Copyright as an Engine of Free Speech: An English Perspective

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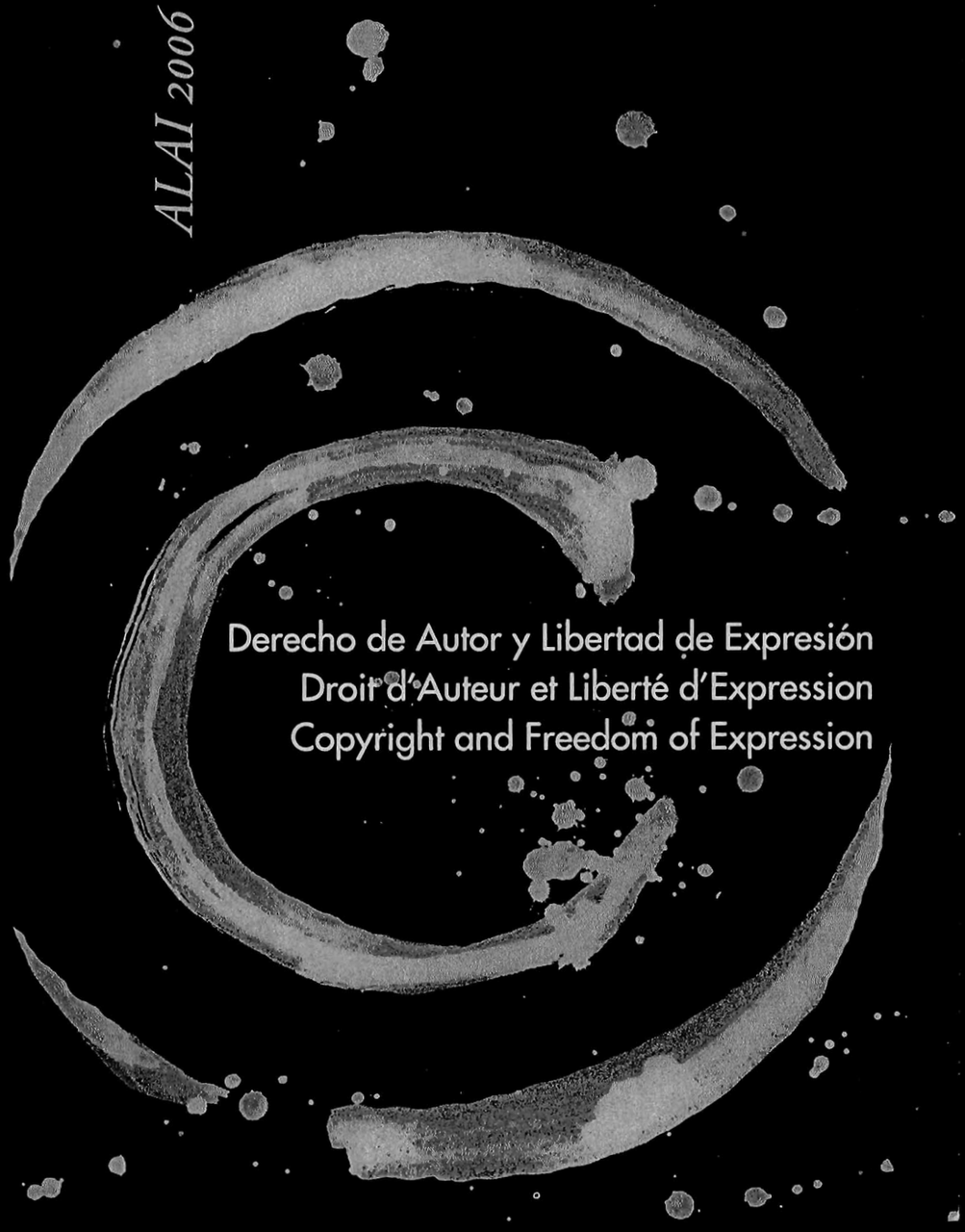

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COPYRIGHT AS AN ENGINE OF FREE EXPRESSION: AN ENGLISH PERSPECTIVE

Speech

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1. INTRODUCTION

In law, what plea so tainted and corrupt
But, being seasoned with a gracious voice,
Obscures the show of evil? [1]

Copyright theorists often argue that copyright compromises free speech. This is especially true in the United States where many academics, and some jurists, have felt alarmed at the encroaching boundaries of copyright law due to the extension of the term of copyright, and by the expanding range of exclusive rights.[2] At least one free speech jurist argues that copyright law compromises free speech principles, and some accommodation of the two rights should be reached.[3] The corollary argument is rarely put forward i.e. copyright is the basis for alternative ways of treating, defining and dealing with creative works which allows more free expression.

This short paper deals with the latter argument from a primarily English perspective. This perspective may appear slightly quixotic to scholars from both common law and civil law systems as copyright, and freedom of

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1 W. Shakespeare, *The Merchant of Venice,* Act 3, Scene 2.

2 M. Birnhack, "The Copyright Law and Free Speech Affair: Making-up and Breaking-up", 43 *IDEA: Journal Of Law And Technology* 233 (2003).

