R. 11., where the originality of a photograph (as an artistic work under the CDPA) was assessed on the basis of whether it was its "author's own intellectual creation" (at ¶ 18). *See also* THJ Systems, Ltd. v. Sheridan, [2023] EWCA Civ 1354 ¶¶ 23–24 (Arnold LJ) (determining that "the correct test" for originality in UK law is that "of 'author's own intellectual creation' laid down by the Court of Justice" in *Infopaq* and not "that of 'skill and labour', which was the test applied by the English courts prior to *Infopaq*…").

[234] *Cf.* Lee, *supra* note 208, at 439 ("While the CDPA's 'closed list' of protected subject matter has traditionally been viewed as an exhaustive list, the UK courts had, prior to the coming into force of the REULA, begun to interpret these categories very broadly so as to bring them in line with the recent jurisprudence of the CJEU. … It is now unclear whether the abolition of the principle of supremacy of EU law will lead the courts to revert to the traditional approach of treating the subject matter categories as a more restrictive 'closed list.'").

[235] *See, e.g.,* Lee, *supra* note 208, at 439; *see also* Ladbroke (Football), Ltd. v. William Hill (Football), Ltd., [1964] 1 W.L.R. 273, 275 (Lord Reid) (referring to "skill, judgment or labour").

[236] *See Designers Guild*, 1 W.L.R. at 2432.

[237] *Sheridan*, EWCA Civ 1354 ¶ 23.

"intellectual creation") and it had aesthetic appeal, it would be *unpropertizable* in EU law due to its failure to meet the "originality" threshold (namely, that of "author's own intellectual creation"). However, this same subject matter would likely qualify as "a work of artistic craftmanship" under the CDPA, due to its aesthetic appeal, rendering it propertizable. Furthermore, its satisfaction of the lower, "labor, skill and judgment" threshold of originality would render it *propertized* as an original artistic work.[238]

Therefore, viewed holistically, the REUL Act now introduces uncertainty (and possible flexibility) into how UK judges will interpret the legal rules relating to subsistence and infringement, where their interpretations have previously been influenced by EU law. One consequence of such flexibility might be that increasing divergence will start to emerge between UK law and EU law as to how judges interpret these legal rules, with the result that a subject matter that is *unpropertizable* in EU law might nevertheless be deemed *propertize*d in the UK.

So, through abolishing *Marleasing* and proposing changes to the judicial interpretation of assimilated case law, the REUL Act will likely impact not just the "unpropertizable" status of certain subject matters in the UK (specifically, a "work" that does not fall within the CDPA's closed list, where judges might be less inclined to circumvent this status), but also the "propertized" status of the copyright work. More specifically, the uncertainty that the Act has introduced as to how UK judges might interpret the "originality" threshold and the "substantial part" test now opens up the possibility that parties might need only meet a lower threshold to determine that their subject matter is propertized (as an *original* LDMA work) and that their copyright has been infringed. As such, in strengthening the "unpropertizable" status of the public domain, the REUL Act might also risk strengthening parties' claims to property.

C. Beyond the Hard Kernel: Contemplating the Implications of this Investigation on the Public Domain

This article will now contemplate the implications of its investigation in this Part on the public domain in both jurisdictions by addressing the following questions: how do these unpropertizable subject matters (in this second understanding) relate to the hard kernel identified in Part II? And what are the consequences for the public domain of the determination in Part III(B) that the "unpropertizable" status of these subject matters is circumventable, but that such circumvention is now likely to be impacted by the REUL Act?

To begin with, this article determines that these unpropertizable subject matters occupy a position within the public domain that is *outside* of its hard kernel because, as Part II revealed, the hard kernel is delimited only by the idea-expression dichotomy. As such, the subject matters that are located within this hard kernel are only those subject matters that, pursuant to the idea-expression

[238] CDPA § 4(1)(c).

dichotomy, are "unpropertizable by nature." Therefore, the subject matters that this Part has identified as being unpropertizable due to their failure to meet certain additional requirements for subsistence are *outside* of this hard kernel because of this different reason for their "unpropertizable" status.[239]

At this point, we must consider the possibility that an "expression" (EU) or "work" (UK) which, pursuant to the idea-expression dichotomy, is not within the hard kernel, may nevertheless fail to meet certain additional requirements for subsistence. On the surface, however, there would seem to be a contradiction if we were to conclude that such an expression or work, which Part II described as being "*propertizable* by nature," is *unpropertizable* because of its failure to meet additional requirements for subsistence.

To avoid the appearance of this contradiction, this article draws attention to its statement in Part II that the identification of an expression or "work," pursuant to the idea-expression dichotomy, represents a necessary, but not sufficient condition for a subject matter to be propertizable. Consequently, an expression or a "work" may be propertizable by nature (or *in principle* propertizable), but ultimately unpropertizable because it has failed to meet these additional requirements.

Turning to its investigation in Part III(B), this article argues that if judges were to circumvent the "unpropertizable" status of subject matters (in this second meaning) this would practically erode this section of the public domain in both jurisdictions. This is because it would effectively introduce a presumption that these subject matters are propertizable which would open up the possibility for encroachment by copyright upon this section of the public domain.

However, now that the REUL Act is in force, it is arguable that such erosion of the "unpropertizable" section of the public domain is unlikely to occur in the UK. This is because, following the abolition of the *Marleasing* principle, UK judges might be less inclined to circumvent the "unpropertizable" status of subject matters that do not fall within the "closed list" in an effort to ensure conformity with EU law.

It also remains to be seen how the Act will impact the "propertizable, but (yet-)unpropertized" section(s) of the public domain in the UK, particularly as it now introduces uncertainty as to how judges might interpret the "originality" requirement. Although a detailed examination of this issue is beyond the scope of this article, the likely impact of the Act will depend on whether a lower threshold of originality (such as that of "labor, skill and judgment") might be (re)introduced through judicial interpretation. If this were to occur, this would mean that a lower threshold would need to be satisfied for an already-propertizable subject matter (namely, an LDMA work) to be propertized as an *original* LDMA work, thereby eroding the "propertizable, but (yet-)unpropertized" section(s) of the public domain.

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[239] *Cf.* Benabou & Dusollier, *supra* note 11, at 174–75 ("Introducing shades into the public domain depiction … might also help to achieve its objectives ... At least three concentric circles could compose the public domain.").

