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Copyright and Freedom of Expression: A Literature Review

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Preface

The relationship between copyright law and freedom of expression has always been controversial, but this tension has deepened in recent years with the emergence of the digital environment and expansion of copyright law. As part of CREATE's theme on human rights and the public interest, our project explores the relationship between freedom of expression and copyright, including how it has changed over time and/or depending on the business model, and whether freedom of expression needs to be reconceived in relation to copyright.

We are pleased to publish this literature review on copyright and freedom of expression. The review has been expertly researched and written by Dr. Yin Harn Lee, who was employed by the University of East Anglia while completing her doctoral studies at the University of Cambridge. Her report is the result of an extensive period of research, and regular conversations with and reviews by us. She has compiled a remarkable range of materials from around the world (both from courts and scholars), and sets out clear examples of what happens when these areas of the law meet. This review traces the nature of the debates about the interaction between copyright and free speech, treatment by the courts (focusing namely on UK (in its wider European context) and USA jurisdictions), specific scenarios where the issues are particularly acute, and current proposals for reform.

It is our hope that this literature review provides insight to the reader on what is an incredibly uncertain area of the law. We invite you to read this literature review and provide us with your comments to help inform the second stage of this project.

From our end, the literature review has certainly been revealing about the extent of the lack of coherence in law (both statutory and case law) concerning the nature and extent of a person's right to use a third party's copyrighted work under the umbrella of fundamental rights. It is questionable at this stage whether there is any such right in substance, although the framework is there in law. When courts have engaged with freedom of expression it is often not in the most direct fashion – especially when disputes arise within the terms of copyright law, as they are likely to be litigated on that basis by experts in that field. The human rights implications typically emerge at a late stage or in subsequent academic writing.

Our objective is twofold. First, one question that emerged consistently in the literature review is whether an independent ‘free speech’ exception is needed to give fulsome protection to the right and/or to facilitate new business models that depend on speech, and if so, what the nature and contours of such an exception should be. It is recognized that this is a vexed question and part of the interrogation requires consideration of the power of fair use and fair dealing provisions, however crafted, to adequately cover such rights, and the balance required with the property and other rights of the creators. The second goal is to translate the knowledge contained in the literature review into practical advice for businesses and lawmakers on how to reconcile copyright and human rights law. Later in 2015 we will convene a workshop, where these matters will be discussed in more detail culminating in the publication of an impact assessment tool, informed both by this review and the outcomes of our workshops.

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Summary of Literature Review

1 Introduction

This literature review covers the following topics:

- The fundamental rights underpinnings of copyright and freedom of expression.
- Background to the debate: factors and developments which have focused attention on the tension between copyright and freedom of expression.
- Nature of the interaction between copyright and freedom of expression: the extent to which the relationship between the two is one of conflict or one of co-existence and co-operation.
- Specific issues: contexts in which the tension between copyright and freedom of expression is particularly acute.
- Proposals for accommodating freedom of expression within copyright law frameworks.
- Related issues and themes: in brief, implications raised by copyright for human rights other than the right to freedom of expression.

2 Fundamental rights underpinnings of copyright and freedom of expression

The status of freedom of expression as a fundamental right is enshrined in international and regional human rights instruments as well as national constitutions. Internationally, freedom of expression is recognised in the Universal Declaration of Human Rights ('UDHR'), art 19, and the International Covenant on Civil and Political Rights ('ICCPR'), art 19; the latter providing that freedom of expression may be subject only to certain necessary restrictions as are provided by law (e.g. for respect of the rights or reputations of others). At the European level, freedom of expression (including the receiving and imparting of information and ideas) is enshrined in the European Convention on Human Rights ('ECHR'), art 10, and the European Union Charter of Fundamental Rights ('EUCFR'), art 11. The ECHR provides that the exercise of the right may be subject to various restrictions as are prescribed by law and are necessary in a democratic society. Freedom of expression is also enshrined in a number of national constitutions across a number of jurisdictions, perhaps most famously in the First Amendment to the US Constitution.

Scholars have sought to situate copyright within the existing human rights framework on one or more of the following grounds:

- The right of an author to benefit from the protection of the moral and material interests resulting from his or her scientific, literary or artistic productions is enshrined in the UDHR, art 27(2) and International Covenant on Economic, Social and Cultural Rights ('ICESCR'), art 15(1)(c). Insofar as copyright serves to protect these moral and material and interests, it is a fundamental right.

Such provisions have been described as having assimilated authors' rights to copyright, in effect recognising copyright as a human right (Kéréver; Hugenholtz; Cohen Jehoram). However, as neither the UDHR or ICESCR require the moral and material interests of the

author to be protected as a human right, it is also arguable that only those aspects of copyright law that protect these moral and material interests in the manner required may be said to have human rights status (Geiger). In this regard, moral rights is sometimes argued to have a stronger claim to protection as human rights compared to the primarily economic nature of copyright (Helfer; Afori).

- Copyright is a form of property, the right to protection of which is guaranteed by various human rights instruments and/or national constitutions (e.g. UDHR, art 17; ECHR, First Protocol, art 1 as applied in *Anheuser-Busch v Portugal*; EUCFR, art 17).
- Copyright is protected as a human right given its role in promoting freedom of expression.

It has been sometimes been argued that constitutional or human rights protection for copyright may flow from its ability to promote the same interests that are safeguarded by freedom of expression (Kéréver; Dimmich). Some degree of support for this argument can be gleaned from national constitutions, e.g. the Swedish constitution, art 19, which provides that '[a]uthors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law', the rationale of which is stated to be 'the promotion of the free formation of opinion', a right encompassed by the scope of freedom of expression.

3 Background to the debate

The two primary factors leading to the recent increase in academic interest in the relationship between copyright and freedom of expression which emerge from the existing literature are the expansion of copyright law and the emergence of the digital environment.

Commentators have observed that the tension between copyright and freedom of expression has become increasingly acute due to the recent expansion of copyright law across a number of jurisdictions (e.g. broader and stronger rights afforded to authors, contractual arrangements, and extended duration), which has not been counterbalanced by a similar expansion of the freedoms afforded to users (Helfer; Birnhack; Patterson; Netanel; Rubinfeld; Geiger; Henningsson).

The transplantation of many daily activities from the analogue world into the digital environment has increased the probability that they may be affected by copyright law (Birnhack). Advances in technology have resulted in changes to the way in which copyright works are accessed; in the digital environment, such access usually involves an act of potentially infringing reproduction (Y'Barbo; Netanel; Elkin-Koren), and made it easier for individual users to produce and share user-generated content, which frequently draws on existing copyright works and may be potentially infringing (Henningsson).

There has historically been little discussion of the relationship between copyright and freedom of expression in the UK, particularly when compared with the more robust debate in the US on the relationship between copyright and the First Amendment. The

enactment of the Human Rights Act 1998 ('HRA'), which incorporates the provisions of the ECHR into the law of the UK, is often identified as the catalyst for greater engagement with the issue (Griffiths; Birnhack; Griffiths and Suthersanen; Barendt; Angelopoulos). Before the coming into force of the HRA, freedom of expression concerns had already been raised in some cases (*Fraser v Evans*; *Hubbard v Vosper*; *Lion Laboratories v Evans*; for commentary see Garnett; Sayal), but not in others where such concerns were clearly implicated (*Beloff v Pressdram*; *Hyde Park Residence v Yelland*).

The judgment of the Court of Appeal in *Ashdown v Telegraph Group* is generally acknowledged as the landmark decision on the intersection between copyright and freedom of expression in the UK (Barendt; Dworkin; Garnett; Griffiths; Joseph). The Court of Appeal held that the idea/expression dichotomy and the fair dealing provisions set out in the UK Copyright, Designs and Patents Act 1988 ('CDPA') would in most circumstances afford sufficient protection to the principle of freedom of expression. However, rare cases might still arise where freedom of expression would come into conflict with the protection afforded by copyright. In such cases, the court is bound, in so far as it is able, to apply the CDPA in a way that accommodates the right to freedom of expression – through declining the discretionary remedy of an injunction, which would leave the defendant still liable to any claim for damages or an account of profits, or allowing the defence of public interest could be raised.

The European human rights tribunals have historically been reluctant to engage with the potential conflict between copyright and freedom of expression (Hugenholtz; Balganesch; Strowel and Tulkens). A number of possible factors have been cited for the late development of European interest in this conflict, including the *droit d'auteur* philosophy underlying the conception of copyright law in Europe, which frames copyright as an unrestricted natural right reflecting the bond between the author and his or her work, and a reluctance to apply fundamental rights and freedoms to 'horizontal' relationships between citizens.

The European Commission on Human Rights was twice confronted with cases involving the conflict between copyright and freedom of expression (*De Geillustreerde Pers v Netherlands*; *France 2 v France*). Its decisions in both these cases have been criticised as being 'disappointing', due to its failure to engage fully with the underlying issues (Hugenholtz). Recently, however, the ECtHR has shown a greater willingness to engage with the potential conflict between copyright and freedom of expression, as it has twice held that a conviction based on copyright law for unlawfully reproducing or publicly communicating material protected by copyright can be regarded as an interference with the right to freedom of expression and information provided for under art 10 of the ECHR, and that any such conviction must accordingly be consistent with the three conditions set out in art 10(2) (*Ashby Donald v France*; *Neij v Sweden*; for commentary see Geiger and Izyumenko).

Under national law, issues have also arisen. In Germany, the District Courts and Courts of Appeal have invoked the constitutional guarantee of freedom of expression as a limitation on copyright, in some cases as an extra-statutory justification (*Maifeiern*; *Bild Zeitung*; *Terroristenbild*; *Monitor*; for commentary see Hugenholtz). However, the Supreme Court has been rather more cautious in this regard, holding that the constitutional guarantee of freedom of expression does not provide a defence to

copyright infringement, as freedom of expression is already incorporated into the copyright statute. It did accept in principle that under exceptional circumstances, limits to copyright exceeding the express statutory limitations may be taken into consideration (*Lili Marleen*; for commentary see Hugenholtz), and interpreted the citation exception available under the copyright statute broadly in light of the freedom of artistic freedom enshrined in the constitution (*Germania 3*; for commentary see Strowel and Tulkens; Smith).

In Austria, the Supreme Court has in at least two cases refused to allow freedom of expression to be used as a defence in copyright infringement cases (*Head-Kaufvertrag*; *Karikaturwiedergabe*; for commentary see Hugenholtz). More recently, it has held that the reproduction of 16 articles on a website operated by the person the articles were about, to demonstrate that the website owner was the target of a large-scale media campaign, was protected by art 10 of the ECHR (*Medienprofessor*; for commentary see Geiger; Smith).

In the Netherlands, courts have acknowledged that, in principle, copyright may conflict with the right to freedom of expression guaranteed by art 10 of the ECHR (albeit not on the individual facts of these cases) (*Boogschutter*; *Dior v Evora*; *Anne Frank Fonds v Het Parool*; for commentary see Hugenholtz). More recently, the Hague Court of Appeals has held that the publication on a website of internal Scientology documents for the purposes of criticism was protected by art 10 of the ECHR (*Church of Scientology v Dataweb*; for commentary see Strowel and Tulkens; Smith), and the introduction of a statutory exception for caricature, parody and pastiche has been followed by a greater willingness to invoke freedom of expression in the context of parodies (*Dafurnica*; *Miffy*; Mendis and Kretschmer).

The French courts, long the strongest advocates for authors' rights, have been described as being very hesitant to accept freedom of expression defences in copyright cases (Hugenholtz). In a line of cases concerning the scope of freedom to display protected works of art briefly during television broadcasts, freedom of expression concerns were not raised by the courts at any level (*SPADEM v Antenna 2*), but a more recent case saw the direct application of art 10 ECHR regarding infringement claims brought by the Utrillo estate against the national television station France 2 for showing 12 protected paintings in a news item on an exhibition, in holding that right of the public to be informed of important cultural events should prevail over the interests of the copyright owner (*Utrillo*).

The discourse surrounding the relationship between copyright and the First Amendment in the US has been described as developing in three separate 'waves' (Birnhack). The first wave, in response to the decisions in *Rosemont Enterprises v Random House* and *Time v Bernard Geis Associates*, included two influential law review articles (Nimmer proposing a specific exception for news photographs; Goldstein proposing a wider First Amendment exception) and a student note (Sobel, arguing that the idea/expression dichotomy avoided conflict between copyright and freedom of expression) on the potential conflict between copyright and the First Amendment. These cases involved the unauthorised use, respectively, of various magazine articles about Howard Hughes in a biography of him and frames from the Zapruder film of President John F. Kennedy's assassination in a book about the same event. In both cases, although the First

Amendment was not explicitly acknowledged, the courts found that the defence of fair use was available to the defendants on the basis of the public interest in free dissemination of information.

The First Amendment argument was subsequently raised before the courts on a number of occasions. With one exception (*Triangle Publications v Knight-Ridder Newspapers*), every argument that claimed a First Amendment defence was dismissed, usually with only a brief statement (e.g. *McGraw-Hill v Worth Publishers*). This culminated in *Harper & Row Publishers v Nation Enterprises*, where the Supreme Court dismissed the defendants' First Amendment defence on the ground that copyright itself promotes freedom of expression, and furthermore that First Amendment protections such as the idea/expression dichotomy and fair use were already embodied in the copyright statute itself.

In a second wave, the concern for First Amendment values was placed in the wider context of concern for the effects of the continuous commodification of information (Zimmerman; Dreyfuss; Elkin-Koren and Netanel).

Most recently, cases may indicate a greater willingness on the part of the courts to engage with First Amendment issues in copyright cases (for commentary see Birnhack; Netanel). In *Universal City Studios v Reimerdes*, the prohibition on the circumvention of technological protection measures provided for in the Digital Millennium Copyright Act ('DMCA') was held not to abridge the First Amendment, but the judge was prepared to take a close look at the interaction between the DMCA and the First Amendment through the lens of First Amendment doctrine. *Suntrust Bank v Houghton Mifflin* was decided on the basis of fair use, but the court recognised the importance of remaining cognisant of the First Amendment protections woven into copyright law, and made reference to First Amendment concerns regarding comment and criticism. Finally, the Supreme Court, in upholding the constitutionality of the Copyright Term Extension Act ('CTEA') in *Eldred v Ashcroft*, took the view that there was no conflict between copyright and the First Amendment, as any such concerns would generally be addressed adequately by the free speech accommodations built into copyright law, namely the idea/expression dichotomy and the doctrine of fair use. However, it did recognise that copyright is not categorically immune to challenges under the First Amendment, and suggested that such a conflict might arise if and when Congress were to alter the 'traditional contours' of copyright law (see also *Golan v Holder*).

4 Nature of the interaction between copyright and freedom of expression

Copyright grants to copyright owners the exclusive right to control and prevent the dissemination of their works. This right amounts to an effective fetter on what other persons are able to speak, write and so forth, resulting in a conflict between copyright and freedom of expression (*Ashdown v Telegraph Group* (CA); Macmillan Patfield; Griffiths; Birnhack; Hugenholtz; Balganesch; Akester; Goldstein; Hoberman; Volokh and McDonnell; Benkler; Baker).

Copyright serves to incentivise the creation of new forms of expression, thereby promoting freedom of expression (*Harper & Row Publishers v Nation Enterprises*; *Eldred v Ashcroft*; Derclaye; Netanel), and already incorporates values and notions derived

from the right to freedom of expression (*Ashdown v Telegraph Group* (Ch); *Harper & Row Publishers v Nation Enterprises*; *Eldred v Ashcroft*; Derclaye; Torremans; Nimmer; Oakes; Shipley). The relationship is therefore argued to be one of co-existence and co-operation.

The argument that copyright promotes freedom of expression is founded on the premise that copyright fosters and incentivises the independent creation of expressive work; both copyright and freedom of expression, therefore, have the same aims (*Harper & Row Publishers v Nation Enterprises*; *Eldred v Ashcroft*). Copyright provides authors with a degree of artistic and financial autonomy free from the influence of the government or elite patrons (Chafee; Netanel), although this might result in important but financially unprofitable works not being published (Masiyakurima), and the empirical basis for the argument that copyright protection necessarily incentivises the production of more diverse creative expressions is questionable (Benkler; Netanel).

Proponents of the view that copyright incorporates principles that accommodate freedom of expression argue that, even if these values could potentially come into conflict with each other, any such conflict can ultimately be resolved through the application of the statutory exceptions and limitations contained in copyright law (*Ashdown v Telegraph Group* (Ch); *Harper & Row Publishers v Nation Enterprises*; *Eldred v Ashcroft*; Derclaye; Torremans; Nimmer). However, others caution against assuming that copyright law's internal principles *necessarily* safeguard freedom of expression, such that the courts need not engage further with the conflict between them (*Ashdown v Telegraph Group* (CA); Griffiths; Birnhack; Barendt; Danay).

The primary limitations internal to copyright law which are said to reflect values derived from the right to freedom of expression are the idea/expression dichotomy and the defence of fair dealing (in the UK) or fair use (in the US).

As copyright does not protect the ideas that are embodied in or that may have inspired the work, but protects only the expression of those ideas, it has been argued that copyright is not a constraint on freedom of expression, as it does not prevent a person from repeating or making use of the ideas or information contained a protected work, but merely prevents that person from copying the form of expression used in that work (*Associated Newspapers v News Group Newspapers*; *Harper & Row v Nation Enterprises*; *Eldred v Ashcroft*; Macmillan Patfield; Nimmer; Sobel).

There are, however, a number of counter-arguments which have been raised in opposition to this view. Restrictions on the form of expression constitute significant limitations on freedom of expression (*Jersild v Denmark*; *Cohen v California*; Barendt; Danay). The idea/expression dichotomy is simply too vague to enable individuals to determine whether their speech constitutes an infringing reproduction or a permissible reformulation of an existing work (Netanel; Tushnet; Yen). In a number of cases, a meaningful distinction between an idea and its expression will simply not exist (e.g. with representational copyright works such as artistic works, photographs, films and broadcasts (Macmillan Patfield; Griffiths; Nimmer; Reis; Tharmaratnam; Zimmerman; Hoberman; Kreig)). In the context of UK copyright law, these concerns are exacerbated by the lack of a principle similar to the 'merger' doctrine under US copyright law, to the effect that where an idea can be expressed intelligibly in only one or a very limited

number of ways, the expression of that idea cannot be protected by copyright (Garnett). Even in cases where there has been no true merger of idea and expression, the inability to use the actual words or images from the protected work may nevertheless undermine the impact and believability of the message which it conveys (Tushnet; Griffiths; Burrell).

The defence of fair dealing set out in the CDPA provides that certain acts that might otherwise constitute infringement will not incur liability (ss 29 and 30). For this reason, it has been identified as a mechanism through which copyright is able to accommodate freedom of expression (*Ashdown v Telegraph Group* (CA); Macmillan Patfield; Griffiths; Masiyakurima).

However, the limitations surrounding fair dealing have led to questions as to whether they are able to function effectively in this manner. These limitations firstly relate to the statutory limitations of the fair dealing provisions themselves.

The defence of fair dealing is applicable only where the dealing with a protected work is made for one of the enumerated purposes set out in the CDPA, namely: non-commercial research and private study; criticism or review; reporting current events; non-commercial instruction. It has been doubted whether they are capable of functioning as an effective safeguard for freedom of expression, as freedom of expression concerns may arise in a wider range of cases than those falling within the fair dealing provisions (Griffiths; Macmillan Patfield; Danay); courts have not been consistent in interpreting the precise scope of these purposes, having applied both broader (*Time Warner v Channel Four*; *Pro Sieben Media v Carlton UK Television*) and narrower approaches (*Ashdown v Telegraph Group* (Ch); *Newspaper Licensing Agency v Marks and Spencer* (CA); *Distillers Co (Biochemicals) v Times Newspapers*).

Previously, fair dealing did not extend to uses of sound recordings, films and broadcasts for the purpose of research and private study, even though they may also be repositories of cultural information (Macmillan Patfield; Masiyakurima). However, the CDPA has since been amended so as to permit fair dealing with any type of copyright work for the purposes of non-commercial research and study. The express exclusion of photographs from fair dealing for the purpose of reporting current events is justified on the grounds of the special impact and importance of photographs (*BBC v British Satellite Broadcasting*; Cornish and Llewellyn) and the economic vulnerability of freelance news photographers (Kelly), but it has been argued that the inability of journalists to reuse photographs without authorisation for the purpose of reporting current events may dilute the vividness and accuracy of the information presented to the public (Griffiths; Masiyakurima; Kelly).

It has been argued that the courts, in determining whether a dealing is 'fair', have given undue weight to the three 'Laddie factors' set out in the third edition of Laddie, Prescott and Vitoria's *The Modern Law of Copyright and Designs* and insufficient weight to freedom of expression concerns (Griffiths; Angelopoulos; Kelly; Macmillan Patfield). For this reason, it has been suggested that the potential of the fair dealing provisions to protect freedom of expression has not been realised (Masiyakurima).

The first factor whether the alleged fair dealing is in commercial competition with the original work, has been identified by the Court of Appeal as 'by far the most important factor' (*Ashdown v Telegraph Group* (CA); cf *BBC v British Satellite Broadcasting*; *Fraser-Woodward v BBC*). The high degree of importance placed on this factor has been criticised, on the grounds that it cannot be a conclusive factor where there is a legitimate public interest in access to a copyright work (Griffiths), and that it fails to take into account the extent and quality of the competition (Kelly). The second factor is that a dealing which takes place in relation to a work that is unpublished weighs against the dealing being fair. However, the public interest in disclosure of that work is likely to be greater where the work is *unpublished* than where the work has previously been published (Griffiths), although many such works are potentially of great significance, (Masiyakurima). The third factor is that the greater the amount and substantiality of the part taken from the work, the less likely it is that the taking will be found to be a fair dealing. This approach has been described as being very restrictive (Griffiths; Masiyakurima; Kelly; Derclaye; Macmillan Patfield), and difficult to reconcile with ECHR jurisprudence (*Fressoz and Roire v France*), which gives journalists greater freedom to determine the extent to which reproduction of a protected work is necessary for a particular purpose (Griffiths; Angelopoulos; Kelly; Bently and Sherman).

Under US copyright law, the doctrine of fair use is a limitation on the exclusive rights of the copyright owner which permits certain uses of copyright-protected material that would otherwise constitute infringement. Unlike fair dealing, the applicability of the fair use doctrine is not confined to cases where the use of a copyright work has been made for specific enumerated purposes. An explicit link between fair use and the First Amendment has been made by the Supreme Court (*Harper & Row v Nation Enterprises*; *Eldred v Ashcroft*) and commentators (Rosenfield; Zimmerman; Hans; Perry; Shipley), with some portraying fair use as playing a complementary role to the idea/expression dichotomy in protecting First Amendment interests (Goldwag; Oakes; Perry). However, others point out that fair use, which has a largely economic focus, is not necessarily co-extensive with the First Amendment, though it may well be informed by and have the effect of promoting First Amendment goals (Hamel; Swanson; Lockridge; Denicola; Rubenfeld). Some have observed that the fair use doctrine is too vague to enable an individual to predict whether and when he or she will be able to make 'fair use' of another person's work (Leval; Elkin-Koren; Tushnet; Netanel), possibly prompting self-censorship. The (lack of) conflict between copyright law and the First Amendment on the basis of US constitutional history has also been discussed, based on the fact that the First Amendment and the constitution's so-called Copyright Clause were adopted close in time (*Eldred v Ashcroft*; Birnhack; Netanel).

The relevant statutory provision (US Copyright Act of 1976, s 107) sets out four factors to be considered in determining whether a particular use made of a protected work is fair. Under the first factor, the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, is considered. This includes whether the use is transformative in nature. It has been argued that the emphasis on transformative use renders copyright law viewpoint-discriminatory, which would be a *per se* constitutional violation under free speech principles (Rubenfeld). Under the second factor, courts look at the nature of the copyrighted work. It has been argued that this does not speak to any First Amendment issues outside copyright law (Lockridge), and that the Supreme Court's emphasis on this factor in *Harper & Row v*

Nation Enterprises is unjustified (Daniels). Under the third factor, the amount and substantiality of the portion used is considered. It has been argued that this factor has no bearing on First Amendment concerns, as the amount of expression projected by a speaker is irrelevant under the First Amendment (Lockridge), as well as being highly unfavourable to visual artists who wish to appropriate a protected artwork for expressive purposes (Krieg). Finally, the fourth factor requires consideration of the effect of the use upon the potential market for or value of the copyright work, described by the Supreme Court as 'the single most important element of fair use' (*Harper & Row Publishers v Nation Enterprises*; cf *Campbell v Acuff-Rose*).

5 Specific issues

This section considers eight issues in respect of which the conflict between copyright and freedom of expression has become particularly acute. These are parody, user-generated content, file-sharing, Internet browsing, hyperlinking, notice and takedown procedures, website blocking injunctions, and contractual and technological overrides on copyright law.

Parody

A parody usually incorporates a substantial amount of the underlying original work (Wheelwright; Selvin; Nimmer; Light; Goetsch; Bernstein; Jacobson; Francis; Ochoa; Murphy; Spence; Walsh) and the copyright owner of the source work may be reluctant to grant a licence to parody (*Williamson Music v Pearson Partnership*; *Fisher v Dees*; *Deazley*) because the parody is critical of the original source work, while parody is a form of speech that is particularly valuable, as it is often used as a tool for critical literary and social commentary (Jacobson; Goetsch; Bisceglia; Ochoa; Bernstein; Spence; *Deazley*).

In the UK, there is some early case law suggesting that a parodist will not be liable for copyright infringement, even though she has taken a substantial part of the source work, provided that she has contributed sufficient mental labour upon his or her parody so as to render it an original work (*Glyn v Western Feature Film*; *Joy Music v Sunday Pictorial Newspapers*). This has since been rejected by subsequent case law (*Schweppes v Wellingtons*; *Williamson Music v Pearson Partnership*). A statutory exception permitting fair dealing for 'caricature, parody and pastiche' came into force on 1 October 2014.

In Germany, there is no express copyright exception for parody. However, parodies that constitute 'free use' will not be infringing (*Alcolix*; *Gies Eagle*; Mendis and Kretschmer). In the Netherlands, the copyright statute contains an exception for caricature, parody and pastiche. Since its implementation, the courts have shown greater willingness to invoke freedom of expression in cases involving parodies (*Dafurnica*; *Miffy*; Mendis and Kretschmer). In France, the copyright statute contains an exception for caricature, parody and pastiche. To benefit from this exception, the parody should be humorous in nature, should not harm the economic or moral interests of the author of the original source work, and should involve substantial modification of the source work (*SNC Prisma Presse*; Mendis and Kretschmer). Finally, in the US, parodies can be accommodated under the Copyright Act's fair use doctrine (*Campbell v Acuff-Rose Music*).

A number of issues remain unresolved, including whether copyright exceptions for parodies should be applicable only to 'target parodies' or also extend to 'weapon parodies' (or satires) (Gladis; Spence; Angelopoulos; Patry and Perlmutter; Posner; *Campbell v Acuff-Rose Music*); there may be a stronger freedom of expression interest in permitting satires compared to 'true' parodies, as satires provide commentary on wider social issues (Merges; Spies).

User-generated content

Rapid broadband diffusion and the wide availability of user-friendly digital tools have made it easy for ordinary Internet users to sample and remix existing works in order to create new works (Wong; Hetcher; Aufderheide and Jaszi; Long; Collins; Morrison; Reyes; Chik; Ng; Jamar; McKay); much of this user-generated content is of high expressive value (Aufderheide and Jaszi; Lessig; Kinsey; Trombley; Ashtar; Schloss; Tushnet; Lee; Long; Kinsey).

A significant proportion of this user-generated content incorporates copyright-protected material, rendering it potentially infringing (Gervais; Lessig; Hetcher). Copyright law is not capable of accommodating the production of such content, for reasons including the cost and complexity of formal licensing systems (Vrana; Trombley; Harper; Lee; Morrison; Ashtar; Collins), the lack of relevant exceptions in the UK and European Union (Helberger et al), the lack of clear guidance under the US fair use doctrine as to the amount that can be 'borrowed' from an existing work (Collins; Long; Cherry; Kinsey; Halbert; Jamar; Lee; Chik), and the prohibition of unauthorised sampling of even very small parts of sound recordings under US law (*Grand Upright Music v Warner Brothers Records*; *Bridgeport Music v Dimension Films*; Shapell; Ashtar; Collins). To make intellectual property consistent with this model of free speech as democratic culture, it has been argued that intellectual property should not be permitted to operate as a chokepoint or bottleneck in the distribution of culture (Balkin).

Possible solutions include reinterpreting the US doctrines of *de minimis* and substantial similarity so as to permit a certain degree of sampling (Ashtar; Morrison) and fair use itself (Hetcher; Tushnet; Power; Simpson-Jones; Long; Halbert), creating a new copyright exception to permit non-commercial user-generated content (Lessig; Halbert; Katz; Khaosaeng; Canadian Copyright Act, s29.21(1); Scassa; Helberger et al; Gowers Review; Irish Copyright Review Committee. cf Hetcher; Hargreaves Review; Rosati), compulsory (Vrana; Shapell; Ashtar; Brown; Harper; Collins; Lessig. cf Tushnet; Long; Simpson-Jones) or blanket (Mongillo; Harper) licensing, Creative Commons licences (Harper; Lessig; Collins), the voluntary adoption of business practices that encourage user-generated content (Golosker; Lee; Katz), and codes of best practices for contextualising fair use within a particular creative sector (Aufderheide and Jaszi; Falzone and Urban; Dotan et al. cf Rothman).

File-sharing

File-sharing may facilitate freedom of expression, as it can be used for purposes including the exchange of information, ideas and opinions, sharing creative remixes, sequels and reinterpretations of existing works, as a tool for cultural, scientific and technical collaboration, and reducing reliance on traditional models and channels of

media production and distribution (Bonadio; Danay). Restrictions imposed on the use of file-sharing software may constitute an interference with freedom of expression under art 10 ECHR, which has to be justified under the three conditions set out in art 10(2) ECHR (*Neji v Sweden*; Jones).

Internet browsing

The process of browsing the Internet normally involves the creation of temporary copies of the webpages that are accessed on the Internet user's computer screen as well as in the computer's cache memory. Where the webpage concerned contains material that is protected by copyright, this raises the question of whether any temporary copies that are created in this manner amount to infringing reproductions if made without the authorisation of the copyright owner.

This has significant implications for freedom of expression, in particular the freedom to receive and impart information and ideas through the Internet. In Europe, Internet browsing, even where it involves viewing of copyright-protected material, has been held to be an act permitted by the mandatory exception permitting the creation of temporary technology-dictated copies of works under art 5(1) Information Society Directive (*Meltwater*). In the US, one District Court has held that browsing a webpage containing copyright-protected material is *prima facie* infringing (*Intellectual Reserve v Utah Lighthouse Ministry*). This has been criticised for undermining the ability of the general public to browse the Internet (Hoffmann; Myers)

Hyperlinking

Hyperlinking is an integral feature of the Internet. For this reason, if hyperlinking to a work were to be regarded as an act falling within the scope of its copyright owner's exclusive rights, this would have the potential to interfere with the operation of the Internet and thus with the freedom of expression and information of ordinary Internet users (*Crookes v Newton*; *ACLU v Reno*; European Copyright Society). Some European national courts have held that hyperlinking per se is not protected by the right to freedom of expression (*IFPI v Beckers*), while others have held otherwise (*AnyDVD*). The CJEU has recently confirmed that the provision of a hyperlink to a work falls within the scope of its copyright owner's exclusive right to communicate that work to the public, although where works that have already communicated to the public by the copyright owner, the right it is only infringed where the link is directed at a *new public* (*Svensson*). It is argued that this approach could effectively impose on ordinary website operators and Internet users a positive duty to ensure that any webpage that they intend to link to does not contain any infringing material, resulting in a serious encroachment on their freedom of expression (European Copyright Society). In the US, hyperlinks are protected as 'speech' within the meaning of the First Amendment (*ACLU v Miller*; *Universal City Studios v Reimerdes*; *Kuester and Nieves*; *Morris*; *Roarty*; *Sableman*; *Dalal*), and courts have held that the provision of a hyperlink does not in itself constitute copyright infringement (*Ticketmaster v Tickets.com*; *Perfect 10 v Amazon*; *Burk*; *Wassom*).

Notice and takedown

Notice and takedown procedures require hosting providers to act expeditiously to remove or disable access to infringing content or information in order to benefit from statutory exemptions from any liability they may have incurred in hosting such content. These procedures may result in an unjustified interference with the freedom of expression of ordinary Internet users where the material sought to be removed is in fact non-infringing and/or constitutes speech of significant value.

In the EU, the E-Commerce Directive provides the statutory basis for notice and takedown procedures, but does not prescribe any specific technical requirements to be followed. As a consequence, there is heavy fragmentation of such procedures across the EU, particularly in relation to notice and counter-notice, relevant timeframes, liability for submitting wrongful notices and taking down or blocking lawful content, and the assessment of legality of content by private operators. A consultation conducted by the European Commission identified various recommendations for amending these systems.

The statutory basis for notice and takedown procedures in the US is section 512(c) of the US Copyright Act, which was introduced by the DMCA. The implications of the notice and takedown procedure for free speech have been acknowledged by the US courts (*Perfect 10 v CCBill*), and its use for purposes that have a negative impact on free speech identified, including preventing uses of copyright-protected material that are permitted by the doctrine of fair use, and demanding the removal of material beyond that which is alleged to be infringing, such as where the notice cites a high-level URL or a URL that covers a broad range of material (Urban and Quilter; Cobia; Seltzer; *Online Policy Group v Diebold*). The structure of the notice and takedown procedure also incentivises risk-averse behaviour on the part of hosting providers, encouraging them to remove material promptly upon receipt of *any* takedown notice even where such material is not obviously infringing or where the notice itself is deficient (Concepcion; Lemley; Yen).

Proposals for addressing the flaws of the notice and takedown procedure include the regulation of Internet hosting providers under the 'common carriage' regime, which would insulate them from most liability for the speech of their users (Seltzer), requiring hosting providers to provide notice to their users before removing their content (Urban and Quilter), and imposing liabilities on hosting providers that remove legitimately posted content on the basis of a statutorily deficient notice (Cobia).

Website blocking injunctions

The legal basis for blocking injunctions under EU copyright law can be found in the E-Commerce Directive; the Information Society Directive; and the Enforcement Directive. Such injunctions may amount to an interference with the right to freedom of expression of the subscribers whose access to the blocked websites is impeded (in particular their right to receive information and ideas), may constitute an interference with the website operators' right to freedom of expression, and may also amount to an interference with the right to freedom of expression of the ISPs against which they are directed (*Twentieth Century Fox v British Telecommunications*).

Blocking injunctions were considered by the CJEU in *Scarlet v SABAM*, where it held that the injunction should not impose on the ISP an obligation to carry out general monitoring of its traffic, and should strike a fair balance between the copyright owners' right to

intellectual property on the one hand and the ISP's freedom to conduct business and its subscribers' right to protection of personal data and freedom of information on the other.

The CJEU provided additional guidance on blocking injunctions in *UPC Telekabel Wien v Constantin Film*, where it permitted the imposition of a blocking injunction which was framed in general terms and prohibited the ISP from allowing its subscribers to access a certain website, but without prescribing the specific measures to be taken. In particular, it held that while the injunction constituted a restriction on the ISP's freedom to conduct business, it did not infringe the very substance of such freedom, it allowed the ISP to determine the specific measures to be taken in order to achieve the result sought, and that blocking injunctions could not be considered to be incompatible with the requirement that a fair balance be found between all applicable fundamental rights, provided that (i) they did not unnecessarily deprive Internet users of the possibility of lawfully accessing the information available; and (ii) that they had the effect of preventing unauthorised access to protected material or, at least, of making it difficult to achieve and of seriously discouraging Internet users who were using the services of ISP in question from accessing material that had been made available to them in breach of copyright.

The CJEU's line of decisions in *Scarlet*, *Netlog* and *Telekabel* has been criticised by several commentators for their failure to provide clear guidelines as to how a fair balance between competing fundamental rights should be struck in such cases (Meale; James; Savola; Psychogiopoulou; Kulk and Borgesius). Differences between the approach of the Advocate General and the Court are also notable.

The statutory basis for blocking injunctions in the UK can be found in section 97A of the CDPA (implementing article 8(3) of the Information Society Directive) (*Newzbin2; Dramatico Entertainment*). In granting blocking injunctions, the UK courts have held that it is necessary to strike a balance between the IPRs of the copyright owners on the one hand and the freedom of expression of the ISP, the operator of the website sought to be blocked, and the users of the website in question. The consideration of fundamental rights has been praised (Seville), although the lack of representation of users causes concern (Smith).

The statutory basis for a website blocking injunction under US law is section 512(j)(1)(B)(ii) of the Copyright Act, which was introduced by the DMCA. To make use of this provision, copyright owners must show that there has been infringement (whether direct, vicarious or contributory) by the ISP itself. This may have contributed to the unwillingness of copyright owners to seek blocking injunctions in the US (Feiler).

Contractual and technological overridability of copyright law

In the digital environment, copyright owners are able to expand or restrict users' entitlements and freedoms under copyright law through the use of contractual provisions or TPMs. The international copyright framework does not expressly address contractual relations entered into between copyright owners and users of copyright works. However, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty both require parties to provide legal protection against the circumvention of TPMs that are used by copyright owners in the exercise of their rights.

In the EU, the Software and Database Directives contain a few provisions setting out certain mandatory copyright exceptions that cannot be contracted out of. Exceptions that are not expressed to be mandatory in this manner are generally regarded as capable of being overridden by contract (Bechtold). The European Information Society Directive contains express provisions prohibiting the circumvention of TPMs that have been applied to copyright works. The US Copyright Act, as amended by the DMCA, contains a very broad prohibition against the circumvention of TPMs. The statute permits the circumvention of TPMs only for a very limited number of purposes (Vinje).

Electronic contracts also reduce transaction costs and enable price differentiation, affording users a wider range of choices while giving copyright owners the ability to exploit their works more fully (Vinje; Guibault et al); TPMs facilitate price differentiation and reduce transaction costs (Hugenholtz et al; Noguichi), and may encourage copyright owners to distribute digital versions of their works, by giving them a greater sense of security against potential infringers (Ginsburg; Nimmer).

However, copyright owners' ability to contract directly with users of their works enables them to restrict acts that they would not be entitled to restrict through copyright, such as prohibiting copying of public domain materials; prohibiting the making of quotations; prohibiting the use of materials for critical commentary or educational purposes, and prohibiting users from disclosing the work in question to any unauthorised third party (Elkin-Koren; Hugenholtz et al; Benkler; Vinje; Guibault et al; Moffat; Abruzzi; Akester). The same arguments are equally applicable to TPMs (Hugenholtz et al; Benkler; Vinje; Balkin; Dreier; Netanel; Angelopoulos; Akester; Schack), and TPMs as they currently exist are generally not sufficiently flexible or intelligent to effectively accommodate copyright exceptions or freedom of expression concerns (De Werra; Akester and Akester; Cunningham. cf Burk and Cohen).

Contractual restrictions that expand copyright owners' exclusive rights beyond that provided for under copyright law may be rendered unenforceable by of non-copyright doctrines such as abuse of right, competition law, contract law or consumer law (Vinje; Hugenholtz et al; De Werra; Stromdale; Guibault et al; Abruzzi; Bunker). However, these doctrines are unlikely to be capable of fully reflecting the balance provided for under copyright law itself (Vinje; De Werra; Hugenholtz et al).

Certain limitations and exceptions on copyright might be made mandatory, with the effect that any contractual terms that purport to restrict the applicability of these limitations and exceptions will become null and void (Hugenholtz et al; Guibault et al). These limitations and exceptions might be made mandatory only in relation to non-negotiated standard form contracts (Dreier; Hugenholtz et al; Guibault et al) or only where they are directly linked to the fundamental rights and liberties of users (Vinje; De Werra; Guibault et al; Akester) or have an impact on the internal market (Guibault et al).

In the European context, it has been suggested any prohibition on the circumvention of TPMs should be limited to circumvention that is carried out for the purposes of infringing copyright (Vinje). US commentators have called for the fair use doctrine to be made applicable to cases where TPMs are circumvented for legitimate purposes (Samuelson;

Ginsburg). Several commentators have also proposed that users who have committed a breach of a contractual term precluding fair use of a protecting work, for the purpose of making an expressive use of that work, should be able to rely on a constitutional defence based on the First Amendment in the event legal action is taken against them (Benkler; AbruZZi).

6 Accommodating freedom of expression within copyright

Proposals which have been made for more effectively accommodating freedom of expression within copyright law include the reinterpretation of existing defences in copyright law, the creation of new defences, and the implementation of compensation-based mechanisms.

As a general approach to striking the appropriate balance between copyright and freedom of expression, it has been suggested that the courts should take into account both the nature of the protected work as well as the nature of the infringing speech, following categorisations familiar to freedom of expression analysis such as political speech, artistic speech, and commercial speech (Macmillan Patfield; Zimmerman; Griffiths). Furthermore, commentators in the UK context have suggested that the balancing apparatus inherent in art 10(2) of the ECHR might be used (Masiyakurima; Barendt), while in the US, it has been suggested that existing constitutional mechanisms for achieving First Amendment oversight of copyright be used, by treating copyright as a form of content-neutral speech regulation (Netanel).

The statements of the Court of Appeal in *Ashdown v Telegraph Group* indicate that it may be necessary, in cases where freedom of expression concerns are clearly implicated, to give a generous interpretation to terms such as 'criticism', 'review', 'reporting current events', and indeed to what constitutes a 'fair' dealing in order to bring the fair dealing provisions in line with art 10 of the ECHR. (Garrett; Griffiths). In order to do so, it will be necessary for the UK courts to take a broad approach to assessing 'fairness' (thus departing from giving undue weight to the factors that have traditionally been taken into account in such assessments), taking into account both the nature of the protected work and the nature of the infringing speech (Griffiths; Kelly). Concerns that such a broad interpretation of the fair dealing provisions might be incompatible with the Information Society Directive might be addressed with the counter-argument that the ECJ and domestic courts are obliged to interpret European legislation in accordance with the fundamental rights contained in the ECHR (Griffiths).

Regarding the US, several ways for reinterpreting the fair use doctrine so as to accommodate First Amendment interests have been suggested. These proposals include giving greater weight to transformative nature of the use under the first factor, even where the defendant's work competes in the market for derivative works based on the original work (Netanel), as well as expanding the focus of the first factor beyond transformative use to a broader range of uses that serve First Amendment interests, while eliminating the focus on the commercial nature of the use (Lockridge). Others recommend distinguishing reproduction for personal use, which would count as fair use under this new framework, from reproduction which mimics the effect of a competitor, which would not be fair (Elkin-Koren; Patterson), and taking into account the concepts of

public interest and public access in determining whether a use is fair (Zimmerman; Shipley; Hall).

The discretionary refusal of injunctive relief is another approach. The balance between the rights of the copyright owner and the public interest in having access to the protected work may be struck by holding that the copyright owner is not entitled to an injunction, but only to an award of damages (*Ashdown v Telegraph Group* (CA); Dworkin; Garnett; Netanel; Zimmerman; Abrams). In the US, it has been suggested that the grant of an injunction in copyright cases involving freedom of speech would amount to an unconstitutional prior restraint on speech (Zimmerman; Abrams; Lemley and Volokh). Whether such an approach could, in practice, function as an effective safeguard for freedom of expression has, however, been doubted, as it is not a mechanism that is widely used (Garnett), and the courts have not always exercised such discretion in favour of freedom of expression (Griffiths). The defendant's continuing liability to pay damages may also have a 'chilling effect' on the defendant's decision to publish (Garnett; Griffiths; Masiyakurima).

The public interest defence under the law of the UK was initially developed in the context of the law of confidence. It provides defendants with the opportunity to escape liability for breach of confidence if they can establish that the disclosure made by them was justified in the public interest. Subsequently, it made its way into copyright law through a number of cases which involved both copyright and breach of confidence claims (*Beloff v Pressdram*; *Lion Laboratories v Evans*), and has in respect of copyright been expressly linked by the courts to art 10 of the ECHR (*PCR v Dow Jones Telerate*; *Hyde Park Residence v Yelland* (Ch); *Ashdown v Telegraph Group* (CA)).

It has been suggested that the public interest defence would be an appropriate and flexible mechanism for giving effect to the right to freedom of expression, particularly in those cases where the defence of fair dealing is not available (Burrell; Griffiths; Masiyakurima). However, the language of the court has suggested that it will be available only in limited cases, undermining its potential efficacy (*Ashdown v Telegraph Group* (CA); Garnett; Angelopoulos), and it has been doubted whether such a defence would be consistent with the Information Society Directive (Garnett).

As freedom of expression is a fundamental right, it has been suggested that in all instances of conflict between it and copyright, the onus should be placed on the copyright owner to show that the restrictions imposed by copyright are proportionate and 'necessary in a democratic society' within the meaning of art 10(2) of the ECHR (Barendt; Griffiths). Similar suggestions have been made in the US context (Netanel; Rosenfeld; Hoberman).

Alternatively, new defences could be proposed. For instance, a more general, US-style defence of fair use could help to overcome the statutory limitations of the fair dealing provisions (Laddie). However, such a defence might still lack effectiveness if not accompanied by a shift in judicial attitude which results in the courts being more aware of the interests of users (Burrell), and the presence of a flexible fair use defence under US law has not forestalled the disputes surrounding the extent its applicability in free speech cases (Masiyakurima). Again, the compatibility of such a defence with the Information Society Directive has been questioned (Dworkin).

More narrowly, the UK government has introduced an exception for 'caricature, parody and pastiche', which is permitted by the Information Society Directive, into the CDPA. Given the nature of parody, such an exception furthers the aims of freedom of expression (Dworkin). However, it may be of limited utility given current judicial attitudes which privilege economic considerations over freedom of expression, and the difficulty of formulating a clear and comprehensive definition for 'caricature', 'parody', and 'pastiche' (Masiyakurima).

An independent 'freedom of expression' or 'First Amendment' defence would enable the courts to give due consideration to freedom of expression issues outside the constraints of copyright's internal doctrines (Masiyakurima; Wang; Hoberman). In the UK, such a defence might be applicable to cases that are not accommodated by existing defences (Garnett). In the US, different justifications have been identified as the possible basis of such a defence, e.g. where the taking of a protected work is necessary (Denicola; Hamel; Hoberman), where the taking of a protected work is founded on the public interest (Denicola; Oakes; Fraser; Krieg; Wang) or when the protected work is one in which the idea is indistinguishable from its expression (Nimmer; Reis; Tharmaratnam).

However, in the context of the UK, it has been argued that such a defence would be of limited utility if not interpreted purposively by the courts, and may be redundant in some cases as it may cover ground covered by existing defences (Masiyakurima). In the US context, it has even been argued that such a defence would undermine the autonomy of authors and the property right basis of copyright, and even risk trivialising the First Amendment (Swanson).

Several commentators have put forward proposals based on a 'compensation right' approach, which would guarantee compensation for copyright owners while affording the general public greater freedom to share and make use of material protected by copyright (Nimmer; Netanel; Lessig). Proposals include the imposition of a 'non-commercial use levy' on the sale of any consumer product or service whose value is substantially enhanced by peer-to-peer file-sharing (Netanel, developed in the context of file-sharing technology), a system of government rewards to be paid to authors in lieu of copyright (Netanel), and the implementation of a system of compulsory licensing, similar to that used in cable retransmission, which would enable users to freely copy and circulate works (Lessig). However, concerns have been expressed that a compulsory licensing mechanism which is grounded on the right to freedom of expression may effectively constitute a tax for the exercise of a fundamental right (Hoberman).

7 Related issues and themes

Moral rights

Moral rights are intended to protect the non-pecuniary interests of authors of copyright works, and have a human rights dimension (UDHR art 27(2); ICESCR, art 15(1)(c)). The Berne Convention requires states that are parties to it to confer on authors the moral right of integrity, or the right not to have their works subjected to derogatory treatment.

The moral right of integrity advances free speech interests by guaranteeing the author's expressive autonomy and preventing distortion of the author's speech (Stamatoudi; Spence; Masiyakurima; Angelopoulos; Treiger-Bar-Am; Konrad; Cross). However, it may also conflict with freedom of expression by inhibiting the creation and dissemination of derivative works such as parodies (Pessach; Deazley; Angelopoulos; Kwall; Spence; Griffiths). In addition, the safeguards and exceptions applicable to infringements of copyright owners' economic rights (such as the idea/expression, the defence of fair dealing and the defence of fair use) are rarely applicable to infringements of the moral right of integrity (Griffiths; Kelly; Beck et al).

In the UK context, it has been suggested that the public interest defence preserved by the CDPA might be extended to claims for breaches of the moral right of integrity, particularly where the defendant is exercising his or her right to freedom of expression. However, the willingness of the courts to do so has been questioned (Griffiths; *Mars v Teknowledge*). Where the copyright statute contains an exception permitting parodies that would otherwise infringe the economic rights of the copyright owner, the same exception could be extended to parodies that potentially infringe the author's right of integrity (Deazley).

Education

The right to education has been recognised as a human right at the international level (UDHR, art 26(1); ICESCR, art 13; Convention on the Rights of the Child, art 28(1)) and at the European level (First Protocol to the ECHR, art 2; EUCFR, art 14).

The international copyright framework permits states that are party to them to implement domestic exceptions for acts that are carried out for educational purposes (Berne Convention, art 10(2)). However, it also makes it clear that any such exceptions are subject to the constraints of the three-step test set out in the Berne Convention (Berne Convention, art 9(2); TRIPS Agreement, art 13; WIPO Copyright Treaty, art 10; WIPO Performances and Phonograms Treaty, art 16). At the European level, the Information Society Directive permits Member States to enact exceptions or limitations to the copyright owner's exclusive rights 'for the sole purpose of illustration for teaching or scientific research'; in the US Copyright Act, the preamble to the provision establishing the doctrine of fair use makes express reference to fair uses of copyright works for educational purposes.

Copyright law has positive implications for the right to education, as it guarantees the independence of authors from both elite and state patronage, ensuring the production of a diverse range of works (Derclaye; Geiger). However, recent developments in copyright law have made it difficult for students and educators, particularly those in the developing world, to gain access to copyright-protected material. As copyright ownership is concentrated in the hands of publishers in developed countries, individuals and institutions in developing countries face very high costs (relative to per capita income) when attempting to purchase textbooks or accessing online databases (Chon; Thomas; Suthersanen; Commission on IPRs). Furthermore, the use of TPMs has eroded the distinction between protectable expression and unprotectable ideas and information; diminished the effectiveness of statutory copyright exceptions; and effectively nullified the doctrine of exhaustion (Geiger; Sun; Suthersanen; Commission on IPRs).

The three-step test applicable under various international copyright treaties is to be interpreted in a way that permits developing countries to implement broad exceptions for education, and that takes into account the international human rights obligations set out in the UDHR and ICESCR (Suthersanen; Thomas; Geiger; Geiger et al). This could be achieved through amendment of the TRIPS Agreement (Geiger), including a reference to the UDHR in the preamble to the TRIPS Agreement (Geiger), adopting a separate international legal instrument on copyright limitations and exceptions that promotes fundamental rights and freedoms, including the right to education (Hugenholtz and Okediji; Hinze), or implementing 'ceiling' rules that provide for maximum standards of copyright protection at the international level (Grosse Ruse-Khan; Kur and Grosse Ruse-Khan).

Access to information and copyright works for educational purposes can also be facilitated through the broader use of open access mechanisms within the education sector (Geiger; Guadamuz; Sun). These include generally-applicable mechanisms such as free and open source software licences and Creative Commons licences (Geiger; Guadamuz; Sun), alongside more sector-specific solutions such as the publication and promotion of open-access academic journals (Guadamuz).

1 Introduction

This comparative literature review analyses the relationship between copyright and freedom of expression, focusing in particular on a comparison between the UK (within its wider European context) and the US. It looks at the debates in academic works and case law concerning the ways in which copyright and freedom of expression can intersect and conflict, also considering (in less detail) the ways in which copyright and related rights may implicate other human rights issues.

This literature review focuses primarily on academic works, case law, and official documents and/or reports prepared by governments and international human rights organisations as well as other non-governmental organisations that discuss the intersection between copyright and freedom of expression. Three categories of academic works can be identified: (i) those that deal with the intersection between copyright and freedom of expression in general; (ii) those that deal with the intersection between copyright and freedom of expression in the context of a specific issue, such as file-sharing; and (iii) those that address the wider debate on the intersection between intellectual property rights and human rights. There is a certain degree of overlap between these categories; for instance, one discussion of UK copyright legislation and freedom of expression in the specific context of peer-to-peer file-sharing of copyright protected materials also incorporates a more general discussion of the treatment of freedom of expression values under the existing copyright scheme.¹

A number of themes and issues have been raised and developed in the literature on the intersection between copyright and freedom of expression as well as the wider literature on the intersection between intellectual property rights and human rights. These will be discussed under the following six headings.

'Fundamental rights underpinnings of copyright and freedom of expression' shows the extent to which these two concepts have become entrenched in various national constitutional frameworks as well as regional and international human rights and/or fundamental rights frameworks.

'Background to the debate' sets out the factors and developments that commentators have identified as having led to greater academic interest in and focused increased attention on the tension between copyright and freedom of expression, as well as the manner in which the judicial, legal and academic discourse on the issue has been developed across various jurisdictions.

'Nature of the interaction between copyright and freedom of expression' explores the different ways in which commentators have characterised the inter-relationship between copyright and freedom of expression, in particular whether the intersection is described primarily as one of conflict or one of co-existence and co-operation.

¹ Robert Danay, 'Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom' (2005) 8 *Yale Journal of Law & Technology* 32, 36 – 44.

'Accommodating freedom of expression within copyright' examines the various proposals that have been advanced by commentators for incorporating freedom of expression values within copyright law systems.

'Specific issues' is a review of the various contexts in which the intersection between copyright and freedom of expression has been characterised as being particularly relevant, including file-sharing, hyperlinking and parody.

'Related themes and issues' examines the implications of copyright for human rights other than freedom of expression, as well as the interface between freedom of expression and other rights related to copyright.

2 Fundamental rights underpinnings of copyright and freedom of expression

1 2.1 Freedom of expression

The status of freedom of expression as a fundamental right is enshrined in international and regional human rights instruments as well as national constitutions. In some cases, it may be characterised as the right to 'freedom of expression and information', 'free speech' or 'freedom of speech'. There are differences of emphasis between these formulations, but this review will generally refer to 'freedom of expression' as a broad category.

Internationally, the right to freedom of expression is recognised in both the Universal Declaration of Human Rights ('UDHR')² and the International Covenant on Civil and Political Rights ('ICCPR').³ In both of these cases, the right to freedom of expression is framed as including the freedom to hold opinions without interference and the freedom to seek, receive and impart information and ideas. The ICCPR further provides that the right to freedom of expression may be subject to certain restrictions, but these shall be confined to those that are provided by law and are necessary for respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals.⁴

Within the European context, the right to freedom of expression is enshrined in both the European Convention on Human Rights ('ECHR')⁵ and the Charter of Fundamental Rights of the European Union ('EUCFR').⁶ In both cases, the right is expressed to include 'freedom to hold opinions and to receive and impart information and ideas without

² UDHR, art 19.

³ ICCPR, art 19.

⁴ ICCPR, art 19(3).

⁵ ECHR, art 10.

⁶ EUCFR, art 11.

interference by public authority and regardless of frontiers'. The ECHR further provides that the exercise of the right may be subject to restrictions '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'.⁷ This right is often referred to in the introductory material to a number of Directives; see further section 4.1, below.

The right to freedom of expression is also enshrined in national constitutions across a number of jurisdictions. Perhaps the most famous such guarantee is the First Amendment to the US Constitution, which states: 'Congress shall make no law ... abridging the freedom of speech, or the press...' In European national constitutions, provisions guaranteeing the right to freedom of expression have tended to be framed in less absolutist terms, permitting the restriction of the right or its exercise under certain circumstances: the German Basic Law, for instance, provides that the right to freedom of expression may be restricted by the provisions of general laws, provisions for the protection of young persons, and the right to personal honour.⁸

2 2.2 Copyright

The status of copyright as a fundamental right is much less clear-cut than that of freedom of expression. In the literature that seeks to position copyright (and other intellectual property rights) within the framework of fundamental rights, two distinct strands of reasoning can be discerned.⁹ The first of these takes as its starting point the right of every author to benefit from the protection of the moral and material interests resulting from his or her scientific, literary or artistic productions, which is enshrined in various human rights instruments, such as the UDHR and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'); on this basis, it is argued that insofar as copyright serves to protect these moral and material interests, it is a fundamental right. The second line of reasoning proceeds from the basis that copyright is a form of property, the right to protection of which is also enshrined in various human rights and/or fundamental rights instruments. These two strands of thought are neatly summarised by Gervais:¹⁰

⁷ ECHR, art 10(2).

⁸ German Basic Law, art 5(2).

⁹ See Daniel Gervais, 'Intellectual Property and Human Rights: Learning to Live Together' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 14 – 19; Estelle Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 138 – 139; Paul Torremans, 'Copyright (and Other Intellectual Property Rights) as a Human Right' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 199 – 204; Josef Drexler, 'Constitutional Protection of Authors' Moral Rights in the European Union--Between Privacy, Property and the Regulation of the Economy' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing, 2007), 167 – 168; P Bernt Hugenholtz, 'Copyright and Freedom of Expression in Europe' in Rochelle Cooper Dreyfuss et al (eds), *Expanding the Boundaries of Intellectual Property* (OUP, 2001), 346 – 348.

¹⁰ Gervais, 'IP and Human Rights', 14.

Copyright could be defended on one of two bases as a human right. First, because it is seen as property, and property in turn is seen as a human right ... The other human right basis for copyright is [the] fact that, as René Cassin noted, 'Human beings can claim rights by the fact of their creation'.

In addition to these two grounds, the argument has also been made that copyright is protected as a human right due to its link with freedom of expression. It is worth noting that copyright as such may be protected on the basis of more than one constitutional or fundamental right: for instance, in Germany, the moral rights (or personality rights) element of copyright is deemed to be protected under articles 1(1) and 2(1) of the Basic Law, which deal respectively with the inviolability of human dignity and the right to free development of individual personality,¹¹ while the economic rights aspect of copyright is protected under article 14(1), which deals with the right to property and of inheritance.¹²

3 2.2.1 Right of the author to benefit from the protection of moral and material interests

Both the UDHR and the ICESCR provide for the right of every person 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.¹³ In the context of the ICESCR, the Committee on Economic, Social and Cultural Rights has explained in a General Comment that article 15(1)(c) means that:¹⁴

... States parties must prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies, e.g. by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of any use made of their productions and to remunerate them adequately. States parties must ensure that third parties adequately compensate authors for any unreasonable prejudice suffered as a consequence of the unauthorized use of their productions.

These provisions have been described by some writers as having assimilated authors' rights to fundamental human rights, in effect recognising copyright as a human right.¹⁵ Geiger has noted, however, that neither of these instruments require that the moral and material interests of authors should be protected by way of a *property right*, arguing that within the scope of these conventions, means of protection other than copyright can be implemented by legislators.¹⁶ It is therefore possible that only those aspects of copyright law that protect the moral and material interests of authors in the manner required by these instruments may be said to have human rights status. Doubt as to the equivalence

¹¹ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 347; Adolf Dietz, 'Constitutional and Quasi-Constitutional Clauses for Justification of Authors' Rights (Copyright): From Past to Future' (ALAI Congress, Paris, 18 – 21 September 2005), 60 – 61; Drexler, 'Constitutional Protection', 168.

¹² Hugenholtz, 'Copyright and Freedom of Expression in Europe', 347.

¹³ UDHR, art 27(2); ICESCR, art 15(1)(c).

¹⁴ Committee on Economic, Social and Cultural Rights, 'General Comment No 17' (21 November 2005) E/C.12/GC/17, [31].

¹⁵ André Kéréver, 'Authors' Rights are Human Rights' (1998) 32(3) *Copyright Bulletin* 18, 23; Hugenholtz, 'Copyright and Freedom of Expression in Europe', 348; Herman Cohen Jehoram, 'Copyright and Freedom of Expression, Abuse of Rights and Standard Chicanery: American and Dutch Perspectives' (2004) *European Intellectual Property Review* 275, 276.

¹⁶ Christophe Geiger, 'Copyright's Fundamental Rights Dimension at EU Level' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009), 31.

of present-day copyright laws and article 15(1)(c) is a feature of General Comment 17. Indeed, it is sometimes argued that moral rights have a stronger claim to protection as human rights compared to the economic exploitation rights conferred by copyright, as moral rights protect the personal link between a creator and his or her intellectual creations.¹⁷

4 2.2.2 Right to protection of property

The right to protection of property is acknowledged as a fundamental right both in various international and regional human rights instruments as well as national constitutions. At the international level, the right to property is enshrined in article 17 of the UDHR, which states that:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

In the European context, the right to protection of property is provided for in the First Protocol to the ECHR, article 1 of which states that 'every natural or legal person shall be entitled to the peaceful enjoyment of his possessions',¹⁸ as well as the EUCFR, which provides for the right of everyone 'to own, use, dispose of and bequeath his or her lawfully acquired possessions'.¹⁹

In *Anheuser-Busch v Portugal*,²⁰ the European Court of Human Rights ('ECtHR') held that article 1 of the First Protocol to the ECHR was applicable to intellectual property as such, as the concept of 'possessions' in that article had an autonomous meaning that was not limited to ownership of physical goods, and was capable of including other rights and interests constituting assets.²¹ In doing so, the ECtHR referred to its own previous case law as well as decisions of the European Commission of Human Rights. It noted, in particular, that in *Smith Kline & French Laboratories v The Netherlands*,²² the Commission had found that a patent fell within the scope of article 1 of the First Protocol, as patents are deemed to be 'personal property which is transferable and assignable' under Dutch law. This suggests that the European tribunals place significant weight on the exclusivity and transferability of the rights which national laws confer on

¹⁷ Laurence R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 *Harvard International Law Journal* 1, 17 (citing Orit Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004) 14 *Fordham Intellectual Property, Media & Entertainment Law Journal* 497, 524).

¹⁸ First Protocol to the ECHR, art 1.

¹⁹ EUCFR, 17(1).

²⁰ (2007) 45 EHRR 36.

²¹ (2007) 45 EHRR 36, [63] – [72].

²² (1990) 66 DR 70.

owners of intellectual property rights, as both exclusivity and transferability are hallmarks of property.²³

Under the EUCFR, the position is even clearer: while article 17(1) provides for the right to property, it is followed by an express statement that '[i]ntellectual property shall be protected' (article 17(2)).²⁴ This was referred to by the CJEU in its recent decision in *Scarlet v SABAM*,²⁵ where it added that the right was not absolute and must be balanced against the protection of other fundamental rights.²⁶ This point was reiterated by the CJEU in its subsequent decision in *UPC Telekabel Wien v Constantin Film*.²⁷

5 2.2.3 Role of copyright in promoting freedom of expression

The argument has sometimes been made that constitutional or fundamental rights protection for copyright flows from its ability to promote the interests that are safeguarded by the right to freedom of expression. Kéréver's argues that 'freedom of expression' has a positive dimension which encompasses the freedom to create in the cultural, literary and artistic spheres; the economic and moral rights of an author, from this perspective, represent an extension of this 'right to create', as they arise from the link between the author and the work and the very fact of such creation itself.²⁸ The possibility of a link between the right to freedom of expression and protection of copyright is also considered by Dimmich. Based on cases such as *Jersild v Denmark*,²⁹ *Verlagsgruppe News v Austria*³⁰ and *Vereinigung Bildender Künstler v Austria*,³¹ where the ECtHR has weighed freedom of expression against individual rights by taking into account the speaker's contribution to public debate and the right of the public to be properly informed about matters of public interest, she concludes that article 10 of the ECHR may be regarded as potentially guaranteeing protection of the moral rights of the author, particularly when the works in question contribute to public debate.³²

²³ Agata Dimmich, 'Copyright as a Human Right under the European Convention on Human Rights' in Jens Gaster, Erich Schweighofer and Peter Sint (eds), *KnowRight 2008: Knowledge Rights – Legal, Societal and Related Technological Aspects* (Conference Proceedings, Kraków, Poland, 18 – 19 September 2008), 23 – 24; Helfer, 'The New Innovation Frontier', 12.

²⁴ EUCFR, art 17(2).

²⁵ [2012] ECDR 4.

²⁶ [2012] ECDR 4, [43] – [44].

²⁷ Case C-314/12 (27 March 2014), [47], [61].

²⁸ Kéréver, 'Authors' Rights', 19 – 20.

²⁹ (1995) 19 EHRR 1.

³⁰ [2007] EMLR 13.

³¹ (2008) 47 EHRR 5.

³² Dimmich, 'Copyright as a Human Right', 27.

The Swedish Constitution provides that '[a]uthors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law'.³³ According to the explanatory memorandum, the rationale for this constitutional provision is the promotion of 'the free formation of opinion',³⁴ an interest which is encompassed by the scope of the right to freedom of expression. In the context of German law, it has also been suggested that, in addition to the right to protection of property, another possible constitutional basis for the economic rights of the copyright owner can be derived from article 5 of the German Basic Law, which guarantees freedom of expression, 'freedom of art' and 'freedom of science'.³⁵

3 Background to the debate

Much of the literature on the intersection between copyright and freedom of expression (as well as the intersection between intellectual property rights and human rights) begins with the observation that academic interest on this issue is a fairly recent phenomenon, and that copyright law and free speech laws (and more generally, intellectual property law and human rights law) were previously regarded as separate legal regimes. The recent increase in academic engagement has been attributed to a range of different factors, some of which are general in nature while others relate to a specific jurisdiction. This section will first examine the factors that are relevant across all jurisdictions generally (expansion of the law and technological change), before proceeding to a consideration of the factors that are specific to each jurisdiction.

6 3.1 Factors leading to increased engagement

7 3.1.1 Expansion of copyright law

Various commentators have observed that the tension between copyright law and freedom of speech has become increasingly apparent in the face of the dramatic expansion of copyright law, which has not been counterbalanced with a similar expansion at the level of the freedoms accorded to individual users.³⁶ These commentators refer, in particular to the broader and stronger rights accorded to

³³ Constitution of the Kingdom of Sweden, art 19.

³⁴ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 347.

³⁵ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 348.

³⁶ Helfer, 'The New Innovation Frontier', 4 – 5; Michael Birnhack, 'The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up' (2003) 43 *IDEA* 233, 234; L Ray Patterson, 'Free Speech, Copyright and Fair Use' 40 *Vand L Rev* 1 (1987), 11 – 12; Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 *Yale LJ* 283, 299 – 305; Neil Weinstock Netanel, 'Market Hierarchy and Copyright in Our System of Free Expression' (2000) 53(6) *Vanderbilt Law Review* 1879, 1900 – 1901; Jed Rubenfeld, 'The Freedom of Imagination: Copyright's Constitutionality' (2002) 112 *Yale Law Journal* 1, 11; Stephen S Zimmerman, 'A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict' (1986) 35 *Emory Law Journal* 163, 202; Geiger, 'Copyright's Fundamental Rights Dimension', 278; David Henningsson, 'Copyright and Freedom of Expression in Sweden and the European Union: The Conflict Between Two Fundamental Rights in the Information Society' (Lund University, Masters Thesis, 2012), 23.

authors;³⁷ the extended duration of these rights;³⁸ the ancillary protection measures which have been made available for these rights in the digital environment;³⁹ and the increasingly common use by copyright owners of contractual arrangements designed to expand their rights beyond the internal limitations provided for by copyright law.⁴⁰

8 3.1.2 The digital environment

Many daily activities, including the acquisition of information, communication with other people, participation in public discourse, entertainment, and the spending of money, have been transplanted from the analogue world to the digital environment, thus increasing the probability that these activities may be affected by copyright law.⁴¹ In addition, advances in digital technology have resulted in changes to the way in which people are able to access copyright works. For example, *reading* a physical book borrowed from a public library is not and never has been infringement, as it involves no act of reproduction. However, *accessing* an electronic document on a computer is, technically speaking, an act of reproduction, rendering mere access to or use of the work a potentially infringing act.⁴² These advances have also made it much easier for individual Internet users to produce and share user-generated content, which frequently draws upon existing copyright works and thus runs the risk of infringing copyright.⁴³ It has been observed that freedom of expression issues on the Internet become more pertinent when the focus is shifted from 'pure' downloading or file-sharing of copyright-protected works to the use of copyright material in various forms of user-generated content, the latter being an important way for ordinary citizens to share an array of political and artistic expressions with large audiences and to receive and impart knowledge from and to each other.⁴⁴

³⁷ Birnhack, 'The Copyright Law and Free Speech Affair', 234 (referring to the No Electronic Theft Act 1997 and the Digital Millennium Copyright Act 1998); Patterson, 'Free Speech, Copyright and Fair Use', 11 – 12; Netanel, 'Copyright and a Democratic Civil Society', 299 – 305; Netanel, 'Market Hierarchy', 1900 – 1901; Rubinfeld, 'The Freedom of Imagination' 11; Geiger, 'Copyright's Fundamental Rights Dimension', 278.

³⁸ Birnhack, 'The Copyright Law and Free Speech Affair', 234 (referring to the Sonny Bono Copyright Term Extension Act 1998 and its constitutionality as affirmed in *Eldred v Ashcroft* 537 US 186); Zimmerman, 'A Regulatory Theory of Copyright', 202; Netanel, 'Copyright and a Democratic Civil Society', 298 – 299; Netanel, 'Market Hierarchy', 1900 – 1901.

³⁹ Birnhack, 'The Copyright Law and Free Speech Affair', 234 (referring to the Digital Millennium Copyright Act 1998 and its application in *A&M Records v Napster* 239 F.3d 1004 (9th Cir. 2001); *Universal City Studios v Reimerdes* 111 F.Supp.2d 294 (S.D.N.Y. 2000), *affd* *Universal City Studios v Corley* 273 F.3d 429 (2d Cir. 2001); Geiger, 'Copyright's Fundamental Rights Dimension', 278.

⁴⁰ Netanel, 'Copyright and a Democratic Civil Society', 305 – 306.

⁴¹ Birnhack, 'The Copyright Law and Free Speech Affair', 234 – 235.

⁴² Douglas Y'Barbo, 'On Legal Protection for Electronic Texts: A Reply to Professor Patterson and Judge Birch' (1997) 5 *Journal of Intellectual Property Law* 195, 202; Netanel, 'Market Hierarchy', 1901 – 1902; Niva Elkin-Koren, 'Cyberlaw and Social Change' (1996) 14 *Cardozo Arts & Ent LJ* 215, 269 – 274.

⁴³ Henningsson, 'Copyright and Freedom of Expression', 23 – 24.

⁴⁴ Henningsson, 'Copyright and Freedom of Expression', 24.

9 3.2 Background to the debate: specific jurisdictions

10 3.2.1 UK

Commentators writing in the specific context of the UK have observed that there has historically been little discussion of the relationship between copyright and freedom of expression in the UK, particularly when compared with the much livelier debate in the US on the relationship between copyright and the First Amendment.⁴⁵ The enactment and coming into force of the Human Rights Act 1998 ('HRA'), which incorporates the provisions of the ECHR into the law of the UK (including new powers for courts to interpret legislation, strike down administrative action or secondary legislation, or highlight incompatibility for Parliament's attention), is often identified as having provided the impetus for greater judicial and academic engagement with the intersection between copyright and freedom of expression.⁴⁶ Birnhack has observed, for instance, that as a consequence of the HRA, '[f]or the first time in English law freedom of expression has gained an explicit status in the legal landscape'.⁴⁷ Barendt has made a similar observation, commenting that, prior to the enactment of the HRA, 'it was difficult to argue that a UK statute should not be given effect because it infringed the exercise of the right to freedom of expression'.⁴⁸ The HRA has also been described as having 'brought about a sea-change in the thinking of UK lawyers' in relation to all areas of law, including copyright,⁴⁹ and as marking 'a significant shift in the nature of judicial review and human rights law in the UK'.⁵⁰ Angelopoulos even states that in the UK, 'the external conflict between copyright and free speech was, up until the enactment of the HRA, completely hidden from view'.⁵¹

⁴⁵ Jonathan Griffiths, 'Copyright Law and Censorship: The Impact of the Human Rights Act 1998' in Eric Barendt and Alison Firth (eds), *Yearbook of Copyright and Media Law 1999* (OUP, 1999), 4; Michael Birnhack, 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' (2003) 14(2) *Entertainment Law Review* 24, 24; Jonathan Griffiths and Uma Suthersanen, 'Introduction' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 1; Eric Barendt, 'Copyright and Free Speech Theory' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 13; Christina J Angelopoulos, 'Freedom of Expression and Copyright: The Double Balancing Act' [2008] 3 *Intellectual Property Quarterly* 328, 328. Prior to the coming into force of the Human Rights Act 1998, only a few pieces of legal writing had been produced on this topic in the UK: see Meera Sayal, 'Copyright and Freedom of the Media: A Balancing Exercise?' (1995) 6(7) *Entertainment Law Review* 263; Fiona Macmillan Patfield, 'Towards a Reconciliation of Free Speech and Copyright' in Eric Barendt (ed), *Yearbook of Media and Entertainment Law 1996* (Clarendon Press, 1996); and Griffiths, 'Copyright Law and Censorship'.

