Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act

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Abstract

Unlike the legal discourse in the United States, the relationship between copyright law and freedom of expression has not been directly discussed in English case law until recently, nor has it been discussed extensively in the literature. The article examines the relationship of copyright law and freedom of expression in the United Kingdom in light of Ashdown v. Telegraph Group Ltd., a case recently decided by the Court of Appeal.

This claim, that there is some tension between the imperative of copyright law (thou shall not use another’s expression, unless the use is fair) and the core of the right to freedom of expression, has been ignored for a variety of reasons. However, the recent enactment of the Human Rights Act 1998, which came into force in October 2000, and its (partial) incorporation of the European Convention of Human Rights, challenge this common wisdom. For the first time in English law, freedom of expression has gained an explicit status in the legal landscape. Consequently, Ashdown closely examined the relationship of copyright law and freedom of expression.

The court concluded that, as a general rule, freedom of expression should have no impact on the regular course of copyright litigation. But it also observed that “...rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act...”, and that ”in these circumstances, ... the court is bound, ... to apply the [copyright] Act in a manner that accommodates the right of freedom of expression.” This is a fascinating conclusion, especially in comparison to the consistent American judicial
denial of any conflict between the two legal regimes.

This article proposes a framework within which to examine the intriguing intersection of copyright law and freedom of expression. The analysis draws on the American experience and on a constitutional inquiry and proposes a framework within which to examine the intriguing intersection of copyright law and freedom of expression. The Ashdown case serves as a leading example. The author distinguishes between an internal conflict within copyright law and an external conflict, on the constitutional level, and argues that in interpreting copyright law both points of view should be taken. The article further attributes the denial of a conflict to the failure to separate the two points of view.
ACKNOWLEDGING THE CONFLICT BETWEEN COPYRIGHT LAW AND FREEDOM OF

EXPRESSION UNDER THE HUMAN RIGHTS ACT

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BY

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I. INTRODUCTION

The relationship between copyright law and freedom of expression has not been directly discussed in English case law until recently,1 nor has it been discussed extensively in the literature.2 This could be mainly due to the fact that no conflict has

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1 In one well-known case, Lord Denning MR, removed an injunction of a copyrighted work, holding that “the law will not intervene to suppress freedom of speech except when it is abused”. See Hubbard v Vosper [1972] 2 Q.B. 84, 97 (CA). Other courts were also careful in granting injunctions where freedom of expression was at stake. Thus, for example, in a case which involved the unauthorised publication of quotes from the then yet-to-be-published memoirs of Lady Thatcher, after leaving 10 Downing Street, the Court of Appeal was troubled by the effect of an over-broad injunction, and declined to issue it. The claims raised in the case were both of copyright law and of breach of confidence, but the court discussed only the latter, explaining that it subsumes the former. See Times Newspapers Ltd v MGN Ltd, [1993] E.M.L.R. 445. Another copyright case in which freedom of expression was taken into consideration is PCR v Dow Jones Telerate Ltd [1998] F.S.R. 170, 186 (Ch. D.). Article 10 of the ECHR was cited and taken into account in the course of a discussion of the fair dealing defence and the public interest defence.

been observed between the two legal regimes. The basic structure of copyright law - the property right accorded to authors in their original works,\(^3\) means that they can exclude anyone from using their works, and thus begs for such discussion. When a speaker wishes to “use” another author’s expression as part of his own expression he has to obtain the owner’s permission. It is this very limitation, the essence of copyright law, that creates the tension between the two legal regimes. This tension was acknowledged by Lord Phillips M.R., in the recent case of *Ashdown v. Telegraph Group Ltd.*\(^4\) “[C]opyright 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.”\(^5\)

This claim, that there is indeed some tension between the imperative of copyright law and the core of the right to freedom of expression, has been ignored for a variety of intuitions and reasons. However, the recent enactment of the Human Rights Act 1998 (hereafter, HRA), which came into force in October 2000, and its (partial)

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\(^3\) See sections 2(1) and 16 of the Copyright, Design and Patents Act, 1988 (hereafter, CDPA).


\(^5\) *Ashdown II*, at ¶ 30.
incorporation of the European Convention of Human Rights (hereafter, ECHR), challenge this common wisdom. For the first time in English law freedom of expression has gained an explicit status in the legal landscape. Consequently, the Court of Appeal in Ashdown closely examined the relationship of copyright law and freedom of expression. The issue is also rather new to other European jurisdictions. One scholar observed that the ECHR “may serve, perhaps, not as a dyke, but as a life-buoy for bona fide users drowning in a sea of intellectual property”, though he concluded that the practical impact of the ECHR on European copyright law is likely to be limited to specific kinds of expression, i.e. political, journalistic and artistic speech.6

This article proposes a framework within which to examine the intriguing intersection of copyright law and freedom of expression. It begins with a presentation of the Ashdown judgment. The article then embarks on a comparative analysis of the American experience to this subject, which has over 30 years of judicial and academic experience in this regard. As a general matter, American courts concluded that there is no conflict. The core of the article addresses the complex relationship, and points to a few reasons that might explain why and how the tension has gone unnoticed thus far. It is then proposed that a distinction should be drawn between two kinds of conflict, in dealing with the copyright law/freedom of expression relationship. The first is internal to copyright law and is the fundamental mechanism thereof: the tension between the individual author and the public. The second conflict is external: it is

6 See Hugenholtz, n. 2 above. First to point to the relationship between copyright law and freedom of expression in Europe was H. Cohen Jehoram, “Freedom of Expression in Copyright Law”, [1984] 6(1) E.I.P.R. 3.
where the two legal regimes directly face each other. It is argued that the introduction of the ECHR into the English legal discourse has shifted the emphasis from the internal dimension to the external one. It is further submitted that the EC Copyright Directive, the implementation of which is now considered, might strengthen this shift. The initial legal instinct is to try and re-internalise the argument about a conflict. This might indeed reconcile the appearance of a conflict but might not explain the delicate and complex relationship of intellectual property and freedom of expression. In the process of this argument, the constitutional dimension of this relationship is emphasised. The concluding part of the article returns to Ashdown and explores it according to the proposed framework. It is submitted that the Court has succeeded in recognising all levels of intersection between the two regimes, but that it went only half way in its application to the facts of the case.