IV. AN IMMATERIAL PUBLIC DOMAIN? INVESTIGATING THE UNPROPERTIZABLE STATUS OF IMMATERIAL SUBJECT MATTERS IN UK AND EU COPYRIGHT LAW

Building upon its investigation in Parts II and III, this article will now investigate a third understanding of "unpropertizable" subject matters. This refers specifically to subject matters that fail to satisfy certain "material" requirements for subsistence, where "material" is defined broadly as involving the possession of an objective, though not necessarily "permanent" or tangible, form.[240]

The reason for investigating this third understanding is that academics sometimes discuss public domain encroachment in terms of the "dematerialization"[241] of the object of copyright. Such "dematerialization" is described as occurring in different ways; however, a common description is that it involves the protection by copyright of subject matters that, in (somewhat) lacking an objective form, would have otherwise been in the public domain.[242]

An example of such dematerialization can be seen in Jonathan Griffiths's discussion of the CJEU's harmonization of the "work." In opining that the CJEU's emphasis on "creativity" as "the only relevant determinant" of subsistence has undermined the relevance of the "closed list," Griffiths describes the dematerialization of the "work" as involving less (or no) emphasis being placed on the CDPA's "form" requirement.[243]

To investigate this understanding of "unpropertizable" subject matters, this article begins by surveying the requirements for subsistence in both jurisdictions, including those identified in Parts II and III. Of these requirements, there are three that could broadly be described as "material." This is because in the literature they are typically associated with providing (albeit in different ways) a measure of objective certainty in both jurisdictions as to what their respective objects of copyright are.[244] These "material" requirements are the following: first, that in UK law a work must take a particular "form" to fall within one of the LDMA descriptions[245] (such as the form of being "written, spoken or sung" to be a literary work[246]); second, the requirement of "recording" in the UK, according to which LDM works must be "recorded, in writing or otherwise" before copyright can

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[240] *Cf. Levola Hengelo*, C-310/17 ¶ 40.
[241] Griffiths, *supra* note 122, at 781.
[242] *Cf. id.* at 768 ("…the law's continued ability to regulate some forms of copyright dispute by reference to material form has served an important function in justifying judicial resistance to expansionist pressures.").
[243] *Id.* at 785 ("…there is a danger that the UK's statutory 'closed-list' system may … be regarded as incompatible with an exclusive focus on creativity.").
[244] *See* COPINGER, *supra* note 21, ¶ 3-162 ("Since copyright is a form of monopoly in relation to the subject matter which is protected, there must be certainty as to what that subject matter is.").
[245] *Id.* at ¶ 3-164.
[246] CDPA § 3(1).

subsist in them;[247] and third, that to qualify as a "work" in EU law, a subject matter must satisfy the "identifiability requirement."

It is important to note that the first requirement (specifically, that to fall within the CDPA's closed list a work must possess a particular "form") is effectively the same as the requirement (identified in Part III) that a work must fall within one of the LDMA descriptions. However, this Part focuses purely on the "material" *aspects* of this requirement, which this article collectively describes as "the form requirement." This is because the requirement that a subject matter must fall within one of the LDMA descriptions may also contain aspects that are not "material."

An example of this can be seen in Park J.'s statement in *Hadley v. Kemp* that, where a composer "had developed and fixed *in his musical consciousness* the melody" of a song, the fact that the song had not been "reduced to writing … did not mean that the musical work[] did not exist."[248] This suggestion that a work could possess a purely internal and *subjective* form[249] and still fall within the closed list (as a musical work) demonstrates how there may be aspects of the requirement that a work must fall within the closed list that are not "material." Therefore, this Part will investigate the "material" aspects of this requirement because these relate to the objective "form" of a work, while excluding, for present purposes, those aspects that are not "material."

Having identified these three "material" requirements for subsistence, this article can now address the following issues: first, whether in both jurisdictions there are subject matters in the public domain that are unpropertizable in this third way (hereafter, "materially unpropertizable"); and second, whether their "unpropertizable" status has any practical impact on judicial decision-making.

A. An Immaterial Public Domain? Identifying the Unpropertizable Status of Immaterial (LDMA) works

To address the first issue, this article will investigate whether the failure of a subject matter to meet (any of these) "material" requirements for subsistence renders it materially unpropertizable. Here, "materially unpropertizable" denotes that these subject matters bear an "unpropertizable" status *because* they have failed to satisfy a "material" requirement for subsistence.

As regards the first requirement (specifically, the "form" requirement in UK law), this article determines that the failure of a "work" to satisfy this requirement renders it unpropertizable. This is because of the gatekeeping role that the LDMA

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[247] *Id.* § 3(2). The "recording" requirement in UK law is also frequently referred to as the requirement of "fixation." This can be seen in Arnold J.'s judgment in SAS Institute [2013] EWHC, at 922 ("[I]t is important to distinguish between the putative work on the one hand and any particular fixation of the work on the other hand…"). This article will refer to this as the "recording" requirement to reflect the language of the CDPA.

[248] Hadley v. Kemp, [1999] E.M.L.R. 589, 591 (U.K.) (emphasis added).

[249] *See* COPINGER, *supra* note 21, ¶ 3-175 (stipulating that a "musical work may exist as such in the mind of its composer as well as when it has been merely played or sung").

categories serve in delimiting the subject matters that may be protected under the CDPA, which conforms with the protection of "literary and artistic works" under the Berne Convention.[250] For instance, "an original ex tempore speech,"[251] if not previously written down, must be "spoken or sung" to fall within the description of a literary work[252] under the CDPA. If this "work" were to fail to satisfy this "form" requirement, it would be materially unpropertizable notwithstanding its (necessary, but not sufficient) status as "propertizable by nature" (or *in principle* propertizable) by virtue of being a "work" (Part III).

A (theoretical) example of an ex tempore speech that would constitute an expression (or a "work"), but fail to satisfy the form requirement to be a literary work (because it is not "written, spoken or sung") might be where it is delivered purely via sign language.[253] Whether such a speech would meet the "form" requirement of a literary work would depend on how the words "spoken or sung" are interpreted in the CDPA. Although sign languages are recognized languages that are expressed through manual-visual signs, on one possible interpretation of these words, an ex tempore speech expressed purely through sign language would likely meet the requirement of an "expression" as such, but would be neither spoken nor sung. This would be based on an interpretation of speaking and singing as requiring the use of the speaker's tongue to produce words, an interpretation that would exclude signing per se.[254]

As regards the second requirement (namely, that of "recording" under the CDPA which applies only to LDM works), this article determines that, although meeting this requirement often simultaneously satisfies the requirement of a particular "form," the reverse does not always hold.[255] Specifically, it is not always the case that meeting the requirement of a particular "form" thereby also satisfies the "recording" requirement, which specifies that the LDM work must be "recorded, in writing or otherwise."[256] Thus, although "an original ex tempore speech" would, upon its delivery, possess the required form (in being "spoken")

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[250] Berne Convention art. 1.

[251] COPINGER, *supra* note 21, ¶ 3-170.

[252] CDPA § 3(1).

[253] Irini Stamatoudi refers to "the concept of words" being "narrower compared to that of language," with the result that "sign language … is not protected as a literary work as such, though it is called language, since no use of the tongue is made": Irini A. Stamatoudi, *Multimedia Products as Copyright Works* 54, n. 91 (PhD thesis, Jun. 1999).

[254] *Id.* It is implicit in Stamatoudi's understanding of the requirement that a work must be "written, spoken or sung" to be a literary work that this involves words of some sort, where words require the use of one's tongue. For an interesting discussion of sign languages and spoken languages, *see* Susan Goldin-Meadow & Diane Brentari, *Gesture, Sign, and Language: The Coming of Age of Sign Language and Gesture Studies*, 40 Behav. Brain Sci. e46 (2017).

[255] *See* COPINGER, *supra* note 21, ¶ 3-165 (specifying that courts ought not to "confuse" the recording requirement with the requirement that a work must take a particular form).

[256] CDPA § 3(2).

to be a literary work,[257] copyright would only subsist in it if, at the time of its delivery, there was "some record of it, whether in shorthand or … by some technical recording means."[258] Without this record, it would still satisfy the "form" requirement to be a literary work, but not be protected by copyright; essentially, it would be propertizable (as an original literary work), but unpropertized.