⁴⁶ In addition to the sources described in the main text, see also Torremans, 'Copyright as a Human Right', 195 – 196 (observing that while the interaction between copyright and human rights is not a new phenomenon, it gave the impression of being so in the UK due to the introduction of the HRA).

⁴⁷ Birnhack, 'Acknowledging the Conflict', 24.

⁴⁸ Barendt, 'Copyright and Free Speech Theory', 13.

⁴⁹ Gerald Dworkin, 'Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer's Perspective' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 166.

⁵⁰ Danay, 'Copyright vs. Free Expression', 34.

⁵¹ Angelopoulos, 'Freedom of Expression and Copyright', 352.

Copyright and freedom of expression before the HRA

Even before the coming into force of the HRA, freedom of expression concerns had already been raised and referred to in a number of cases involving claims in copyright as well as breach of confidence and/or defamation.⁵² However, it is not completely clear whether the courts' discussion of the issues raised by freedom of expression in these cases was carried out in the context of the copyright claims as well as the other claims, or was predicated primarily on the claims in breach of confidence and/or defamation. In this regard, it should be noted that a freedom-of-expression-oriented defence is a well-established aspect of both the law on breach of confidence and the law on defamation: in the case of the former, the relevant defence is that of disclosure in the public interest, while in the case of the latter, the relevant defence is that of fair comment.

The first of these cases, *Fraser v Evans*,⁵³ involved a confidential report prepared by the claimant for the Greek Government, a copy of which had been obtained by the *Sunday Times*. The *Sunday Times* intended to publish extracts from the report as part of an article, together with further information provided by the claimant during an interview and their comments on both. The claimant obtained an injunction to restrain publication, on the grounds that it would both be in breach of confidence and defamatory. He also relied on his copyright in the report. The *Sunday Times* appealed against the injunction, arguing that no interim injunction should be granted as the article had not yet been published, and furthermore that it intended to rely on the defence of fair dealing for the purpose of reporting current events, and also to argue that there was a public interest in publication.⁵⁴ The principal difficulty faced by the court was that it did not know what the published article would contain. It thus appeared to give the benefit of the doubt to the *Sunday Times* on the fair dealing point, Lord Denning MR holding:

We have not seen what is going to be published. We cannot pre-judge the matter. We cannot say that there is going to be an unfair dealing when the *Sunday Times* say it is to be a fair dealing. So no injunction should be granted to prevent them publishing.⁵⁵

While the public interest defence was not expressly dealt with, it and freedom of expression concerns formed a major part of the court's thinking.⁵⁶ On this point, Lord Denning held:

It all comes back to this. There are some things which are of such public concern that the newspapers, the Press, and indeed, everyone is entitled to make known the truth and to make fair comment on it. *This is an integral part of the right of free speech and expression. It must not be whittled away.* The *Sunday Times* assert that in this case there is a matter of public concern. They admit that they are going to injure Mr. Fraser's

⁵² See *Fraser v Evans and others* [1969] 1 QB 349; *Hubbard v Vosper* [1972] 2 QB 84; *Lion Laboratories v Evans* [1985] QB 526. See also commentary in Kevin Garnett, 'The Impact of the Human Rights Act 1998 on UK Copyright Law' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 195 – 197, 200 – 203.

⁵³ [1969] 1 QB 349.

⁵⁴ The report allegedly revealed that the claimant, who was a public relations consultant, had been employed by the Greek Government to influence opinion among Members of Parliament in the UK.

⁵⁵ [1969] 1 QB 349, 363.

⁵⁶ Garnett, 'The Impact of the HRA', 195.

reputation, but they say that they can justify it; and that they are only making fair comment on a matter of public interest; and, therefore, they ought not to be restrained. We cannot prejudge this defence by granting an injunction against them. I think the injunction which has been granted should be removed. The *Sunday Times* should be allowed to publish the article at their risk. If they are guilty of libel or breach of confidence, or breach of copyright, that can be determined by an action hereafter and damages awarded against them. But we should not grant an interim injunction in advance of an article when we do not know in the least what it will contain. I would allow the appeal accordingly and discharge the injunction.⁵⁷

It is not completely clear from this passage whether Lord Denning was discussing the right to free speech and expression in the context of the defamation claim exclusively, or whether he was referring to its significance in the context of the copyright claim (and the claim for breach of confidence) as well.

Another example is *Hubbard v Vosper*,⁵⁸ where the defendant had written a book which was very critical of the Church of Scientology and contained substantial extracts from the published and unpublished writings of its founder, L. Ron Hubbard. The claimants obtained an interim injunction to prevent its publication on the grounds of copyright infringement and breach of confidence. The defendant appealed against the grant of the injunction. In relation to the copyright claim, he relied on the defence of fair dealing for criticism and review. Lord Denning found that, on the facts, the defendant could have a good defence of fair dealing to raise at trial. In defamation law, injunctions were not normally available when the proposed defence was truth (justification). The appeal was allowed and the injunction removed, Lord Denning holding:

But here, although Mr. Hubbard owns the copyright, nevertheless, Mr. Vosper has a defence of fair dealing: and although Mr. Hubbard may possess confidential information, nevertheless, Mr. Vosper has a defence of public interest. These defences are such that he should be permitted to go ahead with the publication. If what he says is true, it is only right that the dangers of this cult should be exposed. We never restrain a defendant in a libel action who says he is going to justify. So in copyright action, we ought not to restrain a defendant who has a reasonable defence of fair dealing. Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest. The reason is because the 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*.⁵⁹

Again, it is not entirely clear from the passage above whether Lord Denning's reference to freedom of speech was made in the context of the action for breach of confidence exclusively, or in the context of the copyright action as well.

A third example is the case of *Lion Laboratories v Evans*,⁶⁰ where a manufacturer of breathalyser kits sought to prevent the publication by the defendant newspaper of extracts of a confidential internal memorandum that cast doubt on the accuracy of the breathalysers, and thus the safety of convictions in drink driving prosecutions where the results of these breathalysers had been used. Its claim was based both on breach of confidence and on copyright. In refusing the claimant's application for an interim injunction, on the ground that there was an arguable public interest defence to both the

⁵⁷ [1969] 1 QB 349, 363 (emphasis added).

⁵⁸ [1972] 2 QB 84.

⁵⁹ [1972] 2 QB 84, 97 (emphasis added).

⁶⁰ [1985] QB 526.

breach of confidence and copyright infringement claims, Stephenson LJ made express reference to the right to freedom of expression set out in article 10 of the ECHR:

The problem before the judge and before this court is how best to resolve, before trial, a conflict of two competing public interests. The first public interest is the preservation of the right of organisations, as of individuals, to keep secret confidential information. The courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer. The duty of confidence, the public interest in maintaining it, is a restriction on the freedom of the press which is recognised by our law, as well as by article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969); the duty to publish, the countervailing interest of the public in being kept informed of matters which are of real public concern, is an inroad on the privacy of confidential matters.⁶¹

Once again, it is unclear whether Stephenson LJ's discussion of article 10 was intended to be confined exclusively to the claim in breach of confidence or whether it was intended to encompass the claim in copyright as well. Given that the claim in breach of confidence was the more heavily argued of the two,⁶² the former view might well be the more plausible one.

*Beloff v Pressdram*⁶³ was perhaps the first case in which the defence of disclosure in the public interest was considered in relation to a claim for copyright infringement without an accompanying claim of breach of confidence.⁶⁴ It involved the reproduction in *Private Eye* magazine of an internal office memorandum of *The Observer* describing a conversation between *The Observer's* Political and Lobby Correspondent and a named cabinet minister regarding possible successors to the prime minister in the event of the latter's accidental death. The defendants, the publisher and printer of *Private Eye*, raised the public interest defence as well as the defence of fair dealing for the purposes of criticism or review or reporting current events, all of which were rejected by the court. In doing so, the court gave a fairly narrow interpretation to the public interest defence, explaining that:

The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure ... justified in the public interest, of matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including

⁶¹ [1985] QB 526, 536 – 537, citing the judgments of Lord Denning MR in *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; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 (dissenting), and the speeches of Lord Wilberforce, Lord Salmon and Lord Fraser of Tullybelton in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096. For commentary, see Garnett, 'The Impact of the HRA', 200 – 203 (noting among other things that Stephenson LJ's judgment 'could almost have been written after the Human Rights Act came into force' and that it contains 'a prophetic discussion of the issues').

⁶² See in this regard the observation of O'Connor LJ in the same case that while the plaintiffs 'may have causes of action for breach of copyright and conversion, and after publication for libel or slander of goods ... the heart of the matter is the unauthorised use of the confidential information, and that can be protected by the equitable remedy of injunction': [1985] QB 526, 547.

⁶³ [1973] FSR 33.

⁶⁴ Sayal, 'Copyright and Freedom of the Media', 266.

matters medically dangerous to the public; and doubtless other misdeed of similar gravity. Public interest, as a defence in law, operates to override the rights of the individual, (including copyright), which would otherwise prevail and which the law is also concerned to protect. Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view, clearly recognisable as such.⁶⁵

On this basis, the court held that, as the publication of the memorandum did not disclose any 'iniquity' or 'misdeed', the defence of public interest failed.

*Hyde Park Residence v Yelland*⁶⁶ concerned the publication by *The Sun* of certain stills of Princess Diana and Dodi Fayed, taken from security footage recorded at the villa which they had visited the day before their deaths. The footage had been recorded by cameras installed by the plaintiff, which was responsible for ensuring the security of the villa. It was accepted by both parties that the plaintiff was the owner of the copyright in the security footage. *The Sun* argued that the publication amounted to fair dealing for the purpose of reporting current events within the meaning of the CDPA, as the stills exposed the falsehood of statements made by Mohammad Al Fayed that the two had enjoyed a lengthy stay at his house in Paris and were engaged to be married. The Court of Appeal gave little weight to the freedom of expression concerns relating to the copyright claim in this case, distinguishing such claims from breach of confidence claims in which freedom of to publish might exist depending on the public interest in knowing the truth. It held that:

Section 30 of the 1988 Act expressly allows fair dealing with certain works for the purpose of criticism or review or of reporting current events. Copyright does not lie on the same continuum as, nor is it the antithesis of, freedom of expression. The force of an owner's interest in the protection of his copyright cannot be weighed in the same direct way against a public interest in knowing the truth. Section 171(3) of the Act expressly preserves the possibility that the enforcement of copyright may be prevented or restricted on grounds of public interest. But there is an obvious need for caution about recognising any wider public interest in the same general area as addressed by section 30, while the different considerations applicable to confidential information and copyright must on any view make the exercise of identifying an overriding public interest a different one.⁶⁷

The Ashdown decision

The Court of Appeal's judgment in *Ashdown v Telegraph Group*⁶⁸ is generally acknowledged by commentators as the landmark decision on the intersection between copyright and freedom of expression in the UK.⁶⁹ This case concerned the publication, in the *Sunday Telegraph*, of substantial extracts from Mr Ashdown's confidential and unpublished memorandum of a secret meeting at the Prime Minister's office, during which the possibility of a coalition between the Labour Party and the Liberal Democrats

⁶⁵ [1973] FSR 33, 57.

⁶⁶ [2001] Ch 143.

⁶⁷ [2001] Ch 143, [76].

⁶⁸ [2001] Ch 685 (Ch); [2002] Ch 149.

⁶⁹ Barendt, 'Copyright and Free Speech Theory', 13; Dworkin, 'Copyright, Public Interest, and Freedom of Speech', 167 – 168; Garnett, 'The Impact of the HRA', 175. For commentary on this case, see Jonathan Griffiths, 'Copyright Law after *Ashdown*: Time to Deal Fairly with the Public' [2002] 3 *Intellectual Property Quarterly* 240; Louis Joseph, 'Human Rights versus Copyright: The Paddy Ashdown Case' (2002) 13(3) *Entertainment Law Review* 72.

had been discussed. The contents appeared to contradict statements emanating from 10 Downing Street at the time; had members of the Labour Party known of the meeting, there might have been a political revolt. Mr Ashdown brought legal proceedings against the proprietor of the *Sunday Telegraph*, seeking injunctions and damages (or alternatively, an account of profits) for breach of confidence as well as infringement of copyright. In relation to the claim for copyright infringement, the *Sunday Telegraph* relied on the defence of fair dealing for the purposes of criticism and review, the public interest defence, and the provisions relating to freedom of expression contained in article 10 of the ECHR. It did not seek to rely on the article 10 provision as a separate, independent defence; rather, it submitted that it was entitled to the right to freedom of expression provided for in article 10, and that the court could and should interpret and apply the provisions of the CDPA in order to give effect to it.

At first instance, Morritt VC rejected the *Sunday Telegraph's* argument, holding that the CDPA struck a balance between freedom of expression and protection of private property and that any restriction on the freedom of expression resulting from its provisions was no more than was 'necessary in a democratic society' as required by article 10(2) of the ECHR.⁷⁰ This aspect of his judgment was reversed on appeal. The Court of Appeal rejected the *Sunday Telegraph's* contention on the facts, but took the opportunity to review the law relating to defences against a claim for copyright infringement in the light of the HRA. It observed that, notwithstanding the limitations and exceptions contained in the CDPA, rare circumstances could arise where the right of freedom of expression came into conflict with the protection afforded by copyright; in these circumstances, it would be the duty of the court to apply the CDPA in a manner which accommodated the right to freedom of expression.⁷¹ In most cases of this type, it would be sufficient simply to decline the discretionary remedy of an injunction, which would leave the defendant still liable to any claim for damages or an account of profits;⁷² however, in the rare case where it would be in the public interest for the precise words used in a copyright work to be published by another person without sanction, the defence of public interest could be raised.⁷³

11 3.2.2 Europe

The European human rights tribunals have historically been reluctant to engage with the potential conflict between copyright and the right to freedom of expression.⁷⁴ Hugenoltz cites a number of factors for the late development of European interest in this potential

⁷⁰ [2001] Ch 685, 693 – 694, 696.

⁷¹ [2002] Ch 149, para 45.

⁷² [2002] Ch 149, para 46.

⁷³ [2002] Ch 149, paras 47, 58.

⁷⁴ Hugenoltz, 'Copyright and Freedom of Expression in Europe', 344 – 345. See also Shyamkrishna Balganesh, 'Copyright and Free Expression: Analyzing the Convergence of Conflicting Normative Frameworks' (2004) 4 *Journal of Intellectual Property* 45, 81 (noting 'a general reluctance among courts to recognize the very possibility of such a conflict'); Alain Strowel and Françoise Tulken, 'Freedom of Expression and Copyright under Civil Law: Of Balance, Adaptation and Access' in Griffiths and Sutharsanen (eds), *Copyright and Free Speech*, 287 – 288 (observing that 'European copyright lawyers have not pondered very seriously the impact of freedom of expression on their field').

conflict. The first is the *droit d'auteur* philosophy which underlies the conception of copyright law in continental Europe: according to this philosophy, copyright is 'an essentially unrestricted natural right reflecting the "sacred" bond between the author and his personal creation', and can be contrasted with the position in the US, where the utilitarian justification for copyright law is reflected in its Constitution.⁷⁵ The second is the reluctance of European national courts and scholars to apply fundamental rights and freedoms in 'horizontal' relationships between citizens.⁷⁶ This, it has been noted, is especially the case with French civil law doctrine, compared to the German approach under which constitutional rights are considered to express an objective system of values that is imposed on all fields of law, including private law.⁷⁷ Third, unlike the US, many European countries do not have constitutional courts which possess the power to overturn national legislation on the ground of unconstitutionality, an exception being the German constitutional court, which has, since 1948, displayed a measure of constitutional activism comparable to that of the US Supreme Court.⁷⁸ Fourth, unlike the First Amendment, which is framed in absolutist terms, constitutional protection for freedom of expression in Europe generally leaves room for reasonable restrictions to be imposed by national legislatures; for this reason, courts in Europe will be faced with issues of constitutionality only in exceptional cases.⁷⁹ Helfer has identified a possible fifth factor, namely the view that the right to protection of property under article 1 to the First Protocol of the ECHR is 'among the weakest rights in the Convention system, affording governments broad discretion to regulate private property in the public interest'.⁸⁰

Even at a relatively early stage, however, concerns about the potential conflict between copyright and freedom of expression were not entirely absent from the European legal community. The European Commission's Legal Advisory Board, for instance, made the following observations in relation to the Green Paper preceding the proposal for the Information Society Directive, which contained provisions that would result in an expansion of the copyright owner's right of reproduction:⁸¹

... the LAB notes with concern that considerations of informational privacy and freedom of expression and information are practically absent from the Green Paper. The LAB wishes to underline that these are basic freedoms expressly protected by Articles 8 and 10 of the European Convention on Human Rights, and therefore part of European community law. In the opinion of the LAB, the extent and scope of these rights are clearly at

⁷⁵ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 344.

⁷⁶ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 345. See also Geiger, 'Copyright's Fundamental Rights Dimension', 275.

⁷⁷ Geiger, 'Copyright's Fundamental Rights Dimension', 275 – 276.

⁷⁸ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 345.

⁷⁹ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 345.

⁸⁰ Helfer, 'The New Innovation Frontier', 2 (citing Arjen van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions' in Pieter van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, 2006), 864).

⁸¹ Legal Advisory Board, Reply to the Green Paper on Copyright and Related Rights in the Information Society (Brussels, September 1995).

stake, if as the Commission suggests (Green Paper, p. 51-52), the economic rights of right holders is to be extended or interpreted to include acts of intermediate transmission and reproduction, as well as acts of private viewing and use of information.[...] The LAB therefore recommends that the Commission give sufficient attention and weight to issues of privacy protection and freedom of expression and information when undertaking any initiative in the area of intellectual property rights in the digital environment. [...] According to the LAB, the broad interpretation of the reproduction right, as advanced by the Commission, would mean carrying the copyright monopoly one step too far. Freedom of reception considerations may, perhaps, not carry much weight in respect of computer programs. However, the information superhighway will eventually carry the very works for which Articles 8 and 10 of the European Convention of Human Rights were written.

The Information Society Directive's attempt at 'harmonising' the copyright exceptions and limitations applicable the European Union, through an exhaustive list of exceptions to which national legislations are confined, also led to concerns that Member States might be denied the flexibility needed to accommodate freedom of expression and the public interest.⁸²

Furthermore, even at this early stage, national courts in Europe had begun to apply the fundamental rights provisions guaranteed under the ECHR to intellectual property rights, and to recognise that copyright should, in exceptional circumstances, give way to freedom of expression.⁸³ The readiness of these courts to allow a freedom of expression defence was more apparent where the expression was political or had significant public interest involved, or involved the freedom of the press more generally.⁸⁴ Freedom of expression defences were particularly successful in cases where literal copying was considered essential – such as for purposes of quotation – and in cases involving 'live' broadcasting of works of art.⁸⁵

European Commission of Human Rights and European Court of Human Rights

The European Commission of Human Rights, formerly the gateway to the ECtHR, was twice confronted with the conflict between copyright and freedom of expression.⁸⁶ The first of these, which occurred in 1978, was the case of *De Geillustreerde Pers NV v The Netherlands*,⁸⁷ which involved the Dutch public broadcasters' monopoly in radio and television programme listings. The publisher De Geillustreerde Pers complained that copyright protection for the (non-original) listings, together with the broadcasters' refuse to license, were at odds with article 10 of the ECHR. The Commission, however, held that the broadcasters' copyright did not restrict freedom of expression and information in the first place, and thus article 10(2) was not engaged. Although the Commission acknowledged that the programme listings were 'information' within the meaning of article 10, it observed:

⁸² Hugenholtz, 'Copyright and Freedom of Expression in Europe', 352.

⁸³ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 354; Geiger, Copyright's Fundamental Rights Dimension', 276 – 277.

⁸⁴ Balganes, 'Copyright and Free Expression', 81 – 82; Hugenholtz, 'Copyright and Freedom of Expression in Europe', 354.

⁸⁵ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 354.

⁸⁶ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 358.

⁸⁷ [1978] ECC 164.

In the first place, such lists of programme data are not simple facts, or news in the proper sense of the word. They are rather a compilation of facts and they are news in the sense that they provide an orientation guide for television viewers or radio listeners prior to or during a particular week with a view to assisting them in the selection of forthcoming programmes. The characteristic feature of such information is that it can only be produced and provided by the broadcasting organisations being charged with the production of the programmes themselves and that it is organised by the Foundation being the co-ordinating body of these organisations.

The Commission considers that the freedom under Article 10 to impart information of the kind described above is only granted to the person or body who produces, provides or organises it. In other words the freedom to impart such information is limited to information produced, provided or organised by the person claiming that freedom, being the author, the originator or otherwise the intellectual owner of the information concerned. It follows that any right which the applicant company itself may have under Article 10 of the Convention has not been interfered with where it is prevented from publishing information not yet in its possession.

...

However, there can be no question in the present case that the freedom of the press in general is threatened in the sense that the public is deprived of any specific information, i.e. in the present case, the programme data, by censorship or otherwise by reason of any undue State monopoly on news. On the contrary, every person in the Netherlands may inform himself about the forthcoming radio and television programmes through a variety of mass media representing various sections and tendencies of society. To that extent there is, in the Commission's opinion, no merit in the applicant company's claim that the public is prevented from receiving unbiased information about these programmes owing to the fact that it can only obtain such information by reading the broadcasting organisations' own magazines.⁸⁸

Hugenholtz describes the Commission's rationale for its decision as being 'difficult to fathom',⁸⁹ and notes that it has been criticised by many commentators.⁹⁰ He states the following view:⁹¹

The Commission's conclusion that third parties may never invoke Article 10 freedoms with respect to 'single-source' data is obviously erroneous. Freedom of expression under Article 10 is not confined to speech that is original with the speaker. Moreover, the Commission was arguably wrong in suggesting that freedom of expression and information is not restricted as long as the free flow of information 'to the public in general' is not impeded. The existence of alternative communications channels may be an element in measuring the 'necessity' of a restriction, but to declare that no restriction exists if alternative channels are available is clearly at odds with the meaning and purpose of Article 10.

The second Commission decision, *France 2 v France*,⁹² involved a television broadcast covering the reopening of the theatre on the Champs-Élysées after major restoration work. In the course of the programme, the camera focused several times, for a total duration of 49 seconds, on the theatre's famous fresco by Edouard Vuillard. The visual arts collecting society SPADEM, representing the Vuillard estate, demanded and eventually obtained compensation. The Court of Cassation held that France 2 could not

⁸⁸ [1978] ECC 164, [83] – [84], [86].

⁸⁹ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 358.

⁹⁰ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 359.

⁹¹ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 359 (citing Herman Cohen Jehoram, [1979] 28 *Ars Aequi* 153; Petrus van Dijk and Godefridus JH van Hoof, *De Europese Conventie in Theorie en Praktijk* (2nd edn, Nijmegen: Ars Aequi), 358).

⁹² App No 30262/96 (European Commission of Human Rights, 15 January 1997)

invoke the statutory right to quote briefly from a copyright work for informational purposes,⁹³ as communicating an entire work to the public did not, by definition, amount to a 'brief quotation' within the meaning of the law. Before the Commission, France 2 complained that the Court of Cassation analysis was at odds with article 10 of the ECHR. The Commission acknowledged that copyright was, in principle, a restriction on the freedom of expression and information protected under article 10, and observed that copyright law is 'prescribed by law' for the purpose of protecting the 'rights of others'. However, it added that it was 'normally not for the organs of the Convention to decide, in respect of article 10(2), possible conflicts between the right to communicate information freely, on the one hand, and the right of the authors of the works communicated, on the other hand'.⁹⁴ It found that the principles of both copyright and freedom of expression were satisfied by reducing SPADEM's claim to a simple matter of paying royalties, and held that 'under the circumstances of the case the French courts had good reason to take into account the copyrights of the author and the right holders in the works that were otherwise freely broadcast by the applicant'.⁹⁵ Hugenholtz describes this decision as being 'equally disappointing in its reasoning' compared to the earlier decision in *De Geillustreerde Pers NV v The Netherlands*.⁹⁶

In its more recent decisions, the ECtHR has had occasion to deal with the conflict between copyright and freedom of expression. In *Ashby Donald v France*,⁹⁷ it went so far as to hold that a conviction based on copyright law for unlawfully reproducing or publicly communicating copyright-protected material can be regarded as an interference with the right to freedom of expression and information provided for under article 10 of the ECHR, and that, accordingly, any such conviction must be consistent with the three requirements set out in the second paragraph of article 10. In this case, the applicants, three fashion photographers, were convicted for copyright infringement following their publication of certain photographs that had been taken by the third applicant at fashion shows in Paris on the website of a fashion company run by the first and second applicants. These photographs had been published without the permission of the fashion houses involved. The applicants were, in addition, ordered to pay fines between €3,000 and €8,000 as well as an award of damages amounting to €255,000 to the fashion houses.

The ECtHR observed that the freedom of expression and information guaranteed by article 10 of the ECHR applied to Internet communication and to the publication of photographs, regardless of the type of message conveyed and regardless of whether the objective pursued was of a pecuniary nature. It thus concluded that the publication of the photographs on a website dedicated to fashion and presenting to the public images

⁹³ French Intellectual Property Code, art L-111-1.

⁹⁴ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 360 (translated).

⁹⁵ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 360 (translated).

⁹⁶ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 359.

⁹⁷ ECtHR, 10 January 2013. See Dirk Voorhoof and Inger Høedt-Rasmussen, 'Copyright vs Freedom of Expression Judgment' (*ECHR Blog*, 22 January 2013) <<http://echrblog.blogspot.co.uk/2013/01/copyright-vs-freedom-of-expression.html>> accessed 4 December 2013.

of fashion shows for viewing free of charge or in return for payment or for sale constituted the exercise of the applicants' right to freedom of expression. The ECtHR therefore considered the applicants' conviction to be an interference with the freedom of expression, which would constitute a breach of article 10 unless fulfilled the three-step test set out in article 10(2) of the ECHR – namely, it had to be 'prescribed by law', pursue one or more of the legitimate aims referred to in article 10(2), and be 'necessary in a democratic society' for the achievement of such aims. It concluded without difficulty that the conviction was 'prescribed by law' (namely, articles L335-2 and L335-3 of the French Intellectual Property Code) and that the law pursued one of the legitimate aims enumerated in article 10(2), namely the protection of the rights of others – in this case, the copyrights of the fashion houses concerned.

It went on to hold that this interference was consistent with the second paragraph of article 10, as it was necessary in a democratic society. The ECtHR noted that, on the facts of the case, the national authorities retained a wide margin of appreciation, given the 'commercial speech' character of the publication of the photographs, as well as the need of the national authorities to balance the right to freedom of expression against the conflicting right to protection of property guaranteed by article 1 of the First Protocol to the ECHR. It also considered that the fines and award of damages ordered against the applicants were not disproportionate to the legitimate aim pursued, stating that the applicants had given no evidence that these sanctions had 'financially strangled' them.

An even more recent case is *Neij v Sweden*,⁹⁸ where the applicants were the operators of the website The Pirate Bay, which enabled users to exchange copyright-protected material with one another through file-sharing. The applicants were convicted with complicity to commit crimes in violation of the Copyright Act; they were each sentenced to one year's imprisonment, and were held jointly liable for damages of approximately €3.3 million to the owners of the copyright in the protected material whose exchange had been facilitated by The Pirate Bay. On appeal, their prison sentences were reduced to ten and eight months respectively, but their liability for damages was increased to approximately €5 million. The ECtHR held that the applicants' convictions constituted an interference with their right to freedom of expression. It emphasised that article 10 of the ECHR guarantees the right to impart information and the right of the public to receive it, and that it applies not only to the content of the information but also to the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information. It also took note of the fact that the applicants had, in this case, put into place the means for others to receive and impart information within the meaning of article 10. The ECtHR also went on to hold, however, that the interference was consistent with the requirements of article 10(2) of the ECHR, as it was prescribed by law – in this case, the Swedish Copyright Act – and was pursued with the legitimate aim of protecting the rightholders' copyright to the material in question.

In discussing whether the convictions were 'necessary in a democratic society' for the achievement of the legitimate aim in question, the ECtHR – unlike in *Ashby Donald* – did not analyse the commerciality (or otherwise) of the applicants' activity. Instead, it only stated somewhat generally that 'although protected by art. 10, the safeguards afforded

⁹⁸ (2013) 56 EHRR SE19.

to the distributed material in respect of which the applicants were convicted cannot reach the same level as that afforded to political expression and debate'.⁹⁹ The ECtHR stated that the national authorities were afforded a wide margin of appreciation in the present case, adding that the national authorities had to balance two competing interests which were both protected under the ECtHR. In arriving at its conclusion, the ECtHR also stated that the national courts had advanced sufficient reasons for considering the applicants' activities as amounting to criminal conduct requiring appropriate punishment, and that the prison sentences and award of damages could not be regarded as disproportionate.

In perhaps the most comprehensive analysis of the ECtHR's case law in this area to date, Geiger and Izyumenko take the view that the two cases crystallise important aspects of a developing European perspective on the relationship between copyright and freedom of expression, evince a judicial readiness to admit that copyright-based restrictions constitute an interference with freedom of expression, and suggest that the balance to be achieved between copyright and free expression must be different according to whether the use of the copyright work is made in the general public interest or not.¹⁰⁰ However, they also note that these cases still leave unclear the weight of the commerciality criterion, grant to States a particularly wide margin of appreciation,¹⁰¹ and demonstrate some unwillingness to account for some essential article 10 ECHR considerations, such as the status of the press and the form of expression.¹⁰²

In both *Ashby Donald v France* and *Neij v Sweden*, the ECtHR considered the non-contribution of the applicants' expression to a public debate of general interest as a key reason for allowing the State a particularly wide margin of appreciation. In both cases, it had little difficulty finding that the applicants' expression did not reach the same level of protection as political expression and debate. As Geiger and Izyumenko point out, however, the general public interest in information is not confined to information that is strictly political.¹⁰³ Such an interest had previously been recognised by the ECtHR itself in information concerning sporting events and performing artists¹⁰⁴ as well as information concerning the moral position advocated by an influential religious community.¹⁰⁵ While it might be difficult to argue that there was a general public interest

⁹⁹ *Neij v Sweden*, [36].

¹⁰⁰ Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45(3) *International Review of Intellectual Property and Competition Law* 316, 322 – 323. See also 'Copyright: Freedom of Expression – Copyright Infringement – *Kolmisoppi v Sweden*' [2013] 4 *European Human Rights Law Review* 425, 427 (noting that these two cases demonstrate the ECtHR's willingness to accept that copyright protection amounts to an interference with the right to freedom of expression under article 10).

¹⁰¹ See also 'Copyright: Freedom of Expression – Copyright Infringement – *Kolmisoppi v Sweden*', 427 (noting the deferential approach of the ECtHR in both cases).

¹⁰² Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 323.

¹⁰³ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 325.

¹⁰⁴ See *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15, [109]; *Axel Springer AG v Germany* (2012) 55 EHRR 6, [90].

¹⁰⁵ See *Verlagsgruppe News GmbH and Bobi v Austria* (ECtHR, 4 December 2012), [76].

in the information exchanged on the applicants' file-sharing website in *Neij v Sweden*,¹⁰⁶ a stronger argument could be made in *Ashby Donald v France*, especially since the ECtHR did not give any specific reasons as to why fashion shows should have no place in a 'debate of general interest'.¹⁰⁷ In this regard, Geiger and Izyumenko highlight that the US District Court had refused to enforce a civil judgment given by the French court against the first and second applicants' fashion website, on the grounds that it was against the freedom of speech protected by the First Amendment of the US Constitution.¹⁰⁸ In particular, the US District Court took the view that:¹⁰⁹

The subject matter of protected expression extends beyond the political to include matters of cultural import ... Fashion shows are a matter of great public interest, for artistic as well as commercial purposes. These shows are open to the public, including the press – indeed, the defendant's employees and agents were able to take the photographs at issue because they were given access by invitation ... – and the extensive coverage given to such events in various mass media makes clear that there is widespread public interest in these matters ... The First Amendment simply does not permit plaintiffs to stage public events in which the general public has a considerable interest, and then control the way in which information about those events is disseminated in the mass media.

Although the US District Court's order was subsequently vacated by the Court of Appeals for the Second Circuit due to its failure to conduct the full analysis necessary to reach that conclusion,¹¹⁰ its reasoning does suggest a basis for recognising a general public interest behind fashion shows.¹¹¹

In *Ashby Donald v France*, the ECtHR had placed some emphasis on the commerciality of the applicants' activities, as the photographs in question were offered for sale on the first and second applicants' website. As Geiger and Izyumenko note, however, the profit-making motivations of newspapers and other media organisations have not, in the past, prevented them from relying on their article 10 ECHR rights.¹¹² They also cite the example of the case of *Open Door Counselling and Dublin Well Woman v Ireland*,¹¹³ in which injunctions had been issued to prevent Dublin clinics from distributing in Ireland information about the availability of abortions in the UK. Both the clinics and the British abortion services operated commercially. However, in finding a breach of article 10 of the ECHR, on the basis that the injunction was not 'necessary in a democratic society', the ECtHR avoided categorising the nature of the applicants' expression in the case, and appeared to proceed on the unarticulated assumption that it was political in nature, if

¹⁰⁶ cf Joseph Jones, 'Internet Pirates Walk the Plank with Article 10 Kept at Bay: *Neji and Sunde Kolmisoppi v Sweden*' (2013) 35(11) *European Intellectual Property Review* 695, 699 (suggesting that the ECtHR might have overlooked the argument that file-sharing fosters access to culture).

¹⁰⁷ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 326.

¹⁰⁸ *SARL Louis Feraud International v Viewfinder Inc* 406 F Supp 274 (SDNY, 2005).

¹⁰⁹ *SARL Louis Feraud International v Viewfinder Inc* 406 F Supp 274 (SDNY, 2005), 282 – 284.

¹¹⁰ *SARL Louis Feraud International v Viewfinder Inc* 489 F 3d 474 (2nd Circuit, 2007), 480.

¹¹¹ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 327.

¹¹² Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 328 – 329.

¹¹³ (1993) 15 EHRR 244.

anything.¹¹⁴ Geiger and Izyumenko also observe that the ECtHR has tended to weigh the commercial and non-commercial elements of expression by applying the 'public debate' test, rather than focusing on the type of expression as such.¹¹⁵ They also suggest that the ECtHR's silence on the commerciality of the applicants' expression in the subsequent case of *Neij v Sweden* may mean that profit-making motivations, though important, might not be conclusive.¹¹⁶

The ECtHR's apparent assumption that all the attributes of copyright protection – that is to say, the maximum scope of the economic rights afforded to copyright owners under existing copyright systems – are guaranteed by the right to protection of property provided for under article 1 of the First Protocol to the ECHR is also questioned by Geiger and Izyumenko.¹¹⁷ In doing so, they cite Yu's argument that the human right to protection of property should not extend to 'all forms of economic rights as protected in the existing intellectual property system, but rather [to] the limited interests of authors and inventors in obtaining just remuneration for their intellectual labour'.¹¹⁸ They also make reference to a General Comment made by the Committee on Economic, Social and Cultural Rights in the context of article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, which provides for the human right of every author to benefit from the protection of the moral and material interests resulting from his or her scientific, literary or artistic productions. In describing the relationship between the protection of this human right and intellectual property rights, the Committee stated that:¹¹⁹

Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. *Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements ... It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c).*

Geiger and Izyumenko further note that, in *Ashby Donald v France*, the ECtHR did not address the fact that the applicants acted in their capacity as part of the media in taking pictures of the fashion shows, notwithstanding its extensive case law granting the press

¹¹⁴ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 329 – 330 (citing Colin R Munro, 'The Value of Commercial Speech' (2003) 62(1) *Cambridge Law Journal* 134, 141).

¹¹⁵ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 328 (citing *Hertel v Switzerland* (1999) 28 EHRR 534, [47]; *Barthold v Germany* (1985) 7 EHRR 383).

¹¹⁶ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 328

¹¹⁷ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 330 – 335.

¹¹⁸ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 331 (citing Peter Yu, 'Ten Common Questions About Intellectual Property and Human Rights' (2007) 23 *Georgia State University Law Review* 709, 732).

¹¹⁹ Committee on Economic, Social and Cultural Rights, 'General Comment No 17' (21 November 2005) E/C.12/GC/17, [2] – [3]. (emphasis added).

a special status in the exercise of article 10 ECHR freedoms.¹²⁰ Another feature absent from the ECtHR's reasoning in *Ashby Donald v France* was any consideration of the *form* of the expression adopted by the applicants as a vehicle of expression and information – in this case, photographs.¹²¹ This is because, as Geiger and Izyumenko observe,¹²² the ECtHR has consistently held that article 10 is applicable 'not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information'.¹²³ In light of this, they argue that the ECtHR should have at least considered the applicants' chosen form of expression in connection with the information it aimed to convey, as words would have been a very inadequate substitute for the information conveyed by the photographs in the case.¹²⁴

Germany

The German regional courts have, in a number of cases, directly invoked the guarantee of freedom of expression in article 5 of the German Basic Law as a limitation on copyright.¹²⁵ In 1960, the Berlin District Court permitted an unauthorized re-broadcasting by West Berlin television of parts of a news item produced in the German Democratic Republic. In an *obiter dictum*, it held that even if the re-broadcast was not permitted by the statutory exceptions for quotation, the freedom of expression guaranteed by article 5 of the German Basic Law would nevertheless provide an extra-statutory justification.¹²⁶ In 1968, the Berlin Court of Appeal held that the unauthorised republication of cartoons stereotyping students in a Berlin periodical was justified, as it had taken place in the context of a critical analysis of the way left-wing students were portrayed in the Springer press.¹²⁷ The court noted that the statutory exceptions contained in copyright law should be interpreted in light of the free speech norms contained in article 5 of the German Basic Law; accordingly, although this republication did not fulfil the requirements of the statutory quotation right,¹²⁸ it was nevertheless held not to infringe the cartoonist's rights.¹²⁹

¹²⁰ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 335 (citing Monica Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (Council of Europe Publishing, 2001), 11; *Lingens v Austria* (1986) 8 EHRR 407, [42]).

¹²¹ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 336 – 338.

¹²² Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 336.

¹²³ *Autronic AG v Switzerland* (1990) 12 EHRR 485, [47].

¹²⁴ Geiger and Izyumenko, 'Copyright on the Human Rights' Trial', 337 – 338.

¹²⁵ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹²⁶ *Maifeiern* (Berlin District Court, 12 December 1960). See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹²⁷ *Springer Press* (Court of Appeal, Berlin, 26 November 1968). See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹²⁸ German Copyright Act, art 51.

¹²⁹ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

In 1977, the Berlin District Court, referring to the 1968 decision, allowed the broadcast by German public television of four copyright protected photographs of members of the Baader-Meinhof terrorist group (RAF), which had previously been published in *Der Spiegel*, in a critical news report on *Der Spiegel's* purported role as a vehicle of RAF publicity.¹³⁰ Again, although the facts of the case did not fall neatly within the scope of the statutory exception for quotations, the court emphasised that a narrow interpretation of the statutory exception would be in violation of the constitutional guarantees of freedom of expression and information; the fact that the broadcast involved political speech weighed heavily in the determination that no infringement had occurred. In 1983, the Munich District Court allowed a television station to show a pharmaceutical brochure in a programme critical of pharmaceutical advertising aimed at juveniles.¹³¹ Even though this case did not involve political speech, the court nevertheless held that the principles underlying article 5 provided a defence.¹³²

It has been pointed out that the German Federal Supreme Court, unlike the regional courts, was rather more cautious in imposing free speech limitations on copyright during the 1980s and 1990s.¹³³ The *Lili Marleen* case in 1985 involved the unauthorised publication of the lyrics of the 'Lili Marleen' song in newspaper articles on a forthcoming film about the singer-songwriter Lale Anderson, who was best known for her interpretation of the song in question.¹³⁴ The Federal Supreme Court held that article 5 did not provide a defence to copyright infringement, as freedom of the press was already incorporated into the German Copyright Act. Nevertheless, it did accept in principle that 'under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding the express statutory limitations may be taken into consideration'.¹³⁵ A similar outcome was reached in the two *CB-Infobank* decisions,¹³⁶ where the defendant operated a commercial research database containing abstracts of articles published in professional periodicals, and also offered a document delivery service providing full-text copies.¹³⁷ The Federal Supreme Court held that the public interest in accessing information did not justify a departure from the rule that statutory limitations on copyright should be narrowly construed. It did, however, note that copyright does not protect information as such, and that information services, therefore,

¹³⁰ *Terroristenbild* (Berlin District Court, 26 May 1977). See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹³¹ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹³² Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹³³ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹³⁴ *Lili Marleen I* (German Supreme Court, 7 March 1985). See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 355.

¹³⁵ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 356.

¹³⁶ *CB-Infobank I* (German Supreme Court, 16 January 1997); *CB-Infobank II* (German Supreme Court, 16 January 1997).

¹³⁷ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 356.

remain free to provide facts, data and bibliographical information. What is worth noting is that the Federal Supreme Court did not directly discuss the applicability of article 5 of the Constitution, which deals with freedom of expression. Strowel and Tulkens, therefore, 'do not feel, unlike Hugenholtz, that the Supreme Court "refused to apply article 5 of the Constitution" ... on the contrary, it seems that no link was made between the request for access and the protection of freedom of expression'.¹³⁸ Thus: '[t]his case shows that a request for access (here from a bank) is not necessarily based on a claim of freedom of expression and that a request for free access is in fact often motivated by the desire to avoid payment. If the request for access is a dressed-up demand for compensation, courts are reluctant to give it precedence over copyright'.¹³⁹

In its more recent decisions, the Federal Supreme Court has shown a greater willingness to balance copyright claims against freedom of expression considerations. This is perhaps best illustrated by several key statements from its decision in the *Geis Eagle* case, which concerned a parody.¹⁴⁰ The parodied work in this case was the German national symbol – an eagle, created by the artist Geis in the 1950s. The defendant, who was the publisher of the magazine *Focus*, used a caricature of the eagle to illustrate an article concerning an alleged abuse of taxation law. A collecting society, asserting the artist's copyright in the original version of the eagle, petitioned for an injunction against the caricature of the eagle. The Federal Supreme Court refused the petition, holding that there had been a sufficient change of form from the original version of the eagle to the caricature to deem the latter a 'free use'; under the German Copyright Act, an independent work created by free use of the work of another person may be published and exploited without the consent of the author of the original work.¹⁴¹ In arriving at this decision, the court explained that, as a matter of principle, the copyright statute should be regarded as containing an exhaustive regulation of the powers deriving from copyright, and that the exclusive right granted by the law to the author is the result of a balance reached by the legislature between the author's interest in enjoying exclusive powers that are as extensive and unrestricted as possible and the general public's interest in access to and use of the copyright work with as few restrictions as possible. Accordingly, the court stated, there is no scope for a general balancing of legally protected interests outside the copyright exploitation powers and the limits on copyright set out in the statute. The court then went on to identify a number of mechanisms by which this balance is struck, including the idea/expression dichotomy, the nature of the exploitation rights granted to the author – which, according to the court, largely take into account the fact that the obtaining and communication of information should not be subject to greater restrictions than necessary – the fact that the copyright owner may, in certain circumstances, be obliged to grant licences to parties wishing to use the work,¹⁴²

¹³⁸ Strowel and Tulkens, 'Freedom of Expression and Copyright', 307.

¹³⁹ Strowel and Tulkens, 'Freedom of Expression and Copyright', 307 – 308.

¹⁴⁰ Federal Supreme Court, 20 March 2003.

¹⁴¹ German Copyright Act, s 24(1).

¹⁴² *Radio Telefis Eireann v Commission* [1995] 4 CMLR 718 (ECJ holding that a copyright owner's refusal to license copyright in lists of television programmes was an abuse of a dominant position and a contravention of competition law).

and that the powers of the copyright owner are limited by a number of statutory restrictions that take into account both the interests of the general public and that of specific user groups. Notably, the court explained that:

If, for instance, there is a greater public interest in the reproduction of a protected work, this may under certain circumstances be taken into account in the interpretation of the powers to which the author is entitled, and in any event in the interpretation of the limits to copyright, and may in the individual case mean that a narrow construction focused on the wording of the legislation may have to give way to a more generous interpretation that takes account of the general public's interest in information and use...

Note should also be taken of the case law of the German Constitutional Court, and in particular the *Germania 3* case, which was decided in 2001.¹⁴³ In this case, the court held that the incorporation of extracts from Brecht into the defendant's own literary work was protected by the German Basic Law. Notwithstanding the fact that the extracts were too long to constitute quotations for the purposes of the statutory exception for quotations under copyright law, the court considered that:

...in the context of artistic creation, the freedom to quote a work is larger and cannot have for its only function backing up a personal development. It must be possible for the artist to insert protected works into his own creation even if it is not necessarily the author's own development that the quotation would illustrate. However, the quotation must be used as a tool or vehicle of an artistic opinion expressed by the author.¹⁴⁴

Accordingly, the court interpreted the quotation exception in light of the artistic freedom guaranteed by article 5(3) of the German Basic Law and, after weighing the issue of proportionality, concluded that:

When – as in the present case – a violation of copyright of small range, which entails only a small financial loss for the claimants, opposes the freedom of creation, the artist's interest to use the *opus* freely in the context of an artistic confrontation has to prevail over the simple financial concerns of the claimants.¹⁴⁵

According to Strowel and Tulkens:¹⁴⁶

The fact that the Constitutional Court decided to interpret another exception (the citation exemption) broadly in the context of the reuse of four pages of Berthold Brecht's plays in another original literary work ... simply confirms the view that freedom of expression should receive more weight when there is a transformative use of the copyrighted work. The Constitutional Court correctly held that the freedom of artistic expression enshrined in Article 5(3) of the Constitution was at stake, and therefore a broader interpretation in favour of secondary use was required.

Austria

In 1997, the Austrian Supreme Court refused to allow freedom of expression (which is protected under article 13 of the Austrian Constitution in addition to article 10 of the ECHR) to be used as a defence in a case involving the unauthorised publication of a

¹⁴³ *Germania 3* (German Constitutional Court, 29 June 2000). See Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', 47 – 48; Graham Smith, 'Copyright and Freedom of Expression in the Online World' (2010) 5 *Journal of Intellectual Property & Practice* 88, 90.

¹⁴⁴ Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', 47 – 48.

¹⁴⁵ Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', 48.

¹⁴⁶ Strowel and Tulkens, 'Freedom of Expression and Copyright', 308.

contract for the sale of stocks in a magazine article criticising the sale.¹⁴⁷ Similarly, in 1997, the Supreme Court again refused to accept a freedom of expression defence in a case involving the unauthorised republication of copyright-protected cartoons to illustrate a news feature, asserting that the free speech values involved were sufficiently acknowledged in the relevant statutory limitations on copyright.¹⁴⁸

Subsequently, however, it took a different approach in the 2000 case of *Schüssels Dornen-Krone*.¹⁴⁹ This concerned a report by the weekly newspaper *Falter-Stadtzeitung Wien* on a campaign of the newspaper *Neue Kronen Zeitung*, which was aimed at hindering a coalition between two of the main Austrian political parties. The report included spread out facsimile reproductions of five original cover pages of different editions of the *Neue Kronen Zeitung*. The Austrian Supreme Court first held that this reproduction was not covered by the exception for reporting on events of topical interest, as permitted by the Austrian Copyright Act, as the exception allows exclusively reports on actual events and does not include reporting on newspaper articles. It went on to hold that the exception for the use of copyright-protected works in quotations was also not applicable, as the quotation of pictures presupposes the reproduction of a whole picture requiring a broad free use exception, and such broad free use exceptions were allowed only for scientific publications under the Austrian Copyright Act. It then concluded that the lack of an exception allowing the quotation of entire pictures constituted a lacuna, which should be filled in by way of a broad interpretation of the free use exceptions in light of the right to freedom of expression and information. The court concluded that a narrow interpretation of the right to quote pictures would be in violation of the right to freedom of expression and information, since the reproduction of a picture can be as necessary in an intellectual debate as the reproduction of parts of the page. On the facts of the case, it was necessary for *Falter* to reproduce the cover pages of *Neue Kronen Zeitung* so as to enable readers to form their own opinion of the issue. The court also considered that the economic damage caused by the quotation was small, since the commercial value of the cover pages was not eroded by their reproduction.

Following this, in the 2001 *Medienprofessor* case, the Austrian Supreme Court held that the reproduction of 16 newspaper articles on a website operated by the subject of the articles, to demonstrate that they were the target of a large-scale media campaign, was protected by article 10 of the ECHR.¹⁵⁰ It stated that the newspaper's use of its copyright for the purpose of hindering criticism concerning their media campaign against the website owner 'cannot justify any restriction to freedom of expression in a democratic society'.¹⁵¹

¹⁴⁷ *Head-Kaufvertrag* (Austrian Supreme Court, 17 December 1997).

¹⁴⁸ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 356.

¹⁴⁹ Austrian Supreme Court, 4 October 2000. See Christophe Beat Graber, 'Copyright and Access – A Human Rights Perspective' in Christoph Beat Graber et al (eds), *Digital Rights Management: The End of Collecting Societies?* (Stämpfli Publishers, 2005), 24 – 25.

¹⁵⁰ Austrian Supreme Court, 12 June 2001. See Graber, 'Copyright and Access', 25; Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', 46; Smith, 'Copyright and Freedom of Expression in the Online World', 90.

¹⁵¹ Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', 46.

In the *Gedicht* case,¹⁵² however, the Austrian Supreme Court held that the unauthorised reproduction of a poem in the preface of a photography book was not justified in light of its previous jurisprudence. It emphasised that the reproduction harmed the commercial interests of the copyright owner, as reproductions of texts are usually only allowed on payment of remuneration. It also found that the defendant was unable to show that the free reproduction of the poem was the only way to exert his freedom of expression and information.

The Netherlands

Under Dutch law, Acts of Parliament are not subject to being tested against the Constitution, leaving freedom of expression defences reliant solely on article 10 ECHR. Hugenholtz notes that courts in the Netherlands have traditionally been hesitant to apply article 10 to copyright cases, though a few recent cases show signs of a possible change in attitude.¹⁵³ The first of these cases, which was decided in 1994, involved an interview with a well-known 'corporate raider', which was published in the daily newspaper *De Volkskrant*.¹⁵⁴ The piece was illustrated by a photograph taken in the interviewee's office, which showed prominently one of the works of art on display in the office – a statuette of an archer. The Dutch licensing society for visual arts, *Stichting Beeldrecht*, claimed damages for copyright infringement. *De Volkskrant* conceded that no statutory copyright limitation was available, as Dutch law does not recognise a fair use defence; instead, it relied on the protection of article 10 of the ECHR. While the Amsterdam District Court found for the claimant, it did agree that, under certain circumstances, copyright might conflict with article 10; in doing so, it expressly noted that a shift had occurred in legal doctrine since the 1980s. Nevertheless, the court considered it unnecessary to invoke article 10 on the facts of the present case, as it concluded that the depiction of the work of art in this manner was not really necessary for the purpose of *De Volkskrant*'s news reporting.

The principle that copyright may conflict with article 10 of the ECHR was subsequently confirmed by the Dutch Supreme Court in *Dior v Evora*.¹⁵⁵ This case involved the reproduction of Dior's copyright-protected perfume bottles in advertising brochures by a retailer, Evora. Although none of the exceptions contained in the Dutch copyright statute were directly applicable to the facts of the case, the Supreme Court was willing to draw an analogy with article 23 of the statute, which permits the owner of a work of art to reproduce the work in a catalogue for a public exhibition or sale of that work. On this basis, the Supreme Court held that new copyright exceptions beyond those expressly provided for in the statute could be recognised, provided that they reflected the same kind of balancing of competing interests as those enshrined in the statute. Accordingly, Evora's advertisement of Dior products in this manner was held to be permissible.

¹⁵² Austrian Supreme Court, 9 April 2002. See Graber, 'Copyright and Access', 27.

¹⁵³ Hugenholtz, 'Copyright and Freedom of Expression in Europe', 356.

¹⁵⁴ *Boogschutter* (District Court of Amsterdam, 19 July 1994). See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 356 – 357.

¹⁵⁵ Dutch Supreme Court, 20 October 1995. See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 357.

Another case in 1998 concerned the 'missing pages' of Anne Frank's diary, which were reprinted without authorisation by the Dutch newspaper *Het Parool*.¹⁵⁶ After weighing the public interest in having the pages divulged against the interest of the Anne Frank Foundation (owner of the copyright in the diary) in protecting the reputations of the Frank family members described in the pages, the Amsterdam District held that the freedom of expression and information guaranteed in article 10 did not override the Foundation's copyright claims.

Subsequently, in 2003, the Hague Court of Appeals held that the publication on a website of internal Scientology documents for the purposes of criticism was protected by article 10 of the ECHR.¹⁵⁷ The court's approach is summarised by Strowel and Tulkens:¹⁵⁸

...the Hague Court of Appeal upheld the claim of copyright infringement, but stated that the enforcement of copyright 'must give way to the freedom of information in exceptional cases'. The court further asked whether this limitation on freedom of expression corresponded to a pressing social need in a democratic society and was proportionate to the legitimate aim pursued, taking account of the fact that a national court was granted a margin of appreciation in this respect in accordance with the case law of the ECtHR.

After an extensive review of various documents and the statements on the Web describing in detail how the Church exerts pressure on its members, the court held that the borrowings from the Scientology books were used to support Ms Spaink's critical view of the functioning of the Church of Scientology. In addition, the court further stressed that the use of these copyrighted extracts did not appear to further a commercial objective. Interestingly, the court employed one of the criteria incorporated in the US 'fair use' test [i.e. the criterion of the commercial nature of the use]. Finding that (i) the doctrine and organization of the Church of Scientology are contrary to democratic values, (ii) the secrets contained in its copyrighted books help the Church to exert control over its members and to prevent discussion of its practices, (iii) these books had already been made temporarily available to the public in a US court case, and (iv) the Internet service providers' obligation to take down and make this content inaccessible was disproportionate, the court ruled in favour of freedom of expression as there was no demonstrated 'need' within the meaning of Article 10 of the ECHR and the interest of the defendants outweighed those of the copyright holder.

... The *Church of Scientology* decision is apparently the first illustration by a court of appeal of the existence of an implicit 'fair use' test in Dutch copyright law. Where copyright is not used to obtain compensation, but rather to prohibit further access to a copyrighted work (that is, in order to obtain access, it was necessary to become a member of the Church and pay a disproportionate access fee), freedom of expression must clearly prevail.

Since the introduction into the Dutch Copyright Act of an express statutory exception for caricature, parody and pastiche¹⁵⁹ following the implementation of the Information Society Directive, it has been noted that the courts have shown a greater willingness to invoke freedom of expression in the context of parodies of copyright-protected works.¹⁶⁰ The relevant provision states that:

¹⁵⁶ *Anne Frank Fonds v Het Parool* (Court of Appeal, Amsterdam, 8 July 1999). See Hugenholtz, 'Copyright and Freedom of Expression in Europe', 357.

¹⁵⁷ Smith, 'Copyright and Freedom of Expression in the Online World', 90.

¹⁵⁸ Strowel and Tulkens, 'Freedom of Expression and Copyright', 309 – 310.

¹⁵⁹ Dutch Copyright Act, art 18b.

¹⁶⁰ Dinusha Mendis and Martin Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* (IPO, 2013), 44.

Publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche will not be regarded as an infringement of copyright in that work, provided the use is in accordance with what would normally be sanctioned under the rules of social custom.

The two leading cases that illustrate its application are the *Darfurnica* and *Miffy* cases. In *Darfurnica*,¹⁶¹ an artist, Nadia Plesner, depicted an African child (from Darfur) holding a Louis Vuitton handbag and a chihuahua dressed in pink. This was aimed at calling the attention of the public at large to the famine in Africa, which the artist explained in the following words:

Since doing nothing but wearing designer bags and small ugly dogs [a reference to the celebrity Paris Hilton, who is often seen with both] apparently is enough to get you on a magazine cover, maybe it is worth a try for people who actually deserve and need attention. If you can't beat them, join them! This is why I chose to mix the cruel reality with showbiz elements in my drawing 'Simple Living'.

Louis Vuitton alleged that Plesner had infringed the copyright in its 'Audra' handbag, whose multicoloured canvas design was the same as that depicted by Plesner. In the legal proceedings, both parties relied on the fundamental liberties guaranteed to them by the ECHR, with Plesner relying on the right to freedom of expression guaranteed by article 10 and Louis Vuitton relying on the right to protection of property guaranteed by article 1 of the First Protocol to the ECHR. The preliminary assessment of the District Court of Amsterdam was that, in the present circumstances, the importance of allowing Plesner to continue freely expressing her (artistic) opinion outweighed the importance of Louis Vuitton's peaceful enjoyment of its property.

In the *Miffy* case,¹⁶² the well-known fictional rabbit character, Miffy, was parodied in seven cartoons that were posted on the defendant's website, Punt.nl, one of the biggest hosting sites in the Netherlands. These cartoons depicted Miffy in unusual situations with adult themes, and included images of Miffy at a party, sniffing cocaine, and in an airplane about to crash into a skyscraper. The creators of Miffy objected to these images on the basis of their copyrights. The defendants contended that their works fell within the parody exception provided for in the Dutch Copyright Act. The Court of Appeal of Amsterdam held that the cartoons did not infringe the copyrights of Miffy's creators, as all of them could be regarded as permitted parodies.

France

Article 10 of the ECHR was applied directly by the Paris Court in the 1999 decision of *Utrillo*.¹⁶³ In this case, a television station produced a short report (a little over two minutes in duration) on an exhibition dedicated to the work of Maurice Utrillo, the famous French painter. Over the course of the broadcast, 12 of Utrillo's paintings were

¹⁶¹ District Court of the Hague, 4 May 2011 rev'd District Court of Amsterdam, 13 September 2011. See Mendis and Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 44; Lucie Guibault, 'The Netherlands: *Darfurnica*, *Miffy* and the Right to Parody!' (2011) 2 *Journal of Intellectual Property, Information Technology, and Electronic Commerce Law* 236, 236 – 237.

¹⁶² District Court of Amsterdam, 22 December 2009 rev'd Court of Appeal of Amsterdam, 13 December 2011. See Mendis and Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 45 – 46; Guibault, '*Darfurnica*, *Miffy* and the Right to Parody!', 237 – 238.

¹⁶³ Paris Court of Grand Instance, 23 February 1999.

briefly filmed and shown to the public. In response to an action for copyright infringement brought by the owner of the copyright in Utrillo's paintings (his successor in title, Jean Fabris), the television station relied on a article L-122.5 of the French Intellectual Property Code, which permitted short quotations from copyright-protected works, as well as the public's right to information pursuant to article 10 of the ECHR. It succeeded on the second ground: the Paris Court considered that the showing of the works in the broadcast was justified 'by the right of the TV viewers to be briefly informed in an appropriate manner of a cultural event, as this represents immediate news in relation to the work and its author'.¹⁶⁴ This decision was, however, overruled by the Paris Court of Appeal which, in dismissing the defence based on the public's right to information, held that the author's legal monopoly on his work was an intangible property guaranteed under the right of every physical or legal person to the respect of his property, to which the appropriate limits had been applied by the legislature, such limits including the exceptions to the copyright owner's exclusive rights and the provisions against obvious abuse of rights set out in articles L122.5 and L122.9 of the Intellectual Property Code respectively.¹⁶⁵ In addition, it also held that the television station could have informed viewers of the exhibition without necessarily presenting the works of the painter in the contested manner, and could have obtained the copyright owner's consent for such a presentation.¹⁶⁶ This decision was subsequently affirmed by the Court of Cassation.¹⁶⁷

Geiger has criticised the appellate courts' reluctance to take into account the circumstances of the case, as well as their apparent assumption that the balance between copyright and the public's right to information had already been appropriately effected within the copyright legislation, such that there was no need for a correction by means of external norms in order to satisfy the requirement of proportionality.¹⁶⁸ Geiger considers, in the context of the case, that it is difficult to see how the television station could have effectively informed the public of the exhibition without filming at least some of the works included, and that it would appear to be incompatible with the need for rapid information if such uses were to be subjected to the copyright owner's authorisation.¹⁶⁹

12.3.2.3 US

¹⁶⁴ Geiger, 'Copyright's Fundamental Rights Dimension at EU Level', 44.

¹⁶⁵ Paris Court of Appeal, 30 May 2001. See C Geiger, 'France: Intellectual Property Code, Art L 122-5-3; European Convention on Human Rights, Art 10 – Utrillo' (2004)35(5) *International Review of Intellectual Property and Competition Law* 716, 716.

¹⁶⁶ Geiger, 'France – Utrillo', 716.

¹⁶⁷ Court of Cassation, 13 November 2003. See Geiger, 'France – Utrillo', 716.

¹⁶⁸ Geiger, 'France – Utrillo', 723 – 724.

¹⁶⁹ Geiger, 'France – Utrillo', 725.

The copyright law-First Amendment discourse in the US has been described as having developed in three separate 'waves' of interest.¹⁷⁰ These are outlined below.

The 1970s: Responses to Rosemont and Time

The first such wave is said to have begun with two influential law review articles published respectively by Melville Nimmer¹⁷¹ and Paul Goldstein,¹⁷² as well as a student note by Lionel Sobel.¹⁷³ Each of these articles offered a different solution for addressing the perceived conflict between copyright and the First Amendment. Nimmer believed that the idea/expression dichotomy dealt with the conflict sufficiently in most cases, except in the case of 'news photographs', for which he proposed a specific exception, while Goldstein proposed a wider First Amendment exception to copyright in circumstances involving the public interest. Sobel, meanwhile, preferred the view that there was ultimately no conflict between the two.¹⁷⁴

These articles were triggered by the decisions in *Rosemont Enterprises v Random House*¹⁷⁵ and *Time v Bernard Geis Associates*.¹⁷⁶ *Rosemont* was a case involving the eccentric Howard Hughes, a public figure who was intensely protective of his privacy. Hughes learned that a biography of himself was about to be published by Random House. Three days before publication, a company which he owned and controlled exclusively bought the rights to various magazine articles that had been published about him about twelve years earlier. When the biography was published, Hughes sought an injunction restraining its sale, distribution and advertisement, contending that it infringed the copyright in the magazine articles. The Second Circuit held, however, that any use which had been made of the articles in the writing of the biography constituted fair use, thus blocking Hughes' attempt at preventing the distribution of the biography. Although the First Amendment was not explicitly acknowledged, the court did refer to the public interest in 'free dissemination of information' – which is strongly associated with the right to free speech – in its formulation of fair use.¹⁷⁷ The *Time* case, meanwhile, arose from the use of sketches based on frames from the Zapruder film of President John F. Kennedy's assassination, which were published in a book about the assassination. Again, the court found that the fair use defence was available to the

¹⁷⁰ Birnhack, 'The Copyright Law and Free Speech Affair', 241 – 247.

¹⁷¹ Melville B Nimmer, 'Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?' (1970) 17 *UCLA Law Review* 1180.

¹⁷² Paul Goldstein, 'Copyright and the First Amendment' (1970) 70 *Columbia Law Review* 983.

¹⁷³ Lionel S Sobel, 'Copyright and the First Amendment: A Gathering Storm?' (1971) 19 *Copyright Law Symposium* 43.

¹⁷⁴ Sobel, 'Copyright and the First Amendment', 67 – 79.

¹⁷⁵ 366 F.2d 303 (1966).

¹⁷⁶ 293 F.Supp 130 (1968).

¹⁷⁷ See Birnhack, 'The Copyright Law and Free Speech Affair', 249 (observing that the *Rosemont* decision 'demonstrates a profound understanding of both the nature of copyright law and its relationship with the First Amendment').

defendants, given the public interest in having the fullest information available about the assassination, and the fact that the publication of the sketches resulted in little (if any) injury to the market for the film. Having arrived at this conclusion, the court did not address the explicit First Amendment argument raised by the defendants. Birnhack argues that the fact that these two cases did not address the First Amendment at all, even though they reached a result that favoured it on the basis of fair use, created 'a mythical legacy that the defense has the power to accommodate First Amendment concerns'.¹⁷⁸

Soon after the publication of Nimmer's article, the First Amendment argument was raised before the courts on a number of occasions; however, with one exception,¹⁷⁹ every argument that claimed a First Amendment defence was dismissed, usually with only a brief statement. In *McGraw-Hill v Worth Publishers*,¹⁸⁰ for instance, the defendants' First Amendment was simply dismissed as 'flying in the face of established law'. This line of cases culminated in the Supreme Court's dismissal of the First Amendment defence in *Harper & Row Publishers v Nation Enterprises*.¹⁸¹ This case involved the memoirs of former president Gerald Ford, which contained significant unpublished material on the Watergate crisis and Ford's pardon of former President Nixon. Ford had licensed the publication rights to the claimants, Harper & Row, which subsequently contracted for excerpts of the memoir to be printed in *TIME* magazine prior to the publication of the memoirs as a whole. Shortly before the *TIME* article's scheduled release, the editor of *The Nation* (the defendant), a political commentary magazine, acquired a copy of the memoirs. The editor wrote an 2,250-word article using quotes, paraphrases and facts taken from the manuscript – containing verbatim quotes totalling between 300 to 400 words – which was subsequently published in *The Nation* ahead of the scheduled publication in *TIME*. The Supreme Court held that the publication of the article did not constitute a fair use of Ford's memoirs, to which the claimants held the rights, emphasising in particular the unpublished nature of the work. The First Amendment defence was dismissed on the ground that copyright itself promotes freedom of expression, and furthermore that First Amendment protections such as the idea/expression dichotomy and fair use were already embodied in the Copyright Act itself.

The 1990s: Free speech as information policy

The second wave of interest, according to Birnhack, occurred in the 1990s.¹⁸² The concern for First Amendment values was placed in a wider context than it had been

¹⁷⁸ Birnhack, 'The Copyright Law and Free Speech Affair', 248.

¹⁷⁹ *Triangle Publications v Knight-Ridder Newspapers* 445 F.Supp. 875 (1978), 880.. Some contemporaneous commentators have suggested that this case would be more appropriately decided on fair use grounds rather than the First Amendment: Peter E Hans, 'Constitutional Law – Commercial Speech – Copyright and the First Amendment' (1979) *Wisconsin Law Review* 242, 246; Celia Goldwag, 'Copyright Infringement and the First Amendment' (1979) 19 *Columbia Law Review* 320, 327.

¹⁸⁰ 335 F.Supp. 415 (1971).

¹⁸¹ 471 US 539 (1985).

¹⁸² Birnhack, 'The Copyright Law and Free Speech Affair', 242 – 243.

during the first wave, as a concern for the effects of the continuous commodification of information.¹⁸³ The sources of the threat were understood to be wider than copyright law, and to include other forms of intellectual property, such as trade mark law and the right to publicity. This renewed interest in the relationship between copyright and free speech was reinforced by the disruptive effects of the Internet¹⁸⁴.

The present day

The third wave of interest is said to be taking place in the present day, in the face of the current expansion of copyright law.¹⁸⁵ Birnhack identifies three cases which suggest a greater willingness on the part of the courts to engage with First Amendment issues in copyright cases. The first is *Universal City Studios v Reimerdes*,¹⁸⁶ which addressed the constitutionality of section 1201(a) of the US Copyright Act as amended by the Digital Millennium Copyright Act ('DMCA'). Section 1201(a) prohibits the offering to the public of, provision of, or other trafficking in any technology that is primarily designed or produced for the purpose of circumventing a technological protection measure that effectively controls access to a copyright work. It was concluded by Judge Kaplan (and affirmed on appeal by the Second Circuit) that the prohibition did not abridge the First Amendment; in doing so, however, Judge Kaplan was willing to take a close look at the interaction between the DMCA and the First Amendment through the lens of First Amendment doctrine.¹⁸⁷ As Birnhack notes, 'despite the particular result, this case might indicate a new and promising approach'.¹⁸⁸ The second case is *Suntrust Bank v Houghton Mifflin*,¹⁸⁹ which involved a novel called *The Wind Done Gone*, which was based on *Gone with the Wind* and was intended to challenge the racist stereotypes and romantic portrait of antebellum plantation life perpetuated by the earlier novel. While the case was decided on the basis of fair use, the court did recognise the importance of 'remain[ing] cognizant of the First Amendment protections interwoven into copyright law'. It refused to grant the injunctive relief sought by the copyright owner of *Gone with the Wind*, stating that such relief would be improper given the lack of irreparable injury suffered by the copyright owner, the likelihood that the defendant's fair use defence would prevail, and First Amendment concerns regarding comment and criticism. Netanel describes *Suntrust Bank* as 'extraordinary', being 'the first time an appellate court has applied the

¹⁸³ Representative publications from this era include: Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw out the Public Interest with the Bath Water* (1994) *Annual Survey of American Law* 403; Niva Elkin-Koren and Neil Weinstock Netanel (eds), *The Commodification of Information* (Kluwer, 2002).

¹⁸⁴ See for instance Rochelle Cooper Dreyfuss et al (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the*

Knowledge Society (OUP, 2001)

¹⁸⁵ Birnhack, 'The Copyright Law and Free Speech Affair', 243.

¹⁸⁶ 111 F.Supp.2d 294 (2000); 111 F.Supp.2d 346 (2000).

¹⁸⁷ See Section 5.5.2 below.

¹⁸⁸ Birnhack, 'The Copyright Law and Free Speech Affair', 243.

¹⁸⁹ 268 F.3d 1257 (2001).

First Amendment's Free Speech Clause to constrain the enforcement of a copyright';¹⁹⁰ Birnhack himself, however, is somewhat less enthusiastic, observing that while the rhetoric of the court does make reference to the First Amendment, its decision is ultimately based on a rather traditional fair use analysis.¹⁹¹ In this regard, it should be noted that in subsequent copyright cases in which *Suntrust Bank* has been cited, it has generally been cited as authority for the correct interpretation and application of the fair use doctrine. In deciding these cases, the courts have not engaged in any detailed discussion of the First Amendment; to the extent that the First Amendment is referred to at all in these cases, it has been in the context either of a statement that copyright enforcement does not implicate First Amendment concerns,¹⁹² or a statement that the balance between copyright and the First Amendment is preserved in part by the doctrine of fair use.¹⁹³

The third case identified by Birnhack is *Eldred v Ashcroft*,¹⁹⁴ in which the Supreme Court upheld the constitutionality of the Copyright Term Extension Act ('CTEA'), affirming the judgment of the DC Circuit on this point but expressly addressing First Amendment arguments. The majority opinion took the view that there was no conflict between copyright and the First Amendment, as any such concerns would generally be addressed adequately by the free speech accommodations built into copyright law, namely the idea/expression dichotomy and the doctrine of fair use. However, it did recognise that the DC Circuit 'spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment"',¹⁹⁵ and suggested that such a conflict might arise if and when Congress alters 'the traditional contours of copyright law',¹⁹⁶ though it did not explain what these traditional contours were.

The approach taken in *Eldred v Ashcroft* was elaborated upon by the Supreme Court in the case of *Golan v Holder*.¹⁹⁷ Much like *Eldred v Ashcroft*, this case involved a constitutional challenge, specifically a challenge to section 514 of the Uruguay Round Agreements Act 1994, which amends the US Copyright Act to accord protection to certain foreign works that had previously fallen into the public domain in the US. It was contended by the petitioners that the provision in question contravened the First Amendment. The Supreme Court, however, upheld the constitutionality of the provision. In doing so, it repeatedly quoted from and relied upon what it described as its

¹⁹⁰ Neil Weinstock Netanel, 'Locating Copyright within the First Amendment Skein' (2001) 54 *Stanford Law Review* 1, 2.

¹⁹¹ Birnhack, 'The Copyright Law and Free Speech Affair', 243 – 244.

¹⁹² *Golan v Gonzales* 2005 WL 914754, 17.

¹⁹³ *Salinger v Colting* 641 F.Supp.2d 250 (2009), 254 – 255; *Latimer v Roaring Toyz* 601 F.3d 1224 (2010), 1240; *Cariou v Prince* 784 F.Supp.2d 337 (2011), 346; *Bollea v Gawker Media* 913 F.Supp.2d 1325 (2012), 1329.

¹⁹⁴ 537 US 186 (2003).

¹⁹⁵ 537 US 186 (2003), 221.

¹⁹⁶ 537 US 186 (2003), 221.

¹⁹⁷ 132 S Ct 873 (2012).