3 E. Barendt, "Copyright and Free Speech Theory", in J. Griffiths and U Suthersanen, *Copyright And Free Speech: Comparative And International Analyses,* Oxford Univ Press, 2005, p. 11.

expression, have only been statutorily recognised as "human rights" since the enactment of the Human Rights Act 1998 (HRA). There has, historically, been no positive law in the United Kingdom prior to the HRA, such as a Bill of Rights or constitution, recognising human rights.[4] Rather since our Glorious Revolution of 1688, the unwritten constitution of the UK, in reliance on statutory instruments and judicial decisions, has always stated that Parliament was sovereign and unfettered. As one commentator has stated, the British constitution can be summed up in eight words: What the Queen in Parliament enacts is law.[5]

In accordance with such a principle, courts have never been overly concerned with human rights in the absence of Parliamentary regulation in this area. Instead, concepts such as the right to privacy and freedom of expression relied on the recognition of negative civil and political liberties under common law: unless and until there is a law against what you are doing, you may be free to do anything.[6] As Barendt notes in his treatise on *Freedom of Speech*: "[...] English law took little or no notice of such concepts as "freedom of speech" and "liberty of the press". Legal commentary was then as silent, it may be added, as the statute book".[7]

Thus, from this historical perspective, the Human Rights Act 1998 should perhaps be considered one of the few constitutional documents in the United Kingdom.[8] The Act entered into full force in the United Kingdom in October 2000, and incorporated for the first time into British legal history,

4 For a pre-1988 HRA perspective, see M. Zander, *A Bill Of Rights?*, Sweet & Maxwell, 3rd ed., 1985.

5 V. Bogdanor, "Britain and the European Community" in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, Oxford University Press, 3rd ed., 1994, pp. 3-4.

6 Cases which recognised a right to freedom of expression under common law include: *Attorney General v. Guardian Newspapers Ltd.* (No 2) [1990] 1 AC 109; *Reynolds v. Times Newspapers* [1999] 3 WLR 1010 (HL); *R v. Secretary of State for the Home Department, Ex p Simms*, [2000] 2 AC 115 (HL). A very early Parliamentary recognition of freedom of speech but in the limited capacity of Parliamentary privilege is in Article 9, of the Bill of Rights, February 13, 1689 which provides that the freedom of speech and debates and proceedings in Parliament are not to be impeached or questioned in any court of place outside Parliament; see M. Ashley, *The Glorious Revolution Of 1688*, Hodder & Stoughton, 1966, p. 208. Oliver and Drewry point to this as being another reinforcement of the sovereignty of Parliament principle.

7 E. Barendt, *Freedom Of Speech*, Oxford University Press, 2005, p. 40.

8 The only comparison perhaps being the European Communities Act 1972 – see *R v Transport Secretary ex p. Factortame Ltd.* [1991] 1 AC 603, 638, 643-644.

the fundamental freedoms protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), including freedom of expression.[9]

2. THE PUBLIC AND HUMAN RIGHTS NATURE OF COPYRIGHT LAW

Copyright law promotes both private and public national and international interest. It serves not only authors, performers, producers and broadcasters, but also the common weal. As the US Supreme Court has previously noted: "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts".[10]

This dual aspect of copyright law is recognised in international copyright law. The preamble to the 1996 WIPO Copyright Treaty notes that there is: "a need to maintain a balance between rights of authors and the large public interest, particularly education, research and access to information"

Moreover, it is impossible to ignore the public nature of copyright law if one accepts the argument that copyright law can be justified under the International Bill on Human Rights and the European Convention on Human Rights. There is further muted international legal support for the proposition that copyright is a human right within the Solemn Declaration adopted in the 1986 centenary Assembly of the Berne Union where member states declared, *inter alia*, the following: "Solemnly declare that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creation be recognized and effectively protected both in their own country and in all other countries of their world;"[11]

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9 Although the United Kingdom was a signatory of the European Convention on Human Rights from November 4th, 1950, it was never imported into domestic law.

10 *Fox Film Corp. v. Doyal*, 286 US 123, 127 (1932) and approved in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 US 417 (1984).

11 The declaration is reprinted in whole in *Cérémonies du centième anniversaire de la Convention de Berne*, 22 *Copyright* 367-375 (1986).

From this general rhetoric, we can extrapolate the following three bases under human rights law as to why enlightened and democratic societies confer rights not only on creators but also on performers, producers and broadcasters.[12]

2.1. Copyright as a civil and political human right

It is the natural right of an individual to have some claim to the fruits of his labour. Such a right may be a strong exclusive property right, or a lesser right to object to the misappropriation of his labour by others, or a claim to an equitable remuneration or some other restitutionary claim.[13] This type of claim can be equated to the body of classical (and individual) civil and political rights - the traditional bastion developed by liberals during the Enlightenment - which guarantees the rights of the private individual such as the right to life, liberty and human dignity.[14] These rights have also always been advocated by the Western states as constituting not only the foundations of democracy but also the rights of the creators. Under German law, for instance, the German courts have expressly accepted that the rights to human dignity and personal development also constitute the basis for author's rights.[15]

2.2. Copyright as a social, economic and cultural right

The economic and moral rights of authors are recognised, for example, as economic and cultural rights under Article 27, Universal Declaration of

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12 For a further discussion on the human rights basis of copyright law, see U. Suthersanen, "Human Rights and International Copyright Law", in J. Griffiths and U. Suthersanen (eds.), *Copyright And Free Speech: A Comparative And International Analyses*, Oxford University Press, 2005.

13 T. Hobbes, *The Leviathan*, 1652. J. Locke, *The Two Treatises*, 1690.

14 "[I]t is the privilege and proper condition of a human being... to use and interpret experience in his own way....He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation". J.S. Mill, *On Liberty*, pp.70-71, 124-25.

