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COPYRIGHT AND FREE EXPRESSION: ANALYZING THE CONVERGENCE OF CONFLICTING NORMATIVE FRAMEWORKS

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ABSTRACT

Recent attempts to expand the domain of copyright law in different parts of the world have necessitated renewed efforts to evaluate the philosophical justifications that are advocated for its existence as an independent institution. Copyright, conceived of as a proprietary institution, reveals an interesting philosophical interaction with other libertarian interests, most notably the right to free expression. This paper seeks to understand the nature of this interaction and the resulting normative decisions. The paper seeks to analyse copyright law and its recent expansions, specifically from the perspective of the human rights discourse. It looks at the historical origins of modern Anglo-Saxon copyright law and the theoretical justifications that are often advocated for its continued existence and expansion. It then analyses how the proprietary and libertarian interests conflict in the context of four separate settings – (a) U.S. Copyright law and the First Amendment; (b) digital copyright and the emergence of anti-circumvention measures; (c) copyright expansion in continental European systems and their understanding of expression, and (d) U.K. copyright law following the impact of the European Convention on Human Rights on the same. It also looks at the argument that since copyright is, in itself, an instrument of free expression, a normative conflict is logically impossible. The paper concludes by identifying strategies for re-postulating the existent discourse and recognising an increased role for value-based normative hierarchies, adopting a process of 'norm specification' used by courts in dealing with normative decisions during the process of constitutional interpretation.

INTRODUCTION: GLOBALIZATION AND THE EXPANSION OF PROPRIETARY CONTROL OVER INFORMATION AND TECHNOLOGY

The term 'globalization', as used in most current international trade discussions and debates, would readily fit onto a list of indefinable terms the meanings of which are better appreciated through perception than through synonymy. A catchword for

proponents of trade expansion and market liberalization, and an intangible adversary for advocates of a more cautious approach – globalization has become one of the major determinants of international political relations in recent times. This was, however, not the case about a decade ago. Even if one concedes that the process of globalization did commence several centuries ago,[1] most discussions hardly considered relevant the practical ramifications of the process, let alone those relating to international relations. The establishment of the World Trade Organization (WTO) in 1995 marked the first creation of a tangible vehicle to accelerate the supposedly pre-existent process of globalization.[2] Trade expansion and global economic integration remain the central objectives of the WTO.[3]

Without answering the controversial question of precisely when globalization originated, one may nevertheless proceed to understand the features of the world economy characterized today either as 'globalized' or as witnessing the process of globalization. Manuel Castells, in his pioneering study of the socio-economic and political changes introduced by radical technological developments in the late 20th century, observes that three distinctive features characterize the new global economy.[4] The most important of these he identifies is that the economy today is *informational* – where productivity and competitiveness have come to depend on the capacity of the economy to generate, apply and manage efficiently, knowledge based information.[5] Thus, the twentieth century transformation of the global economy from an industrial one to an informational one is of critical relevance. Probably the most important contributory to this transformation has been the diffusion of new technologies of communication and the dissemination of information itself.[6]

It would be wrong, however, to equate this transformation with the paradigmatic shift that occurred from an agricultural economy to an industrial one, in most nation-states prior to the present shift. The previous transformation witnessed a complete overhaul in the mode of production. The present shift, however, does little more than deepen the use of technology within existing modes of production. Industrial development can hardly be replaced by information – generation. The two need to form a symbiotic relationship in the new information economy.[7] The widespread diffusion of new technologies was therefore responsible to a very large extent in the creation of this new 'globalised, informational' economy.

While Castells no doubt rightly identifies the role of technology in the creation of the 'information society', another important development that began to accompany this process was the emergence of *strategic control over information*. If information and technology held the key to progress and development,[8] then logically, developing greater control over the same would ensure the creation and maintenance of a strategic advantage for individual nations. Thus, with the emergence of the information society, controlling the use of and access to *information* and *technology* became a growing concern. It is precisely in this context, that the intellectual property system provided the perfect solution – as a legal means of enhancing control over and access to information.[9] This does not imply that intellectual property, as an institution did not exist. Instead, its use in the context of multilateral trade assumed for the first time, a manifestly *strategic* dimension.

Under the auspices of the WTO, in 1995 the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) was negotiated as one of several mandatory

agreements. Structured in the nature of a minimum standards treaty seeking to harmonize the scope and extent of global intellectual property protection, the treaty successfully ensured the introduction of new forms of proprietary control over information and knowledge that were hitherto considered a part of the public domain in most nations, specifically the developing world.[10] The inarticulate strategic motive (i.e., information control) behind the entire treaty was overshadowed by a broader argument for enhanced proprietary protection to ensure greater scientific and technologic advancement and in the seemingly obvious advantages of having a harmonized system of intellectual property protection. Knowledge and information resources, previously considered to be freely accessible (beyond a minimal level of private control) in a democratic society, were now *commodified* through a property-regime, with exclusivity being the characteristic feature of the new proprietary model.

The TRIPs agreement deals with several forms of intellectual property – with each having its own immediate and long-term justifications. Among them however, the law of copyright assumes specific relevance for the purposes of the present paper, in relation to the right to free expression. Two characteristic features of the law of copyright deserve special mention here – *firstly,* being in the nature of a property right over expression, in the course of its continued expansion, copyright is bound to come into conflict with the borders of the liberty interest inherent in the very concept of expression; *secondly*, more than any other form of intellectual property, the theoretical justifications offered for copyright law vary from the those that are objectively consequentialist to those that are abstractly deontological, thereby allowing for a ready comparison with its libertarian counterpart.

During the course of the present paper, an attempt is made to study copyright law and its modern expansions using the framework of the human rights discourse. This is done at two levels. One is in examining whether copyright law and free expression are capable of a non-confrontational coexistence, given the commonality of subject matter, i.e., expression. Even if copyright, as it originally existed, did allow for such a balance, is the same being altogether abandoned by recent attempts to expand copyright law beyond its original purpose? The second is in examining whether the possibility of a confrontation ought to be altogether negated, with the understanding that copyright is *itself a means of free expression*. Would this then mean that the consequentialist dimension of expression (property right) and the deontological dimension (free expression/liberty) are but one and the same? These are some of the issues that are sought to be brought out in the course of this paper.

Part I of the paper provides a brief overview of the historical origins of modern Anglo-Saxon copyright law in the context of the printing press in 17th century England. The paper then goes on to critically review two important philosophical arguments often used to justify the existence of copyright law – the Lockean labor argument in the common law understanding and the Hegelian personality theory, which is often used in civil law systems. Part II examines the nature of the normative conflict that exists between the property and liberty interest in relation to copyright and does so using four specific areas – the U.S. First Amendment jurisprudence, recent developments in relation to digital copyright, the the approach adopted in continental European legal systems and lastly, the impact of the ECHR on U.K. copyright law. Part III addresses the argument

that copyright law is in itself an embodiment of the right to free expression or an instrument aimed at furthering the same and that a normative conflict is but a theoretical possibility. The last part concludes the normative debate, with suggestions for re-postulating the entire discourse in favour of the libertarian interest.

I. REVISITING THE LAW AND PHILOSOPHY OF COPYRIGHT

Before proceeding to analyze how copyright expansion poses a threat to free expression, it is necessary to provide a brief overview of the law of copyright and identify specific elements that may be sites for a potential conflict with libertarian values.

Copyright law accords protection, in the form of exclusivity, to any original *expression* of an idea.[11] The idea itself is not protected, only the expression is.[12] The requirement of originality is not to be confused with the concept of novelty, but merely means that the work in question must *originate* from the person claiming to be the author of the same, though the requirement of originality has been modified, to a limited extent, to include a 'modicum of creativity' requirement in the United States.[13] In general terms, copyright law accords the copyright holder the exclusive right to sell, use, distribute, rent on hire and make copies of the work in question. Being in the nature of a right, it is assignable and freely transferable, as in the case of most forms of property. The rights enumerated above, form one component of copyright and are collectively called 'economic rights'. In addition to these, however, copyright law includes a concept called 'moral rights' – which are rights conferred only on authors and are by their very nature theoretically inalienable. Moral rights consist of the right to be named as the author of the work and the right to ensure that the work is not mutilated.[14] Most jurisdictions around the world recognize this classification of copyright.[15]

Moral rights, unlike the other elements of copyright, derive intrinsically from the author and are therefore incapable of transference to another person. They may however be unilaterally waived or relinquished.[16] This element of copyright law is critical because it distinguishes copyright from other forms of intellectual property rights by introducing a large ethical element into the discourse.

Copyright law at its most basic level, in operative terms, confers on a holder the right to prevent others from performing activities that the holder has an exclusive prerogative to perform. When others perform such activities, it is termed as *infringement.*[17] In addition to identifying the realm of proscribed activities, copyright law also enumerates certain forms of copying and reproduction, which would theoretically qualify as infringement, but are in broader public interest, considered permissible. These activities are collectively referred to as 'fair use' (in the U.S.) or as 'fair dealing'(in the U.K.), and generally include the use of copyright works for purely personal, non-commercial or educational purposes.[18]

While the basic postulates of copyright law and their operation may sound simple, problems begin to surface when attempting to trace them back to their historical origins and compare their present day formulations with their contextualised doctrinal geneses. This inquiry must necessarily begin with the most fundamental question – why copyright? What necessitated the origins and the continued development of copyright law? Is the modern law reflective of the same? While the paper deals with the last question later, it analyzes the others in the present part.

A. The Origins of Modern Copyright

The general law of intellectual property is often traced back to merchant statutes of Venice, Italy. The modern law of Anglo-Saxon copyright, however, emerged in 16th century Britain with the arrival of the printing press. Inter-societal conflict in this time witnessed the extensive use of the printing press in the distribution of pamphlets and brochures decrying different governmental activities and calling for uprisings against authoritarian governance.[19] In this context, a royal charter was passed in 1557, with the express objective of banning writings of heresy, sedition and treason. This charter is often considered as the starting point for the modern law of copyright. In purely functional terms, the charter established the Stationers' Company and granted it the exclusive right to control all printing. Consequently, as a symbol of regulation and to avoid anonymous publishing, it became customary for authors and printers to affix their names to works produced, printed and distributed and to enter their names and works into a register for the same. This was done, not to give authors due credit, but to monitor their activities.[20] Censorship and trade regulation were therefore inextricably linked together in the development of the printing press, and were to continue for several decades along these lines.[21]

Subsequent to the passage of the charter, the Stationers' Company as a guild grew to acquire an immense amount of political patronage and economic clout. The exclusive control given to it to regulate printing had gradually evolved into the equivalent of a royal prerogative or a monopoly, as a consequence of which it was perceived as controlling the entire book trade.[22] An analysis of the development of the modern law of copyright from this form of regulation makes for an interesting reading reflecting a confluence of three values – liberty interests, proprietary concerns and lastly, governmental censorship.

The absolute monopoly granted to the Stationers' Company continued for several decades all the way up to the Licensing Act of 1662, which made it illegal to publish anything without first obtaining a license from the appropriate authority. The object of this regulation was identical to that of the previous enactment.[23] This form of control was of little controversy until the 1690s, when owing to political factionalism that Britain witnessed, authoritarian control of the printing press was first considered a distinct possibility. A realization soon formed that if a partisan or arbitrary regime controlled the licensing power, printing as a whole would suffer.[24] During this period, a spate of vehement criticism formed against the existing system of regulation.

John Locke was one of the most vocal of these critics. For purposes of the present discussion, it is extremely relevant to note that Locke opposed the regulation on the purported ground that it restricted free speech.[25] While it may be debatable whether Locke was actually concerned with censorship, it is undisputed that Locke was opposed to the concept of absolute proprietorship over publishing, which he thought was a mere pretence for control.[26] Because of these other similar protests, the Licensing Act was eventually allowed to lapse.

Following the lapse of this Act, a gradual shift took place towards an emphasis on authorial property. Recognizing that the publishers lobby would again begin a movement for a new licensing enactment, several authors, who had begun to acquire considerable political significance in this era, argued for the recognition of a property right in the work of the author. This argument derived from two premises - one, that unscrupulous publishers existed who wrongly attributed works to authors or who failed to acknowledge authors and two, that just as authors could be liable for seditious or treacherous works, so

too were they also to be rewarded for non-seditious works.[27] It is perhaps also important to note that this era, which had witnessed the Cromwellian Revolution, was driven by the values of liberty and freedom, and *property* was ideologically considered an inherent element in the concept of liberty. Consequently, the need to grant individual authors the freedom to publish their own works naturally got translated into giving these authors a proprietary claim in the work – a monopoly that had hitherto been only with the Stationers' Company.