II. ASHDOWN V. TELEGRAPH GROUP LTD., AND THE LEGAL SETTING

The Facts

The occasion that gave rise to the legal conflict took place first at 10 Downing Street and then across the pages of the Sunday Telegraph. The dispute emerged after the newspaper published an as yet-unpublished minute written by Paddy Ashdown, then the leader of the Liberal Democrats. It was a minute of a secret meeting Ashdown had had with the Prime Minister in October 1997 several months after the general elections. Two copies of the minute were made. One was kept in Ashdown’s safe and

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7 See European Community Directive 2001/29EC on the harmonisation of certain aspects of copyright and related rights in the information society. The directive entered into force on June 22, 2001, and requires that it is implemented by Member States by December 22, 2002. The UK patent Office has recently issued a consultation in regard of the implementation of the directive, proposing several important changes.
the other was destroyed shortly after it was written. Two years later, after resigning from the leadership of his party Mr. Ashdown considered the possibility of publishing his memoirs. In the process of surveying the publishing market, parts of his diaries, including the minute, were presented to several publishers on a confidential basis. Before any contract was signed the document reached the hands of the political editor of the *Sunday Telegraph*. On November 28, 1999 *The Telegraph* broke out with the exclusive story describing the minute as a “leaked document”. Its coverage included verbatim quotations of the unpublished minute.

According to the report, the minute exposed the fact that the Prime Minister considered forming a coalition cabinet despite 10 Downing Street’s official denials. Soon after the publication Ashdown sued the newspaper for breach of confidence and infringement of copyright. After a hearing, Sir Andrew Morritt, Vice-Chancellor issued a summary judgment on the copyright claim: an injunction against further infringement was granted as well as an order to disclose information so that Ashdown could choose the remedy: damages or defendant’s profits. The Court of Appeal dismissed an appeal.

*The Legal Setting*

There is no real dispute that the minute is an original literary work, that it enjoys copyright protection, and that parts thereof were reproduced without the author’s permission. Accordingly, the main issue in court was whether the copying and publication of the minute by *The Telegraph* amounted to “infringement” or whether

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8 This presentation relies on the courts’ description of the newspaper’s report.
9 See CDPA, s.1(1)(a).
the latter enjoyed one of the defences offered by the Copyright Act. *The Telegraph* invoked the obvious defences of fair dealing\(^\text{10}\) and public interest,\(^\text{11}\) but it also brought to the court a novel claim. It argued that the HRA, and hence Article 10 of the ECHR, require that these defences be interpreted or applied in a manner that preserves its right of freedom of expression.\(^\text{12}\) Article 10 reads in its relevant parts as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, …
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of... rights of others...\(^\text{13}\)

In fact, as reported in the decisions the newspaper’s defence was that courts should examine whether “it was necessary in a democratic society” to recognise an exception to the general rule of copyright protection in each and every copyright case. In other

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\(^{10}\) See CDPA, s 30.

\(^{11}\) See CDPA, s 171(3).


\(^{13}\) Emphasis added. Article 10 is incorporated into English law by sections 1 and 3 of the HRA. Sections 12(2) and 12(4) of the HRA further reinforces the protection of freedom of expression, in that they guide courts in choosing the remedy. Section 12(4) provides that “the court must have particular regard to the importance of the Convention right to freedom of expression...”. The Court of Appeal found that this section underlies the requirement of section 2(1) of the HRA. See *Ashdown II*, at ¶27.
words, the newspaper argued for the recognition of a new “freedom of expression” exception to copyright law in addition to the existing statutory exceptions.¹⁴

In no previous reported case had such an argument been made, though freedom of expression had previously been mentioned in some copyright cases without explication. The invocation of this claim can be explained due to the constitutional changes, which were caused by the enactment of the HRA. Human rights which previously were recognised by the Common Law now enjoy an explicit statutory status. This important change raises many questions as to the workings of English constitutional law.

The Courts’ Response

In the High Court (Chancery Division), the Vice-Chancellor was willing to engage Article 10 in the discussion of copyright law but only to some extent. The judgment was rather moderate in the meaning it was willing to accord to Article 10:

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.¹⁵

¹⁴ The first instance phrased the defence in the following wording: “[the defendant] contends that in every case all the individual facts must be considered to ascertain whether the restriction on the right to freedom of expression imposed by the CDPA is necessary in a democratic society notwithstanding that the facts do not bring the case within any of the statutory exceptions or defences”. – *Ashdown I*, 693.