'pathmarking decision in *Eldred*',¹⁹⁸ and essentially reiterated its reasoning in *Eldred v Ashcroft*. Notably, it also explained that copyright law's two built-in First Amendment safeguards – the idea/expression dichotomy and the fair use doctrine – were what the *Eldred* court had meant by 'copyright's traditional contours'.¹⁹⁹ It then held that there was no need for heightened scrutiny in this instance as section 514 'leaves undisturbed the "idea/expression distinction" and the "fair use" defense'.²⁰⁰ Netanel has suggested that, notwithstanding its narrow definition of the traditional contours of copyright protection, *Golan v Holder* imposes two potentially significant First Amendment constraints on copyright protection: first, it suggests that Congress may not expand or extend copyright protection in a way that avoids or diminishes the idea/expression distinction or fair use defense, at least without providing some alternative First Amendment protection; second, it fortifies and gives First Amendment import to the idea/expression dichotomy and the fair use defense.²⁰¹

At present, therefore, the position taken by the US Supreme Court appears to be that any conflicts that may arise between copyright and the First Amendment will, in almost all cases, be resolved by the fair use doctrine and the idea/expression dichotomy, though there is some indication that it may be prepared to hold that First Amendment interests are not adequately accommodated by these internal copyright rules where the traditional contours of copyright law have been altered. In light of the decision in *Golan v Holder*, Netanel has suggested that this would be the case if an amendment to the US Copyright Act were to 'eliminate, eviscerate, or otherwise disturb the idea/expression dichotomy or fair use defense'.²⁰² In this regard, Netanel has also suggested that statutory provisions prohibiting the circumvention of technological protection measures and notice and takedown procedures might be vulnerable to challenge under the First Amendment, as they have the effect of preventing users from engaging in fair use of copyright works.²⁰³

4 Nature of the interaction between copyright and freedom of expression

Two major approaches to the characterisation of the inter-relationship between copyright and freedom of expression can be identified from the existing literature. The first approach sees the relationship as being primarily one of *conflict*, while those the second approach sees it as being primarily one of *co-existence and co-operation*. These two

¹⁹⁸ 132 S Ct 873 (2012), 889.

¹⁹⁹ 132 S Ct 873 (2012), 890. The Supreme Court even chided the Tenth Circuit, the court below, for incorrectly giving 'an unconfined reading to our reference in *Eldred* to "traditional contours of copyright"': 132 S Ct 873 (2012), 890.

²⁰⁰ 132 S Ct 873 (2012), 890 – 891.

²⁰¹ Neil Weinstock Netanel, 'First Amendment Constraints on Copyright after *Golan v Holder*' (2013) 60 *UCLA Law Review* 1082, 1103.

²⁰² Netanel, 'First Amendment Constraints on Copyright after *Golan v Holder*', 1102.

²⁰³ Netanel, 'First Amendment Constraints on Copyright after *Golan v Holder*', 1113 – 1127.

approaches will be discussed in turn. However, it is worth noting that these two views are not necessarily mutually incompatible: Netanel, for instance, recognises that copyright both provides an incentive for the creation of new expression and burdens speech,²⁰⁴ and other commentators, while taking the view that copyright and freedom of expression will not generally collide, do recognise that a conflict may still arise in exceptional circumstances.²⁰⁵

13.4.1 Conflict

The nature of the conflict between copyright and freedom of expression can be described quite simply. Copyright protects the expression of ideas and information by giving copyright owners the exclusive right to control and prevent the dissemination of their works. This right amounts to an effective fetter on what other persons are able to speak, write and so forth, as a person who wishes to use the copyright owner's protected expression must first obtain permission from the copyright owner.²⁰⁶ The nature of the conflict between copyright and freedom of expression was summarised by Lord Phillips in *Ashdown*:

... copyright is essentially not a positive but a negative right ... The Act gives the owner of the copyright the right to prevent others from doing that which the Act *recognises* the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.²⁰⁷

Some commentators take the view that this conflict arises particularly in cases where copyright is deliberately used by the copyright owner to impede the dissemination of information embodied in the work concerned.²⁰⁸ In the specific context of US free speech

²⁰⁴ Neil Weinstock Netanel, *Copyright's Paradox* (OUP, 2008), 3.

²⁰⁵ Derclaye, 'IPRs and Human Rights', 134, 142; Cohen Jehoram, 'Copyright and Freedom of Expression', 276.

²⁰⁶ For descriptions of the conflict in the UK context, see: Macmillan Patfield, 'Towards a Reconciliation', 208 – 215; Griffiths, 'Copyright Law and Censorship', 4; Birnhack, 'Acknowledging the Conflict', 24; Garnett, 'The Impact of the HRA', 172. For the wider European context, see Cohen Jehoram, 'Copyright and Freedom of Expression', 276; Hugenholtz, 'Copyright and Freedom of Expression in Europe', 343 – 344; Balganes, 'Copyright and Free Expression', 48; Henningsson, 'Copyright and Freedom of Expression', 22; Patricia Akester, 'The Political Dimension of the Digital Challenge: Copyright and Free Speech Restrictions in the Digital Age' [2006] *Intellectual Property Quarterly* 16, 16. For the US context, see Goldstein, 'Copyright and the First Amendment', 984 (describing copyright as 'the uniquely legitimate offspring of censorship'); Leonard W Wang, 'The First Amendment Exception to Copyright: A Proposed Test' (1977) *Wisconsin Law Review* 1158, 1158; Jeffrey Oakes, 'Copyright and the First Amendment' (1978) 33 *University of Miami Law Review* 207, 207; Michael D Brittin, 'Constitutional Fair Use' (1982) 28 *Copyright Law Symposium* 141, 142 – 143; Greg A Perry, 'Copyright and the First Amendment: Nurturing the Seeds for Harvest' (1986) 65 *Nebraska Law Review* 631, 638 – 639; Henry S Hoberman, 'Copyright and the First Amendment: Freedom or Monopoly of Expression?' (1986) 14 *Pepperdine Law Review* 571, 573 – 574; Eugene Volokh and Brett McDonnell, 'Freedom of Speech and Independent Judgment Review in Copyright Cases' (1997) 107 *Yale Law Journal* 2431, 2433 – 2434; Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain' (1999) 74 *NYU Law Review* 354, 393 – 394; Edwin C Baker, 'First Amendment Limits on Copyright' (2002) 55 *Vanderbilt Law Review* 891, 892.

²⁰⁷ [2002] Ch 149, [30].

²⁰⁸ Griffiths sees the conflict as being most apparent where copyright is invoked in order to suppress the publication of a work – or, as he puts it, for the purpose of censorship: Griffiths, 'Copyright Law and Censorship', 5 – 6. For the US context, see *Rosemont Enterprises v Random House* 366 F.2d 303 (1966) (the court framing the conflict as occurring where a copyright owner seeks to exercise his rights in order to interfere with the public's right to be informed regarding matters of general interest); Brittin, 'Constitutional Fair Use', 155.

law, Rubenfeld describes how copyright law 'blithely ignores at least three basic principles of free speech jurisprudence that elsewhere go without saying', namely that (i) it is a 'content-based speech restriction' that is not subjected to 'strict scrutiny'; (ii) courts routinely issue prior restraints (such as prepublication injunctions) in copyright cases; and (iii) courts are frequently called upon to enjoin speech that borrows from a particular work unless it is 'critical' of that work, which is a form of viewpoint discrimination.²⁰⁹

It is also interesting to note that references to freedom of expression are contained in several European Directives dealing with copyright, in a way that recognises the potential for conflict. For instance, recital 3 to the Information Society Directive states that the proposed copyright harmonisation, in addition to promoting the implementation of the four freedoms of internal market, would also relate to 'compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest';²¹⁰ recital 2 to the Enforcement Directive states that the protection of intellectual property should 'allow the widest possible dissemination of works, ideas and new know-how' without hampering 'freedom of expression, the free movement of information'.²¹¹

14.4.2 Co-existence and co-operation

Two major sub-strands of argumentation can be discerned from assertions that the relationship between copyright and freedom of expression is primarily one of co-existence and co-operation rather than one of conflict. The first of these is that copyright serves to *incentivise* the production of new forms of expression, thereby promoting freedom of expression. The second of these is the argument that copyright law already *incorporates values and notions* derived from the right to freedom of expression, which allows any potential conflicts to be resolved effectively.

Derclaye's view that there is no intrinsic conflict between intellectual property rights and human rights – though she acknowledges that 'real conflicts' may occur in some rare cases where an excess of intellectual property protection exists – contains elements from both strands of argumentation.²¹² From the broader human rights perspective, she argues that intellectual property rights are themselves human rights and, for this reason, share the same goals as other human rights; the identity or similarity of these goals means that human rights and intellectual property rights do not simply co-exist, but also coincide and co-operate.²¹³ This mirrors the first line of argument, outlined in the preceding paragraph, that copyright and freedom of expression share the same ultimate goal. In the specific context of copyright and freedom of expression, she argues that there is no conflict between the two due to the existence of inbuilt exceptions and

²⁰⁹ Rubenfeld, 'The Freedom of Imagination', 5 – 7.

²¹⁰ Information Society Directive, recital 3.

²¹¹ Enforcement Directive, recital 2.

²¹² Derclaye, 'IPRs and Human Rights', 134, 142.

²¹³ Derclaye, 'IPRs and Human Rights', 134.

limitations within copyright law, namely the idea/expression dichotomy, the requirement of originality, defences, and the limited term of copyright.²¹⁴ These limitations, she states, allow individuals enough room to express themselves freely by taking the ideas or non-original expressions from protected works, or by taking protected expressions where these have fallen into the public domain or in circumstances where a defence is available.²¹⁵

15 4.2.1 Copyright promotes freedom of expression (incentive)

The idea that copyright promotes freedom of expression is founded on the premise that copyright fosters and incentivises the independent creation of expressive works; both copyright and freedom of expression, therefore, have the same aims. As Macaulay said in his first speech on the bill which led to the English Copyright Act of 1842:

It is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally enumerated; and the least objectionable way of remunerating them is by means of copyright.²¹⁶

This idea comes across vividly in the characterisation of copyright as ‘the engine of freedom of expression’ – the famous metaphor of O’Connor J in the leading US Supreme Court decision in this area, *Harper & Row Publishers v Nation Enterprises*.²¹⁷ In delivering the opinion of the court, O’Connor J stated that: ‘... it should not be forgotten that the Framers [of the Constitution] intended copyright itself to be an engine of freedom of expression’.²¹⁸ This view has since been reaffirmed by the more recent decision in *Eldred v Ashcroft*,²¹⁹ where the US Supreme Court, citing *Harper & Row*, emphasised that ‘copyright’s purpose is to promote the creation and publication of free expression’.²²⁰ Birnhack has described this as the *shared goal* argument, in that copyright and freedom of expression are depicted as striving towards the same goal, which is supplemented by the *division of labour* argument, where copyright and freedom of expression are portrayed as playing separate roles towards the achievement of this goal, where copyright provides the incentive for the creation of new expression, which the right to freedom of expression is then called upon to protect.²²¹

Copyright can also be seen establishing a marketplace that both provides remuneration to authors, enabling them to continue producing works, and allows them to assert a degree of financial and artistic autonomy, promoting the creation of a diverse variety of

²¹⁴ Derclaye, ‘IPRs and Human Rights’, 142.

²¹⁵ Derclaye, ‘IPRs and Human Rights’, 142.

²¹⁶ HC Deb 5 Feb 1841, vol 56, col 346.

²¹⁷ 471 US 539.

²¹⁸ 471 US 539, 558.

²¹⁹ 537 US 186.

²²⁰ 537 US 186, 219.

²²¹ Birnhack, ‘The Copyright Law and Free Speech Affair’, 266 – 272.

works rather than those that have been approved by a patron or government, thus laying the foundation for the kind of robust discourse which is a feature of a democratic society. Netanel is perhaps the best-known contemporary scholar associated with this argument,²²² but similar concerns about art and literature sponsored exclusively by the government or elite patrons have been voiced even earlier.²²³

Some commentators have expressed skepticism as to whether copyright law, as it stands at present, truly promotes freedom of expression in the manner suggested by the US Supreme Court. Masiyakurima identifies two distinct ways in which this incentive- and market-based view of copyright may harm freedom of expression.²²⁴ First, given that publishing decisions are usually based on the likely profitability of a copyright work, important but financially unattractive works may not be published. Second, upon publication, the extensive monopolies granted to copyright owners may constrict access to vital information through high prices.²²⁵ Furthermore, even where access to a work is possible, the extensive rights conferred by copyright may hinder derivative uses of vital expressions.²²⁶

Masiyakurima's second concern, that the monopolies conferred by copyright might lead to the imposition of overly burdensome costs on individual users, is shared by a number of other commentators. Writing at a relatively early stage of copyright history, Chafee has expressed the same concern, observing that the monopoly granted by copyright to authors over their works may limit access to those works by 'persons of slender purses', making it necessary to ensure that 'a particular provision of the Copyright Act really helps the author – that it does not impose a burden on the public substantially greater than the benefit it gives to the author'.²²⁷ In the same vein, Barendt has also observed that, even if copyright law does indeed promote the *production* of works, it equally clearly inhibits the *distribution* of these works.²²⁸ Netanel has expressed a similar concern.²²⁹

Netanel, while observing that copyright serves important democracy-enhancing functions, also cautions that a 'bloated' copyright would frustrate these goals in two basic ways: first, it would permit copyright owners to use their proprietary entitlements

²²² Netanel, 'Copyright and a Democratic Civil Society', 288 – 289; 347 – 352.. See also Gillian Davies, *Copyright and the Public Interest* (IIC Studies, 1994), 173; Cohen Jehoram, 'Copyright and Freedom of Expression', 3; Rebecca Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has In Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation' (2000) 42 *Boston College Law Review* 1, 35 – 37.

²²³ Zechariah Chafee, 'Reflections on the Law of Copyright: I' (1945) 45 *Columbia Law Review* 503, 507.

²²⁴ Patrick Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 241.

²²⁵ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 241.

²²⁶ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 241.

²²⁷ Chafee, 'Reflections on the Law of Copyright: I', 507.

²²⁸ Barendt, 'Copyright and Free Speech Theory', 28.

²²⁹ Netanel, 'Democratic Civil Society', 292 – 293.

in order to suppress political, social and personal criticism;²³⁰ second, it would impose a burdensome 'tax' on audiences and subsequent authors.²³¹ In an environment where consumers are charged for each and every digital use of a work, access might become prohibitively expensive for audiences.²³² An overly expanded copyright might lead to an environment in which subsequent authors are required to pay for each quotation from an existing work, or for each reformulation, adaptation or parody of an existing work; this would constitute a material disincentive to the production and dissemination of creative, transformative uses of preexisting expression, meaning that some transformative works will never be created.²³³ Barendt also asks whether authors and publishers truly require the extensive range of rights and lengthy term of protection conferred by copyright in order to be sufficiently incentivised to produce literature and other works.²³⁴

Benkler has questioned the empirical basis for the premise that copyright protection necessarily incentivises the production of more diverse creative expressions.²³⁵ The dichotomy between 'free' market actors and 'beholden' beneficiaries of State or private patronage, he observes, is a problematic one.²³⁶ He asks:²³⁷

In what sense, precisely, is an employee of the Walt Disney Corporation more "free" than the recipient of a five year NSF grant or a MacArthur fellow? In what sense are Fox News reports, produced by reporters who work for News Corp., more politically free and diversity-enhancing than the work of an amateur moderator of a listserve who does not seek direct economic returns, or a tenured member of the history department at CUNY?

On a related note, Netanel has made reference to commentary questioning whether the copyright incentive is truly necessary to underwrite a system of free expression, pointing out that the Internet and other digital technologies have resulted in vast number of

²³⁰ Netanel cites as examples cases where the Church of Scientology has invoked copyright to prevent critics from bringing allegedly corrupt Church practices to public scrutiny (*Religious Tech Ctr v Netcom On-Line Communication Servs* 907 F.Supp. 1361); where famous reclusive figures have brought copyright infringement actions to suppress the publication of biographical material (*Salinger v Random House* 811 F.2d 90; *Rosemont Enterprises v Random House* 366 F.2d 303); where Walt Disney Productions has used copyright to obtain an injunction against the publication of a counterculture comic book that sought to contest Disney's all-American "world of scrubbed faces, bright smiles and happy endings" by depicting Mickey Mouse engaged in various illicit activities (*Walt Disney Prods v Air Pirates* 581 F.2d 751); and where a police officer has brought suit to prevent a newspaper from exposing his racist fable, which had appeared in a police department newsletter (*Belmore v City Pages Inc* 34 USPQ2d (BNA) 1295).

²³¹ Netanel, 'Democratic Civil Society', 294 – 296.

²³² The same concern was raised at an even earlier stage of copyright history by Chafee, noting that the fact that copyright gives an author a monopoly over his or her works, thus limiting access to those works especially by 'persons of slender purses', makes it necessary to ensure that 'a particular provision of the Copyright Act really helps the author – that it does not impose a burden on the public substantially greater than the benefit it gives to the author': Chafee, 'Reflections on the Law of Copyright: I', 507.

²³³ Netanel, 'Democratic Civil Society', 294 – 296.

²³⁴ Barendt, 'Copyright and Free Speech Theory', 28.

²³⁵ Benkler 'Free as the Air to Common Use'.

²³⁶ Benkler, 'Free as the Air to Common Use', 410.

²³⁷ Benkler, 'Free as the Air to Common Use', 398.

authors who do not rely on the copyright incentive in order to produce and disseminate new expression.²³⁸

Rubinfeld has also questioned the applicability of the marketplace metaphor to freedom of expression issues, observing that the objective of the First Amendment is neither the maximisation of total speech production nor the establishment of an efficient speech market which generates at exactly as much speech as the public is willing to pay for.²³⁹ Given the difference in the objectives of the First Amendment and the objectives of copyright law – namely, the establishment of *ex ante* incentives to maximise the production of profitable creative works – he argues that it would be inadvisable to conflate the two. Free speech, Rubinfeld asserts, ‘cannot be reduced to fair speech, neither can it be reduced to efficient or wealth-maximizing speech’.²⁴⁰ He illustrates the difference between the objectives of the First Amendment and those of copyright with the following scenario:

If speech could be suppressed whenever suppression produced on the whole a net gain in valuable public discussion, we would live in a First Amendment world very different from the one we have known. The truth is that banning a book can often be expected to provoke much more good public discussion about the topics it raises than the book’s unfettered publication would have generated. Again, *The Wind Done Gone* provides an example. It would be a strange First Amendment – it would not be the American First Amendment – that asked judges to calculate the speech produced by banning books, subtract the speech that would be yielded by the book’s publication, and if the remainder is positive, uphold censorship as an engine of free expression.²⁴¹

16 4.2.2 Copyright incorporates principles that accommodate freedom of expression (incorporation)

Proponents of the view that copyright co-exists and co-operates with the right to freedom of expression also argue that, even if the two concepts could potentially come into conflict with each other, any such conflict can ultimately be resolved through the application of the statutory exceptions and limitations contained in copyright law.²⁴² Consequently, there is no reason to look outside copyright law – and towards constitutional and human rights law – for a means of resolving the conflict.²⁴³ Torremans alludes to this argument when he states that ‘[the] balance between public and private interests is not an external element for copyright ... On the contrary it has been internalized by copyright and is part of its fundamental nature’.²⁴⁴ This largely reflects

²³⁸ Netanel, ‘Locating Copyright’, 29.

²³⁹ Rubinfeld, ‘The Freedom of Imagination’, 21 – 24.

²⁴⁰ Rubinfeld, ‘The Freedom of Imagination’, 23 – 24.

²⁴¹ Rubinfeld, ‘The Freedom of Imagination’, 23.

²⁴² Derclaye, ‘IPRs and Human Rights’, 142; Torremans, ‘Copyright as a Human Right’, 206 – 207; Nimmer, ‘Does Copyright Abridge the First Amendment Guarantee’; Oakes, ‘Copyright and the First Amendment’, 160; David E Shipley, ‘Conflicts between Copyright and the First Amendment after *Harper & Row, Publishers v Nation Enterprises*’ (1986) *BYU Law Review* 983, 987.

²⁴³ The statutory exceptions and limitations contained in copyright law have, for this reason, sometimes been referred to as ‘internal controls’: Dworkin, ‘Copyright, Public Interest, and Freedom of Speech’, 154.

²⁴⁴ Torremans, ‘Copyright as a Human Right’, 206.

the position taken by the US Supreme Court. In *Harper & Row*, the Supreme Court held that the Copyright Act already contained several First Amendment protections, namely the idea/expression dichotomy and the fair use doctrine; consequently, there was no need to expand the fair use doctrine further so as to include the kind of public interest use advocated for by the defendant. This was subsequently affirmed in *Eldred v Ashcroft*.

In UK context, this argument is reflected in the first instance decision of Morritt VC in *Ashdown*, where he stated that:

Article 10(2) recognises that the exercise of the right to freedom of expression carries with it duties and responsibilities. Thus restrictions on the exercise of the right are permissible if they are (1) prescribed by law; (2) for the protection of rights of others and (3) are necessary in a democratic society ... inherent in the argument for the "Sunday Telegraph" is the submission that the provisions of the 1988 Act are incapable by themselves and without more of satisfying requirement (3) ...²⁴⁵

I do not accept the submission. In my view the provisions of the Act alone can and do satisfy the third requirement of article 10(2) as well. The needs of a democratic society include the recognition and protection of private property ... the United Kingdom is entitled to a margin of appreciation in giving effect to the provisions of article 10 of the Convention in the field of intellectual property: *Handyside v United Kingdom* (1976) 1 EHRR 737. I can see no reason why the provisions of the 1988 Act should not be sufficient to give effect to the Convention right subject only to such restrictions as are permitted by article 10(2).²⁴⁶

... article 10 cannot be relied on to create defences to the alleged infringement over and above those for which the 1988 Act provides. The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself in the legislation it has enacted. There is no room for any further defences outside the code which establishes the particular species of intellectual property in question. In particular it is not open to an infringer to defend the proceedings on the basis that although he cannot make out one or more of the statutory defences nevertheless the relief sought would be more than that which is necessary in a democratic society and therefore contrary to article 10(2).²⁴⁷

In a contemporaneous case comment, Griffiths is critical of this approach, describing Morritt VC's view that copyright legislation could, as a whole, satisfy the balance of interests required by article 10 of the ECHR as being 'quite untenable' and as demonstrating 'an unwillingness to engage with, and a serious misconception as to the effects of, the jurisprudence of the European Court of Human Rights.'²⁴⁸ According to Griffiths:

It is not open for a court to find that an overall legal framework secures compliance regardless of the application to the facts of a particular case. Such an approach cannot serve to protect individual rights. The Convention clearly requires a decision-making body to assess whether any interference with freedom of expression can be justified on an *individual* basis.²⁴⁹

²⁴⁵ [2001] Ch 685, 693.

²⁴⁶ [2001] Ch 685, 693 – 694.

²⁴⁷ [2001] Ch 685, 696.

²⁴⁸ Griffiths, 'Copyright Law after *Ashdown*', 244.

²⁴⁹ Griffiths, 'Copyright Law after *Ashdown*', 244. Griffiths cites in support of this argument *Reynolds v Times Newspapers* [2000] EMLR 1, 30 (Lord Steyn stating that 'a test expressed in terms of a category of cases, such as political speech, is at variance with the jurisprudence of the European Court of Human Rights which in cases of competing rights and interests requires a balancing exercise in the light of the concrete facts of each case. While there is as yet no decision directly in point, it seems to me that Professor John Fleming is right in saying that the basic approach of the European Court of Human Rights has been close to the German approach by insisting on individual evaluation of each case rather than categories: "Libel and Constitutional Free Speech" in *Essays for Patrick Atiyah* (Cane and Stapleton ed., 1991), page 333 at pages 337 and 345').

Birnhack is similarly critical, describing Morritt VC's approach at first instance in *Ashdown* – namely, one which sought to resolve the conflict between copyright law and freedom of expression – as having 'mechanically internalised' what was actually an external conflict, thus failing to identify the constitutional dimension of the intersection between the two areas of law.²⁵⁰

The approach taken by Morritt VC at first instance in *Ashdown* was subsequently rejected on appeal, the Court of Appeal holding that:

... rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the 1988 Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, in so far as it is able, to apply the Act in a manner that accommodates the right of freedom of expression.²⁵¹

Griffiths, however, is again critical of the Court of Appeal's chosen approach.²⁵² While acknowledging that it displays a number of positive qualities, in particular its recognition that the enactment of the HRA requires that the right to freedom of expression be capable of trumping a copyright interest, Griffiths points out that it demonstrates a similar unwillingness to engage substantively with the demands of article 10 of the ECHR, as reflected in the fairly traditional conception of 'fairness' applied by the Court of Appeal in determining whether the fair dealing provisions were applicable on the facts of the case.²⁵³

Similarly, Birnhack finds that, while the Court of Appeal's approach is the more desirable one, it still failed to give full effect to the right to freedom of expression by its restrictive interpretation of the factors governing the defence of fair dealing.²⁵⁴ In particular, he observes that although the Court of Appeal had in its judgment warned against applying inflexible tests based on existing fair dealing precedents,²⁵⁵ it did not fully follow its own caution either in outlining the factors to be considered in the fair dealing analysis or in the application of existing precedents to the facts of the case.²⁵⁶ On the contrary, it had accepted precedents which predated the HRA, and which laid emphasis on the commercial motive of the defendant, without taking into account the wider purpose pursued by the defendant in *Ashdown*, namely that of informing the public and of reporting newsworthy events, all of which could have been classified as 'political speech' and given due weight if considered in the context of the HRA.²⁵⁷

²⁵⁰ Birnhack, 'Acknowledging the Conflict', 32.

²⁵¹ [2001] EWCA Civ 1142, [45]

²⁵² Griffiths, 'Copyright Law after *Ashdown*', 247 – 255.

²⁵³ Griffiths, 'Copyright Law after *Ashdown*', 247 – 255.

²⁵⁴ Birnhack, 'Acknowledging the Conflict', 33 – 34.

²⁵⁵ [2002] Ch 149, [71].

²⁵⁶ Birnhack, 'Acknowledging the Conflict', 33.

²⁵⁷ Birnhack, 'Acknowledging the Conflict', 33.

In relation to the fair dealing factors identified by the Court of Appeal, Birnhack notes that the Court of Appeal in *Ashdown* once again focused on the commercial nature of the defendant's dealing and its effect upon the market for the claimant's work, without considering the fact that there are very few speech acts which are purely commercial or purely non-commercial in nature, and without considering the possibility that, given the contribution made to public discourse by the defendant's dealing, some negative effect on the market for the protected work might be tolerated.²⁵⁸

At a more general level, several commentators have cautioned against assuming that copyright law's internal principles necessarily safeguard freedom of expression. Birnhack states that copyright law should not be taken for granted as being immune from judicial review, and that any assumption regarding the power and ability of internal principles such as the idea/expression dichotomy and the fair dealing defence to 'take care of' any freedom of expression concerns should be carefully reviewed; this implies that the courts should not automatically defer to the legislative balance embedded in the CDPA, but should question whether they actually protect the right to freedom of expression.²⁵⁹

Barendt is similarly skeptical of the argument that copyright's internal principles adequately protect freedom of expression, observing that if the courts were to hold that copyright law *necessarily* safeguards freedom of expression, such that no further consideration of any conflict arising between them is required, it would be 'an abdication of their responsibility to determine the scope of constitutional rights ... and how far it is necessary to restrict its exercise to protect the right to copyright'.²⁶⁰ For this reason, he takes the view that the Court of Appeal in *Ashdown* was correct to reject the High Court's view that the CDPA makes exhaustive provision for freedom of expression, and to hold that the right to freedom of expression may conflict with copyright notwithstanding the presence of fair dealing defences in the statute.²⁶¹

Danay takes the view that the principles internal to copyright – citing, in particular, the idea/expression dichotomy and the defence of fair dealing – being relatively pre-determined and inflexible legal mechanisms, are not sufficiently context-sensitive to do justice to the task of safeguarding freedom of expression.²⁶² The idea/expression dichotomy, for instance, strikes the balance between competing interests one-and-for-all, assuming that in all circumstances freedom of expression is satisfied without the need for using any particular form of expression, even though there are clearly cases where the form as well as the content of the expression may need to be reproduced.²⁶³

²⁵⁸ Birnhack, 'Acknowledging the Conflict', 33.

²⁵⁹ Birnhack, 'Acknowledging the Conflict', 29.

²⁶⁰ Barendt, 'Copyright and Free Speech Theory', 15.

²⁶¹ Barendt, 'Copyright and Free Speech Theory', 15.

²⁶² Danay, 'Copyright vs. Free Expression', 43.

²⁶³ Danay, 'Copyright vs. Free Expression', 43. This was recognised by the Court of Appeal in *Ashdown*: see discussion below.

He compares these principles unfavourably to the three-stage proportionality test set out in *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing*,²⁶⁴ where the Privy Council, adopting the analysis formulated by Gubbay CJ in two cases from Zimbabwe,²⁶⁵ held that in determining whether a particular restriction on freedom of expression was necessary in a democratic society, a court should ask itself:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.²⁶⁶

Danay asserts that, as the test laid down in *de Freitas* draws the courts' attention to the fundamental task at hand, namely the balancing of the right to freedom of expression against other competing values within appropriate constitutional boundaries, it provides a more context-sensitive test that is capable of exposing the competing interests at stake and balancing them in a reasoned manner.²⁶⁷

The primary exceptions and limitations internal to copyright law which are said to reflect values derived from the right to freedom of expression are the idea/expression dichotomy and the defence of fair dealing (in the UK) or fair use (in the US). Each of these will be discussed in turn.

17 4.2.3 Incorporation: the idea/expression dichotomy

It is a long-established principle that copyright law does not protect the ideas that are embodied in or that may have inspired the work, but protects only the expression of those ideas.²⁶⁸ On this basis, it has been argued that as copyright law does not prevent a person from repeating or making use of the ideas or information contained in a protected work, but merely prevents that person from copying the form of expression used in that work, it is not a constraint on freedom of expression.²⁶⁹ As Griffiths notes, it is very often possible to express the ideas and information contained in a work in a different way and thus to avoid reproducing a 'substantial part' of the work.²⁷⁰ Birnhack makes a similar observation, namely that as the idea/expression dichotomy does not prevent a citizen

²⁶⁴ [1999] 1 AC 6. This was an appeal to the Privy Council from the Court of Appeal of Antigua and Barbuda.

²⁶⁵ *Nyambirai v National Social Security Authority* [1996] 1 LRC 64; *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* [1996] 4 LRC 489.

²⁶⁶ [1999] 1 AC 6, [25].

²⁶⁷ Danay, 'Copyright vs. Free Expression', 43.

²⁶⁸ This principle has been described by the House of Lords as 'trite law': see *LB (Plastics) v Swish Products* [1979] FSR 145, 160 (Lord Hailsham), 165 (Lord Salmon). It has also been recognised in international treaties: see TRIPS, art 9(2); WIPO Copyright Treaty, art 2.

²⁶⁹ See e.g. Cohen Jehoram, 'Copyright and Freedom of Expression', 276 – 277 (describing the idea/expression dichotomy as the primary means through which 'copyright has respected freedom of expression', which 'wards off most potential cases of the collision between freedom and copyright').

²⁷⁰ Griffiths, 'Copyright Law and Censorship', 14. He goes on to acknowledge that this may not always be possible.

from expressing ideas or conveying information, it eases much of the initial appearance of a conflict between freedom of expression and copyright law.²⁷¹

This view is reflected in the judgment of Walton J in *Associated Newspapers v News Group Newspapers*.²⁷² The claimants in this case were the owners of the *Daily Mail*, who had obtained, for a limited time, the exclusive rights in the nature of copyright in a collection of letters written by the late Duke and Duchess of Windsor to each other. The defendants were the owners of *The Sun*, who printed one of these letters and a portion of another in their newspaper. The claimants sought an injunction to restrain publication until the expiry of their rights to the letters. The defendants argued that the grant of an injunction would amount to an interference with the press' freedom of speech or publication. This, however, was rejected by Walton J:

[The defendant] has tried to make a great deal of play on the lines that to grant the injunction would be to interfere with the press's freedom of speech or publication. It seems to me that that is total nonsense. A person is not in any way prohibited from saying exactly what he likes, or publishing exactly what he likes, if he cannot publish it in the precise words which somebody else has used, which is the essence of copyright. Freedom of speech is interfered with when somebody is not allowed to say what is the truth: and the truth here is that the Duchess wrote a large number of letters to the Duke and the Duke wrote a large number of letters to the Duchess and anybody is free to say that and also to say, on the one hand, that they are the most tender love letters they have ever read or, on the other hand, that they consider them about the most banal letters they have ever read. There is no interference of any description in the present application with freedom of speech.²⁷³

In an article written prior to the emergence of the current major debate on the interaction between copyright and freedom of expression in the UK, Macmillan Patfield suggests that the idea/expression dichotomy may be sufficient to ensure that copyright does not curb a workable concept of freedom of speech, adding that, 'it may even be possible to go so far as to say that this is its intended function'.²⁷⁴ She cites in support of this view the holding of the US Supreme Court in *Harper & Row*, namely that the idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression'.²⁷⁵ She does, however, concede that there are circumstances under which the idea/expression dichotomy would appear not to be an adequate safeguard, such as where the form of expression is intimately connected with its content, or where the form is as important as the content.²⁷⁶ These circumstances, together with those outlined by other commentators, will be discussed below.

²⁷¹ Birnhack, 'Acknowledging the Conflict', 26. See also Angelopoulos, 'Freedom of Expression and Copyright', 334.

²⁷² [1986] RPC 515.

²⁷³ [1986] RPC 515, 517.

²⁷⁴ Macmillan Patfield, 'Towards a Reconciliation', 216.

²⁷⁵ 471 US 539, 556.

²⁷⁶ Macmillan Patfield, 'Towards a Reconciliation', 216 – 218.

In the US context, the argument that the idea/expression dichotomy serves to address any conflict between copyright and free speech was made as early as 1970 by Nimmer.²⁷⁷ The idea/expression dichotomy, Nimmer argues, adequately serves both the interests underlying copyright and the interests which freedom of speech is intended to protect in most cases.²⁷⁸ He points out that it is consistent both with the primary justification for freedom of speech, namely the maintenance of democratic dialogue, which requires only that individual have free access to ideas, and not to their particular expression,²⁷⁹ as well as the function of free speech as self-fulfilment, as one who copies the expression of another is not engaged in self-expression in a meaningful sense.²⁸⁰ Sobel's views on the idea/expression dichotomy as an effective mechanism for addressing any conflict largely accord with Nimmer's,²⁸¹ and this view has also found support from later commentators.²⁸²

Nimmer does concede, however, that the idea/expression dichotomy may not strike an adequate balance in cases where the 'idea' of a work has merged with its expression (in particular news photographs),²⁸³ though Denicola has suggested that this is ameliorated by the 'merger' doctrine, under which an expression which is inextricably merged with an idea is denied copyright protection.²⁸⁴ This is because, when an idea and its expression are so inextricably merged so that the use of the former necessarily entails use of the latter, the merger doctrine will operate to permit copying of the expression. This ensures that the copyright owner will not be able to retain a monopoly over the idea itself.²⁸⁵ Since then, the idea/expression dichotomy has been cited by the Supreme Court in both *Harper & Row*²⁸⁶ and *Eldred v Ashcroft*²⁸⁷ as one of the First Amendment accommodations built into copyright law.

The notion that the idea/expression dichotomy can provide adequate protection for freedom of expression can be criticised from a number of perspectives. These will be dealt with in turn. Initially, it will be considered whether restriction on the form of

²⁷⁷ Nimmer, 'Does Copyright Abridge the First Amendment Guarantee'.

²⁷⁸ Nimmer, 'Does Copyright Abridge the First Amendment Guarantee', 1189 – 1193.

²⁷⁹ Nimmer, 'Does Copyright Abridge the First Amendment Guarantee', 1191 – 1192.

²⁸⁰ Nimmer, 'Does Copyright Abridge the First Amendment Guarantee', 1192.

²⁸¹ Sobel, 'Copyright and the First Amendment', 71 – 73.

²⁸² Goldwag, 'Copyright Infringement and the First Amendment', 323 – 325; Shipley, 'Conflicts Between Copyright and the First Amendment', 989 – 990.

²⁸³ Nimmer, 'Does Copyright Abridge the First Amendment Guarantee', 1196 – 1200.

²⁸⁴ Robert C Denicola, 'Copyright and Free Speech: Constitutional Limitations on the Protection of Expression' (1979) 67 *California Law Review* 283, 292 – 293.

²⁸⁵ Denicola, 'Copyright and Free Speech, 292 – 293.

²⁸⁶ 471 US 539, 556.

²⁸⁷ 537 US 186, 219.

expression constitute significant limitations on freedom of expression. Then, the vagueness of the dichotomy is explored, and the distinction between the two categories assessed (including the 'merger' doctrine). The two final propositions are that the regulation of expression through copyright law underlines the impact of the message, and that copyright law could extend beyond what is necessary.

Restrictions on the form of expression constitute significant limitations on freedom of expression

The first criticism of this argument is that it runs counter to the fundamental free speech principle that a speaker, in addition to determining the intellectual content or subject matter of his or her discourse itself, is also entitled to determine the form in which his or her arguments are formulated.²⁸⁸ This principle has been accepted not only by the US Supreme Court, but also by the ECtHR. In *Cohen v California*,²⁸⁹ the Supreme Court held that the words 'Fuck the Draft' on a jacket worn in a courthouse corridor were protected speech, and thus could not be abridged by a state law which prohibited 'maliciously and wilfully disturb[ing] the peace of quiet of any neighbourhood or person [by] offensive conduct'. In *Jersild v Denmark*,²⁹⁰ the ECtHR stated categorically that 'Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed'.

Rubinfeld observes, from a US perspective, that First Amendment jurisprudence has systematically rejected the notion that speech regulation is constitutional if it merely prohibits particular forms of expressing ideas, rather than the ideas themselves.²⁹¹ If the First Amendment protected only ideas and not particular expressions of ideas, Rubinfeld argues, the plaintiff in *Cohen v California* should have gone to jail, as he was free to express the same idea in a thousand different ways.²⁹² Barendt has also noted that copyright law, in proscribing the use of language and other material which have become the subject of intellectual property protection, does impose a real limitation on the manner of speech, if not its intellectual contents.²⁹³ He cites as an example the US case of *Walt Disney Productions v Air Pirates*,²⁹⁴ where certain Walt Disney characters were depicted in adult comic books as engaging in behaviours such as sex and drug-taking. The Ninth Circuit held that it was unnecessary to use those characters in order to parody American life and society; accordingly, the defence of fair use was not available to the

²⁸⁸ Barendt, 'Copyright and Free Speech Theory', 24 – 25.

²⁸⁹ 403 US 15.

²⁹⁰ (1995) 19 EHRR 1. See also *Fressoz and Roire v France* (2001) 31 EHRR 2 (holding that a journalist was entitled under article 10 of the ECHR to publish documents containing the tax assessments of the head of Peugeot in order to give credibility to a story about the latter's salary, notwithstanding that the documents had been obtained in breach of confidence).

²⁹¹ Rubinfeld, 'The Freedom of Imagination', 14.

²⁹² Rubinfeld, 'The Freedom of Imagination', 15.

²⁹³ Barendt, 'Copyright and Free Speech Theory', 24 – 25.

²⁹⁴ 581 F.2d 751 (1978).

defendant in an action for copyright infringement. Such an approach, Barendt comments, 'severely circumscribes the right of satirists to use familiar emblems, symbols, and characters to illustrate their critique'.²⁹⁵ Tushnet has highlighted the inconsistency in using the idea/expression dichotomy to denigrate the importance of expression from a free speech perspective, while still attempting to justify the legal protection of expression as property under copyright law.²⁹⁶ She argues that the law protects expression, both in free speech and in copyright, precisely *because* expression is what makes speech worthwhile; from this perspective, she asserts that it is incorrect to state that there is no First Amendment value in 'expression' as opposed to ideas.²⁹⁷ She gives the following example:

Even if we are confident in theory that a thesaurus and some thought will produce an alternate way to say almost anything with almost as much grace, courts never actually make this inquiry and it would be hard to imagine them doing so. To decide whether it is possible to express a particular idea in a different way, we have to determine what is idea-ish about the idea and what is its expressive raiment. That is, we would have to decide what *Leaves of Grass* says and how to say it in another way while still communicating its exact idea. There will be nearly as many different answers to this question as there are readers, and that is what makes *Leaves of Grass* so very protectable.²⁹⁸

The view that a limitation on the form of speech, rather than its contents, constitutes a restriction on the right to freedom of expression, was endorsed both by the High Court and the Court of Appeal in *Ashdown*. At the High Court, Morritt VC stated that:

It is ... a restriction on the right to freedom of expression to inhibit another from copying the method of expression used by the copyright owner even though there may be open to him a host of other methods of expression of the same idea.²⁹⁹

A similar sentiment was expressed at the appellate stage, with the Court of Appeal stating that:

The prime importance of freedom of expression is that it enables the citizen freely to express ideas and convey information. It is also important that the citizen should be free to express the ideas and convey the information in a form of words of his or her choice.³⁰⁰

However, the Court of Appeal also qualified the impact of its statement by indicating that the limitation on the manner of speech imposed by copyright would constitute a significant constraint on freedom of expression only in exceptional cases. In the same paragraph, it stated that:

Copyright does not normally prevent the publication of the *information* conveyed by the literary work. Thus it is only the freedom to express information using the verbal formula devised by another that is prevented by

²⁹⁵ Barendt, 'Copyright and Free Speech Theory', 25.

²⁹⁶ Tushnet, 'Copyright as a Model for Free Speech Law', 11.

²⁹⁷ Tushnet, 'Copyright as a Model for Free Speech Law', 11.

²⁹⁸ Tushnet, 'Copyright as a Model for Free Speech Law', 10.

²⁹⁹ [2001] Ch 685, 693.

³⁰⁰ [2001] EWCA Civ 1142, [31].

copyright. This will not normally constitute a significant encroachment on the freedom of expression ... It is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form of words devised by someone else. None the less there are circumstances ... where this freedom is important.³⁰¹

This aspect of the Court of Appeal's judgment in *Ashdown* has been criticised by Danay as being inconsistent with the free speech principle, described earlier, that restrictions on forms of expression are indeed constitutionally significant.³⁰² He argues that, in relying on the idea/expression dichotomy to eliminate the conflict between copyright and freedom of expression in 'most circumstances', the court committed a quasi-constitutional error, as the article 10(1) of the ECHR is drafted in broad terms and refers to 'expression' in the widest sense without drawing any distinction between the forms of expression that do or do not enjoy *prima facie* protection.³⁰³ For this reason, a *prima facie* violation of article 10 occurs where copyright law prevents individuals from using the exact form of the works of others,³⁰⁴ and a restriction of this nature needs to be justified in accordance with article 10(2) of the ECHR – and, presumably, not merely dismissed through the application of a principle internal to copyright law.³⁰⁵

Vagueness of the idea/expression dichotomy

The second ground of criticism is that the idea/expression is simply too vague to enable individuals to determine whether their speech constitutes an infringing reproduction or a permissible reformulation of an existing work.³⁰⁶ As Judge Learned Hand famously said in *Nichols v Universal Pictures*:³⁰⁷

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended ... Nobody has ever been able to fix that boundary, and nobody ever can.

Unsurprisingly, the dichotomy itself has been described as being 'notoriously malleable and indeterminate'.³⁰⁸ Practically speaking, if the courts adopt a narrow view of what constitutes an idea and a broad view of what constitutes expression, more similarities will be similarities of expression and therefore subject to claims of infringement;

³⁰¹ [2001] EWCA Civ 1142, [31].

³⁰² Danay, 'Copyright vs. Free Expression', 40 – 41.

³⁰³ Danay, 'Copyright vs. Free Expression', 40.

³⁰⁴ Danay, 'Copyright vs. Free Expression', 40.

³⁰⁵ Danay, 'Copyright vs. Free Expression', 40 – 41.

³⁰⁶ Netanel, 'Locating Copyright', 19 – 20; Tushnet, 'Copyright as a Model for Free Speech Law', 19 – 21; Alfred C Yen, 'A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"' (1989) 38 *Emory Law Journal* 393, 403 – 406.

³⁰⁷ 45 F.2d 119.

³⁰⁸ Netanel, 'Locating Copyright', 19.

conversely, a broad view of idea and a narrow view of expression mean that fewer similarities will qualify as similarities of expression.³⁰⁹ Where the line between idea and expression is uncertain, this results in uncertainty as to the precise scope of what constitutes copyright-protected material.

Legal rules which are unclear result in three identifiable fears among individuals: first, they may not know if their conduct is illegal; second, even if their conduct is legal, they may still be mistakenly punished by the system; third, even if they know that they will eventually vindicate themselves through the legal process, the cost of litigation alone might dissuade them from acting.³¹⁰ In the context of copyright and freedom of expression, the uncertainty inherent in the idea/expression doctrine would result in self-censorship and a 'chilling' of speech on the individual level; this is particularly undesirable given the status of freedom of expression as a fundamental right.³¹¹

One commentator has suggested, however, that the legal uncertainty of the idea/expression dichotomy may, rather than 'chilling' speech, actually lead to greater speech by giving people who suspect their speech may be infringing sufficient room to justify speaking anyway; this, it is argued, could allow for the creation and distribution of speech that would not be produced were the line between idea and expression better defined.³¹²

No meaningful distinction between idea and expression

The third ground of criticism is based on the observation that, in a number of cases, a meaningful distinction between an idea and its expression will simply not exist; these have sometimes been described in cases where there has been a 'merger' of idea and expression.³¹³ This is especially apparent with representational copyright works such as artistic works, photographs, films and broadcasts, where the form of the expression is so intimately connected with its content that the idea/expression dichotomy is simply incapable of ensuring that the speech in question is not suppressed.³¹⁴ Aside from representational works such as photographs, drawings and films, this might include works such as compilations of tables that contain information arranged in a particular

³⁰⁹ Yen, 'A First Amendment Perspective', 400.

³¹⁰ Yen, 'A First Amendment Perspective', 424.

³¹¹ Netanel, 'Locating Copyright', 19 – 20; Yen, 'A First Amendment Perspective', 424 – 425; Tushnet, 'Copyright as a Model for Free Speech Law', 20 – 21.

³¹² Edmund T Wang, 'The Line between Copyright and the First Amendment and Why Its Vagueness May Further Free Speech Interests' (2011) 13 *University of Pennsylvania Journal of Constitutional Law* 1471, 1494 – 1495.

³¹³ Griffiths, 'Copyright Law and Censorship', 14 – 15; Garnett, 'The Impact of the HRA', 173 – 174.

³¹⁴ Macmillan Patfield, 'Towards a Reconciliation', 217; Griffiths, 'Copyright Law and Censorship', 14 – 15; Nimmer, 'Does Copyright Abridge the First Amendment Guarantee', 1196; Leslie Ann Reis, 'The Rodney King Beating – Beyond Fair Use: A Broadcaster's Right to Air Copyrighted Videotape as Part of a Newscast' (1994) 13 *John Marshall Journal of Computer & Information Law* 269, 291; Mythili Tharmaratnam, 'Copyrighting Raw Videotapes: A Restriction of the Free Press' (1993) *University of Chicago Legal Forum* 417, 290; Zimmerman, 'A Regulatory Theory of Copyright', 201; Hoberman, 'Copyright and the First Amendment', 590 – 591; Brittin, 'Constitutional Fair Use', 155 – 165; Patricia Krieg, 'Copyright, Free Speech, and the Visual Arts' (1983) 93 *Yale Law Journal* 1565, 1570 – 1571.

way such that it would not be practicable to present it in any other way, such as television listings,³¹⁵ or historical documents such as letters, particularly where the defendant's copying is an attempt to assess the mood of the period.³¹⁶ It has been questioned, however, whether these cases represent a true 'collapse' of idea into expression, as the facts and ideas contained in a photograph or film are still capable of being communicated in words, even though the verbal description might not have as much of an impact as the image itself.³¹⁷

In the context of UK copyright law, this criticism is exacerbated by the lack of a principle – similar to the 'merger' doctrine under the copyright law of the US – stating expressly that where an idea can be expressed intelligibly in only one or a very limited number of ways, the expression of that idea cannot be protected by copyright.³¹⁸ The doctrine of 'merger' as it exists under US copyright law has been developed through two cases, namely *Morrissey v Procter & Gamble*³¹⁹ and *Herbert Rosenthal Jewelry v Kalpakian*.³²⁰ In *Morrissey*, it was held by the First Circuit that copyright did not subsist in a set of rules written for a sweepstakes-type sales promotional contest, as there was only a small, limited number of ways for expressing the idea behind these rules and the rules themselves did not constitute protectable subject matter.³²¹ In *Kalpakian*, the Ninth Circuit held that, as there were only a limited number of ways in which a jeweller could construct a small, jewel-encrusted pin in the shape of a bee, the 'idea' of the jewelled bee pin and its expression had become inseparable; accordingly, it was not an infringement for the defendant to create a jewelled bee pin that was substantially similar in appearance to one that had been created by the plaintiff, as conferring protection on the expression of the plaintiff's bee pin would be tantamount to granting the plaintiff a monopoly over the business of manufacturing and selling jewelled bee pins.³²² The possibility that this doctrine might also be applicable under the copyright law of the UK was rejected in *IBCOS Computers v Barclays Mercantile Highland Finance*,³²³ where Jacob J stated that there was 'danger in the proposition that, "If there is only one way of

³¹⁵ Macmillan Patfield, 'Towards a Reconciliation', 217 (citing *BBC v Time Out* [1984] FSR 64, where the listing of advance details of selected television programmes in the defendant's magazine was held to be infringement of the claimants' copyright in their television listings and schedules). See also Garnett, 'The Impact of the HRA', 173 (observing that compilations of information and data may be protected even though the information or data is reused in a different form, particularly where there is a database right).

³¹⁶ Goldwag, 331.

³¹⁷ James L Swanson, 'Copyright versus the First Amendment: Forecasting an End to the Storm' (1987) 7 *Loyola of Los Angeles Entertainment Law Review* 263, 'Copyright Versus the First Amendment', 287 – 289; Shipley, 'Conflicts Between Copyright and the First Amendment', 1026 – 1031.

³¹⁸ Garnett, 'The Impact of the HRA', 174 (citing *IBCOS Computers v Barclays Mercantile* [1994] FSR 275, 291).

³¹⁹ 379 F.2d 675 (1967).

³²⁰ 446 F.2d 738 (1971).

³²¹ 379 F.2d 675, 678 – 679.

³²² 446 F.2d 738, 740 – 742.

³²³ [1994] FSR 275.

expressing an idea that way is not the subject of copyright.”³²⁴ Accordingly, he refused to accept the argument that if a function of a computer program could only be achieved in one or a limited number of ways, no copyright could subsist in that computer program.³²⁵ It should be noted that Jacob J’s rejection of the merger doctrine may no longer be sustainable following the decision of the CJEU in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministertvo kultury* (‘BSA’),³²⁶ where the court held that in circumstances where the expression of a work is dictated by its technical function, ‘the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable’.³²⁷ Thus far, however, the question of whether the merger doctrine is now applicable under European (and hence UK) copyright law has not been further discussed by the courts.

Impact of message undermined

Related to the previous criticism is the fourth argument that, even in cases where there has been no true merger of idea and expression, the use in a derivative work of the actual words or images from the copyright-protected work may still be of key importance in order to fully convey the ideas and information in them. The inability to do so would undermine the impact and effectiveness of the message, as well as its believability; as one scholar has observed, ‘an inability to use the most evocative expression possible diminishes the power of a speaker’s message’.³²⁸ Again, this may be most apparent in cases of representational copyright works,³²⁹ but it may also be true in cases where the use of the actual words contained in a literary work is required in order to expose the original author’s ideas or character, or to convey the author’s thoughts or thought patterns more precisely.³³⁰

In this context, Griffiths has pointed out that the argument that a literary work can be paraphrased – thus conveying the same idea while potentially avoiding any claim of infringement – underestimates the significance of access to authentic expression, as a rephrased document is unlikely to convey exactly the same meaning as the original.³³¹ Burrell has also observed that the assumption that, as long as information and ideas are not appropriated, there can be no threat to freedom of expression ‘ignores the danger

³²⁴ [1994] FSR 275,291.

³²⁵ [1994] FSR 275, 290 – 291.

³²⁶ Case C-393/09; [2011] FSR 18.

³²⁷ [2011] FSR 18, [49].

³²⁸ Tushnet, ‘Copyright as a Model for Free Speech Law’, 10.

³²⁹ Macmillan Patfield, ‘Towards a Reconciliation’, 218; Griffiths, ‘Copyright Law and Censorship’, 14 – 15; Garnett, ‘The Impact of the HRA’, 173; Masiyakurima, ‘The Free Speech Benefits of Fair Dealing Defences’, 243; Netanel, ‘Locating Copyright’, 15 – 16.

³³⁰ Netanel, ‘Locating Copyright’, 15 – 16.

³³¹ Griffiths, ‘Copyright Law and Censorship’, 15.

that without the freedom to quote from other sources any expression will lack authority and will probably be ignored'.³³²

Copyright protection extends beyond protection of the literal expression of the work

The fifth criticism of the argument that the idea/expression dichotomy sufficiently accommodates freedom of expression concerns is made on the basis that the protection conferred by copyright is not confined to the literal expression of the work, but also extends to non-textual elements such as – in the case of a novel or play – the plot or storyline; thus, even where this is retold in new words, it may still give rise to a claim for infringement.³³³ As Netanel observes, given the current liberal construction of the copyright owner's exclusive right of reproduction, many reformulations, adaptations and other derivative works based on existing copyright works may be held to be infringing appropriations of those original works, even if they resemble the original only at a fairly high level of abstraction.³³⁴

Garnett cites *PCR v Dow Jones Telerate*³³⁵ as an illustrative case in this regard.³³⁶ In this case, the articles transmitted to its subscribers by the Dow Jones wire service were found to have infringed the copyright in the claimant's cocoa crop reports because too much information had been reproduced from the reports; the finding was made notwithstanding that much of the information taken had not been copied slavishly from the claimant's reports, but had been paraphrased or summarised by the defendant's employee in preparing those articles. As noted by Masiyakurima, even significant departures from the original form of expression may still constitute infringement, such as in the case of *Designers Guild*, where the claim succeeded despite some appreciable differences between the two fabric designs in question.³³⁷

18 4.2.4 Incorporation: the defence of fair dealing (UK)

The defence of fair dealing set out in the CDPA provides that certain acts that might otherwise constitute infringement will not incur liability.³³⁸ Macmillan Patfield, writing prior to the enactment of the HRA, expresses uncertainty as to the extent to which the fair dealing provisions were consciously framed with free speech considerations in mind, noting the lack of express statements linking freedom of expression concepts and the

³³² Robert Burrell, 'Defending the Public Interest', (2000) 22(9) *European Intellectual Property Review* 394, 398.

³³³ Garnett, 'The Impact of the HRA', 173 (citing *Ravenscroft v Herbert* [1980] RPC 193); Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 243; Wang, 'The First Amendment Exception to Copyright', 1179; Brittin, 'Constitutional Fair Use', 143; Netanel, 'Locating Copyright', 16 – 19.

³³⁴ Netanel, 'Locating Copyright', 16 – 19.

³³⁵ [1998] FSR 170.

³³⁶ Garnett, 'The Impact of the HRA', 174.

³³⁷ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 243.

³³⁸ CDPA, ss 29 and 30.

fair dealing provisions by English judges.³³⁹ She does, however, take the view that the fair dealing provisions, in particular fair dealing for the purpose of reporting current events, may go some way towards addressing the need for freedom of expression in relation to copyright works that contain information on current events and other information that might be loosely described as political.³⁴⁰ Griffiths has expressed the opinion that these provisions are 'clearly related to the preservation of freedom of speech', being designed to promote informed and critical debate on political, social and artistic issues.³⁴¹

Since then, the fair dealing provisions have been identified as a mechanism through which copyright is able to accommodate freedom of expression. In *Ashdown*, the Court of Appeal considered that the fair dealing provisions reflect freedom of expression values in that, in the specific circumstances set out and provided that the dealing is indeed 'fair', freedom of expression would displace the protection otherwise afforded by copyright.³⁴²

Masiyakurima also takes the view that the fair dealing defences under UK copyright law do reflect freedom of expression concerns, describing them as having been 'designed in part to safeguard the economic benefits flowing from copyright ownership while promoting access to information necessary for freedom of expression'.³⁴³ He cites the exclusion of commercial research from the ambit of fair dealing for the purpose of research and private study as an instance of shielding the economic benefits of copyright protection from free riding while allowing private research for the purpose of self-actualization.³⁴⁴ He links the fair dealing purposes to the freedom of expression value of allowing users to enhance their self-actualization: fair dealing for the purpose of non-commercial research or private study is said to provide the ingredients for cultivation of knowledge, self-development and informed individual participation in community affairs, while fair dealing for the purpose of criticism and review aids the democratic process by facilitating dissemination of ideas and also enhances self-actualization by providing users with opportunities for confronting the ideas that shape them.³⁴⁵ He also takes the view that fair dealing defences may promote authors' expressive autonomy, a concept which

³³⁹ Macmillan Patfield, 'Towards a Reconciliation', 223. She does conclude, however, that none of this necessarily means that the fair dealing provisions cannot be turned to the task of serving freedom of expression, particularly where the idea/expression dichotomy does not do so adequately. Cf Griffiths, 'Copyright Law and Censorship', 16 (stating the courts have occasionally recognised the link between copyright and freedom of expression, citing *Hubbard v Vosper* [1972] 2 QB 84; *BBC v BSB* [1992] Ch 141; *Time Warner v Channel Four* [1994] EMLR 1; *Pro Sieben Media v Carlton UK Television* [1999] EMLR 109).

³⁴⁰ Macmillan Patfield, 'Towards a Reconciliation', 226.

³⁴¹ Griffiths, 'Copyright Law and Censorship', 16.

³⁴² [2001] EWCA Civ 1142, [33].

³⁴³ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 238.

³⁴⁴ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 238.

³⁴⁵ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 246.

considers the decision-making processes involved when speaking to others and may include aspects of the right to privacy and the right not to speak.³⁴⁶

Notwithstanding this, the limitations surrounding the fair dealing provisions have given rise to questions as to whether they are able to function effectively as a mechanism for accommodating freedom of expression values. Some of these questions relate directly to the statutory constraints of the fair dealing provisions, while the others relate to the manner in which they have been interpreted and applied by the court. These will be dealt with separately.

The defence of fair dealing: statutory limitations

Limited fair dealing purposes

A notable feature of the defence of fair dealing under the CDPA is that it is only applicable in cases where the dealing with a protected work is made for one of the enumerated purposes set out in the statute, namely:³⁴⁷

- (i) fair dealing for the purposes of non-commercial research and private study;³⁴⁸
- (ii) fair dealing for the purpose of criticism or review;³⁴⁹
- (iii) fair dealing for the purpose of reporting current events;³⁵⁰ and
- (iv) fair dealing for the purpose of non-commercial instruction.³⁵¹

Thus, if a defendant is unable to bring his or her acts within one or more of the enumerated purposes, the defence of fair dealing will not be available, regardless of whether the use made by the defendant of the work was 'fair' for some other purpose or 'fair' in a general sense. This was held by Ungood Thomas J in *Beloff v Pressdram*:

The relevant fair dealing is thus fair dealing with the memorandum for the approved purposes. It is fair dealing directed to and consequently limited to and to be judged in relation to the approved purposes. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general.³⁵²

The restricted approach taken under the CDPA can be contrasted with the general defence of fair use provided for by the US Copyright Act (discussed in section 4.2.5 below), which contains a non-exhaustive, illustrative list of the purposes to which the

³⁴⁶ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 247 – 248.

³⁴⁷ New exceptions permitting fair dealing for the purpose of quotation and the purpose of caricature, parody or pastiche, in force from 1 October 2014: see Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356.

³⁴⁸ CDPA, s 29.

³⁴⁹ CDPA, s 30(1).

³⁵⁰ CDPA, s 30(2).

³⁵¹ CDPA, s 32(1).

³⁵² [1973] FSR 33, 60

defence might apply.³⁵³ Due to the limited scope of these provisions, Griffiths has doubted whether they are capable of functioning as an effective safeguard for freedom of expression.³⁵⁴ Macmillan Patfield has also observed that freedom of expression concerns may arise in a wider range of cases than those falling within the fair dealing provisions.³⁵⁵ Similar sentiments have been expressed by Danay, who considers that the fair dealing provisions, while being more context-sensitive and flexible than the idea/expression dichotomy, remain restricted to a narrow class of cases that are defined 'with extraordinary precision and rigidity'³⁵⁶ and are unable to accommodate new and unexpected cases, particularly those brought about by advances in technology and other societal changes.³⁵⁷

A core weakness of the fair dealing provisions, as identified by the Gowers Review of Intellectual Property in 2006,³⁵⁸ is their failure to promote derivative uses of copyright works.³⁵⁹ This has been contrasted with the defence of fair use under US law, which has been applied in a manner which permits the creation of transformative works.³⁶⁰ The Gowers Review acknowledged that it would not be possible, at present, to provide for a general defence for transformative uses, as it is not one of the exceptions permitted by the Information Society Directive; to this end, it recommended that the UK Government seek an amendment of the Directive to allow for an exception for creative, transformative or derivative works.³⁶¹ Significantly, however, this recommendation was not pursued in the subsequent Hargreaves Review,³⁶² where it was concluded that the wholesale transposition of fair use was unlikely to be legally feasible in Europe.³⁶³ The

³⁵³ Hugh Laddie, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?' (1996) 18(5) *European Intellectual Property Review* 253, 258 (drawing a comparison between the US fair use and UK fair dealing provisions in the following words: 'Compare that with our legislation. Rigidity is the rule. It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls. This approach also assumes that Parliament can foresee, and therefore legislate for, all possible circumstances in which allowing copyright to be enforced would be unjustified. Based on this approach, we now have an Act in which there are 49 sections of numbingly detailed exceptions to copyright infringement').

³⁵⁴ Griffiths, 'Copyright Law and Censorship', 16.

³⁵⁵ Macmillan Patfield, 'Towards a Reconciliation', 232.

³⁵⁶ Quoting Laddie J in *Pro Sieben Media v Carlton UK Television* [1999] EMLR 109, [118].

³⁵⁷ Danay, 'Copyright vs. Free Expression', 43 – 44.

³⁵⁸ A Gowers, *Gowers Review of Intellectual Property* (HM Treasury, 2006) ('Gowers Review'), 61 – 62.

³⁵⁹ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 242. See also Macmillan Patfield, 'Towards a Reconciliation', 230 (noting that the use of copyright protected artistic works would not appear to be covered by any of the fair dealing provisions, unless such amounted to criticism; in particular, noting that appropriation of protected artistic works for other purposes such as subversion or reinvention would not be covered).

³⁶⁰ Gowers Review, 66 – 68.

³⁶¹ Gowers Review, 68.

³⁶² I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (HM Treasury, 2011) ('Hargreaves Review').

³⁶³ Hargreaves Review, 5.

Hargreaves review suggested that the UK could achieve many of the benefits conferred by fair use by taking up copyright exceptions already permitted under EU law and arguing for an additional exception allowing uses of a work enabled by new technology which do not directly trade on the underlying creative and expressive purpose of the work, such as data mining or search engine indexing, both of which involve the creation of copies of protected works for computer analysis but nevertheless do not compete with the normal exploitation of these works.³⁶⁴

In addition to the generally restrictive nature of the fair dealing provisions, concerns also arise from the manner in which the recognised fair dealing purposes as they stand have been interpreted by the courts. Such criticism has been on the grounds of over-protection *and* under-protection.

In the context of the defence of fair dealing for the purpose of criticism or review, the courts have sometimes interpreted 'criticism or review' broadly as including not only criticism or review of the copyright work used, but also the thought or philosophy underlying it as well as its broader social and moral implications. In *Time Warner v Channel Four*,³⁶⁵ for instance, the use of extracts from the film *A Clockwork Orange* in a documentary which criticised the decision to withdraw the film from distribution in the UK was held to fall within the defence of fair dealing for the purpose of criticism or review, Henry LJ stating that:

It is clear from the wording of the section that the criticism need not be primarily directed at work infringed, but may be directed at another work. And *Hubbard v Vosper* ... makes clear that the criticism relied on need not be directed at the work, but may be directed at the thought and philosophy behind the work ... In these circumstances it seems to me that the fair dealing defence may apply equally where the criticism is of the decision to withdraw from circulation a film in the public domain, and not just of the film itself. In the present context the two are in my view inseparable.³⁶⁶

A similar approach was taken in *Pro Sieben Media v Carlton UK Television*,³⁶⁷ where the use of extracts – featuring interviews with a woman who was pregnant with octuplets – taken from the claimant's television broadcast in the defendant's programme was held to fall within the scope of the defence of fair dealing for the purpose of criticism or review, even though the defendant's programme criticised the practice of 'cheque book journalism', which the claimant's broadcast was said to be an example of, rather than the broadcast itself. The court held that '[c]riticism of a work need not be limited to criticism of style. It may also extend to the ideas to be found in a work and its social or moral implications'.³⁶⁸

³⁶⁴ Hargreaves Review, 44 – 47. For commentary, see Antony W Dnes, 'Should the UK Move to a Fair-Use Copyright Exception?' (2013) 44(4) *International Review of Intellectual Property and Competition Law* 418.

³⁶⁵ [1994] EMLR 1.

³⁶⁶ [1994] EMLR 1, 15.

³⁶⁷ [1999] EMLR 109.

³⁶⁸ [1999] EMLR 109, 123.

In other cases, however, the courts have applied the stricter rule that the permitted criticism or review must be that of the protected work or of another work or of a performance of a work.³⁶⁹ This is exemplified by the first instance decision in *Ashdown*, which was subsequently endorsed on appeal, where Morritt VC held that:

I accept, of course, that the expression 'criticism and review' is of wide import ... But what is required is that the copying shall take place as part of and for the purpose of criticising and reviewing the work. The work is the minute. But the articles are not criticising or reviewing the minute: they are criticising or reviewing the actions of the Prime Minister and the claimant in October 1997. It was not necessary for that purpose to copy the minute at all. In my judgment the articles do not come within section 30(1) because the purpose of copying the work was not its criticism or review.³⁷⁰

In this regard, it should be noted that following the recommendations set out in the Hargreaves Review, the UK government made changes to the defence of fair dealing for the purpose of criticism or review so as to permit broader quotations from protected works.³⁷¹ It is significant to note that the government, in commenting on its proposal, stated that it would 'remove unnecessary restrictions to freedom of expression and comment and will better align UK law with international copyright standards'.³⁷²

Similar concerns have arisen in the context of the defence of fair dealing for the purpose of reporting current events. Again, the courts have not been consistent in defining what constitutes a 'current event'. In *Distillers Co (Biochemicals) v Times Newspapers*,³⁷³ the requirement that the events must be 'current' was interpreted restrictively, Talbot J taking the view that the details of the effects of the drug thalidomide were not 'current' because the drug had been withdrawn 12 years previously, notwithstanding that its effects were still apparent and earlier discussion had been prevented by the *sub judice* rule. More recently, however, the courts have appeared to take the broader view that 'current events' may include historical material which has become relevant as the result of a fresh event, and events which, though no longer recent, are still so much under discussion that they might fairly be regarded as being still current. In relation to historical material, Walton J stated in *Associated Newspapers v News Group Newspapers*³⁷⁴ that:

...the publication of historical material, material that is strictly historical, may nevertheless be of urgent necessity in reporting current events. One has only to think, for example, of correspondence dealing with nuclear reactors which have just blown up or have had a core melt-down: that might date from a very

³⁶⁹ This is in accordance with the strict wording of the statute: CDPA, s 30(1).

³⁷⁰ [2001] Ch 685, 697 – 698. See the Court of Appeal's endorsement of this reasoning at [2002] Ch 149, [61].

³⁷¹ HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (HM Government, 2012), 26 – 28. See Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, reg 3(4).

³⁷² HM Government, *Modernising Copyright*, 28.

³⁷³ [1975] QB 613.

³⁷⁴ [1986] RPC 515.

considerable period previous to the event happening, but would be of a topical nature in order to enable a report on what had actually happened to be properly prepared.³⁷⁵

Another example of this broader approach can be seen in the decision of the Court of Appeal in *Ashdown*, where it emphasised that the expression 'reporting current events' should be interpreted liberally;³⁷⁶ accordingly, it held that although the 'event' in question, namely the secret meeting at the Prime Minister's office, had taken place two years ago and was not current in the sense of being recent in time, it arguably remained a matter of current interest to the public.³⁷⁷

Griffiths considers that an overly restrictive view of what constitutes a 'current' event appears to pay insufficient regard to the relationship between certain past events and current concerns.³⁷⁸ Angelopoulos also takes the view that this might restrict the availability of sources of information that may be capable not only of shedding light on present situations but also of enhancing society's understanding of its past.³⁷⁹ From this perspective, the liberal interpretation given to the term by the courts in *Associated Newspapers* and *Ashdown* would appear to be a welcome development.

Judges have expressed differing views as to whether the defence should be confined to cases where there has been *public* reporting of a current event – that is, the defendant must have copied the protected work for the purpose of reporting a current event to the public – as opposed to disseminating information concerning that event to a closed circle of persons.³⁸⁰ This is perhaps most evident in the decision of the Court of Appeal in *NLA v M&S*. The first member of the court, Peter Gibson LJ, while conceding that the unauthorised copying of a copyright-protected article for internal circulation within Marks & Spencer might literally amount to reporting a current event, nevertheless felt that it was not the sort of activity intended to fall within the ambit of the defence; instead, he suggested that the reporting should be 'public reporting of a recent newsworthy event' for the defence to apply, adding that 'I can see no public interest reason why the legislature should want to provide a defence to an infringement of copyright for the copying within a commercial organisation for commercial reasons of material subject to copyright'.³⁸¹ However, the second member of the court, Chadwick LJ, disagreed; he accepted that the purpose for which the copying was done in the present case was capable of being brought within a liberal interpretation of the phrase 'for the purpose of reporting current events', and added that in the circumstances of the case, the copying was done for the purpose of reporting the events to those within Marks & Spencer's

³⁷⁵ [1986] RPC 515, 519.

³⁷⁶ [2002] RPC 5, [64].

³⁷⁷ [2002] RPC 5, [64].

³⁷⁸ Griffiths, 'Copyright Law and Censorship', 17.

³⁷⁹ Angelopoulos, 'Freedom of Expression and Copyright', 337

³⁸⁰ Christopher Kelly, 'Current Events and Fair Dealing with Photographs: Time for a Revised Approach' [2012] 4 *Intellectual Property Quarterly* 242, 247 – 248.

³⁸¹ [2001] Ch 257, [43].

organisation who had a commercial need to be informed of it.³⁸² He did hold, however, that on the facts of the case, even if the defendant's copying had been carried out for the purpose of reporting current events, it was not a 'fair' dealing as it had been done for the defendant's own commercial advantage and was not justified by any overriding element of public advantage.³⁸³ Mance LJ, the third member of the court, took a middle ground: he acknowledged that it was possible to think of circumstances under which the exception would apply to private reporting which was itself in the public interest, such as reporting to the Cabinet or other official bodies, but was reluctant to extend the exception to *all* forms of reporting.³⁸⁴

These comments were referred to by Proudman J at first instance in *Newspaper Licensing Agency v Meltwater*,³⁸⁵ who went on to hold that the effect of the Court of Appeal's decision in *NLA v M&S* was that the defence did not apply to 'commercial, non-public user'.³⁸⁶ This aspect of her judgment was upheld on appeal,³⁸⁷ and was not addressed upon further appeal to the Supreme Court. In the course of her judgment, Proudman J also made reference to the statement of the Court of Appeal in *Ashdown* that the defence of fair dealing for the purpose of reporting current events 'is clearly intended to protect the role of the media in informing the public about matters of current concern to the public'³⁸⁸ to support her view that the defence did not apply to internal, non-public uses. Interestingly, however, that statement of the Court of Appeal in *Ashdown* was originally made in the course of emphasising the need for a liberal interpretation of 'reporting current events'.

In relation to the defence of fair dealing for research or private study, the definition of what constitutes 'private study', as well as the distinction between 'private' and 'public' study, is not clear, though the CDPA does define 'private study' as excluding 'any study which is directly or indirectly for a commercial purpose'.³⁸⁹ Macmillan Patfield has hypothesised that it may mean that studies carried out by the government, publicly funded studies or studies funded by commercial concerns will not fall within the ambit of the defence.³⁹⁰

³⁸² [2001] RPC 5, [75].

³⁸³ [2001] RPC 5, [77].

³⁸⁴ [2001] RPC 5, [113].

³⁸⁵ [2010] EWHC 3099 (Ch), [132]. Proudman J, however, referred to these comments in the context of her analysis as to whether the dealing was fair, rather than in considering (as Peter Gibson LJ did) whether the dealing was for the specified purpose in the first place.

³⁸⁶ [2010] EWHC 3099 (Ch), [135].

³⁸⁷ *NLA v Meltwater* [2011] EWCA 890 Civ, [39].

³⁸⁸ [2001] EWCA Civ 1142, [64].

³⁸⁹ CDPA, s 178.

³⁹⁰ Macmillan Patfield, 'Towards a Reconciliation', 231.