15 This is a natural extension of the Hegelian notion that author's rights are for the protection of the authorial personality, rather than for the author's labour and skill – see G. Hegel, *Philosophy Of Right*, (tr. T.M. Knox) Oxford, Clarendon Press, 1952, paragraph 68. The intersection between moral rights and human rights is clearly seen in *Re Neo-Fascist Slant In Copyright Works*, where the German Regional Court of Appeal, held that an author's right was based on a mixture of fundamental constitutional principles as well as fundamental freedoms. Case 11 U 63/94, Oberlandesgericht (Regional Court of Appeal), (Frankfurt Am Main), 6 December 1994, [1996] ECC 375.

Human Rights (UDHR), and Article 15, International Covenant on Economic, Social and Cultural Rights (ICESCR). Moral rights protection is further boosted by Article 17, ICESCR. UK copyright law, which ordinarily tends towards a more economic based reasoning, accepts that one basis of copyright law is the fundamental right to enjoyment of property under the 1st Protocol, European Convention on Human Rights (ECHR).[16]

A further comment should be made in relation to Article 15, ICESCR. This is a wide provision which enjoins States to recognize the right of everyone to:

a. To take part in cultural life;

b. To enjoy the benefits of scientific progress and its applications;

c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 15 identifies a need to balance the protection of both public and private interests in intellectual property. The traditional interpretation of Article 15 is that it promotes access to scientific and cultural goods, whilst guaranteeing the protection of those "authors" (including inventors, designers, etc) of scientific and cultural goods, without specifying the modalities of such protection.[17] This reading of the law allows one to regard intellectual property rights as human rights This view is further reinforced in national and regional jurisprudence. In a recent groundbreaking decision, the European Court of Human Rights held that intellectual property "undeniably attracted the protection of Article 1 of Protocol No. 1 [of ECHR]". Furthermore, this protection extends to a trade mark registration as well.[18]

16 *Ashdown v Telegraph Group Ltd* [2002] ECDR 32, The European Convention on Human Rights (ECHR), in contrast, has no equivalent provision in respect of intellectual property rights though courts have accepted that there is a muted basis for copyright in Article 1, 1st Protocol, ECHR, which promises peaceful enjoyment of "possessions".

17 The drafting history of this provision shows that one original intention was that the provision should guarantee a moral right to the scientist and the artist, against plagiarism, theft, mutilation and unwarranted use. See M. Green, "Drafting History of the Article 15(1)(c) of the International Covenant", UN Doc. E/C.12/2000/15 (Oct. 9, 2000), pp.7-8.

18 See *Anheuser-Busch Inc. v. Portugal*, European Court of Human Rights, Grand Chamber, No. 73049/01, 11 January 2007.

Perhaps a more extreme reading of Article 15, ICESCR would allow one to recognise the entrepreneurial efforts of producers and broadcasters, and the role played by these corporations in disseminating the creative works of individual authors and performers. Indeed, Article 15(2) ICESCR calls for States to take steps to achieve the full realization of this right including "those necessary for the conservation, the development and the diffusion of science and culture".

2.3. Copyright as a collective human right

Intellectual property rights as a whole, including copyright, can be justified on the grounds of "collective human rights". This last basis of rights usually reflects post-colonial demands to secure rights to collectives such as national minorities (or indigenous groups) or rights to development or self-determination.[19] This category of rights reminds us that the term "human rights" should not merely refer to individualistic concerns but also to the protection of activities and relations that make individuals' lives more valuable since such rights straddle both private, individual interests and public communitarian interests.[20] Indeed, it is recognised that an emphasis on individual rights undermines both economic and social values, many of which can only be enjoyed collectively. An example of this approach can be seen in respect of claims of indigenous peoples to the right of property, including copyright protection to indigenous artworks.[21]

3. COPYRIGHT NEEDS FREEDOM OF EXPRESSION

Both classical and modern rights theories state that the existence and exercise of some rights presupposes the existence of other rights. Property rights are accompanied by rights of freedom which are, in turn, accompanied by welfare rights. Drahos points out, for example, that the right to education aids the meaningful exercise of a right of freedom of speech.[22] He further

19 J Morsink, *The Universal Declaration of Human Rights*, Philadelphia, Univ. of Penn Press, 1999, Chapter 3, pp. 210-212.

20 S. Lukes, "Five fables about human rights", 40 *Dissent* 427 (1993).

21 For a discussion of this, see J Griffiths, "Copyright and its complex and varying contexts, in F. Macmillan and K. Bowrey (eds.), *New Directions in Copyright Law*, Edward Elgar, 2006.

22 P. Drahos, "Intellectual property and human rights", 3 *Intellectual Property Quarterly* 349-371 (1999).

argues the rights created through the enactment of intellectual property laws are instrumental rights, and as such should serve the interests and needs that citizens identify through the language of human rights as being fundamental for example, access to health and to education. Thus, intellectual property rights should be pressed into service on behalf of human rights. This is not necessarily converse to economic theory. Although classical capitalist theory dictates that market regulation prioritise private interests above public interest, the best climate for the production of knowledge is not only a market structure with legal protection but also a market structure which allows for the taking and borrowing of knowledge. The creation of all intellectual property depends on fundamental human rights of others being respected such as the right to freedom of expression, and the right to education.

