CRITIQUE AND COMMENT

AUTHORSHIP AND FIXATION IN COPYRIGHT LAW: A COMPARATIVE COMMENT

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[The present comment considers an issue that has received little discussion in the common law world: namely whether fixation and authorship are parts of the same creative act in relation to literary, dramatic and musical works. The importance of the question is that, if authorship does not entail fixation, it should logically be possible for a person independent of the author to reduce the work to material form for copyright purposes. This would significantly expand the range of works protected by copyright and would extend protection to those works which have never been fixed by their authors. The focus of the comment is Australian law, but its discussion is comparative, with particular attention given to UK law.]

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I INTRODUCTION

An aspiring politician makes an ad hoc election speech; a celebrity is interviewed on a talk show; a stand-up comedian responds to a heckler with impromptu wit; a musician improvises a riff during a performance. In all of these cases it is arguable that the words or notes are sufficiently significant to be worth some sort of protection. The person speaking might not want the spoken words to be taken up and re-used by another person perhaps inaccurately, perhaps out of context, and perhaps for the commercial profit of the borrower. Or perhaps the speaker may feel that the words are best not reproduced, due to their possibly negative impact on his or her reputation. The musician, likewise, would like to be given credit for his or her own creativity.

Since words or sounds are at issue here, copyright protection under the Copyright Act 1968 (Cth) (‘Copyright Act’) might be expected to assist. The moral rights of authorship might also be looked to. However, these forms of protection can exist only in relation to copyright works,1 and one of the most basic principles of copyright law in Australia is that its protection extends only to works that are reduced to material form.2 Yet none of the above persons has written or recorded the material in advance.

But perhaps copyright protection may still be available for the spoken word in these instances. Perhaps another’s recording of the composition could suffice to characterise it as a copyright work. Perhaps a media organisation, or even a member of the public with a mobile phone, could fix the expression in the way required by copyright law. These possibilities are contingent upon fixation not being an element of authorship, so that fixation need not be exercised by the person claiming authorship status (and hence the status of first copyright owner). In this case authorship would be constituted by the intellectual acts of composition and expression, divorced from fixation. Fixation would have been reduced to little more than a formality, capable of exercise by anybody.

The question raised by the above speculations — namely whether fixation and authorship are part of the same creative act in relation to aural works, or whether they can be decoupled — is fundamental to copyright theory. Strangely, however, it has attracted little discussion to date.

The present comment will consider the current law in Australia pertaining to the fixation of aural expression — literary, dramatic or musical. It will do so against the background particularly of United Kingdom (‘UK’) law, but also of Irish, New Zealand (‘NZ’), United States (‘US’) and Canadian law. (It will not discuss the fixation/authorship issue in the visual arts, since different principles apply in that context.) It will be seen that there is some lack of coherence in the

1 For the requirement of copyright subsistence in relation to moral rights, see Copyright Act 1968 (Cth) s 189 (definitions of ‘artistic work’, ‘dramatic work’, ‘literary work’ and ‘musical work’).
2 Ibid ss 22(1)–(2), 32.
treatment of this issue across the common law world. In particular, Australian constructions of the authorship/fixation nexus diverge, possibly inadvertently, from the constructions evidenced in the legislation of other common law countries. Yet such divergence is not a necessary result of our legislation’s wording. The comment will conclude that a more thoughtful and planned approach to the issue is required in Australia.

II Commentary in Australia

In 1986 Gibbs CJ in the High Court of Australia, in *Computer Edge Pty Ltd v Apple Computer Inc* (‘Computer Edge’), stated that ‘in the case of a literary work, the expression must be in print or writing, as the ordinary meaning of the words ‘literary work’ suggests.’ The necessary implication of the statement was that a literary work could not come into existence without fixation in the required form. In other words, the authorship of such a work would require the appropriate type of fixation.

This view was already well established in Australia, and has continued to be endorsed by legal scholars here. Though the matter has not been discussed at any length, various observations on the nature of authorship — especially joint authorship — and on the nature of a ‘work’ touch on the issue. They indicate, for example, that ‘if it is the original material form of expression [that is] protected by copyright law, presumably the author is the person who first puts the ideas into that form, provided of course that there is some skill or mental labour involved in so doing.’ Similar comments have regularly been made by learned authors over the decades.

This body of commentary has received influential support recently. In April 2009, the High Court of Australia brought down its judgment in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (‘IceTV’), in which three judges from an awkwardly constituted bench of six expressed (in dicta) their understanding of the relationship between authorship and fixation in the context of a printed and digitised database. They did so by reference to UK law and commentary, stating that the word ‘author’ connoted the person who ‘created’ a work and that this person was ‘the person who brings the copyright work into existence in its material form’.

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3 (1986) 161 CLR 171, 181 (Gibbs CJ).
7 Gummow, Hayne and Heydon JJ from a bench constituted by French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ.
Subsequently, Gordon J, in *Telstra Corporation Ltd v Phone Directories Co Pty Ltd*, has stated that authors are ‘persons who bring the work into existence in its material form’ and that ‘[t]he author or authors will be those who gather or organise the collection of material and who select, order and arrange its fixation in material form’. For both statements *IceTV* is cited as an authority. In 2010 Stone J, in *Primary Health Care Ltd v Federal Commissioner of Taxation*, indicated a general acceptance of this position.

I would suggest, however, that these statements are not clearly supported by the Australian legislation and are inconsistent with the dominant international views of authorship for copyright purposes.

III THE STATE OF THE LAW IN THE UNITED KINGDOM

The judicial comments in *IceTV* direct attention to UK copyright law, and especially the present *Copyright, Designs and Patents Act 1988* (UK) c 48 (‘*CDPA*’).

Under the *CDPA* a work can be fixed for copyright purposes by a person independent of the speaker/author. This is established by s 3, which defines literary, dramatic and musical works and sets the requirements for copyright subsistence. That section supports the following propositions:

1. For something to qualify as a literary work (leaving aside the issue of copyright protection) it may be expressed in the form of speech or song.