The "form" and "recording" requirements are therefore distinct. Furthermore, as envisioned by the wording of the CDPA (namely, that "[c]opyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise"[259]), the "recording" requirement operates either contemporaneously with or, as indicated by this wording, *subsequently* to the "form" requirement (such that it applies to a work that is already an LDM work).

Consequently, unlike the (distinct and typically anterior) "form" requirement, this article determines that the failure of an LDM work to satisfy the recording requirement does not render it materially unpropertizable. Rather, having already satisfied the form requirement, the LDM work is propertizable, but then its failure to meet the recording requirement renders it unpropertized. In other words, the unrecorded LDM work is propertizable, but ultimately unpropertized. An example of this features in *Copinger*, where "*A* improvises a tune in *B*'s presence" but *B* subsequently records it.[260] Here *A* will have created a musical work (which is thereby propertizable) as their improvisation satisfies the form requirement of this description of work. It is only when *A*'s musical work is recorded that copyright may subsist in it; however, the fact that *B* records *A*'s tune does not negate *A*'s status as its author, as *A* is "the person who created it."[261]

As regards the third requirement (specifically, that of "identifiability" in EU law), this article repeats the conclusion that it reached in Part III(A). Specifically, the failure of a subject matter to meet the identifiability requirement does *not* render it unpropertizable; instead, it renders an already-propertizable subject matter ultimately *unpropertized*.

At this point, this article should probe its determination that the distinct requirements of "identifiability" in EU law and of "recording" in UK law both produce the same outcome: they render an already-propertizable subject matter propertized. This is because, whereas this article has treated propertization as being the state of a subject matter when it both exists as a "literary and artistic work" under the Berne Convention[262] *and* copyright subsists over it, in *Wright v. BTC Core* Arnold LJ emphasizes that there is a distinction between the existence

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[257] *Id.* § 3(1).
[258] COPINGER, *supra* note 21, ¶ 3-170.
[259] CDPA § 3(2).
[260] COPINGER, *supra* note 21, ¶ 3-175.
[261] *Id.*
[262] Berne Convention art. 1.

of a work, on the one hand, and the subsistence of copyright in it, on the other.[263] More specifically, he states that "it is important not to confuse the fixation with the work" and, on this basis, he distinguishes the "identifiability" condition in EU law (as being "one of the requirements for the *existence* of a work"[264]) from the "recording" requirement in UK law (which goes to the separate issue of *subsistence*).

Thus, by treating both requirements as rendering an already-propertizable subject matter propertized, it would appear that this article's account skirts over the different roles that these requirements play in determining if a subject matter is protected by copyright. And, according to Arnold LJ, these differences are important when assessing whether there has been infringement because the copyright owner need "only … prove that [what] has been copied" is the work itself and not "the [recording that was] relied upon for the purposes of subsistence."[265]

Nevertheless, this article contends that its account of the "recording" and the "identifiability" requirements (according to which they *both* render an already-propertizable subject matter ultimately propertized) is not incompatible with Arnold LJ's distinction between the existence of a "literary and artistic work" and the subsistence of copyright in it. To begin with, this article has defined "propertization" as occurring when copyright subsists in a subject matter that exists as a "literary and artistic work," whether such subsistence occurs contemporaneously with, or subsequently to, the existence of the subject matter as such a work. Thus, its account adds to Arnold LJ's distinction between existence and subsistence by recognizing that, in meeting the "identifiability" requirement in EU law, this simultaneously causes the subject matter to exist as a "literary and artistic work" *and* for copyright to subsist in it. In other words, it thereby becomes propertized. Thus, whereas Arnold LJ distinguishes this requirement from that of "recording" in UK law, on the basis that the former goes to the existence of a "literary and artistic work," whereas the latter goes to the subsistence of copyright in it, this article's account draws attention to the similarities between these requirements. These similarities are revealed in the fact that the "identifiability" requirement in EU law also goes to the subsistence of copyright, albeit *simultaneously* to the existence of this subject matter as a literary and artistic work.

Moreover, this article's account of the "propertizable" status of a subject matter (according to which it is propertizable if it is inside of the "literary, scientific and artistic domain," as referred to in the Berne Convention,[266] but

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[263] *See Wright*, EWCA Civ 868 ¶¶ 59, 69 (stating that "[i]t is clear from Article 2(2) of Berne that a work may exist before it is fixed (this is even clearer from section 3(2) of the 1988 Act)" and that "the work … must be fixed in order for copyright to subsist in it…").
[264] *Id.* ¶ 59 (emphasis added).
[265] *Id.* ¶ 74.
[266] Berne Convention art. 2(1).

unpropertizable if it is outside) provides a different insight into the "non-property" status of the public domain. In particular, this account demonstrates how a subject matter may be propertizable but *not exist* as a "literary and artistic work" under Arnold LJ's distinction. To take an example, in EU law, following *Levola Hengelo*, the taste of a food product was implicitly treated as being propertizable (on account of its being inside of the "literary, scientific and artistic domain"[267]), though because it failed to meet the identifiability requirement, it neither existed nor did copyright subsist in it as a "work." In other words, the failure to meet the identifiability requirement rendered this already-propertizable subject matter ultimately unpropertized. What is noteworthy about this example is that it illustrates that a subject matter might be viewed as propertizable in EU law (because it meets the "expression" and the "originality" requirements and is therefore inside of the "literary and artistic domain"), though it does not *exist* as a "literary and artistic work" (or, in other words, a "work" for the purposes of EU law) because it has not (yet) met the identifiability requirement.

What is therefore significant about this article's account is that it supplements Arnold LJ's depiction of what it means for a "literary and artistic work" not to exist. For instance, if the CJEU had, in fact, stipulated that the taste of a food product is outside of the "literary and artistic domain" because "its scope [is limited] to works that can be perceived through sight and hearing,"[268] then, drawing upon Arnold LJ's notion of "existence," this subject matter would not exist as a "literary and artistic work" for this reason. Though, importantly, on this article's account, this subject matter would be unpropertizable because it is outside of this domain. Given that, in *Levola Hengelo*, the CJEU seemed to imply that this subject matter was, in fact, inside of this domain,[269] this article has thereby treated it as being propertizable, though on Arnold LJ's account, again, its failure to meet the identifiability requirement means that it did not exist as a "literary and artistic work."

Thus, whereas using Arnold LJ's terminology, a "literary and artistic work" would not exist in both scenarios (the former because the subject matter is outside of the "literary and artistic domain," the latter because, although it is inside of this domain, it has failed to meet the identifiability requirement), this article's account illustrates that the former scenario would involve an *unpropertizable* subject matter, whereas the latter would be *propertizable* (but ultimately unpropertized). So, rather than being incompatible with Arnold LJ's distinction between the existence of the work and the subsistence of copyright in it, this article's emphasis

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[267] *See* McCutcheon, *supra* note 162.

[268] Caterina Sganga*, Say Nay to a Tastier Copyright: Why the CJEU Should Deny Copyright Protection for Tastes (and Smells)*, 14 J.INTELL. PROP. L. & PRAC. 187, 189 (2019).

[269] *See* McCutcheon, *supra* note 162 ("It seems the CJEU's failure to … set any limits to what might be conceived as the literary, scientific or artistic domain … may have been deliberate … This would leave the door open to copyright protection for … a future sensory copyright.").

on the "unpropertizable" and "propertizable" statuses of a subject matter sheds a different light on the public domain's "non-property" status.