Article 19, UDHR and Article 19 (2) of the 1966 International Covenant on Civil and Political Rights (ICCPR) guarantee the right to freedom of expression. This right is wide: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, *receive and impart information and ideas* of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

Copyright law is implicitly recognised as part of this package in that the right to freedom of expression is condition on respecting the rights or reputations of others which are prescribed by law and are necessary.[23] The interaction is further recognised in Article 15, ICESCR which states as follows: "The States Parties to the present Covenant undertake to respect *the freedom indispensable for scientific research and creative activity*".

Within the European framework, many of the fundamental freedoms guaranteed under the ECHR as well, in that most of the freedoms are qualified rights but also antithetical in character. This is overwhelmingly so in the case of copyright which is obviously affected by Article 10 of the ECHR which guarantees the right to freedom of expression. On the other hand, Article 10 (2) allows that the exercise of freedom of expression be subjected to restrictions as prescribed by law and are necessary in a democratic society *for the protection of the rights of others*. Presumably, this includes the rights of the copyright owner (including performers and producers). Furthermore Article 1 of the First Protocol ECHR provides that no one should be deprived of possessions except in the public interest.

23 Art. 19(3), ICCPR.

4. INTRINSIC TOOLS TO RECOGNISE FREEDOM OF EXPRESSION- THE UK *ASHDOWN* DECISION

Authors' rights under copyright law are not absolute but are subject to refinements and curtailments. Examples of these under national laws include the "idea-expression dichotomy" (international) or the fair dealing (UK) or fair use (US) defences, or *kleine Muenze* or *freie benutzung* (Germany).[24]

Some of these statutory (and sometimes judicial) rules, exceptions and limitations allow courts to claim that freedom of expression is recognised within copyright law.

Nevertheless, this is a tricky balancing act as was shown in the UK *Ashdown* decision.[25] The case involved the attempt by Paddy Ashdown (a former leader of a British political party called the Liberal Democrat Party) to obtain an injunction to stop a British newspaper *The Daily Telegraph* from printing a verbatim copy of a confidential memo between Ashdown and the then British Prime Minister Tony Blair.

The Court of Appeal acknowledged the internal conflict within the human rights legislation in that most of the fundamental freedoms, in similar to copyright law, were qualified rights, and hence it fell to the court to undertake a balancing exercise. It held that while Article 10, ECHR guarantees the right to impart information and ideas, Article 10(2) curtailed this right in instances where there was an equal duty not to infringe the rights of others such as the right to protection of property as guaranteed by Article 1 of the First Protocol, ECHR. In its opinion, the infringement of copyright constituted interference with the "peaceful enjoyment of possessions", and hence was a breach of Article 1, First Protocol.

4.1. Idea-expression

Some of the Court's pronouncements are nevertheless puzzling. For instance, the Court accepted that both copyright and the right to freedom of expression were antithetical in nature because "it prevented anybody except the owner from expressing the information in the same form as that which it protected. Copyright, however, served only to protect the author's specific verbal formula of the written work; it did not normally prevent publication

24 See chapters 7 and 10, J.A.L. Sterling, *World Copyright Law*, Sweet & Maxwell, 2nd ed., 2003.

25 *Ashdown v Telegraph Group Ltd.* [2002] ECDR 32.

of the information in an alternative form and would not normally, therefore, encroach too significantly on the freedom of expression"

Thus, the premise appears to have been that the right to freedom of expression would usually be automatically preserved in relation to using a copyright work as copyright law did not forbid a party from using information and ideas, but rather the form in which those ideas and information are set out. The *Ashdown* Court emphasised that the concept of freedom of expression was limited to "ideas" and "information", and it did not allow one to misappropriate the "the form of words devised by somebody else".

Of course, the Court is clearly signalling the importance of maintaining the idea-expression principle in copyright law as it is one means of ensuring the principle of freedom of expression. Yet, we know that the idea-expression dichotomy is fiendishly difficult to apply. Moreover, it makes no sense whatsoever in decisions involving copying of *original elements* or *non-literal* copying where the expression is not copied.[26]

However, the *Ashdown* Court went further to admit that Article 10, ECHR can, in some circumstances, take precedence over the property right to allow the taking of the form or expression of the work. In such situations, the *Ashdown* Court agreed that parties may, in rare circumstances, and *despite* the express statutory exceptions under the copyright law, use the copyright work verbatim based on the right of freedom of expression.[27] It cited, with approval, the European Court on Human Rights in *Fressoz and Roire v. France*[28] with respect to Article 10, ECHR: "In essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism".[29]

26 See for instance *Designers Guild Limited v Russell Williams (Textiles) Limited, Designers Guild Ltd.* [2001] 1 WLR 2416, where the House of Lords held that "the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work".

27 [2001] HRLR 57 (CA), paragraphs 28, 39-45.

28 5 BHRC 654 (1999).

29 *Ibid.*, paragraph 54.

The *Ashdown* Court of Appeal then proceeded further to identify the second plank within UK copyright law which accommodated freedom of expression concerns – the exceptions within the copyright law. Of particular importance, the Court held, were the defence of fair dealing as set out in s. 30 of the UK Copyright, Designs and Patents Act 1988, and the common law defence of "public interest" which subsisted by virtue of s. 171(3) of the said same Act.

4.2. Summary of "fair dealing"

The *Ashdown* court's reasoning as to whether copying was to be deemed fair or unfair is important as it was applied later *in toto* to the public interest and human rights arguments. The court concluded that the publication of the copyright work was unsupportable under the fair dealing defence for a variety of reasons.