This resulted in the Statute of Anne in 1709, which recognized a limited copyright in its emphasis on the concept of authorial copyright. Some writers have argued that the entire Statute of Anne was merely to reduce the control that existed with the Company. By introducing a limited copyright, the crown sought to negate any common law arguments of the Company. More importantly, by introducing authorial copyright, the Crown was mainly seeking to negate the Company's monopoly under the earlier charter of 1557, which continued to exist. Therefore, the emphasis was not so much on the grant of rights to authors as it was purportedly to reduce the control of the Company.[28]

Subsequent to the passage of the Statute of Anne, a controversy arose. Since the Statute granted authors copyright protection only for a limited time, many publishers began to argue that once this period terminated, they were still entitled to additional protection indefinitely under the common law – which they called the 'common law of copyright'. The matter eventually reached the House of Lords, which initially ruled that such a right did exist with authors.[29] In the subsequent decision of *Donaldson* v. *Beckett*[30], however, the House of Lords eventually concluded that the enactment of the Statute of Anne terminated such protection. Several authors have interpreted the

Donaldson decision to imply a ruling that while such protection did exist in theory under common law, the passing of the Statute abrogated the same.[31] This interpretation implies that the House of Lords attributed greater control over an authorial work to *traditional copyright*. A recent counter interpretation argues that the House of Lords did not support the existence of a common law of copyright prior to the passage of the Statute of Anne.[32] The *sequitur* of such an interpretation is that the House of Lords did indeed attribute to copyright law a more public-oriented function, implicitly recognizing that excessive copyright protection would have deleterious consequences for information dissemination and was therefore to be restricted.[33] In either analysis, however, the debate over copyright as an element of control remains conspicuously central.

The modern law of copyright, therefore, derives largely from debates on the necessity of control over information dissemination. In the beginning, control was by the government in the form of censorship. Later, this control came in the form of a monopoly with the Stationers' Company. Therefore, copyright, at its roots, has an underlying notion of control associated with it. Even the purportedly neutral concept of authors' rights, was evolved, in one analysis, as a counter-control measure.

While control was clearly at the root of copyright debates, property was seemingly not viewed as a direct form of control.[34] Property was considered conceptually aligned with the values of freedom and liberty and consequently, in this period it was common to speak in terms of a natural right to property or a freedom to acquire. Control was viewed as antithetical to liberty. However, at the same time, property, specifically copyright (as author's rights), seems to have been considered an element of liberty and not of control, especially in the debates preceding the enactment of the Statute of Anne.[35]

It is arguable that the House of Lords implicitly abandoned this theory in its *Donaldson* ruling of 1774.

Ironically, one sees that limited copyright evolved as a need to reduce the scope of monopoly control. It emerged as a counter-force to the monopoly of the Stationers' Company and therefore supposedly representative of the authors' freedom. *Reduction of control* was therefore of purported essence in its genesis. The modern trend of further expanding copyright, which evolved in the context of a need to reduce control, seems to belittle the purposive foundations of copyright law even though the same may be justified by the exigencies of modern society. It might even be true that the need to *limit* copyright in the public interest was something that the House of Lords implicitly recognized as early as 1774, but something which seems to have been dogmatically abandoned in recent times where copyright expansion appears to be the norm.

B. Justifying Copyright law

While copyright law clearly originated in a debate relating to the control of the printing press, its continued existence has derived from independent philosophical theorization about the author and his entitlement to a proprietary right in the work he creates.

The most commonly advocated philosophical justifications for intellectual property are the Lockean labor theory and the Hegelian personality theory.[36] The difference between the two theories assumes special significance in the context of the human rights discourse. Discourses on free trade and economic integration are often couched in excessively consequentialist language, represented by the simple aphorism that the 'ends justify the means'. Human rights, on the other hand, are supposed to be

distinctively *a*-teleological in that they approach the issue from a deontological perspective, with the means taking precedence over the result.[37] Therefore, if a Lockean approach to copyright were to be adopted by a legal system, the conflict with human rights relating to expression becomes unavoidable because the Lockean theory would view copyright as a distinct form of property. On the other hand, were a Hegelian approach to be adopted *in toto*, the metaphysical emphases on the actualization of freedom might eliminate the need to view liberty and property as necessarily opposing values.

In Locke's theory of property, an individual's expenditure of labor upon unclaimed common goods entitles him to a right of appropriating the same, so long as the same is not to the detriment of similar appropriations by others. Put simply, an individual's expenditure of labor entitles him to a property right over the subject matter in issue, because the individual, by the exertion, mixes his labor with something and thereby appropriates it to himself.[38] This appropriation, however, is permissible only to the extent that the residue of the state of nature remains in a condition qualitatively and quantitatively the same.[39] Locke would therefore have assumed that all intellectual property was a substantive value addition to the existent knowledge and never a reduction from the same. Additionally, Locke postulated that that appropriation of property must not result in an accumulation of so much property that some is destroyed without being used.[40] This condition is referred to as the 'non-waste condition'.

The Lockean labor theory thus provides a justification for property premised on an implicit reference to an incentive/desert mechanism. Since labor is considered an unpleasant task, a reward worthy of undertaking the same is a property right over the fruit

of the labor.[41] The theory is therefore understood as providing the basis for most modern property theories of desert and rewards. Not surprisingly, intellectual property has often been considered a similar form of reward – for innovation or creativity.[42] When applied specifically in the context of copyright, this theory would posit the conferral of a property right (to the author, in the expression) upon a substantial value addition made by the author. Copyright law, however, has been toying with the question whether mere labor (devoid of all qualitative significance) would suffice for protection, or whether some additional qualitative element is necessary. The issue is yet to be conclusively resolved.[43] Nevertheless, the move away from the 'mere labor' standard for copyright in some jurisdictions may be taken as an indication that copyright law may not be concerned merely with a desert-based approach after all.

In the event of an overlap between the subject matter of a proprietary claim and a free speech right, the debate might have to be resolved applying Locke's concept of the 'enough and as good' – the idea of a knowledge commons that cannot be appropriated. The problem, however, is that Locke appeared to have conceived his idea of the commons in terms of prior matter *inherently capable* of proprietary protection. In other words, the conflict between two or more (existent or potential) proprietary interests seems to have been Locke's focus rather than a conflict between property and liberty interests.[44] In this context, Lockean thinking remains ambiguous, as does a large part of Anglo-Saxon jurisprudence, in seeking to classify the accumulation of property under the rubric of a liberty interest itself. If both interests are liberty interests, the assumption of a mutual co-existence is inherent. The reason for this most likely is that Locke was specifically seeking to justify the institution of private property as being natural and pre-

societal in origin.[45] Consequently, property is seen in terms of a natural freedom to appropriate.

In an interesting paper, Wendy Gordon argues that an application of the Lockean theory to intellectual property through the 'no-harm principle' and the 'enough and as good' condition would ensure that the scope and extent of natural law proprietary interests are curbed to the extent necessary.[46] She argues that Lockean theory recognizes the importance of the 'commons'[47] - the equivalent of the public domain in the context of intangibles. She also argues that, when coupled with the 'enough and as good' proviso, the Lockean theory enables other public liberty interests to co-exist with intellectual property.[48] Essentially, her argument is that the protection of libertarian expressive interests is built into intellectual property theory, when understood from a Lockean perspective. Consequently, a true Lockean understanding would enable free speech interests to operate freely.[49]

While the Lockean approach is used most often in Anglo-Saxon jurisprudence, the Hegelian understanding predominates in continental legal systems. To Hegel, the *will* lies at the core of individual existence, and this will constantly attempts to actualize itself in the real world.[50] Property is considered reflective of this individual personality being concretized in the actual world. Hegelian theory is premised on the concept of freedom, not in terms of a libertarian understanding of the concept (in terms of the absence of control), but, rather, freedom in terms of a metaphysical 'actualization of the human will' externally.[51] Property allows this to happen through the interaction between human will and the external world.

From a civil liberties' vantage point, Hegel's theory may provide a strong base to argue for the continuance of copyright law. Postulated in abstract, metaphysical terms, the theory comes across as deontological. However, Hegel's theory makes specific reference to copyright (intellectual property). He argues that intellectual property (including copyright) can never be alienated *in toto*, since it is considered a universal (i.e., intrinsic) part of the individual.[52] Only individual *things* into which the universal is embodied can be alienated.[53]

While Hegel premises the inalienability of the universal on his personhood argument, the reasons Hegel provides to permit the alienability of copies seem to derive less from the personhood argument than they do from utilitarian considerations – to promote the progress of the sciences and the arts.[54] Consequently, this utilitarian reasoning seems to have little normative coherence with the personhood argument, though some authors have sought to link the two together through the concept of 'recognition'.[55]

Applying the Hegelian theory to modern copyright law raises several intriguing issues. Apart from the obvious and somewhat important question of whether there is a critical connection between the subject matter of protection and the personality of the individual, another important issue which an extrapolation of this theory seeks to ignore, is that copyright law goes beyond the mere protection of the individual personality. As discussed earlier, it is only the element of 'moral rights' that accords protection to the individual's personality for ethical reasons. Consequently, the rest of copyright law, taking from Hegel's theory, is nothing more than making the individualized personality a marketable commodity in simple utilitarian terms – something to which Hegel merely

alludes to in passing. If the protection of an individual's representation is considered so sacrosanct that it should be protected against imitation by another as also from distortion (i.e., the right to integrity), what then is the *personhood* rationale for making it a marketable right? Most rights accruing from copyright are assignable and inherently market-friendly.[56] Surely a personality-based justification cannot account for this distinctively consequentialist trait in copyright law.

Foucault makes a similar point, observing that the concept of the 'author', integral to copyright, is but a discourse attempting to rationalize a process of appropriation that began several decades ago.[57] He thus alludes to the fact that an argument hinging on copyright protection as serving the interest of individualized representations is a charade and a mask for an ulterior commodificatory motive – of making the representation marketable. An analysis of copyright law as assignable property further substantiates his point.

A philosophical understanding based on Hegel's theory faces another problem in that it is constructed on the concept of an individualized autonomous author. The concept of 'originality' is taken to the extreme, with the assumption that an author works independent of existent expressions and produces his work from nowhere.[58] This is certainly not the case from an epistemological perspective – a work can never be totally independent of other expressions or expressions contained in the public domain. If this is the case, the work cannot be individualized to the author *in toto*. What then is the personality rationale for protection? Again, Hegel seems to make indirect reference to this point, observing that the true extent to which a person makes something his property

through the reproduction of another's intellectual products cannot be precisely determined.[59]

Therefore, a personality-based deontological justification for the entirety of modern copyright law is inadequate. In an interesting analysis of Hegelian property theory applied to intellectual property, Jeanne Schroeder concludes that the Hegelian theory may be more utilitarian and pragmatic than it is originally believed to have been.[60] She goes on to conclude that the romanticism associated with the traditional Hegelian understanding is completely misplaced and that it is a misreading of the theory to use it in justifications for continental moral rights. In this analysis, while Hegel did believe that property was necessary for personhood, he was not concerned with the content of the property regime, or its origins. To him, property was justifiable only because of its role in society and not on the basis of any independent natural or metaphysical reason. This analysis, in its rejection of the Hegelian theory to justify the substantive content of personality-based intellectual property rights (i.e., as emanating from the connection between the work and the personality of the creator) only substantiates the general inadequacy of the Hegelian theory to provide a comprehensive philosophical argument that explains copyright law.

Thus, a consequentialist, market-based approach takes precedence in most cases – but for the small element of moral rights. If the market-based approach is self-sufficient – why then is the deontological element (i.e., moral rights) still retained? The answer may lie in the use of the deontological element of copyright, where the author needs to protect his individual creation from misappropriation or distortion as a justification for the

continued expansion of copyright law, even though the market-driven, consequentialist side is benefiting from the same.

Modern copyright law, therefore, has little deontological legitimacy. While the 'author' initially was projected as the party seeking protection for his personalized creativity, even this has been abandoned in most jurisdictions today, with the emphasis having shifted to protecting the financial investments of those involved in the creation, regardless of their creative contribution (e.g., copyright protection for databases in Europe). Copyright law is and has been a creation of the market, an attempt to commodify creativity – a process that begun subtly with the emergence of the printing press, but that has turned into an openly restrictive framework. While this may not be objectionable *per se*, it is bound to have repercussions for innumerable democratic institutions.