Limited categories of works to which the defence applies

Previously, the defence of fair dealing for the purpose of research and private study is expressed to apply only to literary, dramatic, musical and artistic works and the typographical arrangement of published editions. This completely excluded uses of sound recordings, films and broadcasts from the ambit of the defence, which was criticised on the grounds that these works may also be repositories of cultural information.³⁹¹ Following a recommendation in the Hargreaves Review that this defence should be extended to cover the full range of media, including audiovisual works and sound recordings,³⁹² the CDPA has now been amended so as to permit fair dealing with any type of copyright work (including sound recordings, films and broadcasts) for the purposes of non-commercial research and private study.³⁹³

The CDPA also expressly excludes photographs from the scope of the UK's defence of fair dealing for the purpose of reporting current events.³⁹⁴ Commonly cited explanations for this exclusion include the special impact and importance of photographs³⁹⁵ and the economic vulnerability of news photographers, who frequently operate on a freelance basis.³⁹⁶

Given Jacob J's statement in *Hyde Park* that photographs may leave an indelible impression on users which words alone cannot do, the inability to reuse photographs without authorisation for the purpose of reporting current events may dilute the vividness and accuracy of the information presented to the public.³⁹⁷ Macmillan Patfield describes this exclusion as striking a 'somewhat discordant note' in the context of freedom of expression concerns, which brings into doubt the free speech credentials of the defence.³⁹⁸ This further exacerbates the difficulties raised by the inadequacy of the

³⁹¹ Macmillan Patfield, 'Towards a Reconciliation', 231; Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 246.

³⁹² Hargreaves Review, 50.

³⁹³ CDPA, ss 29(1) and (1C) (as amended by the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372).

³⁹⁴ CDPA, s 30(2).

³⁹⁵ See e.g. the argument of counsel for BSB in *BBC v British Satellite Broadcasting* [1992] Ch 141 (stating that the reason for the exception 'may have been that a photograph may not be excerpted, summarised or shortened, so that one is either using the photograph or one is not'; W Cornish and D Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (6th edn, Sweet and Maxwell, 2007), [12-40] (stating that 'Photographs have been differently treated in order to preserve the full value of holding a unique visual record of some person or event').

³⁹⁶ SC Deb (E), cols 210, 216 (19 May 1988). For the legislative history of this exclusion, see Kelly, 'Current Events and Fair Dealing with Photographs', 242 – 245.

³⁹⁷ Griffiths, 'Copyright Law and Censorship', 16; Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 238; Kelly, 'Current Events and Fair Dealing with Photographs', 257.

³⁹⁸ Macmillan Patfield, 'Towards a Reconciliation', 226.

idea/expression dichotomy in relation to representational works in this regard.³⁹⁹ Kelly argues that there is no sensible reason for a blanket exclusion of all photographs from the scope of the defence, pointing out that copyright works of a visual nature have been dealt with adequately under these provisions and that the underlying questions of fairness would not be materially different if the work in question was a photograph.⁴⁰⁰ For this reason, he has suggested that the CDPA be amended to remove this exclusion.⁴⁰¹ The possibility of such an amendment was contemplated by the UK government in the course of implementing the recommendations set out by the Hargreaves Review, but was ultimately rejected following consultation on the basis of concerns expressed by photographers and their representatives, who argued that the removal of the exclusion could weaken photographers' rights without necessarily providing greater clarity or support greater freedom of expression.⁴⁰²

Requirement of sufficient acknowledgement

Under the CDPA, the defence of fair dealing, regardless of whether it is for the purpose of research or private study, criticism or review, or reporting of current events, can only be invoked where the use of the work has been accompanied by 'sufficient acknowledgement'.⁴⁰³ As Laddie has highlighted, in the absence of such an acknowledgement, infringement will have occurred even where the dealing does no harm and all readers are aware of both the identity of the work and its author.⁴⁰⁴ Griffiths has described this as an 'unjustifiably technical' requirement.⁴⁰⁵ This becomes most apparent where the requirement is applied strictly, as was the case in *Express Newspapers v News (UK)*,⁴⁰⁶ where it was held that the common newspaper practice of recognising that a story originates from another newspaper did not constitute 'sufficient acknowledgement', as in such a case it would be the right of the copyright holder, and not authorship, that was acknowledged. Angelopoulos points out that the fact that the absence of correct attribution will automatically negate the applicability of the fair dealing defence, even where the defendant has acted in good faith, is a cause for concern, given that the identity of the author of a work is not always apparent.⁴⁰⁷

³⁹⁹ Griffiths, 'Copyright Law and Censorship', 16; Angelopoulos, 'Freedom of Expression and Copyright', 337 – 338.

⁴⁰⁰ Kelly, 'Current Events and Fair Dealing with Photographs', 252.

⁴⁰¹ Kelly, 'Current Events and Fair Dealing with Photographs', 258.

⁴⁰² HM Government, *Modernising Copyright*, 27 – 28.

⁴⁰³ CDPA, ss 29(1), 30(1) and (2). No such acknowledgment is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise: CDPA, s 30(3).

⁴⁰⁴ Laddie, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?', 258.

⁴⁰⁵ Griffiths, 'Copyright Law and Censorship', 16.

⁴⁰⁶ [1991] FSR 36.

⁴⁰⁷ Angelopoulos, 'Freedom of Expression and Copyright', 339.

The defence of fair dealing: the courts' assessment of 'fairness'

In determining whether a defence of fair dealing for a specified purpose is applicable, the courts, in addition to determining whether the dealing was indeed carried out for the said purpose, also need to assess whether the dealing is 'fair'. In doing so, they take into consideration factors such as whether the work was published or unpublished, the manner in which the work was obtained, the amount taken from and the use made of the work, and the presence or absence of a commercial motive on the part of the defendant.

It has been argued that, in assessing whether a particular dealing is 'fair', the courts have given undue weight to the 'Laddie factors' set out in the third edition of Laddie, Prescott and Vitoria's *The Modern Law of Copyright and Designs*⁴⁰⁸ – namely whether the alleged fair dealing is in fact competing with the copyright owner's exploitation of the copyright work; whether the work has already been published or otherwise exposed to the public; and the amount and importance of the work that has been taken – and, correspondingly, insufficient weight to freedom of expression concerns.⁴⁰⁹ This echoes the concerns expressed by Macmillan Patfield in her 1996 article, where she observes that, in the context of the defence of fair dealing for the purpose of criticism or review, the courts have been particularly concerned with the defendant's motive in using the protected material, as well as the amount of proportionality taken from the protected work, but little concerned with the nature and importance of the material concerned – an approach which she finds to be at odds with the aim of securing a balance between copyright and freedom of expression.⁴¹⁰

This state of affairs, it is said, remains the case notwithstanding the coming into force of the HRA. In *Ashdown*, the Court of Appeal took cognisance of the point that, given the coming into force of the HRA, '[i]t is ... now essential not to apply inflexibly tests based on precedent, but to bear in mind that considerations of public interest are paramount'.⁴¹¹ As Birnhack points out, however, the Court of Appeal did not fully follow its own caution either in the outlining of the factors to be considered in the fair dealing analysis, nor in the application of the precedents to the facts of the case; rather, it adopted precedents which pre-dated the HRA.⁴¹²

Griffiths criticises the approach taken by the Court of Appeal in *Ashdown* for focusing exclusively on the actions and interests of the parties to the proceedings, without taking into account the public interest in access to information, which is protected under article

⁴⁰⁸ M Vitoria et al, *Laddie, Prescott and Vitoria on the Modern Law of Copyright and Designs* (4th edn, LexisNexis, 2011), 867.

⁴⁰⁹ Griffiths, 'Copyright Law after *Ashdown*', 248 – 255; Angelopoulos, 'Freedom of Expression and Copyright', 339; Kelly, 'Current Events and Fair Dealing with Photographs', 248 – 251.

⁴¹⁰ Macmillan Patfield, 'Towards a Reconciliation', 228.

⁴¹¹ [2002] Ch 149, [71].

⁴¹² Birnhack, 'Acknowledging the Conflict', 33.

10 of the ECHR.⁴¹³ He suggests that this forms part of a more general trend reflective of judicial anxiety about allowing too much scope for free uses of copyright works, contrasting earlier cases in which judges have shown awareness of the need to ensure that copyright legislation is interpreted in a way that does not interfere unduly with public access to information – such as *Lion Laboratories* – with more recent restrictive interpretations of the fair dealing provisions as applied in *Hyde Park* and in *Ashdown* itself.⁴¹⁴ Masiyakurima, who (as noted previously) believes that the fair dealing provisions reflect freedom of expression values, also argues that their potential has not been realised by their actual interpretation by the courts, who have tended to privilege economic considerations over freedom of expression concerns.⁴¹⁵ He observes that judicial determination of 'fairness' in fair dealing cases is largely predicated on safeguarding economic incentives for copyright,⁴¹⁶ citing as an example *Ashdown*, where the commercial importance of the minute was held to trump the importance of the minute to prevailing political debates.⁴¹⁷

Each of the factors routinely taken into consideration by courts in determining whether a particular dealing with a copyright work is 'fair', and its potential for constraining freedom of expression, will be discussed below.

Whether the alleged fair dealing is in commercial competition with the original work

This is the first of the 'Laddie factors' applied by the Court of Appeal in *Ashdown*. In *The Modern Law of Copyright and Designs*, it is explained in the following words:

... by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on.⁴¹⁸

The claimant's economic loss is undoubtedly a relevant factor to be considered in assessing whether a dealing is fair.⁴¹⁹ However, Griffiths points out that there are circumstances in which the claimant's loss as a result of the defendant's activities will be

⁴¹³ Griffiths, 'Copyright Law after *Ashdown*', 256.

⁴¹⁴ Griffiths, 'Copyright Law after *Ashdown*', 262. Griffiths also highlights the decline of judicial willingness to rely on the common law to restrain the exercise of copyright and copyright-like interests and the evolution of an approach to copyright infringement that allows little scope for policy-based arguments to be advanced by a defendant as being indicative of this general trend.

⁴¹⁵ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 252 – 253.

⁴¹⁶ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 239 – 240.

⁴¹⁷ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 241.

⁴¹⁸ Vitoria et al, *Laddie, Prescott and Vitoria on the Modern Law of Copyright and Designs*, 867,

⁴¹⁹ Griffiths, 'Copyright Law after *Ashdown*', 250; Kelly, 'Current Events and Fair Dealing with Photographs', 249.

irrelevant, such as those similar to the facts in *Hubbard v Vosper*.⁴²⁰ He refutes the implication of the passage from *The Modern Law of Copyright and Designs* that even where a defendant uses a copyright work to ventilate a grievance or to contribute to political controversy, the fair dealing defence will still only be effective in the absence of commercial competition.⁴²¹ Griffiths concludes that where there is a legitimate public interest in access to a copyright work, the claimant's financial loss cannot be conclusive; the paramount importance placed on commercial competition by the 'Laddie factors' should therefore be qualified where such a legitimate public interest exists.⁴²²

Kelly is also critical of the manner in which commercial competition has been elevated to a matter of high importance by the Laddie factors, as they tend towards the assumption that any element of commercial competition will result in the non-applicability of the defence altogether, rather than leading to an analysis of the extent and quality of the competition.⁴²³ They also appear to limit the amount that can be taken, suggesting that even where there is no commercial competition, the defence is likely to succeed only where there has been 'moderate' taking and there are no special adverse factors.⁴²⁴ This, according to Kelly, is not necessarily borne out by the existing case law.⁴²⁵ For instance, in *BBC v British Satellite Broadcasting*,⁴²⁶ which involved the use of BBC footage by BSB in a competing programme, Scott J stated that:

The fact that the other broadcaster is a commercial rival of the copyright owner does not, *ipso facto*, take the case outside fair dealing. It is a factor, and perhaps in some cases a very weighty factor, to be taken into account in considering whether there has been fair dealing, but it is no more than a factor.⁴²⁷

Another case cited by Kelly as being illustrative of this point is *Fraser-Woodward v BBC*,⁴²⁸ where a photographer, Fraser-Woodward, brought proceedings against the BBC in respect of its use of certain of his photographs in a television programme. Mann J considered the claimant's commercial practices and whether the value of his photographs would be adversely affected due to their use by the BBC. He attached particular weight to the fact that each photograph was featured for only a few seconds in the television programme. The transient nature of their use, and the fact it was in

⁴²⁰ [1972] 2 QB 84.

⁴²¹ Griffiths, 'Copyright Law after *Ashdown*', 251.

⁴²² Griffiths, 'Copyright Law after *Ashdown*', 251 (also pointing out that claimants in defamation or breach of confidence cases 'cannot avoid the defences of qualified privilege or public interest by demonstrating the financial cost of a defendant's activities').

⁴²³ Kelly, 'Current Events and Fair Dealing with Photographs', 249 (contrasting this with the argument of counsel in *BBC v BSB* [1992] Ch 141, 145: 'Once use of a broadcast is permitted for reporting current events, there is *bound* to be competition between rivals ...The question is: is it fair competition?').

⁴²⁴ Kelly, 'Current Events and Fair Dealing with Photographs', 249.

⁴²⁵ Kelly, 'Current Events and Fair Dealing with Photographs', 249 – 251.

⁴²⁶ [1992] Ch 141.

⁴²⁷ [1992] Ch 141, 158.

⁴²⁸ [2005] EWHC 472 (Ch).

conjunction with other visual material, and the qualities of the photographs themselves (which people would want to study carefully, at their own pace), pointed towards the conclusion that the BBC's use did not inevitably and seriously damage their value, and was therefore not unfair. In the course of his judgment, Mann J observed that:

Risk to the commercial value of the copyright may go towards demonstrating or creating unfairness, but it does not follow that *any* damage or *any* risk makes *any* use of the material unfair.⁴²⁹

In contrast, in *Ashdown*, both at first instance and on appeal, the existence of commercial competition was given significant weight. The Court of Appeal appeared to endorse Morritt VC's view that the existence of commercial competition was sufficient to render the dealing unfair, without a detailed analysis of the magnitude of the competition or its effect on the commercial value of the work.⁴³⁰ The Court of Appeal stated that:

In a passage of its defence ... Telegraph Group contended that its publication 'in no or no appreciable way competed ... with any publication or publications which the claimant might issue in the future'. The Vice-Chancellor rejected this assertion, and we consider that he was right to do so. There was evidence, as he pointed out, that the publication in the *Sunday Telegraph* destroyed a part of the value of the memoirs which it had been Mr Ashdown's intention to sell, and which he did in fact sell. Equally, we are in no doubt that the extensive quotations of Mr Ashdown's own words added a flavour to the description of the events covered which made 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.⁴³¹

Whether the defendant has a commercial motive

In copyright cases where the defence of fair dealing has been raised, courts have suggested that the commercial or financial motivation of the defendant will weigh against them in attempting to show that the dealing was fair. This is closely related to the preceding factor.

This can be seen in the judgment of the Court of Appeal in *NLA v M&S*.⁴³² In this case, it was held by the majority that the defendant, in obtaining newspaper cuttings from a licensed agency and making further copies of some of the cuttings for daily internal circulation, had not infringed the copyright in the typographical arrangement in the newspapers; thus, it was unnecessary to decide whether their actions constituted fair dealing for the purpose of reporting current events. The statements of the judges, however, indicate that the defendant would be found to have failed in establishing this defence had it been necessary to do so, as the copying had been carried out for the defendant's internal commercial purposes. This is most evident from the judgment of Chadwick LJ:

I can see no reason why Parliament should have intended, in the absence of some overriding element of public advantage, to permit one person to deal with copyright work to his own commercial advantage and to the

⁴²⁹ [2005] EWHC 472 (Ch), [64].

⁴³⁰ Kelly, 'Current Events and Fair Dealing with Photographs', 250.

⁴³¹ [2002] Ch 149, [72].

⁴³² [2001] Ch 257.

actual or potential commercial disadvantage of the copyright owner; and no reason why what would otherwise be an infringement of the rights of the owner of copyright in typographical arrangement should be permitted simply because the particular commercial advantage to be obtained was a more convenient (or less costly) means of disseminating reports of current events within a commercial organisation by the circulation of facsimile copies of press cuttings.⁴³³

For Peter Gibson LJ, the commercial motive of the defendant would have weighed against the finding that the copying was carried out for the purpose of reporting current events:

... to interpret section 30(2) as providing a defence to copyright infringement in a case like the present would seem to me to have nothing to do with the public interest and everything to do with serving the private commercial interests of M & S. I can see no public interest reason why the legislature should want to provide a defence to an infringement of copyright for the copying within a commercial organisation for commercial reasons of material subject to copyright, whereas a public interest can be discerned in the public reporting of newsworthy current events. I would therefore hold, in agreement with the judge, that if what M & S did was an infringement of copyright, it would not come within the defence of section 30(2).⁴³⁴

However, his Lordship did go on to state that, if it was held that the dealing had indeed been for the purpose of reporting current events, he would have found the dealing to be 'fair' notwithstanding that it had been carried out for a commercial purpose:

The commercial motives and intentions of M & S cannot be impugned. The degree to which the challenged use competes with exploitation of copyright by the copyright owner was recognised to be a very important consideration in *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] FSR 610, 619. The use by M & S was not in competition with the newspapers or the NLA. M & S was using the copies purely internally, and was not, for example, exploiting the copied material by selling it to others. In all the circumstances I would incline to the view that, if the dealing had been for the purpose of reporting current events, that dealing was fair dealing.⁴³⁵

Mance LJ also expressed doubt as to whether the defence could be applied to a dealing carried out for private commercial purposes:

The problem remains that the exception of fair dealing for the purpose of reporting current events represents a public interest exception to copyright, which is difficult to extend to the reporting of current events for private commercial purposes. One may contemplate circumstances where the exception would apply to private reporting which was itself in the public interest, for example reporting to the Cabinet or other official bodies. But to extend the exception to all reporting for any purpose seems to me debatable. The rationalisation that in a capitalist society all economic activity serves the public good does not avoid the distinction.⁴³⁶

The Court of Appeal in *Ashdown* placed emphasis on this factor, pointing out that 'the extensive quotations of Mr Ashdown's own words added a flavour to the description of the events covered which made the article more attractive to read and will have been of

⁴³³ [2001] Ch 257, [77].

⁴³⁴ [2001] Ch 257, [43].

⁴³⁵ [2001] Ch 257, [44]. See Kelly, 'Current Events and Fair Dealing with Photographs', 250 (describing this as 'a somewhat curious conclusion: while Marks & Spencer was not exploiting the copied material by selling it to others, it was using the copied material without paying a fee, and doing so for its own commercial advantage. Obtaining a valuable item and then duplicating that item oneself rather than obtaining more from the original source clearly competes with that source').

⁴³⁶ [2001] Ch 257, [114].

significant commercial value in enabling the *Sunday Telegraph* to maintain, if not to enhance, the loyalty of its readership'.⁴³⁷

While the concern that media organisations will act abusively if unrestrained is a valid one,⁴³⁸ the weight that the courts have accorded to it is problematic in that it restricts the ability of commercial media to rely upon fair dealing. Barendt has argued that this does not do justice to freedom of expression concerns as, from that perspective, it is immaterial whether or not a speaker has exercised his or her free speech rights purely or mainly for profit.⁴³⁹

If the existence of a financial motive were to take speech outside the scope of the First Amendment or other constitutional provision, there would be few, if any, press freedom cases. Books, magazines, and newspapers are published, at least partly, to make money for their publishers ... There is freedom to receive information and ideas, and recipients are not generally troubled if the speaker has something to gain financially from publication.

Other commentators have emphasised that the press would be unable to carry out its role as the public's watchdog if it was unable to profit financially from the activities.⁴⁴⁰ As Griffiths observes, in concentrating on the Telegraph Group's desire to profit from their use of Ashdown's minute, the Court of Appeal appeared to have been unduly concerned with remedying apparent unfairness between the parties to the proceedings without, however, taking into consideration the interests of the public.⁴⁴¹

Birnhack suggests abolishing the binary division of speech-acts into commercial and non-commercial ones, instead replacing it with a continuum that recognises that most speech-acts have both commercial and non-commercial characteristics; accordingly, the fact that newspapers are operated with a commercial motivation should not obscure the fact that they have significant non-commercial value in terms of the information conveyed to the public and the contribution to public discourse and the marketplace of ideas.⁴⁴²

A more realistic approach would appear to be that taken by Jacob J in the first instance decision of *Hyde Park*, where he held that the fact that the security guard and *The Sun* both expected to make money from the publication of the stills did not derogate from the fair dealing defence:

The reality 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 the Mr Murrell was

⁴³⁷ [2002] Ch 149, [72].

⁴³⁸ Griffiths, 'Copyright Law after *Ashdown*', 251.

⁴³⁹ Barendt, 'Copyright and Free Speech Theory', 25 – 26.

⁴⁴⁰ Griffiths, 'Copyright Law and Censorship', 19 – 20; Griffiths, 'Copyright Law after *Ashdown*', 251 – 252; Birnhack, 'Acknowledging the Conflict', 33; Angelopoulos, 'Freedom of Expression and Copyright', 343.

⁴⁴¹ Griffiths, 'Copyright Law after *Ashdown*', 252.

⁴⁴² Birnhack, 'Acknowledging the Conflict', 33.

paid and that the Sun expected to make money derogates in any way from the "fair dealing" (or any public interest) justification.⁴⁴³

It should also be noted that where fair dealing for the purpose of research or private study is concerned, the CDPA expressly excludes activities that have a financial motive. The defence is expressed to apply only to fair dealing 'for the purposes of research for a *non-commercial purpose*',⁴⁴⁴ while 'private study' is defined as not including 'any study which is directly or indirectly for a commercial purpose'.⁴⁴⁵

Whether the work was published or unpublished

Whether a work is published or unpublished is a relevant factor (as one of the 'Laddie factors') in assessing whether a dealing is 'fair'. A dealing which takes place in relation to a work that is unpublished weighs against the dealing being fair. The relevant passage from *The Modern Law of Copyright and Designs* is as follows:

The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information.⁴⁴⁶

This is one of the 'Laddie factors' applied by the Court of Appeal in *Ashdown*. It was also identified by Ungood-Thomas J in *Beloff v Pressdram*, where he stated that:

I come now to the relevant factors in determining fair dealing. A number of authorities were cited, but for present purposes, at any rate, the law is most conveniently stated in *Hubbard v Vosper* [1972] 2 W.L.R. 389 at 394D to 395D by Lord Denning, M.R. and at page 398F to H by Megaw, L.J. To summarise the statements: Fair dealing is a question of fact and of impression, to which factors that are relevant include the extent of the quotation and its proportion to comment (which may be justifiable although the quotation is of the whole work); whether the work is unpublished: and the extent to which the work has been circularised, although not published to the public within the meaning of the Copyright Act.⁴⁴⁷

However, he also made it clear that the fact of a work being unpublished did not automatically exclude it from the purview of the fair dealing provisions:

... unpublished as well as published works are within the fair dealing provisions of both Acts: and what would otherwise be infringement cannot of itself, without regard to any other circumstances, be outside the exception to infringement made by those sections, as that would be to exclude from the sections what the sections in terms include.⁴⁴⁸

⁴⁴³ [1999] EMLR 654, 663.

⁴⁴⁴ CDPA, s 29(1).

⁴⁴⁵ CDPA, s 178.

⁴⁴⁶ Vitoria et al, *Laddie, Prescott and Vitoria on the Modern Law of Copyright and Designs*, 867,

⁴⁴⁷ [1973] FSR 33, 61.

⁴⁴⁸ [1973] FSR 33, 61.

In doing so, Ungood-Thomas J directly addressed Romer J's observations in *British Oxygen Co v Liquid Air Ltd*⁴⁴⁹ that subjecting an unpublished literary work to public criticism, review or newspaper summary was 'manifestly unfair' and could not therefore amount to a 'fair dealing' with the work.⁴⁵⁰

Griffiths acknowledges that there are sound reasons for the courts' unwillingness to sanction the disclosure of a previously unpublished work, as such a disclosure will often involve a breach of confidence and, in some jurisdictions, constitute a breach of an author's moral right of divulgation; in addition, the right of first publication is of considerable economic significance.⁴⁵¹ Nevertheless, he asserts that under the HRA, the significance of this factor to assessments of fairness is problematic, pointing out that where there is a public interest in the subject matter of a copyright work, the public interest in disclosure of that work is likely to be greater where the work is *unpublished* than where the work has previously been published.⁴⁵² He highlights that much valuable investigative journalism, which is vital in supporting the interests protected by article 10 of the ECHR, derives from 'leaks', a point which was acknowledged even in *The Modern Law of Copyright and Designs*.⁴⁵³ On this basis, he finds that the Court of Appeal in *Ashdown* did not consider this factor sufficiently thoroughly, as it simply held that the unpublished status of the minute favoured the claimant⁴⁵⁴ without taking into account the issues raised.⁴⁵⁵

Masiyakurima also points out that there is a risk, in taking into account this factor, that the courts may not accord sufficient weight to the fact that important political or cultural information may be gleaned from unauthorised exploitation of unpublished works.⁴⁵⁶ This problem would be exacerbated if the author of the unpublished work dies and disclosure of the work is prevented by protected heirs.⁴⁵⁷ Furthermore, many types of copyright works that could potentially contain information of great public significance, such as security videos, photographs taken by security devices, internal memoranda, safety reports and technical drawings, are invariably unpublished.⁴⁵⁸

⁴⁴⁹ [1925] Ch 383.

⁴⁵⁰ [1925] Ch 383, 393.

⁴⁵¹ Griffiths, 'Copyright Law after *Ashdown*', 252 – 253.

⁴⁵² Griffiths, 'Copyright Law after *Ashdown*', 253.

⁴⁵³ Griffiths, 'Copyright Law after *Ashdown*', 253.

⁴⁵⁴ [2002] Ch 149, [75].

⁴⁵⁵ Griffiths, 'Copyright Law after *Ashdown*', 253.

⁴⁵⁶ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 242. See also Angelopoulos, 'Freedom of Expression and Copyright', 337.

⁴⁵⁷ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 248.

⁴⁵⁸ Burrell, 'Defending the Public Interest', 398.

In the specific context of the defence of fair dealing for criticism or review, there is an express statutory requirement that the work must have been made available to the public.⁴⁵⁹ The work may have been made available by any means, but no account of any unauthorised act may be taken into consideration.⁴⁶⁰ This was implemented⁴⁶¹ pursuant to the Information Society Directive,⁴⁶² which permits member states to provide for exceptions or limitations in the case of 'quotations for purposes such as criticism or review' only where these relate to 'a work or other subject matter which has already been made lawfully available to the public'.⁴⁶³

The amount taken from the work

The third of the 'Laddie factors' applied by the Court of Appeal in *Ashdown* relates the amount taken from the protected work:

The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing.⁴⁶⁴

As Griffiths observes, this is, once again, a valid consideration; there must be some relationship of proportionality between the legitimate purpose for which a work is used and the amount that is taken by the defendant.⁴⁶⁵ Once again, however, he takes issue with the manner in which this factor was applied in *Ashdown*, where the Court of Appeal merely explained that roughly one-fifth of the minute had been reproduced verbatim or almost-verbatim, without providing an explicit explanation as to *why* this was reproduction of too much of the minute.⁴⁶⁶

Closely related to this is the question of whether the defendant could have conveyed the same message in its derivative work without the publication of a substantial part of the original work.⁴⁶⁷ The application of this factor can be seen in the case of *Hyde Park*, where the Court of Appeal held that the extent of the use made of the stills had been

⁴⁵⁹ CDPA, s 30(1).

⁴⁶⁰ CDPA, s 30(1A).

⁴⁶¹ Via the Copyright and Related Rights Regulations 2003 (SI 2003/2498), ss 10(1)(a) and (b).

⁴⁶² Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

⁴⁶³ Information Society Directive, art 5(3)(d).

⁴⁶⁴ Vitoria et al, *Laddie, Prescott and Vitoria on the Modern Law of Copyright and Designs*, 867 – 868,

⁴⁶⁵ Griffiths, 'Copyright Law after *Ashdown*', 253.

⁴⁶⁶ Griffiths, 'Copyright Law after *Ashdown*', 254.

⁴⁶⁷ This would appear to be largely consistent with the Information Society Directive, arts 5(3)(a), (c) and (d) of which expressly limit the scope of exceptions for teaching and research, reproduction by the press, and criticism or review, respectively, to the extent 'justified by the non-commercial purpose to be achieved', 'justified by the informatory purpose', and 'required by the specific purpose'.

excessive, as the only significant aspects were the times recorded on them, and this information could have been reported simply as a fact.⁴⁶⁸ A similar conclusion was reached in *Ashdown*, where the Court of Appeal indicated that the amount copied by the defendant from the minute was disproportionate:

Can it be argued that the extensive reproduction of Mr Ashdown's own words was necessary in order to satisfy the reader that the account given of his meeting with Mr Blair was authoritative? We do not believe that it can. The statement by the *Sunday Telegraph* that they had obtained a copy of the minute coupled with one or two short extracts from it would have sufficed.⁴⁶⁹

The approach taken by the Court of Appeal in *Hyde Park* has been described by Garnett as being 'very restrictive ... because in almost all cases it is possible to argue that the message can be got across without publication of a substantial part of the copyright work'.⁴⁷⁰ He states further that such an approach 'tends to ignore ... the very great impact which publication of the very words of a document or an actual picture can have in an era of mass communication, where quick impressions count for much'.⁴⁷¹ In this regard, he observes that 'the very absence of [a] crucial document is often a negative rather than a neutral factor in a story's credibility'.⁴⁷²

This view is shared by Masiyakurima, who observes that alternative means of expression may dilute the poignancy or accuracy of the ideas conveyed by the original work, and believes that the rejection of fair dealing defences based on the existence of alternative means of expression ignores the importance of allowing users to choose the expressions they need for free speech purposes.⁴⁷³ Kelly argues that this sets the bar for fair dealing 'excessively high, permitting fair dealing only where there is an absence of other options for the journalist'.⁴⁷⁴ Even Derclaye, who is generally of the view that there is no conflict between copyright and freedom of expression, nevertheless acknowledges that there are some works, particularly those of a visual character, whose nature requires them to be communicated in their entirety for the user to achieve the purpose behind a fair dealing defence, such as the reporting of current events;⁴⁷⁵ she cites the scenario in *Hyde Park* as an example of a case 'where a photograph or film is necessary rather than its description in words ... to report current events'.⁴⁷⁶

⁴⁶⁸ [2001] Ch 143, [40] (per Aldous LJ), [70] (per Mance LJ).

⁴⁶⁹ [2002] Ch 149, [81].

⁴⁷⁰ Garnett, 'The Impact of the HRA', 204.

⁴⁷¹ Garnett, 'The Impact of the HRA', 204.

⁴⁷² Garnett, 'The Impact of the HRA', 205.

⁴⁷³ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 243.

⁴⁷⁴ Kelly, 'Current Events and Fair Dealing with Photographs', 249.

⁴⁷⁵ Derclaye, 'IPRs and Human Rights', 142.

⁴⁷⁶ Derclaye, 'IPRs and Human Rights', 143.

Overall, commentators who are critical of the approach taken by the Court of Appeal in *Hyde Park* prefer the views expressed by Jacob J at first instance in the same case, where his Lordship suggested that the test of whether the use of a work was 'necessary' was not the correct one, and also acknowledged that, on the facts of the case, the mere publication of the information contained in the stills would not have the same impact and force as the publication of the actual stills themselves.⁴⁷⁷

This case is not like one of those cases where the defendant is seeking to compete with the plaintiff ... and no attempt was made to suggest unfairness of that sort. What was said was that there was no need for the Sun to use this copyright work at all – a test of necessity. I do not think that is the right approach. One simply asks 'is what the defendant did with this work 'fair'? It may well be that in some cases what a defendant publishes is completely unnecessary so far as any reporting of public events is concerned. That may take the use outside the scope of 'fair dealing'. But it by no means follows that a use can only amount to 'fair dealing' where it is necessary.

Besides, in this case I think the *Sun* was in the position where it was close to necessary to publish the photographs to refute what Mr Al Fayed said in the *Mirror* and elsewhere. Mr Bloch said the *Sun* could have said they had interviewed [the chief security officer] and seen the photographs without actually publishing them. Or it could have first told Mr Al Fayed that it had the pictures and challenged him to withdraw his statement. But the former course would not have had anything like the same impact and force as actual publication of the stills. A picture says more than a thousand words. The *Sun* was showing that it had convincing evidence of the duration of the visit. The latter course would have been to invite pre-emptive legal action.

Macmillan Patfield, writing prior to the decision of the Court of Appeal in *Hyde Park*, appears to have anticipated the general trend of the concerns arising from the approach taken by the court; she observes that, in determining whether the defence of fair dealing for the purpose of criticism or review is applicable, the courts have been more concerned with the use made of the copyright work and the volume and proportionality of the amount taken, but little with the nature and importance of the material.⁴⁷⁸

Commentators have also expressed the opinion that the approach taken by the Court of Appeal in *Hyde Park* may be difficult to reconcile with ECHR-inspired jurisprudence, as the latter gives journalists greater freedom to determine the extent to which reproduction of a protected work is necessary for a particular purpose.⁴⁷⁹ In *Fressoz and Roire v France*,⁴⁸⁰ it was held (in a non-copyright case) by the European Court of Human Rights that:⁴⁸¹

In essence, [article 10] leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' rights 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.

⁴⁷⁷ [1999] EMLR 654, 662. This passage has been cited with approval by a number of commentators: see Garnett, 'The Impact of the HRA', 205; Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 243.

⁴⁷⁸ Macmillan Patfield, 'Towards a Reconciliation', 228.

⁴⁷⁹ Griffiths, 'Copyright Law after *Ashdown*', 254 – 255; Angelopoulos, 'Freedom of Expression and Copyright', 343; Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP, 2009), 205; Kelly, 'Current Events and Fair Dealing with Photographs', 249.

⁴⁸⁰ (2001) 31 EHRR 2.

⁴⁸¹ (2001) 31 EHRR 2, [54].

Macmillan Patfield demonstrates the difficulty of drawing a bright line between a use of a work which is necessary for a particular purpose and that which is not, in the context of fair dealing for the purpose of criticism or review; she argues that any criticism which does not substantially reproduce the copyright work in question might fail to hit its target, while use of the whole work might exceed the rules on volume and proportionality which limit the use of the defence.⁴⁸²

The manner in which the work was obtained

Where a dealing relates to a work that is leaked or stolen, or obtained by unauthorised access to a database, this weighs against a finding that the dealing is fair. In *Beloff v Pressdram*, which involved a confidential memorandum which had been 'leaked' to the defendant magazine, Ungood-Thomas J held that the publication of a document that had been obtained through illicit means was not a 'fair' dealing.⁴⁸³

This consideration amplifies the problems inherent in rejecting the fairness of dealing unpublished works, and may impede dissemination of information contained in documents that have not been made public.⁴⁸⁴ Masiyakurima cites as an example the Australian case of *Commonwealth of Australia v John Fairfax Ltd*,⁴⁸⁵ where the publication of leaked documents that would have revealed the Australian Government's 'incompetent foreign policy in the Asia-Pacific basin' was effectively censored by the grant of an injunction to restrain such publication on the basis that it amounted to copyright infringement.⁴⁸⁶ The fair dealing defences raised by the defendant were rejected, Mason J holding that:

To my mind the absence of consent, express or implied, or such circulation by the author of an unpublished literary work as to justify criticism or review is ordinarily at least an important factor in deciding whether there has been "a fair dealing" under s. 41.

There has been no such consent or conduct on the part of the plaintiff here. As I have said, the defendants knew on the Friday evening that the plaintiff objected to any publication at all and knew or ought to have known that the documents had been "leaked" without the plaintiff's authority. There is a difficulty in saying that a publication of leaked documents, which could not without the leak have been published at all, is "a fair dealing" with unpublished works in the circumstances to which I have referred (see *Beloff v. Pressdram Ltd.* (1973) 1 All ER 241, at p 264).⁴⁸⁷

⁴⁸² Macmillan Patfield, 'Towards a Reconciliation', 229.

⁴⁸³ [1973] FSR 33, 62 – 63.

⁴⁸⁴ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 249. See also Macmillan Patfield, 'Towards a Reconciliation', 227 – 228 (expressing similar concerns).

⁴⁸⁵ (1980) 147 CLR 39.

⁴⁸⁶ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 249.

⁴⁸⁷ (1980) 147 CLR 39, [43] – [44].

Mason J also considered, but ultimately rejected, the possibility that a dealing with unpublished works as against a government might be fair as it would promote public knowledge and public discussion of government action:

... there is another possible approach to the concept of "fair dealing" as applied to copyright in government documents, an approach which was not spelled out in argument by the defendants. It is to say that a dealing with unpublished works which would be unfair as against an author who is a private individual may nevertheless be considered fair as against a government merely because that dealing promotes public knowledge and public discussion of government action. This would be to adopt a new approach to the construction of ss. 41 and 42 and it would not be appropriate for me on an interlocutory application to proceed on the footing that it is a construction that will ultimately prevail. Situations such as the present case would scarcely have been within the contemplation of the draftsman when the two sections and their ancestors were introduced.⁴⁸⁸

19 4.2.5 Incorporation: the defence of fair use

Under US copyright law, the doctrine of fair use is a limitation on the exclusive rights of the copyright owner which permits certain uses of copyright-protected material that would otherwise constitute infringement. Unlike fair dealing, the applicability of the fair use doctrine is not confined to cases where the use of a copyright work has been made for specific enumerated purposes. The doctrine existed only at common law until it was codified in the Copyright Act of 1976. The relevant statutory provision provides that:⁴⁸⁹

...the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The Supreme Court has, in two key cases involving the conflict between copyright and the First Amendment, made an explicit link between fair use and the First Amendment: in both *Harper & Row* and *Eldred v Ashcroft* it described the latitude for scholarship and comment afforded by fair use as one of the First Amendment protections embodied in the Copyright Act.⁴⁹⁰ A similar link has been made by commentators writing both before and after these decisions,⁴⁹¹ one of whom describes it as 'the legal vehicle developed by

⁴⁸⁸ (1980) 147 CLR 39, [45].

⁴⁸⁹ US Copyright Act, s 107. The four statutory fair use factors are derived from the opinion of Justice Story in *Folsom v Marsh* 9 F.Cas. 342.

⁴⁹⁰ *Harper & Row v Nation Enterprises* 471 US 539, 560; *Eldred v Ashcroft* 537 US 186, 190.

⁴⁹¹ Harry N Rosenfield, 'The Constitutional Dimension of "Fair Use" in Copyright Law' (1974) 50 *Notre Dame Lawyer* 790, 799; Zimmerman, 'A Regulatory Theory of Copyright', 165; Oakes, 'Copyright and

the courts for effectuating the public's access to copyrighted matter, a right guaranteed under the first amendment's protection of the right to read, the right to hear, and the right to know⁴⁹² and another as '[t]he method chosen by lawmakers and courts to deal with the tension between free speech and copyright protection'.⁴⁹³ Some writers have portrayed fair use as playing a complementary role to the idea/expression dichotomy in protecting First Amendment interests: the fair use doctrine, it is argued, averts a potential conflict between copyright and the First Amendment in situations where freedom of speech demands access both to the ideas embodied in a copyright work and the particular form of expression of that work.⁴⁹⁴

However, a number of other scholars have taken pains to point out that fair use is not co-extensive with the First Amendment, though they do acknowledge that fair use is informed by and has the effect of promoting First Amendment goals.⁴⁹⁵ Denicola and Rubinfeld have argued that the largely economic focus of the fair use doctrine means that it is incapable of functioning as an adequate substitute for a principled, public-discourse-sensitive First Amendment analysis.⁴⁹⁶

Lockridge, in particular, observes that the early case law on fair use made no reference to the First Amendment,⁴⁹⁷ and that the legislative history of the Copyright Act reveals no mention of the First Amendment or freedom of speech.⁴⁹⁸ She also notes that there has been little critical discussion of the First Amendment in copyright cases both at the Supreme Court and in the lower courts.⁴⁹⁹

A succinct answer is given by from the Supreme Court in *Eldred v Ashcroft*:⁵⁰⁰

[The First] Amendment and the Copyright Clause were adopted close in time. This proximity indicates the Framers' view that copyright's limited monopolies are compatible with free speech principles.

the First Amendment', 212; Hans, 'Constitutional Law', 256; Perry, 'Copyright and the First Amendment', 642; Shipley, 'Conflicts Between Copyright and the First Amendment', 994 – 995

⁴⁹² Rosenfield, 'The Constitutional Dimension of Fair Use', 799.

⁴⁹³ Zimmerman, 'A Regulatory Theory of Copyright', 165.

⁴⁹⁴ Goldwag, 'Copyright Infringement and the First Amendment', 325 – 326; Janice E Oakes, 'Copyright and the First Amendment: Where Lies the Public Interest?' (1984) 59 *Tulane Law Review* 135, 140; Perry, 'Copyright and the First Amendment', 642.

⁴⁹⁵ W Warren Hamel, 'Harper & Row v The Nation: A First Amendment Privilege for News Reporting of Copyrightable Material?' (1985) 19 *Columbia Journal of Law & Social Problems* 253, 267; Swanson, 'Copyright Versus the First Amendment', 273; Lee Ann W Lockridge, 'The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech' (2007) 24 *Santa Clara Computer & High Technology Law Journal* 31, 61; Denicola, 'Copyright and Free Speech', 299, 303 – 304.

⁴⁹⁶ Rubinfeld, 'The Freedom of Imagination', 16 – 20; Denicola, 'Copyright and Free Speech', 293 – 299, 303 – 304.

⁴⁹⁷ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 61.

⁴⁹⁸ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 76.

⁴⁹⁹ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 81 – 94.

⁵⁰⁰ 537 US 186, 190. See also Sobel, 'Copyright and the First Amendment', 70.

Related to this is the argument based on constitutional structure, which Birnhack summarises as follows: 'The Framers enacted a prohibition on abridging speech just a few years after enacting a limitation on speech; thus, the two regimes were designed to coexist'.⁵⁰¹ The effective meaning of such an approach, Birnhack observes, is that copyright law is immunised from the First Amendment.⁵⁰²

These arguments have been refuted by Birnhack and Netanel on four main grounds. First, both of them argue that the contemporary understanding of freedom of speech has expanded dramatically since the 18th century – when both the Copyright Clause and the First Amendment were drawn up – while copyright has also expanded dramatically in a manner which is counter to freedom of speech; thus, even though the two might have been compatible in the 18th century, this does not automatically give rise to compatibility in the contemporary setting.⁵⁰³ Second, as Birnhack points out, there is little direct historical evidence about the constitutionalisation of copyright law and the actual intent of the Framers, as not much is known about the particular circumstances of the enactment of the Copyright Clause.⁵⁰⁴ Third, Birnhack argues that an interpretation based on indicia of external subjective intent, such as the structure of the Constitution, would be an unjustified deviation from constitutional practice; other constitutional conflicts are not analysed in this manner and there are no *a priori* reasons for distinguishing conflicts between copyright and the First Amendment from other constitutional conflicts.⁵⁰⁵ Fourth, as Netanel observes, since the First Amendment has repeatedly been held to override legislation enacted by Congress pursuant to its other enumerated powers under the Constitution, there is no reason why it should not be held to invalidate inconsistent copyright provisions.⁵⁰⁶

Criticisms of the ability of the fair use doctrine to function as an adequate safeguard for free speech interests have been founded on two main grounds. The first relates to the vagueness of the doctrine itself, and the high level of uncertainty which it introduce, while the second pertains to the inability of each of its statutory factors (which will be considered individually) to appropriately take into account considerations that are relevant to free speech.

Vagueness and uncertainty in the scope of the fair use doctrine

A number of commentators have observed that the fair use doctrine is too vague to enable an individual to predict, with any degree of accuracy, whether and when she is

⁵⁰¹ Birnhack, 'The Copyright Law and Free Speech Affair', 256 – 257.

⁵⁰² Birnhack, 'The Copyright Law and Free Speech Affair', 256 – 257.

⁵⁰³ Birnhack, 'The Copyright Law and Free Speech Affair', 287 – 289; Netanel, 'Locating Copyright', 38; Netanel, *Copyright's Paradox*, 178 – 179.

⁵⁰⁴ Birnhack, 'The Copyright Law and Free Speech Affair', 261; Michael Birnhack, 'Copyright Law and Free Speech after *Eldred v Ashcroft*' (2003) 76 *Southern California Law Review* 1275, 1285.

⁵⁰⁵ Birnhack, 'The Copyright Law and Free Speech Affair', 261.

⁵⁰⁶ Netanel, 'Locating Copyright', 38; Netanel, *Copyright's Paradox*, 178 – 179.

able to make 'fair use' of another's original work in creating her own derivative work.⁵⁰⁷ The statutory factors, it is argued, provide little guidance as to how they should be interpreted or what priority should be given to each of them.⁵⁰⁸ Furthermore, even though the statute leaves open the possibility that other factors may be taken into account, it identifies none.⁵⁰⁹ It has also been observed that inconsistencies between fair use cases are common,⁵¹⁰ and that judges do not appear to have developed any consensus as to the definition of fair use; their decisions, it has been suggested, may be the result of intuitive responses to individual fact patterns rather than the application of consistent principles.⁵¹¹ This lack of stability and predictability in terms of individual users' rights may have an inhibiting effect on users, prompting a kind of self-censorship, as the prospect of litigation might dissuade them from engaging in acts that may be found infringing.⁵¹² One commentator has suggested, however, that the legal uncertainty underlying the fair use doctrine, much like the legal uncertainty underlying the idea/expression dichotomy, may actually give people who suspect that their speech might be infringing greater room to justify speaking anyway.⁵¹³

First factor: the purpose and character of the use

Under the first factor, courts will usually consider whether the use of the work made by the defendant is transformative in nature, which will weigh in favour of a finding of fair use, and whether the use was made for a commercial purpose, which will weigh against such a finding. In relation to the first aspect of this assessment, Rubinfeld has argued that the emphasis on transformative use, which favours 'critical' or 'parodic' treatments – both being paradigmatic 'transformative uses' of copyright-protected material renders copyright law viewpoint-discriminatory, which would be a *per se* constitutional violation under free speech principles.⁵¹⁴ In relation to the second aspect, Lockridge argues that an analysis that disadvantages all commercial uses contradicts First Amendment values; she points out that the First Amendment does not tolerate discrimination against speech simply because it is sold for monetary profit, nor does its protection diminish simply because a speaker has been paid to disseminate a message.⁵¹⁵ An emphasis on non-

⁵⁰⁷ Oakes, 'Copyright and the First Amendment', 212, 214; Brittin, 'Constitutional Fair Use', 178; Hoberman, 'Copyright and the First Amendment', 579 – 581; Pierre Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105, 1105 – 1107. Elkin-Koren, 'Cyberlaw and Social Change', 283. Tushnet, 'Copyright as a Model for Free Speech Law', 24; Netanel, 'Locating Copyright', 20 – 21.

⁵⁰⁸ Leval, 'Toward a Fair Use Standard', 1105 – 1106.

⁵⁰⁹ Leval, 'Toward a Fair Use Standard', 1106; Tushnet, 'Copyright as a Model for Free Speech Law', 24.

⁵¹⁰ Tushnet, 'Copyright as a Model for Free Speech Law', 24.

⁵¹¹ Leval, 'Toward a Fair Use Standard', 1106 – 1107; Tushnet, 'Copyright as a Model for Free Speech Law', 24.

⁵¹² Elkin-Koren, 'Cyberlaw and Social Change', 283; Tushnet, 'Copyright as a Model for Free Speech Law', 24.

⁵¹³ Wang, 'The Line between Copyright and the First Amendment', 1494 – 1495.

⁵¹⁴ Rubinfeld, 'The Freedom of Imagination', 17. See also Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 78.

⁵¹⁵ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 78 – 79.

commercial use as fair use would also place news organisations at a disadvantage, as they operate in a free market as well as a free speech environment.⁵¹⁶

Second factor: nature of the copyrighted work

Under this factor, courts have looked at whether the copyright work used is fictional and creative, as opposed to being non-fictional and factual, as well as whether the work was published. All other considerations being equal, fictional work is less likely to be found to have been fairly used compared with a work of non-fiction, and a work which has yet to be published is less likely to have been fairly used than a work that has already been published. According to Lockridge, the favouring of fictional, creative works over factual ones merely re-emphasises the idea/expression dichotomy embodied within copyright, and does not speak to any separate First Amendment issues outside it.⁵¹⁷ A commentator on *Harper & Row* has criticised what she perceives as an inordinate emphasis on the unpublished nature of the work given in that case, which was ultimately held to outweigh the public's interest in gaining access to its underlying facts and ideas.⁵¹⁸

Third factor: amount and substantiality of the portion used

This factor looks at the quantity of the amount taken from the copyright-protected work as well as the qualitative importance of the part taken in relation to the work as a whole. In general, the larger the amount or the greater the importance of the part taken, the less likely it is that the taking will amount to fair use. Lockridge has observed that there is no connection between this factor and the First Amendment as, under First Amendment jurisprudence, the amount of expression projected by a speaker is irrelevant.⁵¹⁹ This factor, it has also been argued, is highly unfavourable to visual artists who wish to appropriate a copyright-protected work of art for expressive purposes, as they would be unable to do so without, in most cases, taking a substantial part of the work.⁵²⁰

Fourth factor: effect of the use upon the potential market for or value of the copyrighted work

This factor supports copyright's aim of incentivising the production of creative works by providing for an economic reward for authors; its function is to avoid significant interference with any potential market incentive or reward which an author might expect

⁵¹⁶ Hamel, '*Harper & Row v The Nation*', 283 – 285.

⁵¹⁷ Lockridge, '*The Myth of Copyright's Fair Use Doctrine*', 79.

⁵¹⁸ Stacy Daniels, '*Harper & Row Publishers, Inc v Nation Enterprises: Pirating Unpublished Copyright Works: Does the Fair Use Doctrine Vindicate First Amendment Rights?*' (1985) 19 *John Marshall Law Review* 501, 514 – 522.

⁵¹⁹ Lockridge, '*The Myth of Copyright's Fair Use Doctrine*', 80.

⁵²⁰ Krieg, '*Copyright, Free Speech and the Visual Arts*', 1573.

to receive.⁵²¹ Lockridge has observed that, again, this has little bearing on free speech issues: under First Amendment doctrine, the financial effect upon the target of speech or on competing speech being disseminated by others is not a relevant consideration.⁵²²

5 Specific issues

This section will consider eight copyright-related issues that have generated a significant amount of commentary thus far, and that also have important implications for freedom of expression. These issues are:

- parody;
- user-generated remix, namely user-generated content that samples from or remixes existing copyright-protected works;
- file-sharing;
- Internet browsing;
- hyperlinking;
- notice and takedown procedures;
- website blocking injunctions and
- technological protection measures ('TPMs') and contractual terms that prohibit or restrict individuals from making use of copyright works in ways that would otherwise be entitled to under copyright law.

It should be noted that this is in no way a comprehensive list of all the situations in which any conflict between copyright and freedom of expression might arise; instead, this section simply seeks to illustrate how certain principles identified in this report (which are considered in more detail in part 6, below) might be developed and applied in the context of several particularly current and controversial matters. Under each heading, the freedom of expression implications of each issue will be briefly highlighted, and an account of the existing legislation, case law, and commentary relating to each issue will be provided.

20 5.1 Parody

21 5.1.1 Parody and the interaction between copyright and freedom of expression

There are three major reasons for treating parody as an issue that raises particularly pertinent considerations in the context of copyright and freedom of expression, according to the existing literature. First, it is usually *necessary* for a successful parody to incorporate or reproduce a substantial amount of the original copyright work on which it is based, thus rendering parodies more susceptible to claims of copyright infringement than other types of derivative works. Second, because parody is often used as a tool for critical literary, political and social commentary, it is perceived as having a particularly

⁵²¹ The Supreme Court in *Harper & Row* described this as 'the single most important element of fair use': US , 566. Leval has suggested that this might be something of an overstatement: Leval, 1124.

⁵²² Lockridge, 80 – 81. See also Hamel, '*Harper & Row v The Nation*', 288 – 290.

high *value* from the perspective of freedom of expression. Third, the fact that parodies are usually critical of the underlying original work means that the owner of the copyright in the latter will generally be *reluctant to grant* an appropriate licence to a would-be parodist, making it difficult for the would-be parodist to realise her creative vision. These reasons will be discussed in turn.

Necessity: a parody usually incorporates a substantial amount of the underlying original work

This particular aspect of parody has been highlighted by numerous commentators writing in the context of US and UK law, and is neatly summarised in a student note published as early as 1976:⁵²³

The difficulty with parody stems from the very nature of the art in that the copying or imitating which the art form requires is exactly what is prohibited by the copyright statutes. The parodied work must be identifiable in the parody in order for the parodist to effectively criticize the parodied work, but the copying necessary to accomplish that identification is arguably an infringement of the original work's copyright protection.

Spence observes that parodies often draw upon and quote from an original copyright work in order to criticise that work or its creator and, in addition, frequently use the original work as shorthand for a range of values that the parody ironically undercuts, and for which no adequate alternative means of expression exists.⁵²⁴ In these situations, he notes, a conflict arises between copyright and the parodist's right to free speech. Walsh, discussing the possibility of introducing a copyright exception for parody under the UK CDPA, states similarly that: 'The essence of parody lies in imitation of an original work of art, which makes it likely to infringe copyright, unless a valid legal defence is employed'.⁵²⁵

Value: the high speech value of parody

⁵²³ Kevin W Wheelwright, 'Parody, Copyrights and the First Amendment' (1976) 10 *University of San Francisco Law Review* 564, 570. For statements to the same effect by other US commentators, see Herman F Selvin, 'Parody and Burlesque of Copyrighted Works as Infringement' (1958 – 1959) 6 *Bulletin of the Copyright Society of the USA* 53, 55; RT Nimmer, 'Reflections on the Problem of Parody-Infringement' (1969) 17 *Copyright Law Symposium* 133, 139; Sheldon N Light, 'Parody, Burlesque, and the Economic Rationale for Copyright' (1979) 11 *Connecticut Law Review* 615, 616 – 617; Charles C Goetsch, 'Parody as Free Speech – The Replacement of the Fair Use Doctrine by First Amendment Protection' (1980) 3 *Western New England Law Review* 39, 39 – 40; Richard A Bernstein, 'Parody and Fair Use in Copyright Law' (1984) 31 *Copyright Law Symposium* 1, 11; Nels Jacobson, 'Faith, Hope and Parody: *Campbell v Acuff-Rose*, "Oh, Pretty Woman", and Parodists' Rights' (1994) 31 *Houston Law Review* 955, 962 – 963; Melissa M Francis, 'The "Fair Use" Doctrine and *Campbell v Acuff-Rose*: Copyright Waters Remain Muddy' (1995) 2 *Villanova Sports & Entertainment Law Forum* 311, 313; Tyler T Ochoa, 'Dr Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody' (1997 – 1998) 45 *Journal of the Copyright Society of the USA* 546, 558; Barbara S Murphy, 'The Wind Done Gone: Parody or Piracy? A Comment on *Suntrust Bank v Houghton Mifflin Company*' (2002) 19 *Georgia State University Law Review* 567, 576 – 577.

⁵²⁴ Michael Spence, 'Intellectual Property and the Problem of Parody' (1998) 114 *Law Quarterly Review* 594, 610 – 611.

⁵²⁵ Alina Walsh, 'Parody of Intellectual Property: Prospects for a Fair Use/Dealing Defence in the United Kingdom' (2010) 21(11) *International Company and Commercial Law Review* 386, 386.

Because parody is frequently used as a tool for both critical literary and social commentary, it is perceived, from the perspective of freedom of expression, as a form of speech that is particularly valuable. As one commentator puts it:⁵²⁶

Literary authorities and legal scholars agree that the genre of parody fulfills a function of vital importance. As a form of satire, parody allows authors to pointedly criticize a culture's foibles and failings. It is the unforgiving mirror in which society is able to see itself most honestly reflected – warts and all. By lampooning political, social, or religious subjects, parodists generate healthy discourse and cultural self-examination. They skewer our most sacred cows, often using current popular works to symbolize the targets of their criticism. In so doing, the parodist can at once both catch the attention of the public and deftly impale the object of her ridicule.

Writing in the US context, Goetsch draws an express connection between parody and the right of free speech guaranteed by the First Amendment; he notes that, just as the freedom to publish literature and criticism constitutes an important element of free speech, the right to publish legal parody also constitutes an element of free speech, legal parody being a unique combination of literature and criticism.⁵²⁷ Bernstein has also observed that, if the objective of the First Amendment is indeed the maximisation of the spectrum of available thought, parody undoubtedly forms part of that spectrum, and may accordingly play a role that is integral to the First Amendment ideal of a marketplace of ideas.⁵²⁸

In the context of UK copyright law, Spence has also raised the argument that special treatment for parody may be justified on the basis that such treatment is necessary to protect the parodist's right to freedom of speech.⁵²⁹ Deazley has stated that, while not all infringing uses of copyright-protected material will trigger free speech concerns, 'parody certainly does'.⁵³⁰

The importance of parody to freedom of expression was also highlighted by respondents to the IPO's recent consultation concerning the introduction of a copyright exception for parody, though this was not discussed in great detail either in the Hargreaves Review, which recommended the implementation of the exception, or in the IPO's summary of responses received throughout the consultation process. The Hargreaves Review does note expressly that the most important issue arising in the context of a copyright exception for parody concerns freedom of expression, but states that such concerns sit outside the Review's terms of reference.⁵³¹ Meanwhile, the IPO's summary of responses to its consultation only states briefly that '[t]he benefits of freedom of expression, and

⁵²⁶ Jacobson, 'Faith, Hope and Parody', 961 – 962. See also Goetsch, 'Parody as Free Speech', 41 – 42; Julie Bisceglia, 'Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act' (1987) 34 *Copyright Law Symposium* 1, 33 – 36; Ochoa, 'Dr Seuss, the Juice and Fair Use', 552 – 555.

⁵²⁷ Goetsch, 'Parody as Free Speech', 62.

⁵²⁸ Bernstein, 'Parody and Fair Use in Copyright Law', 30 – 31.

⁵²⁹ Spence, 'Intellectual Property and the Problem of Parody', 608.

⁵³⁰ Ronan Deazley, 'Copyright and Parody: Taking Backward the Gowers Review?' (2010) 73(5) *Modern Law Review* 785, 805.

⁵³¹ Hargreaves Review, 50.

the cultural ability to comment on works through satire or parody were also frequently cited as an argument in favour of an exception'.⁵³² In addition, its formal response to the consultation merely explains that an exception for parody would give rise to 'compelling social and cultural benefits such as the development of free speech and the fostering of creative talent. The wider public would also benefit from increased legal clarity and opportunities for freedom of expression when creating parody for non-commercial reasons'.⁵³³

In this regard, it is perhaps significant to note that the IPO, following the public consultation on the recommendations made by the earlier Gowers Review, categorically rejected the possibility – raised by some of the responses to the consultation⁵³⁴ – that an exception for parody was necessary for the CDPA to be compliant with article 10 of the ECHR; instead, citing the *Ashdown* decision, it took the view that the existing defences of fair dealing and public interest were sufficient to prevent or restrict the enforcement of copyright in circumstances where the interest in freedom of expression overrides the interests of the copyright owner.⁵³⁵ This has been criticised by Deazley, who argues that the defence of fair dealing for criticism or review does not allow meaningful scope for successful parody that draws explicitly upon an original copyright work, and that the extent to which the public interest defence is capable of accommodating a parodist's free speech rights may prove to be more illusory than real.⁵³⁶

As we will see below, the relationship between parody and freedom of expression has also been recognised in decisions by a number of European national courts.

Willingness to licence: the difficulty of obtaining a licence to parody

Because parodies are usually critical of their underlying original works, the owner of the copyright in the original work may understandably be reluctant to grant licences permitting the creation of any parodies based on the work in question. In the case of *Williamson Music v Pearson Partnership*,⁵³⁷ which concerned a television advertisement that parodied the music and lyrics of a song from the Rodgers and Hammerstein musical *South Pacific*, evidence was presented to the effect that it was the plaintiff's policy that 'permission will not in any circumstances be granted for the making of parodies of either the words or the music of Rodgers and Hammerstein compositions',⁵³⁸ and the judge in that case duly noted that 'permission, if sought, would not have been granted at any

⁵³² HM Government, *Consultation on Copyright: Summary of Responses June 2012* (HM Government, 2012), 19.

⁵³³ HM Government, *Modernising Copyright*, 31.

⁵³⁴ IPO, *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (IPO, 2009), 43.

⁵³⁵ IPO, *Taking Forward the Gowers Review*, 34.

⁵³⁶ Deazley, 'Copyright and Parody', 806.

⁵³⁷ [1987] FSR 97, 103.

⁵³⁸ [1987] FSR 97, 100.

price'.⁵³⁹ In the US case of *Fisher v Dees*,⁵⁴⁰ Sneed J observed that '[p]arodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee'.⁵⁴¹

This point was noted by the IPO in the first stage of its consultation on the Gowers Review, where it observed that for copyright owners, 'use of their work, or a part of it, for the purposes of parody, can be a sensitive issue'.⁵⁴² In its subsequent consultation on the Hargreaves Review, the IPO also observed that, at present, parodists face a number of legal barriers and administrative costs due to copyright law as, in order to create a parody legally, it will be necessary for them to undertake the potentially arduous and expensive process of clearing the use of the underlying original works with the copyright owners, and that this, in turn, had the potential to stifle free expression by individuals.⁵⁴³

As a related point, it has also been highlighted that, as a successful parody depends upon audience recognition of the underlying original work, the parody must be published while the underlying work remains current in the minds of its intended audience, leaving the parodist with an extremely narrow temporal window of opportunity. Consequently, any restriction on the ability of the parodist to borrow from contemporary works also constitutes a restriction on the ability of the parodist to comment on contemporary culture.⁵⁴⁴ This was also noted by the IPO in its consultation on the Hargreaves Review, where it pointed out that the need to obtain permissions from copyright owners would present particular difficulty for the creation of parodies that require a quick turnaround or that are made on a budget.⁵⁴⁵

22.5.1.2 Parody under copyright law

UK

In terms of case law, there exists some early authority which indicates that a parodist will not be liable for copyright infringement, notwithstanding the fact that she has taken a substantial part of an existing original work in order to create the parody, if she has contributed sufficient mental labour to what she has taken so as to render her parody an

⁵³⁹ [1987] FSR 97, 101.

⁵⁴⁰ 794 F.2d 432.

⁵⁴¹ 794 F.2d 432, 437.

⁵⁴² IPO, *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* (IPO, 2007), 31. See also Deazley, 'Copyright and Parody', 792 (noting that 'parodies are often extremely critical of, or offensive to, the underlying work, or to the opinions and sensibilities of the author (or the rightsholder) of that work, and that the author (or the rightsholder) may not be interested in licensing the use of the work for parodic purposes').

⁵⁴³ HM Government, *Consultation on Copyright* (HM Government, 2011), 85.

⁵⁴⁴ Ochoa, 'Dr Seuss, the Juice and Fair Use', 558 – 559.

⁵⁴⁵ HM Government, *Consultation on Copyright* (HM Government, 2011), 85.

original work. In *Glyn v Weston Feature Film Co*,⁵⁴⁶ Younger J stated that: '[N]o infringement of the plaintiff's right takes place where a defendant has bestowed such mental labour upon what has been taken as to subject it to such revision and alteration as to produce an original result'.⁵⁴⁷ This was applied by McNair J in the subsequent case of *Joy Music v Sunday Pictorial Newspapers*,⁵⁴⁸ which involved a parody of a popular song entitled 'Rock-a-Billy'. The parody, which was intended to support the activities of Prince Philip in the face of criticism from other quarters, used the words 'Rock-a-Philip, rock' in the same way as the words 'Rock-a-Billy, rock' were used in the chorus of the original. McNair J held that there was no infringement by the parodist, as the parody 'was produced by sufficient new work', and was therefore not a reproduction of the original 'Rock-a-Billy', but a new work derived from 'Rock-a-Billy'.

The approach taken in these two cases was rejected by subsequent case law. In *Schweppes v Wellingtons*,⁵⁴⁹ Falconer J stated categorically that the test adopted in *Joy Music*, namely whether the parodist had subjected the material copied to such revision and alteration so as to produce an original work, was not a correct statement of the law, and that the sole test was whether the alleged infringer had reproduced a substantial part of the original copyright work. This was subsequently approved in *Williamson Music v Pearson Partnership*,⁵⁵⁰ where Judge Paul Baker QC made it clear that the correct test to be applied in assessing whether a parody amounted to an infringement of the copyright in the underlying original work was whether it made use of a substantial part of the latter. The present position under UK copyright law, therefore, is that in assessing whether a parody does in fact infringe the copyright in its underlying original work, it is to be treated no differently from other types of potentially infringing works.

At the time these cases were decided, the CDPA did not contain an express statutory exception for parody, though as stated previously, one has been added to it (in force from 1 October 2014). Of the existing defences, it has been suggested that certain types of parodies might be accommodated under the defence of fair dealing for criticism or review provided for in section 30(1) of the CDPA, a possibility that was acknowledged by the court in *Williamson Music v Pearson Partnership*.⁵⁵¹ Deazley has pointed out, however, that the language of section 30(1), which requires that the criticism or review in question be directed either at the original work, or another work, or a performance of a work, curtails the possibility of using the original work to parody wider social mores and values.⁵⁵² This was also acknowledged by the IPO, which noted in its consultation on

⁵⁴⁶ [1916] 1 Ch 261.

⁵⁴⁷ [1916] 1 Ch 261, 268.

⁵⁴⁸ [1960] 2 QB 60.

⁵⁴⁹ [1984] FSR 210.

⁵⁵⁰ [1987] FSR 97.

⁵⁵¹ [1987] FSR 97, 103.

⁵⁵² Deazley, 'Copyright and Parody', 788 – 789. Deazley also highlights that article 5(3)(d) of the Information Society Directive, which underpins section 30(1), expressly allows quotations for purposes such as criticism or review 'provided that *they relate to a work* or other subject-matter' (emphasis added). See also Spyros M

the Hargreaves Review that most parodies would not fall within the scope of the defence of fair dealing for criticism or review.⁵⁵³ Deazley has also argued that section 30(1)'s requirement that the use of an original work for the purposes of criticism or review must be 'accompanied by sufficient acknowledgement' may well prove problematic for parodists as, depending on the medium and nature of the parody, sufficient acknowledgement may not always be available, and that in any event, parody will often fail in its inherent purpose if its inspiration has to be explicitly identified.⁵⁵⁴

The exception for parody may go some way towards ameliorating such concerns. Notably, it does not contain a requirement that the parody be accompanied by sufficient acknowledgement of its underlying original work, in contrast with existing exemptions such as those discussed by Deazley. The wording of the new exception is as follows:

Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.⁵⁵⁵

In implementing the new exception, the UK Government has chosen not to provide a statutory definition for any of these terms. In the consultation leading up to the implementation of the new exception, the UK Government appeared to focus on the similarities between these concepts (rather than their differences), and observed that while each of these concepts is defined in slightly different ways, 'all can include an element of imitation, and may incorporate, to a greater or lesser extent, elements of the original work. The whole point of these types of works is that they should "conjure up" the original work upon which they are based'.⁵⁵⁶

The Oxford English Dictionary defines 'caricature' as 'a grotesque usually comically exaggerated representation especially of a person; ridiculously poor imitation or version'; 'parody' as 'an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect'; and 'pastiche' as 'an artistic work in a style that imitates that of another work, artist, or period'.⁵⁵⁷ Furthermore, the CJEU has recently, in *Deckmyn*, articulated a definition of what constitutes a 'parody'. This is discussed further below (section 6.3.1).

Maniatis and Ellen Gredley, 'Parody: A Fatal Attraction? Part 1: The Nature of Parody and Its Treatment in Copyright' (1997) 19(7) *European Intellectual Property Review* 339, 341 – 342.

⁵⁵³ HM Government, *Consultation on Copyright* (HM Government, 2011), 84.

⁵⁵⁴ Deazley, 'Copyright and Parody', 790 – 791. In this regard, Deazley also highlights that article 5(3)(k) of the Information Society Directive does not impose any requirement as to identification or acknowledgement in relation to the exception for parody, unlike article 5(3)(d) of the same Directive, which does impose such a requirement in respect of the exception permitting an exception for the use of quotations for purposes such as criticism or review.

⁵⁵⁵ Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, reg 1, adding new s 30A to the CDPA..

⁵⁵⁶ IPO, *Taking Forward the Gowers Review*, 31.

⁵⁵⁷ Kretschmer and Mendis, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 3. See also IPO, *Taking Forward the Gowers Review*, 31.

Europe

Germany

The German Copyright Act does not contain an express exception for parody; for this reason, parodies will generally fall within the scope of the adaptation right provided for in the statute, which states that adaptations or other transformations of a work may be published or exploited only with the consent of the author of the original work.⁵⁵⁸ This is subject, however, to the 'free use' provision set out in the Act, which states that '[a]n independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work'.⁵⁵⁹ Parodies that fall within the scope of 'free use' may therefore be published and exploited freely by the parodist.

In the *Alcolix* case⁵⁶⁰, the German Federal Supreme Court stated that, in order to assess whether an independent new work has been created through the free use of a previous, copyrighted work, the decisive factor is the difference maintained between the new work and the borrowed personal creative features of the work used. It explained that this would usually be accomplished by minimising the extent of the creative features borrowed from the original work used so that they appear merely as an inspiration for the new independent work. It also added, however, that a derivative work which incorporated even obvious features of the original work might still amount to a 'free use' provided that the derivative work maintained sufficient 'inner distance' from the features borrowed from the original work. In this regard, the court explained that the necessary 'inner distance' will generally be attained 'if the new work enters into a discourse with the previous creation', which could be achieved by means of parody, but also by other forms of personal creative effort by the creator of the derivative work. The court also held that, to determine whether there had been such a personal creative effort, the derivative work must be evaluated not from the point of view of an average reader of the original work (in this case, the *Asterix* comics), but by an onlooker who both knew the original work and also had the intellectual understanding demanded by the derivative work. This, the court explained, was necessary to provide working space needed for sophisticated art forms and guaranteed by article 5 of the German Basic Law, which expressly protects freedom of expression including freedom of art.

In the subsequent *Gies Eagle* case,⁵⁶¹ the Federal Supreme Court laid greater emphasis on the 'inner distance' requirement, stating that the precondition for a free use (for example in the form of parody or caricature), is that the derivative work, despite external correspondences to the original work, maintains a clear 'internal distance' that

⁵⁵⁸ German Copyright Act, s 23.

⁵⁵⁹ German Copyright Act, s 24(1).

⁵⁶⁰ German Federal Supreme Court, 11 March 1993. See Karl H Pilny, 'Germany: Copyright: Protection of Comic Strips under Copyright Law – "Alcolix"/"Asterix" – Parodies' (1995) 17(7) *European Intellectual Property Review* D198.

⁵⁶¹ German Federal Supreme Court, 20 March 2003. See Mendis and Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 31.

is expressed generally in an 'anti-thematic treatment'; the fact that the critical treatment is directed not at the original work itself but rather to its thematic environment is of no consequence.

The Netherlands

The Dutch Copyright Act contains an express exception for caricature, parody or pastiche. The relevant provision states that:⁵⁶²

Publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche will not be regarded as an infringement of copyright in that work, provided the use is in accordance with what would normally be sanctioned under the rules of social custom.

This provision was introduced in 2004, following the implementation of the Information Society Directive. Since then, as noted in Section 3.2.2, the courts have shown greater willingness to invoke freedom of expression in the context of parody, as illustrated by the *Darfurnica* and *Miffy* cases, also discussed in Section 3.2.2.

France

The French Intellectual Property Code contains a copyright exception for parody, which provides that, once a work has been communicated to the public in any form, the author may not prohibit certain acts to be carried out in relation to that work, including analysis, quotation, press reviews, and 'parody, pastiche and caricature, observing the rules of the genre'.⁵⁶³ In order to benefit from the parody exception, the derivative work should be humorous in nature, though it need not also be critical in nature; should not harm the commercial or moral rights of the author of the original work; and should involve a substantial modification of the original work.⁵⁶⁴ In addition, while the parodic derivative work may be commercialised, it should not compete with the original work in this respect.⁵⁶⁵

US

US copyright law does not at present contain an express statutory exception for parody, though it has been possible for parodies to be accommodated under the defence of fair use. To date, the most authoritative judicial pronouncement on the position of parody under copyright law in the US is the decision of the US Supreme Court in *Campbell v Acuff-Rose Music*.⁵⁶⁶ In this case, the rap group 2 Live Crew composed, recorded, and released commercially a song entitled 'Pretty Woman', which parodied Roy Orbison's

⁵⁶² Dutch Copyright Act, article 18b.

⁵⁶³ French Intellectual Property Code, art L122-5.

⁵⁶⁴ *SNC Prisma Presse et EURL Femme v Charles V et association Apodeline* (Paris Court of First Instance, 13 February 2001); Mendis and Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 18 – 19.

⁵⁶⁵ Mendis and Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*, 19.