A brief explanation of the UK fair dealing concept is perhaps in order here. Unlike the concept of "fair use" under the U.S. Copyright Act 1976, fair dealing is a circumscribed defence which is available only for the purposes of private study, research, criticism, review and reporting of current events. First introduced under the 1911 Copyright Act[30], Parliament's intention in introducing the defence of fair dealing was clearly to codify pre-existing case law which had accepted that certain types of substantial takings would be condoned on the grounds of "fair quotation"[31] or "real and fair abridgement".[32] It is unclear whether the pre-1911 cases were intended by the courts to offer a more generous defence more akin to the US "fair use" type of defence,[33] or a narrow defence limited to specific cases. Nevertheless, "use" of copyright works without authorisation was reduced to the current formula of "fair dealing" for narrowly defined purposes.

"Fair dealing" is not defined within the statute [34]and guidance must be sought solely from the courts and academic treatises. Many of the decisions discussing fair dealing have adopted a reasonable approach as to the scope of

30 s.2, 1911 CA; and later, in s.6, 1956 CA.

31 *Bradbury v. Hotten*, 8 LR Ex 1 (1872).

32 *Gyles v. Wilcox*, 2 Atk. 141 (1741).

33 Robert Walker LJ agreed, in *Pro Sieben v. Carlton* [1999] RJQ 610, 618, that there had been a general "fair use" doctrine under pre-1911 CA.

34 Sections 29 and 30, Copyright, Designs and Patents Act 1988.

the "fair dealing" defence. The Court of Appeal, in *Hubbard v Vosper*[35], were particularly generous in mapping the scope of the fair dealing defence:

- the defence is not confined to published works, but can apply to the publication of unpublished works;
- "fair dealing" is a question of degree and must be a matter of impression, with the court looking to the number and extent of quotations and extracts;
- is the use for comment, criticism or review as opposed to rival or competitive use;
- if a defendant has the reasonable defences of fair dealing and public interest, they should not be restrained from publication by interlocutory injunction because such a defendant "if he is right, is entitled to publish it: and the law will not intervene to suppress freedom of speech except when it is abused".[36]

Clearly, the appellate court in Hubbard was conscious of the nexus between fair dealing, public interest and freedom of speech; the court, however, went no further with this statement. It was left to future courts and laws to determine whether the fair dealing defence is synonymous with freedom of expression.

4.3. Aligning fair dealing with freedom of speech

The *Ashdown* court was critical as to the substantiality of the taking, as well as the motive of the defendant, observing that the defendant had appropriated the most important passages in the minute had been used to make the "article more attractive to read and will have been of significant commercial value in enabling the Sunday Telegraph to maintain, if not to enhance, the loyalty of its readership".[37]

However, why should the substantiality of copying or the commercial purpose of the copying be relevant in considering "freedom of expression" concerns? Moreover, surely it goes without saying that the question of substantiality of taking will nearly always be answered in favour of the claimant as infringement only occurs when a substantial part of the

35 *Hubbard v Vosper* [1972] 2 QB 84, 94.

36 *Ibid.*, per Denning M.R., p. 97.

37 [2001] HRLR 57 (CA), paragraph 72.

copyright work, qualitatively and quantitatively, has been taken!

The *Ashdown* Court further held that the newspaper's publication competed with the claimant's future market for derivative works and that the defendant's scoop had devalued the memoirs which Ashdown eventually sold. It is questionable whether the defendant's verbatim copying was substitutive of the claimant's market for the diaries - would the newspaper article have injured the claimant's sale of his diaries, or is it more likely that it would have done the reverse and served in many ways to heighten the anticipated publication of the diaries? [38]

Indeed courts are unduly concerned with the insalubrious nature of press reporting when it comes to questions of copyright infringement and the fair dealing defence. Part of the reason is echoed in an earlier Court of Appeal decision which advocated that courts take heed of the fact that the media is not an altruistic trade, and as such is "peculiarly vulnerable to the error of confusing the public interest with their own interest".[39] This may be a genuine concern in relation to copyright infringement, but it is not reasonable when the legal issue is also one of freedom of expression.

A pragmatic opinion expressed by Jacob J. (now Lord Justice Jacob), in *Hyde Park Residence v. Yelland* is that "the press often have to pay for information of public importance and when they publish they will always expect to make money. They are not philanthropists. I do not think that the fact that Mr [M] was paid and that The Sun expected to make money derogates in any way from the "fair dealing" (or any public interest) justification".[40]

A different stance as to why interference with press publication was a matter of public concern was offered by Lord Woolf C.J. in *A v. B&C*: "The fact that if the injunction is granted it will interfere with the freedom of expression of others and in particular the freedom of the press is a matter of particular importance. This well-established common law principle is underlined by section 12(4) [of the Human Rights Act 1998]. Any interference with the press has to be justified because it inevitably has some effect on the ability

38 The Court of Appeal also considered the taking unfair since the minute was secret and "undoubtedly obtained in breach of confidence". The court relied on the fact that whether a work is unpublished or nor is a relevant factor in considering whether usage is fair or not. [2001] HRLR 57 (CA), paragraph 75.

39 [1985] QB 526, 537; citing *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 WLR 892, 898.

40 [1999] RPC 655 (Ch.D), 663.

of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified...Regardless of the quality of the material which it is intended to publish *prima facie* the court should not interfere with its publication. Any interference with publication must be justified".[41]

Of course, these are views expressed in relation to whether the right to freedom of expression trumps an individual's right to privacy in respect of injunctive relief – but they are highly relevant in considering how the balance between property rights and the right to freedom of expression is to be made.