Having examined these three "material" requirements for copyright subsistence, this article determines that the failure of a subject matter to satisfy only *one* of these requirements renders it unpropertizable. This is the requirement (which features *only* in the UK) that a work must possess a particular "form" to fall within one of the LDMA descriptions. Therefore, this article reaches the following conclusion to the first issue: that, in the UK *alone*, there are subject matters in the public domain that are materially unpropertizable. It collectively describes these unpropertizable subject matters as immaterial (LDMA) works.

B. Immaterial (LDMA) Works: Examining the Practical Significance of their "Unpropertizable" Status

This article will now address the second issue: whether the "unpropertizable" status of immaterial (LDMA) works has any practical impact on judicial decision-making. To do so, it returns to its investigation in Part IV(A) of the three "material" requirements for copyright subsistence in both jurisdictions. By comparing these requirements, this article will then identify how the "unpropertizable" status of immaterial (LDMA) works is, in practice, circumventable. Consequently, if such circumvention were to occur, this status would have little practical impact on judicial decision-making.

This article begins its comparison by focusing on the yet-unaddressed issue that what is "material" about these three requirements may not necessarily be the same for each requirement. For instance, the "identifiability" requirement, in "co-opting" the representation requirement in trademark law,[270] focuses not on the particular form that the subject matter takes but rather on the general *quality* of that form. Here, this requirement is described as being "material" because of the "certainty and objectivity" that it reinforces in the "work" under EU law.[271]

By contrast, the UK's "form" requirement focuses not on the general quality of this form but rather on its specific manifestation which differs for each LDMA description. For example, the particular form that a work must take to be a collage (an artistic work[272]) has been interpreted as requiring "the use of glue or some other adhesive."[273] Here, what is "material" about the form requirement is less that it reinforces the "certainty and objectivity" of each LDMA category and more that it emphasizes their *specificity* as distinct categories.[274]

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[270] *Id.* at 939; *see also* Case C-273/00, Ralf Sieckmann v Deutsches Patent- und Markenamt, EU:C:2002:748 ¶ 30.
[271] McCutcheon, *supra* note 162, at 939.
[272] CDPA § 4(1)(a).
[273] Creation Records, Ltd. v. News Grp. Newspapers, Ltd., [1997] E.M.L.R. 444, 449 (U.K.).
[274] *Cf.* Pila, *supra* note 23, at 11 (Describing how such categories in IP regimes "can be seen to operate in either or both of two ways: first, to denote differences between subject

Furthermore, what is "material" about the UK's "recording" requirement is that it *evidences* each LDM work in requiring, over and above their specificity of "form," an actual record of this form.[275]

These different understandings of what makes these requirements "material" suggest that they might yield different outcomes. For instance, a subject matter might arguably meet only one of these requirements and fail to satisfy the others. These different outcomes can be seen in the following example: where the "form" (UK) and the "identifiability" (EU) requirements are applied to an "intrinsically ephemeral" arrangement of a scene that is then "disassembled as soon as" a photograph is taken of it.[276]

If we focus on the arrangement itself (excluding the photograph), it would arguably satisfy the identifiability requirement, though its expression "is not … in permanent form."[277] This is because the elements that are assembled in the arrangement "are capable of being understood with a high level of certainty"[278] and, as such, arguably meet the requirement of a "precise and objective form of expression."[279] For instance, the elements are easily-recognizable "*objets trouvés*."[280]

However, the arrangement lacks the required "form" to qualify as an artistic work under the CDPA. For instance, no element is "carved, modelled or made"[281] in a way that would meet the form requirement to be a sculpture.[282] Therefore, this example demonstrates that these "material" requirements can yield different outcomes.

1. *From Sand Sculptures to a "Pre-Construction Sketch or Photograph":*[283] *Circumventing the Unpropertizable Status of Immaterial (Artistic) Works*

This article will now identify one way in which judges might circumvent the "unpropertizable" status of immaterial (LDMA) works. This arises in the specific context of immaterial (artistic) works—works that fail to possess the

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matter of a certain type; and second, to denote systems of subject matter by sorting every member of a certain type that exists.").

[275] *See Wright*, EWCA Civ 868 ¶ 73 ("[T]he requirement of fixation … serves two purposes: to evidence the existence of the work and to delimit the scope of protection.").

[276] *Creation Records*, E.M.L.R. 444 at 450.

[277] *Levola Hengelo*, C-310/17 ¶ 40.

[278] Bently, *The Football Game*, *supra* note 157, at 224 (arguing that "the incidents that comprise" a football match—such as "connected movements of bodies and ball across physical space," which can be "recorded and analysed as objective facts"—would likely satisfy the identifiability requirement).

[279] *Levola Hengelo*, C-310/17 ¶ 42.

[280] *Creation Records*, E.M.L.R 444 at 449.

[281] *Id.*

[282] CDPA § 4(1)(a).

[283] Islestarr Holdings, Ltd. v. Aldi Stores, Ltd., [2019] EWHC 1473 (Ch.), [2020] E.C.D.R. 20 ¶ 48 (U.K.).

required "form" to be an artistic work under the CDPA. Here, such circumvention occurs when a judge shifts the focus of their inquiry from the *unpropertizable* work before it (which lacks the required form to be an artistic work) to a different, but *propertizable* artistic work (which has met this requirement). When undertaking the infringement assessment, the judge can then treat the unpropertizable work as a mere intermediary that is connected to this (different, but propertizable) artistic work. Consequently, any (direct) copying[284] of this intermediary would amount to *indirect*[285] copying of the connected artistic work and potentially infringe its copyright.

Such circumvention occurred in *Islestarr Holdings, Ltd. v. Aldi Stores, Ltd.*, which addressed the issue of whether the design embossed into the surface of makeup powders that is inevitably rubbed away is propertizable as an artistic work. The design had been finalized in a drawing before it was embossed into the surface of the powders. In answering this question, Deputy Master Linwood notably shifted his focus from the design embossed into the powder to its pre-embossed (or "pre-construction") drawing and determined that "the powders are a three-dimensional reproduction of the two-dimensional object, namely the drawing."[286]

In so doing, he was able to circumvent the otherwise unpropertizable status of the embossed design which, due to the "ephemeral" nature of its powder medium, arguably lacked the required form (such as a "surface"[287]) to be a

[284] CDPA § 16(1)(a).
[285] *Id.* § 16(3)(b).
[286] *Islestarr Holdings*, EWHC 1473 ¶ 48.
[287] Merch. Corp. of Am. Inc. v. Harpbond, Ltd., [1983] F.S.R. 32, 46 ("A painting is not an idea: it is an object; and paint without a surface is not a painting.").

"graphic work"[288] (such as an engraving[289]) under the CDPA. By shifting from one medium (the three-dimensional powder) to another (the two-dimensional drawing), merely because the former was based on (or was a "reproduction of") the latter, Deputy Master Linwood was able to circumvent the unpropertizable status of an immaterial (artistic) work through identifying a different, though propertizable, artistic work to which it was connected. Because the drawing—unlike the embossed design—was completed on a non-transitory surface, this satisfied the "form" requirement applicable to this (different) artistic work, thereby rendering the design propertizable under the CDPA.

Furthermore, this shift in focus from the embossed design to the drawing (where the drawing was viewed as the artistic work and the embossed design was a mere "reproduction of" it) then carried through to the infringement assessment[290] where (direct) copying of the design embossed on the powder amounted to *indirect*[291] copying of the design in the drawing.