¹⁵ *Ashdown I*, 696.
Morritt, V.-C. identified no less than 42 circumstances in which copying does not amount to infringement of copyright.\textsuperscript{16} This is a key finding, for it was seen as an indication that the legislature considered freedom of expression and took it into account. The Vice-Chancellor went on to reject the specific defences of fair dealing and that of the public interest, granted summary judgment to the plaintiff and issued an injunction as to future infringements.\textsuperscript{17}

The Court of Appeal, in a decision delivered by Lord Phillips M.R. and joined by Walker LJ and Keene LJ dismissed the newspaper’s appeal. It phrased its task as one of defining the balance between the two rights, each of which is qualified on its own terms.\textsuperscript{18} Like the Chancery Division, it found resort in prior copyright law doctrines, which resolve much of the tension between copyright law and freedom of expression. One such mechanism is a basic tenet of copyright law: that it accords protection only to the form of the literary work, not to the information it conveys,\textsuperscript{19} or as this principle is better known – the idea/expression dichotomy.\textsuperscript{20} Professor Cornish defines it as an

\begin{itemize}
  \item\textsuperscript{16} \textit{Ashdown I}, 694.
  \item\textsuperscript{17} Morritt, V.-C. followed this line of reasoning, that article 10 of the ECHR does not preclude injunctions in copyright cases in another decision delivered on the same day. The companion decision focused more on breach of confidence, but this cause of action was coupled with that of copyright. See \textit{Imutran Ltd v Uncaged Campaigns Ltd} [2001] 2 All E.R. 385.
  \item\textsuperscript{18} See \textit{Ashdown II}, at ¶28.
  \item\textsuperscript{19} See \textit{Ashdown II}, at ¶31.
  \item\textsuperscript{20} The dichotomy does not enjoy an explicit statutory position, but is well established. For discussion of this dichotomy see S. Stokes, \textit{Art & Copyright} 48 (Oxford, 2001). The dichotomy is explicitly recognised in the US Copyright Act. See 17 USC §102(a).
\end{itemize}
axiom: “copyright protects the expression of an idea rather than the idea itself.”21 This in itself does not mean that the rule is clear – indeed it is rather vague and courts have struggled to define the line of demarcation between an idea and its expression.22

Leaving the issue of application aside the dichotomy means that copyright does not prevent a citizen from expressing ideas or conveying information. Hence the dichotomy eases much of the initial appearance of a conflict between freedom of expression and copyright law.

However, the court admitted that in some circumstances the form of expression is no less important than the information it conveys.23 This is an important conclusion often overlooked by American courts that direct defendants to “alternative avenues” which they could have used to express the unprotected idea in their own manner without using the copyright owner’s expression.24 This conclusion echoes Marshall McLuhan’s famous saying that “the medium is the message”.25 Admitting that in some cases borrowing the copyrighted expression is needed so one can express oneself, the court pointed to a second copyright mechanism that further mitigates the


22 For discussion, see Cornish, ibid, at §11-07 (at p. 417).


24 For examples, see Roy Export Co. v CBS 672 F.2d 1095, 1100 (2d Cir. 1982); Walt Disney Prod. v Air Pirates 581 F.2d. 751, 757 (9th Cir. 1978). For criticism, see A. Kozinski and C. Newman, “What’s so Fair About Fair Use?”, (1999) 46 J. Copr. Soc’y 513, 517.

appearance of a conflict between copyright law and freedom of expression – the fair dealing defence. The defence allows, in the cases mentioned in the Act and in the circumstances prescribed by case law, the use of the form of a copyrighted work, i.e., the expression and not just the use of ideas.26

Based on these two copyright law doctrines, the court concluded, that as a general rule freedom of expression should have no impact on the regular course of copyright litigation, or as rephrased in the wider setting, in most cases the incorporation of ECHR into English law should not affect copyright law:

…rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the court to look closely at the facts of individual cases (as indeed it must whenever a ‘fair dealing’ defence is raised). We do not foresee this leading to a flood of litigation.27

After setting the legal framework the court turned to examine the various defences raised by The Telegraph. It endorsed the conclusions of the Vice-Chancellor. The interpretation and application of the fair dealing and the public interest defences were partially influenced by the court’s discussion of the implications of the HRA.

26 See Ashdown II, at ¶44-45. The defence is enacted as CDPA, s 30, and was interpreted in numerous cases, one of the most influential is Hubbard, n. 1 above, 94. For discussion, see K. Garnett, J. Rayner James, G. Davies, Copinger and Skone James on Copyright (14th ed., London, 1999), §9-07, at 496.

27 See Ashdown II, at ¶45.
The court further held that *The Telegraph* destroyed part of the commercial value of Ashdown’s forthcoming memoirs; that the fact that the minute was obtained by a breach of confidence was a material consideration, and that a substantial portion of the minute had been copied. The conclusion was that the defendant could not rely on the defence of fair dealing. But this was not the end of the discussion, as the court returned to the question of the impact of the HRA on the case. Here, it closely examined *The Telegraph*'s reproduction of Ashdown’s minute and found that it was beyond the necessary requirement for reporting the information authoritatively. Accordingly, the appeal was dismissed.

*The Issue Framed*

The issues at stake can now be better defined: in general terms, it is asked: what impact should the enactment of the HRA have on previously existing well-established copyright law? And in particular terms: how should the relationship between copyright law and freedom of expression be addressed? Other jurisdictions have struggled with a similar question, chief among them being the American legal system.

**III. THE AMERICAN EXPERIENCE**

A few cases in the late 1960s drew attention to the relationship of copyright law and freedom of expression (or free speech, in American law) even without mentioning the first amendment.\(^{28}\) The first addressed an attempt by Howard Hughes, an industry tycoon and a highly intriguing character to enjoin the publication of a biography about

\(^{28}\) US Const., Amend. I (“Congress shall make no law... abridging the freedom of speech, or of the press...”).
him.29 Hughes had acquired the copyright in three previously published articles about him, which he correctly suspected would be used by the biographer as raw material. He then asserted his copyright and claimed that the biography infringed his rights. The court denied his motion for a preliminary injunction, basing its decision on the fair use defence -- the American version of the fair dealing defence.30 The second case involved the use of sketches based on frames from the famous amateur film of the assassination of President John F. Kennedy, in a book about the assassination.31 The suit of the copyright owner was dismissed since the defendant enjoyed the fair use defence.