4.4. A constitutional "public interest" defence?

On the other hand, the *Ashdown* court's view was that the fair dealing defence was already predisposed towards freedom of expression, *and* public interest. It stated that public interest considerations could override copyright, though under undefined circumstances.[42]. In the Court's view, the fair dealing defence "will normally afford the Court all the scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press. There will then be no need to give separate consideration to the availability of a public interest defence under section 171".[43]

What is this "public interest" defence? British judges, sometimes, indulge in law making. The theoretical position constitutionally is that this does not happen. The theory sits Parliament and the Courts as the two branches of government which straddle the opposite ends of the constitutional divide. The tacit agreement between the two is that Parliament is precluded from criticising individual judges, whilst the courts adopt legislative sovereignty implacably. However, as Oliver and Drewry state: "The supreme law-making power exercised by the sovereign Parliament of the UK ostensibly relegates the courts to a passive, even submissive, role in applying and interpreting legislation. Recently, however, a number of extra-judicial observations have raised the possibility that the courts could refuse to give effect to a statutory provision that was in some respects profoundly undemocratic. For instance,

41 [2002] EWCA Civ 337, paragraphs 11(v), (vi).

42 [2001] HRLR 57 (CA), paragraph 58.

43 *Ibid.*, paragraph 66.

Sir John Laws[44] and Lord Woolf of Barnes[45] have both made this point. There are also academic arguments in favour of such a position".[46]

Judges only depart from the principle of parliamentary sovereignty if fundamental democratic principles are threatened. One such fundamental democratic principle was perhaps the right to freedom of expression. Historically, one reason why the UK Copyright, Designs and Patents Act has a statutorily recognised "public interest" defence is that this judge-made principle surfaced when the British courts were deciding on simultaneous actions of breach of confidentiality and copyright. Indeed, the first real discussion of the "public interest" defence occurs in cases dealing with breach of confidence where one sees a whole line of unhesitating jurisprudence accepting that an action of confidentiality was qualified by a general "public interest" defence.[47]

Having accepted, in many cases, the "public interest" defence in respect of the breach of confidentiality action, courts imported the same reasoning and result into the copyright action as well. The defence was well and truly accepted within copyright law in *Beloff v Pressdram*, where the court held that the public interest is a defence which "is outside and independent of statutes, is not limited to copyright cases and is based upon a general principle of common law".[48]

In any event, whatever the basis of the defence within copyright law, Parliament introduced section 171(3) into the 1988 copyright legislation which states: "Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise".

Is this Parliament's weapon to protect human rights concerns such as the right of privacy and the right to freedom of speech prior to the enact-

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44 Sir John Laws, "Law And Democracy", *Public Law* 72 (1995).

45 Lord Woolf, "Droit Public – English Style", *Public Law* 57 (1995).

46 D. Oliver and G. Drewry, *The Law and Parliament*, 1998 at 5-6.8; and also AW Bradley, "The sovereignty of Parliament – its perpetuity"? in JL Jowell and D Oliver (eds.) *The Changing Constitution*, 3rd edition, 1994.

47 *Initial Services Ltd. v. Putterill* [1968] 1 QB 396; *Fraser v. Evans* [1969] 1 QB 349; *Hubbard v. Vosper* [1972] 2 QB 84; *Woodward v. Hutchins* [1977] 1 WLR 760; and per Lord Denning M.R. (dissenting) in *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] QB 1; *British Steel Corporation v. Granada Television Ltd.* [1981] AC 1096.

48 *Beloff v Pressdram* [1973] RPC 765, 783, per Ungoed-Thomas J. The court appears to have incorporated the defence by wrongly relying on, as precedents, *Hubbard and Initial Services*.

ment of the Human Rights Act in the UK? Is the "public interest" defence an *uber-defence* which overrides copyright? Is it the English human rights tool?

One interpretation of s.171(3) is that public interest considerations asserted itself not merely as a statutorily-recognised defence but rather as a rule. Moreover, this is a constitutionally mandated device, having first been employed by judges as a defence, and then subsequently ratified by Parliament as a rule of law. It is not immediately clear under what circumstances it can be employed though Professor Cornish maintains that the public interest rule can be seen to favour two types of distinct policies:

a) a policy against legal protection whereby the courts have refused relief on the basis of express disapproval of the content of the work because obscene, immoral, defamatory, blasphemous, irreligious, or seriously deceptive of public;

b) A policy favouring dissemination of the material.[49]

Thus, there is some basis for arguing that s. 171(3) promotes a wider, constitutional public interest rule, as opposed to merely a defence. A rule which perhaps asserts that the fair dealing defences within our copyright law are not to be equated to human rights principles, and do *not* incorporate human rights concerns. The latter have to be tested differently. The analysis of the decisions shows that the "public interest" rule comes up where courts are torn between individual rights on the one hand (such as copyright), and communitarian interests, on the other. In particular, the "public interest" defence or rule may be invoked when there has been an interference with the freedom of expression, including freedom of the press.