Many recent developments seem to call into question the suitability of these theoretical approaches to understanding the philosophical basis for copyright law. More recently, some have sought to argue that the Lockean natural rights approach does little more than make a case for *limited* proprietary protection and that the deontological approach (i.e., a personality justification) has little normative representation in modern copyright law besides moral rights.[61] These approaches locate the philosophical legitimacy of copyright law in incentive mechanisms, supported by broader public benefit arguments.[62] While one may apply these approaches with ease within a specific constitutional framework (such as that of the United States, given the language of Article I, Clause 8), the question remains whether the same is applicable to the entirety of modern copyright law, given its transnational and multi-cultural genealogy.

II. UNDERSTANDING THE CONTOURS OF THE NORMATIVE CONFLICT

Having traced the origins of modern copyright law and its inherent element of control, and having analyzed the various philosophical debates about copyright law's existence, we next examine the nature and extent of the conflict between libertarian and proprietary interests in relation to 'expression', the subject matter of copyright law.

A. 'Expression': The site of conflict

The concept of expression forms the subject matter of protection under copyright law as well as free speech laws. Therefore, it is imperative, at the outset, to understand the scope of the term, assuming such delimitation to be possible.

Etymologically, 'expression' represents any verbal or non-verbal communication that purports to represent any internal emotion.[63] This understanding is wide and does represent, in theory, the full range of human communication. Nevertheless, is the same meaning intended in human rights and copyright discourses?

In the context of human rights discourses, expression is generally given an extremely wide meaning. A right to expression (often clubbed with the right to free opinion) includes not only outward communication, but also communications from others. The UDHR,[64] the ICCPR[65] and other related conventions adopt a similar understanding. The right to free speech is often used in conjunction with the right to expression and is sometimes said to be a sub-set of free expression. Any form of communication, therefore, regardless of its substantive quality[66], is accorded protection under the right to free expression. The width of the concept is best illustrated by the

interpretation that the right to expression includes the right to non-expression, i.e., the right to remain *incommunicado*.

Copyright law understands the concept of 'expression' as a counter-position to the concept of the intangible idea. The concept derives from the infamous idea-expression dichotomy, considered to be central to copyright law.[67] Two limitations, however, restrict the scope of expression in copyright law. First is the requirement that only the expression to the exclusion of the idea can be protected. Thus, if the idea and expression merged, such as where an idea is capable only of one form of expression, no copyright protection would be available.[68] This is not so regarding free expression, where ideas themselves can form a part of the protected expression.[69] Secondly, copyright protection is only available (in most jurisdictions) to expressions that can be *fixed*.[70] This fixation requirement derives from the idea of reproducibility inherent in copyright law. Thus, mere utterances or speeches would not be protectable expressions unless reduced (or inherently capable of being reduced) to written form or recorded using other means. Once so reduced, it is the reproducible form that is protected, which is contrary to free expression rights, where reproducibility has little relevance. These limitations on the meaning of expression in copyright law derive from the purpose and function of copyright law as such.

All forms of expression covered by copyright law would thus find coverage under the right to free expression, while the converse need not necessarily hold true. As understood in human rights discourses, the concept of expression is expansive and seeks to cover as many forms as possible. By contrast, in copyright law, it is understood in the sense of a counter-position to the notion of the *intangible, ephemeral* idea.

B. Instances of the confrontation

This part briefly examines four different areas where the liberty-property conflict is best seen in relation to copyright law. It is important to note at the outset that the approach adopted in seeking to balance these interests has varied in all of these cases, reflecting the lack of a singular solution to the problem.

1. United States copyright law and the First Amendment

The conflict between copyright law and free expression is especially relevant in the United States and has existed for several decades. This special significance exists because both copyright law and free expression derive from the Constitution. Both seek to promote values recognized as *fundamental* in the United States polity. Article I, Clause 8[71] speaks of copyright law, while the First Amendment guarantees the right to free expression.[72] Therefore, arguments that constitutional supremacy provides the balance are of little relevance,[73] reducing the conflict to one between two constitutional directives. The critical distinction remains, however, that while one is positive, by enabling legislation on a subject (i.e., copyright), the other, by its very nature, restricts that enabling power.

Another significant feature of the U.S. model is that it clearly delineates the purpose of copyright, albeit in teleological terms, as lying in the promotion of science and arts. No covert attempt is made to disguise copyright extension in terms of deontological personality assumptions discussed earlier. Over the years, courts have faced the implications of the conflict on many occasions and have developed certain techniques in dealing with them. These techniques may be classified into three categories.[74] The remainder of this section will attempt to analyze these techniques. Not all cases on the

point are presented here,[75] but a representative selection is used to illustrate the different approaches.

At the very outset, it is important to remember that the First Amendment, on numerous occasions, has been accorded an expansive interpretation by the U.S. judiciary.[76] The approach has been one of understanding liberty as both an end as well as a means. Free speech and expression were considered the cornerstone of the American democratic set-up and, therefore, courts went out of their way to guard that right.[77] This has led several scholars to argue that the primacy accorded to the First Amendment ought to imply the impossibility of a normative conflict, since the First Amendment would always triumph if one were to ever arise and consequently, to argue that the real issue lies in the courts' reluctance to recognize the very existence of a conflict.[78]

In the first category of approaches adopted by courts, emphasis was placed on the idea-expression dichotomy. Whenever the possibility of a conflict between a copyright interest and a First Amendment interest arose, courts immediately invoked the dichotomy to argue that expression was the subject matter of copyright, while the First Amendment was aimed only at protecting "…a free marketplace of *ideas*"[79]. Consequently, no conflict existed because copyright law could never cover ideas.

In *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corporation,*[80] the defendant's advertisements featured a 'McDonaldland' with characters and figures therein. The plaintiff had developed a television series called 'Pufnsuf', which had near identical characters and names. When the court found that the defendant had copied from the plaintiff, the defendant immediately sought to invoke the First Amendment's right to free expression. The Court rejected this argument, stating that the idea-expression

dichotomy necessitated treating copyright expression and First Amendment protected ideas separately. Therefore, the court ruled out the very possibility of a conflict.[81] The court later used near identical reasoning in *Harper & Row Publishers* v. *National Enterprises.*[82]

This reasoning seeks to avoid the issue altogether and is, in that sense, commendable. However, it ignores the fact that while the First Amendment may protect ideas, it is not restricted to ideas alone. If an idea and an expression overlap, both lie protected under the First Amendment. In such a case, the conflict becomes very clear and courts will have to make a value-based decision. Further, the reasoning also ignores situations where an idea may only be capable of a singular expression.[83] In such a case, the conflict cannot be avoided by resort to the idea-expression dichotomy and would call into application the 'doctrine of merger', discussed earlier.[84]

The second approach involves the court's use of the 'fair use' doctrine. As mentioned earlier, this doctrine serves as a defence by making certain blatant acts of infringement non-actionable. It remains debatable whether fair use can be legitimately considered an element of free expression. Since, in its nature, 'fair use' is not an enabling right, but rather a defensive one, authors have tended to disagree on this point.[85] While courts are yet to decide this point, they still seek to avoid resorting to the First Amendment *per se* by invoking the fair use doctrine.[86]

What is of interest here, however, is that in applying the fair use doctrine, courts have sought to introduce an element of 'public interest' clearly not expressly mandated under the traditionally understood requirements of fair use.[87] Though not decisive, courts have used the existence of this element to buttress their arguments and in ruling against

infringement in numerous cases. Thus, in *Rosemont Enterprises* v. *Random House,*[88] the court applied the doctrine of fair use and additionally found that public interest favoured allowing the defendant to disseminate the copyrighted information of the plaintiff, since it involved the biographical details of an eminent individual and in *New York Times* v. *Roxbury Data Interface,*[89] it allowed the extraction of names from an index because the new index being made by the defendant *would serve the public interest in disseminating the information*. The most important of these cases is that of *Times, Inc.* v. *Bernard Geis Associates.*[90] This case related to photographs taken of the Kennedy assassination, copyright over which was vested with the plaintiff. The Warren Commission extensively used these photographs to make its findings on the assassination. When the defendant sought to reproduce these photographs in his report seeking to disprove the findings of the Commission, the plaintiffs brought an action for infringement. In finding for the defendant, the court held that "…there was a public interest in having the fullest information available on the murder of President Kennedy.[91]" In all these cases, the court refused to expressly rule on the applicability of the First Amendment guarantee to the issue involved.

The third approach is a slight modification of the second, and has primarily been the subject of academic thinking. It involves the recognition of an independent first amendment exception to infringement, independent of the fair use doctrine, but applicable only in cases of public interest. The fair use exception, being an intrinsic defense, cannot exist independent of copyright law. The first amendment defense would, according to this argument, have an independent existence and therefore be of greater legitimacy.[92]

The second and third approaches discussed above may prove to be acceptable solutions assuming an important caveat is recognized in their application. This caveat allows the 'public interest' determinant to serve only to evaluate the circumstances justifying the normative precedence of free speech interests, vis-à-vis copyright law, and not to subjectively determine the qualitative *public interest* impact, which *a specific expression* has in the circumstances of the case. Adopting the latter approach means that if an expression had little political (and therefore public) utility, it would risk not qualifying for protection under these public interest approaches. Such an approach is clearly inconsistent with the wide understanding of expression in the liberty discourse. The issue may ultimately be viewed as one of *adequate generality* in the discourse. Thus, while it may be appropriate to argue normatively that *public interest necessitates permitting the dissemination (through copying) of information relating to public health issues,* it would be a qualitative determination to argue that the *nature of information present in the expression renders it in public interest to allow its free dissemination (and copying).* The former would be a normative determination coupled with a specific reference area (public health, in the illustration) in which the normative preference would operate. The subjective determination, if any, is restricted to a determination of whether one can categorize the expression as falling within the reference area identified, which is dependent on how widely or narrowly it is defined. The latter, however, is a subjective determination without a normative reference area, requiring a qualitative assessment of the content of the expression itself by reference to an indeterminate principle.

Robert Denicola, in arguing for the introduction of an independent first amendment privilege to copyright infringement, states that such a qualitative 'public

interest' determination is inevitable, given the case-by-case assessments that are involved and the ephemeral distinctions that copyright law entails.[93] However, there appear to be judicial pronouncements where courts have used 'public interest' more as a normative determination rather than as a qualitative one – though not in express terms.[94]

It may be important to pause here and understand the significance of the distinction between the two methods discussed above. The distinction may be likened to the process of 'constitutional specification' that some proponents of the original intent school of constitutional interpretation advocate. Michael Perry, in his discussion of original intent, argues that the process of constitutional specification is between the processes of constitutional interpretation, which involves the isolation of the norm in question, often indeterminate, and the actual application of the norm to the facts before the court.[95] The process of *specification* according to Perry is a normative inquiry, which involves determining the contextualized meaning of a norm in a given situation.[96] Thus, it is the process of determining the amplitude of a constitutional norm within a given factual context, thereby ridding it of its abstract nature and filling it with a specific policy-based normative preference.[97] This is to be distinguished from the process of application, which is a purely deductive process and involves no appeal to normative preferences.[98]

The process, as noted earlier, is one of reducing the generality of the norm by coloring it with a contextual significance. Thus, to say *free speech interests must ordinarily prevail when they conflict with copyright* would be, in a sense, indeterminate to a context. To further *specify* it, by what may be called ascribing to it a 'reference area' clothes it with contextual meaning whereby it gets translated into – *in the context of*

public health issues, free speech interests must always prevail over copyright claims (with the reference area being expressions in the area of public health). The last process involves one of actually applying the contextualized norm by determining whether the expression involved is one relating to a public health issue. Therefore, the court's subjective determination of the expression's qualitative nature is limited to within the identified reference area.

The significance of this discussion is critical to the operation of a full liberty interest and is discussed again in the context of U.K. developments, where courts seem to have adopted a similar process.

All the approaches of the courts thus far indicate a general reluctance to tackle the issue head-on, possibly reflecting the perceived inadequacy of any solution. The fair use determination, at the end of the day, would be a factually dictated one, while one based on the First Amendment would be policy related, necessitating a pronouncement by the court on the relative importance of the two conflicting values, within an identified reference area.