However, two prominent scholars and one student seized the opportunity to analyse the copyright law/free speech relationship. The path-breaking work was that of Professor Melville Nimmer.32 He proposed a specific exception to copyright law, for


30 At the time, the defence was not codified, but it has been included in the Copyright Act of 1976, and is now codified as 17 USC §107. Unlike fair dealing, fair use is not limited to a closed list of enumerated uses. Another important difference is that the statute instructs a court to consider four factors, upon a claim of fair use.


“news photographs” that capture historic moments.\textsuperscript{33} Other than that he believed that the idea/expression dichotomy mitigates the conflict.

Following this lead the argument that copyright law should withdraw, at least to some extent in the face of free speech, was raised in numerous copyright cases. However, courts rejected it systematically on several grounds.\textsuperscript{34} The definitive rejection of the argument came in 1985, in \textit{Harper & Row Publishers v. Nation Enterprises}.\textsuperscript{35} The case dealt with an unauthorised publication in \textit{The Nation} news magazine of 300 words of a then-forthcoming autobiography of President Gerald Ford, sometime after he had left the White House. The quoted words and phrases were Ford’s explanation of his decision to pardon his predecessor, President Nixon. \textit{Harper & Row} is the most elaborate judicial discussion of the conflict to date. The Supreme Court turned to several internal copyright mechanisms, such as the idea/expression dichotomy and the fair use defence, and concluded:

\begin{quote}
\textsuperscript{33} Nimmer’s examples were the pictures of the Kennedy assassination and a well known photograph of the massacre that took place in My-Lai, Vietnam.


\textsuperscript{35} 471 US 539 (1985).
\end{quote}
In our haste to disseminate news, it should not be forgotten that the framers intended copyright itself to be the engine of free expression.36

It is interesting to observe the many bases to which the American courts turned in their refusal to acknowledge that there is a conflict between copyright and free speech. One explanation was the constitutional setting. The Constitution explicitly authorises Congress to enact copyright laws.37 The text of the Constitution and the first amendment were traditionally interpreted to allow limitations of free speech despite the definitive language of the first amendment. But the history of the relationship and the prevalent mode of interpretation, which places great emphasis on the original meaning of the Constitution, resulted in a refusal to acknowledge the tension between the two legal regimes. The framers, the argument goes, enacted both the authority to Congress to enact copyright law and the first amendment. They therefore, implicitly, did not recognise the conflict.

For sometime, it seemed that Harper & Row put an end to the discussion of the copyright law/free speech relationship. But in recent years the question has emerged once again. Copyright law in the US has expanded quite dramatically in the last five years: new rights have been added to the bundle of rights enjoyed by authors; the duration of protection has been extended; quasi-copyright law protections have been added such as a ban on circumventing technological measures, and harsher criminal


37 US Const., Art I, Sec. 8, Cl. 8, reads: “Congress shall have the power ... [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
punishments on wilful infringers have been imposed.\textsuperscript{38} The question is especially acute in the digital environment, namely the Internet, where copying is cheaper, easier, and results in creating an exact copy of the original, but where detection is also easier, and where technology offers an unprecedented control of creative works.\textsuperscript{39} The constitutional setting in the United Kingdom is different from that in the US, but some lessons can be drawn from this comparison.

\section*{IV. The Many Levels of Intersection}

The American experience teaches us that the relationship between copyright law and freedom of expression has been systematically ignored and that it is much more complicated than it may first have appeared to be. This section discusses a few possible reasons for rejecting the argument that there is a conflict between copyright and freedom of expression and searches for constructive guidelines.

\textit{A Constitutional Dimension}

The American experience clearly suggests that the intersection has a constitutional dimension. In the US, this dimension is obvious. In the United Kingdom the legal picture is, at least currently, more complex and it is submitted that the status of freedom of expression is undergoing a transformation. This transformation merits a short documentation. Freedom of expression has been recognised at Common Law,

\footnotesize{\begin{itemize}
\item\textsuperscript{38} See No Electronic Theft Act (NET), 1997; Sonny Bono Copyright Term Extension Act, 1998; Digital Millennium Copyright Act, 1998 (DMCA).
\item\textsuperscript{39} For discussion of the theme of control in the Internet, see N. Elkin-Koren “Its All About Control: Rethinking Copyright in the New Information Landscape”, in \textit{The Commodification of Information}, note 2 above; A. L. Shapiro, \textit{The Control Revolution: How The Internet Is Putting Individuals In Charge and Changing The World We Know} (New York, 1999).
\end{itemize}}
long before the enactment of the HRA.  

English courts were obviously aware of the ECHR, that was then not yet binding but held that “in the field of freedom of speech there was no difference between English law on the subject and article 10 of the Convention… the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.”

The same approach was also taken after the enactment of the HRA but before it came into force. Thus, Lord Hoffmann stated that “much of the convention reflects the common law” and that “the adoption of the text [ECHR] as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights.”

Furthermore, attention should be paid to the free expression jurisprudence of the Privy Council in regard to the constitutions of the West Indies. However, the incorporation of the ECHR did affect the constitutional methodology. The right was enumerated, i.e., anchored in a legislative text. The change is not only one of form, but is of substance as well. The traditional *Wednesbury* reasonableness test which usually applied to the administrative decisions has been replaced with the test of proportionality. The latter

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43 See for example *Observer Publications LTD v Matthew and Others* [2001] UKPC 11.

test focuses on the nature of the legislative (or administrative) objective. The question of the effect of the HRA on copyright law is even more complicated, since it is a statute at stake, not merely an administrative act.45

Article 10 of the ECHR does not pose the textual problem with which the Americans had to deal (i.e., the definitive language of the first amendment). It allows restrictions of freedom of expression if prescribed by law and if necessary in a democratic society for the protection of the rights of others.46 Another related factor is that English law is yet to develop a comprehensive theory of constitutional interpretation. It is unlikely that such a theory will run into the difficulties that some American interpreters are faced with, namely, the figuring out of the original meaning of a document written over two centuries ago. But the normative status of human rights vis-à-vis other rights and statutes,47 the current status of judicial review, i.e., the judiciary’s power to


46 See Art. 10(2).

47 Lord Steyn, for example, is of the opinion that rights entrenched in a Bill of Rights should be accorded a higher normative status. See Lord Steyn, “The New Legal Landscape”, [2000] 6 E.H.R.L.R. 549, 550.
declare a statute incompatible with a Convention right, are all issues yet to be determined.