What is also noteworthy about this circumvention of the otherwise unpropertizable status of the embossed design is the example that Deputy Master Linwood gave of a person who makes a sand sculpture which is "then washed away." In stipulating that this would not remove their "claim to copyright in … a pre-construction sketch or photograph of the completed work,"[292] he left a key issue unaddressed. Specifically, how would a claim involving such a sand

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[288] *But see* Poorna Mysoor, *Does UK Really Have a "Closed" List of Works Protected by Copyright?*, 41 E.I.P.R. 474, 475 (2019), who suggests that the word "includes" in the description of a "graphic work" in CDPA § 4(2) (specifically, a "graphic work includes—(a) any painting, drawing, diagram…") should be given "an expansive definition" under ordinary principles of statutory interpretation. From this, she argues that a graphic work "not only includes paintings [and drawings], but also those that are similar to paintings [and drawings], but not quite paintings [and] drawings in the traditional sense," such as face painting and tattoos. Therefore, Mysoor might arguably be open to treating the powder design in *Islestarr Holdings* as possessing the required "form" to be, say, an engraving under CDPA § 4(2)(b), notwithstanding that it lacked a "surface" in the traditional (non-ephemeral) sense. HHJ Hacon also appears to adopt a similarly expansive definition of a "graphic work" in *Response Clothing* (at ¶ 16), where he states that "[a]ll the examples of a graphic work" in CDPA § 4(2) "are created by the author making marks on a substrate to generate an image." The use of the word "substrate" as opposed to, say, "surface," would appear to embrace non-traditional understandings of the "form" that is required for a subject matter to be a graphic work, such that the powder medium in *Islestarr Holdings* would meet this requirement. Nevertheless, it is noteworthy that HHJ Hacon envisages limits on the meaning of "making marks on a substrate to generate an image," such that he did not believe that the "definition of a graphic work can be stretched to include a fabric, whether made on a loom or a knitting machine." Therefore, in keeping with HHJ Hacon's awareness of there being limits on the "form" that is required to be a graphic work, this article will treat the embossed design in *Islestarr Holdings* as arguably failing to meet this requirement owing to its non-traditional powder medium.

[289] CDPA § 4(2)(b).

[290] *Id.* § 16(2).

[291] *Id.* § 16(3)(b).

[292] *Islestarr Holdings*, EWHC 1473 ¶ 48.

sculpture or an embossed design be decided in the *absence* of there being a separate artistic work (such as a photograph or drawing) to which they are apparently connected?

Following Laddie J.'s suggestion in *Metix (UK), Ltd. v. Maughan (Plastics), Ltd.*[293] that an ice sculpture would possess the required form to be a sculpture under the CDPA (specifically, as a "three-dimensional work made by an artist's hand"[294]) notwithstanding that "it may melt,"[295] it is likely that a sand sculpture would also meet this "form" requirement, despite its transitory nature. However, if a claim were to be brought in respect of a sand sculpture that has been "washed away" and, importantly, where there is no documentary evidence (such as a photograph or drawing) of its having existed,[296] such a claim would likely fail. This is because, notwithstanding the generally accepted view that "a copyright work cannot itself be destroyed: it remains in existence even if the original embodiment or fixation of it is destroyed,"[297] the absence of documentary evidence of its existence would mean that its copyright would be difficult to enforce in practice. It is therefore possible that, despite being propertized in theory, the sand sculpture might be treated, in practice, in much the same way as if it were unpropertizable.

Furthermore, in relation to the embossed design, the "ephemeral" nature of its powder medium would likely mean that it lacks the required form to be a graphic work,[298] with the result that it would be unpropertizable. Thus, in the absence of a drawing or photograph of the embossed design, a claim brought in respect of this design alone would also likely fail. This is because there would be no artistic work connected to the embossed design which could itself be the focus of an infringement claim (where any copying of the embossed design would amount to *indirect* copying of this connected work).

The fact that the claim in *Islestarr Holdings* expressly concerned the issue of whether the *embossed design* was an artistic work, but was instead decided on the (fortuitous) basis that the *drawing* for it was an artistic work, only reinforces the ability of judges to circumvent the "unpropertizable" status of immaterial (artistic) works. Whether this might ensue in future cases will depend on the pleadings. However, in circumstances where the purported artistic work is connected to another artistic work that possesses the required "form," the "unpropertizable" status of immaterial (artistic) works will likely have little practical impact on judicial decision-making.

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[293] [1997] F.S.R. 718 (U.K.).
[294] *Id.* at 722.
[295] *Id.* at 721.
[296] *See generally* Tania Cheng-Davies, *Can a Work of Art Be Destroyed under Copyright Law?*, 103 IP FORUM 32 (2015).
[297] GILLIAN DAVIES & KEVIN GARNETT, MORAL RIGHTS ¶ 8-023 (1st ed. 2010).
[298] *Islestarr Holdings*, EWHC 1473 ¶¶ 41–42; *see* CDPA § 4(2)(b).

2. How the Flexibility of the "Material" Impacts Immaterial (LDMA) Works

It is possible to identify another way in which judges might circumvent the "unpropertizable" status of immaterial (artistic) works. This is where a judge, when confronted with an otherwise unpropertizable "work" that lacks the required form to be an artistic work, elides this "form" requirement with the distinct requirement of "recording" (which applies *only* to LDM works). In so doing, they might render a work that, in its present state, lacks the "materiality"[299] of form required to be an artistic work (and is thus unpropertizable), *propertizable*. This is achieved by treating it like an LDM work and determining that its "content"[300] has been recorded in a separate medium that possesses this "materiality."

Before explaining this circumvention in more detail, we must identify the type of immaterial (artistic) work that is of concern here, which this article has described as lacking the "materiality" of form required to be an artistic work. This type of immaterial (artistic) work is one that involves a *separation* between the medium that possesses materiality and the medium that contains the content of the work, a separation that is not permitted on a traditional view of the form requirement that applies to artistic works.[301] This traditional view assumes that artistic works involve "a certain materiality"[302] that features in *the same* medium in which the content of the work is located; in other words, there is *no separation* between the medium that contains this content and the medium that possesses materiality.[303]

An example of this non-separation in the context of artistic works can be seen in the case of a graphic work (such as a drawing[304] or an engraving[305]). Here, pursuant to the definition of a graphic work (namely, a work that is "created by the author making marks on a substrate to generate an image"[306]), the substrate medium both contains the content of this work (here, the "image") and also possesses materiality because it is a record of this image. Thus, in keeping with the traditional view of artistic works, there is no separation between the medium that contains the content of this work and the medium that possesses materiality. So, where there *is* a separation between these two media, a "work" would lack the required form to be an artistic work on this traditional view and would thus be an immaterial (artistic) work.

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[299] Pila, *supra* note 23, at 180.

[300] *See* SAS Institute [2013] EWHC ¶ 27. *See generally*, Richard Arnold, *Content Copyrights and Signal Copyrights: The Case for a Rational Scheme of Protection*, 1 QUEEN MARY J. INTELL. PROP. 272, 276 (2011).

[301] *Cf.* COPINGER, *supra* note 21, ¶ 3-177 ("Artistic works are not made subject to a specific requirement of fixation under the 1988 Act, but the nature of each of the types of work … within the definition of artistic work is such that the work will have taken a material form.").

[302] Pila, *supra* note 23, at 180.