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Sections 3 states:

1. In this Part —
   
   ‘literary work’ means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes —
   
   (a) a table or compilation other than a database,
   
   (b) a computer program;
   
   (c) preparatory design material for a computer program; and
   
   (d) a database.

   ‘dramatic work’ includes a work of dance or mime; and

   ‘musical work’ means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.

2. Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.

3. It is immaterial for the purposes of subsection (2) whether the work is recorded by or with the permission of the author; and where it is not recorded by the author, nothing in that subsection affects the question whether copyright subsists in the record as distinct from the work recorded.

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9 (2010) 264 ALR 617, 624 [20].

10 Ibid [emphasis in original].

11 Ibid, citing in support of the first statement *IceTV* (2009) 239 CLR 458, 471 [26], 474 [33] (French CJ, Crennan and Kiefel JJ), 493–5 [98]–[99] (Gummow, Hayne and Heydon JJ), and citing in support of the second statement *IceTV* at 486–7 [73]–[74], 494–5 [99] (Gummow, Hayne and Heydon JJ).

12 (2010) 186 FCR 301, 312 [37].
Writing is only one of the three forms of possible expression and is not given special status.

2 The legislators have not been concerned to indicate that dramatic or musical works need to be expressed in fixed form, any more than literary works do.

3 Recording, but not necessarily writing, is a requirement for the subsistence of copyright in a literary, dramatic or musical work.

4 The literary, dramatic or musical work is conceived of as existing separately from its recording.

5 The ‘making’ of such a work occurs at the time when the work is recorded.

6 A work can be recorded (and hence ‘made’) for copyright purposes with or without the author’s permission and presumably also with or without the author’s knowledge.

7 *The recording of the work is not an element in the act of authorship of the literary, dramatic or artistic work, since it can be carried out by a person who is not called an author and who may be acting without authorial permission.*

8 Two copyrights may come into being upon the recording — copyright in the recording itself and copyright in the work recorded — but the section is not intended to say or imply anything about the former.

The seventh point here is central to the current argument. The position summarised there — that the authorship of a work is distinct from its fixation — is supported by other aspects of the CDPA and particularly by the definition of an author as the ‘creator’ of a work and not as the person who either ‘made’ or ‘recorded’ it.14 This ‘creation’ terminology was new for the common law world when introduced in 1988. It would seem to disconnect the act of creation (or authorship) from any fixation of the work.

The propositions in s 3 are not entirely new, since some UK authorities had observed prior to 1988 that a work could be reduced to material form in such a way as to sustain copyright, even when this was not done by the author. Yet such comments had tended to be ambiguous, avoiding pronouncements on the relationship which needed (or did not need) to exist between the author and the recorder in order for copyright to subsist. These comments could have been saying one of two things: either that the speaker could claim authorship when the recorder of the work stood in an agency relationship to the speaker (the ‘amanuensis relationship’), or that the speaker could claim authorship despite no relationship at all existing between the two persons.

14 *CDPA* s 9(1).
A The Amannensis Relationship

At least since Donoghue v Allied Newspapers Ltd, it has been accepted that when another person acts as an amanuensis to the author, the author will achieve copyright protection for the words recorded. The physical acts of the agent or scribe are attributed wholly to the author who has supplied the words to be recorded. The scribe cannot usurp the role of author but has rather fixed the work for copyright purposes for the benefit of the person who has provided the expression. This truth could be the source of some statements that works may be reduced to material form by a person other than the author.

B No Need for Any Relationship?

However, the question has always been begged of how a court would react if a work were reduced to material form by a person who stood in no relationship with the author. A number of comments prior to the passing of the current legislation seemed to suggest that, in this case too, copyright might subsist in the recorded words for the benefit of their speaker/author.

As early as 1967, at the Stockholm revision conference of the Berne Convention, the UK delegate noted the possibility under the then UK law that ‘fixation of a work by a third person created a copyright in favor of its author.’ The comment was made in a context where delegates from several Berne Union countries were insisting that any fixation requirement for the purposes of copyright protection was a breach of the then Convention text and where it was asserted that the recording/fixation of a work, though of evidential significance, had no relevance to the question of copyright subsistence.

This was the expression of a dominant position among the civil law countries. In these countries, copyright subsistence is generally not conditional upon fixation. For example, protection in Germany is afforded to authored ‘language works’, including unfixed speeches, and to unfixed musical works expressed solely in the form of sound. The precondition to an authored work coming into existence is not material form but perceptible form.

Ten years after the Stockholm conference, the Whitford Committee, in its report on copyright and designs law, recommended a clarification of the fact that,

15 [1938] Ch 106.


18 As the Swedish delegate at the Stockholm revision conference pointed out, the previous wording of the Convention implied that a country would be in breach if it did not protect unfixed works (except for choreographic shows and dumb shows): ibid 878 (Mr Bergström). The Danish delegate, Mr Weincke, reiterated the point on the next page: at 879.

19 Ibid 879.

20 See Urheberrechtsgesetz [Copyright Law] (Germany) § 2(1); Ulrich Loewenheim, ‘§ 2 Geschützte Werke’ in Gerhard Schricker and Ulrich Loewenheim (eds), Urheberrecht (Verlag C H Beck, 4th ed, 2010) 93, 102 [20]. See also the Code de la Propriété Intellectuelle [Code of Intellectual Property] (France) art L112-2, expressly covering speeches and sermons.

21 See below n 94 and accompanying text.
when speeches and lectures delivered extempore were fixed, ‘albeit by someone else’, the material should receive copyright protection which would be vested in the speaker.\textsuperscript{22} The committee gave the example of a transcript or recording made without the consent of the speaker.\textsuperscript{23}

Commentators too were indicating, even after the introduction of the Copyright Act 1956,\textsuperscript{24} that the concept of a ‘work’ (and hence authorship)\textsuperscript{25} was separate from any copyright protection and could exist in the absence of fixation.\textsuperscript{26} Indeed, the 1956 legislation did not preclude a ‘literary work’ from existing in unfixed form. The term was defined inclusively only — ‘includes any written table or compilation’.\textsuperscript{27} Dramatic works, on the other hand, had to be fixed.\textsuperscript{28}

\textbf{C The Laddie and Copinger Commentaries}

Nevertheless, three judges of the Australian High Court have indicated that the UK authors to which they referred in \textit{IceTV} — Laddie, Prescott and Vitoria — had denied the existence of authorship without material form.\textsuperscript{29} It is to these authors that we now turn.