Judicial Review

The constitutional changes, which English law is undergoing requires the development of a new, or a renewed theory of the judicial role. Such a task far exceeds the scope of this article. It will suffice to note that the American experience might once again be an interesting source for comparison. Since the American Constitution is considered the “supreme law of the land”, it is a well-established feature of American law that a court may declare a statute unconstitutional. The justification for such a bold judicial decision is complex, but one of the most convincing responses is that an independent review of the majority’s power is necessary to protect the minority’s rights. Hence, to the extent that a court concludes that a human right is unjustly restricted, it may overrule the decision of the majority, even if the latter is embedded in a statute.


50 US Const., Art. VI, section 2.

It is still left to be seen how the English judiciary will interpret its powers (or lack thereof) under the HRA.\textsuperscript{52} In any case, Article 10(2) of the ECHR lists few conditions, which if satisfied allow for the restriction of freedom of expression. It is clear that the limitation at stake here, is prescribed by law (the Copyright Act). There should not be much, if any doubt as to copyright law’s necessity in a democratic state. Copyright law enhances the creation of information and it’s expression, it promotes innovation and cultural production, which enriches the public discourse. Since a restriction is allowed if necessary to protect the rights of others and since there is no doubt that copyright is such a right, copyright law as a whole should not be threatened. However, the HRA instructs (in section 3) that the ECHR should have an interpretive effect: courts should read and construct legislation in a manner which is compatible with the ECHR.\textsuperscript{53} Section 12 further instructs courts to take the ECHR into account when ordering a remedy.

The ECHR has been interpreted by the European Court of Human Rights to include yet further requirements. For our purpose, the requirement of proportionality, already mentioned above, is of special relevance: A limitation of a human right for the benefit of the public should be proportionate to the legitimate public aim pursued.\textsuperscript{54} This


\textsuperscript{53} See HRA, s 3.

\textsuperscript{54} See for example \textit{Sunday Times}, n. 41 above; \textit{Bowman v United Kingdom} (1998) 26 E.H.R.R. 1. For a critical discussion of proportionality under European Union law, see R. Clayton, "Regaining A Sense
issue was not discussed in Ashdown. The nature of proportionality still requires further elaboration, but it may serve as an important legal forum for balancing conflicting rights and interests. The emerging European jurisprudence examines under the auspices of the requirement of proportionality not only the validity and importance of the public goal but the relationship between this goal and the means applied to achieve it. In the course of this examination courts consider the extent of the restriction of the human right and the effect it might have and the existence of less restrictive means to attain the public goal.

Applying these requirements to copyright law suggests that the complex details of the statute should be permitted in as much and only to the extent that they promote copyright law’s goals. In other words, copyright law should not be taken for granted as immune from judicial review and its details should not enjoy an a-priori immunity. To the contrary: Copyright law must not run afoul of freedom of expression and it is the courts’ role to ensure this through the interpretation of the CDPA. One practical implication is that the ability and power of the idea/expression dichotomy or the fair dealing defence to “take care” of considerations of freedom of expression should be carefully reviewed. This conclusion well-fits the holding of the House of Lords in relation to the intensity of judicial review when human rights are at stake. The House of Lords stated that “the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.”55 In copyright law terms this

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55 See Shayler, n. 45 above.
implies that a court should not defer to the legislative balance embedded in the internal copyright law mechanisms, but question whether they actually protect the human right of freedom of expression in a proportional manner.

The Horizontal Effect

Another obstacle in acknowledging the conflict between the two legal regimes is the conventional manner in which freedom of speech is thought of. Usually, it arises in the context of the relationship between the government (or the State) and a citizen. This is the governmental paradigm of freedom of speech, or as it is better known – the vertical effect. But as western democracies turn more and more to market-oriented economies and cultures the source of the threat to the freedom of speech spills over to other players in the democratic field as well, namely the market. In other words, the difficulty in acknowledging the conflict stems from the public/private distinction, and as Professor Bernt Hugenholtz phrased it, the question is “whether freedom of expression and information can be invoked directly (‘horizontally’) against other citizens.” There are several suggestions regarding the possibility of applying the HRA horizontally and the manner to do so. It is important to point not only to the technical way to implement the horizontal effect but to the substantive reasons for doing so. The fact that a player owns the copyright in a work might imply his control

56 For such a claim, see Patfield, n. 2 above, 207-209.

57 See Hugenholtz, n. 2 above, 11, at 247.

over a segment of the public discourse. The copyright owner is given the power to control the use of his work, and thus, of its meaning. Hence, it should not stay outside the reach of the HRA. In any event, the horizontal/vertical issue can be resolved after a careful examination of the claim that freedom of expression should have place within copyright cases: the claim is not only that copyright owners are bound by freedom of expression (horizontal effect), but that the legislation should be interpreted in accordance therewith (vertical effect).