The U.S. Supreme Court recently had to make this very determination once again in *Eldred* v. *Ashcroft.*[99] This case involved a constitutional challenge to the Copyright Term Extension Act, which extended the term of copyright protection retrospectively by twenty years. Accordingly, works that had already fallen into the public domain would now be entitled to an additional period of protection. This was challenged as both violative of Article I, clause 8, and of the First Amendment. The court, with a seven-judge majority, found the statute to be *intra vires* the First Amendment. The court recognized that while copyright *per se* was not immune to First Amendment limitations,

traditional copyright was provided with many limitations and safeguards, taking it outside the scope of free expression.[100]

The Court seems to acknowledge that while the values could conflict in theory, they were incapable of doing so in practice. The inherent limitations in copyright doctrine rendered such a conflict impossible. Does this render these inherent limitations more as elements of free expression than parts of copyright law? The court once again adopted the strategy of avoiding the issue. The crucial issue, however, in terms of the rights discourse, is the effect of a proposition that, on the one hand, reaffirms the supremacy of a normative value but at the same time, refuses to apply it in a concrete situation. Given its emphasis on the *means*, it appears that such an approach would nevertheless fall within the accepted parameters of the rights discourse.[101]

The American approach, therefore, represents a judicial approach seeking to favour market-driven copyright, with the understanding that the incursions, if any, into free expression are minimal and therefore capable of being ignored. If nothing else, the readiness of the courts and the constitutional set-up to recognize this is commendable. Even though much has been written and theorized about the conflict in the American constitutional set-up,[102] the judiciary has been reluctant to recognize the conflict in normatively concrete terms. The judiciary, however, has exhibited a progress from the earlier approaches to ruling that a conflict may be *theoretically possible* at best. This is indeed a positive advancement along the spectrum of avoidance.

This *avoidance* approach has been the subject of some harsh criticism in recent times. Neil Weinstock Netanel, has convincingly argued that this anomaly is a result of an antiquated understanding of the courts, deriving from notions of copyright as they

stood prior to the recent spate of expansionist trends.[103] He further explains how copyright is effectively 'content-neutral' regulation, subject to a rigorous and exacting *intermediate* scrutiny under the First Amendment, in spite of its being characterized as a regulation that purports to further free speech interests.[104] It is heartening to see the recognition that the avoidance approach of the U.S. courts and their subtle doctrinal loopholes are insufficient to immunize copyright from First Amendment challenges.

2. Digital Copyright & Anti-circumvention Provisions

With the emergence of the 'information age' and the extended use of the Internet for communication, copyright's traditional form of control through restrictions on the physical medium came to be gradually eroded, necessitating an overhaul of copyright law. Through the use of freely available technology over the Internet, copies could be made of works and distributed *ad infinitum* at absolutely no expense at all. Not only could such occurrences not be controlled technologically, but they also could not be readily detected either.

This necessitated the introduction of new forms of control into copyright law. The foremost of these were provisions aimed at curbing the circumvention of technological measures[105]. To prevent multiple copying of software and digital media, companies developed technological safeguard measures that locked the code inherent in the software or medium in question. This locking ensured that only the original owner could use the software in conjunction with the medium of purchase.[106] To break these locks, individuals soon began to create various programs and devices, which they freely distributed. The introduction of anti-circumvention provisions into copyright law effectively curbed this and rendered the distribution or creation of software/devices

meant to unlock technological anti-copying mechanisms, itself a form of proscribed conduct.[107]

As many scholars have observed, the development of the Internet as a global communication medium was primarily because it served as a medium for the free exchange of information and software between individuals. If this came to be regulated – either technologically or legally, then the very basis on which the Internet evolved, i.e., *freedom* would cease to exist and with it, eventually the Internet as we know today.[108]

Measures such as technological anti-copying mechanisms, ensure that both non-legitimate and legitimate reproducutions (i.e., fair use copies) of a copyrighted expression (i.e, software) are effectively forbidden. If fair use is indeed an element of free expression, as debated previously, then the conflict is but obvious. Can an argument be made that technological control is a restriction on free expression? Even if this argument is implausible, the second limb is surely possible – that penalizing circumventions regardless of the use is an infraction of the right. Anti-circumvention provisions have the effect of further legitimizing technological anti-copying systems by rendering conduct directed to disabling the technology illegal.

This was precisely the point in *Universal City Studios* v. *Reimerdes.*[109] Here, the court considered the validity of the anti-circumvention measures of the Digital Millennium Copyright Act (DMCA)[110] in light of the right to free speech and expression under the First Amendment. The argument was advanced at two levels. The defendant first argued that software code was speech and therefore that the anti-circumvention measure proscribing it was invalid as an unjustifiable restriction on the right. Next, the defendant argued that even if otherwise permissible, by failing to draw a distinction

between legitimate and illegal uses of the code, the anti-circumvention provision curtailed fair use, an integral element of free speech. While both these arguments were rejected, the reasoning of the court is of relevance.

While the court readily recognized that code was capable of being an expression protectable under the First Amendment, it went on to observe that since this expression (i.e., software code) had a *functional relevance*, courts should treat it differently under the First Amendment. The court held that code was *speech-conduct* as an independent category.[111] Therefore, conduct, being a functional element, was incapable of being categorized as *expression*. The *sequitur* of this classification was that the court now could adopt a differential standard for review of the provision's constitutionality. The court then observed that though the code (i.e., the DeCSS code) was essentially speech, it had a certain *effect* when functional, which could be illegitimate, and hence was entitled to a differential treatment.

Should the *contextualised effect of an expression*, make it less worthy of libertarian protection? Not only does the expression in question have a specific effect only in a specific context (i.e., when fed into a computer); even in this context, it is only within a further sub-category of cases that the expression has an impermissible consequence. The code is capable of being used for permissible fair use purposes, thereby reducing the probability that the speech (i.e., code) will produce an impermissible result.

The court completely avoided the issue of constitutional protection for the fair use doctrine and refused to provide an answer, finding that the Constitution nowhere guaranteed copying the original work in its original format.[112] Consequently, the court rejected the fair use argument as well.

The implications of anti-circumvention provisions for fair use merit some analysis. In its simplest form, fair use refers to certain activities, which though ordinarily the exclusive prerogative of the copyright holder to perform, are nevertheless permitted to be performed by others as well under certain specific circumstances.[113] It, therefore, refers to a form of conduct and embodies a certain libertarian element, thereby undeniably forming a part of the right to free expression. Though anti-circumvention laws (forming a part of copyright law) expressly provide that the fair use right will remain intact in its original form, this actually seems to be mere lip service. Courts, in interpreting these provisions, have concluded that the reference to fair use is restricted to *traditional copyright fair uses* alone and not to actions based on anti-circumvention provisions.[114] Thus, if an anti-circumvention provision were violated for the purpose of accesing information protected therein, for purely educational purposes (which would qualify as fair use) – the act would still constitute a violation of the provision, with the actual purpose being of little relevance to the inquiry. Anti-circumvention provisions have therefore effectively restricted the scope of fair use and thereby impinged upon the right to free expression. This has resulted in some authors calling for the invocation of an independent and general *legitimate use* defense specific to anti-circumvention law.[115]

As noted earlier, expression in its widest sense is taken to cover accessing information as well, in addition to its dissemination. It thus becomes crucial to distinguish between copy control and access control technologies of protection. While the former merely seeks to restrict the copying of information, the latter seeks to restrict the copying of information by controlling access to the information to begin with. This raises the issue of whether access control technologies can protect works that cannot be the

legitimate subject matter of copyright protection and thereby regulate conduct that has no connection with copyright law. In the tangible world – access control does exist over the medium of dissemination, but is never the subject matter of copyright law. The analogy would be to having a book with a key-lock and bringing the act of picking the lock under copyright law with the tenuous reasoning that by protecting the lock device, one is indirectly preventing the copying of the book. This would restrict access to the information *in toto* – regardless of whether the work is sought to be copied. The issue of whether access control can be the subject matter of copyright law (even if copy control can, since it has some connection with copyright) is one that has not received sufficient philosophical attention – specifically since such access control would constitute a direct incursion of the right to free expression, understood in its widest sense.

This issue was addressed in the context of the anti-circumvention provisions of the Australian Copyright Act, 1968[116]. There, the argument was advanced that access control provisions had no link with copyright law and that they would further restrict access to works existing in the public domain.[117] In spite of this, the Australian approach sought to balance the two such that the existent definition of the term 'effective technological protection measure' is a hybrid of both access and copy control.[118]

The expansion of digital copyright under the rubric of anti-circumvention law clearly evinces a distinctly teleological approach to copyright law. The end sought to be regulated, *reduction of copying*, seems to take precedence over all other values, including free expression. In the process, copyright law is expanded to the extent that it no longer becomes an anti-copying form of control, but one that actually restrains everyday human conduct. Clearly such regulation falls foul of any interpretation placed on a free

expression doctrine. In this arena, it undoubtedly remains that proprietary interests reign supreme.

A broader issue raised by the entire digital copyright debate remains whether, in the context of the Internet, a new free expression standard ought to be developed since the Internet has traditionally been considered the bastion of free expression and liberty.[119] Already, there exists literature stating that traditional notions of intellectual property may need modification to suit the nature of creativity on the Internet.[120] This may also be equally applicable in the context of free expression. One can argue that the very architecture of the Internet promotes a culture of free exchange of ideas and information, making it *inherently* the subject matter of a libertarian free expression interest. It may be that this standard is too high. Nevertheless, for the time being, it is clear that liberty interests come second to copyright concerns over the Internet in spite of there being a considerable amount of criticism leveled against this form of copyright expansion.[121] This probably reflects an ancient tradition that began with the Statute of Anne – new technologies fostering new forms of control.

3. Copyright & Free Expression in Continental Europe

The overlap between copyright law and free expression in Europe is interesting, primarily because copyright in continental Europe has traditionally been premised on a deontological understanding of the work, representing the individual personality of the author (termed as *droit d'auteur*).[122] This is unlike the Anglo-Saxon jurisprudence.[123]

Copyright law in the continental system (specifically, France and Germany) developed along lines similar to the common law system. Here too, it originated in a system of privileges, aimed primarily at censorship and control, rather than in granting

exclusive monopoly rights.[124] These printing privileges were renewed from time to time. Eventually, however, a conflict arose between metropolitan printers (mainly the Parisian ones) and those in outlying provinces, with the latter arguing that the privilege system unfairly favored the metropolitan printers over others. In this context, the Parisian printers (i.e., metropolitan printers) sought to argue that the privilege system merely recognized the pre-existent, natural property of authors, in an attempt to safeguard their own interests.[125] The provincial printers, in contrast, argued against all forms of control, stating that ideas were *never created* as such and consequently that any monopoly right had to be limited in scope and duration.[126]

The law eventually sought to balance both these arguments by recognizing authorial property for a limited duration and then allowing the property to pass into the public domain.[127] In the entire debate surrounding authorial property, the concept of the *droit d'auteur* (based on authorial personality) was not the exclusive philosophical reason for the emergence of the right. Similar to the common law, the primary concern of the system apparently lay in safeguarding exploitation rights and curbing piracy.[128] The copyright discourse here assumed a moralistic plane only much later, in an effort to accommodate judicial pronouncements and the political exigencies of the period.[129] Legislatures finally recognized this development statutorily in the mid-twentieth century. According to one school of thought, however, this recognition was based on a misreading of prior texts rather than a reflection of the prevalent copyright philosophy.[130]

A critical distinction observed between the two systems, is that while in the Anglo-Saxon approach, copyright is narrowly defined with its various limitations accorded an expansive approach, in the continental approach the copyright is as a natural

right very widely understood, with very limited exceptions.[131] The reason for this rather late recognition in continental Europe of the need for exceptions may lie in the varied concepts of *freedom* and *liberty* held in many of these nations, which still espouse a doctrine of copyright constructed around the romantic concept of the author and original genius.

In a sense, therefore, the deontological element theoretically informs the entire copyright discourse. In many jurisdictions, the absence of a fair use defense can be attributed to the simple understanding (rightly or wrongly) that copyright deals primarily with the need to safeguard authors against misuses of their works, which would amount to distortions of their individual personalities as embodied in the expression. Fair use has always been concerned with the need to show absence of *commercial* motive. From a purely deontological reading, however, this is irrelevant since the commercial/non-commercial distinction is of little relevance in protecting the personality of the author.[132] The practicalities of globalization have in recent times forced the harmonization of copyright laws in Europe and across the world, resulting in this *abjectly* deontological nature of continental copyright law being diluted with distinctively commercialistic, consequentialist notions.