One first point that might be made is that the 1980 edition of their textbook,\textsuperscript{30} to which the \textit{IceTV} decision refers, cannot indicate the meaning of ‘create’, since that word entered the CDA eight years later. This edition therefore cannot indicate that creation entails reduction to material form. To the contrary, it (perhaps surprisingly) notes that a work might come into being simply through formulation within the author’s mind.\textsuperscript{31}

Whatever one might think of this proposition,\textsuperscript{32} it is difficult to see that Laddie, Prescott and Vitoria in this edition are consistently endorsing the view

\begin{itemize}
\item \textsuperscript{22} Committee to Consider the Law on Copyright and Designs, \textit{Report — Copyright and Designs Law} (1977) 149 [590].
\item \textsuperscript{23} Ibid.
\item \textsuperscript{24} 4 & 5 Eliz 2, c 74.
\item \textsuperscript{25} The assumption is made here that, in the context of copyright laws, a work cannot exist without authorship, and vice versa. ‘Authorship’ involves the exercise of whatever originality is required in the domestic jurisdiction. Indeed, ‘author’ and ‘original work’ are correlative: \textit{Sands & McDougall Pty Ltd v Robinson} (1917) 23 CLR 49, 55 (Isaacs J).
\item \textsuperscript{26} See, eg, J A L Sterling and M C L Carpenter, \textit{Copyright Law in the United Kingdom and the Rights of Performers, Authors and Composers in Europe} (Legal Books, 1986) 42 [206], 48 [214].
\item \textsuperscript{27} \textit{Copyright Act 1956}, 4 & 5 Eliz 2, c 74, s 48(1) (definition of ‘literary work’).
\item \textsuperscript{28} Ibid s 48(1) (definition of ‘dramatic work’): ‘“dramatic work” includes a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, but does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film’.
\item \textsuperscript{29} See above n 8 and accompanying text.
\item \textsuperscript{30} Laddie, Prescott and Vitoria, \textit{The Modern Law of Copyright}, above n 8.
\item \textsuperscript{31} Ibid 15–16 [2.17].
\item \textsuperscript{32} And I would suggest that it is an overstatement. No ‘work’ within the meaning of a copyright Act, no matter how perfect, can exist solely in the mind of the author. Copyright and related regimes presuppose ‘expression’; the work must have been expressed in some way, though not necessarily in material form. Without expression it remains merely an idea. See below nn 93–95 and accompanying text.
\end{itemize}
attributed to them by the High Court judges. Indeed, the authors in their text posit a two-stage creation of a work — first in the author’s mind, and then in material form, whereupon the work becomes ‘complete’ for copyright purposes, though it has already ‘existed’ prior to that fixation. On this reasoning, the authorship must occur at the point where the work comes into ‘existence in a real sense’, while copyright will subsist only upon completion of title.33

When the 1988 legislation was passed, the views of these authors appeared not to change. Thus, in their 1995 edition they noted that, under s 3 of the CDPA, a work may be fixed for copyright purposes without the author’s permission (and hence clearly not by or for the author), and then ‘submitted that the law was the same’ ‘[u]nder the 1956 Act’.34

The authors of Copinger and Skone James on Copyright35 have taken a similar position, but have stated it more bluntly, questioning the logic of the authorship–fixation nexus. Like the Scandinavian delegates at Stockholm,36 these authors contend that:

Since fixation addresses the issue of the definition of the work, and proof as to its existence and content, there is no reason of principle why the person who creates the work and the person who fixes the work should be the same. The functions of creation and fixation are distinct … Copyright protects the skill and labour of the author, and once he has created and expressed his work, it is immaterial how his work comes to be fixed.37

Other UK commentators too have observed that literary, dramatic and musical works can exist in the absence of fixation.38

D Judicial Discussion of the UK Wording

The crucial sub-s (3) of CDPA s 3 does not appear to have been expressly discussed in UK cases, though Park J followed its logic in Hadley v Kemp.39 In that case he found that musical works (which had been expressed in aural form) had an existence prior to their fixation.40

33 Laddie, Prescott and Vitoria, The Modern Law of Copyright, above n 8, 16 [2.17].
34 Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs, above n 8, 35–6 [2.32]–[2.33] (though the major issue discussed at this point is the nature of fixation and whether recording is sufficient. No particular attention is given to the authorship issue — as if it were not an issue at all).
35 Kevin Garnett, Gillian Davies and Gwilym Harbottle, Copinger and Skone James on Copyright (Sweet & Maxwell, 16th ed, 2011).
36 See above n 18.
37 Garnett, Davies and Harbottle, above n 35, 134 [3-112].
40 Ibid 645.
In Ireland, on the other hand, greater discussion of the corresponding wording (in the Copyright Act 1963 (Ireland)) occurred. The case of Gormley v EMI Records (Ireland) Ltd ("Gormley")\(^{41}\) concerned the reproduction of the oral narratives of a young child, originally recorded on tape by the child’s teacher and published commercially many years later with the teacher’s permission.\(^{42}\) In its judgment in the matter, the Supreme Court of Ireland drew a distinction between the 'making' or recording of the work and its authorship, and recognised that these might be carried out by different persons.\(^{43}\) In this case the facts did not raise the possibility of any sort of agency or amanuensis arrangement, since there appeared to have been no question of the six-year-old child having initiated or authorised the taping. Therefore, when Barron J (Barrington J and Murphy J agreeing) referred to the recording being done by 'someone other than the author',\(^{44}\) he was presumably referring to someone unsanctioned by the author. Barron J also noted that the then Irish Act allowed a work to exist even if it had not been reduced to material form.\(^{45}\) The Court clearly saw the act of fixation as not being an element of authorship for legal purposes.