[303] *Id.* at 159.

[304] CDPA § 4(2)(a).

[305] *Id.* § 4(2)(b).

[306] *Response Clothing*, EWHC 148 (IPEC) ¶ 16.

Having identified this type of immaterial (artistic) work, this article will now consider how a judge might circumvent the "unpropertizable" status of this work. This circumvention is achieved by separating the medium that contains the artistic "content" of the work and the medium that possesses "materiality" (contrary to the traditional view of artistic works) and then determining that the content of the former is recorded in the latter. In so doing, the judge effectively treats the "content" of an artistic work like an LDM work that is recorded in a separate medium and thereby determines that this medium meets the "form" requirement of an artistic work, notwithstanding that this separation between these two media would mean that this "form" requirement would not be satisfied on the traditional view of artistic works.

An example of this circumvention can be seen in *Abraham Moon v. Thornber*, which involved an action for copyright infringement of a fabric design that had been recorded on a "ticket stamp" consisting of only "words and numbers."[307] In this case, HHJ Birss QC determined that the ticket stamp was both an original literary work and an original artistic work[308] (specifically, a graphic work[309]). However, for present purposes, this article will focus on his determination that the ticket stamp was an artistic work and that making a fabric that bore "a clear visual resemblance"[310] to the ticket stamp amounted to copyright infringement.

Two features that guided HHJ Birss QC's determination that the ticket stamp was an artistic work are of particular interest to us. The first is that, when faced with a separation between the medium that possessed materiality (here, the ticket stamp) and the medium in which the content of the work (namely, the "visual image" of the design) was located, he appeared to conflate the "form" requirement applicable to artistic works with that applicable to LDM works. This conflation can be seen in his determination that, although the ticket stamp consisted of only "words and numbers," it was a graphic work, albeit "of an unusual sort."[311] This is because the ticket stamp had "real visual significance" to an "experienced fabric designer" who, upon looking at the stamp, would be able to visualize the image of the design.[312] What is significant about this determination is that HHJ Birss QC effectively assessed whether the ticket stamp met the "form" requirement of an artistic work by applying an understanding of this "form" requirement that applies only to LDM works.

More specifically, whereas LDMA works are what Richard Arnold refers to as "contents" (works that "are protected regardless of the signals by which they

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[307] Abraham Moon & Sons, Ltd. v. Thornber, [2012] EWPCC 37, [2012] F.S.R. 17 ¶ 102 (U.K.).
[308] *Id.* ¶¶ 90, 118.
[309] CDPA § 4(1)(c); *Id.* ¶ 107.
[310] *Thornber*, EWPCC 37 ¶ 108.
[311] *Id.* ¶ 107.
[312] *Id.* ¶ 102.

are carried"[313]), as already discussed, the "form" requirement of an artistic work is traditionally viewed as involving a materiality that obtains in *the same* medium that contains the artistic "content" of the work.[314] By contrast with artistic works, however, it is possible for LDM works to satisfy the "form" requirement (in a way that does *not* involve materiality) and then to acquire such materiality through being recorded in a *separate* medium (thus meeting the "recording" requirement).[315] This is reflected in the wording of the recording requirement in the CDPA (namely that "[c]opyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise"[316]), which implies that an LDM work may already exist as such before it is recorded.[317]

To illustrate this distinction between LDM works and artistic works, we can compare the example of a sculpture (an artistic work[318] under the CDPA) with that of an improvisation by a pianist that is recorded on film.[319] Here, a subject matter that meets the "form" requirement to be a sculpture (for instance, by being a "three-dimensional work made by an artist's hand"[320]) would thereby possess materiality *in the same medium*. By contrast, the musical improvisation would possess the required form to be a musical work[321] under the CDPA because it is "a work consisting of music";[322] however, it would only acquire materiality through being recorded *in a separate medium* (here, the film).

Returning to HHJ Birss QC's determination that the ticket stamp was an artistic work, we can see that he treated the ticket stamp as meeting the form requirement to be an artistic work, although the content of this artistic work (namely, the "visual image" of the fabric design[323]) was located in a separate medium. More specifically, although the ticket stamp possessed materiality (as a "recording" of this image), the image itself (the "content" of this artistic work) was located in the *minds* of "experienced fabric designer[s]" who viewed the

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313 Arnold, *supra* note 300; *see also id.* ¶ 106.

314 Arnold contrasts "contents" with "signals," the latter being defined as works where "what is protected is the signal itself, as distinct from the content it carries." Although artistic works and signals both involve a materiality that features in the same medium that contains the "content" (in the case of artistic works) or the "signal" (in the case of signals), they differ in that the copyright in signals "can only be infringed by copying the signal," whereas the copyright in contents "may be infringed without copying the signal or medium on which the work was recorded." *Id.*

315 The "recording" requirement is sometimes met contemporaneously with the "form" requirement. An example of this can be seen where a "work" is written, which thereby satisfies both the "form" requirement of a "literary work" and the "recording" requirement: *see* CDPA §§ 3(1)–(2).

316 *Id.* § 3(2).

317 *Wright*, EWCA Civ 868 ¶ 59.

318 CDPA § 4(1)(a).

319 *Id.* § 5B(1).

320 Metix, at 722.

321 CDPA § 1(1)(a).

322 *Id.* § 3(1).

323 *Thornber*, EWPCC 37 ¶ 107.

stamp.[324] Therefore, the work at issue in *Thornber* involved a *separation* (which, on the traditional view of artistic works, may only arise in the context of LDM works) between the ticket stamp medium and the medium of the "visual image" (namely, the minds of the fabric designers). Here, the ticket stamp possessed "materiality," whereas the minds of the fabric designers conjured up the visual "content" of the design.

It is arguable that, on the traditional view of artistic works, the ticket stamp would have lacked the required form to be an artistic work owing to this separation between the medium that possessed materiality and the medium that contained the visual content of this work. As such, the ticket stamp would have been unpropertizable. However, by employing an understanding of the "form" requirement that applies only to LDM works (where such a separation is possible), HHJ Birss QC was able to circumvent this "unpropertizable" status by determining that the ticket stamp possessed the required form to be an artistic work.

To illustrate how this circumvention occurred, this article now turns to the second feature that guided HHJ Birss QC's determination that the ticket stamp was an artistic work. This second feature is where he treated the ticket stamp (which possessed materiality) as meeting the "form" requirement of an artistic work because the "visual image" of the design (i.e. the "content" of this work), which was located in a separate medium, had been *recorded* in it.[325] What is significant here is that HHJ Birss QC effectively used the "recording" requirement[326] (applicable only to LDM works) to circumvent the otherwise unpropertizable status of an immaterial (artistic) work. More specifically, he determined that, notwithstanding the separation between the medium that possessed "materiality" and the medium that contained the "content" of the work, the ticket stamp met the "form" requirement of an artistic work (and was thus propertizable) because this content was recorded in it. In so doing, he elided the "form" requirement (applicable to artistic works) with the "recording" requirement (applicable to LDM works only) to render the ticket stamp propertizable as an artistic work.

Beyond artistic works, this use of the recording requirement to circumvent the otherwise unpropertizable status of immaterial (artistic) works is arguably capable of applying to all LDMA works. Such circumvention might occur in the following way: where a judge treats a work that lacks the required form to be an LDMA work as meeting the "form" requirement because the "content" of this work has been recorded. This can be seen in Poorna Mysoor's article where, despite stressing the need for us to distinguish the "work" (as an "expression"

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[324] *Id.* ¶ 102.