The vigorous international copyright campaign of the Church of Scientology serves as an example. The Church attempts to enforce its copyright in the writings of its founder, L. Ron Hubbard.59 The attempt is aimed at those who have been members of the Church, left it, and then turned against it. One of the most efficient ways of criticism is to expose the Church’s fundamental writings and critically analyse them. What should be the implication of asserting copyright in the writing? Unless the fair dealing defence or another defence is invoked, the public discourse might suffer. This is an especially problematic issue when political speech is at stake. This kind of expression is typically considered to be more important than other kinds of expression, such as commercial speech.60 Thus, freedom of expression does not lose its importance once shifted from the vertical sphere to the horizontal one, i.e., from the realm of public law to that of private law. Hence, there are strong substantive


923 F.Supp. 1231 (N.D. Cal., 1995); in the Netherlands: Scientology v XS4ALL.

60 For discussion, see C.R. Sunstein, Democracy and the Problem of Free Speech (1993).
reasons for overcoming the vertical/horizontal issue. It is thus crucial that copyright law accommodates freedom of expression.

Copyright as Property?

Another dimension of the relationship between copyright and the freedom of expression is that strong intuitions lead us to deny the existence of a conflict. It is worth pursuing these intuitions and dispelling them.

One such intuition is that copyright law, being an integral part of intellectual property law, is a kind of property.61 Copyright itself does not enjoy a direct constitutional position in the United Kingdom or in European law, but as “property” it is protected by the first protocol of the ECHR.62 A public interest, the intuition would continue, however important, cannot trump property rights: Copying someone’s copyrighted work without permission, even though it is used for the copier’s own expression, is not justified. This is a strong intuition, but a flawed one, for property is not an absolute right. The response to this intuition turns firstly to the horizontal effect, already discussed, and secondly, to the theoretical rationales of copyright law. Copyright law, the response would be, is not necessarily a “natural right”. Rather, it is better understood and interpreted as a legal mechanism. It is a right created by society in order to achieve social goals. These goals might be for the promotion of the common good, the “encouragement of learning” (in the words of the Statute of

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61 For discussion of the problems such a view raises, see Vaver, n. 2 above, at 632.

62 The absence of copyright from national constitutions is common to many European countries. See Hugenholtz, n. 2 above.
Anne), or the promotion of “the progress” (in the words of the American Constitution). Another version of this idea, perhaps a less extreme one, would suggest that copyright law constitutes a compromise of interests between the public’s interest in the wide dissemination of works of authorship and easy access to these works on the one hand, and the “just desert” to the author. These views mean that copyright law does not predate the social order but is created by it. Thus, it is an instrumental conception of copyright law. In fact, this view underlies what is probably the most important copyright case in English law, Donaldson v. Becket. Under the instrumental view it is clear that copyright law does not mean absolute protection to the author. On the contrary: It allows imposing limitations thereon, thus achieving the public good or the proper balance.

Yet a related difficulty in acknowledging that there might be tension between copyright law and freedom of expression is the common legal classification. Jurists are trained to organise the law into ready-made categories. Copyright and freedom of speech have never before been placed in the same category. Hence, an argument

63 The statute read: “An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times herein mentioned.” 8 Ann. c. 19 (1709).


65 See G. Davies, Copyright and the Public Interest 44-45, 135-137, 173-174 (IIC Studies, 1994)

about a conflict between the two does not resonate well with jurists. This difficulty is removed once we are aware of it. There is no inherent truth in legal categorisation. Categories are meant to assist one in organising the law. It is only an aid, not a goal in itself.67

To summarise, all of the above reasons suggest that there is no genuine reason not to acknowledge the conflict between copyright law and freedom of expression. It is important to clarify that this assertion does not suggest that copyright law should be abolished, only that the conflict should be addressed and resolved. In the course of this discussion, a few guidelines emerged, as to how to solve the conflict. Turning to internal copyright law mechanisms such as the idea/expression dichotomy, the fair dealing defence or other specific exceptions of the 42 mentioned by the courts, is crucial but should not be conclusive. While copyright law as a whole withstands scrutiny, its particular details and interpretation should be subordinated to and influenced by the now higher normative status of freedom of expression. The burden to do so lies on the shoulders of the courts. To a large extent, the Ashdown court followed these guidelines, and did not fall astray, as many of its American counterparts have. Before turning to evaluate the decision, it is useful to outline the framework with which to conceptualise the relationship between copyright law and freedom of expression.

67 For an argument along these lines, see D. Leenheer Zimmerman, “Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights”, (1992) 33 Wm. & Mary L. Rev. 665, 668-669.
V. COPYRIGHT AND FREEDOM OF EXPRESSION: TWO CONFLICTS

A prevalent judicial response to the claim that a conflict exists between copyright law and freedom of expression turned to internal copyright mechanisms. Similar to the Ashdown case, many American courts reasoned that since copyright law does not protect ideas there is no real clash.68 Other courts turned to another copyright law mechanism, the fair use defence, reasoning that it enables the necessary “breathing space” for free speech, and thus, mitigates any potential conflict.69 This section suggests that two conflicts should be identified – an external conflict and an internal one. Accordingly, a process of internalisation is observed.

Mechanical Internalisation

The arguments that turn to the internal copyright law mechanisms cannot be easily dismissed and in fact they have been raised in many jurisdictions.70 But while these mechanisms do mitigate many potential conflicts between copyright law and freedom of expression they do not fully resolve the conflict. It has already been pointed out that for constitutional reasons these mechanisms cannot be taken for granted.


Furthermore, their power to mitigate the conflict has been criticised on various
grounds. It is also important to note one further feature of this response: it does not
rely on the theoretical justification of copyright law. Hence, it is applicable to any
system of copyright law, no matter how it is understood and justified. It is suggested
that this kind of rejection of the argument that there is a place for freedom of
expression jurisprudence within the contours of copyright law be called mechanical
internalisation. This kind of argument refers to a friction between two separate
branches of the law: copyright law and freedom of expression. Hence it is a claim that
there is an external conflict. The idea/expression dichotomy and the fair dealing
defence are part of copyright law but are designated a role in dissolving the
appearance of a conflict. Hence, these internal mechanisms enable a court to reject the
external aspect of the conflict. Hence it is an internalisation. It is mechanical, for it
does not attempt to reconcile the prima facie conflicting areas of the law at a deeper
level, that of their theoretical basis.