The upshot of the discussion to this point is that fixation can, with reasonable confidence, be stated not to be an element of authorship within the UK copyright regime, since the act of fixation can be performed by a non-author who has no agency or similar relationship with the person responsible for the relevant expression.\(^{46}\) This has arguably been the case not only under the current CDPA (though it has been made particularly clear there) but also under the Copyright Act 1956,\(^{47}\) which was occupying the minds of Australian legislators during and before the passing of the Australian Copyright Act in 1968. It was similarly the case under the former Irish legislation.

### IV OTHER COMMON LAW COUNTRIES

What then is the position outside the UK, under more recent copyright Acts? Ireland, for example, passed new legislation in 2000, superseding the Act under

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41 [2000] 1 IR 74. For a discussion of the case see MacQueen, above n 38, 354, 363–4, 366.
42 [2000] 1 IR 74, 77–8 (Costello P).
43 Ibid 89 (Barron J, Barrington J and Murphy J agreeing), referring expressly to s 3 of the CDPA. The case was decided under the then Irish legislation, the Copyright Act 1963 (Ireland), which corresponded closely to the Copyright Act 1956, 4 & 5 Eliz 2, c 74.
44 Gormley [2000] 1 IR 74, 89.
45 Ibid, citing Copyright Act 1963 (Ireland) s 3(4), which states that ‘[r]eferences in this Act to the time at which, or the period during which, a literary, dramatic or musical work was made are references to the time or period at or during which it was first reduced to writing or some other material form.’ The logic here is that the existence of a work must necessarily precede its first fixation.
46 MacQueen, above n 38, 367 summarises the situation as follows: Since the copyright does not come into existence unless and until the recording is made, copyright confers no right on a speaker to stop people making recordings of what is said. If there is any right at all to prevent recording of one’s words, it must be sought in other branches of the law.
47 4 & 5 Eliz 2, c 74.
which *Gormley* was decided.\(^{48}\) New Zealand passed new legislation in 1994.\(^{49}\) Both legislatures were deeply influenced by the 1988 *CDPA*. But did their legislators endorse the position that fixation is not an element of authorship? And what is the position in Canada, and in the US?

**A New Zealand**

In fact, NZ has copied its relevant provision practically word for word from the UK statute. Like the UK, NZ distinguishes between the ‘making’ (‘recording’) and the ‘creation’ (‘authorship’) of the work.\(^{50}\) It further allows copyright protection for a work that has been recorded without the permission (and presumably also without the knowledge) of the author.\(^{51}\) It is therefore tolerably clear that fixation cannot be an element of authorship in NZ.

**B Ireland**

Ireland is in a different position from NZ. The Supreme Court in *Gormley* had recommended in 1998 that the Parliament should consider ‘when and in what manner copyright protection can be achieved for [literary, dramatic or musical] works’.\(^{52}\) In particular, the Court had in mind the question of fixation, and the nature and circumstances of that fixation. The Irish legislature responded to this recommendation in a way which has caused a significant divergence from UK law.

When it came to drafting new legislation, the Irish legislators followed the UK in the assertion that an author is the person who ‘creates’ the work.\(^{53}\) A clear distinction is therefore drawn between the ‘creation’ and the recording or ‘making’ of the work that is mentioned elsewhere in the Act.\(^{54}\) Furthermore, the wording of the Act makes particularly clear that the existence of the work will precede the recording.\(^{55}\)

On the other hand, the Irish legislators have apparently disapproved of the UK formulation of the relationship between authorship and copyright, and have worded the provision in such a way as to tighten that relationship.\(^{56}\)

\(^{48}\) *Copyright and Related Rights Act 2000* (Ireland). See s 10, repealing *Copyright Act 1963* (Ireland).

\(^{49}\) Ibid s 5(1) states that ‘the author of a work is the person who creates it’; s 18 states that works qualify for copyright protection if ‘the author … at the material time’ satisfies various criteria; s 2(1) (definition of ‘material time’) aligns the ‘material time’ concept with the ‘making’ of the work, hence with its recording but not with its creation.

\(^{50}\) Ibid s 15.

\(^{51}\) [2000] 1 IR 74, 90 (Barron J, Barrington J and Murphy J agreeing).

\(^{52}\) *Copyright and Related Rights Act 2000* (Ireland) s 21.

\(^{53}\) Ibid ss 18(2) (stating that a work is ‘made’ when it is ‘recorded’), 183 (outlining in sub-s (1) that a work qualifies for copyright protection ‘where the author was at the material time a qualifying person’, and in sub-s (6)–(7) that the material time is when the work or other subject matter was made).

\(^{54}\) Ibid s 18(1) (emphasis added): ‘Copyright shall not subsist in a literary, dramatic or musical work or an original database until that work is recorded in writing or otherwise’.

\(^{55}\) Ibid.
Although copyright can subsist in a literary work that has been fixed through the making of a sound recording or other record, and although that record need not be made by the author (the person who ‘created’ the work), the Irish legislators have stipulated that it cannot subsist in a work recorded without the author’s consent.\(^{57}\) (It is unclear from the wording whether consent would need to be express or whether it could sometimes be inferred from the circumstances of the case, but presumably it could be.) Thus, in Ireland much media-recorded material would generate copyright in the author’s hands, since it would be recorded with the author’s consent. But illicitly recorded material, such as that recorded surreptitiously with a mobile phone, would not generate copyright. This is perhaps anomalous, since the author (the would-be copyright owner) might be especially concerned to exercise control over that which was likely to be recorded surreptitiously.\(^{58}\)

In summary, just as in the UK and NZ, the Irish Act does not indicate that fixation is an element of authorship for the purposes of its copyright regime, but neither does it allow copyright protection in all circumstances of third party recording. It treads a path between the wholesale rejection of the thought that authorship might be independent of fixation and the wholesale acceptance of it. It clearly and deliberately blocks some of the opportunities for copyright ownership opened up by the CDPA.