Given this deontological inclination, and assuming that a court is ready to assume the existence of a conflict, how would a solution present itself? This discussion assumes importance for the first time, in light of Article 10 of the ECHR,[133] which provides a codification of basic human rights against which courts can review domestic legislation and actions. While the initial phase saw a general reluctance among courts to recognize the very possibility of such a conflict, the next important trend that one is able to discern

is a readiness among courts to allow a free speech/expression defence if the *expression is political or has significant public interest involved.*[134] This would amount to no more than the qualitative assessment discussed earlier, which requires courts to examine the *importance* of the individual expression in question but not necessarily along normative lines. Nevertheless, this should be avoided to retain the intended width of protection under Article 10. The public interest test, on the other hand, should be in the nature of a normative process determination – as discussed earlier. Thus, an artistic expression with little public policy significance might be allowed such libertarian protection if the public utility/interest served in allowing artistic expressions is considered greater than that of restricting the same, within the reference area in question. This seems to be the initial approach adopted in one French case,[135] where the court allowed the picturization of artistic collections under the rubric of free expression, arguing that the right of the public to be informed of important cultural events would prevail over copyright interests in the artistic work itself.[136] This represented a distinctively utilitarian approach to the entire conflict issue, and seems *prima facie* representative of the process identified earlier – the identification and application of a reference area (important cultural events) to the case at hand (i.e., the identification of an open-ended norm, which is further contextualized and then specifically applied)

On appeal however, the decision of the court along the 'public interest' lines was expressly rejected by the Court of Appeals. The case was that *Jean Fabris* v. *Sté France 2,*[137] where a broadcaster had made and broadcast a news report about an exhibition of paintings. Copyright in the paintings vested in the estate of the artist, which claimed that the act constituted copyright infringement. The broadcasters sought to place reliance on

Article 10 of the ECHR, arguing that the rights of freedom of expression and the right of the public to information necessitated the infringement. The lower court found in favour of the defendants, making the observations noted above in what seems to be an adoption of the normative reference area approach.[138] The Paris Court of Appeals however, in reversing the decision of the lower court, refused to recognize the existence of this independent defence, on the premise that copyright law has sufficient in-built safeguards which ensured that it did not transgress free expression interests.

The decision of the Paris Court of Appeals in essence is the approach initially adopted by courts in the United States, where they sought to accommodate the normative conflict through the internal doctrines of copyright law. It may well be that this is representative of an underlying recognition by the courts of the distinctively consequentialist flavour that copyright law has come to acquire in recent times.

The dearth of sufficient case law in Europe relating to these issues allows only for a minimal amount of theorization about what the approach of the courts will be in the days to come. However, judging from recent trends and the specific philosophical foundations from which the law of copyright derives, it is highly likely that with national courts in jurisdictions where copyright derives from the moralistic plane, the *droit d'auteur* will take precedence over the right to free expression. However, some scholars do believe that with the establishment of the European Court of Human Rights, specifically to ensure enforcement of the ECHR – this attitude will change to one in favor of the libertarian interests.[139] This would indeed be an illustration of the supra-national enforcement of human rights taking primacy over the international harmonization of

copyright laws within Europe. Only time however, will determine whether this will indeed occur or not.

4. U.K. Copyright Law and Article 10 of the ECHR: Norm Specification

In the United Kingdom, the absence of a written constitution and a bill of rights has meant that the development and protection of basic liberties emerged through the judicial process. As a result, the U.K. lacked any constitutional procedure, or procedurally equivalent process, for the judicial review of legislative action as existent in other democracies that operate under a written constitution. With its accession to the ECHR, the U.K. enacted the Human Rights Act in 1998[140] specifically mandating that courts interpret domestic legislation in accordance with the rights enshrined in the ECHR[141] and make a declaration of incompatibility in the event of a conflict.[142] Such a declaration, however, has no bearing on the validity of the enactment (in the sense that a procedure of judicial review ordinarily would) and is thus different from the traditional process of judicial review, which enables a court to declare a law invalid for non-compliance with constitutional directives.[143] Nevertheless, the limited review process has ensured that, in interpreting existent legislative provisions, courts give due consideration to important libertarian interests, including the right to free expression.

In the U.K., copyright law is governed by the Copyright, Designs and Patent Act of 1988.[144] The CDPA recognizes copyright both in economic and moral terms, with the former being dominant. The moral rights recognized, though extensive, nevertheless can be waived or infringed with the consent of the author in question.[145] Relevant to our present discussion, however, is a provision contained in Section 171(3) of the CDPA,

which provides that courts may prevent or restrict the enforcement of copyright for public interest or other reasons.[146] The question, therefore, is whether the right to free expression constitutes a *public interest reason* for restricting copyright protection under this provision, especially since the right is now mentioned in U.K. legislation under the Human Rights Act. [147]

The Court of Appeals was called upon to make this determination in *Ashdown* v. *Telegraph Group Ltd.*[148] This case involved the report of a confidential political meeting, prepared by the plaintiff using his personal diaries. The confidential report was leaked to the defendants who then carried news stories on the report, quoting verbatim from parts of the report. The plaintiff, thereafter, claimed copyright infringement and breach of confidence. In response, the defendant argued that since Article 10 of the ECHR was now a part of U.K. law, it necessitated an examination of whether the copyright protection in the instant case was violative of the right to free expression enshrined therein. The lower court rejected this argument and the matter was appealled.[149]

On appeal, the court, for the first time, concluded that circumstances could arise where copyright law conflicted with free expression interests and that in such cases, the need to balance the two interests, could lead to the right to free expression *trumping* copyright interests.[150] The court, however, eventually ruled that the defendant's excessive reproduction of the plaintiff's language was not necessary in the interests of accuracy (a *public interest* reason), and was used to "…add flavour to the article." Therefore, the defendant was not entitled to libertarian protection at the cost of the plaintiff's proprietary interest.[151]

While the eventual decision did favor the proprietary interest over the libertarian one, the case is of importance to our analysis primarily from a methodological perspective. Recalling the distinction drawn earlier between the court's role in evaluating the subjective element of the expression and in deciding the issue from a normative basis, where would the approach of the Court of Appeals in the *Ashdown* case fall?

It would appear that the court did not interpret the 'public interest' defence as involving a subjective evaluation of the *public importance* of the expression in issue. All the same, the court refused to demarcate specific areas where the defence would apply to override proprietary interests. In doing so, the court was apparently motivated by the need to maintain as wide an application of the doctrine as possible, instead of introducing self-imposed limitations.

From one perspective, the court's reluctance to fetter itself with limitations may be seen as an abandonment of the normative approach. It is however equally arguable that the court could have reached an identical solution through the normative approach, applied within the contours of the problem – thereby avoiding the need to identify all possible situations, which seems to have been the primary concern of the court. If one however attempts to understand the court's final conclusion in terms of the *interpretation-specification-application* process discussed earlier, it is possible to make the argument that the court did in fact make a normative judgement, albeit a limited one. It is important, in this analysis not to be influenced by the court's final decision in upholding the primacy of the proprietary interest; the normative reference area approach may indeed be used to demarcate areas where proprietary concerns are perceived as more important than liberty interests.

The court could have reached its decision by applying the *interpretation-specification-application* process through one of two means. First, the court could have identified the normative reference area in terms of the restrictions permitted under the express language of Article 10 of the ECHR.[152] The indeterminate norm here would therefore be that *limited restrictions on free expression are permissible as may be necessary in a democratic society to protect the rights of others.* In a copyright context, this norm would read: *principally commercially motivated free expression can be permissibly overridden by the proprietary interests of others in such expressions.* The court could thereafter have concluded that the expression reproduced by the defendant was commercially motivated and therefore subordinate to the plaintiff's proprietary claims in the same.

The second approach would have been to identify the normative reference area in positive terms. The indeterminate norm would read as – *public interest dictates that copyright law is subject to overriding free expression interests and may be overridden by the same.* This would be contextualized further non-deductively (but normatively) to become – *the reproduction of an expression purely to convey the authenticity a news report would override the property claim that such an expression could be subject to.* The court could then have finally concluded that since the reproduction was for commercial rather than authenticity purposes, it fell outside the normative reference area where liberty interests prevailed and therefore amounted to an infringement of the plaintiff's copyright.

The first approach adopts the normative area in reference to an established exception, thereby approaching the issue in a purportedly negative sense by giving color

and content to the exception enshrined in the protective norm (i.e., free expression). The second, in contrast, adopts the opposite approach and categorizes the reference area in terms of a direct conflict between the two norms – with the ultimate application however establishing that the normative preference need not actually operate since the overlap is not called into question.

From a purely normative analysis, it would seem that the first approach is preferable. Although couched in language favoring the overriding of the liberty interest by copyright, the first approach recognizes the normative pre-eminence of free expression (i.e., by taking its normative starting point as the *permissible exception*) and that copyright law (if it must remain operational in the event of an overlap) *can* exist as an acceptable exception provided its legitimacy is tested against the moral intrinsicalities of free expression. An approach such as this would arguably place a procedural obstacle to the uncontrolled expansion of copyright law by requiring a substantive evaluation of its permissibility vis-à-vis free expression. Note however, that this legitimacy determination occurs as a non-deductive normative process at the *specification* stage. In contrast, the second approach, though producing the same outcome, commences from a position implying the normative supremacy of copyright law. Even though the ultimate preference in the determinate version of the norm is for free expression, the normative hierarchy seems to favor the property interest since the argument is couched in terms of a *defence* to infringement, rather than an outer boundary for copyright law.

The argument, therefore, essentially boils down to this – is Section 171(3) to be interpreted as *normatively equivalent to Article 10 of the ECHR* or as a *defence intrinsic to copyright law that draws color from Article 10?* Though seemingly subtle, the

difference is critical. In the former interpretation, public interest becomes an insuperable hurdle to copyright law, while in the latter, it is a limited area within copyright law, where the property interest must perfunctorily accede to the libertarian. To further extrapolate, however, and speculate on the structural biases of the interpretative process may prove to be of little value, given the insufficient discussion on the issue in the case.

It is well arguable that the above discussion is of little consequence, given the court's final decision; more so given the court's express inclination to avoid demarcating areas where the public interest defense might apply. It is also reasonably justifiable to allege that the entire discussion thus far has sought to read too much normative significance into what is no more than a purely doctrinaire interpretation of the provision or even in the alternative, an intuitive outcome within a given factual paradigm. From such a perspective, not just the relative merits of each theory, but even the normative reference area approach is but a conjecture in the context of the instant case and therefore of little value.

The point may indeed be conceded. Nevertheless such theorization is indeed of value to highlight the possible structural and doctrinal biases that can operate under the garb of a normatively neutral interpretative process. Even if inapplicable to the instant case, it may indeed pave the way for further probing in future property-liberty stand-offs over expression, specifically in the context of these provisions.

III. COPYRIGHT AS A HUMAN RIGHT

Thus far the conflict between copyright law and free expression has been posited as a confrontation between proprietary and libertarian interests in expression. There however does exist a school of thought, which believes that copyright law, is in itself a

form of free expression and therefore a human right in itself. Consequently, the conflict then, it is argued, is not one of balancing two competing normative interests, but one of actually demarcating the amplitude of a single normative principle – free expression. This part examines the legitimacy of such a claim.

The argument that is made in philosophical terms to justify copyright as a form of free expression is that copyright, allows an author to secure his independence from patronage and possible influences from state and individuals. It thereby is supposed to secure the individual freedom of the author, in expressive terms[153] and thus represent an independent libertarian interest.[154]

The Universal Declaration of Human Rights (UDHR), considered the bible for international human rights norms, provides support for the argument that copyright is a human right. Article 27, therein, guarantees all individuals the right to protection of "moral and material interests" flowing from works of authorship.[155] If this provision were indeed a reference to the law of copyright (in its modern expanded form), the argument for copyright law being a human right would find considerable merit.

The emphasis in the provision would however appear to be on the *moral* interest involved in the work – the idea of protecting a personality representation. This has led scholars to argue that the provision is more a representation of the continental idea of the *droit d'auteur* simpliciter than it is of modern copyright law in its expanded amplitude.[156]

If the provision were a mere reference to the deontological moral right element in copyright law, then there would be little problem, given the very deontological nature of the human rights discourse. The problem however, is with the use of the word "material"

in conjunction with moral rights. Would the protection of 'material interests' encompass the tradable proprietary element of modern copyright as well?