⁵⁶⁶ 510 US 569.

rock ballad 'Oh, Pretty Woman'. Subsequently, Acuff-Rose Music, which held the copyright to Orbison's 'Oh, Pretty Woman', brought an action against 2 Live Crew and its recording company. The Supreme Court held that 2 Live Crew's song was capable of falling within the doctrine of fair use. In relation to the first fair use factor, namely the purpose and character of the use, the court noted that 'parody has an obvious claim to transformative value'.⁵⁶⁷ In this regard, it drew a distinction between parody and satire, stating that:⁵⁶⁸

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works ... If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.

In the context of the first fair use factor, the Supreme Court also emphasised that the commercial nature of the parody produced by 2 Live Crew did not necessarily preclude it from falling within the scope of fair use, adding that: 'If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country"'.⁵⁶⁹

In relation to the second fair use factor, namely the nature of the copyrighted work, the Supreme Court observed that it was of little assistance to parody cases, as parodies almost invariably copy publicly known, expressive works. It then moved on to consider the third fair use factor, namely the amount and substantiality of the portion used in relation to the copyrighted work as a whole. While the Supreme Court found that a substantial portion of the original song – in particular, the opening bass riff and the first line of Orbison's lyrics – had been copied, it also took into account the fact that a parody must be able to 'conjure up' at least enough of the original work in order to make the latter recognisable, stating that 'if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart'.⁵⁷⁰ In relation to the fourth fair use factor, namely the effect of the defendant's use upon the potential market for or value of the copyrighted work, the Supreme Court stated that parodies will rarely function as a substitute for the original work, and that as a consequence, harm to the market for the original work may not be so readily inferred. While the court took note of the fact that 'a lethal parody, like a

⁵⁶⁷ 510 US 569, 579.

⁵⁶⁸ 510 US 569, 580 – 581.

⁵⁶⁹ 510 US 569, 584.

⁵⁷⁰ 510 US 569, 588.

scathing theater review', could harm demand for the original work, it emphasised that this was not the type of harm which copyright law is intended to protect the copyright owner from. It also took note of the fact that it was very unlikely for creators of imaginative works to license critical reviews or lampoons of their own creations, thus removing such uses from the potential licensing market. On the facts, it found that there was no evidence to suggest that a potential market for rap versions of 'Oh, Pretty Woman' was harmed in any way by 2 Live Crew's parody.

23 5.1.3 Unresolved issues

Parody vs satire

One question that has arisen in the context of copyright and parodies is whether any copyright exception for parodies should be applicable only to 'true' parodies (sometimes referred to as 'target parodies'), or whether it should extend also to satires (sometimes referred to as 'weapon parodies'). The distinction between the two is as follows: while it is necessary for a 'true' parody to appropriate certain aspects of the original work in order to be able to criticise or comment upon that work, satire is different in that it does not criticise or comment on the original work as such, instead merely using certain aspects of the original work in order to comment on an different matter.⁵⁷¹ A copyright exception that extends only to parodies as such, but not satires, is that in the case of a 'true' parody, the parodist's appropriation of the original work text is only ancillary to the purpose of criticism, and any harm caused or profit made by the parodist often arises from the activity of criticism and not from the appropriation of the original work. On the other hand, the satirist's use of the original work text may be regarded as being essentially an appropriation of the type that intellectual property law is designed to prevent.⁵⁷² As the US Supreme Court noted in *Campbell v Acuff-Rose*, a satirist might draw on the text simply 'to get attention or to avoid the drudgery in working up something fresh'⁵⁷³ and, as noted previously, the distinction between parody and satire was an important aspect of its judgment.⁵⁷⁴ Posner has also suggested that the copyright owner of the original work may be more willing to grant a licence for a satire compared

⁵⁷¹ Brigitte Radigan Gladis, 'District Courts, Fair Use, and Literary Parodies: Parsing the Beautiful, Reciprocal Arrangement' (2011) 41 *Seton Hall Law Review* 1169, 1176.

⁵⁷² Spence, 'Intellectual Property and the Problem of Parody', 612 – 613; Angelopoulos, 'Freedom of Expression and Copyright', 346 – 347; William F Patry and Shira Perlmutter, 'Fair Use Misconstrued: Profit, Presumptions, and Parody' (1992) 11 *Cardozo Arts & Entertainment Law Journal* 667, 714 – 715; Richard A Posner, 'When is Parody Fair Use?' (1992) 21 *Journal of Legal Studies* 67, 71.

⁵⁷³ 114 S Ct 1164, 1172.

⁵⁷⁴ The distinction between parody and satire was a key element in decisions in parody cases subsequent to *Campbell v Acuff-Rose*: see *Leibovitz v Paramount Pictures* 137 F.3d 109, 115 (the Second Circuit finding that the derivative work in the case was a 'true' parody, and adding that '[t]his is not a case like *Steinberg v Columbia Pictures* ... where a copyrighted drawing was appropriated solely to advertise a movie, without any pretense of making a comment upon the original'); *Dr Seuss Enterprises v Penguin Books USA* 109 F.3d 1394 (the Ninth Circuit holding that the derivative work, which it described as 'a rhyming summary of highlights from the OJ Simpson double murder trial' and was written in the style of Dr Seuss's well-known children's book *The Cat in the Hat*, was not a true parody, as the derivative work only mimicked Dr Seuss's characteristic style and had not critical bearing on the substance or style of *The Cat in the Hat*).

to a parody, as, unlike a parody, a satire does not necessarily ridicule or criticise the original work, but merely uses the original work to criticise something else.⁵⁷⁵

In practice, however, it may be difficult to draw a bright line between a 'true' parody and a satire, as a parody may comment on other aspects of society in addition to criticising the original work, and a satire may criticise a different matter while also having the original work as a (secondary) target.⁵⁷⁶ Keller and Tushnet have even suggested that the distinction between the two can be easily manipulated by lawyers, adding that 'before *Campbell*, humorous works often called themselves "satires"; now the preferred word is "parody"'.⁵⁷⁷ In addition, Posner's suggestion that copyright owners may be more willing to grant licences for satires has also been doubted by some commentators, who argue that the copyright owner will be unwilling to grant such a licence where the target of the satire is a set of values or cultural assumptions deeply cherished by the copyright owner or by a significant segment of her audience.⁵⁷⁸ Some commentators have even suggested that there may be a stronger case for permitting satires instead of parodies, as satires serve the goal of promoting criticism of and commentary on 'larger' social issues and values, while parodies merely criticise or comment on a particular work.⁵⁷⁹ Furthermore, a satire based on a particular work may sometimes be the most appropriate way, or sometimes even the only way, of expressing a certain message,⁵⁸⁰ especially where the original work has become a unique shorthand for a particular range of meanings or a social ideology that the satire seeks to target.⁵⁸¹

Over-emphasis on economic considerations

In line with his views concerning the courts' willingness to interpret the fair dealing provisions so as to confer greater protection on freedom of expression, Masiyakurima has expressed doubt as to whether a statutory exception for parody would function as intended, given judicial attitudes.⁵⁸² He notes that: 'Given that courts are reluctant to

⁵⁷⁵ Posner, 'When is Parody Fair Use?', 71.

⁵⁷⁶ Patry and Perlmutter, 'Fair Use Misconstrued', 715; Robert P Merges, 'Notes on Market Failure and the Parody Defense in Copyright' (1993) 21 *AIPLA Quarterly Journal* 305, 311; Sherri L Burr, 'Artistic Parody: A Theoretical Construct' (1996) 14 *Cardozo Arts & Entertainment Law Journal* 65, 71 – 72; Bruce P Keller and Rebecca Tushnet, 'Even More Parodic Than the Real Thing: Parody Lawsuits Revisited' (2004) 94 *Trademark Reports* 979, 979, 985 – 992; Christian Rutz, 'Parody: A Missed Opportunity' [2004] 3 *Intellectual Property Quarterly* 284, 297; Anna Spies, 'Revering Irreverence: A Fair Dealing Exception for Both Weapon and Target Parodies' (2011) 34 *University of New South Wales Law Journal* 1122, 1142 – 1143. See also Roger L Zissu, 'Funny is Fair: The Case for According Increased Value to Humor in Copyright Fair Use Analysis' (1997 – 1998) 55 *Journal of the Copyright Society of the USA* 393, 412 – 414 (describing the Second Circuit's 'belabored' attempt to find a 'true' parody in *Leibovitz v Paramount Pictures*).

⁵⁷⁷ Keller and Tushnet, 'Even More Parodic Than the Real Thing', 992.

⁵⁷⁸ Merges, 'Notes on Market Failure and the Parody Defense in Copyright', 311; Ochoa, 'Dr Seuss, the Juice and Fair Use', 610; Rutz, 'Parody: A Missed Opportunity', 297; Spies, 'Revering Irreverence', 1137 – 1138.

⁵⁷⁹ Merges, 'Notes on Market Failure and the Fair Use Defense in Copyright', 311 – 312; Spies, 'Revering Irreverence', 1136 – 1137.

⁵⁸⁰ Angelopoulos, 'Freedom of Expression and Copyright', 347; Rutz, 'Parody: A Missed Opportunity', 297.

⁵⁸¹ Spies, 'Revering Irreverence', 1139.

⁵⁸² Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 561.

condone misappropriation of copyright works, judges are likely to interpret any new copyright exceptions in a manner that is consistent with protecting the pecuniary advantages springing from copyright ownership'.⁵⁸³

24 5.2 User-generated content

25 5.2.1 User-generated content and freedom of expression

The first two decades of the 21st century have witnessed a huge increase in the amount of expressive content produced by ordinary Internet users. This has been driven by the increase in the number of digital tools available for producing such content; the wide availability of copyright works in a variety of digital formats, which lend themselves much more easily to manipulation than works stored in traditional analogue formats, and thus can more easily be used as the raw materials for producing new creations; and the rapid diffusion of broadband Internet, which facilitates the dissemination of this new content.⁵⁸⁴ These developments are often described as having a decentralising and democratising effect; they shift the power of creating and remaking cultural artifacts and imbuing them with meaning from the hands of the commercial mass media to a broad and diffuse group of user-creators, thereby transforming ordinary passive 'consumers' of creative works into active 'producers' and increasing their participation in the production of culture.⁵⁸⁵ They have also resulted in the creation of a medium of expression that is relatively free from the constraints of traditional mass media companies, thus counteracting the inordinate amount of control that those companies have over the products of culture and channels of distribution that shape so much of public life.⁵⁸⁶ Some commentators even see these developments as having reversed the domination exercised by mass-market media corporations over the production of culture for much of the 20th century in favour of grassroots creativity.⁵⁸⁷

⁵⁸³ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 561.

⁵⁸⁴ Mary WS Wong, "'Transformative' User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?' (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 1075, 1077 – 1078; Steven Hetcher, 'The Kids Are Alright: Applying a Fault Liability Standard to Amateur Digital Remix' (2010) 62 *Florida Law Review* 1275, 1275.

⁵⁸⁵ Wong, 'Transformative UGC', 1078; Joanna E Collins, 'User-Friendly Licensing for a User-Generated World: The Future of the Video Content Market' (2013) 15 *Vanderbilt Journal of Entertainment & Technology Law* 407, 409 – 410; Patricia Aufderheide and Peter Jaszi, 'Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video' (2010) 6 *ISJLP* 13, 18 – 19; Andrew S Long, 'Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video' (2007) 60 *Oklahoma Law Review* 317, 352; David M Morrison, 'Bridgeport Redux: Digital Sampling and Audience Recoding' (2008) 19 *Fordham Intellectual Property, Media & Entertainment Law Journal* 75, 82; James de los Reyes, 'Examining Copyright Exemptions for Web Mashups in the International Context: Applying American Constitutional Considerations as Guideposts for the TRIPS Three-Step Test' (2011) 38 *Hastings Constitutional Law Quarterly* 473, 484 – 485; Warren B Chik, 'Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content under Copyright Law' (2011) 11 *John Marshall Review of Intellectual Property Law* 240, 244 – 245; Alina Ng, 'When Users Are Authors: Authorship in the Age of Digital Media' (2010) 12 *Vanderbilt Journal of Entertainment & Technology Law* 853, 855; Steven D Jamar, 'Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context' (2010) 19 *Widener Law Journal* 843, 843 – 844.

⁵⁸⁶ Morrison, 'Bridgeport Redux', 115 – 116.

⁵⁸⁷ Patrick McKay, 'Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century' (2011) 24 *Regents University Law Review* 117, 119 – 121; Hetcher, 'The Kids Are Alright', 1276.

Such user-generated content often has significant expressive value: it may be used to parody or satirise popular mass media, celebrities and politicians;⁵⁸⁸ comment on and critique various aspects of political, social and cultural life;⁵⁸⁹ trigger discussion on issues of the day;⁵⁹⁰ and aid in the development of self-expression and self-determination.⁵⁹¹ This expressive value has been highlighted by commentators writing in the context of a wide variety of user-generated content. In discussing user-created online videos that incorporate existing copyright-protected works, Aufderheide and Jaszi emphasise that the creators of these videos are not seeking simply to replicate content supplied to them by the mainstream media; instead, they 'are sampling in order to comment, critique, illustrate, and express. They are salvaging, rescuing, celebrating, heralding, and bonding. They are expressing vital connections both to popular cultural expressions and also to others who share their passions and the meanings that they have created around those expressions'.⁵⁹² They give the example of video mash-ups, many of which feature improbable combinations of existing videos that provide political and social commentary 'that is not only pungent, but funny'.⁵⁹³ In the context of fanvids specifically, Trombley has noted that they often comment on or critique the original source material in some fashion, whether by highlighting and advancing an argument about some aspect of the source material; by parodying the source material; by retelling it in a way that is calculated to appeal to new viewers and inspire them to seek out the original source material; by challenging the assumptions and perspectives present in the original source material; or by using the source material to make a broader cultural commentary.⁵⁹⁴

Some of these arguments are not unique to user-generated content on the Internet. Ashtar explains that (musical) sampling may serve a wide range of purposes, including giving new meaning to an existing work, paying homage to past musicians, evoking a time, person or place, or achieving a certain musical aesthetic.⁵⁹⁵ The use of musical samples, especially in the context of American hip-hop production, may carry a strong political meaning; as Schloss states: '[T]here is clearly a political valence to the act of taking a record that was created according to European musical standards and, through the act of deejaying, physically forcing it to conform to an African American

⁵⁸⁸ Aufderheide and Jaszi, 'Recut, Reframe, Recycle', 24 – 26.

⁵⁸⁹ Aufderheide and Jaszi, 'Recut, Reframe, Recycle', 26 – 29; Lawrence Lessig, 'Free(ing) Culture for Remix' (2004) *Utah Law Review* 961, 965.

⁵⁹⁰ Aufderheide and Jaszi, 'Recut, Reframe, Recycle', 29 – 30.

⁵⁹¹ Caroline Kinsey, 'Smashing the Copyright Act to Make Room for the Mashup Artist: How a Four-Tiered Matrix Better Accommodates Evolving Technology and Needs of the Entertainment Industry' (2013) 35 *Hastings Communications & Entertainment Law Journal* 303, 315.

⁵⁹² Aufderheide and Jaszi, 'Recut, Reframe, Recycle', 24.

⁵⁹³ Aufderheide and Jaszi, 'Recut, Reframe, Recycle', 24.

⁵⁹⁴ Sarah Trombley, 'Visions and Revisions: Fanvids and Fair Use' (2007) 25 *Cardozo Arts & Entertainment Law Journal* 647, 651 – 653.

⁵⁹⁵ Reuven Ashtar, 'Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime' (2009) 19 *Albany Law Journal of Science & Technology* 261, 284.

compositional aesthetic'.⁵⁹⁶ A related point has been made by Tushnet in the context of fanvids: she notes that, historically, much remix has originated disproportionately from disempowered groups, who find the opportunity to 'talk back' to the dominant culture using its own audiovisual forms an attractive one.⁵⁹⁷ The groups include women; gay, lesbian, bisexual, transgender and queer people; as well as racial minorities of all genders and orientations.⁵⁹⁸

A number of US-based commentators have linked various forms of user-generated content directly to the First Amendment. Balkin argues, for instance, that the way in which Internet users interact with content and with each other online requires a reconceptualization of existing free speech theory, and, in particular, requires the focus of free speech theory to be shifted from the promotion of democratic governance to the promotion of a participatory democratic culture.⁵⁹⁹ This model of democratic culture is grounded on four components: (i) the right to publish, distribute to, and reach an audience; (ii) the right to interact with others and exchange ideas with them; (iii) the right to appropriate from cultural materials that lie at hand, to innovate, annotate, combine, and then share the results with others; and (iv) the right to participate in and produce culture.⁶⁰⁰ To make intellectual property consistent with this model of free speech as democratic culture, Balkin argues, there should be a generous and ever-expanding public domain with generous fair use rights, and intellectual property should not be permitted to operate as a chokepoint or bottleneck in the distribution of culture.⁶⁰¹

Lee notes that given the role of the First Amendment in 'preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail',⁶⁰² user-generated content is particularly valuable as it enables ordinary people to participate in the marketplace of ideas, thus increasing not only the creation and dissemination of speech, but also people's education and ability to interact in a global marketplace.⁶⁰³ Writing in the context of video mash-ups, Long explains that many of these contain strong political and social criticism, in addition to giving their creators the opportunity to transform previously existing works, thus contributing to the marketplace of ideas.⁶⁰⁴ He notes, in

⁵⁹⁶ Joseph G Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* (Wesleyan University Press, 2004), 79 – 80; Morrison, 'Bridgeport Redux', 113 – 121, 123 – 125.

⁵⁹⁷ Rebecca Tushnet, 'I Put You There: User-Generated Content and Anticircumvention' (2010) 12 *Vanderbilt Journal of Entertainment & Technology Law* 889, 897 – 899.

⁵⁹⁸ Tushnet, 'I Put You There', 897.

⁵⁹⁹ Balkin, 'Digital Speech and Democratic Culture', 33 – 38.

⁶⁰⁰ Balkin, 'Digital Speech and Democratic Culture', 46.

⁶⁰¹ Balkin, 'Digital Speech and Democratic Culture', 53.

⁶⁰² *Red Lion Broadcasting Co v Federal Communications Commission* 395 US 367.

⁶⁰³ Edward Lee, 'Warming Up to User-Generated Content' (2008) *University of Illinois Law Review* 1459, 1504–1505.

⁶⁰⁴ Long, 'Mashed Up Videos and Broken Down Copyright', 318.

particular, that video mash-ups present an exciting opportunity for creative political discourse, as they allow creators to express their message by combining together text, audio, still images and videos from existing sources, imbuing familiar cultural symbols with new meaning; as a result, mash-ups may constitute expression more powerful than expression created using words alone.⁶⁰⁵ In addition to mash-ups that contain social and political commentary and critique,⁶⁰⁶ Long also suggests mash-ups created primarily for entertainment purposes also be valuable due to their ability to give new meaning to existing materials, though they may lack serious political and social commentary.⁶⁰⁷ Kinsey has also observed that video mash-ups are able to enhance First Amendment values by fostering a safe outlet where members of society may adopt, modify, reject and question copyright-protected works.⁶⁰⁸ Lee, giving the example of user-generated political campaign videos, notes that the ability of citizens to disseminate their views to a national audience during a national election is a concern of greatest importance under the First Amendment.⁶⁰⁹

26 5.2.2 User-generated content and copyright law

Much of the user-generated content that is published online incorporates – or ‘samples’, or ‘remixes’, or ‘mashes-up’ – portions of copyright-protected works in some way, usually without permission from the copyright owner.⁶¹⁰ Such unauthorised use of copyright-protected material may well infringe the copyright owner’s exclusive rights in some way; for this reason, Lessig has gone so far as to describe it as being ‘presumptively illegal under the law as it stands’.⁶¹¹

As noted previously, neither UK nor European copyright law contains any exception that might be construed as permitting user-generated content as such; for this reason, the lawfulness of any user-generated content that incorporates a significant part of a protected work will have to be assessed on the same basis as any other use of a copyright work.

Commentators on the legal issues raised by such user-generated content generally agree that copyright law, as it currently stands, is not capable of adequately accommodating such content, notwithstanding its potentially high expressive value. These

⁶⁰⁵ Long, ‘Mashed Up Videos and Broken Down Copyright’, 350 – 351. See also Lessig, ‘Free(ing) Culture for Remix’, 965.

⁶⁰⁶ Long, ‘Mashed Up Videos and Broken Down Copyright’, 324 – 326.

⁶⁰⁷ Long, ‘Mashed Up Videos and Broken Down Copyright’, 323.

⁶⁰⁸ Kinsey, ‘Smashing the Copyright Act’, 315.

⁶⁰⁹ Lee, ‘Warming Up to UGC’, 1522 – 1526.

⁶¹⁰ See Daniel Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 841, 858 – 859 (describing this as ‘user-derived content’, as opposed to completely original ‘user-authored content’).

⁶¹¹ Lessig, ‘Free(ing) Culture for Remix’, 965. For the argument that Lessig has put his case too high in making such a claim, see Hetcher, ‘The Kids Are Alright’, 1280 – 1283, 1317 – 1323.

commentators, writing predominantly in the US context, have identified several deficiencies in the existing copyright regime which make this the case. These deficiencies include the inability of existing systems of formal licensing to accommodate all or even most such uses of copyright-protected material, case law precluding the use of even very small samples of musical sound recordings, and the uncertainties inherent in the doctrine of fair use making it difficult for ordinary users to distinguish between permissible and non-permissible uses of copyright-protected material. Very little analysis on this issue has been carried out in the context of UK or European copyright law.⁶¹² This may be due to the fact that European copyright law does not, at present, contain a specific exception for derivative user-generated content, nor does it provide for a broad-based copyright exception similar to the fair use doctrine.

Arguments that formal licensing systems are incapable of accommodating most uses of copyright-protected material that are made in the production of user-generated content generally focus on the costs – both financial and temporal – of negotiating a licence, the fee for the licence itself, as well as the inaccessibility of large copyright owners to the average user.⁶¹³ Lee, using the example of fan fiction, points out that the transaction costs of individuals seeking to obtain licences from copyright owners are high, as there is no easy and systematic way of doing so, and noting that it may be a challenge even to receive a response from a prominent copyright owner.⁶¹⁴ He also adds that any licence fee imposed by a copyright owner may well be prohibitive for the individual user: 'Just imagine an elementary school student who desires to write a short story involving Harry Potter asking her parents to borrow \$100 so that she can pay a license fee'.⁶¹⁵

Trombley, writing in the context of fanvids, highlights several factors that would make it difficult – if not impossible – for an average creator of fanvids to negotiate the requisite licences from the copyright owner.⁶¹⁶ First, the fanvidder is a single, usually economically and legally unsophisticated bargainer; this means that she may not have the expertise even to identify the copyright owner or owners of the audiovisual materials she wishes to use. Second, the licence required by the fanvidder is likely to be a complex one, as it would need to be tailored to her particular use, and her requirements might well change as the project progressed. Given the complexity of the licence, the fanvidder might well require professional legal advice; this would raise the transaction costs to a level high enough to make the acquisition of a licence unfeasible from her point of view. In addition, the fanvidder is likely to have very imperfect information as to the market

⁶¹² For one such analysis, see Natali Helberger et al, 'Legal Aspects of UCC' in Florence Le Borgne-Bachschmidt et al, *User-Created-Content: Supporting a Participative Information Society* (iVIR, 2008).

⁶¹³ Robert M Vrana, 'The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music' (2011) 68 *Washington & Lee Law Review* 811, 847 – 850; Trombley, 'Visions and Revisions', 676 – 681; Lee, 'Warming Up to UGC', 1531 – 1533; Emily Harper, 'Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm' (2010) 39 *Hofstra Law Review* 405, 437 – 438; Morrison, 'Bridgeport Redux', 131 – 137; Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 273 – 275.

⁶¹⁴ Lee, 'Warming Up to UGC', 1532.

⁶¹⁵ Lee, 'Warming Up to UGC', 1532.

⁶¹⁶ Trombley, 'Visions and Revisions', 678 – 680.

value of the copyright-protected material that she wishes to use, thus making it possible for the copyright owner to demand fees in excess of the actual market value. From the perspective of the copyright owner, meanwhile, the transactions costs which it will have to bear in multiple individualised negotiations with single users is likely to exceed any profit likely to be realised from a licence fee that has been set at the appropriate rate; should it decide to set it at a higher rate, this might render the fee prohibitively expensive for the average user. Furthermore, copyright owners might be reluctant to deal with individual users for non-economic reasons: they might wish to avoid the appearance of endorsing creative activities by individuals whom they do not fully control, or to prevent the tarnishment or dilution of their carefully-crafted cultural products by user-generated content that takes a completely different artistic direction, or to prevent their sources from being used in political or cultural critiques or being reworked in ways that they find undesirable.

In the context of musical samples, it has been pointed out that the successful acquisition of a licence depends entirely upon the whim of the copyright owner, who is entitled to grant or withhold permission to sample at its complete discretion.⁶¹⁷ Even where a licence is agreed upon by the copyright owner, the licence fee imposed may be prohibitively high,⁶¹⁸ ranging from a flat fee of between USD 100 to USD 10,000 per sample, to royalties based on the success of the new work, to a share of the rights or even full ownership of the rights in the new work.⁶¹⁹ Indeed, the cost of obtaining licences may be prohibitive even for established professional musicians: Gregg Gillis, a musician specialising in musical mash-ups and digital sampling who performs under the name 'Girl Talk', has estimated that it would cost millions of dollars and countless hours of negotiating in order to obtain permission to use all 373 of the musical samples featured in his album *All Day*;⁶²⁰ the musician Beck has observed that 'one weird little horn blare that happens for half of a second one time in a song' may result in the musician 'giv[ing] away [seventy percent] of the song and \$50,000'.⁶²¹ As explained by a lawyer acting for the American rapper Jay-Z:⁶²²

Jay's song '99 Problems' uses two huge samples and has four different credited publishers. That's before you've added anyone else's music to it, which would be yet another publisher or two. Making a mashup with that song means the label issuing the mashup has to convince all the publishers involved to take a reduction in

⁶¹⁷ Vrana, 'The Remix Artist's Catch-22', 847 – 848; Harper, 'Music Mashups', 437.

⁶¹⁸ Vrana, 'The Remix Artist's Catch-22', 847; Morrison, 'Bridgeport Redux', 133 – 134.

⁶¹⁹ Morrison, 'Bridgeport Redux', 133 – 134; Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 273 – 274; Collins, 'User-Friendly Licensing', 418 – 420.

⁶²⁰ Z Lazar, 'The 373-Hit Wonder' (*The New York Times*, 6 January 2011) <<http://www.nytimes.com/2011/01/09/magazine/09GirlTalk-t.html?pagewanted=1&r=2&>> accessed 3 June 2014. See also Vera Golosker, 'The Transformative Tribute: How Mash-Up Music Constitutes Fair Use of Copyrights' (2012) 34 *Hastings Communications & Entertainment Law Journal* 381, 388; Harper, 'Music Mashups', 412, 437 – 438;

⁶²¹ Ryan Dombal, 'Review: Beck: *Odelay: Deluxe Edition*' (*Pitchfork*, 29 January 2008) <<http://pitchfork.com/reviews/albums/11104-odelay-deluxe-edition/>> accessed 3 June 2014.

⁶²² Sasha Frere-Jones, '1 + 1 + 1 = 1: The New Math of Mashups' (*The New Yorker*, 10 January 2005) <http://www.newyorker.com/archive/2005/01/10/050110crmu_music?currentPage=all> accessed 3 June 2014.

royalty – otherwise, it won't be profitable for the label. The publishers are not going to agree to this if we're not talking about two huge artists. With Jay-Z and Linkin [Park], it's like found money, but less well known artists might not be sexy enough or big enough.

The situation is exacerbated when the users seeking licences are amateur musicians,⁶²³ who may well have difficulty even locating and contacting the copyright owner of the samples they wish to use.⁶²⁴

The need to obtain a licence for most such uses of copyright-protected material would also place a severe restriction on users' exercise of their creativity.⁶²⁵ As noted by Gregg Gillis in the context of sampling, '[i]t's already very difficult for me to put together 40 minutes of music, and if you say, "Okay, you don't have the whole world of music to sample from; you only have these few hundred songs," it would be really frustrating. That's like asking Metallica to write an album but not use bass'.⁶²⁶

User-generated content under US copyright law

Strict US case law on the use of musical samples

In two key US decisions on the use of unauthorised musical samples, the courts appear to have created a bright-line rule that effectively precludes all such sampling, regardless of the quantity or quality of the samples taken. The first of these cases is *Grand Upright Music v Warner Brothers Records*.⁶²⁷ This involved the use by the rapper Biz Markie of three words and a snippet of music from the song 'Alone Again (Naturally)' by the singer-songwriter Gilbert O'Sullivan. Judge Duffy, of the District Court of the Southern District of New York, did not consider whether Markie's use of the sample was potentially non-infringing under the doctrines of *de minimis* and fair use; instead, he merely ruled that, as the plaintiff had established its ownership of the copyright in the song and its master recording, the act of sampling constituted a *prima facie* infringement of that copyright. Throughout the judgment, Markie's actions were characterised as 'stealing' and 'theft'; indeed, Judge Duffy even began his judgment with statement that "'Thou shalt not steal" has been an admonition followed since the dawn of civilization'.⁶²⁸ Markie's argument that sampling was a widespread practice in rap music was dismissed as being 'totally specious'.⁶²⁹

⁶²³ Harper, 'Music Mashups', 438.

⁶²⁴ Collins, 'User-Friendly Licensing', 420.

⁶²⁵ Morrison, 'Bridgeport Redux', 134; Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 274 – 275.

⁶²⁶ Matthew Newton, 'The Inquisition: Girl Talk' (*Spin*, 22 September 2008) <<http://www.spin.com/articles/inquisition-girl-talk/>> accessed 3 June 2014.

⁶²⁷ 780 F.Supp 182.

⁶²⁸ 780 F.Supp 182, 183.

⁶²⁹ 780 F.Supp 182, 185 fn 2.

The second of these cases was *Bridgeport Music v Dimension Films*,⁶³⁰ which involved the use by the hip-hop group N.W.A of a sample taken from a song by Funkadelic. The portion sampled was a two-second sample from the guitar solo, which was lowered in pitch and looped five times when used in N.W.A's own song. The US Court of Appeals for the Sixth Circuit held that the sampling was an infringement of the copyright in the sound recording in which the Funkadelic song was fixed:⁶³¹

...Get a license or do not sample. We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a "riff" from another work in his or her recording, he is free to duplicate the sound of that "riff" in the studio. Second, the market will control the license price and keep it within bounds. The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording. Third, sampling is never accidental. It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before. When you sample a sound recording you know you are taking another's work product.

In doing so, the court also added that the doctrines of *de minimis* and substantial similarity did not enter into the equation where the sampling of a sound recording was concerned. It also noted that 'something approximating a bright-line test' would benefit both the music industry as well as the courts.⁶³²

The courts' restrictive approach towards musical sampling, as exemplified in these two cases, has been criticised on the basis that it effectively precludes musicians from justifying their use of samples in reliance upon the doctrines of *de minimis* and substantial similarity.⁶³³ The Sixth Circuit's suggestion in *Bridgeport Music* that appropriate limits on the amount of the licence fee payable for a sample can be effectively controlled by the market has also been criticised as discounting copyright owners' absolute power to impose licensing conditions.⁶³⁴ In addition to sampling *per se*, it has also been suggested that the approach taken in these two cases would also preclude the creation of mash-ups and remixes, at least to the extent that these involve the use of a portion of a protected sound recording.⁶³⁵

Deficiencies of the fair use doctrine

Under US copyright law, it may be possible, in theory, for many creators of unauthorised remixes, mash-ups and other user-generated content of a similar nature to rely on the doctrine of fair use in order to justify their use of copyright-protected material. Commentators have, however, stated that the flexible and context-specific nature of the fair use doctrine means that it offers users no clear guidance as to the permissibility (or

⁶³⁰ 410 F.3d 792.

⁶³¹ 410 F.3d 792, 801.

⁶³² 410 F.3d 792, 799.

⁶³³ Anna Shapell, "'Give Me a Beat": Mixing and Mashing Copyright Law to Encompass Sample-Based Music' (2012) 12 *High Technology Law* 519, 552.

⁶³⁴ Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 278.

⁶³⁵ Collins, 'User-Friendly Licensing', 413 – 414.

otherwise) of their activities, and is therefore too uncertain to serve as a reliable shield against claims of copyright infringement.⁶³⁶ An average user is unable to determine, for example, the maximum amount which she may appropriate from a copyright work, as well as the elements she may be able to take from it, before she will be deemed an infringer.⁶³⁷ This is especially the case given that the four statutory fair use factors have sometimes been interpreted by the courts in a manner that is not consistent from case to case.⁶³⁸ It is exacerbated by the dearth of copyright decisions dealing with fair use, particularly in the context of cases involving sampling, remixes, mash-ups and similar types of user-generated content, leading to a lack of legal precedent on the issue.⁶³⁹ It has even been suggested that the lack of litigation on fair use may be due partly to copyright owners themselves, who may be so reluctant to risk a judicial finding that certain types of user-generated content may amount to transformative fair uses that they prefer to offer defendants out-of-court settlements in borderline cases.⁶⁴⁰ Furthermore, the fair use doctrine functions as a positive defence which must be asserted against copyright owners; thus, even where the use of certain copyright-protected material is potentially one that is fair, the copyright owner is still entitled to pursue an infringement claim against the user, and it is the user who will have to bear the burden of establishing that the use falls within the scope of fair use, as well as the legal costs of doing so.⁶⁴¹

27 5.2.3 Proposed solutions

A number of commentators have expressed concerns that the deficiencies and ambiguities inherent in existing copyright doctrines, coupled with the risk of legal action, could potentially exert a 'chilling effect' on the production of user-generated content.⁶⁴²

⁶³⁶ Collins, 'User-Friendly Licensing', 417 – 418; Long, 'Mashed Up Videos and Broken Down Copyright', 342 – 343; Daniel Cherry, 'Blanch It, Mix It, Mash It: A Fair Use Framework for the Mashup' (2011) 28 *Thomas M Cooley Law Review* 495, 504 – 505; Kinsey, 'Smashing the Copyright Act', 315; Shapell, 'Give Me a Beat', 558 – 560; Debora Halbert, 'Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights' (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 921, 953 – 954; Jamar, 'Crafting Copyright Law', 870; Lee, 'Warming Up to UGC', 1510; Chik, 'Paying It Forward' 250 .

⁶³⁷ Kinsey, 'Smashing the Copyright Act', 315.

⁶³⁸ Lee, 'Warming Up to UGC', 1510 – 1513; Long, 'Mashed Up Videos and Broken Down Copyright'.

⁶³⁹ See Barton Beebe, 'An Empirical Study of US Copyright Fair Use Opinions, 1978 – 2005' (2008) 156 *Pennsylvania Law Review* 549. See also Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 298 (noting that the sole case to deal with fair dealing in the context of sampling is *Campbell v Acuff-Rose*, which addressed the issue primarily on the basis of parody, making it of limited applicability); Jeffrey H Brown, "'They Don't Make Music the Way They Used To': Legal Implications of "Sampling" in Contemporary Music' (1992) 41 *Copyright Law Symposium* 195, 207; Harper, 'Music Mashups', 439; Lee, 'Warming Up to UGC', 1510; McKay, 'Culture of the Future', 122 (stating that no case regarding non-commercial, fan-made media has ever gone to trial, and predicting it is likely that none ever will because, when faced with the overwhelming legal and financial might of modern media empires, individual fan-work creators will inevitably yield).

⁶⁴⁰ Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 298; Brown, "'They Don't Make Music the Way They Used To'", 207.

⁶⁴¹ Collins, 'User-Friendly Licensing', 417; Jamar, 'Crafting Copyright Law', 870.

⁶⁴² Hetcher, 'The Kids Are Alright', 1277; Khanuengnit Khaosaeng, 'Wands, Sandals and the Wind: Creativity as a Copyright Exception' (2014) 36(4) *European Intellectual Property Review* 238, 238; Kinsey, 'Smashing the Copyright Act' 315; McKay, 'Culture of the Future', 122.

To this end, a number of proposals that would have the effect of making copyright law more capable of accommodating such user-generated content have been put forward. These include appropriate application of existing legal doctrines; the formulation of a new exception or defence directed at permitting the production of user-generated content; licence-based solutions; and solutions oriented towards the individual creator or of the industry.

Use of existing legal mechanisms

It has been suggested that much of the production of user-generated content based on existing copyright-protected source works, such as remixes and works that make use of samples, could be accommodated through an appropriate interpretation and application of existing legal doctrines. In the US, these include the doctrines of *de minimis* and substantial similarity, as well as that of fair use.

The doctrines of *de minimis* and substantial similarity have tended to be invoked in the specific context of musical sampling. Commentators have argued that, in such cases, the strict, bright-line approach taken by the courts in *Grand Upright Music* and *Bridgeport Music*, under which the use of every sample, no matter how small, constitutes an infringement, should be departed from; instead, where the sample taken from the original sound recording is quantitatively and qualitatively *de minimis*, it should be regarded as being non-infringing.⁶⁴³

In relation to the doctrine of fair use, meanwhile, Hetcher has argued that the proper application of each of the four statutory fair use factors would result in most user-generated content being found to be fair use.⁶⁴⁴ In relation to the first factor, namely the purpose and character of the use, he notes that much user-generated content is likely to be transformative in nature, as it contains new forms of expression, meaning and message; furthermore, most of it is non-commercial in nature. In relation to the second factor, namely the nature of the work copied, he points out that the fact that most user-generated content is drawn from source works that have already been published counts in favour of fair use, but concedes that the fact these source works are generally creative rather than informational in nature weighs, in turn, against a finding of fair use. He considers the impact of this second factor to be minimal, however, as courts have typically characterised it as the least important of the fair use factors. As to the third factor, namely the amount and substantiality of the portion used, Hetcher notes that some user-generated content may draw heavily from the source material, while some may take relatively little; all things being equal, the latter category will be more likely to count as fair use compared to the former. Nevertheless, he notes that the courts have become increasingly inclined to assess this third factor in light of the first factor, meaning that the more transformative the use is, the less likely the amount and substantiality of the part actually taken will matter. In relation to the fourth factor, namely the harm that might be caused to the actual and potential market for the original

⁶⁴³ Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 287 – 292; Morrison, 'Bridgeport Redux', 137 – 141.

⁶⁴⁴ Hetcher, 'The Kids Are Alright', 1303 – 1317; Steven Hetcher, 'Using Social Norms to Regulate Fan Fiction and Remix Culture' (2009) 157 *University of Pennsylvania Law Review* 1869, 1900 – 1913.

work due to the unauthorised use, Hetcher points out that the transformative nature of most user-generated content, which makes it dissimilar to the original underlying work, means that it is less likely to harm the market for the original work, particularly when taken together with the fact that most user-generated content is also non-commercial in nature. He also adds that such user-generated content is unlikely to harm the market for any authorised derivative works that are based on the original underlying work, as such user-generated content tends to be idiosyncratic to a particular creator and is not geared towards a commercial market that the copyright owner is reasonably likely to exploit.

Similar arguments have been made in the specific context of fan fiction⁶⁴⁵ and musical mash-ups,⁶⁴⁶ namely that the transformative and non-commercial nature of these works means that it is likely to be considered fair use where the four statutory factors have been correctly applied. It has been argued that the third fair use factor should carry even less weight in the context of musical mash-ups, as mash-ups, to be effective, must appropriate enough of the source material to be able to 'conjure up' the original work, much like parodies.⁶⁴⁷ However, at least one commentator has doubted whether musical mash-ups can be accommodated within a fair use framework that has traditionally favoured parodic and critical uses, pointing out that mash-ups rarely comment, criticise or parody the original songs on which they are based, even though it may add new expression to those original songs.⁶⁴⁸ She also casts doubt on the argument that mash-ups are generally non-commercial in nature, highlighting the prominent mash-up musician Gregg Gillis, who sells his albums online on a 'pay what you want basis', and also derives significant revenues through live performances.⁶⁴⁹ She does concede, however, that such mash-ups do not decrease sales or revenue from the original songs and do not supersede them; on the contrary, mash-ups might spark listeners' desire to hear the original songs again, thus boosting the market for the original songs.⁶⁵⁰

Long, meanwhile, proposes a shift in fair use analysis that would place greater weight on the first fair use factor, in particular the transformative nature of the user-generated work concerned, compared to the other three factors.⁶⁵¹ Under his proposed approach, courts would treat all works that engage in new expressions as transformative, with the exception of those that only transform the original underlying work minimally, such as by changing a few words in a song while retaining its melody and the rest of its lyrics. This would be the case regardless of whether the transformation had been carried out for

⁶⁴⁵ See e.g. Rebecca Tushnet, 'Legal Fictions: Copyright, Fan Fiction, and a New Common Law' (1997) 17 *Loyola of Los Angeles Entertainment Law Journal* 651.

⁶⁴⁶ Aaron Power, '15 Megabytes of Fame: A Fair Use Defense for Mash-Ups as DJ Culture Reaches Its Postmodern Limit' (2007) 35 *Southwestern University Law Review* 577, 593 – 600.

⁶⁴⁷ Power, '15 Megabytes of Fame', 598 – 599.

⁶⁴⁸ Katie Simpson-Jones, 'Unlawful Infringement or Just Creative Expression? Why DJ Girl Talk May Inspire Congress to "Recast, Transform, or Adapt" Copyright' (2010) 43 *John Marshall Law Review* 1067, 1081 – 1085.

⁶⁴⁹ Simpson-Jones, 'Unlawful Infringement or Just Creative Expression', 1083.

⁶⁵⁰ Simpson-Jones, 'Unlawful Infringement or Just Creative Expression', 1084.

⁶⁵¹ Long, 'Mashed Up Videos and Broken Down Copyright', 360 – 365.

the purposes of social criticism commentary, or whether it had been done for less obviously worthy purposes, such as entertainment. Once a user-generated work has been found to be sufficiently transformative, it will be presumed to be fair use, though this presumption can be rebutted by the party claiming infringement.

Halbert has suggested that the application of the doctrine could be clearly expanded beyond the purposes currently stated in the preamble to the fair use provision – namely ‘purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research’ – so as to include remakes, mash-ups, and creative options that transform the work and become creative entities of their own.⁶⁵²

Creation of a new exception

Given the complexities surrounding the appropriate interpretation of fair use, and the uncertainties inherent in the doctrine, a number of commentators have suggested a better way of accommodating non-commercial user-generated content might be to create a new exception under copyright law to permit the production of such content. Lessig has argued, for instance, that all non-commercial transformative works produced by amateurs should be exempted from the scope of copyright regulation.⁶⁵³ In the same vein, Halbert has proposed that the copyright statute be amended so as to permit all non-commercial derivative works.⁶⁵⁴ Katz has also suggested that copyright law should be amended so as to explicitly permit and encourage the repurposing of existing content, allowing for the development of new and beneficial uses for existing works.⁶⁵⁵ Hetcher has suggested, however, that the doctrine of fair use, if interpreted and applied appropriately, would obviate much of the need for a specific exception for non-commercial user-generated content; he also doubts whether such a specific exception would result in the creation of a bright-line rule permitting most types of transformative user-generated works, as the scope of transformative use might be difficult to determine.⁶⁵⁶

A similar proposal has been put forward by Khaosaeng, who has proposed a new ‘creativity’ exception that would render user-generated content non-infringing provided that it fulfils three requirements.⁶⁵⁷ The first point is that the subsequent creator must have incorporated her creativity into the new work (i.e. the user-generated content), which must perform a different function or purpose from the original such that the

⁶⁵² Halbert, ‘Mass Culture’, 958.

⁶⁵³ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Bloomsbury, 2008), 254 – 255. See also Harper, ‘Music Mashups’, 440 – 442; Chik, ‘Paying It Forward’, 255 – 257; Hetcher, ‘Using Social Norms’, 1894.

⁶⁵⁴ Halbert, ‘Mass Culture’, 955 – 959.

⁶⁵⁵ Michael Katz, ‘Recycling Copyright: Survival & Growth in the Remix Age’ (2008) 13 *Intellectual Property Law Bulletin* 21, 53.

⁶⁵⁶ Hetcher, ‘Using Social Norms’, 1303 – 1317.

⁶⁵⁷ Khaosaeng, ‘Wands, Sandals and the Wind’, 245 – 246.

subsequent work will not supersede or supplant the objects of the original work. Second, the subsequent creator must have reasonable degree of necessity to copy the original materials in order to create the new work. Finally, the subsequent work must not compete in the market with the original or cause adverse economic impact on the original work. Once these three requirements have been fulfilled, the user-generated content would be regarded as being non-infringing regardless of whether it is of a commercial nature.⁶⁵⁸ In Khaosaeng's view, this exception should be broad enough to accommodate most instances of fan fiction as well as appropriation art.⁶⁵⁹

In this context, it should be noted that Canada has recently implemented a new statutory copyright exception that would have the effect of permitting most non-commercial user-generated content. The provision in question states:⁶⁶⁰

It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

- (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
- (b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
- (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
- (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

Scassa describes this provision as striking a balance between the creator of the user-generated content and the creator of the source work on which such user-generated content is based, as it ensures that the creator of the source work is the only party entitled to profit economically from their work, while the creator of the user-generated content will be able to disseminate it only non-commercially and only so long as there is no adverse impact on the source work.⁶⁶¹ She also takes note of its potential to accommodate user-generated content that do not fit easily under the existing fair dealing provisions under the Canadian Copyright Act.⁶⁶² She also observes, however,

⁶⁵⁸ Khaosaeng, 'Wands, Sandals and the Wind', 246.

⁶⁵⁹ Khaosaeng, 'Wands, Sandals and the Wind', 246 – 248.

⁶⁶⁰ Canadian Copyright Act, s 29.21(1).

⁶⁶¹ Teresa Scassa, 'Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law' in Michael Geist (ed), *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press, 2013), 435 – 436.

⁶⁶² Scassa, 'Acknowledging Copyright's Illegitimate Offspring', 44 – 446.

that the open-ended nature of the requirement that the user-generated content must not have a substantial adverse effect upon the exploitation of the source work might prove to be problematic in practice, as the creator of the user-generated content would be able to ascertain whether her use of the source work was legitimate only after costly litigation.⁶⁶³ This requirement, she suggests, makes the scope of the exception more uncertain, and might also have the effect of limiting user-generated content that is closer to the more creative and transformative end of the spectrum.⁶⁶⁴

In the UK, the Gowers Review contained a proposal for a new exception that would enable users to produce creative, transformative or derivative works.⁶⁶⁵ It also noted that such an exception was not currently permitted under the Information Society Directive, and recommended that the UK Government should seek that the Information Society Directive be amended in order to permit the implementation of such an exception.⁶⁶⁶ As explained previously, this proposal was not taken up by the subsequent Hargreaves Review, which also rejected the suggestion that a more open-ended US-style fair use exception might be adopted in the UK.⁶⁶⁷ Several commentators have observed, however, that the introduction of a new exception for 'creative, transformative or derivative works' in any of the EU Member States would require a great deal of research and consultation, as its parameters are still ill-defined.⁶⁶⁸ As researchers from the Institute for Information Law at the University of Amsterdam note:⁶⁶⁹

It is uncertain, for example, who should be its beneficiaries (e.g. the individual or also the institutional user?), whether and how these beneficiaries could be legally defined (e.g. how could the distinction between individuals and institutions be made in practice?) and what type of acts it would cover (e.g. would the already frequently occurring acts of incorporating third party music files in amateur videos also be deemed 'transformative?'). Furthermore, it is not quite clear how a new exception for 'creative, transformative, or derivative works' would relate to existing limitations, such as quotations, incidental use, and parodies, which to a certain degree already permit the creation of new or derivative works. Moreover, it should be noted that the European copyright system is unfamiliar with the term 'transformative' use, which is borrowed from the American system. Rules of interpretation would probably be needed. More research and consultations are necessary in order to identify the specific needs of makers of user created content and to investigate whether other solutions would not be more effective to preserve the balance of interests and the integrity of the copyright system.

Licence-based solutions

⁶⁶³ Scassa, *Acknowledging Copyright's Illegitimate Offspring*, 442.

⁶⁶⁴ Scassa, *Acknowledging Copyright's Illegitimate Offspring*, 443.

⁶⁶⁵ Gowers Review, 68.

⁶⁶⁶ Gowers Review, 68. Some commentators have since suggested that such an amendment would be unnecessary, as the Information Society does not purport to harmonise the *adaptation* right, theoretically leaving Member States free to implement exceptions or limitations to the adaptation right so as to permit certain non-commercial transformative uses: Helberger et al, 'Legal Aspects of UCC', 13; Irish Copyright Review Committee, 91. For a contrary view, see Eleonora Rosati, 'Copyright in the EU: In Search of (In)Flexibilities' (2014) 9(7) *Journal of Intellectual Property Law & Practice* 585.

⁶⁶⁷ Hargreaves Review, 5.

⁶⁶⁸ Helberger et al, 'Legal Aspects of UCC', 13.

⁶⁶⁹ Helberger et al, 'Legal Aspects of UCC', 13.

Commentators have also proposed a range of licence-based solutions that have the potential to accommodate user-generated remix. The most popular of these involve the implementation of some form of compulsory licence, but proposals involving blanket licensing as well as the use of Creative Commons licences have also been made.

Compulsory licensing

In the specific context of commercial musical sampling, remixes and mash-ups, commentators have recommended the implementation of a compulsory licensing scheme that would enable the use of existing sound recordings for such purposes, in exchange for a reasonably-priced, royalty-based payment.⁶⁷⁰ This, it has been suggested, would mitigate most of the difficulties associated with the negotiation of voluntary licences from copyright owners, including the payment of a prohibitively expensive, up-front licence fee.⁶⁷¹ Lessig has extended this proposal to all types of user-generated remixes, including those that make use of copyright-protected source material other than sound recordings; he suggests that a compulsory licence permitting the remix of all types of copyright works could be granted in exchange for a fair, royalty-based payment where the remix is commercial in nature, or for a relatively low flat fee where the remix is non-commercial in nature.⁶⁷²

Some commentators have argued, however, that a compulsory licensing system would still not provide creators of user-generated content with the optimum ability to engage in expressive activity, and might even deter them from doing so.⁶⁷³ Tushnet notes that creativity is often spontaneous and unpredictable: 'If people have to pay \$100 before writing 500 words about Harry Potter, they will make other plans. This is especially true for younger (and poorer) writers'.⁶⁷⁴ Long has argued that a compulsory licensing system would increase the costs of producing a mash-up, compared to the current status quo where amateur creators typically do not seek authorisation for producing their mash-ups.⁶⁷⁵ In this context, Simpson-Jones has also commented that it would be inconsistent to expect creators of mash-ups to pay the creators of source works for the right to create mash-ups when they in fact make no money from using the source works.⁶⁷⁶ Long has also suggested that a compulsory licensing system might deter amateur creators

⁶⁷⁰ Vrana, 'The Remix Artist's Catch-22', 850 – 856; Shapell, 'Give Me a Beat', 560 – 564; Ashtar, 'Theft, Transformation, and the Need of the Immaterial', 312 – 314; Brown, '"They Don't Make Music the Way They Used To"', 247 – 248; Harper, 'Music Mashups', 442; Collins, 'User-Friendly Licensing', 436 – 439.

⁶⁷¹ Vrana, 'The Remix Artist's Catch-22', 854 – 856; Shapell, 'Give Me a Beat', 562.

⁶⁷² Lessig, 'Free(ing) Culture for Remix', 973. See also Harper, 'Music Mashups', 442; Collins, 'User-Friendly Licensing', 437 – 438.

⁶⁷³ Long, 'Mashed Up Videos and Broken Down Copyright', 357 – 360; Simpson-Jones, 'Unlawful Infringement or Just Creative Expression', 1085 – 1087; Rebecca Tushnet, 'User-Generated Discontent: Transformation in Practice' (2008) 31 *Columbia Journal of Law & the Arts* 497, 514 – 516.

⁶⁷⁴ Tushnet, 'User-Generated Discontent', 514.

⁶⁷⁵ Long, 'Mashed Up Videos and Broken Down Copyright', 358.

⁶⁷⁶ Simpson-Jones, 'Unlawful Infringement or Just Creative Expression', 1085.

from producing mash-ups by denying them the ability to engage in anonymous speech,⁶⁷⁷ as these amateur creators would be required to disclose their identity in order to obtain a licence.⁶⁷⁸ Simpson-Jones has also questioned the practical effectiveness of a compulsory licensing system, suggesting that typical amateur creators are unlikely to adhere to its requirements, given that they have already shown a certain disregard for copyright law through their current practice of creating mash-ups without first obtaining authorisation from the copyright owners of the source works used.⁶⁷⁹

Blanket licensing

An alternative licence-based proposal that has been put forward by a few other commentators is the implementation of a blanket licensing system, similar to the system currently used for music performance rights.⁶⁸⁰ Under this system, creators who wish to produce remixes, mash-ups and other such content would pay an annual fee for the right to sample copyright-protected material, with the fee being set based on factors such as the length of the sample used and the popularity of the original creator.⁶⁸¹ It has been suggested that a blanket licence would be more appropriate and cost-effective for mash-up creators who incorporate material taken from several different copyright-protected works into a single new work.⁶⁸² However, it has also been acknowledged that such a system would decrease the amount of payments flowing to copyright owners and, more significantly, decrease the amount of control that copyright owners would have over subsequent uses of their works, as they would no longer be entitled to withhold permission from would-be samplers.⁶⁸³

Creative Commons licences

A few commentators have also suggested that the use of Creative Commons licences by copyright owners could help facilitate the use of copyright-protected material for new and creative purposes.⁶⁸⁴ Collins describes the Creative Commons model as accomplishing two things that the traditional 'all rights reserved' copyright model does not: first, it takes into account the social norms of the 'remix generation' by minimising

⁶⁷⁷ The US courts have repeatedly recognised that anonymous speech serves to achieve First Amendment goals: see Section 7.3 below.

⁶⁷⁸ Long, 'Mashed Up Videos and Broken Down Copyright', 358 – 359.

⁶⁷⁹ Simpson-Jones, 1085 – 1086.

⁶⁸⁰ Joshua Crum, 'The Day the (Digital) Music Died: *Bridgeport*, Sampling Infringement, and a Proposed Middle Ground' (2008) *BYU Law Review* 943, 964; David Mongillo, 'The Girl Talk Dilemma: Can Copyright Law Accommodate New Forms of Sample-Based Music?' (2009) 9 *Pittsburgh Journal of Technology Law & Policy* 1, 18 – 22; Harper, 'Music Mashups', 442 – 443.

⁶⁸¹ Mongillo, 'The Girl Talk Dilemma', 18 – 19; Harper, 'Music Mashups', 443.

⁶⁸² Mongillo, 'The Girl Talk Dilemma', 19 – 20; Harper, 'Music Mashups', 443.

⁶⁸³ Mongillo, 'The Girl Talk Dilemma', 19 – 22.

⁶⁸⁴ Harper, 'Music Mashups', 443; Lessig, 'Free(ing) Culture for Remix', 973; Collins, 'User-Friendly Licensing', 431 – 434.

restrictions on creativity and eliminating the need for individually-negotiated contracts; second, it creates a framework that makes it easy for copyright owners to manage their content and to enumerate which rights they wish to reserve.⁶⁸⁵ She also notes, however, that the Creative Commons model decreases the level of control that copyright owners have over their works, as it requires copyright owners to grant permission in advance to all prospective licensees who may wish to use their works.⁶⁸⁶ She also observes that established and well-known professional creators may have little incentive to participate in the Creative Commons model, meaning that access to their works will continue to be restricted.⁶⁸⁷

Lessig has identified one particular type of Creative Commons licence that is especially relevant for remix, namely the 'recombo' or 'derivatives only' licence, which permits the creation of derivative works based on the original work to which the licence attaches, though it does not permit the distribution or copying of the original work itself.⁶⁸⁸ It must be noted, however, that this type of licence has since been 'retired' by Creative Commons, and its use is no longer recommended.

Creator- and industry-based solutions

A different approach advocated by several commentators is for individual creators and creative industries to voluntarily adopt business practices and strategies that welcome sampling, remixing and mash-ups. Golosker gives examples of high-profile musicians who have come to embrace, rather than oppose, transformative remix, such as Jay-Z, who released an *a cappella* version of his *Black Album* in an accessible format that allowed listeners to remix it.⁶⁸⁹ This approach, according to Golosker, is economically beneficial to Jay-Z, as it allows him to attract new audiences, sparking their curiosity in purchasing his works, and also enables him to maintain his celebrity status, which in turn has the effect of boosting the profitability of his endorsement deals and live performances.⁶⁹⁰

In addition to individual creators, several large media companies have also expressed support for user-generated content. Examples cited by Lee include Viacom, Warner Brothers Entertainment, CBS and NBC, whose representatives have emphasised that, while they object to wholesale copying and redistribution of their works, they consider transformative user-generated remixes to be far less problematic.⁶⁹¹ Media firms such as NBC and MTV have been known to enable the production of remixes by their audiences

⁶⁸⁵ Collins, 'User-Friendly Licensing', 433.

⁶⁸⁶ Collins, 'User-Friendly Licensing', 434.

⁶⁸⁷ Collins, 'User-Friendly Licensing', 434.

⁶⁸⁸ Lessig, 'Free(ing) Culture for Remix', 972.

⁶⁸⁹ Golosker, 'The Transformative Tribute', 398.

⁶⁹⁰ Golosker, 'The Transformative Tribute', 398.

⁶⁹¹ Lee, 'Warming Up to UGC', 1515 – 1517.

by providing these audiences with material taken from their copyright-protected works.⁶⁹²

Codes of best practices

A few commentators, most notably Aufderheide and Jaszi, have advocated for the creation of codes of best practices by creators within specific communities, in order to contextualise the fair use doctrine in relation to their activities, to arrive at a shared understanding of its application, and to expand the utility of the doctrine.⁶⁹³ These codes seek to establish standards for what should be deemed fair use of copyright-protected works in the context of certain specific activities. Working together with the relevant creator and user communities in the US, Aufderheide and Jaszi have developed such codes for use by documentary film-makers,⁶⁹⁴ creators of online videos,⁶⁹⁵ and media literacy educators.⁶⁹⁶ Following the introduction of a US-style fair use provision into the Israeli Copyright Act, higher education institutions in Israel have also developed a similar Code of Fair Use Best Practices for the use of copyright-protected materials in higher education institutions.⁶⁹⁷ However, Rothman has cast doubt on the extent to which these codes and statements of best practices can or should guide the decision-making of the courts.⁶⁹⁸ In this regard, she cautions that these codes may not accurately reflect copyright law as it currently stands;⁶⁹⁹ that the standards set out in them might come to be regarded as maximum 'ceiling' limits on the scope of fair use rather than minimum 'floor' standards;⁷⁰⁰ and that they are likely to be one-sided, having been developed without the input of the copyright owners whose works are likely to be used without permission.⁷⁰¹ Rothman has suggested that these codes might become more worthy of judicial consideration if they were to include the views of copyright owners, and were to

⁶⁹² Lee, 'Warming Up to UGC', 1517 – 1518.

⁶⁹³ Aufderheide and Jaszi, 'Recut, Reframe, Recycle'; Anthony Falzone and Jennifer Urban, 'Demystifying Fair Use: The Gift of the Centre for Social Media Statements of Best Practices' (2009) 57 *Journal of the Copyright Society of the USA* 337.

⁶⁹⁴ Center for Social Media, *Documentary Filmmakers' Statement of Best Practices in Fair Use* <www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use> accessed 7 July 2014.

⁶⁹⁵ Center for Social Media, *Code of Best Practices in Fair Use for Online Video* <<http://www.cmsimpact.org/fair-use/best-practices?page=1>> accessed 7 July 2014.

⁶⁹⁶ Center for Social Media, *The Code of Best Practices in Fair Use for Media Literacy Education* <<http://www.cmsimpact.org/fair-use/best-practices/code-best-practices-fair-use-media-literacy-education>> accessed 7 July 2014.

⁶⁹⁷ Amira Dotan et al, 'Fair Use Best Practices for Higher Education Institutions: The Israeli Experience' (2009) 57 *Journal of the Copyright Society of the USA* 447.

⁶⁹⁸ Jennifer E Rothman, 'Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law' (2009) 57 *Journal of the Copyright Society of the USA* 371.

⁶⁹⁹ Rothman, 'Best Intentions', 376 – 378.

⁷⁰⁰ Rothman, 'Best Intentions', 378 – 381.

⁷⁰¹ Rothman, 'Best Intentions', 384.

be framed as taking a more explicitly normative approach rather than purporting merely to document the actual practices of a particular community or sector.⁷⁰²

28 5.3 File-sharing

File-sharing is a popular and effective tool for exchanging information online. One of the most widely used forms of this technology is peer-to-peer file-sharing, which enables the sharing of files by a direct exchange between individual users' computers rather than via a central server. Where this technology is used to share files containing material protected by copyright, this will generally constitute an infringement of copyright both on the part of the person who permits the file to be copied (the uploader) and the person who receives a copy of the file (the downloader). The uploader will have infringed the copyright owner's exclusive right to issue copies of the work to the public and to communicate the work to the public, while the downloader will have infringed the copyright owner's exclusive right to copy the work.

The relationship between file-sharing and freedom of expression has been highlighted by Bonadio⁷⁰³ and Danay.⁷⁰⁴ Bonadio begins by pointing out the non-infringing uses to which file-sharing technology can be put, noting that it is also for exchanging information, ideas and opinions; criticising other people's beliefs; finding works which would otherwise be unavailable; creating personalised compilations; sharing creative remixes, sequels and reinterpretations of existing works; sharing class notes, assignments and other forms of educational content; as a tool for cultural, scientific and technical collaboration; and conveying messages in general.⁷⁰⁵ He also argues that file-sharing is instrumental to the right to freedom of expression on the basis that it reduces reliance on traditional models and channels of media production and distribution, as it allows authors, artists and other creators who are not associated with major media producers to access a larger market of information, ideas and users.⁷⁰⁶

Both Bonadio and Danay also argue that, even where file-sharing is confined to the passive exchange of infringing media files alone, freedom of expression values will often still be implicated. They take the view that file-sharing and other media-sharing platforms that allow users to leave comments regarding the relevant material (such as YouTube) may constitute an important part of users' 'sense of community, identity and therefore self-fulfilment'.⁷⁰⁷ Bonadio further notes that the evolution of musical and other works in general will be stimulated if more people are able to gain exposure to previous works and to appropriate them creatively – activities that are facilitated particularly

⁷⁰² Rothman, 'Best Intentions', 386 – 387.

⁷⁰³ Bonadio, 'File Sharing, Copyright and Freedom of Speech'

⁷⁰⁴ Danay, 'Copyright vs. Free Expression'

⁷⁰⁵ Bonadio, 'File Sharing, Copyright and Freedom of Speech', 622.

⁷⁰⁶ Bonadio, 'File Sharing, Copyright and Freedom of Speech', 622 – 623.

⁷⁰⁷ Bonadio, 'File Sharing, Copyright and Freedom of Speech', 623 .

effectively by file-sharing technology; for this reason, he describes file-sharing as 'another "engine of free speech"'.⁷⁰⁸ Geiger has argued the contrary, however, stating that: '...legitimate uses in relation to effective access to information must be clearly separated from other uses of works that are mainly for consumption purposes. A user who downloads Britney Spears's latest hit from the internet is not seeking to obtain information but simply wants to listen to the music free of charge without having to buy the CD. Assuming the contrary, as has been sometimes maintained, would clearly be an abuse of the right to information and discredit the argument'.⁷⁰⁹

Danay also argues that restrictions on file-sharing may not be in conformity with article 10 of the ECHR, as such restrictions may not fulfil the requirement prescribed by article 10(2) that they be 'necessary in a democratic society'. Proceeding on the basis that the objectives of copyright law are to secure a reward for authors and to promote and encourage creativity, he states his argument as follows: (i) file-sharing does not, empirically, appear to affect music sales;⁷¹⁰ (ii) even if it is assumed that file-sharing does negatively affect music sales, the overall remuneration received by copyright owners would not be diminished;⁷¹¹ and (iii) even if it is assumed that file-sharing does diminish the remuneration received by copyright owners, the availability of alternative systems of compensation (e.g. private copying levies) which do not impose sanctions as severe as those provided in cases of copyright infringement would still guarantee a reward for copyright owners, and this indicates that the statutory means adopted under the CDPA are wider than necessary to accomplish the objective, and are not minimal impairments on the right to freedom of expression as required.⁷¹²

The ECtHR, in its decision in *Neij v Sweden*,⁷¹³ a case involving file-sharing (also discussed in part 3, above), did not go nearly as far as advocated by these two commentators, though it did acknowledge the value of file-sharing technology from the perspective of freedom of expression. In this case, the applicants were involved in the operation of the well-known file-sharing website 'The Pirate Bay' ('TPB'), which enabled individual users to share digital files with one another online. Many of these files contained material protected by copyright law. In January 2008, the applicants and two others were charged with complicity to commit crimes in violation of the Swedish Copyright Act and were subsequently convicted. They were ultimately sentenced to ten and eight months' imprisonment respectively, and were held to owe 5 million euros to the copyright owners of the protected material in compensation. At the ECtHR, the applicants complained that their convictions amounted to a violation of their right to receive and impart information pursuant to article 10(1) of the ECHR.

⁷⁰⁸ Bonadio, 'File Sharing, Copyright and Freedom of Speech', 623.

⁷⁰⁹ Christophe Geiger, 'The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information' [2010] 1 *Intellectual Property Quarterly* 1, 9.

⁷¹⁰ Danay, 'Copyright vs. Free Expression', 53 – 56.

⁷¹¹ Danay, 'Copyright vs. Free Expression', 56 – 60.

⁷¹² Danay, 'Copyright vs. Free Expression', 60 – 61.

⁷¹³ 56 EHRR SE19.

The ECtHR held their application to be inadmissible. It accepted that an interference with the applicants' right to freedom of expression under article 10(1) had occurred, as article 10(1) safeguards the right to impart and receive information, including on the Internet, and provides protection against any restrictions on the content of the information as well as the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information. It also held that article 10 guarantees freedom of expression to 'everyone', with no distinction being made as to whether the aim pursued is profit-making or not.

The ECtHR went on to hold, however, that the interference was justified by the three conditions set out in article 10(2). Specifically, it was 'prescribed by law', as their convictions were rooted in the Copyright Act and the Penal Code, and related solely to copyright-protected digital material; it pursued the legitimate aims of protecting the rights of others and preventing crime; and it was also 'necessary in a democratic society'. In relation to the third condition, the ECtHR held that the applicants' interest in exchanging information had to be balanced against the rights of copyright owners to protect and prevent the free dissemination of their copyright-protected material; thus, while the applicants benefited from the right to freedom of expression under article 10(1), the copyright owners benefited from the protection of article 1 of the First Protocol of the ECHR. The ECtHR went on to observe that, in balancing those competing interests, the State has a wide margin of appreciation, the extent of which may vary depending on the type of information in dispute. While information that is important to political expression and debate can expect heightened protection under article 10, the nature of the information in dispute in this case served only to widen the margin of appreciation still further. A final consideration in the balancing of these competing interests was the term of imprisonment and financial liability imposed on the applicants, neither of which was held to be disproportionate on the facts, especially given the applicants' failure to remove the relevant files from TPB when asked to do so. Taking all these facts together, the ECtHR was satisfied that the interference with the applicants' right to freedom of expression was necessary.

One case comment suggests that the decision in *Neij v Sweden*, when considered alongside the decision in *Ashby Donald v France*, demonstrates judicial willingness on the part of the ECtHR to accept that copyright protection amounts to an interference with the right to freedom of expression under article 10.⁷¹⁴ It also notes that the ECtHR's approach in both these cases was deferential, as it did not conduct an extensive exercise of balancing competing interests and weighing rights, but instead accepted that the national courts had carried out their own analysis properly and accepted their findings with little or no contestation, and remarks that whether the same approach will be retained in a more marginal case remains to be seen.⁷¹⁵ Another commentator has suggested that the court, in taking the view that the material distributed on the site

⁷¹⁴ 'Copyright: Freedom of Expression – Copyright Infringement – *Kolmisoppi v Sweden*' [2013] 4 *European Human Rights Law Review* 425, 427.

⁷¹⁵ 'Copyright: Freedom of Expression – Copyright Infringement – *Kolmisoppi v Sweden*', 427.

deserved less protection from article 10's guarantee of freedom of expression, perhaps overlooked the argument that file-sharing fosters access to culture.⁷¹⁶

29 5.4 Internet browsing

The process of browsing the Internet normally involves the creation of temporary copies of the webpages that are displayed on the Internet user's computer screen as well as in the computer's cache memory. Where the webpage concerned contains material that is protected by copyright, this raises the question of whether any temporary copies that are created in this manner amount to infringing reproductions if made without the authorisation of the copyright owner. This question has significant implications from the perspective of freedom of expression, in particular the freedom to receive and impart information and ideas through the Internet; if temporary copies of copyright-protected webpages that are created through the process of browsing do indeed constitute potentially infringing reproductions (and therefore require some form of agreement or licence), this imposes a significant restriction on the ability of ordinary Internet users to access, in a lawful manner, material that is available through the Internet.

In the UK, there has been a considerable amount of discussion concerning the legality of viewing a webpage containing copyright-protected material through a web browser. This was one of the key issues raised in the recent case of *Newspaper Licensing Agency v Meltwater* ('*Meltwater*').⁷¹⁷ The issue has attracted less interest in the US, given the absence of a similarly high-profile case; nevertheless, the question has been addressed by at least one US district court, as will be seen shortly. It is striking, however, that in none of these judicial decisions nor in most of the commentary surrounding the issue has the connection between freedom of expression and the ability to browse the Internet without restriction been made explicitly.

30 5.4.1 The *Meltwater* case in the UK and at the CJEU

The Meltwater companies provided media monitoring services, and the Public Relations Consultants Association ('the PRCA') was an incorporated professional association representing UK public relations providers using the services provided by Meltwater. The Newspaper Licensing Agency ('the NLA'), a company formed to manage the intellectual property rights of UK newspaper publishers by granting licences to reproduce the content of these newspapers, was in a dispute with Meltwater and the PRCA. Using automated software, Meltwater monitored a wide range of websites, including those belonging to newspaper publishers represented by the NLA, to create an index of words appearing on those websites. Meltwater's customers would select particular search terms which were of interest to them, and Meltwater would provide each customer with a monitoring report listing every article containing the designated search terms within a defined period. The monitoring report would be emailed to the customer in question, and the customer would also be able to access it via Meltwater's website. For each result, the

⁷¹⁶ Joseph Jones, 'Internet Pirates Walk the Plank with Article 10 Kept at Bay: *Neij and Sunde Kolmisoppi v Sweden*' (2013) 35(11) *European Intellectual Property Review* 695, 699.

⁷¹⁷ [2010] EWHC 3099 (Ch); [2011] EWCA 890 Civ; [2013] UKSC 18.

monitoring report would present the opening words of the article, the search term together with several words on either side of it, and a hyperlink which enabled the customer to access the article on the relevant source website.

The key issue was whether a customer, in viewing one of Meltwater's monitoring reports via its website, would be making a potentially infringing reproduction of each article to which the monitoring report related, assuming that each extract contained in the monitoring report constituted a substantial part of the article from which it had been taken, thus amounting to a reproduction for which the authorisation of the copyright owner is required. Central to the resolution of this issue was whether the temporary copying exception set out in section 28A of the CDPA applied to the facts of the case. Section 28A provides that:

Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable –

- (a) a transmission of the work in a network between third parties by an intermediary; or
- (b) a lawful use of the work;

and which has no independent economic significance.

Section 28A implements the temporary copying exception set out in article 5(1) of the Information Society Directive, which provides that:

Temporary acts of reproduction ... which are transient or incidental, which are an integral and essential part of a technological process and the sole purpose of which is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right..

In *Infopaq International v Danske Dagblades ('Infopaq I')*,⁷¹⁸ the CJEU interpreted article 5(1) as meaning that an act of reproduction may be exempted from the copyright owner's reproduction right only if it fulfils five conditions, namely: (i) it is temporary; (ii) it is transient or incidental; (iii) it is an integral and essential part of a technological process; (iv) the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject matter; and (v) it has no independent economic significance.⁷¹⁹ The CJEU further held that an act is 'transient' within the meaning of condition (ii) only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.⁷²⁰

⁷¹⁸ Case C-5/08; [2010] FSR 20.

⁷¹⁹ [2010] FSR 20, [54].

⁷²⁰ [2010] FSR 20, [64].

At first instance in *Meltwater*, Proudman J held that the exception set out in section 28A of the CDPA did not apply to customers who accessed their monitoring reports through Meltwater's website. She interpreted the exception as being solely concerned with incidental and intermediate copying, so that any copy made for the purpose of consumption of the work, whether temporary or not, did not fall within the scope of the exception. Thus, a person making a copy of a webpage on his computer would not have a defence under section 28A simply because the copy had been created through browsing; he had to show that it was lawful for him to have made the copy. Proudman J also held that a copy of a webpage made in this manner was not an essential and integral part of a technological process, but was, instead, generated by the user's own volition, and that the storage of that copy and the duration of that storage were matters within the user's control. She also noted that the temporary copies of monitoring reports – which were, themselves, potentially infringing reproductions of the newspaper publishers' articles – created by Meltwater customers who accessed the reports through its website did have independent economic significance, as these copies were the very products for which the customers were paying Meltwater. The judgment of Proudman J was subsequently affirmed by the Court of Appeal.