\(\text{C\ The\ United\ States}\)

Copyright in the US is divided between federal copyright and state ‘copyright’\(^{59}\) law, with federal law not pre-empting all aspects of state law on the legal ownership of creative material.\(^{60}\) Title 17 of the United States Code provides for the protection of works ‘fixed in any tangible medium of expression’.\(^{61}\) Title 17 states, furthermore, that a work is ‘fixed’ in a tangible medium of expression ‘when its embodiment in a copy … by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.’\(^{62}\)

Thus, if the fixation is not carried out ‘by or under the authority of the author’, copyright in the work cannot come into being. This is a considerably more restrictive position than that obtaining in the UK or NZ, and is arguably slightly more restrictive than that in Ireland.\(^{63}\)

\(^{57}\) Ibid.
\(^{58}\) To express the anomaly differently, MacQueen, above n 38, 366–7 n 105 states: ‘The requirement of the author’s consent to the recording, which is not found in the UK Act, means that the unauthorized recorder can continue to over-ride the will of the author by reproducing and disseminating the recording without having to seek the latter’s consent — a curious outcome.’
\(^{59}\) That is, the state law relating to ownership of creative material.
\(^{60}\) The United States Constitution art VI cl 2 provides that federal law takes precedence over state law when there is a conflict between the two.
\(^{61}\) 17 USC § 102(a) (2006).
\(^{62}\) Ibid § 101 (emphasis added).
\(^{63}\) Depending on whether ‘under the authority’ (US) is read as a stronger term than ‘by or with the consent’ (Ireland).
There are imperatives beyond copyright law which dictate the need for fixation in the US, though not, perhaps, the need for the author’s authorisation. The constitutional basis for the federal legislation is that the work in question must be a ‘writing’.64 Unless the material is describable in such terms, any federal legislation governing it is unconstitutional. This is not to say, however, that US law contains no concept of authorship in the absence of fixation.

If we turn to 17 USC § 301(b) we find an exception to federal pre-emption which mentions ‘works of authorship not fixed in any tangible medium of expression’. Leaving aside the question of what a ‘work of authorship’ is, this is a clear indication that unfixed works have been imagined, and the concept endorsed, by US lawmakers. In other words, it is conceptually feasible in US copyright discourse to speak of an unfixed work and of a person ‘authoring’ an unfixed work. Granted, some unfixed material which has been claimed as a work of authorship has ultimately been rejected by the state courts.65 Title 17, however, remains as testament to an essentially broad conceptualisation of protectable material in the US and a concept of authorship of which fixation is not an element.

D Canada

The Canadian Copyright Act66 has never expressly made material form a condition of copyright subsistence.67 Despite this, it has been inferred in a leading Canadian judgment that material form is required in order to base copyright.68 This is not to say, however, that a ‘work’ cannot come into existence without fixation. If one looks further afield in the Canadian statute, one finds clear signs that a ‘work’ can come into existence — for example, through embodiment in words or sound — without material form. These signs are to be found in the provisions that deal with performer protection.

The Canadian Act defines a ‘performer’s performance’ as (among other things) ‘a performance of an artistic work, dramatic work or musical work, whether or not the work was previously fixed in any material form,’ and ‘an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work’.69

In the first of these formulations the performance of an unfixed previous work is imagined. Now, if a work (presumably an original authored work) can be

64 United States Constitution art 1 § 8: ‘The Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.
66 RSC 1985, c C-42.
67 This is despite the terms ‘material form’ and ‘fixation’ being used freely in the Act in relation to performances, sound recordings and industrial designs. See, eg, ibid ss 2 (definitions of ‘infringing’, ‘maker’ and ‘sound recording’), 3, 15, 18, 64.
68 Canadian Admiral Corporation Ltd v Rediffusion Inc [1954] Ex CR 382, 394 (Cameron J).
69 Copyright Act, RSC 1985, c C-42, s 2 (definition of ‘performer’s performance’) (emphasis added).
unfixed, then fixation was not an element of its authorship. In the second formulation the improvisation of a ‘work’ is conceived of, and it is clear that the work comes into being through the improvisation. It is not implied that the improvised work need be fixed in order to exist or to have been authored. Both formulations indicate that the authorship which creates a work need not include fixation.

E Summary

In summary, there is cogent evidence that authorship in the international copyright regimes — in common law, as well as in civil law, countries — is not constructed so as to involve reduction to material form, despite occasional comments to the contrary. Fixation is generally a requirement only for copyright protection in the common law countries. The most recent legislation in the UK, NZ and Ireland endorses the view that authorship involves ‘creation’ of a work, but that the creation and the recording of the work are (in all cases except that of artistic works) different processes. In the UK and NZ the legislation has gone further, to state expressly that the recording (or ‘making’) of a work for copyright purposes need not be carried out by the author nor even with the author’s permission. This goes beyond the position in Ireland and the US, both of which require authorial consent or authority for the fixation before copyright can come into being. Neither of these countries’ legislation, however, denies that authorship and the resulting ‘work’ can exist in the absence of fixation. In Canada, furthermore, the wording of the performance provisions indicates that unfixed and improvised works are within the concept of an authored work in that country.

But is Australia in step with the above countries, or does it follow a different path?

V Consideration of the Australian Act

Despite recent court pronouncements, it is questionable whether a valid case can be made under Australian law that fixation is inseparable from the act of authorship.

A The ‘Making’ Argument

The argument most likely to be used in Australia to support the idea of fixation as an element of authorship in relation to literary, dramatic or musical works is based on the references in ss 22 and 32 of the Copyright Act to a work being ‘made’ only when it is reduced to material form. There is a natural tendency to assume that a work which is ‘unmade’ does not exist; that a work can come into existence (ie be authored) only when it is reduced to material form.