Scholarly opinion that the provision only makes reference to the natural right *droit d'auteur* element,[157] rather than a purely proprietary claim, has merit in the actual construction of the provision. The provision uses 'protection' rather than 'property', emphasizes interests (including material interests) *resulting* from the production rather than from a state grant (which is usually the case with intellectual property rights) and most importantly, accords primacy to the moral element and confines the right to the author only and not to someone deriving through him. While the apparent focus of Article 27 is on a *droit d'auteur* approach, some writers opine that the provision is the source for all forms of intellectual property law.[158]

The integration of human rights into discourses on free trade and economic liberalization, however, is not a recent phenomenon. Some authors try tracing this argument back to the writings of Immanuel Kant and his observations on the role of international economic integration as a necessary route to ensuring greater compliance with human rights norms.[159] These approaches seek to place rights, like the 'freedom of contract' and the 'right to property', at the center of human rights discourse. Authors argue that one can effectively exercise other social and civil rights only through these *economic liberties*.[160] Additionally, such approaches clearly reflect the real motive behind this purported merger of the two discourses by their claiming that this would add a certain moral legitimacy to free trade arguments, thereby indirectly promoting the enforcement of human rights.[161]

Philip Alston, in his scathing critique of such approaches, characterizes them as representing a form of 'epistemological misappropriation' that fails to recognize the inherent dichotomy between instrumentalist arguments (which characterize the economic liberalization debate) and those surrounding human dignity, which form the core of human rights discourses.[162] This merely represents the deontological-consequentialist divide existing between the market-driven and dignity-centred approaches discussed earlier. The Alston-Petersmann debate occurs at the generalized level in the context of international economic institutions (such as the WTO) and their role in the human rights discourse, but the reasoning used therein is equally applicable to the specific context of copyright as an element of the human rights discourse.

A broader, structural critique of this approach, however, essentially derives from Upendra Baxi's criticism of a modern trend where elite commercial interests always seek to misappropriate existent normative discourses in seeking to promote the expansion of global capital – what he terms the "…critical appropriation of the human rights discourse by global capital.[163]" This process essentially involves using normative language to justify the expansion of the commercial ideology. The normative framework, therefore, posits itself as a legitimizing factor for the expansion process.[164]

One can trace back in time, the proposition that all forms of intellectual property are human rights in themselves.[165] The modern brand of intellectual property, copyright in specific, however, has none of the characteristic features ordinarily attributed to human rights. Unlike intrinsic and inalienable human rights, these rights are often *state grants,* not *recognitions,* (i.e., not natural rights) and probably, most importantly, are waivable and freely marketable. Further, being in the nature of a commercial interest, their

emphasis is distinctively consequence-based, whereas human rights can be characterized as ethical process rights.

The fallacy inherent in characterizing 'copyright as a human right' is evident not only from recent trends seeking to commercialize intellectual property as 'trade-related rights', but even from the arguments advanced for the same. Even in recent initiatives to expand copyright, the argument is that the expansion is intended to serve the interests of the author and to promote creativity. It is pertinent to note, however, that the TRIPs Agreement does not even make *mention* of the concept of moral rights[166] – probably the only remaining deontological component of copyright law – and exclusive to individual authors. The interests of large commercial entities are therefore projected as those of individual authors.[167] Thus, Baxi's proposition may prove equally true regarding the argument that copyright as such is a human right.

One can draw a parallel with Baxi's conceptual analysis of the 'human rights of corporations', where he observes that recent human rights discourses have begun to witness the emergence of 'trade-related market friendly human rights' in an attempt to legitimize the commercial activities of corporations at the cost of other individual rights.[168] Classifying copyright as a human right would *prima facie* provide an adequate justification for its continued expansion, both quantitatively through term extensions[169] and through other qualitative means.[170] Terming a commercial interest as a human right provides the activity with a considerable degree of legitimacy that is then used to thwart attempts to question the primacy of the commercial interest involved.[171]

Copyright can never be considered a human right *strictu sensu* because the process of commodification is central to the right, unlike deontological human rights.

Under certain circumstances, it is indeed possible that the proprietary interest and liberty interest in an expression *may not* conflict – but it is crucial to understand that this hardly converts one into another. Simply because the subject matter of both interests remains the same (i.e., expression), the absence of a conflict cannot be taken to mean a coalescence of values. A proprietary interest will always be concerned with the creation of marketable value, undoubtedly a possible virtue in itself. Freedom of expression, on the other hand, is more process oriented. While not always opposed to the creation of marketable value, one can hardly imply that the process of value creation gets transfigured into a free expression right. This is for the simple reason that even if the process of value creation in an expression (which may pass for copyright) is taken as the property right in question, it remains distinctly teleological and end-oriented, which human rights are not meant to be.

An alternative argument is that instead of locating copyright within the general human rights discourse, it should be placed within the context of a general democratization process since copyright is essentially a state measure that uses market institutions to enhance the democratic character of civil society.[172] As a result, copyright is supposed to have a dual function – one, the *production function* of encouraging political, artistic and cultural expression in society and two, a *structural function* of enabling the existence of this expression independent of state or other political patronage.[173]

Unlike the previous argument that copyright *is a* form of free expression, this argument postulates that copyright plays a vital role in encouraging free expression in a democratic society. An approach such as this is quite commendable, especially when supplemented by the understanding that copyright's ability to perform this task has in

recent times been waning. This approach seemingly concedes that copyright ultimately is consequentialist or end-driven. In this approach, generating original expression remains the end sought by copyright, which coincides with the objective of encouraging free expression in a democratic society. A commonality of ends is thus achieved, but the approach remains distinct – copyright encourages expression under the incentive of a monopoly right; while free expression does so for the abstract fundamentality of such expression in a democratic society. Thus, copyright encourages expression through the market, which often results in the market-objective eclipsing the value inherent in the expression (which a liberty-based interest seeks to place primacy on). This is distinguishable from the misconception that copyright is deontologically inclined merely because the end achieved is similar to that postulated by the libertarian value of free expression. Indeed, in any deontological approach it would appear that there is no distinct attainable end, since the supremacy of the normative value in question is the abstract and often elusive goal. Freedom, at the end of the day, was never intended to be a tradable commodity.

CONCLUSION: TOWARDS GREATER NORMATIVE INDEPENDENCE

Solutions that are very often suggested to the normative conflict inherent in *expression* come across as either very extreme and impracticable, or as unacceptably defeatist. The former would include arguments that copyright should be relegated back to its initial phase of being nothing more than a mere form of a regulatory monopoly.[174] The latter category would cover arguments that seek to deny the very existence of a conflict through subtle variations in the doctrines of copyright law or the law of free expression.

At the very outset, it must be recognized that modern copyright law is an attempt to propertize expression and convert it into a marketable commodity; while the right to free expression derives from the inherent supremacy of freedom of speech as a value in a democratic society. It is crucial to bear in mind that this difference in purpose will dominate either discourse, and cannot be ignored – regardless of ephemeral overlaps. The element of 'commodification' is therefore decisive in copyright law, as Foucault pointed out, and is evidence of its modern day proximity to market forces rather than to romantic deontological conceptions based on an intangible right to personality.

From the previous illustrations it is seen that innumerable attempts have been made to create a balance for the coexistence of both the proprietary and liberty interests in expression. An important factor that is often ignored in attempts to balance the two values is that the manner in which the discourse is structured is often determinative of the final outcome. If the discourse is structured as one of copyright law and the need for an independent free expression defense to infringement – then the discourse will automatically revolve around how copyright law can accommodate free expression. On the other hand if the discourse is one of the right to free expression and the question of how copyright may be a restriction (reasonable/unreasonable) on the same, the pivotal element will remain free expression. Most judicial and legislative approaches on the issue have tended to adopt one of these methodologies (generally, the former) and have thereby adopted an *a priori* assumption of superiority amongst the normative values. Thus, for instance the attempt to try and formulate a 'first amendment defense' does implicitly recognize that *a priori* copyright interests dominate but that a small area should be carved out for free expression interests. The converse is equally true.

Apart from this, these approaches also suffer from a perceivable lack of consistency, occasionally coming across as *ad hoc* attempts to deal with the issue. They also seem to evince a distinct end-driven approach, which realists would categorize as forms of post-decisional rationalization. The sequitur of such approaches is that neither normative value is able to derive its legitimacy independent of the other.

Courts and policy makers must understand that allowing a true balance will necessitate according precedence to one normative value over the other, in specific situations. Decision makers must recognize copyright law and free expression as competing norms within a narrow framework and that in the event of a conflict between the two, one of the normative values will have to prevail at the cost of the other. An attempt must be made to recognize specific circumstances and situations where one value is more desirable than the other – and ought to accordingly prevail in the event of a conflict. These may be circumstances where public policy may necessitate allowing copyright to prevail over free expression given the realities of the global information market; and there may be yet others where the democratic value of free expression will be considered unimpeachably supreme. However, what is necessary is a clear identification of such circumstances coupled with a readiness to adopt a normative hierarchy for each situation. Such a process may yet provide the only solution to achieving a true balance that allows each normative value to realize itself independent of the other.

The normative reference area approach drawn from the constitutional interpretation (interpretation-specification-application) process provides one methodological approach allowing a normative preference within a recognized context.

In this process, the real normative determination is made at the specification stage where the norm is transformed from its indeterminate state into a determinate and contextualized form through a non-deductive process. The process of adding determinacy to the norm plays a significant role in determining the outcome. As is the case with most issues in the interpretative process, it is unlikely that courts will ever adopt such an approach in overt and express terms and the best that can be hoped is that methodologically this approach can be derived from judicial reasoning. As long as one recognizes the move from the broad, generalized norm to its specific application as requiring a preliminary normative contextualization (the specification process), the methodological pattern is put into place. It is only when courts argue that no *real normative* judgment is involved that one again falls back into a spiral of normative dependence all over again.

The argument that copyright is a human right reflects this normative inter-dependence and must be approached with considerable caution. Very often the argument is used as a masquerade to avoid a selection of normative values or worse still, as part of an inevitability argument, where the preponderance of market forces dictates the content of the human rights discourse. Modern copyright law is clearly market driven and consequentialist. The deontological element is essentially diluted, if not already absent. Attempting to include such a right within the human rights discourse will have the effect of devaluing the deontological approach, considered critical to the human rights discourse.

Nevertheless, one cannot ignore the reality that copyright law and its continuing expansion in light of recent technological developments, though dictated primarily by

market considerations, are here to stay. Failing to recognize this will result in discussions occurring in idealistic realms, oblivious to international developments dictated by the forces of economic globalization. Existent discourses on the conflict remain structurally biased in favour of copyright expansion, driven by market consequentialism. While this is *per se* unproblematic, the failure to recognize the inherent normative hierarchy that this relies on, not only renders nugatory the theoretical supremacy of free expression but also restrains copyright from realizing its objectives, often entangling it in superficial philosophical theories that dilute its essential structure and function. To reverse the trend of copyright expansion may prove to be illusory, unless the structural bias in existent discourses is both recognized and reversed – a seemingly impracticable alternative. The least expected, however, is the readiness to accept the normative hierarchy idea and the fact that this hierarchy is indeed capable of reversing itself in specifically identified situations to suit identifiable public policy objectives. Unless this is achieved, it may only be a matter of time before free expression becomes infused within the doctrines of copyright law, with neither being able to achieve its doctrinal purpose completely.

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[1] *See* MIKE MOORE, A WORLD WITHOUT WALLS 20 (2003). Moore goes on to observe that "…Globalization is not a policy, but a process, which has been going on since man climbed down from trees, emerged from caves and began to organise his life, by harvesting as well as hunting, exchanging goods and ideas…". *See also* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000).

[2] Previous attempts were no doubt made, as in the case of the failed International Trade Organization (ITO) in 1948. These were unfruitful, probably reflective of the importance accorded to *globalization* in these periods.

[3] Indeed these are expressly recognized in the text of the Agreement Establishing the World Trade Organization in its preamble. The creation of an integrated multilateral trading system remains the primary objective of the WTO. *See generally* WTO IN THE NEW MILLENNIUM (2000).

[4] MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 77 (2000).

[5] *Id.* The other two that he identifies are that the economy is *global* – being a network of national economies and that it is *networked* - being a network of businesses.

[6] Argued by some to have arisen through the processes of democratization and de-regulation of the technologies of communication. *See* MOORE, note 1, at 20.

[7] As Castells observes very poignantly, "...What has changed is not the kind of activities humankind is engaged in, but its technological ability to use as a direct productive force what distinguishes our species as a biological oddity; its superior capacity to process symbols." CASTELLS, *supra* note 4, at 101.