Why the Ashdown decision is probably wrong. Is a UK court then to equate both the public interest and human rights defences with the statutory defence of fair dealing? If so, this is tantamount to an implicit rejection of a specific human rights argument with respect to copyright law. It is, of course, arguable that the Court did consider the human rights argument when it stated that the implementation of the Human Rights Act 1998 constituted a further line of enquiry: "Are the facts of this case such that, arguably, the importance of freedom of expression outweighs the conventional considerations set out

49 Emphasis added. W.R.Cornish, *Intellectual Property*, Sweet & Maxwell, 4th ed., 1989, paragraphs 11-55. Cornish's classification remains inconclusive as it suggests that courts will do as they will. For judicial approval of Cornish's classification of the public interest defence, see *Hyde Park Residences v Yelland* [1999] RPC 655, 667-669.

above so as to afford the Telegraph Group a defence of fair dealing?"[50]

The answer was in the negative because the same fair dealing considerations were applied to the human rights defence: "We do not, however, consider that it is arguable that there was any justification for the extent of the reproduction of Mr Ashdown's own words. It appears to us that the minute was deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article and thus to appeal to the readership of the newspaper. Mr Ashdown's work product was deployed in the way that it was for reasons that were essentially journalistic in furtherance of the commercial interests of the Telegraph Group. We do not consider it arguable that Article 10 [ECHR] requires that the Group should be able to profit from this use of Mr Ashdown's copyright without paying compensation".[51]

As stated above, these are highly contestable points when considered from a human rights angle:

(a) The work copied constituted a fraction of the entire protected work. It does not seem legitimate to restrict the exercise of the freedom of expression to insubstantial and unimportant expressions of the copyright work? The fact that only the colourful, and hence valuable, passages of the minute which would appeal to the readership of the newspaper, were appropriated is a showing of qualitative taking in respect of an analysis on copyright infringement. Why should this be relevant for a freedom of expression analysis?

(b) No authority was offered for the sweeping proposition that a third party's use of the copyright work under Article 10, ECHR must be compensated for. Even the copyright statute does not demand that remuneration be paid for a fair dealing of a copyright work,[52] and this has never been a concern under the public interest defence. Furthermore, it cannot be legitimate to restrict a third party's use of the copyright work, especially where he seeks to criticise the

50 *Ibid.*, paragraph 78.

51 *Ibid.*, paragraph 82.

52 Sections 29 and 30(1), CDPA 1988. The Act calls for a sufficient acknowledgement of the source when use is made for news reporting. The Act does expressly indicate the instances when the "commercial" element should bear a considerable role in the fair dealing analysis as - see for example, section 29(1), CDPA 1988 which only allows fair dealing for the purposes of "non-commercial" research.

work, to situations where the copyright owner's permission is sought and paid for.

(c) The assumption that Article 10 ECHR cannot justify the use of another's work for commercial and essentially journalistic purposes is a draconian interpretation of the concept of "freedom of expression". Moreover, in relation to verbatim copying of the text, the Court held that an extensive reproduction of Mr Ashdown's own words was not necessary in order to satisfy a newspaper reader that the account was both credible and authoritative: the defendant could have done what other newspapers had done and reported the event without resorting to the secret memo.

Indeed, nothing can be faulted with the court's theoretical stance, and it did note that a court must consider whether on the facts of the case before it, the importance of freedom of expression outweighed the conventional considerations in a defence of fair dealing. And one can say the *Ashdown* decision shows a UK court accepting the important principle that some analysis of the human rights implications has to be undertaken.

Practically speaking, the application of these principles by the Court of Appeal shows a rather ambivalent policy towards the public interest and human rights defences. The court opted to apply its fair dealing analysis across the board and refrained from undertaking a fresh analysis in relation to the other two defences of public interest and human rights. The court seems to have thought that elements such as substantiality of the taking, nature and quality of the work and commercial considerations of the defendant are the correct criteria for consideration in adjudicating on free speech. Moreover, the case appears to stand for the proposition that, whatever constituted the public interest rule, the constitutional changes effected by the 1998 Act shifts the balance back to the "fair dealing" analysis.

A more cogent line of analysis would ask whether Article 10(1) specifically allows copyright to be restrained to allow verbatim copying of a substantial amount of literary text, and if so, for what reasons?

5. FREEDOM OF EXPRESSION ALLOWS "SUBSTANTIAL COPYING OF LITERAL WORKS FOR COMMERCIAL PURPOSES"

What lessons can we learn from this decision?

It may be true that national copyright laws do take freedom of expression concerns into account by limiting the scope of protection in a myriad of ways from allowing others to appropriate a work for parodic use or for criticism purposes, to excluding ideas and principles from protection. But this is not enough.

5.1. Court psychology

Freedom of expression does not subsist as a subset of copyright law, but is a fundamental right of the alleged copyright infringer. Courts need to grasp that when a defendant pleads "freedom of expression", it is not a defence but a counter-claim. The copyright owner is now the alleged infringer. This requires a psychological shift within the courtroom as it considers two competing and complementary rights and claims. The defendant becomes a claimant/or plaintiff who is pleading that *his* fundamental freedom has been breached. The parodist is claiming that he, the creator of a new work, is being stifled in expressing his art, especially if it is political art.[53] The newspaper journalist is claiming that his "speech" to the public is protected expression irrespective of the economic interests that lie motivates his employers. He claims he has a right to choose the form of his expression, as well as the contents.

5.2. Contextual displacement and authentication

Both the artist and journalist are claiming that freedom of expression allows them, perhaps, to use a copyright protected image or a copyright protected text as they are without any changes because the artist and the reporter alter the context within which the protected work appears. Perhaps we need to protect those who create *new expressions* merely by displacing works from one to another context and audience.