The specific question of whether temporary copies of webpages created during browsing fell within the scope of section 28A of the CDPA (and hence article 5(1) of the Information Society Directive) was appealed by the PRCA to the Supreme Court.⁷²¹ In contrast to the High Court and Court of Appeal, the Supreme Court took cognisance of the broader implications of the question before it, with Lord Sumption observing that:

The issue has reached this court because it affects the operation of a service which is being made available on a commercial basis. But the same question potentially affects millions of non-commercial users of the internet who may, no doubt unwittingly, be incurring civil liability by viewing copyright material on the internet without the authority of the rights owner, for example because it has been unlawfully uploaded by a third party.⁷²²

Given these far-reaching consequences, the Supreme Court elected to refer the question to the CJEU, noting that:

I recognise the issue has a transnational dimension and that the application of copyright law to internet use has important implications for many millions of people across the EU making use of what has become a basic technical facility. These considerations make it desirable that any decision on the point should be referred to the Court of Justice for a preliminary ruling, so that the critical point may be resolved in a manner which will apply uniformly across the European Union.⁷²³

The Supreme Court did, however, set out its own conclusions on the question. It considered the case law of the CJEU as set out in *Infopaq I*, *FAPL* and *Infopaq International v Danske Dagblades* ('*Infopaq II*'),⁷²⁴ and, based on these cases, gave a detailed opinion as to how the temporary copying exception should apply to incidental copies made in the process of browsing, using the five conditions set out in *Infopaq I*.

⁷²¹ [2013] UKSC 18.

⁷²² [2013] UKSC 18, [4].

⁷²³ [2013] UKSC 18, [38].

⁷²⁴ Case C-302/10.

The Supreme Court took conditions (i) and (ii) together, stating that 'temporary' has the same meaning as 'transient'. It explained, based on *Infopaq I*, that for a copy to be temporary or transient, (i) the storage and deletion of the copyright material should be automatic, as opposed to being dependent on 'discretionary human intervention', and (ii) that the duration of the copy should be limited to what is 'necessary for the completion of the technological processes in question'. These requirements, it held, are fulfilled in the case of browsing, as the storage of the copyright material – namely the creation of copies in the cache or computer screen – is the automatic result of browsing the Internet, and requires no other human intervention than the decision to access the relevant web-page, while the deletion of the material is the equally automatic result of the lapse of time coupled with the continuing use of the browser. The Supreme Court also held that it was irrelevant that an Internet user could adjust his cache settings and leave his computer switched on in order to retain a cached copy, as these do not involve a discretionary decision whether to retain the material in memory or not, but are merely artificial ways of extending the duration of the technological processes associated with Internet browsing.

In relation to condition (iii), the Supreme Court held that the making of copies in a computer's Internet cache and screen in the course of browsing was 'manifestly' an integral and essential part of a technological process, being a basic feature of the design of modern computers. In relation to condition (iv), the Supreme Court noted that it was clear from the recitals to the Information Society Directive, in particular recital 33, that it was intended that the exception contained in article 5(1) should 'include acts which enable browsing as well as acts of caching to take place', and that it therefore followed that 'the recital expressly envisages that the exception will apply to end-user viewing of web-pages'. The Supreme Court also held that the phrase 'lawful use' in section 28A and article 5(1) does not apply only to uses authorised by the copyright owner, as such an interpretation would render the provisions meaningless; rather, following *FAPL* and *Infopaq II*, the relevant legal question is whether such uses are restricted by the applicable legislation, regardless of whether or not they are authorised by the copyright owner. In this context, the Supreme Court was clear that lawful use 'necessarily includes the use of the work by an end-user browsing the Internet'. In relation to condition (v), the Supreme Court also held that it was satisfied, as the temporary copies created by Meltwater customers in the process of browsing had no independent economic value for them beyond the mere ability to read these copies on their screens. Referring to *FAPL*, the Supreme Court noted that 'there is no rational distinction to be made between viewing copyright material on a television screen and viewing the same material on a computer'.

In considering the implications of its conclusion on the application of the temporary copying exception, the Supreme Court made reference to the EU's policy of maintaining a high level of protection for intellectual property, but emphasised that it was necessary to keep this point in proportion. It noted that it is not an infringement, under either English or EU law, for a person to read or view an infringing article in physical form, and that article 5(1) of the Information Society Directive merely treats the viewing of copyright material on the internet in the same way as its viewing in physical form, notwithstanding that the technical processes involved incidentally include the making of

temporary copies within the electronic equipment employed. The Supreme Court also considered the implications of its decision for ordinary Internet users, adding that:

...if it is an infringement merely to view copyright material, without downloading or printing out, then those who browse the internet are likely unintentionally to incur civil liability, at least in principle, by merely coming upon a web-page containing copyright material in the course of browsing. This seems an unacceptable result, which would make infringers of many millions of ordinary users of the internet across the EU who use browsers and search engines for private as well as commercial purposes.⁷²⁵

The Supreme Court's interpretation of conditions (i) to (iii) has since been affirmed by the CJEU.⁷²⁶ As questions concerning the proper interpretation of conditions (iv) and (v) were not referred to the CJEU, it did not have the opportunity to consider the approach taken by the Supreme Court in relation to these two conditions.

31 5.4.2 Internet browsing under US copyright law

In the US, the Utah District Court has on one occasion directly addressed the question of whether Internet browsing can result in copyright infringement. The case in question is *Intellectual Reserve v Utah Lighthouse Ministry*,⁷²⁷ where the defendants placed substantial portions of the plaintiff's copyright-protected work on their webpage. When the plaintiff ordered the defendants to remove its work from their website, the defendants complied; however, the defendants also placed a notice on their website that the plaintiff's work was available online elsewhere, provided the URLs for those other websites, and also posted emails on their website encouraging users to visit those other websites. The plaintiff sued the defendants for contributory infringement. Under the copyright law of the US, liability for contributory infringement exists when 'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another';⁷²⁸ it was therefore necessary for the plaintiff to establish that the conduct encouraged by the defendants could potentially amount to infringement. An issue which arose in this context was whether the Internet users who browsed those other websites on which the plaintiff's work was posted (such posting having been carried out without the plaintiff's authorisation and being, therefore, infringing) were infringing the plaintiff's copyright themselves. The court held that these users were in fact infringing the plaintiff's copyright, as temporary copies of the plaintiff's work were created in the random access memory ('RAM') of these users' computers when the browsed those other websites. It cited the decision of the Ninth Circuit in *MAI Systems v Peak Computer*⁷²⁹ as authority for the proposition that when copyright-protected material is transferred to the RAM of a computer, an act of copying which falls within the scope of the copyright owner's exclusive rights has occurred.

⁷²⁵ [2013] UKSC 18, [36].

⁷²⁶ Case C-360/13 *Public Relations Consultants Association v Newspaper Licensing Agency* (4th Chamber, 5 June 2014).

⁷²⁷ 75 F.Supp.2d 1290 (1999).

⁷²⁸ *Gershwin Publishing v Columbia Artists Management* 443 F.2d 1159, 1162 (1971).

⁷²⁹ 991 F.2d 511, 518 (1993).

The conclusion of the district court in *Intellectual Reserve* is consistent with the conclusion arrived at by the Information Infrastructure Task Force, which was established in 1993 to examine the intellectual property implications of the National Information Infrastructure. In its report, published in 1995, the task force concluded that:

...when a computer user accesses a document resident on another computer, the image on the user's screen exists – under contemporary technology – only by virtue of the copy that is reproduced in the user's computer memory. It has long been clear under U.S. law that the placement of copyrighted material into a computer's memory is a reproduction of that material (because the work in memory then may be, in the law's terms, "perceived, reproduced, or ... communicated ... with the aid of a machine or device").

...

Under current technology, when an end-user's computer is employed as a "dumb" terminal to access a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer. Without such copying into the RAM or buffer of the user's computer, no screen display would be possible.⁷³⁰

The decision in *Intellectual Reserve* has been criticised in a student note written by Hoffmann.⁷³¹ She argues that extending copyright protection to RAM copies would not achieve the primary purpose of copyright law as stated in the US Constitution, as it would not act as an incentive for the creation of new works, and would, moreover, be economically ineffective as the cost of protection would not be offset by its role in promoting new works.⁷³² She also argues that the legislative history of copyright law indicates that RAM copies should not be protected, for two reasons: first, because Congress arguably did not intend to extend the scope of the reproduction right to private, non-commercial reproductions; and second, because the reproduction right has historically been based on preventing infringers from benefitting financially by copying protected works – a consideration which does not apply to RAM copies.⁷³³ In addition, she takes the view that existing defences under copyright law, such as the doctrine of fair use and the doctrine of implied licence, are insufficient to shield ordinary Internet users from liability.⁷³⁴ In relation to fair use, Hoffmann points out that the four factors relevant to its assessment – the nature and purpose of the use, the nature of the protected work, the amount and substantiality of the portion taken from the protected work, and the effect of the use upon the potential market for or value of the protected work – do not fit well with RAM copies of webpages that are made in the course of

⁷³⁰ Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (USPTO, 1995), 65 – 66.

⁷³¹ Gretchen McCord Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing' (2000) 9 *Texas Intellectual Property Law Journal* 97.

⁷³² Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 108 – 111.

⁷³³ Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 112 – 114.

⁷³⁴ Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 114 – 118.

browsing.⁷³⁵ In relation to implied licences, she observes that while it appears reasonable to presume that a person placing a copyright-protected work on a publicly accessible webpage grants Internet users an implied licence to enjoy the work at their convenience, the defence of implied licence would nevertheless fail in a case where the author of a webpage has incorporated infringing materials into the webpage, as the copyright owner of the materials in question cannot be said to have granted a licence, implied or otherwise, for Internet users to view these materials.⁷³⁶ She also states that the uncertain legal status of RAM copies of webpages created during browsing threatens the ability of the general public to make the most out of the opportunities presented by the Internet.⁷³⁷ For these reasons, she proposes that a specific exception for RAM copies of webpages be incorporated into the copyright statute.⁷³⁸

In another student note, written in the specific context of bulletin board system users who browse – without downloading – copyright-protected images that have been uploaded to that system by other users, Myers argues that such browsing should be construed as viewing a display of these images rather than as reproducing them.⁷³⁹ Myers argues that, under the copyright statute, the reproduction right is not triggered until a fixed copy is created, and that a RAM copy of an image created while browsing does not constitute a fixed copy, as it will disappear immediately once the user turns off her computer or terminates her connection with the host computer on which the image is stored.⁷⁴⁰ He also notes that the legislative history of the US Copyright Act strongly suggests that Congress intended the copyright owner's display right to include electronic transmissions of images, quoting the following passage from the House Report:⁷⁴¹

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process" ... In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.⁷⁴²

⁷³⁵ Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 114 – 117.

⁷³⁶ Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 117 – 118.

⁷³⁷ Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 127.

⁷³⁸ Hoffmann, 'Arguments for the Need for Statutory Solutions to the Copyright Problem Presented by RAM Copies Made During Web Browsing', 123.

⁷³⁹ Joseph V Myers III, 'Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from *Frank Music*, *Netcom*, and the White Paper' (1996) 49 *Vanderbilt Law Review* 439, 455 – 462. Under the US Copyright Act, the copyright owner of a work has the exclusive right to display that work publicly.

⁷⁴⁰ Myers, 'Speaking Frankly about Copyright Infringement on Computer Bulletin Boards', 458 – 459.

⁷⁴¹ Myers, 'Speaking Frankly about Copyright Infringement on Computer Bulletin Boards', 459.

⁷⁴² Copyright Acts, HR Rep No 1476, 94th Congress, 2d Session 61 (1976), 63.

Myers cites two other reasons for construing browsing as viewing a display rather than as a reproduction. First, from a functional perspective, the user does not retain a permanent copy of the copyright work viewed once the browsing transaction is complete.⁷⁴³ Second, from the perspective of copyright policy, the law does not hold an individual liable merely for viewing, reading, or listening to an unauthorised copy of a copyright-protected work, provided that the individual has not made an unauthorised permanent reproduction of the work.⁷⁴⁴ Instead, any liability for copyright infringement would be incurred by the party that had placed the work on public display.

32 5.5 **Hyperlinking**

A hyperlink is a link from a hypertext document to another location, either within the same document or a different document, which is activated by clicking on a word, phrase, image, or similar element. The ability to provide a link to any location on the Internet was an essential feature of Tim Berners-Lee's conception of the Internet:⁷⁴⁵

The Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks. The universality is essential to the Web: it loses its power if there are certain types of things to which you can't link.

In the context of copyright law, the question has arisen as to whether the act of providing a hyperlink to a webpage containing copyright-protected content, without the authorisation of the copyright owner, amounts to infringement. Because hyperlinking is an integral feature of the Internet (and courts have recognised this),⁷⁴⁶ the legal regulation of hyperlinking has the potential to interfere with the operation of the Internet and thus with the freedom of expression and information of ordinary Internet users.⁷⁴⁷

33 5.5.1 **Hyperlinking under European human rights instruments and European copyright law**

In Europe, the extent to which hyperlinks are protected by the right to freedom of expression is less clear compared to the position in the US, where First Amendment

⁷⁴³ Myers, 'Speaking Frankly about Copyright Infringement on Computer Bulletin Boards', 461 – 462.

⁷⁴⁴ Myers, 'Speaking Frankly about Copyright Infringement on Computer Bulletin Boards', 462.

⁷⁴⁵ Tim Berners-Lee, 'Realizing The Full Potential of the Web' <<http://www.w3.org/1998/02/Potential.html>> accessed 30 January 2014.

⁷⁴⁶ *Crookes v Newton* [2011] SCC 47, [34] (Canadian Supreme Court stating that '[h]yperlinks ... are an indispensable part of [the Internet's] operation'). See also *ACLU v Reno* 929 F.Supp. 824, 836 – 837 (District Court noting that 'links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique').

⁷⁴⁷ European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*' (15 February 2013), 1.

protection of hyperlinks has been acknowledged by the courts.⁷⁴⁸ The approach taken by the national courts has been far from uniform.

In the Belgian case of *IFPI v Beekers*,⁷⁴⁹ a finding of secondary liability was made against a student who had posted hyperlinks to websites containing infringing copies of sound recordings. The defendant asserted that the prohibition of these hyperlinks constituted a restriction on his freedom of expression. The court rejected this argument, stating that: 'The establishment of a link does not represent an opinion. Moreover, freedom of expression is limited and does not provide an alibi for committing an offense'.⁷⁵⁰ However, in the *AnyDVD* case,⁷⁵¹ the German Federal Supreme Court held that hyperlinking was protected by constitutional provisions guaranteeing freedom of expression and freedom of reporting. This case involved an action brought by several music companies against Heise Verlag, an online publisher specializing in IT and computer news, in relation to reports published on Heise's website which included hyperlinks to a third party website (SlySoft) offering software that enabled users to circumvent copy protection for DVDs. The court held that the provision of the hyperlinks was covered by the constitutional right of freedom of press and freedom of opinion guaranteed by article 5 of the German Basic Law, and further that in cases where the actual text of a report was protected by freedom of expression and freedom of press, the included links would also be afforded equal protection. It emphasised that the hyperlinks were to be regarded as part of Heise's reporting because they were complemented and supported what was reported with additional information, and that the hyperlinks did not merely facilitate access to SlySoft's website. The court also explained that the protection of article 5 encompassed freedom of expression and freedom of media in all its aspects; it was therefore not confined to the content of the report, but also included the form of the report. As such, it was up to Heise itself to decide what form of presentation it chose for its reporting. This decision was subsequently affirmed by the German Constitutional Court,⁷⁵² which agreed with the lower court's balancing of parties' conflicting fundamental rights.

The question of whether the provision of a hyperlink to a copyright work constitutes a (potentially infringing) communication of the work to the public within the meaning of article 3(1) of the Information Society Directive has recently been addressed by the CJEU in *Svensson v Retriever Sverige*.⁷⁵³ In its decision, the CJEU held that the provision of a clickable hyperlink to a protected work should be considered an act of communicating the work to the public within the meaning of article 3(1), as the provision

⁷⁴⁸ Alain Strowel and Nicolas Ide, 'Liability with Regard to Hyperlinks' (2001) 24 *Columbia-VLA Journal of Law & the Arts* 403, 411.

⁷⁴⁹ Antwerp Court of First Instance, 21 December 1999 aff'd First Chamber, Court of Appeal, Antwerp, 26 June 2001. See Strowel and Ide, 'Liability with Regard to Hyperlinks', 416. See Section 5.5.2 below

⁷⁵⁰ Strowel and Ide, 'Liability with Regard to Hyperlinks', 416.

⁷⁵¹ German Federal Supreme Court, 14 October 2010.

⁷⁵² German Constitutional Court, 15 Dec 2011.

⁷⁵³ Case C-466/12 (14th Chamber, 3 February 2014). Related references still pending before the CJEU are *C More Entertainment* C-279/13 and *Bestwater* C-348/13.

defines 'communication to the public' so as to include making the work available to the public in such a way that the public may access the work from a place and at a time individually chosen by them. It added, however, that where the communication relates to works that have already communicated to the public by the copyright owner, it will be covered by the concept of 'communication to the public' within the meaning of article 3(1) only where it is directed at a *new public*, that is, a public that was not taken into account by the copyright owner when it authorised the initial communication. On the facts, the CJEU held that there was no communication of the works to a new public, as the works had initially been made available by their copyright owners on a website freely accessible by all Internet users; accordingly, the provision of hyperlinks to those works was not an act requiring the authorisation of the copyright owner. The CJEU added, however, that this would not be the case where:⁷⁵⁴

...a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.

The decision has been received positively in some quarters as striking a sensible balance that allows Internet users to provide hyperlinks to works that have already been made available by the copyright owner while ensuring that copyright owners remain protected in the digital environment.⁷⁵⁵ On closer inspection, however, a number of difficulties arise. Most significantly, given that the CJEU has held that the mere provision of a hyperlink is capable of constituting an act of communication to the public – an act which falls within the exclusive purview of the copyright owner under copyright law – any person who provides a hyperlink to a website containing infringing content could potentially be held liable for copyright infringement. This could effectively impose on ordinary website operators and Internet users a positive duty to ensure that any webpage that they intend to link to does not contain any infringing material. Given the vital role played by hyperlinks in the operation of the Internet, this could result in a severe encroachment on ordinary Internet users' and website operators' freedom of expression. This much was noted by the European Copyright Society in its opinion on the *Svensson* reference.⁷⁵⁶ For this and other reasons, the European Copyright Society advocated that hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public.⁷⁵⁷ Its primary argument was

⁷⁵⁴ Case C-466/12, [31].

⁷⁵⁵ See e.g. Eleonora Rosati, 'Early thoughts on *Svensson*: communication/making available, "new" public, altering the scope of exclusive rights' (*The IPKat*, 13 February 2014) <<http://ipkitten.blogspot.co.uk/2014/02/early-thoughts-on-svensson.html>> accessed 31 March 2014; Tomasz Targosz, 'The Court of Justice on Links: It Is Allowed to Link. At Least in Principle' (*Kluwer Copyright Blog*, 14 February 2014) <<http://kluwercopyrightblog.com/2014/02/14/the-court-of-justice-on-links-it-is-allowed-to-link-at-least-in-principle/>> accessed 31 March 2014.

⁷⁵⁶ European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*', 1.

⁷⁵⁷ European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*', 2. This view has since been endorsed by other commentators: see Jeremy De Beer and Mira Burri, 'Transatlantic

that hyperlinks do not constitute 'communications' because establishing a hyperlink does not amount to 'transmission' of a work, and such 'transmission' is a prerequisite for 'communication'.⁷⁵⁸ One of the texts cited by the European Copyright Society in support of its argument was a monograph published by Aplin in 2005, the relevant passage of which states that:⁷⁵⁹

It seems misconceived to say that ... [hyperlinks] ... constitute making available ... all they have done is referred other users to where the files may be readily found. In other words, they have provided a form of citation to the copyright works. The ability to cite/hyperlink is a key feature of the way the Internet operates and could also be a fundamental aspect of a user's freedom of expression. Thus, it is submitted that inserting a hyperlink in this manner would not and should not constitute making available to the public.

5.5.2 Hyperlinking under the First Amendment and US copyright law

The US courts have, on a number of occasions, held that hyperlinks are protected as 'speech' under the First Amendment. This appears to have first been acknowledged in the 1997 case of *ACLU v Miller*,⁷⁶⁰ which involved a First Amendment challenge regarding the constitutionality of a state criminal statute prohibiting Internet transmissions which falsely identified the sender or used trade names or logos which falsely stated or implied that the sender was legally authorised to use them. The District Court found that a fair reading of the statute would effectively prohibit the use of trade names and trade marks are hyperlinks:⁷⁶¹

The linking function requires publishers of web pages to include symbols designating other web pages which may be of interest to a user. This means that an entity or person's seal may appear on hundreds or thousands of other web pages, just for the purpose of enabling the linking system. The appearance of the seal, although completely innocuous, would definitely "imply" to many users that permission for use had been obtained.

Accordingly, the District Court held that the statute was unconstitutional pursuant to the First Amendment, as it was not narrowly tailored to achieve fraud prevention (the apparent purpose of the statute), but instead 'sweeps innocent, protected speech within its scope' and 'applies regardless of whether a speaker has any intent to deceive or whether deception actually occurs'.⁷⁶² For this reason, it concluded that the statute 'was not drafted with the precision necessary for laws regulating speech'.⁷⁶³

Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada' (2014) 36(2) *European Intellectual Property Review* 95, 104.

⁷⁵⁸ European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*', 2, 8.

⁷⁵⁹ Tanya Aplin, *Copyright Law in the Digital Society* (Hart Publishing, 2005), 151.

⁷⁶⁰ 977 F.Supp. 1228.

⁷⁶¹ 977 F.Supp. 1228, 1233.

⁷⁶² 977 F.Supp. 1228, 1232.

⁷⁶³ 977 F.Supp. 1228, 1233.

Some commentators have described this decision as attaching considerable First Amendment importance to hyperlinking, effectively creating a 'right to link'.⁷⁶⁴ However, it has also been suggested that because commercial speech is afforded significantly less First Amendment protection than non-commercial speech, courts will be unlikely to bar business unfair competition claims or to hold that otherwise improper conduct is privileged under the First Amendment if a linker's website is viewed as commercial competition to the linkee's website, and takes advantage of the information linked to.⁷⁶⁵

The second case to acknowledge the First Amendment value of hyperlinks is *Universal City Studios v Reimerdes*.⁷⁶⁶ In this case, a number of motion picture studios brought an action under the relevant provisions of the DMCA, which prohibit trafficking in technology designed to circumvent technological measures controlling access to a copyright work, to prevent certain website operators from posting a computer program, called DeCSS, that was capable of decrypting digitally encrypted films on DVDs, and from posting hyperlinks to other websites that made DeCSS available. The website operators contended, *inter alia*, that the DMCA, as applied to computer code, was in violation of the First Amendment. One of the issues considered by the District Court was whether an injunction against the posting of hyperlinks to websites making DeCSS available was consistent with the First Amendment. The court held that hyperlinks 'have both expressive and functional elements', and were therefore 'within the area of First Amendment concern'.⁷⁶⁷ However, it also held that given that hyperlinks contained both speech and non-speech elements, the constitutionality of the DMCA as applied to them should be determined by the same standard as that laid down in *United States v O'Brien*⁷⁶⁸ and *Turner Broadcasting v Federal Communications Commission*,⁷⁶⁹ namely that a content-neutral regulation that incidentally affects expression is justified provided that there is a sufficiently important governmental interest in regulating the nonspeech element; that the governmental interest is unrelated to the suppression of free expression; and that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. It concluded that an injunction against posting hyperlinks to websites containing DeCSS fulfilled these requirements, and was therefore constitutional.

Petteys has argued that the mere provision of information (in this case, the hyperlinks) should not fall within the DMCA's prohibition against trafficking in circumvention

⁷⁶⁴ Jeffrey R Kuester and Peter A Nieves, 'Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis' (1998) 38 *IDEA* 243, 270; Rosaleen P Morris, 'Be Careful to Whom You Link: How the Internet Practices of Hyperlinking and Framing Pose New Challenges to Established Trademark and Copyright Law' (1998) 30 *Rutgers Law Journal* 247, 286; Allison Roarty, 'Link Liability: The Argument for Inline Links and Frames as Infringements of the Copyright Display Right' (1999) 68 *Fordham Law Review* 1011, 1016; Mark Sableman, 'Link Law: The Emerging Law of Internet Hyperlinks' (1999) 4 *Communication Law and Policy* 557, 587 – 588.

⁷⁶⁵ Sableman, 'Link Law', 590.

⁷⁶⁶ 111 F.Supp.2d 294.

⁷⁶⁷ 111 F.Supp.2d 294, 339.

⁷⁶⁸ 391 US 367

⁷⁶⁹ 512 US 622.

technology, as the hyperlinks themselves did not 'provide' the DeCSS software itself, but merely created cross-references to websites that did; instead, the more justifiable view is that the provision of such hyperlinks might amount to a material contribution to the trafficking of a circumvention device, similar to contributory copyright infringement.⁷⁷⁰ He also argues that the *Reimerdes* court committed three fundamental errors in suppressing hyperlinks to DeCSS.

The first error was the use of functionality to justify treating linking as a proxy for posting (unwisely suppressing hyperlinks because they are more efficient),⁷⁷¹ including a failure to address the risk to the plaintiffs' interests (existing whether the URL addresses for those sites were communicated via a hyperlink, plain text, or even via word of mouth),⁷⁷² and the court's departure from settled First Amendment law (as the Supreme Court has made clear that the functionality of code or the Internet provides no basis for qualifying First Amendment protection).⁷⁷³

Petteys also argued that the injunction against linking granted in *Reimerdes* restricted the defendants' speech more than was necessary to achieve the interest of protecting the plaintiffs' copyrights.⁷⁷⁴ He highlights the defendants' posting of hyperlinks to websites containing DeCSS as a form of political speech, stating that:⁷⁷⁵

...the injunction deprives the defendants of their preferred method of expression ... The links at issue in the *Reimerdes* case were contained in a page of the defendants' web site entitled "News Archive" This archive can accurately be characterized as symbolic speech advocating defiance of the injunction barring the defendants and others from posting DeCSS. Under a banner declaring, "Stop the MPAA," the defendants stated, "We have to face the possibility that we could be forced into submission. For that reason, it's especially important for as many of you as possible, all throughout the world, take a stand and mirror these files." This page remains in existence today and includes a lengthy list of the URL addresses for sites that purport to offer DeCSS for download in plain, non-hyperlink text. It seems clear that the defendants' use of the hyperlinks, while facilitating the dissemination of DeCSS, was an integral aspect of the defendants' expressive message. In essence, the defendants were expressing the view that DeCSS should not be subject to regulation, and the hyperlinks provided a reference amounting to the effect of "see this web site for additional information, including a copy of DeCSS." Moreover, the injunction entirely prohibits the defendants from linking to several hundred web sites solely on the basis that DeCSS may exist on these sites. This forecloses the defendants from communicating by linking with those sites, regardless of whether the purpose in doing so is to disseminate DeCSS.

Finally, Petteys contended that the governmental interest of protecting against copyright infringement was not served any better by an injunction banning linking than it would be without such an injunction. By the time the case had been decided, DeCSS was widely available on multiple locations on the Internet. Accordingly, any effect the injunction

⁷⁷⁰ David A Petteys, 'The Freedom to Link?: The Digital Millennium Copyright Act Implicates the First Amendment in *Universal City Studios, Inc v Reimerdes*' (2001) 25 *Seattle University Law Review* 287, 327 – 328.

⁷⁷¹ Petteys, 'The Freedom to Link?', 333.

⁷⁷² Petteys, 'The Freedom to Link?', 333.

⁷⁷³ *Reno v ACLU* 521 US 844, 845; Petteys, 'The Freedom to Link?', 334.

⁷⁷⁴ Petteys, 'The Freedom to Link?', 334.

⁷⁷⁵ Petteys, 'The Freedom to Link?', 334 – 335.

would have on minimising its spread would have been so minimal as to be of almost no constitutional significance, and did not justify the substantial burden placed on the defendants' expression.⁷⁷⁶

In relation to the First Amendment value of hyperlinks, it should be noted that Dalal has argued that hyperlinks are not only vehicles that facilitate communication on the Internet, but should be understood as communications in their own right.⁷⁷⁷ Specifically, Dalal contends that hyperlinks can function as a signal of preference or opinion, as a signature on a virtual petition, and as an indication of membership within an Internet-based group.⁷⁷⁸ Dalal also highlights the democratic nature and function of hyperlinks, giving as an example Google's search engine algorithm, determines the relevance of a given webpage based in large part on the frequency of links to that page; this, it is argued, means individual Internet users are able to participate in the determination of the relevance information at a high level by using hyperlinks to push a website and the ideas that it promotes from obscurity to prominence.⁷⁷⁹

While the First Amendment value of hyperlinks was expressly acknowledged in both *ACLU v Miller* and *Universal City Studios v Reimerdes*, the cases themselves did not directly involve any claims that the mere provision of a hyperlink might, in itself, be sufficient to amount to copyright infringement.⁷⁸⁰ This issue was, however, raised in the subsequent case of *Ticketmaster v Tickets.com*,⁷⁸¹ where Ticketmaster asserted claims of copyright infringement against a competitor, Tickets.com, on the basis, *inter alia*, that the latter provided 'deep links' to Ticketmaster's website – namely hyperlinks to the inner pages of Ticketmaster's website, which bypassed its homepage. The District Court held that the hyperlinking did not itself involve copyright infringement, since no copying was involved; instead, all that happened was that the Internet user was transferred to a genuine Ticketmaster webpage. The court further added that 'This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently'.⁷⁸² A similar analogy has been used by others, comparing hyperlinks to footnotes.⁷⁸³ However, it has also been argued, that such analogies may be overly

⁷⁷⁶ Petteys, 'The Freedom to Link?', 335 – 336.

⁷⁷⁷ Anjali Dalal, 'Protecting Hyperlinks and Preserving First Amendment Values on the Internet' (2011) 13 *University of Pennsylvania Journal of Constitutional Law* 1017.

⁷⁷⁸ Dalal, 'Protecting Hyperlinks', 1026 – 1032.

⁷⁷⁹ Dalal, 'Protecting Hyperlinks', 1037.

⁷⁸⁰ While *Universal City Studios v Reimerdes* involved the provision of hyperlinks to websites containing DeCSS, the action arose not because the act of hyperlinking constituted a potential infringement of the work linked to *per se*, but because it potentially amounted to 'trafficking' in technology designed to circumvent technological measures controlling access to a copyright work in breach of the DMCA. cf the facts of *Svensson*, which did involve a potential infringement of rights in the works linked to.

⁷⁸¹ 2000 WL 525390.

⁷⁸² 2000 WL 525390, 2.

⁷⁸³ Daniel L Burk, 'Proprietary Rights in Hypertext Linkages' 1998 2 *Journal of Information, Law and Technology* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/burk/> accessed 31 March 2014; Brian D Wassom, 'Copyright Implications of "Unconventional Linking" on the World Wide Web:

simplistic, as hyperlinks provide greater utility and functionality to their users compared to footnotes. According to these writers, , the court in *Ticketmaster v Tickets.com* failed to properly address the question of whether hyperlinks are capable of violating one or more of a copyright owner's exclusive rights, in treating hyperlinks as no more than footnotes or an index system and thus as presenting no copyright infringement concerns.⁷⁸⁴

At present, the most authoritative statement of the law regarding hyperlinks and copyright is the decision of the Ninth Circuit in *Perfect 10 v Amazon.com*.⁷⁸⁵ Perfect 10 was in the business of marketing and selling images of nude models, to which it held the relevant copyrights. Some of these images had been republished on other locations on the Internet by various website operators without the authorisation of Perfect 10. Some of these webpages were automatically indexed by Google's search engine. When a user of the search engine entered an appropriate search term, Google would return search results including thumbnail versions of these images accompanied by hyperlinks to the websites on which these images had been posted. Perfect 10 brought an action against Google, alleging that the latter's provision of thumbnails and hyperlinks infringed its copyrights in the images. It also brought a similar action against Amazon, which had entered into an agreement with Google that allowed Amazon to provide in-line links to Google's search results to Amazon's own users. In relation to the claim concerning the hyperlinks, the Ninth Circuit affirmed the first instance finding that these did not infringe Perfect 10's rights to control display or distribution of the works, stating that:⁷⁸⁶

Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen. Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues ... and does not constitute direct infringement of the copyright owner's display rights.

First Amendment issues were not expressly raised and addressed in either *Ticketmaster v Tickets.com* or *Perfect 10 v Amazon.com*; however, Dalal described the court in *Ticketmaster v Tickets.com* as engaging in a measured reading of copyright law to ensure that it did not overtake the First Amendment.⁷⁸⁷

Framing, Deep Linking and Inlining', (1998) 49 *Case Western Reserve Law Review* 181, 219; Mark Deffner, 'Unlawful Linking: First Amendment Doctrinal Difficulties in Cyberspace' (2002) 3 *Minnesota Intellectual Property Review* 111, 130 (referring to hyperlinks as 'electrified footnotes').

⁷⁸⁴ Eugene R Quinn, Jr, 'Web Surfing 101: The Evolving Law of Hyperlinking' (2001) 2 *Barry Law Review* 37, 67; Michael Dockins, 'Internet Links: The Good, the Bad, the Tortious, and a Two-Part Test' (2005) 36 *University of Toledo Law Review* 367, 382 – 383.

⁷⁸⁵ 508 F.3d 1146.

⁷⁸⁶ 508 F.3d 1146, 1161.

⁷⁸⁷ Dalal, 'Protecting Hyperlinks, 1060.

34 5.6 Notice and takedown

Notice and takedown procedures require hosting providers to act expeditiously to remove or disable access to infringing content or information in order to benefit from statutory exemptions from any liability they may have incurred in hosting such content. These procedures may result in an unjustified interference with the freedom of expression of ordinary Internet users where the material sought to be removed is in fact non-infringing and/or constitutes speech of significant value.

35 5.6.1 Notice and takedown procedures under European law

The statutory basis for notice and takedown procedures in the EU can be found in article 14(1) of the E-Commerce Directive, which states, in relation to information society services,⁷⁸⁸ that:

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of acts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

This provision applies to liability in general.

Unlike the notice and takedown procedure under US copyright law,⁷⁸⁹ the European framework does not provide any specific requirements as to notice, timing, and so forth. At the time the Directive was adopted, Member States were left free to establish their own notice procedures. As the European Commission notes, however, this has led to the heavy fragmentation of such procedures across the EU, resulting in a significant barrier to the digital single market.⁷⁹⁰

The European Commission carried out a public consultation on this issue in 2010. It is understood that a draft Notice and Action Directive is in existence;⁷⁹¹ however, it has yet to be published. As such, this section will focus on the results of the consultation,

⁷⁸⁸ Information society services' are defined as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services': E-Commerce Directive, art 2(a) read with Technical Standards and Regulations Directive (Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations) as amended by Directive 98/48/EC, art 1(2).

⁷⁸⁹ See Section 5.6.2 below

⁷⁹⁰ Commission, 'Online Services, Including E-Commerce, in the Single Market' (SEC (2011) 1641 final), 43.

⁷⁹¹ See text of open letter from nine MEPs to Commissioner Michel Barnier, urging that the draft text be proposed as a Directive before Parliament: <https://ameliaandersdotter.eu/sites/default/files/letter_commissioner_barnier_notice_and_takedown.pdf> accessed 9 February 2015.

because it is a useful consolidation of the views of various affected parties. In its report, the Commission identified the following issues as resulting in fragmentation: (i) notice requirements; (ii) counter-notifications; (iii) timeframes; (iv) liability for submitting wrongful notices and taking down or blocking lawful content; and (v) the assessment of legality of content by private operators.⁷⁹²

As to (i), the discussion was focused on the level of detail required in the takedown notice. Some copyright owners considered that the notice should not require specific information such as a URL reference or information about why specific content is illegal.⁷⁹³ Many also expressed a wish that the procedure should function as a notice and *stay* down procedure, where a single notice would confer on intermediaries actual knowledge of all potential future infringements that are similar to the notified infringement.⁷⁹⁴ In contrast, intermediaries stressed the importance of a detailed notice in allowing them to assess the alleged illegality of the information, and argued that a notice should contain information which enables the intermediary to identify the complainant, locate the content (e.g. should include URLs) and assess the alleged illegality.⁷⁹⁵

In relation to (ii), a number of respondents, in particular civil society organisations and the majority of intermediaries, took the view that it was important for the right to freedom of expression and information that the uploader of allegedly illegal information should be given the opportunity to submit a counter-notice and defend the legality of the information at issue; accordingly, they favoured the inclusion of a counter-notification procedure.⁷⁹⁶ Copyright owners and ISPs, however, contended that the possibility of a counter-notification would render the procedure more burdensome, slower and less effective, and also suggested that a counter-notification might not be appropriate in the context of manifestly illegal information.⁷⁹⁷

The discussion surrounding (iii) centred upon the requirement, set out in article 14(1)(b) of the Directive, that the intermediary should act 'expeditiously' to remove or disable access to illegal information once they have notice of it.⁷⁹⁸ Intermediaries argued that the term should be left undefined, as this would give them flexibility in dealing with individual cases and to seek legal advice or translation where necessary.⁷⁹⁹ Copyright owners argued, however, that 'expeditious' should be specified so as to correspond to a

⁷⁹² Commission, 'Online Services, Including E-Commerce, in the Single Market', 43 – 46.

⁷⁹³ Commission, 'Online Services, Including E-Commerce, in the Single Market', 43.

⁷⁹⁴ Commission, 'Online Services, Including E-Commerce, in the Single Market', 43.

⁷⁹⁵ Commission, 'Online Services, Including E-Commerce, in the Single Market', 43.

⁷⁹⁶ Commission, 'Online Services, Including E-Commerce, in the Single Market', 44.

⁷⁹⁷ Commission, 'Online Services, Including E-Commerce, in the Single Market', 44.

⁷⁹⁸ Commission, 'Online Services, Including E-Commerce, in the Single Market', 44.

⁷⁹⁹ Commission, 'Online Services, Including E-Commerce, in the Single Market', 45.

short period of time, contending that a long time period would in regular circumstances be unnecessary for assessing the illegality of information.⁸⁰⁰

As to (iv), some respondents to the consultation raised the possibility of imposing liability on complainants for submitting wrongful notices, on the basis that this would decrease the number of such notices.⁸⁰¹ On the issue of whether intermediaries should be liable for removing lawful content, some respondents considered that they should be exempt from liability if they had complied with the notice and takedown procedure in good faith.⁸⁰² In relation to (v), a number of respondents to the consultation expressed concerns that it would not be legitimate or feasible for intermediaries, as private operators, to assess the alleged illegality of content against which a takedown notice is issued.⁸⁰³ Many also considered that the legitimacy of intermediaries deciding on the removal of content without the intervention of the court would depend on the extent to which it was manifestly illegal.⁸⁰⁴

Following this consultation, the Commission launched a consultation on procedures for notifying and acting on illegal online content in June 2012, which concluded in September 2012. At the close of this consultation, the Commission found that while there was general consensus in favour of developing a harmonised EU notice and takedown procedure, there was less agreement as to the precise content of these rules, as ISPs and copyright owners tended to take opposing stances, with consumer and citizen organisations tending to agree with ISPs.⁸⁰⁵ The respondents to this consultation addressed some of the same issues that had been raised in the 2010 consultation, along with a number of new issues. The most relevant of these were: (i) notice requirements; (ii) the interpretation of the requirement that such removal be carried out 'expeditiously'; (iii) the requirement of 'actual knowledge' upon which the intermediary's obligation to remove the allegedly illegal content is premised; (iv) liability for the removal of lawful content; and (v) the possibility of introducing a 'notice and notice' rather than a 'notice and takedown' procedure.

In relation to (i), copyright owners continued to insist that a low level of detail in the notice would suffice, with some claiming that information such as a URL and identification of the illegal content should not be required.⁸⁰⁶ Intermediaries, meanwhile, claimed that a high level of detail should be required, with three suggesting that sufficient information should be defined as the identification of the complainant, the

⁸⁰⁰ Commission, 'Online Services, Including E-Commerce, in the Single Market', 45.

⁸⁰¹ Commission, 'Online Services, Including E-Commerce, in the Single Market', 45.

⁸⁰² Commission, 'Online Services, Including E-Commerce, in the Single Market', 45.

⁸⁰³ Commission, 'Online Services, Including E-Commerce, in the Single Market', 45.

⁸⁰⁴ Commission, 'Online Services, Including E-Commerce, in the Single Market', 46.

⁸⁰⁵ Commission, 'Summary of the Results of the Public Consultation on the Future of Electronic Commerce in the Internal Market and the Implementation of the Directive on Electronic Commerce (2000/31/EC)', 10.

⁸⁰⁶ Commission, 'Summary', 12.

identification and location of content with URL, and a convincing demonstration of illegality.⁸⁰⁷ While copyright owners favoured a 'notice and stay down' procedure, a number of intermediaries considered that this would be incompatible with the prohibition against the imposition of a general obligation to monitor set out in article 15 of the E-Commerce Directive.⁸⁰⁸ In relation to (ii), copyright owners argued that the term 'expeditious' should be more strictly defined as a short time period, though they declined to make specific proposals as to the length of an acceptable time period, while intermediaries and civil rights organisations favoured a flexible interpretation.⁸⁰⁹ The civil rights organisations stressed, in particular, that a stricter definition would incentivise takedown before legality had been fully assessed, which would risk infringing the freedom of expression and conferring inappropriate jurisdictional rights on private actors.⁸¹⁰

As to (iii), many copyright owners argued that 'actual knowledge' should be defined by receipt of notification, and some went so far as to claim that even a general awareness of the possible existence of illegal content should be sufficient to constitute 'actual knowledge'.⁸¹¹ ISPs, meanwhile, opposed a broad definition of 'actual knowledge' on the grounds that it would, in practice, constitute a general monitoring obligation of the type prohibited by article 15 of the E-Commerce Directive.⁸¹² Some intermediaries even suggested that notification in itself should not be sufficient to constitute 'actual knowledge' because notices do not necessarily possess the level of detailed information required to identify and locate an infringement.⁸¹³ A stricter view which was expressed was that only a court judgment or notice from an administrative authority should constitute 'actual knowledge'.⁸¹⁴ In relation to (iv), ISPs raised concerns that they would be liable for acting in good faith on an erroneous notice, and also complained about the lack of a penalty or liability for submitting an erroneous notice.⁸¹⁵ Some intermediaries suggested that there should be no liability for wrongly removing legal content in good faith.⁸¹⁶ In relation to (v), civil liberties organisations and some intermediaries expressed support for a 'notice and notice' procedure, under which the intermediary merely passes on notification of the alleged infringement to the user/uploader without thereby incurring liability; however, this was criticised by other intermediaries on the grounds that it would

⁸⁰⁷ Commission, 'Summary', 12.

⁸⁰⁸ Commission, 'Summary', 12.

⁸⁰⁹ Commission, 'Summary', 11.

⁸¹⁰ Commission, 'Summary', 11.

⁸¹¹ Commission, 'Summary', 10.

⁸¹² Commission, 'Summary', 10.

⁸¹³ Commission, 'Summary', 10.

⁸¹⁴ Commission, 'Summary', 10.

⁸¹⁵ Commission, 'Summary', 12.

⁸¹⁶ Commission, 'Summary', 12.

require identification of the IP or email address of the user, constituting an infringement of data protection rules.⁸¹⁷ In this context, it is worth noting that Canada has recently implemented a mandatory 'notice and notice' procedure, which came into force on 1 February 2015.⁸¹⁸ This formalises a previously voluntary procedure that had previously been adopted by rightholders and ISPs. Under this regime, an ISP who receives a notice of alleged infringement from a rightholder is required to forward the notice 'as soon as feasible' to the subscriber who is associated with the infringing activity.⁸¹⁹ The notice must be in the statutorily prescribed format, and should set out the details of the alleged infringement as well as the rightholder's interest in or right to the work that is said to be infringed.⁸²⁰

36 5.6.2 Notice and takedown procedures under US copyright law

The statutory basis for notice and takedown procedures in the US is section 512(c) of the US Copyright Act, which was introduced by the DMCA. This procedure is specific to copyright and places greater obligations on intermediaries than that in respect of other causes of action (e.g. defamation), where liability is virtually excluded in its entirety.

Section 512(c)(1) exempts a service provider from liability for copyright infringement (so-called 'safe harbour') 'by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider', provided that the service provider: (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing and, upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (ii) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and (iii) upon receiving notification of claimed infringement, responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity. Section 512(c)(3) sets out the requirements which such a notification must comply with; among other things, the notification should include a statement that the complainant has a good faith belief that use of the material in the manner complained of is not authorised by the copyright owner, its agent, or the law.⁸²¹

Once the service provider has removed or disabled access to the material alleged to be infringing, it is required to take reasonable steps to notify the subscriber that it has removed or disabled access to the material.⁸²² If it receives a counter-notification from the subscriber, the service provider must inform the party who provided the initial

⁸¹⁷ Commission, 'Summary', 12 – 13.

⁸¹⁸ Canadian Copyright Act, ss 41.25, 41.26 and 41.27(3).

⁸¹⁹ Canadian Copyright Act, ss 41.25(1) and 41.26(1).

⁸²⁰ Canadian Copyright Act, s 41.25(2).

⁸²¹ US Copyright Act, s 512(c)(3)(A)(v).

⁸²² US Copyright Act, s 512(g)(2)(A).

notification of the counter-notification.⁸²³ Unless the copyright owner takes legal action against the allegedly infringing subscriber within 10 to 14 business days following the receipt of the counter-notification, the service provider is required to replace the removed material and/or to cease disabling access to it.⁸²⁴

The implications of the notice and takedown procedure for free speech were acknowledged by the Ninth Circuit in *Perfect 10 v CCBill*,⁸²⁵ where it explained that: 'Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed'.⁸²⁶

Commentators have highlighted the different ways in which the notice and takedown procedure contained in the US Copyright Act may be used for purposes that have a negative impact on free speech.⁸²⁷ First, notifications may be issued against uses of copyright-protected material that are permitted under the doctrine of fair use.⁸²⁸ Seltzer cites an example from the 2008 Presidential campaign, where videos uploaded to YouTube by the McCain-Palin campaign were removed following notifications by several television networks alleging that the videos in question infringed the television programmes to which they held the copyrights.⁸²⁹ The videos in question were removed notwithstanding the fact that, as Seltzer puts it, 'If there was ever a clear case of non-infringing fair use – speech protected by the First Amendment – this should have been it: a political candidate, seeking to engage in public multimedia debate, used video snippets from the television programs on which the issues were discussed'.⁸³⁰ This is exacerbated by the inherent vagueness and uncertainty of the fair use doctrine itself, as well as the inconsistent application of the doctrine by the courts.⁸³¹ Second, takedown notices may well be issued by entities which are not copyright owners of the material in question against uses that have been authorised by the true copyright owner.⁸³² Third, the notice

⁸²³ US Copyright Act, s 512(g)(2)(B).

⁸²⁴ US Copyright Act, s 512(g)(2)(C).

⁸²⁵ 488 F.3d 1102.

⁸²⁶ 488 F.3d 1102, 1112.

⁸²⁷ See Jennifer M Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act' (2006) 22 *Santa Clara Computer & High Technology Law Journal* 621 (using empirical data to highlight a high incidence of questionable uses of the procedure).

⁸²⁸ Jeffrey Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2009) 10 *Minnesota Journal of Law, Science & Technology* 387, 391.

⁸²⁹ Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24 *Harvard Journal of Law & Technology* 171, 171 – 173.

⁸³⁰ Seltzer, 'Free Speech Unmoored', 173.

⁸³¹ Seltzer, 'Free Speech Unmoored', 178.

⁸³² Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 391.

and takedown procedure may be used to remove material that is not protected by copyright: major retailers such as Wal-Mart and Best Buy have been known to send notifications to comparison shopping websites demanding the removal of price information which, being factual in nature, is highly unlikely to be protected by copyright.⁸³³ Fourth, takedown notifications may demand the removal of material beyond that which is alleged to be infringing, such as where the notice cites a high-level URL or a URL that covers a broad range of material, resulting in the removal of an entire website rather than solely the infringing content, or where the notice requires the removal of a webpage that includes a wide variety of non-infringing content that contains only one instance of infringing content.⁸³⁴

Furthermore, copyright owners have been known to make use of the notice and takedown procedure in order to remove material that is critical of them in some way, even though the use of the material would be very likely to qualify as fair use.⁸³⁵ In one instance, the rapper Akon and his record company Universal Music filed a takedown notice requiring YouTube to remove a video uploaded by blogger Michelle Malkin, on the basis that it contained footage taken from Akon's music videos; Malkin had used excerpts from the music video in question to support her criticism of Akon's misogynistic behaviour.⁸³⁶ The Church of Scientology has also been known to use the notice and takedown procedure to request that Google de-index websites critical of the Church, on the ground that the websites in question contain quotations from Scientology texts to which the Church held the copyrights.⁸³⁷ Perhaps the most egregious example occurred in the case of *Online Policy Group v Diebold*,⁸³⁸ where a manufacturer of electronic voting machines attempted to prevent the circulation of internal emails highlighting flaws in its voting machines by issuing takedown notices alleging that the posting of those emails and the posting of hyperlinks to those emails infringed their copyrights in the emails. The Online Policy Group, a non-profit media service provider, filed a suit for misuse of the notice and takedown procedure, and summary judgment was granted by the District Court in its favour. In the course of its judgment, the court found that the emails had been posted or hyperlinked to for the purpose of informing the public about the problems associated with Diebold's electronic voting machines, which made at least a portion of the postings fair use rather than infringement as alleged by Diebold. It also added that:⁸³⁹

The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA's safe harbor provisions – which were designed to protect [service providers], not

⁸³³ Seltzer, 'Free Speech Unmoored', 206; Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 401 – 403; Urban and Quilter, 'Efficient Process or "Chilling Effects"?', 667 – 672.

⁸³⁴ Urban and Quilter, 'Efficient Process or "Chilling Effects"?', 683.

⁸³⁵ Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 394, 400.

⁸³⁶ Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 400.

⁸³⁷ Seltzer, 'Free Speech Unmoored', 215 – 216.

⁸³⁸ 337 F.Supp.2d 1195.

⁸³⁹ 337 F.Supp.2d 1195, 1204 – 1205.

copyright holders – as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.

It has also been observed that the structure of the notice and takedown provisions incentivises risk-averse behaviour on the part of hosting providers, encouraging them to remove material promptly upon receipt of *any* takedown notice even where such material is not obviously infringing or where the notice itself is deficient in that it does not comply with the statutory requirements set out in section 512(c)(3), rather than to run the risk of losing the exemption from liability provided for by section 512(c)(1).⁸⁴⁰ Because the notice and takedown procedure encourages hosting providers to resolve any doubts about a user's behavior in favor of removing material from the Internet, Yen argues that it runs counter to the First Amendment's mandate that doubts about the legal propriety of silencing speech should be resolved in favor of allowing speech.⁸⁴¹

The notice and takedown procedure imposes a heavy burden on individual speakers, as it compels a speaker to act to reassert the lawfulness of her speech through a counter-notification.⁸⁴² In addition, empirical data collected through the Chilling Effects project reveals a very low incidence of counter-notifications filed in response to takedown notifications,⁸⁴³ casting doubt on the effectiveness of the counter-notification procedure and ordinary Internet users' awareness of it.⁸⁴⁴ Where a counter-notification is filed against the takedown notice, the hosting provider is still required to keep the disputed material off the Internet if it receives notice of a legal action filed by the complainant who issued the initial takedown notice pending the outcome of the litigation; Yen comments that this is tantamount to awarding the complainant a temporary restraining order and preliminary injunction without a court hearing or the posting of a bond.⁸⁴⁵ While individuals who have been injured by unfounded takedown notifications can theoretically seek redress under section 512(f) of the US Copyright Act, which imposes liability for damages on any person who, in the context of the notice and takedown procedure, knowingly materially misrepresents that any material or activity is infringing, the scope of this provision is limited given that it requires the misrepresentation to be 'knowing' and not merely careless.⁸⁴⁶

⁸⁴⁰ Cattleya M Concepcion, 'Beyond the Lens of *Lenz*: Looking to Protect Fair Use During the Safe Harbor Process under the DMCA', (2010) 18 *George Mason Law Review* 219, 236, 240; Seltzer, 'Free Speech Unmoored', 181 – 182; Mark A Lemley, 'Rationalizing Internet Safe Harbors' (2007) 6 *Journal on Telecommunication & High Technology Law* 101, 114 (stating that 'the effect of the notice and takedown system has been to encourage Internet intermediaries to take down any and all content copyright owners complain of, no matter how frivolous the complaint'); Alfred C Yen, 'Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment' (2000) 88 *Georgetown Law Journal* 1833, 1884, 1888.

⁸⁴¹ Yen, 'ISP Liability for Subscriber Copyright Infringement', 1892.

⁸⁴² Seltzer, 'Free Speech Unmoored', 177.

⁸⁴³ Urban and Quilter, 'Efficient Process or "Chilling Effects"?', 679 – 681.

⁸⁴⁴ Lemley, 'Rationalizing Internet Safe Harbors', 115.

⁸⁴⁵ Yen, 'ISP Liability for Subscriber Copyright Infringement', 1889.

⁸⁴⁶ *Rossi v MPAA* 391 F.3d 1000, 1004 – 1005 (noting that the 'good faith' required for a takedown notice is a subjective standard and investigation to verify the accuracy of a claim under the notice and takedown procedure is not required).

To address the flaws of the existing notice and takedown regime, Seltzer has suggested that hosting providers be regulated under the 'common carriage' regime, which requires service providers to carry traffic on non-discriminatory terms, and which would insulate them from most liability for the speech of their users.⁸⁴⁷ Less drastic proposals that have been made include statutory amendments to confine the notice and takedown procedure to the most identifiable and verifiable cases of infringement, such as the entire commercial appropriation of a copyright-protected work;⁸⁴⁸ requiring hosting providers to provide notice to their users before removing their content;⁸⁴⁹ deferring the removal of allegedly infringing content until the uploader has had an opportunity to respond to the copyright owner's notification;⁸⁵⁰ imposing stronger penalties against copyright claimants who attempt to obtain takedowns through misrepresentation, which would have the effect of encouraging them to properly verify and support their claims;⁸⁵¹ subjecting takedown notices to a preliminary examination by the US Copyright Office before they can be forwarded to the relevant hosting provider;⁸⁵² requiring copyright claimants to include in their takedown notices a statement asserting that the allegedly infringing use is not fair use, which would have the effect of encouraging the claimant to undertake an investigation of the use;⁸⁵³ and imposing liabilities on hosting providers that remove legitimately posted content on the basis of a takedown notification that is statutorily deficient.⁸⁵⁴

37 5.7 Website blocking injunctions

An increasingly popular strategy employed by copyright owners (particularly in the EU) in dealing with websites that provide users with links to infringing copies of protected works is to seek injunctions against major ISPs in order to compel them to block their subscribers' access to these websites.⁸⁵⁵ The implications of blocking injunctions, from the perspective of freedom of expression, are threefold. First, such injunctions may

⁸⁴⁷ Seltzer, 'Free Speech Unmoored', 227 – 228. She proposes an exemption from liability similar to that under section 230(c)(1) of the Communications Decency Act, which states that 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. At present, section 230 expressly excludes intellectual property claims from its scope: Communications Decency Act, s 230(e)(2).

⁸⁴⁸ Seltzer, 'Free Speech Unmoored', 230; Yen, 'ISP Liability for Subscriber Copyright Infringement', 1892.

⁸⁴⁹ Urban and Quilter, 'Efficient Process or "Chilling Effects"?', 689.

⁸⁵⁰ Seltzer, 'Free Speech Unmoored', 230; Urban and Quilter, 'Efficient Process or "Chilling Effects"?', 688 – 689;

⁸⁵¹ Seltzer, 'Free Speech Unmoored', 230; Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 406; Urban and Quilter, 'Efficient Process or "Chilling Effects"?', 689 – 690.

⁸⁵² Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 404 – 405.

⁸⁵³ Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure', 410 – 411.

⁸⁵⁴ Concepcion, 'Beyond the Lens of *Lenz*', 242.

⁸⁵⁵ Lukas Feiler, 'Website Blocking Injunctions under EU and US Copyright Law – Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?' (TTLF Working Papers, 2012), 2 – 4.

amount to an interference with the right to freedom of expression of the subscribers whose access to the blocked websites is impeded, in particular their right to receive information and ideas. Second, injunctions of this type may also constitute an interference with the website operators' right to freedom of expression, in particular their right to impart information and ideas.⁸⁵⁶ Finally, there is a possibility that blocking injunctions may amount to an interference with the right to freedom of expression of the ISPs against which they are directed.⁸⁵⁷ In recent years, both the CJEU as well as the UK courts have begun to take human rights concerns (including, to a limited extent, freedom of expression) into account in cases where such injunctions have been sought. The US courts, however, have had fewer opportunities to consider the implications of website blocking injunctions, for reasons that will be explained below.

38 5.7.1 Blocking injunctions under EU copyright law

The legal basis for blocking injunctions under EU law can be found in the E-Commerce Directive, the Information Society Directive, and the Enforcement Directive.⁸⁵⁸ The E-Commerce Directive provides that a provider of a 'mere conduit' service – a term that encompasses ISPs⁸⁵⁹ – is not liable for the information transmitted provided that it: (i) does not initiate the transmission; (ii) does not select the receiver of the transmission; and (iii) does not select or modify the information contained in the transmission.⁸⁶⁰ The E-Commerce Directive also stipulates, however, that this exemption from liability 'shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement'.⁸⁶¹ This includes, in particular, injunctions that order 'the removal of illegal information or *the disabling to access of it*'.⁸⁶² While the E-Commerce Directive does not stipulate the level of specificity required of injunctions issued under this provision, article 15(1) of the Directive does prohibit Member States from imposing 'a general obligation on provider ... to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity'.

⁸⁵⁶ See also *Yildirim v Turkey* App No 3111/10 (EctHR, 18 December 2012) (holding that a court order blocking a website operator from accessing his website because of illegal content on another site hosted by the same hosting service constituted an interference with the operator's right to freedom of expression, in particular his right to receive and impart information and ideas).

⁸⁵⁷ These three sets of implications were acknowledged by the British High Court in *Twentieth Century Fox Film v British Telecommunications* [2011] EWHC 1981 (Ch). See the discussion in Section 5.7.2 below.

⁸⁵⁸ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

⁸⁵⁹ A 'mere conduit' service is defined as an information society service that 'consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network': E-Commerce Directive, art 12(1).

⁸⁶⁰ E-Commerce Directive, art 12(1).

⁸⁶¹ E-Commerce Directive, art 12(3).

⁸⁶² E-Commerce Directive, recital 45 (emphasis added).

Article 8(3) of the subsequent Information Society Directive, meanwhile, requires Member States to ensure that copyright owners 'are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right'. The potential scope of an injunction available under this provision has to be assessed in light of the Enforcement Directive, article 11(3) of which requires Member States to 'ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement'. In *L'Oreal SA v eBay International AG*,⁸⁶³ the CJEU held that injunctions granted under article 11(3) of the Enforcement Directive are not limited to measures which contribute to bringing an end to the infringements complained of, but may also extend to measures which contribute to preventing further infringements of that kind.⁸⁶⁴ Subsequently, in *Scarlet v SABAM*,⁸⁶⁵ it confirmed that article 8(3) of the Information Society Directive and article 11(3) of the Enforcement Directive allows national courts to order ISPs whose services are being used by a third party for infringement 'to take measures aimed not only at bringing to an end infringements already committed against intellectual-property rights using their information-society services, but also at preventing further infringements'.⁸⁶⁶

In *Scarlet v SABAM*, an injunction was sought to compel an ISP to block, or to otherwise make it impossible for its subscribers to send or receive in any way, files containing musical works belonging to the copyright owners which it represented. The CJEU took into account two main factors in determining whether the injunction sought should be granted. First, it considered whether the granting of the injunction would amount to the imposition of a general obligation on the ISP to monitor all the data of each of its subscribers. It took note of the fact that the implementation of the filtering system required by the injunction would require the ISP to identify all the files relating to peer-to-peer traffic within the electronic communications of all its subscribers, to identify within that traffic the files containing works in respect of which the copyright owners claimed to hold rights, to determine which of those files were being shared unlawfully, and to block file-sharing that it considered to be unlawful. The CJEU concluded that the injunction sought would impose on the ISP an obligation to carry out general monitoring, which is prohibited by article 15(1) of the E-Commerce Directive.

Second, the CJEU went on to state that the protection of the copyright owners' right to intellectual property, which is enshrined in article 17(2) of the EUCFR, had to be balanced against other fundamental rights, in particular the ISPs' freedom to conduct business pursuant to article 16 of the EUCFR, and the subscribers' right to protection of personal data and freedom to receive and impart information, which is guaranteed by articles 8 and 11 of the EUCFR respectively. In relation to the respondent's freedom to conduct business, the CJEU held that, as the injunction sought involved monitoring all

⁸⁶³ *L'Oreal v eBay* [2012] EMLR 6.

⁸⁶⁴ [2012] EMLR 6, [144].

⁸⁶⁵ [2012] ECDR 4.

⁸⁶⁶ [2012] ECDR 4, [31].

electronic communications made through the ISP's network, had no limitation in time, was directed at all future infringements, and was intended to protect not only existing but also future copyright works, it would result in a serious infringement of the ISP's freedom to conduct business, as the ISP would be required to install a complicated, costly, and permanent computer system at its own expense. The CJEU also highlighted that this would, additionally, run counter to article 3(1) of the Enforcement Directive, which stipulates that measures necessary for the enforcement of intellectual property rights 'shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays'. In relation to the subscribers' right to protection of personal data and freedom to receive and impart information, the CJEU noted that the implementation of the injunction would involve systematic analysis of all content and the collection and identification of subscribers' IP addresses, and that these IP addresses amounted to protected personal data as they allow the subscribers to be precisely identified. It also held that the injunction could potentially undermine freedom of information, as the filtering system required by the injunction might not distinguish adequately between unlawful content and lawful content, thus potentially resulting in the blocking of lawful communications. It concluded, therefore, that the imposition of the injunction would not strike a fair balance between the copyright owners' right to intellectual property on the one hand and the ISP's freedom to conduct business and its subscribers' right to protection of personal data and freedom of information on the other.

The claimant, material facts and injunction sought in the subsequent *Netlog* decision were, for all practical purposes, identical to those in *Scarlet*; the main difference between the two cases lay in the identity and activities of the defendant, which was the operator of a social networking platform rather than an Internet access provider as in *Scarlet*. The CJEU did not appear to find this distinction a significant one; it reiterated its reasoning in *Scarlet*, using identical words, and arrived at the same conclusions.

The approach of the CJEU in *Scarlet* can be contrasted with the Opinion rendered by Advocate General Cruz Villalón in that case. The Advocate General made no reference to the ISP's freedom to conduct business; instead, his analysis focused upon the subscribers' right to protection of personal data,⁸⁶⁷ their freedom of expression and information,⁸⁶⁸ and – unlike the CJEU – their right to protection of the privacy of their electronic communications.⁸⁶⁹ In the course of this analysis, the Advocate General drew upon the fundamental rights jurisprudence of both the ECtHR and the CJEU itself.⁸⁷⁰ The Advocate General also addressed in detail the question of whether the injunction sought constituted a 'limitation', within the meaning of the EUCFR, on the subscribers'

⁸⁶⁷ *Scarlet*, Opinion of AG Cruz Villalón, [74] – [80].

⁸⁶⁸ *Scarlet*, Opinion of AG Cruz Villalón, [84] – [86].

⁸⁶⁹ *Scarlet*, Opinion of AG Cruz Villalón, [81] – [83].

⁸⁷⁰ See Griffiths, 'Constitutionalising or Harmonising?', 74 (describing the Advocate General's analysis of the existing fundamental rights jurisprudence as being 'much more thorough and precise' compared to that of the CJEU).

fundamental rights.⁸⁷¹ In relation to permitted limitations on fundamental rights, the EUCFR provides that:⁸⁷²

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The Advocate General focused on the specific issue of whether the injunction sought by the claimant was 'provided for by law'. In doing so, he made reference to the jurisprudence of the ECtHR on articles 8(2) and 10(2) of the ECHR, both of which require any interferences or restrictions on the fundamental rights protected by them to be 'prescribed by law'.⁸⁷³

In its most recent decision on website blocking injunctions in *UPC Telekabel Wien v Constantin Film*,⁸⁷⁴ the CJEU provided some additional guidance as to the manner in which the copyright owner's intellectual property rights should be balanced against the freedom of the ISP to conduct business as well as the freedom of information of the ISP's subscribers. In relation to the ISP's freedom to conduct business, the CJEU explained that this included 'the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it'.⁸⁷⁵ On this basis, it held that the blocking injunction sought by the copyright owner in the present case – which was framed in general terms and prohibited the ISP from allowing its subscribers to access a certain website, but without prescribing the specific measures to be taken – did indeed constitute a restriction on the ISP's freedom to conduct business, as it restricted the free use of resources at the ISP's disposal by requiring it to take measures which might represent a significant cost to it, have a considerable impact on the organisation of its activities, or require difficult or complex technical solutions. However, it ultimately concluded that the injunction did not infringe the *very substance* of the freedom of an ISP to conduct a business, because it allowed the ISP to determine the specific measures to be taken in order to achieve the result sought, thus permitting the ISP to ensure that the measures taken were tailored to its available resources and abilities and were compatible with its other obligations and responsibilities, and also because it allowed the ISP to avoid liability by proving that it had taken all *reasonable* measures, thus ensuring that the ISP would not be required to make unreasonable sacrifices.⁸⁷⁶ In relation to the subscribers' freedom of information, meanwhile, the CJEU explained that the measures chosen by the ISP in order to comply

⁸⁷¹ *Scarlet*, Opinion of AG Cruz Villalón, [88] – [114].

⁸⁷² EUCFR, art 52(1).

⁸⁷³ *Scarlet*, Opinion of AG Cruz Villalón, [93].

⁸⁷⁴ Case C-314/12 (27 March 2014).

⁸⁷⁵ Case C-314/12 (27 March 2014), [49].

⁸⁷⁶ Case C-314/12 (27 March 2014), [52] – [53].

with a blocking injunction must also comply with the fundamental right of Internet users to freedom of information, emphasising that:⁸⁷⁷

In this respect, the measures adopted by the internet service provider must be *strictly targeted*, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.

The CJEU ultimately concluded in this case that blocking injunctions could not be considered to be incompatible with the requirement that a fair balance be found between all applicable fundamental rights, provided that (i) they did not unnecessarily deprive Internet users of the possibility of lawfully accessing the information available; and (ii) that they had the effect of preventing unauthorised access to protected material or, at least, of making it difficult to achieve and of seriously discouraging Internet users who were using the services of ISP in question from accessing material that had been made available to them in breach of copyright.

It should be noted that this conclusion of the CJEU runs completely counter to the Opinion given by Advocate General Cruz Villalón in the case. The Advocate General, after referring to the need for a fair balance to be struck between the claimants' right to protection of their intellectual property, the ISP's freedom to conduct business, and its subscribers' freedom of information,⁸⁷⁸ went on to state that '[n]o such balance can be said to exist in the case of an outcome prohibition not specifying the measures to be taken, which is issued against an ISP'.⁸⁷⁹ The Advocate General also observed that such an injunction would place ISPs in a difficult position, for the following reasons:⁸⁸⁰

If, in the interest of its customers' freedom of information, [the ISP] decides on a mild blocking measure, it must fear a coercive penalty in the enforcement process. If it decides on a more severe blocking measure, it must fear a dispute with its customers. The reference to a possible opportunity to defend itself in the enforcement process does not in any way alter the ISP's dilemma. It is true that the originator can rightly refer to the danger of massive infringement of its rights by the website. However, in cases like the present, the ISP has no connection with the operators of the copyright-infringing website and has itself not infringed the copyright. To that extent, the measure to be examined cannot be said to strike a fair balance between the rights of the parties.

39 5.7.2 Blocking injunctions under UK copyright law

The statutory basis for blocking injunctions in the UK can be found in section 97A of the CDPA (implementing article 8(3) of the Information Society Directive), which confers on the High Court the power 'to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright'.⁸⁸¹ The first case in which a blocking injunction was granted pursuant to this

⁸⁷⁷ Case C-314/12 (27 March 2014), [56] (emphasis added).

⁸⁷⁸ *Telekabel*, Opinion of AG Cruz Villalón, [79] – [83].

⁸⁷⁹ *Telekabel*, Opinion of AG Cruz Villalón, [85].

⁸⁸⁰ *Telekabel*, Opinion of AG Cruz Villalón, [89].

⁸⁸¹ The Digital Economy Act 2010, as originally enacted, contained express provisions empowering the Secretary of State to make regulations about 'the granting by a court of a blocking injunction in respect of a

provision is *Twentieth Century Fox Film v British Telecommunications (Newzbin2)*,⁸⁸² where six well-known film production studios sought an injunction against the largest ISP in the UK requiring it to block or at least impede access by its subscribers to the Newzbin2 website. Newzbin2 was a Usenet indexing website, which facilitated access to files containing copyright-protected works that had been uploaded to Usenet. In a previous action, the applicants had successfully sued the operator of Newzbin (the predecessor site to Newzbin2, which functioned in an identical manner) for large-scale infringement of the copyrights in their films and television programmes.

In the course of its judgment, the High Court made reference to the HRA, the ECHR and the First Protocol thereto, the E-Commerce Directive, the Information Society Directive, and the Enforcement Directive. It then addressed a number of issues, including most pertinently: (i) whether the granting of the injunction sought would contravene article 15(1) of the E-Commerce Directive, which prohibits the imposition of a general obligation on information service providers to monitor the information which they transmit; and (ii) whether the injunction sought was proportionate, having regard to both the right to freedom of expression of the respondent's subscribers and the applicants' intellectual property rights.

In relation to the E-Commerce Directive, the High Court held that the injunction sought did not amount to a general obligation to monitor, as it did not require the respondent to engage in active monitoring, but merely required it to block (or at least impede) access to the Newzbin2 website by automated means that did not involve detailed inspection of the data of any of its subscribers. It was therefore specific rather than general in nature. In relation to proportionality, it was accepted by the applicants that the injunction sought engaged the article 10 ECHR rights of the respondent's subscribers, in particular their right to receive information, and accordingly that it was incumbent on the applicants to satisfy the court that the interference with those rights was proportionate, having regard to the applicants' intellectual property rights as guaranteed by article 1 of the First Protocol to the ECHR, which constituted 'rights of others' within the meaning of article 10(2) of the ECHR. The High Court, however, was satisfied that the injunction sought was a proportionate one. It stated that the applicants' property rights under article 1 of the First Protocol clearly outweighed the article 10 rights of the Newzbin2 users, even more clearly outweighed the article 10 rights of the operators of Newzbin2, and also outweighed the respondent's own article 10 rights to the extent that they were engaged. It also pointed out that, unlike the injunction sought in *Scarlet v SABAM* (the reference from which was, at the time, still pending before the CJEU), the applicants were not seeking an order that the respondent 'introduce, for all its customers, *in abstracto* and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a

location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright': Digital Economy Act, s 17(1). Following a review by Ofcom, however, the Government has announced that it will repeal those provisions of the Digital Economy Act. A provision giving effect to the repeal is contained in section 26 of the Deregulation Bill 2014, which is (as of January 2014) still before Parliament.

⁸⁸² [2011] EWHC 1981 (Ch)

musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent'. On the contrary, the injunction sought by the applicants merely required the respondent to implement a technical solution – the 'Cleanfeed' filter, which the respondent had launched in 2004 – which it already employed for a different purpose, namely, to block subscribers' access to websites containing indecent images of children; the respondent had accepted that implementing the solution was technically feasible; the respondent had not suggested that the cost would be excessive; and provision had been made to enable the order to be varied or discharged in the event of a future change in circumstances. It therefore granted the injunction on the terms sought by the applicants.