[8] Which has in fact been a long-standing premise in most development programmes. *See generally* ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT (1990).

[9] For a general discussion on the issues related to the control of information globally *see* PETER DRAHOS *with* JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002).

[10] *See* CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES? 76 (2002). As the author observes, "...one of the chief implications of the TRIPs agreement is an expansion of corporate control over important knowledge resources. This is at the cost of the public or social availability of such knowledge; knowledge as property is not considered to be scarce and exclusive under the terms of the agreement. "

[11] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2000).

[12] Known in copyright law as the idea-expression dichotomy. This is a critical distinction, but does not mean that the idea can never be protected. It only means that copyright law does not protect the idea; other forms of intellectual property such as patent law, properly protect the idea *per se*. For an overview of the doctrine and its modern ramifications *see* Amaury Cruz, *What's the Big Idea behind the Idea-Expression Dichotomy? – Modern Ramifications of the Tree of Porphyry in Copyright Law*, 18 FLA. ST. U.L. REV. 221 (1990).

[13] Jane C. Ginsburg, *No "Sweat?" Copyright and other protection of works of information after* Feist *v.* Rural Telephone, 92 COLUM. L. REV. 338 (1992).

[14] Often referred to as the 'right to authorship' and the 'right to integrity', respectively.

[15] *See generally* Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601 (2001).

[16] *Id* at 653.

[17] 4 NIMMER, *supra* note 11.

[18] David Lange and Jennifer Lange Anderson, *Copyright, Fair use and Transformative Critical Appropriation*, presented at the CONFERENCE ON THE PUBLIC DOMAIN, Nov. 9 – 11, Duke Law School, 2001. *See also,* David Nimmer, *"Fairest of them All" and other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263 (2003).

[19] MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 12 (1994).

[20] Johan Söderberg, *Copyleft vs. Copyright: A Marxist Critique*, FIRST MONDAY, Volume 7, Number 3 (March 2002), *at* http://firstmonday.org/issues/issue7_3/soderberg/index.html; Brendan Scott, *Copyright in a Frictionless World: Toward a Rhetoric of Responsibility*, FIRST MONDAY, Volume 6, Number 9 (September 2001), *at* http://firstmonday.org/issues/issue6_9/scott/index.html.

[21] ROSE, *supra* note 19, at 13.

[22] *Id.* at 47; Scott, *supra* note 20. As Scott observes, "The effect of the Stationer's Company charter and the ordinance of the Star Chamber was that the Stationer's Company was given a monopoly over printing and broad powers to enforce it."

[23] The Preamble of the Act read, "...An Act for preventing the frequent abuses in printing seditious treasonable and unlicensed books and pamphlets...". *See* ROSE, *supra* note 19, at 31. Rose observes that the enactment was not merely a licensing statute, but in effect a comprehensive enactment dealing with publishing control, a regime of regulation.

[24] ROSE, *supra* note 19, at 32.

[25] *Id.* Authors including Rose have however observed that in reality, Locke was concerned with the monopoly element rather than the censorship argument.

[26] JOHN LOCKE, CORRESPONDENCE 366 (1693) cited from ROSE, *supra* note 19, at 33.

[27] ROSE, *supra* note 19, at 37-38.
[28] LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 147 (1968). Whether this reasoning is acceptable or not, one thing that is clear is that the Crown now grew to be concerned about the power given to the Stationers' Company a century ago – which could have repercussions on free trade. Liberty was viewed in economic terms and consequently, property was deemed to be inherent in liberty.
[29] *Millar* v. *Taylor*, (1768) 4 Burr. 2303.
[30] (1774) 2 Bro. P.C. 129
[31] For instance see generally COPINGER AND SKONE JAMES ON COPYRIGHT (K.M. Garnett et al., eds., 1999).
[32] Ronan Deazley, *The Myth of Copyright at Common Law*, 62(1) CAMB. L.J. 106 (2003).
[33] *Id.* at 132-133.
[34] Even though Blackstone had already by then defined property to involve despotic control of the owner. *See,* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765).
[35] As Rose observes, "The passage of the Statute marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation." ROSE, *supra* note 19, at 48.
[36] *See generally,* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988). The former in the Anglo-Saxon or the common law system, while the latter in the civil law or continental European systems. There do exist other important justifications for intellectual property rights apart from these, but these seem best suited to the discussion on copyright law. There are other approaches to justifying copyright law that have come to assume importance in recent times, most notably the economic approach. This approach however, places little reliance on philosophical theorization and is therefore of little importance in understanding the normative debate which is ultimately couched in distinctly philosophical language. *See generally,* Richard van den Bergh, *The Role and Justification of Copyright: A "Law and Economics" Approach*, 2 INTELL. PROP. Q. 17 (1998).
[37] For a general discussion on the difference in the normative approaches of human rights law and economic laws see Frank J. Garcia, *The Global Market And Human Rights: Trading Away The Human Rights Principle*, 25 BROOK. J. INT'L L. 51 (1999). On the interrelationship between human rights and trade related rights, including the conceptual nuances involved see Hoe Lim, *Trade and Human Rights: What's At Issue?*, 35 J. WORLD TRADE 275 (2001); Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. REV. 537 (2000-2002); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753 (2002). It is often argued that human rights are process based in that they seek to propagate the adherence to normative values, regardless of the consequences, which of course, if attained only add value to the normative claim in question. For a generalized discussion on the deontological and teleological approaches *see* James E. Macdonald & Caryn L. Beck-Dudley, *Are Deontology and Teleology Mutually Exclusive?,* 13 J. BUS. ETHICS 615 (1994).
[38] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27-28.
[39] Described by Locke as the "enough and as good" condition. *See id.* at § 33.
[40] *Id.* at § 37.
[41] LAWRENCE BECKER, PROPERTY: PHILOSOPHICAL FOUNDATIONS 35 (1981).
[42] For a detailed exposition of the Lockean theory as applied to the intellectual property context, see Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65 (1997). *See also,* Lawrence Becker, *Deserving to Own Intellectual Property*, 68 CHI-KENT. L. REV. 609 (1993) (arguing that the application of the standard desert theory to intellectual property may prove to be problematic.).
[43] As is evident from the debate on the true meaning of 'originality' with the divergence continuing between the common law and U.S. positions. *See* Ginsburg, *supra* note 13.
[44] Hughes, *supra* note 36, 315.
[45] For a general discussion on the contextual background to Locke's theory see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137-147 (1990).
[46] Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993). For a more recent review of the Lockean theory in the context of copyright law see Richard Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, IPCENTRAL REVIEW, Volume 1, Number 1 (April 8, 2004), *at* http://www.ipcentral.info/review/v1n1epstein.html.
[47] *Id.* at 1558-1560.
[48] The author argues "...in cases of conflict, the public's liberty right in the common prevails." *Id.* at 1562.

[49] *Id.* at 1606 – 1609.
[50] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 75 (Allen W. Wood ed., 1991).
[51] "The person must give himself an external sphere of freedom in order to have being as Idea." *Id.* at 73.
[52] *Id.* at 99.
[53] *See* Hughes, *supra* note 36, at 349.
[54] As Hegel himself states,

> "The purely negative, but most basic, means of furthering the sciences and arts is to protect those who work in them against *theft* and provide them with security for their property...". HEGEL, *supra* note 50, at 99 – 100.

[55] Hughes, *supra* note 36, at 349.
[56] In the alternative, the question may indeed be asked whether this is an instance of what Upendra Baxi calls 'trade-related market friendly human rights'. *See generally* UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2002).
[57] *See* Michel Foucault, *What is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 124-127 (Donald F. Bouchard ed., 1977). As translated from his original French text, he observes in reference to the origins of the concept of the author, "...First, they are objects of appropriation; the form of property they have become is of a particular type whose legal codification was accomplished some years ago. It is important to notice, as well, that its status as property is historically secondary to the penal code controlling its appropriation.... It was a gesture charged with risks before it became a possession caught in a circuit of property values."
[58] This criticism of extreme autonomous originality, being a farce has existed for some time now. *See* MAY, *supra*, note 10, at 3. *See also* NORTHROP FRYE, ANATOMY OF CRITICISM 96-97 (1957).
[59] He argues that this is something that cannot be defined in terms of right and law. *See* HEGEL, *supra* note 50, at 100.
[60] Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, (Benjamin N. Cardozo School of Law, Jacob Burns Inst. for Advanced Leg. Stud., Working Paper No. 80, 2004).
[61] *See* Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1301-1304 (2003).
[62] *See id.* at 1307. For a general discussion of a utilitarian justification for intellectual property, see Patrick Croskery, *Institutional Utilitarianism and Intellectual Property*, 68 CHI-KENT. L. REV. 631 (1993).
[63] Which seems to be the underlying idea behind a series of meanings attributed to the word and to connected phrases by several dictionaries. *See* COLLIN'S PAPERBACK DICTIONARY 215 (1997).
[64] Article 19 of the Universal Declaration of Human Rights (UDHR) reads as follows:

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

[65] Article 10 of the ICCPR deals with the same.
[66] In the sense that it can even be meaningless gibberish and qualify for such protection. The subject matter of the communication is irrelevant and need not even exist.
[67] *See generally* Cruz, *supra* note 12.
[68] This is known as the 'doctrine of merger' in copyright law.
[69] As is obvious from the various provisions in conventions that relate to the right to free expression. An instance is Article 19 of the UDHR, discussed earlier, which makes express reference to an 'idea'.
[70] See Article 2(2) of the Berne Convention for the Protection or Literary and Artistic Works (1886). This requirement is embodied in the language of the U.S. Copyright Act 1976 as well; *see* 17 U.S.C. § 102(a).
[71] Article I, Section 8, Clause 8 reads as follows:

> "Clause 8: 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;"

[72] It reads as follows – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
[73] An argument such as this would have importance in the Indian context, where Article 19(1)(a) of the Constitution speaks of the right to free speech and expression, while copyright law finds no mention at all in the constitution.

[74] This classification is derived from the work of Robert Denicola. *See* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979). He classifies the approaches into internal reconciliations and external accommodations.

[75] Since this would in itself take up an entire study and be of little value to the subject in study.

[76] For a general overview of the First Amendment jurisprudence *see* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). *See also,* DANIEL A. FARBER, THE FIRST AMENDMENT (2002).

[77] For instance, see *New York Times* v. *United States*, 403 U.S. 713 (1971); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[78] In a sense, a concerted attempt to avoid recognizing the conflict may be an implicit recognition that while free expression remains theoretically supreme, in actual practice commercial interests represented by copyright law need to be given their due place, unimpeded by libertarian concerns.

[79] *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[80] 562 F.2d 1157 (9th Cir. 1977).

[81] To use the words of the court, "...the idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment." *Id.* at 1170.

[82] 471 U.S. 539 (1985).

[83] Denicola, *supra* note 74, at 292. The author cites cases where this did actually occur and the courts held that no copyright protection could exist at all – another attempt to evade the issue altogether. One such instance is the case of *Herbert Rosenthal Jewellery Corp.* v. *Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

[84] *See supra* text accompanying note 68.

[85] *See generally* Rosenfield, *The Constitutional Dimensions of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW REV. 790 (1975). The author argues for recognising fair use as an element of the First Amendment.

[86] NIMMER, *supra* note 11, at 1-81. For a general discussion on the fair use doctrine and its varied application *see,* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[87] Traditionally, the fair use determination has depended on (1) the purpose of the use; (2) the nature of the work in question; (3) the amount and substantiality of the copying actually done; (4) the effect of the use on the market for the original work of the plaintiff. No element of public interest can be implied into any of these requirements. The requirements find statutory mention in 17 U.S.C. § 107 (1976).

[88] 366 F.2d 303 (2nd Cir. 1966).

[89] 434 F.Supp. 217 (D.N.J. 1977).

[90] 293 F.Supp. 130 (S.D.N.Y. 1968).

[91] *Id.* at 146.

[92] *See* Denicola, *supra* note 74, at 304.

[93] Denicola, *supra* note 74, at 315. He observes, "It is doubtful that any doctrinal formulation of the first amendment privilege could eliminate the influence of judicial perceptions of the merit or importance of the defendant's work."

[94] For instance, the observations of the court in the case of *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977), though the final decision seems to have been prompted by the application of the fair use doctrine. One sees the approach in some of the decisions of French courts however, discussed later.

[95] MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 74-75 (1996). *See also*, Michael J. Perry, *The Constitution, the Courts and the Question of Minimalism*, 88 NW. U.L. REV. 84 (1993).