Substantive Internalisation

The American courts did not end their response to the argument about a conflict with
this mechanical internalisation. They alluded to yet a further response, one which
refers to the theory that underlies copyright law. The above quoted statement by the
Supreme Court in the case of Harper & Row is illustrative. It claims that each of the
two legal regimes has a similar goal: namely, to promote freedom of expression. This

71 The critique of the dichotomy and the fair dealing exceptions exceed the scope of this paper. For a
critical assessment, see Patfield, n. 2 above, 217-218; Griffiths, n. 2 above, 13-20; Spence, n. 2 above,
605-608, and in the US, see A. C. Yen, “A First Amendment Perspective on the Idea/Expression
Dichotomy and Copyright in a Work’s ‘Total Concept and Feel’. (1989) 38 Emory L.J. 393.
claim assumes an instrumental rationale of copyright law. In the words of the American Constitution, it is a tool to “promote the progress of science and useful arts”. Such an argument too has the effect of internalising the argument about a friction on the external level. But it differs from the previous one in that it relies on the fundamentals of copyright law. Hence, it is proposed to refer to this sort of response as *substantive internalisation*.

**The Internal Conflict**

Once the conflict is internalised the vertical dimension is removed. Courts now can interpret copyright law alone, a task with which they are well-acquainted. Copyright law itself is structured around a fundamental conflict. Unlike the external conflict, the internal conflict is acknowledged and addressed. It can be portrayed along one of several lines. One familiar line is the tension between the rival interests of the public and those of the individual author. The public is interested in widening dissemination of works of authorship, enabling easier access and lowering barriers on using of the works, so they can be used as building blocks for further works. The author wishes to control his work – both in the financial and the cultural sense. Another parallel line is the tension between the present cost to the public and its future gain. As long as a work is protected the public must receive the owner’s authorisation to use it. Copyright is conceived as a means to enhance creative authorship. The words of Lord Macaulay in a speech in Parliament in 1841, opposing a proposal to extend the copyright term beyond the life of the author are a clear reflection of these tensions:

> The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and salutary of human pleasures… I admit, however, the necessity of giving a
bounty to genius and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax.72

In fact, it is arguable that the entire body of copyright law evolves around these internal conflicts: how best to protect the rights of authors in a manner that would promote the public good without undermining the former interests.

To summarise, this discussion provides a framework and some tools with which to address the complex relationship between copyright law and freedom of expression. We should distinguish between a claim of an external conflict and an internal conflict. Once we do so, we should realise that this distinction is not static and the external conflict can be internalised. This might take the form of a mechanical internalisation or of a substantive internalisation. Applying these terms to the American discourse of the conflict results in the following picture: courts that were faced with an argument about a conflict between copyright law and the first amendment, i.e., an argument about the external conflict, internalised it, using both forms of internalisation. This internalisation means that courts defer to the balance struck by the legislature. In a constitutional environment, where courts are in charge of protecting human rights, such an a-priori deference is undesirable. Accordingly, the conclusion should be that both lines of discussion should be undertaken and both the internal and the external dimensions should be carefully examined.

VI. REVISITING ASHDOWN

The observation that the copyright law/freedom of expression intersection involves two conflicts – an external one and an internal one and the further observation that courts in various jurisdictions often tend to internalise the external conflict and collapse it into the internal one - provide a conceptual framework with which to re-examine the Ashdown case. These observations are based on various dimensions of the complex intersection, especially the constitutional setting.

Up until the enactment of the HRA, no external conflict was visible. While freedom of expression was recognised by the Common Law, it did not enjoy an explicit, superior normative position that was conceived as equal to, let alone superior to, copyright law. Hence the discussion was limited to the internal sphere: how best to achieve the balance which permeates the entire body of law known as copyright law. The HRA and ECHR paved the way for a shift in the “conflict discourse”: the normative status of freedom of speech has been elevated to the status of an explicit human right, part of a Bill of Rights. The external level of the conflict became visible at once. Ashdown presents the first judicial attempt to address it.

Faced with the argument about the external conflict the courts immediately turned to the internal sphere. This response is understandable in light of the lack of history or experience with dealing with the external conflict. Both courts turned especially to the fair dealing and public interest defences but there is an important difference between the Vice-Chancellor’s decision and that of the Court of Appeal. The first instance was unwilling to consider the external dimension and focused its sole attention on the internal dimension. The V.-C. was clear about rejecting the external conflict.
I can see no reason why the court should travel outside the provisions of the CDPA and recognise on the facts of particular cases further or other exceptions to the restrictions on the exercise of the right to freedom of expression constituted by the CDPA.\textsuperscript{73}

The conclusion was clear: “[t]he Human Rights Act is not a reason for interpreting CDPA any differently,”\textsuperscript{74} although the court did consider article 12(4) of the HRA, which instructs a court to consider the effect of a relief on the exercise of an ECHR right.\textsuperscript{75} In the terms suggested earlier, the court turned to a mechanical internalisation of the external sphere. It refused to acknowledge the external conflict and in so doing failed to identify the constitutional dimension of the copyright law/freedom of expression intersection.

Following the V.-C., the Court of Appeal too turned to the internal mechanisms of copyright law which do mitigate much of the apparent conflict. But the courts reached the conclusion that this internalisation is, sometimes, insufficient. In its discussion of the idea/expression dichotomy the Court of Appeal observed that in some cases the form of the expression is just as important as the information conveyed. Fair dealing allows the use of copyrighted expression in some cases but the court pointed to the limited power of the defence. In some instances, it concluded, the defence will not suffice.\textsuperscript{76} Accordingly, it declared that in rare circumstances courts should apply the Copyright Act in a manner that will take freedom of expression considerations into account.\textsuperscript{77}

\textsuperscript{73} Ashdown I, 694. See also the passage quoted above, text accompanying n. 15.