Newzbin2 was decided before the decision of the CJEU in *Scarlet v SABAM* had been handed down. However, in the subsequent case of *Dramatico Entertainment v British Sky Broadcasting (No 2)*,⁸⁸³ which involved a similar application for a blocking injunction instigated by record companies against the six major retail ISPs in the UK (requiring the latter to take measures to block or at least impede access by their subscribers to The Pirate Bay, a peer-to-peer file-sharing website), the High Court indicated that it did not believe that the judgment of the CJEU in *Scarlet v SABAM* called into question any of its reasoning in *Newzbin2* in relation to proportionality and the striking of a fair balance between the applicants' intellectual property rights and the article 10 ECHR rights of the respondent and the users and operators of the Newzbin2 website.⁸⁸⁴

On the facts of *Dramatico Entertainment*, the High Court concluded that the order sought was proportionate for similar reasons to those given in *Newzbin2*, and added that the present case was an even stronger one for the making of such an order, as the website made it easy for users to search for and download copyright-protected material as well as to upload torrent files related to such material;⁸⁸⁵ gave users access to a large amount of copyright-protected material;⁸⁸⁶ carried click-through advertising;⁸⁸⁷ and took active steps to facilitate and promote the download of files by its users.⁸⁸⁸ The court also found that the operators of the website had the clear intention and purpose of enabling infringement, as evidenced by the website's name and logo; a statement published on the website to the effect that it was founded 'by a Swedish anti copyright organisation'; the recorded statement of one of its operators, during Swedish criminal proceedings, that 'the purpose of the site was pirate copying'; and the fact that the operators of the website had ignored injunctions and other orders made against them, and had circumvented orders against their hosting service providers by moving the website to

⁸⁸³ [2012] EWHC 1152 (Ch).

⁸⁸⁴ [2012] EWHC 1152 (Ch), [8].

⁸⁸⁵ *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268 (Ch), [22] – [25].

⁸⁸⁶ [2012] EWHC 268 (Ch), [27] – [28].

⁸⁸⁷ [2012] EWHC 268 (Ch), [29].

⁸⁸⁸ [2012] EWHC 268 (Ch), [75] – [76].

new providers.⁸⁸⁹ It also took note of the fact that, notwithstanding their ability to do so and judicial findings that had been made against them, the operators of the website had taken no steps to prevent infringement.⁸⁹⁰

A third case involving a similar blocking injunction – this time against three file-sharing websites named KAT, H3T and Fenopy – was *EMI Records Ltd v British Sky Broadcasting Ltd* ('*EMI Records*').⁸⁹¹ In this case, the High Court considered the proportionality of the blocking order sought in light of its cost and efficacy. Noting that the cost of complying with the order was modest,⁸⁹² and that such orders are 'reasonably effective',⁸⁹³ the court concluded that:⁸⁹⁴

... the orders sought are proportionate for similar reasons to those I gave in [*Newzbin 2*]. The orders are necessary and appropriate to protect the intellectual property rights of the claimants (and other copyright owners). Those interests clearly outweigh the Charter article 11 rights of the users of the websites, who can obtain the copyright works from many lawful sources. They even more clearly outweigh the article 11 rights of the operators of the websites, who are profiting from infringement on an industrial scale. They also outweigh the defendants' article 11 rights to the extent that they are engaged. The orders are narrow and targeted ones, and they contain safeguards in the event of any change of circumstances. The cost of implementation to the defendants will be modest and proportionate.

The conclusion reached in *EMI Records* was reiterated *mutatis mutandis* by the High Court in a subsequent case involving a similar blocking injunction, *Football Association Premier League Ltd v British Sky Broadcasting Ltd* ('*FAPL v BskyB*').⁸⁹⁵ The same proportionality assessment was adopted and the same conclusion reached in yet another case dealing with a similar injunction, *Paramount Home Entertainment Ltd v British Sky Broadcasting Ltd* ('*Paramount*').⁸⁹⁶

40 5.7.3 Commentary on UK and EU blocking injunctions

The CJEU's line of decisions in *Scarlet*, *Netlog* and *Telekabel* has been criticised by several commentators for their failure to provide clear guidelines as to how a fair balance between competing fundamental rights should be struck in such cases. Following *Scarlet* and *Netlog*, it seems clear that an injunction requiring the general filtering and monitoring of Internet traffic by ISPs, at the ISPs' own expense, without limitations as to

⁸⁸⁹ [2012] EWHC 268 (Ch), [78].

⁸⁹⁰ [2012] EWHC 268 (Ch), [79] – [80].

⁸⁹¹ [2013] EWHC 379 (Ch).

⁸⁹² *EMI Records*, [102].

⁸⁹³ *EMI Records*, [103] – [106].

⁸⁹⁴ *EMI Records*, [107].

⁸⁹⁵ [2013] EWHC 2058 (Ch), [59].

⁸⁹⁶ [2013] EWHC 3479 (Ch), [42].

time etc, would not be permitted under European legislation.⁸⁹⁷ Beyond this, however, the CJEU gave very little indication in these two cases as to the acceptable parameters of such injunctions, notwithstanding its statements on the importance of striking a fair balance between ISPs, copyright owners and Internet users. As one commentator pointed out, *Scarlet* can be regarded as 'a classic example of the ECJ answering the narrowest question possible, in circumstances where it was asked to appraise the legality of the widest injunction possible'.⁸⁹⁸ The *Scarlet* and *Netlog* decisions leave open the question of whether a filter that is somewhat less burdensome than that sought in those cases, such as a filter whose implementation costs are split equally between the copyright owner and the ISP, or a filter which is to remain in place for only six months, would be permissible.⁸⁹⁹

These uncertainties were left unresolved in the later decision of *Telekabel*. In that case, the CJEU once again emphasised the importance of striking a fair balance between copyright owners and Internet users, but provided little guidance as to how such a balance was to be established. Instead, it appeared to leave this balancing exercise almost wholly in the hands of ISPs, deferring the assessment of its fairness and proportionality to a later appeal procedure before the national courts.⁹⁰⁰ This was so notwithstanding the Advocate General's assertion that '[n]o such balance can be said to exist in the case of an outcome prohibition not specifying the measures to be taken, which is issued against an ISP'.⁹⁰¹ In arriving at this conclusion, the CJEU laid some emphasis on the benefits of such open-textured injunctions to ISPs, observing that these would give each ISP the flexibility to craft technical measures best suited to the resources at its disposal.⁹⁰² As several commentators have pointed out, however, ISPs might well prefer the imposition of a specifically-worded injunction by the courts. This is because, in the absence of such a specific order, ISPs have no real way of determining whether the technical measures adopted by them would be regarded as striking an appropriate balance between copyright owners and Internet users in the eyes of the law.⁹⁰³ This puts ISPs in a difficult position, as noted in the Opinion of the Advocate General.⁹⁰⁴

⁸⁹⁷ Paddy Gardiner and Gillie Abbotts, 'Scarlet Extended Reprieve From Content Filtering' (2012) 23(3) *Entertainment Law Review* 75, 76 – 77; Francesco Rizzuto, 'Injunctions Against Intermediate Online Service Providers' (2012) 18(3) *Computer and Telecommunications Law Review* 69, 72 – 73.

⁸⁹⁸ Darren Meale, 'SABAM v Scarlet: Of Course Blanket Filtering of the Internet is Unlawful, but This Isn't the End of the Story' (2012) 34(7) *European Intellectual Property Review* 429, 431.

⁸⁹⁹ Meale, 'SABAM v Scarlet', 431.

⁹⁰⁰ Christina Angelopoulos, 'CJEU in *UPC Telekabel Wien*: A Totally Legal Court Order ... To Do the Impossible' (*Kluwer Copyright Blog*, 3 April 2014) <<http://kluwercopyrightblog.com/2014/04/03/upc-telekabel-wien/>> accessed 12 September 2014.

⁹⁰¹ *Telekabel*, Opinion of AG Cruz Villalón, [85].

⁹⁰² *Telekabel*, [52].

⁹⁰³ Steven James, 'Digesting *Lush v Amazon* and *UPC Telekabel*: Are We Asking Too Much of Online Intermediaries?' (2014) 25(5) *Entertainment Law Review* 175, 177; Pekka Savola, 'Website Blocking in Copyright Injunctions: A Further Perspective' (*The 1709 Blog*, 28 March 2014) <<http://the1709blog.blogspot.co.uk/2014/03/website-blocking-in-copyright.html>> accessed 12 September 2014; Angelopoulos, 'CJEU in *UPC Telekabel Wien*'. See also Joel Smith, Andrew Moir and Rachel Montagnon,

In addition, the CJEU in *Telekabel* also gave no clear indication as to the level of effectiveness which technical measures implemented by ISPs in response to such injunctions must reach.⁹⁰⁵ In this part of its judgment, the CJEU goes in the course of a single paragraph from requiring that such measures 'must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say that they must have the effect of preventing unauthorised access to the protected subject-matter' to stating that such measures must at least 'make it difficult' for such unauthorised access to take place, before settling on what appeared to be a minimum threshold of 'seriously discouraging' subscribers from engaging in such unauthorised access.⁹⁰⁶ In this context, it should be noted that the Court of Appeal in The Hague recently overturned an injunction ordering the ISPs ZIGGO and XS4ALL to block their subscribers' access to the well-known torrent website The Pirate Bay, on the basis that the blocking had not been shown to reduce unlawful downloading to any significant degree.⁹⁰⁷ Given the ineffectiveness of the blocking, the court held that it did not constitute a proportionate interference with the ISPs' freedom to conduct business.⁹⁰⁸

Some commentators have also highlighted the CJEU's apparent reluctance to engage in a more detailed analysis of subscribers' fundamental rights to privacy, data protection and freedom of expression and information. Commenting on the CJEU's decision in *Scarlet*, Psychogiopoulou notes that the CJEU made no reference to the jurisprudence of the ECtHR, but only considered its own fundamental rights case law to a certain extent, primarily *Promusicae*.⁹⁰⁹ She also observes that the CJEU appeared to prioritise the ISP's freedom to conduct business over its subscribers' right to protection of personal data and freedom of information, as it addressed the former issue in more detailed and definite terms compared to the latter.⁹¹⁰ In her view, the CJEU's emphasis on the freedom to conduct business 'is indicative of the economic, business-driven logic that often characterises the court's jurisprudence'.⁹¹¹

⁹⁰⁵ 'ISPs and Blocking Injunctions: *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12)' (2014) 36(7) *European Intellectual Property Review* 470.

⁹⁰⁴ *Telekabel*, Opinion of AG Cruz Villalón, [89].

⁹⁰⁵ Savola, 'Website Blocking in Copyright Injunctions'; Angelopoulos, 'The CJEU in *UPC Telekabel Wien*'.

⁹⁰⁶ *Telekabel*, [62].

⁹⁰⁷ Angelopoulos, 'The CJEU in *UPC Telekabel Wien*'; Denise van Schie, 'Internet Service Providers XS4ALL and Ziggo Do Not Have to Block Access to The Pirate Bay Website' (2014) 3(1) *IRIS Legal Observations of the European Audiovisual Observatory* 37 <<http://merlin.obs.coe.int/article.php?id=14574>> accessed 12 September 2014; Kevin T O'Sullivan, 'Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Human Rights' (2014) 36(9) *European Intellectual Property Review* 577, 579

⁹⁰⁸ van Schie, 'Internet Service Providers XS4ALL and Ziggo Do Not Have to Block Access to The Pirate Bay Website'.

⁹⁰⁹ Evangelia Psychogiopoulou, 'Copyright Enforcement, Human Rights Protection and the Responsibilities of Internet Service Providers After *Scarlet*' (2012) 34(8) *European Intellectual Property Review* 552, 554.

⁹¹⁰ Psychogiopoulou, 'Copyright Enforcement', 554.

⁹¹¹ Psychogiopoulou, 'Copyright Enforcement', 554.

Kulk and Borgesius, also writing on *Scarlet*, highlight the absence of any reference to the ECtHR's jurisprudence in the CJEU's judgment, unlike the Opinion of the Advocate General, which examined the case law of the ECtHR in much greater detail.⁹¹² They also highlight the brevity of the CJEU's discussion on the subscribers' right to protection of personal data and freedom of information, each of which was addressed in the space of one paragraph, and suggest that a more extensive analysis of the proposed injunction's impact on freedom of information would have been welcome.⁹¹³ The lack of any analysis in the CJEU's judgment concerning the subscribers' right to privacy of communications and right to respect for private life more generally was also noted.⁹¹⁴ Griffiths, meanwhile, takes the view that the brevity of the CJEU's fundamental rights analysis in *Scarlet*, combined with its lack of engagement with both its own and the ECtHR's fundamental rights jurisprudence, makes it 'difficult to escape the impression that the Court's application of the [EUCFR] in *Scarlet Extended* is little more than window-dressing, functioning primarily to bolster the prior conclusion that the national court's order was incompatible with the requirements of the E-commerce and Enforcement Directives'.⁹¹⁵

Criticisms of a similar nature are also present in Angelopoulos' commentary on the CJEU's decision in *Telekabel*.⁹¹⁶ She notes that, while the CJEU elaborated in some detail upon the impact of the proposed injunction upon the ISP's freedom to conduct business, it '[s]omewhat bizarrely ... refused to enter into a similar analysis with regard to users' rights, instead deciding to pass this hot potato on to the intermediaries'.⁹¹⁷

It has also been suggested, however, that these uncertainties may be ameliorated through the issuance of specific orders by national courts,⁹¹⁸ as is the current practice of the UK courts⁹¹⁹ (as discussed in section 5.7.2, above). Catherine Seville has commented favourably on the decisions of the UK High Court in *Dramatico* and *EMI Records*.⁹²⁰ In particular, she describes the judgment in *Dramatico* as being 'notable for its meticulous

⁹¹² Stefan Kulk and Frederik Zuiderveen Borgesius, 'Filtering for Copyright Enforcement in Europe After the SABAM Cases' (2012) 34(11) *European Intellectual Property Review* 791, 794.

⁹¹³ Kulk and Borgesius, 'Filtering for Copyright Enforcement in Europe', 794.

⁹¹⁴ Kulk and Borgesius, 'Filtering for Copyright Enforcement in Europe', 794 – 795.

⁹¹⁵ Griffiths, 'Constitutionalising or Harmonising?', 74.

⁹¹⁶ Angelopoulos, 'The CJEU in *UPC Telekabel Wien*'.

⁹¹⁷ Angelopoulos, 'The CJEU in *UPC Telekabel Wien*'.

⁹¹⁸ Savola, 'Website Blocking in Copyright Injunctions'.

⁹¹⁹ Graham Smith, 'EU Court of Justice Lays Down Rules for Copyright Site Blocking Injunctions' (*SCL*, 28 March 2014) <<http://www.scl.org/site.aspx?i=ed36663>> accessed 12 September 2014. See also *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [97].

⁹²⁰ Catherine Seville, 'Rhetoric and Reality: The Impact of Constitutional and Fundamental Rights on Intellectual Property Law, as Revealed in the World of Peer-to-Peer File Sharing' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP, 2014), 176 – 177.

consideration of the fundamental rights engaged', and takes the view that the court in both *Dramatico* and *EMI Records* 'considered scrupulously the proportionality of any blocking order'.⁹²¹ However, it is worth noting that, while both parties in *Newzbin 2* made submissions before the court, the defendants in *Dramatico*, *EMI Records*, *FAPL v BskyB* and *Paramount* were unrepresented. The subscribers of the ISPs concerned were also unrepresented in each of these cases. As Smith notes, the fact that ISPs typically do not contest such applications, leaving the court to consider only submissions made by copyright owners, may mean that the procedure is not ideal.⁹²²

41 5.7.4 Blocking injunctions under US copyright law

The statutory basis for a website blocking injunction under US law is section 512(j)(1)(B)(ii) of the Copyright Act (introduced by the DMCA), read in conjunction with sections 502 and 512(a). Section 502 confers on a court the power to grant injunctions 'on such terms as it may deem reasonable to prevent or restrain infringement of a copyright'. Section 512(a), meanwhile, states that a service provider is not liable for monetary relief or injunctive or other equitable relief (except as provided in section 512(j)) 'for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections', provided that: (i) the transmission of the material was initiated by or at the direction of a person other than the service provider; (ii) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (iii) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (iv) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, or for a longer period than reasonably necessary for the transmission, routing, or provision of connections; and (v) the material is transmitted through the system or network without modification of its content. Section 512(j)(1)(B)(ii) limits the scope of injunctive relief available against service providers that fall within section 512(a), including ISPs. It provides that a court may only grant injunctive relief against such a service provider if the injunctive relief takes one of two forms, including, relevantly, an injunction 'restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States'.

It has been explained that section 512(j)(1)(B)(ii) of the US Copyright Act, unlike article 8(3) of the Information Society Directive, does not provide for an independent cause of action; instead, the rules set out in section 512(j)(1)(B)(ii) apply only where there is an injunction against a service provider under section 502 of the US Copyright Act.⁹²³ As an

⁹²¹ Seville, 'Rhetoric and Reality', 176.

⁹²² Smith, 'EU Court of Justice Lays Down Rules for Copyright Site Blocking Injunctions'.

⁹²³ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 31 – 32 (arguing that the plaintiffs in *Arista Records v AT&T Broadband* were mistaken in implying that section 512(j) could serve as the sole

injunction pursuant to section 502 requires the plaintiff to show that the defendant has infringed the plaintiff's copyright, it is necessary for a plaintiff who wishes to obtain a blocking injunction to show that there has been copyright infringement – whether direct, vicarious, or contributory – by the ISP itself.⁹²⁴ Two commentators have explained that, under existing US law, it is difficult to show either direct infringement or vicarious infringement on the part of an ISP;⁹²⁵ in practice, therefore, it is advisable for the plaintiff to attempt to prove contributory infringement on the part of the ISP involved.⁹²⁶ An ISP will be contributorily liable for infringement where it has 'actual knowledge that specific infringing material is available using its system' and can 'take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works'.⁹²⁷ Feiler has suggested that the requirement for the plaintiff to show infringement on the part of the ISP may be a significant contributing factor in the unwillingness of copyright owners to seek blocking injunctions in the US.⁹²⁸

Section 512(j)(2) of the US Copyright Act sets out the following four factors to be considered in determining whether injunctive relief should be granted pursuant to section 512(j):

- (i) whether the injunction would significantly burden either the provider or the operation of the provider's system or network;
- (ii) the magnitude of harm likely to be suffered by the copyright owner if steps are not taken to prevent or restrain the infringement;
- (iii) whether the implementation of the injunction would be technically feasible and effective, and would not interfere with access to non-infringing material at other online locations; and
- (iv) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

Feiler argues that factor (iii) explicitly takes free speech considerations into account, but only in relation to the interests of US users who wish to access the websites that might

statutory basis for a website blocking injunction against Internet backbone operators). See also Daniel W Kopko, 'Looking for a Crack to Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability under the Copyright Act and the DMCA' (2003) 8 *Computer Law Review and Technology Journal* 83, 94 – 96.

⁹²⁴ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 32; Kopko, 'Looking for a Crack to Break the Internet's Back', 96 – 98. Cf Todd Ryan Hambidge, 'Containing Online Copyright Infringement: Use of the Digital Millennium Copyright Act's Foreign Site Provision to Block US Access to Infringing Foreign Websites' (2007) 60 *Vanderbilt Law Review* 905, 915 (interpreting section 512(j)(1)(B)(ii) as only requiring that the ISP has 'infringing customers').

⁹²⁵ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 33 – 37; Kopko, 'Looking for a Crack to Break the Internet's Back', 100 – 103.

⁹²⁶ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 37 – 40; Kopko, 'Looking for a Crack to Break the Internet's Back', 103 – 108.

⁹²⁷ *Perfect 10 v Amazon.com* 508 F.3d 1146, 1172.

⁹²⁸ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 46. Thus far, there has only been one case brought under section 512(j)(1)(B)(ii), namely *Arista Records v AT&T Broadband*, which was voluntarily withdrawn when the infringing website went offline subsequent to the commencement of the action.

be potentially blocked in accordance with such an injunction.⁹²⁹ Because section 512(j)(1)(B)(ii) specifies that such injunctions may only be granted in relation to websites located *outside* the US, and US constitutional law generally does not protect the freedom of expression of foreigners when they reside outside of the US, the free speech interests of these website operators will generally remain unprotected by the First Amendment.⁹³⁰

42 5.8 Contractual and technological overridability of copyright law⁹³¹

Within the digital environment, technological developments have provided copyright owners with the ability to enter into mass-market, standard form electronic contracts with users of their works, as well as the ability to apply TPMs to these works in order to ensure that users will conform to the terms set out in these contracts.

43 5.8.1 Contractual and technological overrides under copyright law

While the international copyright framework does not expressly address contractual relations entered into between copyright owners and users of copyright works, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty both require their parties to provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures' that are used by authors (in the case of works), performers (in the case of performances) and phonogram producers (in the case of phonograms) in connection with the exercise of their rights.⁹³²

EU copyright law

Aside from a few mandatory provisions set out in the Software⁹³³ and Database Directives,⁹³⁴ there are currently no specific rules governing contractual relations between copyright owners and users of copyright-protected material at the European level. The absence of these rules might be explained on the basis that contract law is traditionally perceived as a matter falling under the competence of individual Member

⁹²⁹ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 58 – 59.

⁹³⁰ Feiler, 'Website Blocking Injunctions under EU and US Copyright Law', 57 – 58. See also Hambidge, 'Containing Online Copyright Infringement', 927.

⁹³¹ For a comprehensive overview, see Estelle Derclaye and Marcella Favale, 'Copyright and Contract Law: Regulating User Contracts: The State of the Art and a Research Agenda' (2010) 18 *Journal of Intellectual Property Law* 65.

⁹³² WIPO Copyright Treaty, art 11; WIPO Performance and Phonograms Treaty, art 18.

⁹³³ Software Directive, arts 5(2), 5(3), 6 and 9.

⁹³⁴ Database Directive, arts 6(1), 8 and 15.

States, as well as the fact that the ability of copyright owners to enter into mass-market, standard form contracts with users is a fairly recent phenomenon.⁹³⁵

The Information Society Directive contains a single significant reference to contracts in recital 45, which states that: 'The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law'. On the basis of this recital, some commentators have suggested the exceptions set out in articles 5(2) to 5(4) of the Directive can be overridden by contractual agreement,⁹³⁶ while others believe that this means the ability to engage in legitimate uses that do not require the authorisation of the copyright owner is a factor that can be considered in the context of contractual agreements about the price.⁹³⁷ It should be noted that online standard form contracts are generally held to be valid in Europe, provided that the purchaser is given the opportunity to review the terms of the contract and to give assent to it prior to purchase.⁹³⁸

The Information Society Directive does, however, contain express provisions prohibiting the circumvention of TPMs that have been applied to copyright works. The relevant prohibitions are set out in articles 6(1) and 6(2) of the Directive:

(1) Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

(2) Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.

UK copyright law

Following a series of legislative amendments made in 2014, the CDPA, the CDPA now contains a number of exceptions that are expressed to be incapable of being overridden by contract. In enacting the 2014 amendments, the UK Government accepted as a general principle that contractual restrictions should not be allowed to erode the benefits

⁹³⁵ Lucie Guibault et al, *Study on the implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (iVIR, 2007), 136.

⁹³⁶ Stefan Bechtold, 'Information Society Directive' in P Bernt Hugenholtz and Thomas Dreier (eds), *Concise European Copyright Law* (Kluwer Law International, 2006), 371.

⁹³⁷ M Walter (ed), *Europäisches Urheberrecht: Kommentar* (Springer, 2001), 1064 – 1065 (cited in Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 137).

⁹³⁸ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 154.

of exceptions established by copyright law.⁹³⁹ Accordingly, many of the exceptions that were introduced or reformulated by the amendments all contain a provision stating that any contractual terms purporting to exclude or restrict their applicability are unenforceable, including the new exceptions relating to text and data mining,⁹⁴⁰ caricature, parody and pastiche,⁹⁴¹ personal copying for private uses,⁹⁴² and quotation,⁹⁴³ as well as the reformulated exceptions for non-commercial research and private study,⁹⁴⁴ education,⁹⁴⁵ libraries and archives,⁹⁴⁶ and accessible copies for persons with disabilities.⁹⁴⁷ However, the prohibition against contractual overriding has not been extended to existing statutory exceptions that were not directly dealt with by the 2014 amendments, in particular the exceptions permitting fair dealing for the purposes of criticism or review and news reporting.⁹⁴⁸

In terms of TPMs, it should be noted that the prohibitions set out in the Information Society against the circumvention of TPMs that have been applied to copyright works have been implemented in the UK as sections 296ZA to ZF of the CDPA.

US copyright law

The US Copyright Act, as amended by the DMCA, contains a very broad prohibition against the circumvention of TPMs. The relevant provisions prohibit: (i) gaining unauthorised access to a work by circumventing a TPM put in place by the copyright owner to control access to the work;⁹⁴⁹ (ii) manufacturing or making available technologies, products and services that can be used to circumvent TPMs controlling such access;⁹⁵⁰ and (iii) manufacturing or making available technologies, products and services that can be used to circumvent TPMs that effectively protect the exclusive rights of a copyright owner in a work.⁹⁵¹ The scope of these prohibitions are not limited to acts

⁹³⁹ HM Government, *Modernising Copyright*, 19.

⁹⁴⁰ CDPA, s 29A(5).

⁹⁴¹ CDPA, s 30A(2).

⁹⁴² CDPA, s 28B(10).

⁹⁴³ CDPA, s 30(4).

⁹⁴⁴ CDPA s 29(4B).

⁹⁴⁵ CDPA, ss 32(3) and 36(7).

⁹⁴⁶ CDPA, ss 41(5), 42(7), 42A(6) and 75(2).

⁹⁴⁷ CDPA, s 31F(8).

⁹⁴⁸ Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, OUP, 2014), 229.

⁹⁴⁹ US Copyright Act, s 1201(a)(1).

⁹⁵⁰ US Copyright Act, s 1201(a)(2).

⁹⁵¹ US Copyright Act, s 1201(b)(1).

of circumvention that are carried out for the purpose of copyright infringement. The statute does, however, permit the circumvention of TPMs for a limited set of purposes, namely reverse-engineering of software;⁹⁵² encryption research;⁹⁵³ security testing;⁹⁵⁴ law enforcement and governmental intelligence activities;⁹⁵⁵ the protection of minors;⁹⁵⁶ the protection of personally identifying information;⁹⁵⁷ and the gaining of access to a commercially exploited work by a non-profit library, archive or educational institution solely in order to make a good faith determination of whether to acquire a copy of that work.⁹⁵⁸

The legislative approach taken by the US Congress in implementing these provisions has been described in critical terms by Vinje, who observes that:⁹⁵⁹

Faced with the realisation that its approach would prevent legitimate, socially useful activities, Congress responded not by adopting the sensible approach of subjecting the device prohibition to a general “infringement” criterion, but by enacting a series of exceptions. While these exceptions are useful and important, they surely do not address all the legitimate concerns, and in particular they do not recognise concerns about preserving the efficacy of copyright limits and exceptions.

Congress chose the approach of adopting an extremely broad prohibition, then granting an exception to any group powerful enough to lobby effectively for one. The breadth of the exception also turned on lobbying power; the security testing exception is more comprehensive than the privacy one because the banks and accounting firms pushing for the security testing exception had more political clout than the public interest groups concerned about privacy. Public interest groups concerned about the effect of Section 1201 on copyright limits and exceptions generally did not have sufficient lobbying power, in the face of an intense and lavishly financed campaign by the copyright industry, to achieve the introduction of a general “infringement” limitation on section 1201...

44 5.8.2 Impact on freedom of expression

Positive impact

Some commentators have observed that copyright owners’ ability to contract directly with users of their works can be exercised in ways that have a positive impact upon the latter’s freedom of expression. A copyright owner may, for instance, choose to make his or her work available to the public at large through a Creative Commons licence or some other open access or open content model, thus facilitating subsequent expressive uses of

⁹⁵² US Copyright Act, s 1201(f).

⁹⁵³ US Copyright Act, s 1201(g).

⁹⁵⁴ US Copyright Act, s 1201(j).

⁹⁵⁵ US Copyright Act, s 1201(e).

⁹⁵⁶ US Copyright Act, s 1201(h).

⁹⁵⁷ US Copyright Act, s 1201(i).

⁹⁵⁸ US Copyright Act, s 1201(d).

⁹⁵⁹ Thomas Vinje, ‘Copyright Imperilled?’ (1999) 21(4) *European Intellectual Property Review* 192, 205.

the work.⁹⁶⁰ In addition, copyright owners' ability to enter directly into such contracts may reduce transaction costs.⁹⁶¹ These electronic contracts may also enable greater differentiation between users, thus permitting copyright owners to tailor their products (and pricing policies) to the requirements of specific users; this, in turn, would afford users with a wider range of choices while giving copyright owners the ability to exploit their works more fully.⁹⁶²

TPMs have also been said to give rise to similar advantages, by facilitating price differentiation⁹⁶³ and by decreasing transaction costs.⁹⁶⁴ A few commentators have even argued that, by conferring greater security on copyright owners, legislation that prohibits the circumvention of TPMs serves to forward the aims of copyright law – and, by extension, freedom of expression, to the extent that freedom of expression is served by the copyright regime – by encouraging copyright owners to release digital versions of their works.⁹⁶⁵

Negative impact

However, most of the literature on TPMs and contracts in relation to freedom of expression is very negative. In particular, it is feared that the ability to contract directly with users will enable copyright owners to restrict acts that they would not be entitled to restrict through copyright, such as acts that are done in relation to works or parts of works that are not protected by copyright (e.g. works for which the statutory term of protection has expired, or ideas contained in works), acts that fall outside the scope of their exclusive economic rights, or acts that fall within one of the exceptions permitted by copyright law.⁹⁶⁶ Vinje gives examples of contractual restrictions that prohibit the use

⁹⁶⁰ Thomas Dreier, 'Contracting Out of Copyright in the Information Society: The Impact on Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 387 – 389; Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 149 – 153; Bradley E Abruzzi, 'Copyright, Free Expression, and the Enforceability of "Personal Use-Only" and Other Use-Restrictive Online Terms of Use' (2010) 26 *Santa Clara Computer & High Technology Law Journal* 85, 102 – 105. See generally Séverine Dusollier, 'Sharing Access to Intellectual Property Through Private Ordering' (2007) 82 *Chicago-Kent Law Review* 1391.

⁹⁶¹ Vinje, 'Copyright Imperilled?', 194 – 195; Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 151 – 153.

⁹⁶² Vinje, 'Copyright Imperilled?', 195.

⁹⁶³ Yuko Noguichi, 'Freedom Override by Digital Rights Management Technologies: Causes in Market Mechanisms and Possible Legal Options to Keep a Better Balance' (2006) 11 *Intellectual Property Law Bulletin* 1, 5 – 6.

⁹⁶⁴ P Bernt Hugenholtz, Kamiel Koelman and Natali Helberger, *Protection of Technological Measures* (iVIR, 1998), 24; Noguichi, 'Freedom Override', 6.

⁹⁶⁵ Jane C Ginsburg, 'How Copyright Got a Bad Name for Itself' (2002) 26 *Columbia Journal of Law & the Arts* 61, 67 – 73; Raymond T Nimmer, 'First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 360 – 361, 375 – 383.

⁹⁶⁶ Niva Elkin-Koren, 'Copyright Policy and the Limits of Freedom of Contract' (1997) 12 *Berkeley Technology Law Journal* 93, 106 – 113; Hugenholtz, Koelman and Helberger, *Protection of Technological Measures*, 29 – 30; Benkler, 'Free as the Air to Common Use', 429 – 435; Vinje, 'Copyright Imperilled?', 195; Dreier, 'Contracting Out of Copyright', 390 – 391; Noguichi, 'Freedom Override' 7 – 8; Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 156; Viva R Moffat, 'Super-Copyright:

of ideas contained in a copyright work (contrary to the idea/expression dichotomy), that prohibit the making and performance of parodies, and that prohibit the making of quotations: such prohibitions, he points out, would have serious consequences for users' freedom of expression.⁹⁶⁷ In the European context, it has been doubted whether such prohibitions would be considered 'necessary' and 'proportional' for the protection of the interests of the copyright owner within the meaning of article 10(2) of the ECHR.⁹⁶⁸ Another example that has been given is where a copyright owner imposes a contractual obligation on a purchaser not to disclose the work to any third party – an obligation that would affect public access to the work.⁹⁶⁹ Writing in the context of US law, Abruzzi has argued that terms of use imposed by website operators that prohibit visitors from reproducing material published on those websites for purposes other than 'personal use' effectively prohibit visitors from reproducing such material in the course of critical commentary or for educational purposes – expressive uses that are permitted by the doctrine of fair use.⁹⁷⁰

The same arguments are equally applicable to TPMs, which may be used to control acts that copyright owners are not entitled to restrict by copyright.⁹⁷¹ TPMs may operate to prevent users from reproducing or accessing works for permitted purposes such as scientific research, news reporting and educational and library uses, and can even be used to prevent reproductions of material that is in the public domain.⁹⁷² It has also been observed that, in their current form, TPMs are simply not sufficiently intelligent or flexible to effectively accommodate copyright exceptions or freedom of expression considerations.⁹⁷³ In 2004, the European Commission noted that:⁹⁷⁴

Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 41 *UC Davis Law Review* 45, 55 – 59; Abruzzi, 'Copyright, Free Expression', 96 – 102; Patricia Akester, 'The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture' (2010) 32(8) *European Intellectual Property Review* 372, 375 – 376.

⁹⁶⁷ Vinje, 'Copyright Imperilled?', 195 – 196.

⁹⁶⁸ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 156 – 157.

⁹⁶⁹ Hugenholtz, Koelman and Helberger, *Protection of Technological Measures*, 30.

⁹⁷⁰ Abruzzi, 'Copyright, Free Expression', 96 – 98.

⁹⁷¹ Hugenholtz, Koelman and Helberger, 24; Benkler, 'Free as the Air to Common Use', 414; Vinje, 'Copyright Imperilled?', 197; Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *NYU Law Review* 1, 18, 27; Dreier, 'Contracting out of Copyright', 391; Netanel, 'Locating Copyright', 25, 75; Angelopoulos, 'Freedom of Expression and Copyright', 331- 332; Akester, 'The New Challenges', 376 – 377.

⁹⁷² Benkler, 'Free as the Air to Common Use', 414; Vinje, 'Copyright Imperilled?' 197; Haimo Schack, 'Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use' (2002) *University of Illinois Journal of Law, Technology & Policy* 321, 329; Dreier, 'Contracting Out of Copyright', 391; Netanel, 'Locating Copyright', 25, 75.

⁹⁷³ Jacques De Werra, 'Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions' (2003) 25 *Columbia Journal of Law & the Arts* 239, 251 – 252; Patricia Akester and R Akester, 'Digital Rights Management in the 21st Century' (2006) 28(3) *European Intellectual Property Review* 159, 161 – 162. See also Alan Cunningham, 'Rights Expression on Digital Communication Networks: Some Implications for Copyright' (2005) 13(1) *International Journal of Law and Information Technology* 1. cf Dan L Burk and Julie E Cohen, 'Fair Use Infrastructure for Rights Management Systems' (2001) 15 *Harvard Journal of Law & Technology* 41, 54 – 70.

...in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other rightholders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators...) as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature.

These arguments appear to be borne out by several empirical studies conducted by copyright scholars.⁹⁷⁵ A survey of online contractual practices within the markets for music, films and written works carried out by the Institute for Information Law at the University of Amsterdam found that most online service providers tend to make their products available under terms that are more restrictive than the exceptions and limitations available under national copyright laws generally permit.⁹⁷⁶ The researchers note that these licences generally stipulate that content may be downloaded for private and non-commercial purposes only; prohibit the reproduction, distribution, public communication, transformation or modification of the content without prior written permission from the copyright owner; and are often reinforced by the application of TPMs to the content in question.⁹⁷⁷ Such contractual language, the researchers explain, might have a chilling effect on users seeking to use protected material for legitimate purposes – such as music review, media studies and film criticism – other than private non-commercial use.⁹⁷⁸ An empirical study carried out by Akester on the effects of TPMs on freedom of expression found that, although the use of TPMs has not had an impact on many acts permitted by copyright law, the ability of users to carry out certain permitted acts has nevertheless been adversely affected; moreover, this adverse effect has occurred notwithstanding the existence of technological solutions (enabling partitioning and authentication of users) to accommodate those permitted acts.⁹⁷⁹ The difficulty with these contractual and technological overrides, as Akester points out, is that they have given copyright owners additional technological and legal weapons for protecting their interest in the digital environment, without being counterbalanced by equivalent tools for protecting the public's access to information and works.⁹⁸⁰

⁹⁷⁴ Commission, 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market' (COM (2004) 261 – final), 10.

⁹⁷⁵ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 139 – 148; Patricia Akester, 'The Impact of Digital Rights Management on Freedom of Expression: The First Empirical Assessment' (2010) 41(1) *International Review of Intellectual Property and Competition Law* 31.

⁹⁷⁶ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 149.

⁹⁷⁷ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 149.

⁹⁷⁸ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 157.

⁹⁷⁹ Akester, 'The Impact of DRM'.

⁹⁸⁰ Akester, 'The New Challenges', 377 – 378.

45 5.8.3 Proposed solutions

Reliance upon non-copyright doctrines

Some commentators have pointed out that certain contractual restrictions that expand copyright owners' exclusive rights beyond that provided for under copyright law may well be unenforceable by virtue of non-copyright doctrines such as abuse of right or competition or consumer laws.⁹⁸¹ Where access for information is concerned, for example, it might be considered an abuse of a dominant position under competition law for a party to refuse a competitor access to information that is essential to the development of a new, competing product and no substitute is available.⁹⁸² The use of TPMs might also raise legal issues from the perspective of competition law, as the application of a TPM to a copyright work both dictates the medium or device on which it can be accessed while preventing it from being converted to a different format accessible through other devices.⁹⁸³ In the context of consumer protection law, it has been suggested that an additional provision might be inserted into the list of unfair clauses under the Directive on Unfair Terms in Consumer Contracts, under which a term in a non-negotiated contract would be deemed 'unfair' if it departed from the provisions of the national copyright statute.⁹⁸⁴ Member States might also be encouraged to introduce into the provisions of their national contract law either a rule providing that any term in a non-negotiated licence will be declared null and void where, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the other party; or, alternatively, a rule stating that any clause in a standard form contract will be deemed unfair if it departs from the provisions of the national copyright statute.⁹⁸⁵ In some cases, the doctrine of unconscionability available under contract law might also be invoked to allow users to escape from contractual restrictions that are overly onerous,⁹⁸⁶ though arguments based on this doctrine have not proven to be particularly successful when raised by defendants in the US.⁹⁸⁷ It has also been suggested that courts might decline to enforce such contracts on the ground that they are against public policy,⁹⁸⁸ though this might well prove difficult given that they do not appear to endanger public

⁹⁸¹ Vinje, 'Copyright Imperilled?', 195.

⁹⁸² Hugenholtz, Koelman and Helberger, *Protection of Technological Measures*, 31; De Werra, 289 – 294, 341 – 345.

⁹⁸³ Catherine Stromdale, 'The Problems with DRM' (2006) 17(1) *Entertainment Law Review* 1, 4.

⁹⁸⁴ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 159.

⁹⁸⁵ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 159 – 160.

⁹⁸⁶ De Werra, 'Moving Beyond the Conflict', 282 – 286; Abruzzi, 'Copyright, Free Expression', 124 – 126.

⁹⁸⁷ Abruzzi, 'Copyright, Free Expression', 124 – 126.

⁹⁸⁸ Matthew D Bunker, 'Private Ordering in the Marketplace of Ideas: Contract-Related Claims and the Free Flow of Information' (2000) 22 *Communications and the Law* 23, 34 – 35; De Werra, 'Moving Beyond the Conflict', 279 – 282.

policy to the same extent as other activities – such as gambling or usury laws – typically covered by the public policy exception against enforcement of contracts.⁹⁸⁹

It has also been observed, however, that these doctrines are poorly suited to meet the requirements of users of copyright works, as their application is unlikely to fully reflect the balance provided for under copyright law itself.⁹⁹⁰ For instance, the doctrine of abuse of a dominant position under competition law will be applicable only where competition is hindered, and not merely where individual access to information is prevented.⁹⁹¹

Making copyright exceptions mandatory

Another recommendation that has been put forward by several European commentators is to make certain limitations and exceptions on copyright mandatory, with the effect that any contractual terms that purport to restrict the applicability of these limitations and exceptions will become null and void.⁹⁹² In this context, a number of commentators have observed that an approach which renders *all* copyright exceptions mandatory would be unnecessary; instead, they typically suggest that exceptions should be made mandatory only where they are directly linked to the fundamental rights and liberties of users,⁹⁹³ or have a noticeable impact upon the internal market.⁹⁹⁴ Some also consider that these exceptions should be made mandatory only with respect to non-negotiated standard form contracts, citing concerns that an overly broad rule might frustrate arms'-length negotiations conducted between sophisticated parties of equal bargaining power.⁹⁹⁵ As explained above, the UK has recently made many of its statutory exceptions mandatory and incapable of being overridden by contract, as explained above, though this prohibition against contractual overriding has not been extended to the key public interest exceptions permitting fair dealing for the purposes of criticism or review and news reporting.

Revising the scope of anti-circumvention laws

⁹⁸⁹ De Werra, 'Moving Beyond the Conflict', 282.

⁹⁹⁰ Vinje, 'Copyright Imperilled?', 195; De Werra, 'Moving Beyond the Conflict', 294; P Bernt Hugenholtz et al, *The Recasting of Copyright and Related Rights for the Knowledge Economy* (iVIR, 2006), 67 – 68.

⁹⁹¹ Hugenholtz, Koelman and Helberger, *Protection of Technological Measures*, 31.

⁹⁹² Hugenholtz et al, *The Recasting of Copyright*, 75; Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 160 – 163.

⁹⁹³ Vinje, 'Copyright Imperilled?', 195 – 196; De Werra, 'Moving Beyond the Conflict', 330 – 337; Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 162; Akester, 'The New Challenges', 378 – 379.

⁹⁹⁴ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 162.

⁹⁹⁵ Dreier, 'Contracting Out of Copyright', 396 – 397; Hugenholtz et al, *The Recasting of Copyright*, 75; Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 162 – 163.

In the European context, Vinje has suggested that any prohibition on the circumvention of TPMs should be limited to circumvention that is carried out for the purposes of infringing copyright, as this will ensure that the contours of the prohibition conform to the boundaries of copyright law and permit acts of circumvention that are carried out to facilitate entirely lawful acts.⁹⁹⁶ Another suggestion is that there should be a relationship between the acts for which one may circumvent TPMs and acts that may not be prohibited by contract, meaning that any prohibition against the circumvention for TPMs should exclude acts that fall within mandatory copyright exceptions. The difficulty with this proposal within the European context is that it is still unclear which copyright exceptions are or should be mandatory.⁹⁹⁷

Another possible solution, put forward by Akester, is based on the language of article 6 of the Information Society Directive itself. Having required Member States to grant legal protection against the circumvention of TPMs, article 6(4) goes on to state that:

... in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

This paragraph, however, is subsequently expressed to be inapplicable to 'works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them'.⁹⁹⁸

This Article, nor the Directive, does not define the term 'appropriate measures', though recital 51 refers to 'modifying an implemented technological measure' or 'other means'. Building upon this, Akester suggests that a definition of the term 'appropriate measures' should be inserted into the Information Society Directive, which would make it clear that such measures require the establishment of a procedure to enable expeditious access to works by beneficiaries of copyright exceptions, leading to the creation of standardised work portals across Member States.⁹⁹⁹ Under this model, means of accessing works protected by TPMs (such as a non-protected version of the work, or a decryption key) would be deposited with a nominated deposit agency within each Member State (such as the British Library in the UK); the beneficiary of a copyright exception who finds that her exercise of the exception is limited or prevented by the application of TPMs would be able to request access to the work in question from the national deposit agency concerned.¹⁰⁰⁰ In order to minimise abuse of the system, Akester further suggests that all works provided through the system be individually watermarked, and that it be made

⁹⁹⁶ Vinje, 'Copyright Imperilled?', 197.

⁹⁹⁷ Vinje, 'Copyright Imperilled?', 207.

⁹⁹⁸ Information Society Directive, art 6(4).

⁹⁹⁹ Akester, 'The Impact of DRM', 46 – 51; Akester, 'The New Challenges', 379 – 380.

¹⁰⁰⁰ Akester, 'The Impact of DRM', 49 – 51; Akester, 'The New Challenges', 379 – 380.

an offence to distribute such watermarked copies knowingly to persons not entitled to receive them.¹⁰⁰¹ To create an incentive for copyright owners to deposit the appropriate means of access with the deposit agency concerned, Akester also proposes that article 6(4) of the Information Society Directive should be amended so as to include a provision that, where access to works by the beneficiaries of copyright exceptions has not been facilitated through the deposit of means for ensuring such access, the protection of these exceptions will prevail over the protection of TPMs, even where the works have been supplied online on agreed contractual terms.¹⁰⁰²

Several other commentators, writing in the US context, have called for the application of the fair use doctrine to cases where a user circumvents a TPM in order to gain access to a work in circumstances where such circumvention would not give rise to copyright infringement, such as where the work is in the public domain,¹⁰⁰³ or where the user seeks to make a legitimate use of the work.¹⁰⁰⁴ To this end, Samuelson has suggested that the anti-circumvention provisions currently existing under the US Copyright Act be amended so as to permit legitimate uses,¹⁰⁰⁵ and for periodic reviews of the impact of these provisions to be undertaken on a regular basis.¹⁰⁰⁶

Other defences under US law

Several commentators, writing in the US context, have proposed that a user who has committed a breach of a contractual term precluding fair use of a protecting work, for the purpose of making an expressive use of that work, should be able to rely on a constitutional defence based on the First Amendment in the event legal action is taken against her,¹⁰⁰⁷ particularly where the contractual restriction has been imposed unilaterally by the copyright owner.¹⁰⁰⁸ It has further been suggested that the parameters of such a defence would be similar to that provided by the doctrine of fair use.¹⁰⁰⁹

Furthermore, although copyright is regulated by federal legislation under US law, contractual matters are regulated by the legislation applicable in each state. For this

¹⁰⁰¹ Akester, 'The Impact of DRM', 50; Akester, 'The New Challenges', 379.

¹⁰⁰² Akester, 'The Impact of DRM', 57 – 58; Akester, 'The New Challenges', 379 – 380.

¹⁰⁰³ Jane C Ginsburg, 'Copyright Legislation for the "Digital Millennium"' (1999) 23 *Columbia-VLA Journal of Law & the Arts* 137, 151 – 152.

¹⁰⁰⁴ Pamela Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised' (1999) 14 *Berkeley Technology Law Journal* 519, 543 – 546.

¹⁰⁰⁵ Samuelson, 'IP and the Digital Economy', 543 – 546.

¹⁰⁰⁶ Samuelson, 'IP and the Digital Economy', 557 – 562.

¹⁰⁰⁷ Benkler, 'Free as the Air to Common Use', 439 – 440; Abruzzi, 'Copyright, Free Expression', 126 – 131.

¹⁰⁰⁸ Abruzzi, 'Copyright, Free Expression', 130 – 131.

¹⁰⁰⁹ Abruzzi, 'Copyright, Free Expression', 129 – 130.

reason, it has sometimes been argued that federal copyright law pre-empts claims for breach of contract based on uses of copyright-protected material that are permitted by copyright law.¹⁰¹⁰ To date, however, most US courts have declined to hold that such claims are pre-empted by copyright law.¹⁰¹¹ An illustrative case is *Bowers v Baystate Technologies Inc*,¹⁰¹² where the plaintiff sought to enforce an EULA that prohibited reverse-engineering of the software product at issue. While recognising that copyright law permits a certain amount of reverse-engineering as fair use,¹⁰¹³ the Federal Circuit nevertheless found, by a majority, that 'private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act'.¹⁰¹⁴ Some commentators¹⁰¹⁵ on *Bowers* have approved of the approach preferred by Judge Dyk in dissent, taking the view that the Copyright Act should pre-empt the enforcement of any state law that 'substantially impedes the public use of the otherwise unprotected material'.¹⁰¹⁶ De Werra has suggested, however, the pre-emption might not be the most appropriate tool to capture the delicate balance struck by copyright law, being a very broad doctrine that encompassess all conflicts between state and federal law.¹⁰¹⁷

Adoption of voluntary codes

In addition to strictly legal measures, researchers at the Institute for Information Law have also proposed that Member States should encourage industry players to develop voluntary codes of conduct to promote the adoption of fair contractual terms.¹⁰¹⁸ It has been said that, compared to legislative measures, the adoption of such voluntary codes would have the advantage of being more efficient, being a better fit for the electronic environment, and reduce the costs of rule-making and enforcement.¹⁰¹⁹

¹⁰¹⁰ Bunker, 'Private Ordering' 38 – 39; De Werra, 'Moving Beyond the Conflict', 263 – 273; Moffat, 'Super-Copyright', 87 – 109; Abruzzi, 'Copyright, Free Expression', 115 – 123.

¹⁰¹¹ Abruzzi, 'Copyright, Free Expression', 116 – 121.

¹⁰¹² 320 F.3d 1317.

¹⁰¹³ *Atari Games Corp v Nintendo of America Inc* 975 F.2d 832, 843.

¹⁰¹⁴ 320 F.3d 1317, 1325.

¹⁰¹⁵ Abruzzi, 'Copyright, Free Expression', 120 – 121; Bryan Seigworth, 'Injuring Competition and Impeding the Progress of Science: Why *Bowers v Baystate Technologies* was Wrongly Decided' (2004) 23 *Journal of Law and Commerce* 205, 227; David A Rice, 'Copyright and Contract Preemption after *Bowers v Baystate*' (2004) 9 *Roger Williams University Law Review* 595, 602 – 603; Arthur R Miller, 'Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come' (2006) 119 *Harvard Law Review* 703, 772; David Nimmer, 'Promises, Promises' (2006) 119 *Harvard Law Review Forum* 74, 81.

¹⁰¹⁶ 320 F.3d 1317, 1335

¹⁰¹⁷ De Werra, 'Moving Beyond the Conflict', 272 – 273.

¹⁰¹⁸ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 163.

¹⁰¹⁹ Guibault et al, *Study on the implementation and Effect in Member States' Laws of the Information Society Directive*, 163.

6 Accommodating freedom of expression within copyright

Several measures have been suggested for accommodating and incorporating freedom of expression values within copyright law, ranging from the reinterpretation of existing defences, to the creation of new defences, to the use of remedies available to copyright owners, to the implementation of compensation-based mechanisms. Following on from the examination of specific issues in section 5, above, this section examines these proposals, beginning with a consideration of the general principles governing the way in which the balance between copyright and freedom of expression should be struck.

46 6.1 Striking a balance between copyright and freedom of expression

Writing prior to the enactment of the HRA, Macmillan Patfield suggests that, in order to strike a balance between copyright and freedom of expression, an approach should be adopted which looks both at the nature of the protected work as well as the purpose behind the allegedly infringing speech (or allegedly infringing derivative work), following categorisations familiar to freedom of expression analysis such as political speech, artistic speech and commercial speech.¹⁰²⁰ Thus, if the infringing expression is political, artistic or academic in nature, there would be free speech grounds for arguing that it should be permitted; on the other hand, if the infringing expression is purely commercial in nature, the free speech argument would be correspondingly weakened.¹⁰²¹ A strong case for relaxing copyright restrictions on freedom of expression grounds might involve politically motivated speech which infringes the copyright in a commercial work.¹⁰²² This would have the effect of 'downgrading' the protection offered to copyright works which amount to commercial speech only, and accordingly elevate politically motivated speech which criticises commercial material.¹⁰²³ She explains the decision in *Time Warner* from this perspective, treating it as a case where the court was prepared to uphold the interests of non-commercial, broadly political speech by holding that the use fell within the ambit of the fair dealing defence and disregarding the argument that the amount of footage taken would damage the film's commercial value.¹⁰²⁴ She also explains how the same principle would apply to Andy Warhol's depictions of Campbell soup tins:

The soup-tin label is commercial speech and is, therefore, a form of copyright work which may be regarded as meriting a weaker level of copyright protection than the sort of works to which the values of copyright seem more clearly addressed, such as artistic or scholarly works. The artist's use (and, arguably, subversion) of the copyright image, being for an artistic purpose, should be entitled to a reasonably high level of free-speech protection, although perhaps not as high as something which is more overtly political.¹⁰²⁵

¹⁰²⁰ Macmillan Patfield, 'Towards a Reconciliation', 229.

¹⁰²¹ Macmillan Patfield, 'Towards a Reconciliation', 214.

¹⁰²² Macmillan Patfield, 'Towards a Reconciliation', 214.

¹⁰²³ Macmillan Patfield, 'Towards a Reconciliation', 229.

¹⁰²⁴ Macmillan Patfield, 'Towards a Reconciliation', 229.

¹⁰²⁵ Macmillan Patfield, 'Towards a Reconciliation', 231.

A similar proposal has been made in the US context, where Zimmermann has suggested that the nature of a work will normally be a good indicator of the degree of public interest in its accessibility.¹⁰²⁶ For factual works and works which are based in academic or intellectual exploration, there is a strong public interest in accessibility, which should take precedence over the protection given to the copyright owner's financial incentive; for purely commercial works such as advertisements, on the other hand, there is no significant public interest in accessibility.

The opposite view was taken by the US Supreme Court in *Harper & Row*. In rejecting the defendants' argument that the public importance of President Ford's memoirs meant that their publication of extracts and paraphrases from those memoirs should be permitted as fair use pursuant to First Amendment values, it pointed out that '[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression'.¹⁰²⁷ It then stated that the practical effect of the argument advanced by the defendants would be to accord lesser copyright protection of those works that are of greatest importance to the public, which was fundamentally at odds with the scheme of copyright.¹⁰²⁸ The court went on to add that freedom of thought and expression includes both the right to speak freely and the right to refrain from speaking at all – a First Amendment value which is served by copyright in general and the right to first publication in particular.¹⁰²⁹

Subsequent to the enactment and coming into force of the HRA in the UK, most commentators who perceive a need for striking a balance between copyright and freedom of expression over and above that struck by principles internal to copyright have tended to frame this as the kind of rights-balancing exercise familiar to human rights and constitutional law. They are careful to make it clear that freedom of expression is not absolute, and will not always prevail over other rights, including copyright, in all cases; instead, it has to be balanced against other fundamental rights, in particular the right to property and the right to privacy,¹⁰³⁰ using the balancing apparatus inherent in article 10(2) of the ECHR. Factors which may reasonably be taken into consideration in weighing the right to freedom of expression against copyright, it has been suggested, include the nature of the speech which would otherwise be suppressed, the nature of the speech which is reproduced, as well as the presence (or lack) of adequate safeguards for freedom of expression within copyright law itself. The third factor echoes the view taken by the Court of Appeal in *Ashdown*, where it held that the defence of fair dealing would generally provide the court with all the scope which it would require to properly accommodate freedom of expression.

¹⁰²⁶ Zimmerman, 'A Regulatory Theory of Copyright', 193 – 194.

¹⁰²⁷ 471 US 539, 558.

¹⁰²⁸ 471 US 539, 559.

¹⁰²⁹ 471 US 539, 559 – 560.

¹⁰³⁰ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 253 (citing *Ashdown* and *HRH Prince of Wales v Associated Newspapers* as examples of cases in which freedom of expression was balanced against other fundamental rights).

As an example of the application of these factors, Barendt has suggested that freedom of expression challenges to copyright claims should only be sustained when copyright law is used to suppress the dissemination of information of real importance to the public or to stifle artistic creativity, parody, or satire, and when the legislation itself does not provide adequate safeguards for that freedom.¹⁰³¹ In other circumstances, most obviously those of commercial piracy, the restriction of a thin right to freedom of expression would be considered 'clearly necessary' to protect copyright.¹⁰³²

Returning to the US context, Netanel has also suggested the use of existing constitutional mechanisms for achieving First Amendment oversight of copyright, by treating copyright as a form of content-neutral speech regulation which should be subjected to the rigorous 'intermediate scrutiny' test applied by the Supreme Court in *Turner Broadcasting System v FCC*.¹⁰³³ Under *Turner* scrutiny, the government would be required to demonstrate that legislative extensions of copyright owners' rights, such as the CTEA and the DMCA, further an 'important or substantial governmental interest' and that it is narrowly tailored to burden no more speech than is 'essential to the furtherance of that interest'; Netanel argues that it would be very difficult for the government to demonstrate the constitutionality of either the CTEA or the DMCA on this basis.¹⁰³⁴ It has also sometimes been argued that the First Amendment should prevail over copyright in all cases where the two conflict, as the former is a constitutionally protected right, while the latter is merely a statutory privilege or positive right.¹⁰³⁵

47 6.2 Use of existing legal mechanisms

A simple way of accommodating freedom of expression within copyright law may be to reinterpret and apply legal mechanisms that already exist so as to comply with the requirements of freedom of expression. This section will consider how the defences of fair dealing and/or fair use, the court's discretion to refuse the grant of an injunction, and the public interest defence, may be reinterpreted and used so as to better accommodate the right to freedom of expression.

48 6.2.1 The fair dealing and fair use defences

The defence of fair dealing

In *Ashdown*, the Court of Appeal considered that pre-HRA decisions on the fair dealing provisions of the CDPA should not be applied inflexibly. Instead, it held that it was necessary to consider the impact of the public interest on the fair dealing defence and to ask the question whether the facts of the case were such that the importance of freedom

¹⁰³¹ Barendt, 'Copyright and Free Speech Theory', 32 – 33.

¹⁰³² Barendt, 'Copyright and Free Speech Theory', 33.

¹⁰³³ Netanel, 'Locating Copyright', 47 – 69.

¹⁰³⁴ Netanel, 'Locating Copyright', 70 – 81 (quoting *Turner Broadcasting System v FCC* 512 US 622, 622).

¹⁰³⁵ Rosenfield, 'The Constitutional Dimension of Fair Use', 807; Hoberman, 'Copyright and the First Amendment', 575; Wang, 'The First Amendment Exception to Copyright', 1184.

of expression outweighed the conventional considerations of what amounts to fair dealing.¹⁰³⁶ The court did not elaborate further on the precise manner in which this should be achieved, but it would presumably involve the giving of a very generous interpretation to terms such as 'criticism', 'review', 'reporting current events', and indeed to what constitutes a 'fair' dealing, where appropriate.¹⁰³⁷

Kelly has suggested that, at the very minimum, it will necessary for the courts to clarify their approach to fair dealing by sweeping away the artificial limitations, practices and assumptions that have accreted over time, and to take a broad and all-encompassing approach to assessing 'fairness' which would give courts the relative freedom to make fact-based determinations of whether a particular dealing is fair in any given case, rather than following precedents which state that entire classes of use (e.g. non-public use or use that does not refer to an 'event') automatically fall outside the ambit of the defence.¹⁰³⁸ A rigorous evidence-based approach should also be taken to the question of whether the claimant has experienced economic loss, so that only real rather than perceived loss would remove a dealing from the ambit of the defence.¹⁰³⁹ Kelly also suggests that there is a need for the courts to question and re-evaluate some of their assumptions underlying the relationship between copyright and freedom of expression, including the assumption that it is largely sufficiently dealt with by the idea/expression dichotomy, and the courts' own reluctance to interfere with the rights of copyright owners because of a fixation on the proprietary nature of the right.¹⁰⁴⁰

Griffiths proposes that, in order to interpret 'fair dealing' in a manner which takes into account freedom of expression concerns, the courts should cease to give undue weight to the traditional 'Laddie factors' outlined above, and outlines a set of guidelines for doing so:¹⁰⁴¹

- (i) the fact that the copyright owner suffers financial loss does not indicate conclusively that use of a work is unfair;
- (ii) the fact that publication of a work in the media is motivated by profit is irrelevant to any assessment of fairness;
- (iii) the unpublished status of a work should not weigh as heavily in the claimant's favour in the balance of fairness as it currently does;
- (iv) in assessing fairness, courts should be reluctant to find that a defendant, particularly a media defendant, has acted unfairly in publishing a disproportionate amount of a work. In this regard, the media should be granted a wide margin of

¹⁰³⁶ [2001] EWCA Civ 1142, [78].

¹⁰³⁷ Garnett, 'The Impact of the HRA', 184. See also Griffiths, 'Copyright Law and Censorship', 26 (suggesting that a reinterpretation of the fair dealing provisions to bring them in line with article 10 of the ECHR would be a possible solution for accommodating freedom of expression under copyright).

¹⁰³⁸ Kelly, 'Current Events and Fair Dealing with Photographs', 259.

¹⁰³⁹ Kelly, 'Current Events and Fair Dealing with Photographs', 259.

¹⁰⁴⁰ Kelly, 'Current Events and Fair Dealing with Photographs', 259.

¹⁰⁴¹ Griffiths, 'Copyright Law after *Ashdown*', 257.

discretion in order to avoid the potential chilling effect of sanctions for copyright infringement.

Griffiths also argues that the courts should, in addition, take into account two factors that have been largely overlooked in the analysis of fair dealing, namely the content of the allegedly infringing speech and the content of the protected work.¹⁰⁴² In relation to the first of these two factors, he suggests that, in assessing whether a dealing is 'fair', the courts should apply a strong presumption in favour of a defendant where publication raises issues of legitimate public concern, consistent with the primary guiding principle of the jurisprudence of the European Court of Human Rights in relation to article 10, namely that interference with 'public speech' requires a very high degree of justification.¹⁰⁴³ The second of these two factors reflects the principle that not all copyright interests have equal value: entrepreneurial works such as sound recordings, for instance, are not as well protected as works of authorship, and works invested with a higher degree of skill and labour are granted greater protection compared to simpler works which receive 'thinner' protection. Thus, in *Ashdown*, it could have been argued that the nature of the claimant's minute favoured a finding of fair dealing.¹⁰⁴⁴ It did not represent the culmination of extensive labour, skill and creativity, but was merely a factual record of a meeting attended by the claimant.¹⁰⁴⁵ Indeed, under US law, the nature of the copyright work is one of the four factors relevant to the defence of fair use, and the courts have drawn a distinction between creative works and factual works, with more protection being afforded to the former than the latter. Moreover, the claimant was present at the meeting in his capacity as the leader of a national political party, and would have regarded himself as being engaged in public service at the time; as such, his claim to be entitled under copyright law to secure personal financial advantage from this opportunity would appear not to be a strong one.¹⁰⁴⁶

Kelly has also proposed that the qualities of a copyright work should be taken into account in determining whether the use made of it is fair, as this would permit a greater and more explicit focus on the policies underlying copyright law and help to achieve a more appropriate balance with the right to freedom of expression and the public interest in the circulation of news and access to information.¹⁰⁴⁷

Compliance with the Information Society Directive

Griffiths addresses the argument that his proposed liberal interpretation of the fair dealing defences would be incompatible with article 5 of the Information Society Directive, which restricts the exceptions and limitations to copyright infringement which

¹⁰⁴² Griffiths, 'Copyright Law after *Ashdown*', 257 – 260.

¹⁰⁴³ Griffiths, 'Copyright Law after *Ashdown*', 258.

¹⁰⁴⁴ Griffiths, 'Copyright Law after *Ashdown*', 259.

¹⁰⁴⁵ Griffiths, 'Copyright Law after *Ashdown*', 259.

¹⁰⁴⁶ Griffiths, 'Copyright Law after *Ashdown*', 259.

¹⁰⁴⁷ Kelly, 'Current Events and Fair Dealing with Photographs', 260.

member states are able to enact to a number of specifically enumerated provisions.¹⁰⁴⁸ He raises the counter-argument that, within the law of the EU, provisions such as article 5 of the Information Society Directive should not be permitted to interfere with fundamental freedoms such as the right to freedom of expression, and that the ECJ itself is obliged to interpret European measures in accordance with the fundamental rights contained in the ECHR, as are the domestic courts once these measures have been implemented.¹⁰⁴⁹

The defence of fair use

US scholars have suggested that the fair use doctrine may be modified or reinterpreted so as to accommodate First Amendment interests. Netanel has proposed that the courts should give renewed weight to the defendant's critical expression and purpose, even where the defendant's derivative work competes in the market for derivative works based on the original work.¹⁰⁵⁰ This, he has noted, would not result in a radical change to traditional fair use doctrine; indeed, such a proposal has become necessary only because courts have recently begun holding that even derivative works that communicate new expressions or possess a significant independent purpose are not 'transformative'.¹⁰⁵¹

Lockridge has also made similar proposals relating to the first fair use factor.¹⁰⁵² In particular she has suggested eliminating the focus on the commercial nature of the use, as speech does not lose First Amendment protection solely on the basis of the existence of a profit motive or other commercial advantage to the speaker; to this end, she has recommended that the statutory text be amended so as to redirect the analysis away from the defendant's profit motive.¹⁰⁵³ She has also suggested that the test of the purpose and character of the use under the first factor should not be confined to transformative uses, but should instead be viewed as a proxy for a broader range of uses that serve the public interest; this means that uses which are not necessarily transformative in the traditional sense, but which do serve free speech interests, would also be permitted as fair use.¹⁰⁵⁴ Lockridge gives as an example Allan Cranston's preparation and distribution of a translation of Adolf Hitler's *Mein Kampf*, which was carried out for the purpose of combating the effect of the selectively edited and

¹⁰⁴⁸ Griffiths, 'Copyright Law after *Ashdown*', 263. See also Kelly, 'Current Events and Fair Dealing with Photographs', 251 (noting that, while the Directive has not significantly altered the domestic judicial approach to fair dealing to date, it has the capacity to become a new justification for a restrictive approach to fair dealing in the future).

¹⁰⁴⁹ Griffiths, 'Copyright Law after *Ashdown*', 263. Indeed, this has led to an argument that the flexibility of the public interest defence has led courts' to devalue the significance of parties' copyright interests: Sayal, 'Copyright and Freedom of the Media'.

¹⁰⁵⁰ Netanel, 'Locating Copyright', 83; Netanel, *Copyright's Paradox*, 191 – 192.

¹⁰⁵¹ Netanel, 'Locating Copyright', 84 (citing *Castle Rock Entertainment v Carol Publishing Group* 150 F.3d 132).

¹⁰⁵² Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 34, 94 – 102.

¹⁰⁵³ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 34, 99 – 102.

¹⁰⁵⁴ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 34, 94 – 98.

misleading translation officially available in the US through Hitler's publisher.¹⁰⁵⁵ She argues that Cranston would be unlikely to succeed under contemporary interpretations of the first fair use factor, as his use would be classified as both commercial and non-transformative (being a straightforward reproduction). However, should the first factor be viewed as a proxy for a broader range of uses that are for the public benefit, it would favour Cranston (even though his use was a reproduction rather than a transformation), as the public benefit provided by an accurate translation of the book would serve the First Amendment purpose of dissemination of information and expression.¹⁰⁵⁶

Elkin-Koren has suggested, in this context, that it might be helpful to distinguish reproduction for personal use from reproduction which mimics the effect of a competitor; the former might be considered fair use, even where it reduces the market for the original work and denies the copyright owner compensation for the use, while the latter would be excluded from the scope of fair use.¹⁰⁵⁷ Patterson has made a similar suggestion, arguing that the conflict between copyright and free speech rights can be resolved through the use of a rational fair use doctrine which distinguishes between a consumer's use of a work for ordinary purposes and the use of the same work by a competitor;¹⁰⁵⁸ this, he argues, would reinstate the original purpose of the fair use doctrine, namely to allow fair *competitive* (and not *consumptive*) uses of copyright works.¹⁰⁵⁹

It has also been suggested that the concepts of public interest and public access should be introduced into the fair use analysis. Under such a framework, the court would first determine the amount of public interest in a particular work and, subsequently, estimate the 'adequate' amount of public access that should be provided through the application of the fair use doctrine.¹⁰⁶⁰ A similar suggestion is that courts should supplement fair use analysis with First Amendment considerations where appropriate, taking into account factors such as whether the claimant is a public official, public figure, or private figure, whether the matter is of a public or private concern, and possibly whether the defendant is a member of the media.¹⁰⁶¹ Other suggestions have included a proposal that the fair use analysis should take into account the additional factor of whether the taking was necessary in order to allow a defendant to make a contribution to a debate of public

¹⁰⁵⁵ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 97.

¹⁰⁵⁶ Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 97 – 98.

¹⁰⁵⁷ Elkin-Koren, 'Cyberlaw and Social Change', 283 – 289.

¹⁰⁵⁸ Patterson, 'Free Speech, Copyright and Fair Use', 61 – 63.

¹⁰⁵⁹ Patterson, 'Free Speech, Copyright and Fair Use', 37 – 40.

¹⁰⁶⁰ Zimmerman, 'A Regulatory Theory of Copyright', 191 – 192.

¹⁰⁶¹ James Hall, 'Bare-Faced Mess: Fair Use and the First Amendment' (1991) 70 *Oregon Law Review* 211, 252 – 253.

interest,¹⁰⁶² and a proposal that the public interest in having access to a the original work should be construed as a fifth, non-codified factor in the fair use analysis.¹⁰⁶³

49 6.2.2 Discretionary refusal of injunctive relief

In cases of copyright infringement where a strong public interest predicated on the right to freedom of expression underlies the infringing act, or where the defendant has an arguable claim of fair use, the balance between the rights of the copyright owner and the public interest in having access to the protected work – or alternatively, the balance between the rights of a copyright owner and the free speech interests of a defendant – may be struck by holding that the copyright owner is not entitled to an injunction, but only to an award of damages.¹⁰⁶⁴ The UK Court of Appeal in *Ashdown* has identified this as a possible mechanism for ensuring that the CDPA is applied in a manner that accommodates the right to freedom of expression. In relation to this, the court stated:

Usually, so it seems to us, such a step will be likely to be sufficient. If a newspaper considers it necessary to copy the exact words created by another, we can see no reason in principle why the newspaper should not indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Freedom of expression should not normally carry with it the right to make free use of another's work.¹⁰⁶⁵

In *Campbell v Acuff-Rose*,¹⁰⁶⁶ the US Supreme Court explained in a footnote that the goals of copyright law, namely 'to stimulate the creation and publication of edifying matter', are not always best served by automatically granting injunctive relief in cases of arguable but unsuccessful claims of fair use. In the context of US First Amendment jurisprudence, it has been suggested that the grant of an injunction in copyright cases involving freedom of speech would amount to an unconstitutional prior restraint on speech.¹⁰⁶⁷ In developing this argument, Lemley and Volokh have suggested that permanent injunctions will generally be constitutional, having been granted following a final determination that the defendant's speech was unprotected; however, preliminary injunctions preceding trial will constitute an unconstitutional prior restraint on speech.¹⁰⁶⁸ The unconstitutional nature of such a restraint, they further argue, is exacerbated by the

¹⁰⁶² Oakes, 'Copyright and the First Amendment', 156.

¹⁰⁶³ Shipley, 'Conflicts Between Copyright and the First Amendment', 1039.

¹⁰⁶⁴ Dworkin, 'Copyright, Public Interest, and Freedom of Speech', 169 – 170; Garnett, 'The Impact of the HRA', 172; Goldwag, 'Copyright Infringement and the First Amendment', 337; Netanel, *Copyright's Paradox*, 192 – 193; Baker, 'First Amendment Limits', 946 – 947; Diane Leenheer Zimmerman, 'Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights' (1991) 33 *William & Mary Law Review* 665, 737 – 738; Floyd Abrams, 'First Amendment and Copyright' (1987) 35 *Journal of the Copyright Society of the USA* 1, 10 – 11; Leval, 'Towards a Fair Use Standard', 1131 – 1132; James L Oakes, 'Copyright and Copyremedies: Unfair Use and Injunctions' (1990) 18 *Hofstra Law Review* 983, 996 – 997; Tiffany D Trunko, 'Remedies for Copyright Infringement: Respecting the First Amendment' (1989) 89 *Columbia Law Review* 1940, 1946 – 1947.

¹⁰⁶⁵ [2001] EWCA Civ 1142, [46].

¹⁰⁶⁶ 510 US 569.

¹⁰⁶⁷ Zimmerman, 'Information as Speech', 737; Abrams, 'First Amendment and Copyright', 10 – 11

¹⁰⁶⁸ Mark Lemley and Eugene Volokh, 'Freedom of Speech and Injunctions in Intellectual Property Cases' (1998) 48 *Duke LJ* 147, 169 – 171.

low threshold needed for a preliminary injunction in copyright cases.¹⁰⁶⁹ They suggest, therefore, that while injunctions may continue to be granted in copyright infringement cases that do not involve free speech issues, in cases that do involve free speech issues, preliminary injunctions should readily granted only in 'easy' cases involving mass commercial reproduction of protected works (i.e. 'piracy'); in all other such cases, preliminary injunctions should be conditioned upon a high probability of success on the merits.¹⁰⁷⁰

It has also been suggested that concerns about the prior restraint nature of injunctive relief might make a court reluctant to make a finding of infringement; thus, the court might find itself manipulating the concepts of fair use and the idea/expression dichotomy in a bid to avoid a finding of infringement, resulting in the distortion of these doctrines.¹⁰⁷¹ Whether such an approach could, in practice, function as an effective safeguard for freedom of expression has, however, been doubted. For one thing, it appears not to be a mechanism that is widely used: Garnett notes that there are few reported cases in which the courts have refused to grant interim injunctive relief,¹⁰⁷² and no reported cases in which the courts have gone on to the next stage, namely to deny a final injunction at trial where publication is still threatened.¹⁰⁷³ For another, as Griffiths points out, this discretion has not always be exercised in favour of the interest of freedom of expression.¹⁰⁷⁴ He cites as an example the case of *BBC v Precord*,¹⁰⁷⁵ where the BBC sought an injunction to prevent the making and distribution of a novelty 'rap' record which contained an extract from an interview conducted for the BBC by Neil Kinnock, who was then Leader of the Opposition. Harman J found for the BBC, notwithstanding his recognition that the damages caused to the defendants might almost be impossible to quantify, stating that:

... it is plain that this so-called satire may have a special market value at the moment which may be lost if the defendants are enjoined now but succeed at trial. That gives one particular cause for anxiety because the damage caused to the defendant may in such circumstances be almost impossible to quantify. None the less, it is the court's duty to try to balance the damage caused to the one and the damage cause to the other, remembering that this is a property right which the plaintiffs are entitled to have protected by the courts unless special circumstances are shown.