Sections 22 and 32 seem at first sight to support this view. Section 22(1) defines the ‘making’ of a literary, dramatic, musical or artistic work as reduction to material form. Section 32(1) is designed to bring an unpublished work under the umbrella of the Australian Copyright Act and establishes what indeed looks
like a close link between the ‘author’ and the ‘making’. This provision could be seen as implying that ‘making’ is necessarily an act carried out by the ‘author’, as indeed it typically will be. Nevertheless, the matter is one of implication only. There are, furthermore, reasons why this argument fails to convince, and these take us back into a consideration of the Copyright Act’s antecedents.

1 The History and International Context of s 32

The establishment of copyright protection under Australian law in part by reference to the time of making is derived from the UK. In the UK’s 1911 Act,70 which for many years operated as Australia’s copyright Act, the concept of ‘making’ was unelaborated; it appeared to refer to any process by which the work came into being. Since unfixed speeches, lectures and sermons were capable of copyright protection,71 the point at which they were ‘made’ appeared to be the point of their aural expression.

This is borne out by commentary in an early annotated edition of the 1911 Act. In 1912, MacGillivray commented that protection for all types of work was unconditional upon ‘any specified physical form of production’ and indeed would exist without the work needing to be ‘clothed in any physical form at all.’72 A literary work could be protected ‘even although it exists only in the form of spoken words’.73

The current Australian definition of ‘making’ is taken almost word for word from the UK Copyright Act 1956, which provided for copyright subsistence in original unpublished literary, dramatic and musical works of which the author was a qualified person when the work was made.74 ‘Making’ denoted reduction to material form.75 In other words, the notion of ‘making’ appeared to narrow and to diverge from the apparently more generous concept of ‘making’ allowed by the 1911 Act.

However, it was under this 1956 regime that some commentators in the UK insisted that a work could indeed exist prior to its reduction to material form, and that authorship (or the creation of a ‘work’) and reduction to material form were separate concepts.76 It was also under wording identical to that of the UK Copyright Act 1956 that the Irish Supreme Court stated the opinion that ‘a work may be in existence though not reduced to writing or other material form.’77

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70 Copyright Act 1911, 1 & 2 Geo 5, c 46.
71 For example, ‘copyright’ meant, inter alia, the sole right to deliver or publish a lecture: ibid s 1(2). ‘Lecture’ was defined in s 35(1) to include ‘address, speech, and sermon’. The draftsmen of this Act did not consider it necessary to address the issue of material form in their definition of ‘literary work’ in s 35(1), which suggests that the coverage of unfixed material went without saying. By contrast, in the definition of ‘dramatic work’ in s 35(1) they did feel it necessary to insert a fixation requirement.
72 E J MacGillivray, The Copyright Act, 1911, Annotated (Stevens and Sons, 1912) 4.
73 Ibid.
74 Copyright Act 1956, 4 & 5 Eliz 2, c 74, s 2(1).
75 Ibid s 49(4).
76 See, eg, Sterling and Carpenter, above n 26, 42 [206], 48 [214].
77 Gormley [2000] 1 IR 74, 89 (Baron J, Barrington J and Murphy J agreeing). The Court was repeating a point made already in Laddie, Prescott and Vitoria, The Modern Law of Copyright, above n 8, 16 [2.17].
When the 1956 Act was superseded by the 1988 CDPA, the distinction between the authorship or ‘creation’ of a work on the one hand and its ‘making’ or ‘recording’ on the other was made explicit.\footnote{See CDPA s 9(1) and text accompanying above n 14.} Yet this did not result in the removal or even the significant rewording of the ‘making’ requirement.

The obvious conclusion is that the UK legislators saw the ‘making’ and ‘creation’ concepts as fulfilling separate roles and not conflicting with each other. They saw no anomaly in the notion of fixation by a person other than (and independent of) the author. The position would appear to be the same in NZ and to some degree in Ireland.

While these considerations cannot change the words of the Australian legislation, they do cast doubt on any claimed inevitability in the connection between authorship and ‘making’. The author–fixation connection that is inferred from s 32 of the Copyright Act is evidently not inferred from corresponding provisions elsewhere.

\section{The Purpose of the ‘Making’ Reference}

Further factors in the argument are the context and purpose of the ‘material form’ requirement in Australia. The requirement for the ‘making’ of the work (entailing its reduction to material form) operates within very narrow legislative confines. Section 22(1) of the Copyright Act, which sets down the fixation requirement, is so expressed that it appears to refer only to s 32 (the qualification provision) and not to other provisions in the Act. It defines the concept of making only in relation to unpublished works and only in relation to circumstances where the time of making, or the period over which the work is made, is important for the purpose of establishing the Act’s relevance to the dispute. (For published works the relevance of the Act is derived from the works’ place of publication, which presupposes that they have taken material form.)\footnote{Copyright Act s 32(2).} Section 22(1) does not, curiously, seem to refer to other provisions in the Act where the making of the work is referred to, such as s 35 (dealing with the circumstances under which a work is made). In other words, the subsection, in combination with s 32, is aimed solely at identifying works in which Australian, as opposed to foreign, copyright subsists. It is not designed to establish what the elements of authorship might be. One would not look for this kind of substantive law in such a narrowly focused provision.

\section{Other Arguments against a Nexus between ‘Making’ and Authorship}

Other provisions in the Australian Copyright Act support the argument that the ‘making’, hence the fixation, of the work is not an element of authorship within the schema adopted by our legislators.
1 **Storage of the Work**

Material form is described in s 10 as including any form of ‘storage’ of a work.\(^{80}\) Although it is not inconceivable that a work might come into existence and undergo storage simultaneously, normal language usage suggests that that which is stored would exist prior to the storage. Yet this prior existence must necessarily have come about without fixation.

2 **The Definitions of Literary, Dramatic and Musical Works in Australia**

The definitions of literary, dramatic and musical works in s 10 of the Australian Copyright Act contain little indication that fixation is an essential requirement of the work, or of its authorship. The definition of literary works is inclusive only, as was the 1956 UK definition.\(^{81}\) It includes recorded tables and compilations (recorded in figures, for example) and computer programs.\(^{82}\) The fact that a table is imagined in recorded form is unsurprising, since tables are difficult to imagine in any other form. It is a weak basis on which to argue that every ‘literary work’ must be in a recorded form in order to fulfil the requirements of the genre and to come into existence.