[96] *Id.* at 107. He observes,

> "It is the process of "shaping" the norm, of rendering the norm determinate in a context to which it is relevant but in which it is (until specified) indeterminate. In adjudication, the process of specification is the process of deciding what a legal directive relevant to but indeterminate in the context of the conflict to be resolved shall mean in that context, what resolution of the conflict the directive, in conjunction with all the other relevant legal norms, shall require."

[97] It would be interesting to note the illustration offered by Perry. He notes that an indeterminate norm may merely say that the Government is forbidden from prohibiting a religious practice without a compelling justification. This norm is then *specified* normatively to now read – that the Government is forbidden from preventing the sacramental use of wine at a Mass. This specification is different from an actual application,

which turns on determining whether the case before the court was one where the wine was used in a sacramental sense at a Mass. *See id.* at 110.

[98] Other authors make reference to the same principle, but under different names such as *determinatio* or concretization of a principle. *See* Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 548 (1990).

[99] 537 U.S. 1 (2003).

[100] *Id.*at 31. As the court observed, "To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D. C. Circuit spoke too broadly when it declared copyrights categorically immune from challenges under the First Amendment... ...But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."

[101] Though of course, if it were to be applied, the legitimacy and practicality of the proposition would be further reinforced.

[102] *See generally* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press*, 17 U.C.L.A. L. REV. 1180 (1970).

[103] Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

[104] *Id* at 47.

[105] Or CTMs in short.

[106] Thus, if a software were bought on a Compact Disk (CD), these measures would ensure that it could not be copied onto another medium and would have to be run only in conjunction with the original CD with which it was purchased.

[107] Such as in the infamous § 1201 of the U.S. Digital Millennium Copyright Act (DMCA), which deals with violations relating to circumventions of, copyright protection systems. These forms of protection were based on the WIPO Copyright Treaty of 1996.

[108] *See generally* LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001); LAWRENCE LESSIG, CODE AND OTHER LAW OF CYBERSPACE (1999); JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

[109] 273 F.3d 429 (2nd Cir. 2001). The facts of this case related to the DVD (Digital Video Disc) technology. The DVD technology essentially employed a form of encryption on video compact disks so as to ensure that the movie on the disc could not be copied from the disc. The defendants in this case consisted of software programmers and an online magazine. The programmer had developed a software programme to neutralise the locking mechanism of the DVD encryption technology, called the DeCSS programme (short for De-Content Scramble System). Having made this software, he posted the code onto the publisher's web site from where it could be freely accessed by anyone on the Internet. A claim was brought against the magazine for copyright infringement and the issue of first amendment protection was raised therein.

[110] § 1201 of the DMCA.

[111] *Universal City Studios*, *supra* note 109, at 451. "...Unlike a blueprint or a recipe, which cannot yield any functional result without human comprehension of its content, human decision-making, and human action, computer code can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet. The only human action required to achieve these results can be as limited and instantaneous as a single click of a mouse."

[112] It found that traditional forms of fair use such as parody or fair comment were still allowed and nowhere restricted. What was restricted was a direct copying for personal purposes. This was still possible, but in a non-digital format. The court seems to have found that that was sufficient to satisfy the fair use requirement and that an identical format was nowhere necessary for implementation of the fair use.

[113] For a general discussion of the right to fair use and its different understandings *see* M.B.W. Sinclair, *Fair Use Old and New: The Betamax case and its Forebears*, 33 BUFF. L. REV. 369 (1984); William Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).

[114] As the court did in *Universal City Studios*, *supra* note 109, at 459. For a more detailed elucidation of the operation of the fair use doctrine and its inadequacies vis-à-vis anti-circumvention provisions see David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 730-732. (2000).

[115] *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L. J. 519, 543-547 (1999).
[116] As amended by the Australian Copyright (Digital Agenda) Act, 2000.
[117] *See* Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, (1999) at 60.
[118] As defined in Section 10(1) of the Australian Copyright Act of 1968.
[119] *See generally* LESSIG, *supra* note 108.
[120] *See,* Philip J. Weiser, *The Internet, Innovation and Intellectual Property Policy,* 103 COLUM. L. REV. 534 (2003) (arguing for the adoption of a 'competitive platforms model' for the Internet, that blends proprietary control with a commons-based approach circumstantially).
[121] *See generally* Lev Ginsburg, *Anti-Circumvention Rules and Fair Use*, 2002 UCLA J. L. & TECH. 4; Jane C. Ginsburg, *Copyright Legislation for the Digital Millennium*, 23 COLUM.-VLA J.L. & ARTS 137 (1999); David Nimmer, *Back From the Future*: *A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855 (2001); David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401 (1999).
[122] P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 343, 344 (Rochelle Cooper Dreyfuss et al., eds., 2001).
[123] For a general comparison of the two systems *see* Rudolf Monta, *The Concept of Copyright Versus the Droit d'Auteur*, 32 S. CAL. L. REV. 177 (1958-59).
[124] MAKEEN FOUAD MAKEEN, COPYRIGHT IN A GLOBAL INFORMATION SOCIETY 7 (2001).
[125] *Id.* As the author observes, "In an attempt to preserve the *status quo* the Parisian publishers advanced the argument of the authors' natural property right as a justification for the renewal of their privileges."
[126] *Id* at 8. It is important to note that at this stage, French copyright law did not recognize the idea-expression dichotomy for protectability and also believed that ideas were a gift from God, revealed through the individual author.
[127] *Id* at 9. This was the law of 1793, passed after the French Revolution.
[128] Thomas Dreier, *Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 295, 299 (Rochelle Cooper Dreyfuss et al., eds., 2001).
[129] Such as the need to have a single intellectual property regime across the German provinces. In this context, states emphasized that authorial property was an inherent natural right, and consequently that new legislation did not have to create it, but merely recognize it. *See id* at 300.
[130] *See generally* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991(1990).
[131] *Id.* The author characterises this distinction as one between a 'utilitarian approach' to copyright and a 'naturalist' one as is the approach in Europe.
[132] It is pertinent in this context to note that the introduction of the entire debate on moral rights, as they exist in Anglo-Saxon copyright law, derives from the continental system understanding of copyright law as a whole. This has resulted in the existent hybrid system, which is clearly more consequentialist than it is deontological. *See generally*, Gunlicks, *supra* note 15, at 604. As the author observes, "...The French and German systems regard moral rights as the heart and soul of copyright law. To the Europeans, moral rights symbolise the author-oriented nature of their copyright systems. Theoretically, under the European system, the very basis of copyright law is an author's moral right."
[133] Which reads as follows;

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

[134] The German courts in *Bild Zeitung*, Court of Appeal (Berlin), [1969]54 UFITA 296 and *Terroristenbild*, Landgericht Berlin, [1978] GRUR 108; the Dutch court in *Boogschutter*, [1994] INFORMATIERECHT/AMI 51 both *cited from* Hugenholtz, *supra*, note 122, at 356.
[135] Specifically, *Jean Fabris* v. *Sté France 2*, RIDA 2000 n°184 p 374 (February 23, 1999).
[136] Hugenholtz, *supra*, note 122, at 358.
[137] Dalloz 2001 n°30 p 2504 (May 30, 2001).
[138] *Jean Fabris, supra* note 135.
[139] Hugenholtz, *supra* note 122, at 360-363.
[140] U.K. Human Rights Act 1998 (c. 42).
[141] Section 3(1) of the Act.
[142] Section 4(2).
[143] *See* Section 4(6)(a) of the Act, which specifically provides for the same. The most expansive forms of judicial review would be as recognized in the United States Constitution or in the Constitution of India, both written constitutional documents.
[144] Hereinafter, the CDPA.
[145] Section 87 of the CDPA.
[146] Which reads as follows:

> "(3) Nothing in this part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise;"

[147] It is important to note that this provision would not qualify the anti-circumvention provisions, which are contained in Part VII of the CDPA. That part specifically provides that only certain parts of the traditional copyright law provisions apply to anti-circumvention and Section 171(3) does not find mention in that list. *See* Section 296(6) of the CDPA.
[148] [2001] EWCA Civ. 1142 (July 18, 2001).
[149] *Ashdown* v. *Telegraph Group Ltd.*, [2001] 2 W.L.R. 967, 972 where the court observed, "...It does not follow that because Article 10 is engaged the facts of each case have to be considered to determine whether the restriction imposed by the law of copyright goes further than what is necessary in a democratic society."
[150] For a general discussion of the significance of this recognition and a comparison with the American experience, see M.D. Birnhack, *Acknowledging the conflict between copyright law and freedom of expression under the Human Rights Act*, 14 ENT. L. REV. 24 (2003). *See also,* Jonathan Griffiths, *Copyright law after Ashdown - time to deal fairly with the public*, 3 INTELL. PROP. Q. 240 (2002) (discussing the implications of *Ashdown* on the interpretation of the fair dealing defence to infringement).
[151] *Ashdown*, *supra* note 149, at [82].
[152] Article 10.2 of the ECHR.
[153] *See* Herman Cohen Jehoram, *Freedom of Expression in copyright law*, [1984] 1 EUR. INTELL. PROP. REV. 3.
[154] Libertarian in the European sense, as Castells points out, driven by the general purpose of securing of freedom as a goal – from the state and otherwise and not necessarily a mere reference to a systematic distrust of government, as American libertarianism would seem to postulate. *See* MANUEL CASTELLS, THE INTERNET GALAXY 33 (2001).
[155] Article 27(2), which reads as, "...Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
[156] *See* Francois Dessemontet, *Copyright and Human Rights*, *at* <http://www.unil.ch/cedidac/articles/copyrightandhumanrights.pdf> (last visited June 10, 2003).
[157] *See* Dreier, *supra* note 128, at 299.
[158] *See* Robert L. Ostergard, *Intellectual Property: A Universal Human Right,* 21(1) HUM. RTS. Q. 156, 175 (1999)
[159] *See*, Ernst Ulrich Petersmann, *From "Negative" to Positive "Integration" in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?*, 37 COMMON MKT. L. REV. 1363 (2000) [hereinafter Petersmann]; Ernst Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration,* 13 EUR. J. INT'L L. 621 (2002).
[160] *See,* O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029 (1999).

[161] Petersmann, *supra* note 159, at 1376.

[162] Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002). The author observes that while there may be nothing wrong with such instrumentalism as such, it should be understood as distinct from the human rights discourse. For an equally derisive rejoinder to Alston's piece criticizing his work, see Ernst Ulrich Petersmann, *Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 EUR. J. INT'L L. 845 (2002).

[163] BAXI, *supra* note 56, at 147.

[164] *See* Petersmann, *supra* note 159, at 1376.

[165] *See also* Benjamin Hill, *An Analysis of Intellectual Property as a Human Right, in* GLOBAL AND LOCAL DISCOURSES ON HUMAN RIGHTS (Sue Darlington and Flavio Risech-Ozeguera eds., 2001). *See also generally*, Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, INTELLECTUAL PROPERTY AND HUMAN RIGHTS, WIPO PUBLICATION NO. 762 (E) Geneva: 1999; Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the benefits of Science*, INTELLECTUAL PROPERTY AND HUMAN RIGHTS, WIPO PUBLICATION No. 762 (E) Geneva: 1999.

[166] *See generally* Monica Kilian, *A Hollow Victory For The Common Law?: TRIPs And The Moral Rights Exclusion*, 2 J. MARSHALL REV. INTELL. PROP. L. 321 (2003).

[167] For a general discussion on the expansion of copyright in the hands of media conglomerates see Fiona Macmillan, *Copyright's Commodification and Creativity*, Oxford Intellectual Property Research Centre Working Paper Series No. 2 January 2003 *at* <http://www.oiprc.ox.ac.uk/EJWP0203.html> (last visited June 10, 2003).

[168] BAXI, *supra* note 56, at 146.

[169] As in the case of the recent Sonny Bono Copyright Term Extension Act in the U.S.

[170] Such as the emergence of anti-circumvention measures.

[171] As one author observes,

> "Ongoing copyright industry consolidation on the one hand, and the explosion of digital dissemination of expression not dependent on the copyright incentive on the other, have vitiated the argument that, whatever its free speech costs, copyright ultimately serves to underwrite our system of free expression." Netanel, *supra* note 103, at 13.

[172] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

[173] *Id.*

[174] *See for instance*, L. Ray Patterson, *Copyright in the New Millennium: Resolving the conflict between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703 (2001). The author argues that copyright should play a role akin to the doctrine of misappropriation that is often invoked.