The parodist should be able to argue that appropriating copyright protected images and characters and displacing them into a different context is protected expression under human rights law. Consider the following examples:

- taking Walt Disney's characters such as Mickey Mouse, Minnie Mouse and Pluto the Dog and contextually displaced them by abandoning their wholesome values and making them indulge in sex and drugs;[54]

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53 See *Vereinigung Bildender Künstler v Austria*, [2007] ECDR 181 [European Court of Human Rights].

54 *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756-759 (9th Cir. 1978) [The US

- taking cute comic Asterix characters such as Asterix and Obelix and placing both the fictional characters and the real artist in disparaging contexts i.e. as an alcoholic and as a copyright lawyer[55]

Should we forbid the newspaper reporter from using copyright-protected authentic versions of text or images in the course of his reporting activities? Does not the public interest rule, at least in UK law, clearly apply in the context of "communication of what is essentially information--information clothed in copyright"?[56] When a journalists or researcher employs protected text or images, it can be that nothing else can convey the factual data sufficiently. Indeed, as many have previously noted, sometimes such works are the most convincing and credible means of reporting to the public.[57] The European Court of Human Rights readily agrees that courts should not substitute their judgements as to what is the best manner for reporting a particular news item.[58]

5.3. Public debate and pure commercial speech

Indeed, contrary to the manner in which the *Ashdown* court treated press reporting, newspaper articles are a far more noble and elevated type of expression than pure "commercial speech" insofar as human rights classifications are concerned. An example of a pure commercial speech is an advertisement. And in the case of the latter, the European Court of Human Rights has held that:

Circuit Court rejected the freedom of expression claim, holding that they had infringed copyright.]

55 BGH, March 11, 1993; *GRUR* 206 (1994); 25 *IIC* 605 (1994). The German Supreme Court allowed the parody using the German copyright principle of *freie Benutzung and* the German constitutional principle of freedom of expression which includes freedom of art - see section 24, German Copyright Law, and Article 5(3) of the German Basic Law.

56 *Hyde Park Residence v. Yelland*, [1999] RPC 655 (Ch.D), 671.

57 See for example, *Time, Inc. v Bernard Geis Associates*, 293 *F. Supp.* 130 (SDNY, 1968); and M.B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?", 17 *UCLA L. Rev.* 1180, 1197-1200 (1970).

58 See for example *Fressoz and Roire v France* (1999) 5 BHRC 654, paragraph 54 [The European Court was unambiguous in its view that the taking of the form or expression of the work may be allowed if journalists need some credibility in order to authenticate their reports].

- Article 10, ECHR protects such speech;[59]
- the profit-making purpose is considered irrelevant i.e. neither the financial element nor the competition-related promotional statements are excluded from the ambit of protection of Article 10 ECHR. [60]

This point cannot be emphasised: commercial considerations and profit making are not crucial. What is required is a consideration of the individual's participation in a "public debate" i.e. a debate affecting the general interest to which the individuals expression or speech may concern.[61] A further criterion is whether or not the contested speech has the potential of contributing significantly to the above-mentioned debate.

6. CONCLUSION

Once more unto the breach, dear friends, once more [...]
I see you stand like greyhounds in the slips,
Straining upon the start. The game's afoot:
Follow your spirit[62]

If there is one lesson to be learnt from the English *Ashdown* decision, it is that courts are too conservative in embarking on fresh avenues of enquiry and analysis when it comes to confronting the copyright-freedom of expression nexus. It may be unfair to reap the fruits of another person's creative expression, and it may be unjust to appropriate protected property of another person. But do we take these elements into account when considering whether a defendant is entitled to use a work under his right to freedom of expression?

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59 See *Barthold v. Germany, Barthold v Germany* [1985] 7 EHRR 383; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* [1989] 12 EHRR 161; *Hertel v. Switzerland* [1998] 28 EHRR 534.

60 *Casado Coca v Spain* [1994] 18 EHRR 1; *Barthold v Germany* [1985] 7 EHRR 383.

61 *Hertel v. Switzerland, ibid.*, paragraph 47. Indeed, the unimportance of commercial purpose was highlighted in this and in the *Barthold* cases if one compares the stance of the European Court of Human Rights vis-à-vis the national German courts. The latter emphasised the purpose of speech, whereas the European Court weighed the commercial and non-commercial elements by applying the "public debate" test.

62 W Shakespeare, *Henry V*, Act 3, Scene 1.

One can safely say that despite rumours to the contrary, copyright law is not under threat. What copyright law does suffer from is, perhaps, an image crisis.

Therefore it behoves us copyright lawyers and jurists to stop exploring the basic principles and justifications of copyright law, and to cease the endless push for greater rights. These were easy tasks for our forefathers. Perhaps this generation's task is to struggle for survival as copyright law is constantly attacked in the next 20 years for not taking into account different stakeholders' needs. Our task should be to look at the boundaries between copyright law and other laws and ask how we should refine copyright law in order to safeguard:

(a) *societal* needs (thus safeguarding copyright from human rights attacks)

(b) *market* needs (thus safeguarding copyright from competition law attacks)

(c) *contractual* needs of individual creators (thus safeguarding copyright from being refined quietly by the Creative Commons "rules").

And in the long run, we need to steel ourselves and reform the (in)famous three-step test under Article 9(2), Berne Convention and Article 13, TRIPS Agreement and give it a more enlightened and holistic interpretation which takes the above needs into account.