To be sure, in 1986 the High Court in the *Computer Edge* case\(^{83}\) referred to the 1916 case of *University of London Press Ltd v University Tutorial Press Ltd*\(^{84}\) to state that the word ‘literary’ required the work to be in ‘writing’ (interpreted broadly), on the basis of the ordinary meaning of the term ‘literary’.\(^{85}\) However, it may be argued that all the word ‘literary’ implies is the *aptitude* to be fixed in writing, a view endorsed by Laddie, Prescott and Vitoria.\(^{86}\) Indeed, the current wording of the Australian Copyright Act supports this view, in providing that a literary work may sometimes be fixed in the form of sounds on a sound recording.\(^{87}\) We have moved beyond the state of law expressed in *Computer Edge*.

Furthermore, *Computer Edge* reasoning would not apply to dramatic or musical works, the names and definitions of which do not allude to any form of fixation. Indeed, in 1989 Australian legislators followed their UK counterparts in altering the definition of a ‘dramatic work’ so as to remove any reference to a particular form of fixation.\(^{88}\) While this was not done in order to clarify the concept of a work or its moment of genesis, the fact remains that the legislators chose to remove from the provision any reference to the form of the work. They

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\(^{80}\) Ibid s 10(1) (definition of ‘material form’).

\(^{81}\) Copyright Act 1956, 4 & 5 Eliz 2, c 74, s 48(1) (definition of ‘literary work’).

\(^{82}\) Copyright Act s 10(1) (definition of ‘literary work’).

\(^{83}\) (1986) 161 CLR 171.

\(^{84}\) [1916] 2 Ch 601.

\(^{85}\) Computer Edge (1986) 161 CLR 171, 181 (Gibbs CJ), citing ibid 608 (Peterson J).

\(^{86}\) In 1980 these authors stated that ‘[a]n original literary work is the product of the mind of a human author … capable of being expressed in writing’: Laddie, Prescott and Vitoria, The Modern Law of Copyright, above n 8, 11 [2.9].

\(^{87}\) Copyright Act s 22(2).

\(^{88}\) Copyright Amendment Act 1989 (Cth) sch (‘Further Amendments to the Copyright Act 1968’) item 1, amending Copyright Act 1968 (Cth) s 10(1); re-enacted by Copyright Amendment (Re-Enactment) Act 1993 (Cth) s 4.
thereby allowed the inference that fixation was not a crucial factor in the identification of the material as ‘a dramatic work’.

3 The Performance Argument

Beyond the fact that nothing in the Copyright Act seems to create any significant barrier to authorship in the absence of fixation, it also appears that the Act may currently be utilising the concept of an unfixed work. Section 248A defines a performance for the purposes of performer protection.\(^89\) Most types of performance, under our Act, are associated with what are called ‘works’. They are described either as performances of works, or as improvisations of works.

The reference to ‘improvisation’ juxtaposed against the reference to a ‘work’ is initially puzzling. If one were to assume that a work could exist (be authored) only in material form, then the work would have to predate the performance, including the improvisation. Yet it is logically impossible to improvise something which already exists. The work is the object and result of the act of improvisation. Far from the Act referring to an improvisation upon an earlier work, it is referring to an improvisation of the work itself. The work which is improvised, since it is brought about through the performative improvisation, is, in most cases, going to be devoid of material form.\(^90\)

C Have We Been Over-Influenced by Principles That Apply Only to Artistic Works?

The principle that authorship requires fixation is both understandable and correct in relation to artistic works, and commentators on the fixation requirement have perhaps been influenced by cases dealing with the visual arts. Artistic works must undoubtedly be brought into existence through reduction to material form simply because they will not fit within the Australian categories of artistic works — ‘paintings’, ‘drawings’, ‘engravings’, ‘sculptures’, ‘photographs’, ‘buildings’, ‘models of buildings’ and ‘works of artistic craftsmanship’\(^91\) — unless they are fixed. Artistic works can, by definition, exist neither in the author’s brain, nor in some form of pre-fixation expression. The only type of expression in which an ‘artistic work’ can come into being for the purposes of the Copyright Act is one of the listed types of material expression. That being the case, and authorship for the purposes of the Act not taking place prior to expression, the act of authorship will occur upon the act of fixation.

True as this is, the analogy does not support a narrow reading of authorship in relation to other types of work. In contrast to artistic works, literary, dramatic and musical works are not constrained by their definitions in this way. All are capable of finding expression (and hence being created/authored) in a form of unrecorded words or notes or bodily movements. For copyright to subsist in

\(^89\) Copyright Act s 248A(1) (definition of ‘performance’).

\(^90\) Should this seem improbable, one need only look at the much more clearly articulated position in Canada: see Copyright Act, RSC 1985, c C-42, s 2 (definition of ‘performer’s performance’) and text accompanying above n 69.

\(^91\) Copyright Act s 10(1) (definition of ‘artistic work’).
them, they must take material form, but that does not mean that the reduction to material form is a necessary element of their authorship.

VI THE CONSEQUENCE OF THIS REASONING — THE IMPORTANCE FOR COPYRIGHT OF THE THIRD-PARTY RECORDER

In sum, it would appear that there is no firm basis in the Australian Copyright Act for an assumption that the authorship of an aural work must necessarily involve its fixation. And any reference to UK or other overseas authority is likely to frustrate rather than assist the Australian argument to the contrary.92

My argument is that a slippage has occurred at some point in Australian copyright thinking. Starting with a premise that a work must be more than an idea and that the supply of facts or thoughts does not constitute authorship, the conclusion has been reached that the work therefore comes into existence upon reduction to material form and that the person who reduces his or her work to material form (either personally or through an agent) will be the author. Yet it is not material form that constitutes the work, but rather original expression; this is what must be contributed by the author.