\textsuperscript{74} Ashdown I, 700.

\textsuperscript{75} Ashdown I, 700-701.

\textsuperscript{76} Ashdown II, at ¶44.

\textsuperscript{77} Ashdown II, at ¶45 (passage is quoted above, text accompanying n. 27).
While the court did turn to the mechanical internalisation as a first resort to mitigate the apparent conflict, it acknowledged that the external conflict cannot be set aside and that it should be taken into consideration. In the terms proposed here, the court suggests that both dimensions should be taken into consideration and that the power of internal copyright law mechanisms to mitigate the conflicts should not be taken for granted. This approach is clearly instructed by the constitutional dimension of the conflict and it is respectfully submitted that the Court of Appeal’s approach is desirable.

The *ratio-decidendi* of the decision in the appeal is thus that copyright law is not immune from re-examination and that the main influence of the HRA on copyright law should be in the interpretation of the latter. Indeed, the court’s own interpretation of the fair dealing defence was partially guided by this conclusion. Thus, for example, it interpreted the term “reporting current news” liberally, so as to include reporting events that occurred two years earlier. While the meeting at 10 Downing Street took place in 1997 and hence in 1999 was no-longer “current”, the court found it to be of “continuing public interest”. As for which considerations should be taken into account in applying the defence of fair dealing the court applied existing rules, but warned against applying inflexible tests based on precedent.

However, it seems that this caution has not been fully followed either in the very outlining of the factors to be considered in the fair dealing analysis, nor in the

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78 See *Ashdown II*, at ¶64.
79 See *Ashdown II*, at ¶71.
application of the precedents to the facts of the case. In fact, the court adopted the precedent as to fair dealing, precedents, which predate the HRA. Despite the acknowledgement of the fair dealing’s shortcomings, the court did not pause to consider these factors. If freedom of expression is to be taken into consideration, as the court agrees, albeit in rare circumstances, this should be done not only at the level of applying the law but also at the level of interpreting and constructing the law. Thus, for example, the court accepts the precedents that emphasised the commercial use of the alleged fair dealing.\textsuperscript{80} Considering this factor is more than reasonable and is shared by American copyright law as well.\textsuperscript{81} But it is submitted that the effect of the HRA should be, for example, in reconsidering the fair dealing analysis. Not only the commercial use of the alleged fair dealing should be addressed – its purpose, in a wider sense, should also be taken into consideration. Thus, the fact that in \textit{Ashdown} the use by \textit{The Telegraph} was one of informing the public, of reporting newsworthy events, all of which are classified as “political speech” – should have been taken into consideration. In other words, it is argued here that the court did not follow its own imperative of interpreting copyright law in light of the ECHR and the freedom of expression.

This failure is also apparent in the application of the factors of fair dealing to the particular facts of the case. The court mentioned that some evidence exists, which points out that the publication by \textit{The Telegraph} “destroyed” part of the value of the

\textsuperscript{80} \textit{Ashdown II}, at ¶¶70-71.

\textsuperscript{81} See 17 USC §107(1), and its interpretation in \textit{Sony Corp. of America v Universal City Studios, Inc.} 464 US 417 (1984), where this gained a prime position. Later on, however, the Supreme Court has scaled down this rule. See \textit{Campbell v Acuff-Rose Music Inc.} 510 US 569 (1994).
This reasoning reflects the pre-conceptions embedded in the precedent. One such hidden assumption is that a speech-act can be either commercial or non-commercial, in a binary manner. It is argued that this dichotomy is wanting. In our modern times, it is hard to come up with examples of expressive acts which are purely commercial or purely non-commercial. Nowadays, almost any speech-act has at least some commercial aspect. Hence, it is suggested that the dichotomy should be replaced with a continuum: most speech-acts have both commercial and non-commercial characteristics. The owners of a newspaper enjoy revenue from several sources and in most cases run their newspapers as a business with the intention of profiting therefrom. But the value of newspapers, in general, goes beyond these profits (what economists would call a ‘positive externalisation’). The value is the information conveyed to the public, the contribution made to the public discourse and the marketplace of ideas. Accordingly, the fact that the newspaper has a commercial motivation should not blind us from seeing its effect. Accordingly, some effect of the unauthorised publication on the market of the protected work should be tolerated.

VII. CONCLUSION

New technologies challenge old notions as to the regulation of the innovative and creative processes. Changes in legal concepts have a similar effect. The enactment of the HRA raises a new question in regard to copyright law: what is – or what should - the effect of freedom of expression have on copyright law? This article addressed this issue through discussing the Ashdown case, exploring the American experience, and turning to the basic rationales of copyright law as well as to constitutional principles.

82 Ashdown II, at ¶72.
It is the present author’s conclusion that it is important to observe that the copyright law/freedom of expression relationship has many dimensions, the constitutional dimension being the most important. Thus, it is important to recognise two spheres of tension between copyright and freedom of expression: an external sphere (and accordingly, an external conflict), and an internal sphere (and an internal conflict). The tendency to internalise the external sphere into the internal one by turning to copyright law mechanisms such as the fair dealing defence should be carefully inspected. Drawing quick conclusions may result in failing to take into account the constitutional dimension of the copyright law/freedom of expression intersection.

These lessons should be taken into account when courts face an argument about a conflict between copyright law and freedom of expression. The effect of the HRA and the ECHR is one of the challenges of current copyright law jurisprudence, a challenge which will be furthered by the implementation of the EC Directive on the harmonization of copyright law.