[325] *Id.* ¶ 104 ("the ticket acts as a record of the image").

[326] *See id.* ("Although s.3(2) of the 1988 Act only refers to literary, dramatic and musical work, and s.4 has no corresponding provision, I presume that is just because it is assumed that s.4(1) inevitably requires a record of the work in a material form.").

pursuant to the idea-expression dichotomy) from its "form" under the CDPA, she states that "[a] work gets its form because of its record."[327] In so doing, she elides the "form" of a work (as an LDMA work) with the matter of its "record." This therefore opens up the possibility that a work that fails to possess the required form to be an LDM work—such as the (arguable) failure of silence[328] to be a "work consisting of music"[329] in the case of a musical work—may nevertheless be considered propertizable (as a musical work) by virtue of its "content" being recorded. For example, it might be recorded in writing on an empty stave.

So, this flexibility in applying these "material" requirements (where the form requirement can be elided with the recording requirement) might enable judges, in practice, to circumvent the "unpropertizable" status of immaterial (LDMA) works. If such circumvention were to occur, this status would have little practical impact on judicial decision-making.

C. Comparing the Implications of this Investigation on the Public Domain in Both Jurisdictions

This article will now examine the implications of its investigation on the public domain by comparing the respective legal situations in the UK and the EU. To begin with, this investigation illuminates an "immaterial"[330] dimension to the public domain in both jurisdictions. According to this dimension, subject matters that lack the "materiality" needed to satisfy "material" requirements for subsistence are, depending on the requirement, either *materially* "unpropertizable" or "propertizable, but (yet-)unpropertized."

Consequently, the "unpropertizable" status of immaterial (LDMA) works in UK law arguably limits one way in which the object of copyright might be *dematerialized*,[331] namely where this object lacks the materiality of a particular "form." To understand the impact of dematerialization on the object of copyright, we can draw upon Griffiths's account of the dematerialization of the "work" in UK law that followed the CJEU's decision in *Infopaq*.[332] As noted by Griffiths, the *Infopaq* decision steered the infringement assessment in UK law towards identifying if a restricted act had been performed in relation to "elements which are the expression of the [author's own] intellectual creation."[333] Here Griffiths predicted that, following *Infopaq*, "the boundaries of the protected work as a

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[327] Mysoor, *"Form," supra* note 60, at 84.

[328] *See* David M. Seymour, *This Is the Piece That Everyone Here Has Come to Experience: The Challenges to Copyright of John Cage's* 4'33", 33 LEGAL STUD. 532 (2013) (presenting an argument in favor of protecting John Cage's *4'33"* as a "musical work" under the CDPA).

[329] CDPA § 3(1).

[330] Griffiths, *supra* note 122, at 768.

[331] *Id.*

[332] *Id.* at 780–89.

[333] *Id.* at 789.

whole"[334] would become less relevant in the infringement assessment in UK law because it would become possible for "small sub-elements of much larger works" to be the subject of an infringement claim provided that they contain "elements which are the expression of [such] … creation."[335] From this, Griffiths viewed dematerialization as occurring when "[t]he outer boundaries of the material form" of the work no longer provide a limit on whether protection may be granted by copyright.[336]

Building upon Griffiths's understanding of dematerialization, this article argues that the object of copyright becomes dematerialized when it is possible to protect a subject matter by copyright that lacks the materiality of a particular "form." This is because the absence of a (material) form requirement (and thus an "outer boundary" of the work) means that the material "form" of the work does not provide a limit on whether a subject matter may be protected by copyright. The consequence of such dematerialization is that it triggers uncertainty as to whether there are any "material" limits on the subject matters that may fall within the "literary, scientific and artistic domain"[337] (or, in other words, the subject matters that are *propertizable*).

Therefore, as dematerialization can introduce this uncertainty into copyright law, the "unpropertizable" status of these (dematerialized) subject matters in UK law removes this risk of uncertainty. By contrast, the situation in the EU (where there are no such materially unpropertizable subject matters) lacks an equivalent limit on such dematerialization. For this reason, this article argues that the situation in the UK is preferable to that in the EU.

V. EXAMINING THE IMPLICATIONS OF THIS INVESTIGATION ON THE PUBLIC DOMAIN IN UK AND EU COPYRIGHT LAW

This article will now examine the implications of its investigation in Parts II-IV on the public domain by addressing the following questions: first, what do the three understandings of unpropertizable subject matters reveal about the public domain's composition?[338] Second, what is the impact on the public domain of asking this article's question in its negative[339] ("unpropertizable") formulation? And third, now that the REUL Act is in force, what impact might this Act have on the findings relating to the UK in Parts II-IV?

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[334] *Id.* at 784.
[335] *Id.* at 789.
[336] *Id.* at 788.
[337] Berne Convention art. 2(1).
[338] *See* Benabou & Dusollier, *supra* note 11, at 163.
[339] *See* Samuels, *The Public Domain in Copyright*, *supra* note 1 ("Is the public domain simply whatever is left over after various tests of legal protection have been applied? Is it the mere 'background', the 'negative' of whatever may be protected?").

A. "Not One Public Domain, But Many"?[340] Exposing the Layers of (Un)Propertizable Subject Matters

To answer the first question, this article's investigation in Parts II-IV has provided an insight into the complexities of the public domain and its possible encroachment by copyright in both jurisdictions.

As regards the public domain, this investigation sheds light both on its composition within each jurisdiction and its "non-property" status more generally. To begin with, unlike the binary depiction of the relationship between the public domain and copyright[341] that we often encounter in the academic literature (according to which the public domain is typically oversimplified as merely being the "opposite of property"[342]), this investigation reveals that its "non-property" status is, in fact, capable of bearing different meanings.

More specifically, this investigation has exposed multiple "sections" or "layers" to the public domain in both jurisdictions.[343] These represent the different non-property statuses that subject matters might possess, namely as being "unpropertizable" or "propertizable, but (yet-)unpropertized." What differentiates these subject matters is the particular requirement for copyright subsistence that they have failed to satisfy. So, for instance, some subject matters (such as those within the public domain's hard kernel) are automatically and permanently excluded from copyright protection, whereas others (such as a "work" in UK law or an "expression" in EU law) bear a status that changes depending on whether they meet additional requirements for subsistence. Furthermore, as the requirements for subsistence in UK and EU law differ, the public domain's composition varies *across* both jurisdictions. Consequently, this article endorses Boyle's statement in determining that, across both jurisdictions, there "is not one public domain, but many."[344]

By identifying these multiple sections or layers, this investigation also reveals that public domain encroachment might take different forms and have different ramifications, depending on the particular subject matter that is involved (or encroached upon).[345] So, for instance, we might identify one form of encroachment as occurring upon the hard kernel, the ramifications of which are

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[340] Boyle, *The Second Enclosure Movement*, *supra* note 12, at 62.

[341] *See generally* Chander & Sunder, *supra* note 29, at 1334 (describing the "increasingly binary tenor of current intellectual property debates—in which we must choose *either* intellectual property *or* the public domain…").

[342] BOYLE, THE PUBLIC DOMAIN, *supra* note 13.

[343] *See* Samuelson, *Challenges in Mapping the Public Domain*, *supra* note 26, at 13-17 (providing a visual "mapping" of multiple different conceptions of the public domain in the academic literature).