Furthermore, even in cases where injunctive relief is denied to the claimant, the defendant still remains liable for a claim in damages, and the prospect of such a claim is a 'chilling' factor for the defendant in deciding whether or not to publish, particularly

¹⁰⁶⁹ Lemley and Volokh, 'Freedom of Speech and Injunctions', 173 – 175.

¹⁰⁷⁰ Lemley and Volokh, 'Freedom of Speech and Injunctions', 210 – 216.

¹⁰⁷¹ Trunko, 'Remedies in Copyright Infringement', 1956 – 1957; 1960 – 1961.

¹⁰⁷² Garnett, 'The Impact of the HRA', 179 (citing as examples of these rare cases *Hubbard v Vosper* and *Lion Laboratories*).

¹⁰⁷³ Garnett, 'The Impact of the HRA', 179. He does acknowledge that the primary reason for this could be because such cases are usually determined, one way or the other, at the interim stage.

¹⁰⁷⁴ Griffiths, 'Copyright Law and Censorship', 24.

¹⁰⁷⁵ SRIS C/89/91.

where the publisher is of limited means.¹⁰⁷⁶ Some commentators have raised the possibility that the public interest defence can be invoked as a defence against a claim for damages.¹⁰⁷⁷ Griffiths, for instance, reads the Court of Appeal's judgment in *Ashdown* as supporting such a possibility, as it begins by acknowledging that there are 'rare circumstances' in which article 10 of the ECHR may permit a defendant to reproduce a copyright work notwithstanding the unavailability of an express fair dealing defence; goes on to suggest that, in many such cases, the requirements of article 10 could be accommodated simply by the court's refusal to exercise its discretion to grant an injunction; and finally that in the 'rare case where it is in the public interest that the words in respect of which another has copyright should be published without any sanction' – which Griffiths reads as recognising that an award of damages might also sometimes infringe the right to freedom of expression – the apparently conflicting demands of the CDPA and of the ECHR could be resolved through the application of the public interest defence.¹⁰⁷⁸ The position, however, remains unclear.

50 6.2.3 The public interest defence

The public interest defence under UK law was initially developed in the context of the law of confidence. It provides defendants with the opportunity to escape liability for breach of confidence if they can establish that the disclosure made by them was justified in the public interest.¹⁰⁷⁹ Subsequently, it made its way into copyright law through a number of cases which involved both copyright and breach of confidence claims.¹⁰⁸⁰ *Beloff v Pressdram* is usually regarded as the first case to recognise the public interest defence for an infringement of copyright.¹⁰⁸¹ Ungood-Thomas J stated in that case that: '... public interest is a defence outside and independent of statutes, *is not limited to copyright cases* and is based upon a general principle of common law'.¹⁰⁸² The existence of a public interest defence to copyright claims was also accepted by all three members of the Court of Appeal in the subsequent case of *Lion Laboratories*.¹⁰⁸³ In particular, Griffiths LJ stated

¹⁰⁷⁶ Griffiths, 'Copyright Law after *Ashdown*', 246 (describing this as a situation where the 'defendant effectively purchases the right to exercise the right to freedom of expression', and questioning whether it is compatible with the HRA); Garnett, 'The Impact of the HRA', 179; Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 255.

¹⁰⁷⁷ Griffiths, 'Copyright Law after *Ashdown*', 246; Garnett, 'The Impact of the HRA', 185 – 186. Cf Sayal, 'Copyright and Freedom of the Media', 273 (stating that view that damages should be recoverable, even if disclosure is in the public interest).

¹⁰⁷⁸ Griffiths, 'Copyright Law after *Ashdown*', 246.

¹⁰⁷⁹ *Campbell v Frisbee* [2002] EMLR 31, [23] (Lord Phillips stating that 'the right of confidentiality ... is not absolute. That right must give way where it is in the public interest that the confidential information shall be made public'). The origins of this defence can be traced to the dicta of Wood VC in *Gartside v Outram* (1857) 26 LJ Ch 113, 116.

¹⁰⁸⁰ Macmillan Patfield, 'Towards a Reconciliation', 224 (noting that the introduction of this defence into the law of copyright 'seems to have been by the back door as a consequence of cases involving an obvious breach of confidence and copyright').

¹⁰⁸¹ [1973] FSR 33.

¹⁰⁸² [1973] FSR 33, 56 (emphasis added).

¹⁰⁸³ [1985] QB 526.

unequivocally that 'I am quite satisfied that the defence of public interest is now well established in actions for breach of confidence and, although there is less authority on the point, *that it also extends to breach of copyright*'.¹⁰⁸⁴

Beloff v Pressdram and *Lion Laboratories* were cases decided under the Copyright Act 1956, which made no express reference to the public interest defence. Its successor, the CDPA, does however contain in section 171(3) a statement that 'Nothing in the Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise'.¹⁰⁸⁵ This was interpreted as statutory recognition of the public interest defence by the courts of first instance in *PCR v Dow Jones Telerate*, *Hyde Park*, and *Mars UK v Teknowledge*.¹⁰⁸⁶ Another first instance decision from this period which recognised the existence of the public interest defence, though making no reference to section 171(3), is *Service Corporation v Channel Four*.¹⁰⁸⁷ In both *PCR v Dow Jones Telerate* and *Hyde Park*, the public interest defence was expressly linked to the right to freedom of expression as set out in the ECHR.

This trend, however, was reversed by the decision of the Court of Appeal in *Hyde Park*, where the majority held that the basis of the public interest defence in a breach of confidence action could not be the same as the basis of such a defence to an action for copyright infringement. This was because, in the view of the majority, the jurisdiction of the court to refuse to enforce copyright on the basis of public interest arose from the court's inherent jurisdiction, and was limited to cases where the enforcement of copyright would offend against the policy of the law. While acknowledging that the circumstances where it would be against the policy of the law to use the court process to enforce copyright were not capable of definition, the court did go on to identify three sets of circumstances in which this would be the case, namely where the work in question: (i) was immoral, scandalous or contrary to family life; (ii) was injurious to public life, public health and safety or the administration of justice; or (iii) incited or encouraged others to act in such a manner.¹⁰⁸⁸

Shortly after the Court of Appeal handed down its decision in *Hyde Park*, the HRA came into force.¹⁰⁸⁹ It was on the basis of the HRA that the defendant in the subsequent case of *Ashdown* urged the court to recognise that the right to freedom of expression came within the scope of section 171(3). At first instance, Morritt VC declined to do so, holding

¹⁰⁸⁴ [1985] QB 526, 550.

¹⁰⁸⁵ CDPA, s 171(3).

¹⁰⁸⁶ [2000] ECDR 99, 108 (Jacob J recognising that the 'spare parts' exception established in *British Leyland v Armstrong* [1986] AC 577 'is founded on public policy and is yet another example of the general public policy defence to copyright claims which are recognised in my own judgment in *Hyde Park Residence v Yelland*').

¹⁰⁸⁷ [1999] EMLR 83, 91 – 92 (Lightman J stating that, in order to succeed, the claimants would have to resist the defence that the defendants' showing of the film in which they claimed copyright was in the public interest).

¹⁰⁸⁸ [2001] Ch 143, [64] – [66]. See also the dissent of Mance LJ, [83] (stating that 'I prefer to state no more in this case than that the circumstances in which the public interest may override copyright are probably not capable of precise categorisation or definition').

¹⁰⁸⁹ The HRA came into force on 2 October 2000, while the decision of the Court of Appeal in *Hyde Park* had been handed down on 10 February 2000.

that as the HRA was no reason for interpreting the CDPA any differently, the Court of Appeal's decision in *Hyde Park* was binding upon him notwithstanding that it had been decided prior to the coming into force of the HRA.¹⁰⁹⁰ This aspect of his judgment, however, was reversed on appeal. The Court of Appeal stated clearly that:

Now that the Human Rights Act 1998 is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the 1988 Act. In such circumstances, we consider that section 171(3) of the Act permits the defence of public interest to be raised.¹⁰⁹¹

This decision supports the view, contrary to that taken by the Court of Appeal in *Hyde Park*, that a public interest defence is available to copyright claims under the law of the UK. Given that the circumstances under which the public interest defence may be invoked are those in which the right to freedom of expression is most likely to be engaged, it would appear to be an appropriate mechanism for giving effect to the right to freedom of expression, particularly in those cases where the defence of fair dealing is not available.¹⁰⁹² It has been suggested that a purposive interpretation of the public interest defence could provide the courts with more flexibility than the fair dealing provisions, could remedy the current exclusion of photographs from the ambit of the defence of fair dealing for the purpose of reporting current events, and could also result in less need to rely on judicial vagaries on the interpretation of 'fairness', instead replacing it with a balancing exercise between competing interests.¹⁰⁹³ It has also been noted, however, the language of the court suggests that this defence will only be available in a very limited range of cases, potentially undermining its efficacy in this area.

Restrictive application of the public interest defence

In *Ashdown*, the Court of Appeal, while acknowledging the existence of the public interest defence, also went on to hold that it could be invoked only in those 'rare cases' where the right to freedom of expression trumps the rights conferred by the CDPA and cannot be accommodated under either the fair dealing defence or through the discretionary refusal of an injunction.¹⁰⁹⁴ For this reason, the court emphasised that where there was a dealing with a copyright-protected work for the purpose of reporting current events within the meaning of the CDPA, this would normally afford the court all the scope that it needed to properly reflect the public interest in freedom of expression; in those circumstances, there would be no need to give separate consideration to the

¹⁰⁹⁰ [2001] Ch 685, 700.

¹⁰⁹¹ [2001] EWCA Civ 1142, [58].

¹⁰⁹² Burrell, 'Defending the Public Interest', 398 (indicating that 'the additional flexibility offered by the public interest defence may be essential if the United Kingdom is to meet its obligations under [article 10 of] the ECHR', particularly in light of the limitations of the fair dealing defence).

¹⁰⁹³ Griffiths, 'Copyright Law and Censorship', 27; Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 254.

¹⁰⁹⁴ [2001] EWCA Civ 1142, [45] – [46], [58].

availability of a public interest defence.¹⁰⁹⁵ This indicates that the public interest defence is confined to very exceptional cases; as Garnett observes, it appears to be regarded by the Court of Appeal as 'something of a safety valve or a last resort'.¹⁰⁹⁶ For this reason, it is doubtful whether the public interest defence can, in practice, serve as an effective safeguard for freedom of expression. Angelopoulos notes that, while the decision of the Court of Appeal in *Ashdown* did have the positive outcome of reintroducing the public interest defence in copyright cases subsequent to its rejection in *Hyde Park*, it did not bring the position all the way back to the pre-*Hyde Park* situation which was more favourable to users, as exemplified by the decision in *Lion Laboratories*.¹⁰⁹⁷ In *Lion Laboratories*, the rationale of the decision appeared to be that, if a breach of confidence action could be deflected by a defence of public interest, then there is no *prima facie* reason why a copyright action founded on the same factual matrix as that of the breach of confidence action should succeed; in contrast, it was held in *Ashdown* that the defence would only be available in 'rare cases'.¹⁰⁹⁸

Given the manner in which it has been developed in breach of confidence cases, Garnett takes the view that, going forward, the public interest defence is likely to be applied strictly.¹⁰⁹⁹ For one, the courts have repeatedly emphasised that a distinction is to be drawn between cases where publication is in the public interest and cases where publication will merely be of interest to the public, thus circumscribing the scope of the defence.¹¹⁰⁰ For another, the courts have tended to examine closely whether the public interest is in fact best served by publication by the press or by more limited disclosure to the appropriate authorities, such as the police, particularly where the material reveals wrongdoing.¹¹⁰¹ A third factor is that the courts, in assessing the applicability of the public interest defence, will also take into consideration whether the publication of a substantial part of a protected work is necessary to satisfy a genuine public interest, or whether that interest can be adequately satisfied by publishing the information in a way that does not infringe copyright, as with their assessment of the applicability of any fair dealing defence raised. The cumulative effect of these factors is to limit the scope of the public interest defence.

Compliance with the Information Society Directive

Garnett has expressed doubt as to whether the public interest defence is fully compliant with the Information Society Directive, article 5 of which sets out the exceptions and

¹⁰⁹⁵ [2001] EWCA Civ 1142, [66].

¹⁰⁹⁶ Garnett, 'The Impact of the HRA', 185.

¹⁰⁹⁷ Angelopoulos, 'Freedom of Expression and Copyright', 344.

¹⁰⁹⁸ Angelopoulos, 'Freedom of Expression and Copyright', 344.

¹⁰⁹⁹ Garnett, 'The Impact of the HRA', 176.

¹¹⁰⁰ *British Steel Corporation v Granada Television Ltd*, [1981] AC 1096, 1168 (per Lord Wilberforce); *Lion Laboratories* [1985] QB 526, 553 (per O'Connor LJ).

¹¹⁰¹ *Initial Services v Putterill* [1968] 1 QB 396, 405 – 406 (per Lord Denning MR); *Francome v Mirror Group Newspapers* [1984] 1 WLR 892, 898 (per Sir John Donaldson MR).

limitations to the exclusive rights of the copyright owner which member states either must, or are permitted to, provide.¹¹⁰² The list of exceptions and limitations is closed, and use 'in the public interest' is not one of the listed exceptions. The Directive does cater for certain defences of a public interest nature, including:

- (i) reproduction by the press, communication to the public or the making available of published articles on current economic, political or religious topics or of broadcast works or of other subject matter of the same character;¹¹⁰³
- (ii) use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose;¹¹⁰⁴
- (iii) quotations for purposes such as criticism and review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public,¹¹⁰⁵

However, it does not contain any reference to a balancing requirement in the interests of freedom of expression.¹¹⁰⁶ Griffiths argues that this would not preclude the continued use of the public interest defence, as it is a particular expression of a more general legal principle rather than being a specific limitation or exception to copyright infringement, and accordingly is not expected to be included in the list of permitted exceptions and limitations under the Information Society Directive.¹¹⁰⁷ Garnett suggests that it may be possible to bring the public interest defence within the spirit, if not the letter, of article 9 of the Information Society Directive, which contains a general saving for 'other legal provisions', and provides that the Directive is without prejudice to provisions concerning 'in particular' a number of enumerated rights, including laws on trade secrets, security, confidentiality, data protection and privacy, and access to public documents.¹¹⁰⁸

6.2.4 Shifting of the burden of proof

As freedom of expression is a constitutionally guaranteed right, Barendt has suggested that in all instances of conflict between it and copyright, the onus should be placed on the copyright owner to show (in the context of the ECHR) that copyright law imposes necessary and proportionate restrictions on the exercise of the infringer's freedom of expression.¹¹⁰⁹ In many cases, Barendt believes that this burden would be easy to discharge, though not so in cases where the infringer claims to be making a parody of

¹¹⁰² Garnett, 'The Impact of the HRA', 177 – 178.

¹¹⁰³ Information Society Directive, art 5(3)(c).

¹¹⁰⁴ Information Society Directive, art 5(3)(c).

¹¹⁰⁵ Information Society Directive, art 5(3)(d).

¹¹⁰⁶ Recital 31 to the Directive merely speaks in general terms of safeguarding a fair balance of rights and interests between rightholders and users.

¹¹⁰⁷ Griffiths, 'Copyright Law after *Ashdown*', 264.

¹¹⁰⁸ Garnett, 'The Impact of the HRA', 178.

¹¹⁰⁹ Barendt, 'Copyright and Free Speech Theory', 19.

the work or giving the public information which would otherwise be impossible, or perhaps too expensive, to obtain.¹¹¹⁰ Griffiths makes a similar suggestion, stating that where a defendant succeeds in establishing that a copyright dispute is covered by article 10 of the ECHR, it is the copyright owner who ought to be required to demonstrate that there is a need for copyright to be enforced and that a remedy for copyright infringement is a proportionate response to the defendant's actions.¹¹¹¹ Suggestions regarding the burden of proof have also been made in the US.¹¹¹²

51 6.3 Creation of new legal mechanisms

52 6.3.1 Creation of new defences

Concerns have been raised that the existing defences under copyright law contain inherent limitations which mean that they are not able to accommodate freedom of expression concerns in all scenarios, even when interpreted liberally and purposively. The most direct way of addressing this would appear to be the creation of new statutory defences capable of taking into account freedom of expression concerns. Possible options for new defences which have been put forward include, in the specific context of the UK, a general 'fair use' defence and the implementation of an exception for 'caricature, parody and pastiche', as well as, more generally, a 'freedom of expression' defence. Each of these options are considered in this section.

A general 'fair use' defence

One of the shortcomings of the defence of fair dealing under the CDPA is that it is not expressed to be generally applicable to all uses of a copyright work, but is instead confined to uses for certain enumerated purposes. The obvious solution for remedying this would therefore appear to be the introduction of a general, US-style defence of 'fair use'. Such proposals, which pre-date the current debate on copyright and freedom of expression, have been made not only in the context of the UK,¹¹¹³ but also in other Commonwealth countries which provide for similar fair dealing defences.¹¹¹⁴ A similar proposal was discussed in a recent report prepared by the Irish Copyright Review Committee, which recommended the introduction of a tightly-drawn, specifically Irish provision (as opposed to a pure US-style provision) permitting fair use of copyright works, which is tied very closely to the existing statutory exceptions – including the fair

¹¹¹⁰ Barendt, 'Copyright and Free Speech Theory', 19.

¹¹¹¹ Griffiths, 'Copyright Law and Censorship', 22.

¹¹¹² Rosenfield, 'The Constitutional Dimension of Fair Use', 804; Hoberman, 'Copyright and the First Amendment', 597, 599; Netanel, *Copyright's Paradox*, 192.

¹¹¹³ Laddie, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?', 258. As early as 1977, the adoption of a general defence of fair use was recommended in the Whitford Committee Report, though this was subsequently rejected: *Report of the Committee to Consider the Law on Copyright and Designs* (Cm 6732, 1977).

¹¹¹⁴ In Canada, a 1984 report recommended that Canada adopt a US-style fair use defence: *From Gutenberg to Telidon: A White Paper on Copyright* (Canada Department of Consumer and Corporate Affairs/Department of Communications, 1984), 35 – 49.

dealing defence currently existing under the Irish Copyright and Related Rights Act 2000 – and which requires these existing exceptions to be exhausted before any claim to fair use can be allowed.¹¹¹⁵

However, commentators have expressed skepticism as to the effectiveness of this defence in protecting the interests of users generally and their right to freedom of expression in particular.¹¹¹⁶ Burrell argues that, unless the introduction of a fair use defence is accompanied by a transformation in judicial attitudes, the defence would be of limited utility.¹¹¹⁷ His historical analysis of the development of exceptions under copyright law reveals a pattern of judges failing to take account of the interests of users and adopting a restrictive approach to the interpretation of exceptions to copyright.¹¹¹⁸ Thus, he warns that the introduction of a general fair use defence should not be regarded as a panacea, as it is not inevitable that the desired change in judicial attitude will follow.¹¹¹⁹ He cites as an example of judicial conservatism in this regard the comparative lack of judicial support for a public interest defence subsequent to the enactment of section 171(3) of the CDPA, as exemplified by the decision of the Court of Appeal in *Hyde Park*, where the majority held that no general defence of public interest, arising from the same basis as that available for breach of confidence claims, existed in the context of an action for copyright infringement.¹¹²⁰ As Burrell notes: '[W]hen Parliament signalled its desire for the judges to continue to develop a public interest defence they failed to rise to this challenge'.¹¹²¹

In addition, it has also been pointed out that the presence of a flexible fair use defence under US law has not forestalled the disputes surrounding its interpretation and its applicability in cases involving freedom of expression issues.¹¹²² Furthermore, it has been doubted whether a general defence of fair use would fall within the closed list of exceptions and limitations set out in article 5 of the Information Society Directive.¹¹²³ In

¹¹¹⁵ Copyright Review Committee, *Modernising Copyright* (2013), 89 – 97, 176 – 177.

¹¹¹⁶ Robert Burrell, 'Reining in Copyright: Is Fair Use the Answer?' [2001] 4 *Intellectual Property Quarterly* 361.

¹¹¹⁷ Burrell, 'Reining in Copyright', 365.

¹¹¹⁸ Burrell, 'Reining in Copyright', 365 – 375.

¹¹¹⁹ Burrell, 'Reining in Copyright', 388.

¹¹²⁰ [64] – [66]. See Burrell, 'Reining in Copyright', 378 – 381 (noting that the Court of Appeal did so notwithstanding that the interpretation of s 171(3) as indicating express statutory recognition of the public interest defence was consistent with Parliamentary intention at the time, had been applied in several first instance decisions, and had been understood as indicating such by the New Zealand legislature, which sought to introduce a public interest exception into the New Zealand Copyright Act 1994 by incorporating a provision in identical terms). As Burrell notes, 'when Parliament signalled its desire for the judges to continue to develop a public interest defence they failed to rise to this challenge'.

¹¹²¹ Burrell, 'Reining in Copyright', 388.

¹¹²² Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 253.

¹¹²³ Dworkin, 'Copyright, Public Interest, and Freedom of Speech', 168 – 169. It has also been doubted whether the fair use defence is compatible with the three-step test set out in the Berne Convention (art 9(2))) and the TRIPS Agreement (art 13); on this basis, it has also been doubted whether the fair use defence would

relation to this latter point, it should be noted that the Irish Copyright Review Committee has stated that the tightly-drawn fair use exception contained in its recommendations is not necessarily precluded by the Information Society Directive, particularly given that case law at both the CJEU and ECHR has increasingly emphasised that the protection of intellectual property rights must be balanced against the protection of other fundamental rights.¹¹²⁴

An exception for 'caricature, parody and pastiche'

Parody has been recognised in the US as being a use of a protected work that potentially falls within the scope of the fair use defence, even where it is carried out for commercial purposes.¹¹²⁵ The position of parody in the UK, however, is less certain, as the CDPA does not contain an express defence of parody, and it is unclear whether most parodies would fall within the scope of the defence of fair dealing for the purpose of criticism or review.

The Gowers Review contains a recommendation that the UK should create an express exception to copyright for the purpose of caricature, parody or pastiche.¹¹²⁶ This is one of the exceptions and limitations which the Information Society Directive permits member states to provide for in their national laws.¹¹²⁷ Such an exception, it has been suggested, would be in furtherance of the aims of freedom of expression.¹¹²⁸ This recommendation was subsequently taken up in the Hargreaves Review,¹¹²⁹ and a statutory exception permitting fair dealing with copyright works for the purposes of caricature, parody or pastiche came into force on 1 October 2014.¹¹³⁰ In its response to the public consultation

be compatible with the Information Society Directive, art 5(5) of which requires all exceptions and limitations provided for by member states to be subject to the three-step test.

¹¹²⁴ Copyright Review Committee, *Modernising Copyright*, 91.

¹¹²⁵ *Campbell v Acuff-Rose Music* 510 US 569. The assessment of whether a parody constitutes a fair use remains subject to a consideration of the four factors set out in the US Copyright Act, such that it is not correct to claim that all parodies will necessarily fall within the scope of fair use. Nevertheless, courts appear to be more inclined to find that parodies, as opposed to other types of derivative works such as satires, amount to fair use.

¹¹²⁶ Gowers Review, 68. Masiyakurima has suggested that an exception for transformative uses would sufficiently cover both parodies and pastiches: Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 253 – 254. However, as was pointed out in the Gowers Review, the Information Society Directive does not currently permit the implementation of a general defence for transformative uses.

¹¹²⁷ Information Society Directive, art 5(3)(k).

¹¹²⁸ Dworkin, 'Copyright, Public Interest, and Freedom of Speech', 169 (stating that it would be 'sensible' to take advantage of this permitted exception under the Information Society Directive). The link between parody and freedom of expression was also made in two papers on copyright and parody commissioned by the Intellectual Property Office: see Mendis and Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions*; Kris Erickson, Martin Kretschmer and Dinusha Mendis, *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options* (Intellectual Property Office, 2013), 23 – 25, 34.

¹¹²⁹ Hargreaves Review, 8. See also HM Government, *Modernising Copyright*, 29 – 31.

¹¹³⁰ Draft Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, reg 1.

on the recommendations made in the Hargreaves Review, the government drew an express link between the proposed exception and freedom of expression, noting that it would bring 'compelling social and cultural benefits such as the development of free speech'.¹¹³¹ However, Masiyakurima believes that the utility of this proposed exception would be extremely limited, due to a number of factors: first, it would be subverted if judicial attitudes which privilege economic considerations over freedom of expression were to prevail;¹¹³² second, it is difficult to make a case for singling out these specific uses for preferential treatment, given that there are other public interests; and third, the difficulty of formulating a comprehensive definition for 'parody' and 'pastiche', resulting in uncertainty.¹¹³³

Meanwhile, the CJEU has ruled on the matter of parody, in *Deckmyn v Vandersteen*. Importantly for the new provisions in the UK, it found that the term 'parody' must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the EU, yet also have its meaning and scope determined in accordance with its usual meaning in everyday language. Specifically, it noted that essential characteristics of parody are to evoke an existing work while being noticeably different from it and to constitute an expression of humour or mockery. However, the concept is not subject to conditions that it should display an original character of its own (beyond displaying noticeable differences with respect to the parodied work), that it could reasonably be attributed to a person other than the author of the original work itself, or that it should relate to the original work itself or mention the source of the parodied work.

The Court also added some observations on the striking of a fair balance between the rights and interests of different parties. It suggested that if a parody conveys a discriminatory message (noting that non-discrimination is provided for in both the Charter and the Convention), this is relevant to assessing the legitimate interest of the original rightsholder in ensuring that the source work is not associated with such a message.

A 'freedom of expression' defence

The inability of internal copyright principles such as the idea/expression dichotomy and the defences of fair dealing and fair use to adequately accommodate freedom of expression concerns has also led to proposals for an independent 'freedom of expression' (or 'First Amendment') defence to claims for copyright infringement. Such a defence, it has been argued, has a number of advantages. First, it would enable the courts to give due consideration to freedom of expression issues outside the constraints of copyright's internal doctrines.¹¹³⁴ Additionally, in the context of the UK, it has also been suggested that such a defence could be used to mitigate the limitations imposed on the defence of

¹¹³¹ HM Government, *Modernising Copyright*, 31.

¹¹³² As described previously, Masiyakurima attributes to such judicial attitudes the inability of fair dealing defences to adequately accommodate freedom of expression concerns.

¹¹³³ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 254.

¹¹³⁴ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 252; Wang, 'The First Amendment Exception to Copyright', 1159.

fair dealing by the Information Society Directive¹¹³⁵ and to minimise the technical difficulties arising from allocating various copyright uses to the recognised statutory exceptions.¹¹³⁶ In the US context, meanwhile, it has been suggested that a principled First Amendment defence would do much to restore the credibility of copyright law, which has been eroded by its continued reliance on a patchwork of inchoate exceptions to resolve constitutional conflicts.¹¹³⁷ One US commentator has noted that in at least two cases,¹¹³⁸ the courts have, while rejecting First Amendment defences on the facts, suggested that the First Amendment might require the creation of an independent privilege in certain circumstances.¹¹³⁹ He has also noted that the creation of a constitutionally-mandated privilege to protect First Amendment rights is not without precedent in areas such as the law of defamation.¹¹⁴⁰

Criticisms

Notwithstanding the attractions of such a defence, however, Masiyakurima again concludes that, at least in the UK, its benefits would be largely illusory, as it involves a questionable assumption that the courts will interpret it purposively.¹¹⁴¹ According to him, the defence of fair dealing often fails in cases involving freedom of expression not because of lack of judicial awareness of the importance of these issues in copyright law, but rather because economic considerations are allowed to prevail over other public interests.¹¹⁴² Thus, there is no guarantee that the courts will not interpret and apply a new freedom of expression defence in the same manner. Additionally, the proposed scope of such a defence may be redundant in some cases, as it may cover ground already covered by the existing fair dealing and public interest defences.¹¹⁴³

Others have been even more vocal in their criticisms of an independent freedom of expression defence, not on the grounds of limited impact but regarding necessity and scope. Swanson, in particular, has argued that such a defence would (i) diminish the autonomy of authors, as its exercise would deprive an author of the opportunity to

¹¹³⁵ Under the CDPA, the defence of fair dealing for the purpose of criticism or review is only applicable to works that have been made available to the public: CDPA, s 30(1). This is a requirement pursuant to the Information Society Directive, art 5(3)(d). In principle, users would be able to rely on an independent freedom of expression defence to circumvent this requirement.

¹¹³⁶ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 252.

¹¹³⁷ Hoberman, 'Copyright and the First Amendment', 572; Wang, 'The First Amendment Exception to Copyright', 1158.

¹¹³⁸ *Wainwright Securities v Wall Street Transcript* 558 F.2d 91 ; *Sid & Marty Krofft Television Productions v McDonald's* 562 F.2d 1157.

¹¹³⁹ Hoberman, 'Copyright and the First Amendment', 594 – 595.

¹¹⁴⁰ Hoberman, 'Copyright and the First Amendment', 595.

¹¹⁴¹ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 252.

¹¹⁴² Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 252 – 253.

¹¹⁴³ Masiyakurima, 'The Free Speech Benefits of Fair Dealing Defences', 253.

decide when and where a particular work was to be published, should the use of the work fall within the scope of the defence;¹¹⁴⁴ (ii) undermine the property right basis of copyright law, as it would deprive copyright owners of the right to exclude others and the opportunity to exploit the work in its most highly valued use;¹¹⁴⁵ that it would undermine the incentive function of copyright, as authors would have less of an incentive to create if they were unable to profit from the full economic value of their expression, which would be the case if uncompensated takings were permitted;¹¹⁴⁶ (iv) lead to socialisation of copyright, as the exclusive rights of authors would be subordinated to the goal of public access;¹¹⁴⁷ and (v) even harm the First Amendment itself, as such a defence would risk trivialising it and converting it into a tool to be used by one competitor against another.¹¹⁴⁸ It has also been argued that there is no precedent within US law for such a defence, as, thus far, no court held that the First Amendment provides for a copyright defence distinct from the accommodation embodied in the fair use doctrine.¹¹⁴⁹

Shaping an independent freedom of expression defence

In the context of the UK, Griffiths has suggested that, as the HRA already introduces a free-standing defence based directly on the incorporated articles of the ECHR,¹¹⁵⁰ an option could be for this defence simply to take its place alongside the existing defences; however, he acknowledges that this could lead to an unnecessary overlap between this new ECHR-based defence and the existing ones.¹¹⁵¹ Garnett has suggested that the right to freedom of expression may give rise to a 'new' defence in cases that are not otherwise accommodated by the existing defences under the CDPA, though giving little indication as to the precise legal form which such a defence should take.¹¹⁵² He identifies five scenarios under which such a defence would be applicable, all of which are situations in which the existing defence of fair dealing would not apply:¹¹⁵³

- (i) where the use made of a work is for the purpose of reporting current events, but the corresponding defence of fair dealing under the CDPA is not applicable as the work is a photograph;

¹¹⁴⁴ Swanson, 'Copyright Versus the First Amendment', 289 – 291.

¹¹⁴⁵ Swanson, 'Copyright Versus the First Amendment', 291 – 293.

¹¹⁴⁶ Swanson, 'Copyright Versus the First Amendment', 293 – 294.

¹¹⁴⁷ Swanson, 'Copyright Versus the First Amendment', 294 – 295.

¹¹⁴⁸ Swanson, 'Copyright Versus the First Amendment', 295 – 297.

¹¹⁴⁹ Oakes, 'Copyright and the First Amendment', 140.

¹¹⁵⁰ HRA, s 7(1)(b).

¹¹⁵¹ Griffiths, 'Copyright Law and Censorship', 26 – 27.

¹¹⁵² Garnett, 'The Impact of the HRA', 208.

¹¹⁵³ Garnett, 'The Impact of the HRA', 208 – 209.

- (ii) where a work is used for the purpose of reporting events which are in the public interest, but are not 'current',¹¹⁵⁴
- (iii) where the use is for the purposes of criticism or review of a work or performance of a work which has not been made available to the public;
- (iv) where the use is for the purposes of criticism or review of something which is not a work or performance of a work, such as a parody whose target is not a particular work but rather the author's style or the lifestyle of some other person;
- (v) where the use is neither for the purposes of reporting an event of any kind or for the purposes of criticism or review, though Garnett acknowledges that it would be difficult to think of a case where use is made of a substantial part of a work in a manner which gives rise to implications for freedom of expression, but which nevertheless does not involve reporting of current events, criticism or review.

Apart from this, there have been no significant attempts by UK-based scholars to sketch out the contours of such a possible defence. This is in contrast to US-based commentators, who have drawn upon a range of different theoretical justifications upon which to found their particular version of an independent freedom of expression defence.

The first group of these commentators bases its proposals on the ground of necessity. An independent freedom of expression defence, it is argued, should apply either where the taking of a copyright-protected work is necessary for a speaker to communicate his own ideas, or, more narrowly, where such taking is both necessary and not permitted by the internal mechanisms of copyright law.¹¹⁵⁵ This has been criticised on the basis that it is difficult to determine when such a taking is necessary, as opposed to when it is merely helpful.¹¹⁵⁶

The second group suggests that such a defence should be founded on the public interest, so as to apply only where there has been an unauthorised taking or dissemination of copyright-protected material which relates to matters of general or public interest.¹¹⁵⁷ Cases such as *Rosemont* and *Time*, it has been argued, provide a precedent of sorts for the recognition of a First Amendment defence where there is a public interest in the free dissemination of information.¹¹⁵⁸ The difficulty with this proposal is that it raises the

¹¹⁵⁴ *Ashdown* [2001] EWCA Civ 1142, [44] (the Court of Appeal acknowledging the possibility of such a scenario in stating 'it is possible to conceive of information of the greatest public interest relating not to a current event, but to a document produced in the past. We are not aware of any provision of the 1988 Act which would permit publication in such circumstances...').

¹¹⁵⁵ Denicola, 'Copyright and Free Speech', 304 – 315; Hamel, '*Harper & Row v The Nation*', 272; Hoberman, 'Copyright and the First Amendment', 597 – 599.

¹¹⁵⁶ Swanson, 'Copyright Versus the First Amendment', 283 – 285.

¹¹⁵⁷ Oakes, 'Copyright and the First Amendment', 232, 246; Fraser, 'The Conflict Between the First Amendment and Copyright Law', 28 – 31.

¹¹⁵⁸ Krieg, 'Copyright, Free Speech and the Visual Arts', 1575; Wang, 'The First Amendment Exception to Copyright', 1184 – 1185; Denicola, 'Copyright and Free Speech', 299 – 300.

question of what constitutes a matter of significant public interest;¹¹⁵⁹ as one commentator points out, '[e]verything is imbued with public interest to some degree'.¹¹⁶⁰ Such an approach might encourage *ad hoc* and overly subjective judicial decision-making that undercuts the value of copyright protection, creates uncertainty, and, by infusing an additional factor into the cause of action for copyright infringement, increases the likelihood of erroneous decisions.¹¹⁶¹

The third group of commentators advocates for the availability of an independent defence based on freedom of expression only where there has been a merger of idea and expression, meaning that the idea/expression dichotomy has failed, and the taking of that expression is therefore necessary for the communication of the idea.¹¹⁶² It has been questioned, however, whether such a merger truly exists; in particular, it has been argued that the ideas and facts contained in a photograph or film, for instance, are perfectly capable of being communicated in words – the fact that the verbal description may not be as vivid or shocking as the image does not mean that there has been a collapse of idea into expression.¹¹⁶³

Some proposals combine one or more of the grounds set out above. One commentator, for instance, suggests that there should be a freedom of expression defence to the media's use of copyright-protected videotapes and photographs only where: (i) the material uniquely contributes to public debate about a news event; (ii) public access to the material is not otherwise available through any public or costless medium; and (iii) there has been a collapse of the fact-expression dichotomy of the source material.¹¹⁶⁴

53 6.3.2 Implementation of compensation-based mechanisms

Several commentators have put forward proposals based on a 'compensation right' approach, which would guarantee compensation for copyright owners while affording the general public greater freedom to share and make use of material protected by copyright. These have generally been discussed in the context of peer-to-peer file-sharing technologies. Proposals range from the imposition of a 'non-commercial use levy',¹¹⁶⁵ to a regime of government compensation paid to copyright owners out of general tax revenue,¹¹⁶⁶ and to compulsory licences.

¹¹⁵⁹ Goldwag, 'Copyright Infringement and the First Amendment', 332.

¹¹⁶⁰ Goldwag, 'Copyright Infringement and the First Amendment', 333.

¹¹⁶¹ Goldwag, 'Copyright Infringement and the First Amendment', 335; Hoberman, 'Copyright and the First Amendment', 596 – 597.

¹¹⁶² Nimmer, 'Does Copyright Abridge the First Amendment Guarantee'; Tharmaratnam, 'Copyrighting Raw Videotapes', 427 – 428; Reis, 'The Rodney King Beating', 303 – 305.

¹¹⁶³ Swanson, 'Copyright Versus the First Amendment', 287 – 289.

¹¹⁶⁴ Tharmaratnam, 'Copyrighting Raw Videotapes', 433 – 434.

¹¹⁶⁵ Neil Weinstock Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File-Sharing' (2003) 17 *Harvard Journal of Law & Technology* 1.

¹¹⁶⁶ Netanel, 'Impose a Noncommercial Use Levy', 80 – 82.

An early example of such a scheme was put forward by Nimmer in the specific context of news photographs, which he regarded as the only instance in which the conflict between free speech interests and copyright interests would not be adequately addressed by the idea/expression dichotomy.¹¹⁶⁷ He proposed that if, within one month of the making of the news photograph in question, it had still not appeared in the newspapers, magazines, or television news programs servicing a given area, anyone who be entitled to reproduce the photograph in such an area, with no obligation other than to pay to the copyright owner of the photograph what might be determined as a reasonable royalty by the court.

A more recent proposal put forward by Netanel involves the imposition of a 'non-commercial use levy' on the sale of any consumer product or service whose value is substantially enhanced by peer-to-peer file-sharing, such as Internet access, peer-to-peer software and services, computer hardware, consumer electronic devices used to copy, store, transmit or play downloaded files (including CD burners, MP3 players and digital video recorders), and blank storage media used with those devices. The levy would be paid by the suppliers of these products and services, and the proceeds would be distributed to copyright owners based on the users' demand for their works as measured by technology that tracks and monitors such use. In return for the payment of the levy, the law will provide immunity against any claims in copyright for individuals who copy, distribute, adapt and modify any expressive content that the copyright owner has previously released to the public, provided that these uses are for non-commercial purposes.¹¹⁶⁸ Netanel believes that such a system would allow non-commercial users and creators greater freedom to explore, share and modify existing works (thus promoting freedom of expression) while continuing to provide remuneration to authors and publishers, thus remaining consistent with the aims of copyright.¹¹⁶⁹ He does, however, also acknowledge that the system proposed is open to criticism and, in this regard, highlights two principal concerns: first, that the levy will not be able to yield sufficient funds to compensate copyright owners without imposing unacceptable costs on consumers; and second, that the levy will inefficiently and inequitably require low-volume users of protected content to subsidise both copyright owners and high-volume users.¹¹⁷⁰

An alternative mechanism suggested by Netanel is a system of government rewards to be paid to authors in lieu of copyright.¹¹⁷¹ Such a system would take much the same form as his proposed non-commercial use levy, except that copyright owners would be paid from a body funded by general tax revenues rather than levies imposed on selected products and services. Netanel points out that this regime would have a number of

¹¹⁶⁷ Nimmer, 'Does Copyright Abridge the First Amendment Guarantee', 274 – 275.

¹¹⁶⁸ Netanel, 'Impose a Noncommercial Use Levy', 4. Netanel considers computer programs to be non-expressive works whose use would not be covered by such immunity.

¹¹⁶⁹ Netanel, 'Impose a Noncommercial Use Levy', 6.

¹¹⁷⁰ Netanel, 'Impose a Noncommercial Use Levy', 59 – 74.

¹¹⁷¹ Netanel, 'Impose a Noncommercial Use Levy', 80 – 82.

advantages over the non-commercial use levy, as it would obviate the need to determine which products and services should be subject to the levy and the amount of levy to be imposed on each product and service; avoid imposing a potentially innovation-inhibiting tax on new technologies; and could be funded by a progressive income tax rather than a regressive 'sales tax' on selected goods and services. However, it is also subject to a number of drawbacks: first, the prospect of higher taxes may be politically unpalatable for the general public, particularly given the absence of a direct nexus between such a tax and their use of file-sharing technology; second, such a system could result in inequitable cross-subsidisation at an even greater degree than the non-commercial use levy, as the cost of payments to copyright owners is spread among a much greater population, making it more likely that people who do not engage in copying of protected works will have to pay; and third, such a system raises the possibility of untoward government influence on the speech of authors, given the attendant possibility of government officials' involvement in deciding which types of speech will or will not be funded. For this reason, Netanel finds the non-commercial use levy to be a more politically tenable and desirable option.¹¹⁷²

A third option, proposed by Lessig, is the implementation of a system of compulsory licensing, similar to that used in cable retransmission, which would enable users to freely copy and circulate works through file-sharing technology.¹¹⁷³ The relevant fee would be set not by the copyright owner, but by policymakers keen on striking a fair balance. Such a system would, in principle, increase the ability of users to access and share works online, thus promoting freedom of expression.¹¹⁷⁴ However, Botein and Samuels have expressed skepticism as to the feasibility of such a solution, pointing out that compulsory licensing schemes for audio and video in the US, with the possible exception of the well-established compulsory licence for making and distributing phonorecords,¹¹⁷⁵ have so far proved to be unsuccessful for various reasons.¹¹⁷⁶ They highlight that jukebox compulsory licence was repealed following concerns that it violated US obligations under the Berne Convention, article 11(1) of which assures copyright owners of the exclusive right in the public performance of their works,¹¹⁷⁷ while the digital audio home recording royalty, which was directed at copies made using digital audio tape (DAT) technology, yielded very little in the way of licensing fees as DAT technology has

¹¹⁷² Netanel, 'Impose a Noncommercial Use Levy', 83.

¹¹⁷³ Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Random House, 2001), 255.

¹¹⁷⁴ Enrico Bonadio, 'File Sharing, Copyright and Freedom of Speech' (2011) 33(10) *European Intellectual Property Review* 619, 631.

¹¹⁷⁵ US Copyright Act, s 115. The other compulsory licensing schemes discussed are the jukebox compulsory licence (US Copyright Act, s 116 (now repealed)); the digital home recording royalty (US Copyright Act, ss 1003 – 1007); the digital performance right in sound recordings licence (US Copyright Act, s 114); the cable compulsory licence (US Copyright Act, s 111); the public broadcasting licence (US Copyright Act, s 118); the satellite retransmission licence (US Copyright Act, s 119); and the local-to-local retransmission licence. (US Copyright Act, s 122).

¹¹⁷⁶ Michael Botein and Edward Samuels, 'Compulsory Licences in Peer-to-Peer File Sharing: A Workable Solution?' (2005) 30 *Southern Illinois University Law Journal* 69, 69.

¹¹⁷⁷ Botein and Samuels, 'Compulsory Licences in Peer-to-Peer File Sharing', 72 – 73.

not been widely adopted by consumers.¹¹⁷⁸ While the digital performance right in sound recordings licence has begun generating a moderate flow of revenue, Botein and Samuels point out that much of this revenue is attributable to commercial radio satellite services, and that the same scenario is unlikely to arise in the context of peer-to-peer file-sharing given that much of it is carried out on a non-commercial basis.¹¹⁷⁹ The cable compulsory licence, meanwhile, is argued to have been replaced to a large extent by negotiated agreements between broadcasters and owners of programming.¹¹⁸⁰

The advantage of these proposed mechanisms is that they do not erase copyright – which still functions beneficially as an ‘engine of freedom of expression’ – but, rather, attempt to strike a balance between it and the right to freely access copyright works on the internet, which is ancillary to the fundamental right to freedom of expression.¹¹⁸¹ Concerns have been expressed, however, that a compulsory licensing mechanism which is grounded on the right to freedom of expression – in particular the right of the public to access information – may effectively constitute a tax for the exercise of a fundamental right.¹¹⁸²

7 Further issues

This section briefly examines the interface between the moral right of integrity and freedom of expression, as well as the implications of copyright for human rights other than freedom of expression, in particular the right to education.

54 7.1 The moral right of integrity and freedom of expression

Moral rights are intended to protect the non-economic or non-pecuniary interests of the author of a copyright work. These rights include the right of attribution, or the right to be identified as the author of the work when it is copied or communicated to the public; the right of integrity, or the right to object to derogatory treatment of the work; the right to divulge or publish the work; the right to withdraw the work from circulation; and the right to object to excessive criticism of the work. The present discussion will focus primarily on the moral right of integrity, as it has particular implications for freedom of expression, for reasons that will be explained below. These moral rights have a human rights dimension; as noted previously, both the UDHR and the ICESCR provide for the right of every person 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.¹¹⁸³

¹¹⁷⁸ Botein and Samuels, ‘Compulsory Licences in Peer-to-Peer File Sharing’, 73 – 74.

¹¹⁷⁹ Botein and Samuels, ‘Compulsory Licences in Peer-to-Peer File Sharing’, 74 – 75.

¹¹⁸⁰ Botein and Samuels, ‘Compulsory Licences in Peer-to-Peer File Sharing’, 77.

¹¹⁸¹ Bonadio, ‘File Sharing, Copyright and Freedom of Speech’, 631.

¹¹⁸² Hoberman, ‘Copyright and the First Amendment’, 593 – 594.

¹¹⁸³ UDHR, art 27(2); ICESCR, art 15(1)(c).

55 7.1.1 The moral right of integrity under international and domestic copyright frameworks

The Berne Convention requires members of the Union to confer on authors the moral right of integrity. The relevant provision states:¹¹⁸⁴

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

This obligation has been implemented in the UK as section 80 of the CDPA. The relevant provision confers on authors of copyright-protected literary, dramatic, musical and artistic works, as well as directors of copyright-protected films, the right not to have their works subjected to derogatory treatment.¹¹⁸⁵ 'Treatment' is defined as 'any addition to, deletion from or alteration to or adaptation of the work',¹¹⁸⁶ and a treatment of a work will be derogatory where it 'amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director'.¹¹⁸⁷ In the US, the obligation to protect the author's moral right of integrity has been implemented only to a limited extent at the federal level via the Visual Artists Rights Act of 1990, which amends the Copyright Act. This confers on the author of a work of visual art the right 'to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation'.¹¹⁸⁸

56 7.1.2 Nature of the interaction between the moral right of integrity and freedom of expression

Several commentators have pointed out that the moral right of integrity serves to forward free speech interests by ensuring the expressive autonomy of the author.¹¹⁸⁹ Stamatoudi draws a direct link between the moral right of integrity and freedom of expression, observing that:¹¹⁹⁰

...a denial of [the right of integrity] would lead to the violation of your intellectual integrity, as this is reflected in the work; the product of the mind. That product is the direct result of your freedom of expression. You can

¹¹⁸⁴ Berne Convention, art 6*bis*(1). The provision also requires members of the Union to confer on authors the moral right of attribution.

¹¹⁸⁵ CDPA, s 80(1).

¹¹⁸⁶ CDPA, s 80(2)(a).

¹¹⁸⁷ CDPA, s 80(2)(b).

¹¹⁸⁸ US Copyright Act, s 106A(a)(3)(A).

¹¹⁸⁹ Irini A Stamatoudi, 'Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators' [1997] 4 *Intellectual Property Quarterly* 478, 501; Spence, 'Intellectual Property and the Problem of Parody', 609; Patrick Masiyakurima, 'The Trouble with Moral Rights' (2005) 68(3) *Modern Law Review* 411, 413, 420; Angelopoulos, 'Freedom of Expression and Copyright', 348 – 349.

¹¹⁹⁰ Stamatoudi, 'Moral Rights of Authors in England', 501.

only be free to express yourself to the full extent, if you can also control the exact wording and format of your expression.

In a similar vein, Spence has argued that moral rights may be regarded as being consistent with the principle of free speech particularly where that principle is grounded in respect of speaker autonomy, adding that '[i]t may be that I can only contribute to public debate if I have the right both to be identified with my speech and to prevent it from being distorted'.¹¹⁹¹ Masiyakurima has made a similar observation, noting that the right of integrity prevents distortion or adulteration of the author's expression, thus protecting the author's message against unauthorised interference.¹¹⁹² Angelopoulos also takes the view that the identification of an author with a distorted version of his message might amount to a transgression against his autonomy of expression, potentially giving rise to a free speech claim on his behalf; she cites as one example the composer Dmitri Shostakovich's objection to the use of his music in an American spy film during the Cold War, whose anti-Soviet context added to his music a flavour he did not condone.¹¹⁹³

Writing in the US context, Konrad has argued that there is a First Amendment interest in preventing the distortion of speech, which is served by the moral right of integrity.¹¹⁹⁴ According to Konrad, a speaker's freedom of speech is meaningless without assurances that his speech will remain relatively unchanged as it enters the marketplace of ideas; this is because distorted speech that the speaker is not in a position to correct will fill the marketplace of ideas with destructive information that confuses participants in the democratic process, thus thwarting both the First Amendment's social safety-valve effect as well as its intended facilitation of speaker self-fulfilment.¹¹⁹⁵ Cross has also argued that laws that confer integrity rights upon authors are constitutional from the perspective of the First Amendment, as they involve content-neutral regulation of speech (within the meaning of *United States v O'Brien*¹¹⁹⁶ and *Turner Broadcasting v Federal Communications Commission*),¹¹⁹⁷ and also serve the governmental interests of encouraging artistic production by guaranteeing that the author's reputation is accurate as well as the preservation of the integrity of (and hence the author's message in) works

¹¹⁹¹ Spence, 'Intellectual Property and the Problem of Parody', 609.

¹¹⁹² Masiyakurima, 'The Trouble with Moral Rights', 413, 420.

¹¹⁹³ Angelopoulos, 'Freedom of Expression and Copyright', 348 – 349. See also Leslie Treiger-Bar-Am, 'Adaptations with Integrity' in Helle Porsdam (ed), *Copyright and Other Fairy Tales: Hans Christian Anderson and the Commodification of Creativity* (Edward Elgar, 2006), 69. For the litigation generated by this incident, see *Shostacovich v Twentieth-Century Fox Film Corporation* 196 Misc. 67, 80 N.Y. Supp. 2d 575 (1948), aff'd by memorandum opinion 275 App. Div. 692, 87 N.Y. Supp. 2d 430 (1949); *Societe Le Chant du Monde v Societe Fox Europe and Societe Fox Americaine Twentieth Century Ct. App. Paris*, Jan. 13, 1953. For commentary, see William Strauss, 'The Moral Right of the Author' (1955) 4 *American Journal of Comparative Law* 506.

¹¹⁹⁴ Otto W Konrad, 'A Federal Recognition of Performance Art Author Moral Rights' (1991) 48 *Washington & Lee Law Review* 1579, 1606 – 1608.

¹¹⁹⁵ Konrad, 'A Federal Recognition', 1607 – 1608.

¹¹⁹⁶ 391 US 367

¹¹⁹⁷ 512 US 622.

of art.¹¹⁹⁸ Cross also argues that integrity laws achieve these interests without restricting speech too greatly, as a person who wishes to criticise a piece of art or its author will remain free to convey that message without reproducing or altering the work.¹¹⁹⁹

However, most of these commentators also recognise that the moral right of integrity may well come into conflict with freedom of expression, as it may inhibit the creation and dissemination of derivative works.¹²⁰⁰ Writing in the context of parodies, both Spence and Deazley have observed that an author's moral right of integrity is likely to be implicated by a parodic treatment of his work,¹²⁰¹ though Spence also notes the existence of arguments to the contrary, namely that a parody will not usually be prejudicial to the honour or reputation of the author of the source work.¹²⁰² In a similar vein, Griffiths argues that the case of *Suntrust Bank v Houghton Mifflin*, which involved a parody of the novel *Gone with the Wind* entitled *The Wind Done Gone*, might have been decided very differently in the UK had the action been brought on the basis of infringement of the author's moral right of integrity under the CDPA.¹²⁰³ He notes, in particular, that the heirs of Margaret Mitchell (the author of *Gone with the Wind*) would have been able to make out an arguable case that Mitchell's 'honour or reputation' had been prejudiced by the publication of *The Wind Done Gone*, as many readers would be left with a diminished opinion of Mitchell and *Gone with the Wind* as a result of reading *The Wind Done Gone*.¹²⁰⁴ For some of these commentators, the main difficulty with the moral right of integrity is that it is not subject to the same safeguards as those applicable to economic rights, such as the defence of fair dealing in the UK or fair use in the US, that would have the effect of ameliorating any conflict between these economic rights and freedom of expression.¹²⁰⁵

57.7.1.3 Proposed solutions

¹¹⁹⁸ John T Cross, 'Reconciling the "Moral Rights" of Authors with the First Amendment Right of Free Speech' (2007) 1 *Akron Intellectual Property Journal* 185, 239 – 240, 248 – 249.

¹¹⁹⁹ Cross, 'Reconciling the Moral Rights of Authors', 249.

¹²⁰⁰ Guy Pessach, 'The Author's Moral Right of Integrity in Cyberspace: A Preliminary Normative Framework' (2003) 34(3) *International Review of Intellectual Property and Competition Law* 250, 256 – 257; Deazley, 'Copyright and Parody', 798 – 799; Angelopoulos, 'Freedom of Expression and Copyright', 348 – 349; Roberta Kwall, 'The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)' (2002) 77 *Washington Law Review* 985, 1028.

¹²⁰¹ Spence, 'Intellectual Property and the Problem of Parody', 597 – 598; Deazley, 'Copyright and Parody', 798.

¹²⁰² Spence, 'Intellectual Property and the Problem of Parody', 597.

¹²⁰³ Jonathan Griffiths, 'Not Such a "Timid Thing": The UK's Integrity Right and Freedom of Expression' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP, 2005), 226 – 229.

¹²⁰⁴ Griffiths, 'Not Such a Timid Thing', 229.

¹²⁰⁵ Griffiths, 'Not Such a Timid Thing'; Kathryn A Kelly, 'Moral Rights and the First Amendment: Putting Honour Before Free Speech?' (1994) 11 *University of Miami Entertainment & Sports Law Review* 211, 243 – 244; Joseph M Beck et al, 'Moral Rights and Wrongs: Conflicts in the Digital World' (2009) 57 *Journal of the Copyright Society of the USA* 587, 607 – 609.

In the UK context, Griffiths has suggested that the public interest defence available at common law and preserved by section 171(3) of the CDPA might be extended to a claim for breach of the moral right of integrity, in cases where a sanction for the breach cannot be justified under article 10 of the ECHR.¹²⁰⁶ He also adds, however, that it is unclear whether the UK courts would be willing to apply the public interest defence in this manner, for a number of reasons. First, while section 171(3) expressly preserves 'any rule of law preventing or restricting the enforcement of *copyright*, on grounds of public interest or otherwise' (emphasis added), it makes no express mention of claims for breaches of moral rights; while it might be argued that moral rights are established by the CDPA and thus form part of copyright law in the broad sense, this argument is not borne out by the overall structure of the CDPA, which draws a clear distinction between actions for infringement of copyright and actions for infringements of moral rights.¹²⁰⁷ Second, the Court of Appeal's conclusion in *Ashdown* that section 171(3) of the CDPA preserved the public interest defence available at common law was based heavily on its view that the defence pre-dated the enactment of the CDPA itself; as there were no statutory moral rights prior to the coming into force of the CDPA, Griffiths suggests it is difficult to argue that section 171(3) preserves any similar rule relating to moral rights.¹²⁰⁸ Third, the courts have shown an unwillingness to apply the common law rule of public interest in circumstances where the claim of infringement is based on a detailed legislative scheme that makes no provision for an appropriate statutory exception.¹²⁰⁹ The example cited by Griffiths in support of this contention is *Mars UK Ltd v Teknowledge Ltd*,¹²¹⁰ where the UK High Court held that section 171(3) of the CDPA did not preserve a common law 'right to repair' or analogous exception in relation to a claim for infringement of the copyright and database rights subsisting in a computer program, as no such defence had been legislated for by the European legislation in adopting the Software and Database Directives, nor by the British Parliament in implementing these Directives in the CDPA.¹²¹¹

Another solution proposed by Griffiths is to interpret the moral right of integrity in a manner that minimises any conflict with freedom of expression.¹²¹² Under Griffiths' proposed interpretation, prejudice to the author's honour or reputation within the meaning of the integrity right would arise only where the public believes that the author in question is responsible for the derogatory treatment of the work. In such a case, a subsequent creator who alters the work will be insulated from liability provided that a sufficiently prominent disclaimer is used. In these circumstances, Griffiths argues, any prejudice caused to the honour or reputation of the author would not result directly from

¹²⁰⁶ Griffiths, 'Not Such a Timid Thing', 230 – 232.

¹²⁰⁷ Griffiths, 'Not Such a Timid Thing', 231.

¹²⁰⁸ Griffiths, 'Not Such a Timid Thing', 231.

¹²⁰⁹ Griffiths, 'Not Such a Timid Thing', 232.

¹²¹⁰ [1999] EWHC 226 (Pat).

¹²¹¹ [1999] EWHC 226 (Pat), [16] – [20].

¹²¹² Griffiths, 'Not Such a Timid Thing', 232 – 243.

the subsequent creator's alteration of the work, as the public would remain fully aware of the existence of the source work as a separate work in its original form; instead, any such prejudice would arise solely from the public's reassessment of the source work in the new light cast upon it by the alteration.¹²¹³

Writing prior to the publication of the Hargreaves Review, Deazley has suggested that if a specific parody exception were to be adopted *vis-à-vis* copyright, there would be no reason for not accommodating a similar exception within the moral rights regime.¹²¹⁴ Thus far, however, the UK Government has shown little inclination to do so; in implementing the fair dealing exception for caricature, parody and pastiche of copyright works recommended by the Hargreaves Review, it emphasised that the existing moral rights regime would be left unchanged, 'so that creators will be protected from damage to their reputation or image through the use of works for parody'.¹²¹⁵

58 7.2 Copyright and the right to education

The right to education has been recognised as a human right by various international and regional human rights instruments. At the international level, the UDHR provides that:¹²¹⁶

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

The ICESCR contains a similar provision, which states that:¹²¹⁷

(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

¹²¹³ Griffiths, 'Not Such a Timid Thing', 242 – 243.

¹²¹⁴ Deazley, 'Copyright and Parody', 798.

¹²¹⁵ HM Government, *Modernising Copyright*, 31.

¹²¹⁶ UDHR, art 26(1).

¹²¹⁷ ICESCR, art 13.

- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

The status of the right to education as a human right is also enshrined in the Convention on the Rights of the Child, which provides that:¹²¹⁸

States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

At the European level, the right to education is enshrined as a human right in both the ECHR and the EUCFR. The First Protocol to the ECHR provides in its article 2 that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

While the EUCFR states in article 14 that:

- (1) Everyone has the right to education and to have access to vocational and continuing training.
- (2) This right includes the possibility to receive free compulsory education.
- (3) The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

59 7.2.1 The right to education under international and domestic copyright frameworks

As noted by UNESCO, copyright 'has emerged as one of the most important means of regulating the international flow of ideas and knowledge-based products, and will be a central instrument for the knowledge industries of the twenty-first century'.¹²¹⁹ Because the exercise of the right to education almost invariably involves the use of copyright-protected materials, the international copyright treaties permit states that are party to them to implement in their domestic copyright legislation exceptions for certain acts carried out for the purposes of education. The Berne Convention specifies that:¹²²⁰

¹²¹⁸ Convention on the Rights of the Child, art 28(1).

¹²¹⁹ UNESCO, *World Information Report 1997/98* (UNESCO, 1998) <<http://unesdoc.unesco.org/images/0010/001062/106215e.pdf>> accessed 7 July 2014, 320.

¹²²⁰ Berne Convention, art 10(2).

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

States' freedom to legislation for such exceptions may, however, be constrained by the requirements of the three-step test set out in the Berne Convention, which states that:¹²²¹

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

For states that are also members of the World Trade Organisation, the need to ensure that any copyright exceptions implemented by them are compliant with the three-step test is further reinforced by a similar requirement found in article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement'), which forms part of the Agreement Establishing the World Trade Organisation; compliance with the three-step test is also required by the WIPO Copyright Treaty¹²²² and WIPO Performances and Phonograms Treaty.¹²²³

At the European level, the Information Society Directive permits Member States to enact exceptions or limitations to the copyright owner's exclusive rights 'for the sole purpose of illustration for teaching or scientific research'.¹²²⁴ At the domestic level, the UK has implemented several copyright exceptions that are related to education, including in particular the fair dealing exceptions for non-commercial research or study¹²²⁵ and non-commercial instruction.¹²²⁶ Under the US copyright statute, the preamble to the provision establishing the doctrine of fair use also makes express reference to fair uses of copyright works for educational purposes, as it states that 'the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use)*, *scholarship*, or *research*, is not an infringement of copyright'.¹²²⁷

60 7.2.2 Nature of the interaction between copyright and the right to education

¹²²¹ Berne Convention, art 9(2).

¹²²² WIPO Copyright Treaty, art 10.

¹²²³ WIPO Performances and Phonograms Treaty, art 16.

¹²²⁴ Information Society Directive, art 5(3)(a).

¹²²⁵ CDPA, s 29(1).

¹²²⁶ CDPA, s 32(1).

¹²²⁷ US Copyright Act, s 107 (emphasis added).

A few commentators have suggested that copyright law has positive implications for the right to education, primarily on the basis that it guarantees both material and intellectual independence from State and private patronage, thus ensuring the production of a diverse array of works.¹²²⁸ In this context, Derclaye has noted that under the ECHR, the right to education includes the safeguard of pluralism, as the State is required to 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'; this pluralism, she argues, is facilitated by copyright.¹²²⁹ Derclaye rejects the view that conflicts may arise between copyright and the right to education. She argues that, in most cases, any potential conflict is adequately accommodated by copyright's intrinsic limitations, such as the idea/expression dichotomy, the limited term of protection, and the existence of exceptions for research and teaching.¹²³⁰ She does acknowledge, however, that conflicts may occur in those rare instances where the domestic copyright legislation does not contain an educational exception.¹²³¹

Others however observe that recent developments in copyright law have created difficulties for students and educators seeking to make use of copyright-protected materials for educational purposes. In particular, the additional protection given to copyright owners who have applied TPMs to control access to and copying of their works, in the form of statutory provisions that prohibit the circumvention of these TPMs, is said to have eroded the distinction between unprotectable ideas and information and protectable expression in practice (as TPMs are unable to differentiate between the two),¹²³² as well as diminishing the effectiveness of statutory copyright exceptions¹²³³ and effectively nullifying the doctrine of exhaustion.¹²³⁴ The difficulty of accessing copyright-protected material for the purposes of education is much more severe for developing and least developed countries, as copyright ownership is largely concentrated in the hands of major developed countries and major multimedia corporations, leaving developing countries at a significant disadvantage.¹²³⁵ Students and educators in developing countries face very high costs relative to per capita income when purchasing

¹²²⁸ Derclaye, 'IPRs and Human Rights', 157; Christophe Geiger, 'Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World' (2006) 28(7) *European Intellectual Property Review* 366, 367 – 368.

¹²²⁹ First Protocol to the ECHR, art 2.

¹²³⁰ Derclaye, 'IPRs and Human Rights', 146.

¹²³¹ Derclaye, 'IPRs and Human Rights', 146.

¹²³² Geiger, 'Copyright and Free Access', 368 – 369; Haochen Sun, 'Copyright Law under Siege: An Inquiry into the Legitimacy of Copyright Protection in the Context of the Global Digital Divide' (2005) 36(2) *International Review of Intellectual Property and Competition Law* 192, 204; Uma Suthersanen, 'Education, IPRs and the Right to Knowledge' (UNCTAD/ICTSD/BA Regional Dialogue, Alexandria, 26 – 28 June 2005), 8.

¹²³³ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (3rd edn, Commission on Intellectual Property Rights, 2003), 106 – 107; Sun, 'Copyright Law under Siege', 204 – 208; Suthersanen, 'Education, IPRs', 8.

¹²³⁴ Sun, 'Copyright Law under Siege', 204 – 205.

¹²³⁵ Commission on IPRs, *Integrating IPRs and Development Policy*, 95.

textbooks or access to online databases.¹²³⁶ It has even been suggested that many lower-income groups in developing countries have only been able to access copyright-protected materials through the use of unauthorised copies available at a fraction of the price of authorised copies.¹²³⁷ As Suthersanen notes, in such a situation:¹²³⁸

...educators may be tempted to encourage or turn a blind eye to the copying of [copyright-protected] texts by students, schools and colleges. This creates a difficult dilemma for developing countries: should they clamp down on copyright infringers but allow textbook prices to be prohibitively high for most students and educational institutions? Or should they allow copying with impunity but risk being threatened with trade sanctions by the governments of the copyright-owning publishing companies if they fail to enforce copyright?

For this reason, it has been suggested the stronger level of protection and enforcement of copyright standards required by the TRIPS Agreement and other international treaties may have had the unintended impact of reducing access to knowledge products in developing countries.¹²³⁹ Furthermore, the current international copyright framework may not offer developing countries sufficient flexibility to strike an appropriate balance between their requirements for education and the standard of protection required under the various international treaties.¹²⁴⁰ The situation is further exacerbated when developing countries enter into free trade agreements with developed countries that require them to implement 'TRIPS-plus' levels of copyright protection going beyond the minimum standard established under the TRIPS Agreement itself.¹²⁴¹

61 7.2.3 Proposed solutions

Interpreting the three-step test

A number of commentators have advocated for an interpretation of the three-step test set out in the Berne Convention and reinforced by the TRIPS Agreement so as to make it clear that developing countries are permitted to implement broad copyright exceptions for educational purposes.¹²⁴² In particular, it has been suggested that these treaties should be considered in the context of the overall international legal order, thus allowing international human rights obligations set out in the UDHR and ICESCR to serve as

¹²³⁶ Margaret Chon, 'Intellectual Property "from Below": Copyright and Capability for Education' (2007) 40 *UC Davis Law Review* 803, 825 – 827; Nicole M Thomas, 'An Education: The Three-Step Test for Development' (2012) 34(4) *European Intellectual Property Review* 244, 248 – 249; Suthersanen, 'Education, IPRs' 9; Commission on IPRs, *Integrating IPRs and Development Policy*, 102 – 104.

¹²³⁷ Commission on IPRs, *Integrating IPRs and Development Policy*, 101.

¹²³⁸ Suthersanen, 'Education, IPRs', 9.

¹²³⁹ Commission on IPRs, *Integrating IPRs and Development Policy*, 101.

¹²⁴⁰ Commission on IPRs, *Integrating IPRs and Development Policy*, 99 – 100.

¹²⁴¹ Thomas, 'An Education', 249.

¹²⁴² Suthersanen, 'Education, IPRs', 12 – 13; Thomas, 'An Education', 257 – 259; Christophe Geiger, 'Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions' (2009) 40(6) *International Review of Intellectual Property and Competition Law* 627, 627 – 631, 637 – 642; Christophe Geiger et al, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39(6) *International Review of Intellectual Property and Competition Law* 707.

guidelines for interpreting the three-step test.¹²⁴³ This more balanced interpretation of the three-step test could be achieved either through an amendment of the TRIPS Agreement;¹²⁴⁴ an addition of an appendix to the TRIPS Agreement or another legal instrument setting out a guideline for the interpretation of the three-step test;¹²⁴⁵ to include a reference to the UDHR in the preamble to the TRIPS Agreement itself, clarifying that international human rights treaties are to be taken into account when interpreting it.¹²⁴⁶

Another possible solution would be for states to adopt a separate international legal instrument on copyright limitations and exceptions that would have the goals of: (i) facilitating access to information products; (ii) supporting mechanisms for promoting and reinforcing fundamental freedoms; and (iii) promoting the normative balance necessary for supporting knowledge diffusion.¹²⁴⁷ A further solution would be to implement 'ceiling' rules that would provide for maximum standards – rather than, as under the TRIPS Agreement, minimum standards – of international copyright protection.¹²⁴⁸

In this context, the conflict resolution approach suggested by the United Nations Committee on Economic, Social and Cultural Rights for striking a balance between the right to education and the protection of the moral and material interests of authors, both of which are recognised under the ICESCR, should be noted:¹²⁴⁹

The right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the Covenant. States parties are therefore obliged to strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant. In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant. Ultimately, intellectual

¹²⁴³ Geiger, 'Implementing an International Instrument', 629 – 631; Geiger et al, 'Declaration on a Balanced Interpretation of the "Three-Step Test"'.

¹²⁴⁴ Geiger, 'Implementing an International Instrument', 640.

¹²⁴⁵ Geiger, 'Implementing an International Instrument', 640.

¹²⁴⁶ Geiger, 'Implementing an International Instrument', 640 – 641.

¹²⁴⁷ P Bernt Hugenholtz and Ruth L Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (iVIR and University of Minnesota Law School, 2008); Geiger, 'Implementing an International Instrument', 641; Gwen Hinze, *Making Knowledge Accessible Across Borders: The Case for Mandatory Minimum International Copyright Exceptions and Limitations for Education, Capacity Building and Development* (Electronic Frontier Foundation, 2008), 5.

¹²⁴⁸ Henning Grosse Ruse-Khan, 'Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection' (2009) 1 *Trade, Law and Development* 56; Annette Kur and Henning Grosse Ruse-Khan, 'Enough is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection' in Annette Kur (ed), *Intellectual Property Rights in a Fair World Trade System: Proposals for the Reform of TRIPS* (Edward Elgar, 2011); Hinze, *Making Knowledge Accessible Across Borders*, 5.

¹²⁴⁹ Committee on Economic, Social and Cultural Rights, 'General Comment No 17', [35].

property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education...

This balancing exercise, it has been suggested, would allow states to implement domestic copyright legislation that permit broader uses of copyright works for educational purposes, in order to strike a balance that reflects each state's social and economic conditions and priorities.¹²⁵⁰

Domestic legislation

At the domestic level, developing countries have been advised by the Intellectual Property Commission (which was set up by the UK Government to examine how intellectual property rights might work better for developing countries) not to adopt copyright standards that go beyond the minimum level of protection required by the TRIPS Agreement.¹²⁵¹ In particular, they have been advised to consider carefully the implications of endorsing the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty, which would limit their freedom to legislate on the appropriate level of protection for TPMs.¹²⁵² The Intellectual Property Commission has also suggested that developing countries should provide, in their domestic legislation, that attempts by suppliers of digital information or software to restrict legitimate uses of their products (including educational uses) by contractual provisions associated with the sale or distribution of these products should be deemed to be void, and that where the same attempts to restrict legitimate uses are attempted through TPMs, the circumvention of such TPMs should not be regarded as illegal.¹²⁵³

Open access models

A significant number of commentators have also suggested that access to information and copyright works for educational purposes could be facilitated through the broader use of open access mechanisms within the education sector.¹²⁵⁴ At a general level, these include mechanisms such as free and open source software licences and Creative

¹²⁵⁰ Sharon Foster, 'The Conflict Between the Human Right to Education and Copyright' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 303.

¹²⁵¹ Commission on IPRs, *Integrating IPRs and Development Policy*, 106 – 109.

¹²⁵² Commission on IPRs, *Integrating IPRs and Development Policy*, 106 – 109; Sun, 'Copyright Law under Siege', 211 – 212.

¹²⁵³ Commission on IPRs, *Integrating IPRs and Development Policy*, 107 – 109.

¹²⁵⁴ Geiger, 'The Future of Copyright in Europe', 11 – 12; Andres Guadamuz Gonzalez, 'The Digital Divide: It's the Content, Stupid: Part 2' (2005) 11(4) *Computer and Telecommunications Law Review* 113, 116 – 118; Sun, 'Copyright Law under Siege', 212.

Commons licences,¹²⁵⁵ while more sector-specific solutions include the publication and provision of subscription-free open access academic journals.¹²⁵⁶

Publisher-focused proposals

It has also been suggested that publishers of educational materials should review their pricing policies in developing countries in order to help reduce unauthorised copying of their works and to facilitate access to their products in developing countries.¹²⁵⁷

¹²⁵⁵ Geiger, 'The Future of Copyright in Europe', 11 – 12; Guadamuz, 'The Digital Divide', 116 – 117; Sun, 'Copyright Law under Siege', 212.

¹²⁵⁶ Guadamuz, 'The Digital Divide', 117 – 118. See also the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities of 22 October 2003.

¹²⁵⁷ Commission on IPRs, *Integrating IPRs and Development Policy*, 101 – 102.

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