Despite the position stated by Laddie, Prescott and Vitoria and also in Copinger and Skone James on Copyright,93 I would suggest that ‘expression’ must necessarily be beyond the realm of ideas and perceptible to another human being. The word ‘ex-press’ itself seems to require this. The need for perceptibility is explicitly embraced in other jurisdictions94 and would apply to any type of work. Until that moment of perceptibility is reached — which is not to say that perception itself needs to occur — the future work remains a (possibly elaborate) idea. Typically, expression would take a visual or aural form, though at least one jurisdiction has endorsed the notion of scent being a form of perceptible expression.95 In any event, to say that the person who supplies facts or ideas is not the author does not lead to the conclusion that authorship of literary, dramatic or musical works requires fixation. The further step of securing copyright protec-

92 The fact that judges of the High Court in 2009 in IceTV (2009) 239 CLR 468 turned immediately to UK commentary in order to define authorship (see above n 8) exemplifies the influence that the law and commentary of that country continue to have in Australia. Therefore, should the real UK position on authorship be as indicated by s 3 of the CDPA, and should this not be considered in the UK to be a major divergence from the previous law, that would be a persuasive reason for amending the Australian position. And, should the UK position be borne out in one way or another throughout the common law world (as argued for in this piece), this would be another persuasive reason for revising the common Australian view of authorship.

93 See above Part III(C). See also the discussion in Copinger and Skone James on Copyright, where the authors envisage a musical work existing as such in the composer’s mind and cite Hadley v Kemp [1999] EMLR 589 as authority: Garnett, Davies and Harbottle, above n 35, 136 [3-119]. However, in that case it was clear that the musical works in question had been expressed repeatedly in audible form.

94 In Germany the requirements for protection include perceptible, but not material, form: Loewenheim, above n 20, 102–3 [20]. In the Netherlands the need for perceptibility (not materiality) is discussed in the opinion of the Advocaat-Generaal in Kecofa BV v Lancôme Parfums et Beauté et Cie SNC [2006] NJ 585 (Supreme Court of the Netherlands), available in Dutch at <http://zoek.rechtspraak.nl/detailpage.aspx?ljn=au8940>.

tion does require such fixation, but at that stage — presuming that expression has occurred — the work already exists.

Assuming that this is true, and given that fixation is necessary for copyright purposes, it must be irrelevant who it is who ultimately fulfils the fixation requirement. Legislation can determine the circumstances under which fixation must take place, as in the US and Ireland, but in the absence of such statutory determination the identity of the fixer must be immaterial.

This would logically put media organisations, court recorders and other persons, including members of the public, in the position of fixing works for copyright purposes simply by recording them. The copyright in the ‘work’ would then belong to the person whose originality devised the work in question and who expressed it. (Copyright in the recording would, of course, belong to the maker of that recording.) There are several consequences of this, both desirable and problematic:

- A number of persons whose contribution to the creation of material has been wholly aural could find that they enjoy copyright protection by virtue of the activities of the media and other bodies. This may be a situation entirely to be welcomed in many circumstances. Indeed it has long been recognised, not least by the framers of the Copyright Act 1911 in the UK,96 that certain types of unfixed expression are thoroughly worthy of copyright protection.97 But it may also complicate further what is already a complex and ungainly copyright system.

- The media, who have assumed that they own all the copyright that exists in a particular item — namely the copyright in the cinematograph film or sound recording — may find that they have in fact created a copyright interest which can be used by the author, and his or her heirs and assigns, against the media organisations themselves.

- The creation of this copyright interest would also bring into existence the moral rights that attach to the author of a copyright work.98 The possibility of these rights being exercised against the media organisation or other fixer of the work would be substantial. And these rights may have come into existence in circumstances where it is difficult for the media organisation to arrange any contractual consent to otherwise infringing actions on its part. The organisation may not have a contractual relationship of any kind with the speaking, singing or performing party.

- A wide range of criminal offences might be committed by any person who infringed the copyright that had been generated. Any commercialisation of copyright material has the capacity to lead to criminal liability under the

96 1 & 2 Geo 5, c 46.
98 See Copyright Act pt IX.
newer provisions of the *Copyright Act*. Digitisation of the materials aggravates the offence. To allow the existence of copyrights that were not previously thought to exist has the potential to attract criminal liability to a wide range of parties.

**VII Conclusion**

Jurisprudence in Australia suggests that legal notions of a ‘work’ and of ‘authorship’ have drifted away from those expressed in overseas legislation, including that of Australia’s immediate peer group. All the current pieces of legislation examined in this piece seem to indicate that authorship of a work can occur without fixation — with the result that, for copyright purposes, a work may be fixed by a person independent of the author. Yet what is most notable in Australia is the rigidity with which some of our most senior judges adhere to what was at best an insecure UK construction of authorship, which has now been superseded.

Unless the High Court expressly addresses this issue in a binding way, and in light of the current wording of the *Copyright Act*, the legislature will one day need to turn its mind to the possibilities raised by the broader reading of authorship canvassed in this piece. Two clear pathways are open to it if it wishes to limit or negate the subsistence of copyright in the hands of a person who did not fix the work:

- It could choose to make clear in the legislation that authorship must entail reduction to material form. This, I would suggest, would be a mistake, since it would cement our copyright law into a position at odds with the copyright jurisprudence of important common and civil law countries and it would deny protection to a group of otherwise worthy creators.

- It could, as the Irish and US legislators have done, restrict the circumstances under which the recording of a work by a third party will give the author copyright in it. It may require that the work be fixed at the instance of, or with the express consent of, the author, in order to sustain protection. This can lead to anomalous outcomes, as described above, but has the virtue of creating greater certainty.

In any event, with the unaccustomed amount of attention being given in recent judgments to the importance of identifying authors, Australian courts and legislators would both do well to give more sustained thought to the question of what an author actually is.

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99 Ibid pt V div 5.
100 Ibid s 132AK.
101 See above Part IV(B). See especially the commentary by MacQueen, quoted in above n 58.