[344] Boyle, *The Second Enclosure Movement*, *supra* note 12, at 62.

[345] *See* Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROBS. 147, 147 (2003) (Arguing that "some of what is in the public domain is detritus; some of what is valuable in the public domain might be better utilized if propertized to some degree; other parts of the public domain need to remain open and unownable as sources for future creations.").

likely to be serious due to the structural purpose that these subject matters typically serve as "raw material" for authorship.[346]

Therefore, this investigation has revealed that there are different (un)propertizable layers to the public domain in both jurisdictions and, relatedly, that the possibilities for public domain encroachment are multiple.

B. Searching for "Non-Property": Examining the Implications of this Question's Negative ("Unpropertizable") Formulation

What is significant about this article's question (specifically, "In UK and EU copyright law, are there subject matters in the public domain that are unpropertizable?") is its negative ("unpropertizable") formulation, which emphasizes the public domain's "non-property" status. This is because, although the topic of the public domain receives ongoing coverage in the academic literature, there is a tendency for authors to conceive of the public domain using the positive or rights-based language of property.[347] This can be seen in Lange's article where, following his concerns about public domain encroachment, he argues that courts should view the public domain "not merely as an unexplored abstraction but as a field of individual rights fully as important as any of the new property rights."[348]

This tendency implies that the public domain is strengthened (against possible encroachment by copyright) when it emulates certain key features of property, such as exclusive rights.[349] Although, as noted by Mark Rose, this implication arguably finds its basis in the apparent prioritization of property that undergirds IP law (according to which "possession is nine-tenths of the law" or, in other words, "the law is mostly about property"[350]), this article argues that it inadvertently reinforces the residual status of the public domain. According to this status, the public domain is only visible in IP law when it is viewed *relative* to IP. This therefore risks our understanding of the public domain being "at the mercy of" our perceptions of the scope and/or value of IP.[351]

So, through the negative ("unpropertizable") formulation of its question, this article has sought to render the public domain visible by advancing its "non-property" status "first in [its] … own right"[352] and without seeking to conform it to property. In anticipation of the likely impact of the REUL Act, it now remains

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[346] Litman, *supra* note 4.
[347] *See* Samuels, *The Public Domain in Copyright*, *supra* note 1.
[348] Lange, *Recognizing the Public Domain*, *supra* note 3, at 178.
[349] *See* Fhima, *supra* note 16, at 5–6 (describing the "positive rights" of public property, which are "held by all by virtue of being members of the public domain").
[350] Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 L. & CONTEMP. PROBS. 75, 85 (2003).
[351] Dusollier, *Scoping Study*, *supra* note 5, at 68.
[352] Lange, *Recognizing the Public Domain*, *supra* note 3, at 177.

to be seen whether this article's pursuit of the often-invisible "one-tenth of the law" will be reflected in future developments in UK copyright law.

C. Contemplating the Future of the Public Domain in UK Law

This article concludes its investigation by anticipating the impact that the REUL Act will likely have on its findings in Parts II-IV. Although, in England and Wales, only the UKSC and the EWCA have the power to depart from assimilated EU case law,[353] it is likely that the Act will facilitate growing divergence between the UK and the EU.[354]

As we saw in Part III, the REUL Act has abolished the *Marleasing* principle in the UK,[355] with the result that no UK court is now required to interpret the CDPA so as to achieve conformity with EU law. This will likely impact the "two-stage approach" to determining if a subject matter qualifies for copyright protection in the UK because judges are no longer required to interpret the LDMA categories expansively to accommodate a "work" under EU law.[356] Therefore, the circumvention that Part III identified as being consequent on the *Marleasing* principle will likely not occur.

As a result of this, UK judges might also exercise greater freedom to interpret the LDMA categories in ways that diverge from, or conflict with, EU law. One particular context in which this freedom might be exercised is in the interpretation of "a work of artistic craftmanship" under the CDPA (see Part III(B)(3)).[357] At the same time, the flexibility in applying the "form" and the "recording" requirements in the UK might continue (Part IV). This is because the Act will likely cement those requirements for copyright subsistence in the UK that *already* diverge from the EU.

Furthermore, as touched upon in Part III, the Act might also impact how judges will interpret the precedent that underpins, inter alia, the "originality" requirement and the "substantial part" test of infringement in UK law.[358] If these legal thresholds become "[less] demanding" as a result of this Act,[359] this would make it easier for parties to prove that their subject matter is propertized (as an original LDMA work) and that their copyright has been infringed. In other words, it would likely weaken the "propertizable, but (yet-)unpropertized" section(s) of the public domain and strengthen the "propertized" status of the copyright work.

Therefore, this article argues that, in some ways, the Act will now ensure that some "unpropertizable" sections of the public domain in the UK are no longer

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[353] European Union (Withdrawal) Act, §§ 6(4)(a), 6(4)(ba).
[354] In particular, it is likely that such divergence will occur when REUL Act § 6 comes into force. For an insight into the likely impact that this will have on UK law, *see* Johnson, *supra* note 22, at 642–45.
[355] BAILEY & NORBURY, *supra* note 22, at 11.
[356] *Shazam*, EWHC 1379 (IPEC) ¶ 92.
[357] CDPA § 4(1)(c).
[358] *See* discussion *supra* Part III(C)(3).
[359] *Sheridan*, EWCA Civ 1354 ¶ 23.

so susceptible to encroachment by copyright; however, at the same time, it might strengthen parties' claims to property. It now remains to be seen how this will develop going forward.

VI. CONCLUSION

Following Lange's 1981 article, a number of academic commentaries have debated whether the public domain is undergoing excessive encroachment by copyright. In response to this apparent phenomenon, there has been a tendency within the academic literature to seek to strengthen the public domain against possible encroachment by redefining the public domain so that it emulates certain core features of "property." However, these attempts have effectively eroded the public domain's traditional "non-property" status.

Therefore, instead of adopting a "property"-centered approach to the public domain in copyright law, this article's investigation sought to identify the strongest form of "non-property" amid the risk of such encroachment. It did so by answering the following question: In UK and EU copyright law, are there subject matters in the public domain that are unpropertizable? To answer this question, this article structured its investigation around two issues: first, in what way(s) are subject matters in the public domain unpropertizable in the UK and the EU? And second, does their unpropertizable status have any practical impact on judicial decision-making?

In Parts II-IV, this article addressed the first issue by identifying three possible ways in which subject matters are unpropertizable in both jurisdictions. It did so by considering their respective requirements for copyright subsistence. These three understandings were the following: first, where subject matters are unpropertizable by nature and so form the public domain's hard kernel (Part II); second, where subject matters, beyond this hard kernel, fail to meet certain additional requirements for subsistence (Part III); and third, where subject matters fail to meet "material" requirements for subsistence (Part IV).

This article ultimately argued that, in both jurisdictions, there are subject matters in the public domain that are unpropertizable in the first and second understandings; however, subject matters that are unpropertizable in the third way only appear in the UK. Nevertheless, it then addressed the second issue by determining that the "unpropertizable" status of these subject matters (in all three ways) is circumventable. Consequently, if such circumvention were to occur, this status would have little practical impact on judicial decision-making.

In Part V, this article then examined the implications of its investigation on the public domain. It determined that its investigation had illuminated the public domain's "non-property" status; however, it is presently uncertain what the future impact of this might be in the UK.