THE HISTORICAL DEVELOPMENT OF EXCEPTIONS TO COPYRIGHT AND ITS APPLICATION TO COPYRIGHT LAW IN THE TWENTY-FIRST CENTURY

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1. Introduction

George Bernard Shaw wrote: ‘When a stupid man is doing something he is ashamed of, he always declares that it is his duty.’ Years earlier La Rochefoucauld noted: ‘Hypocrisy is the homage vice pays to virtue.’ But whether stupid or wise, men are not just hypocritical; they are honestly unsure where their duty lies. This is one of the main reasons for the creation of rules and exceptions to these rules.

The aim of this paper is to take the reader through the historical development of exceptions to rules, in particular exceptions to copyright law in the light of technological advancement. The present discussion will commence by going back in time to consider how exceptions to rules came about and the reasons why exceptions were created in the first place. Having established this brief history, the paper will then set out an overview of the background to copyright exceptions before turning to the main discussion about the development of copyright law and exceptions to copyright in the UK. The discussion will be concluded by looking at the present position of copyright exceptions and the future impact following the implementation of the Information Society Directive in the UK.

2. The historical development of exceptions to rules: Why do we need them?

Just as people in all societies allow exceptions to many rules, in most - perhaps all - societies, people follow other rules strictly allowing no exceptions. For example, the Siriono should not, and did not, eat raw meat, even when they faced starvation. Igdlulik Eskimo [sic] women with infant children were never allowed to share their cooking utensils with other women . . . None of this should be eye-opening for anthropologists, but with the decline of the normative theory, reports such as these are frequently dismissed as statements of ’ideal’ rules that would not be borne out by real behaviour if the matter were investigated . . . As a result, strict rules receive little attention in modern social theory; it is far more likely that the flexibility and intracultural

1 The author is a first-year Ph.D. student at the School of Law, University of Edinburgh, under the supervision of Professor Hector MacQueen and Dr Charlotte Waelde, and would like to thank them for their assistance and helpful comments on an earlier draft.

2 Caesar and Cleopatra (1946).
diversity of rules will be emphasized.³

As far back as 2500 years ago, organised societies based on laws or rules recognised the need for exceptions, based on people’s social rank, relationships and motivation as well as the circumstances surrounding the ‘crime’. However, as R.B. Edgerton states, a society has not done without rules altogether, whereas societies have been reluctant to introduce exceptions or defences to rules for many reasons.⁴ Bearing this in mind, the central question that can be asked is - why have exceptions to rules become almost a necessity? To quote Edgerton once again:

If rules are so important for the creation and maintenance of social order, then why allow exceptions to them? Why not state these rules explicitly and unambiguously, follow them, and penalize anyone who fails to do so? If the answer to the first question - whether rules are indeed vital for social order - is pursued in a global way, it can become the epistemological equivalent of gardening in a nuclear-waste dump. Only if we keep in mind that there are different kinds of rules and that some rules help to solve problems for people while others create problems - at least for some people - can we avoid the hazards of global assertions about the role of rules in human affairs.⁵

As such, four general categories of exceptions to rules that lead to reduced responsibility have been identified in most of the world’s societies. They are

(1) exceptions based on temporary conditions, such as intoxication, spirit possession, illness or strong emotions;⁶

(2) specific statuses that carry with them longer-lasting exceptions from certain kinds of responsibility; statuses providing such exceptions commonly include infancy, old age, political authority and chronic mental illness;⁷

(3) exceptions relating to special occasions, such as harvest or initiation rituals, funerals, and women’s protests;⁸ and


⁴ *Id.*, at p. 255.


⁶ For example, homicide committed while one is enraged or in fear for one’s life is a defence to murder, namely self-defence. Homicide need not be excused or even punished less severely, but when a society denies exemption on the basis of strong emotion, it does so despite the presence of a condition that makes ordinary rule-governed propriety problematic and creates the possibility that there should be legitimate exceptions to rules for people who are temporarily affected by one of these conditions - see *op. cit.*, Edgerton at p. 208.

⁷ If physically impaired persons are to remain members of society, some exceptions to the rules may have to be allowed and age be taken into account - especially children and the elderly.

⁸ Donald Tuzin relates an example from Papua New Guinea of the guilt and confusion that Ilahita Arapesh men felt when ritual occasions obliged them to be cruel and sadistic to their wives and children. As Tuzin describes, these men loved their wives and children, yet, during certain ceremonies, these same men were required to follow rules that forced them to carry out acts of ritual cruelty against women and children. See Tuzin D. F., ‘Ritual Violence among the Ilahita Arapesh: The Dynamics of Moral and Religious Uncertainty’ in Herdt G. H., (ed.) *Rituals of Manhood: Male Initiation in Papua New Guinea* (Berkeley, Los Angeles, London: University of California Press; 1982), pp. 321-355.
(4) exceptions that apply only in certain settings, such as sanctuaries, men’s houses or barrooms.

So what if a society has rules without any exceptions? Such a society will experience inequality (as it is usually the powerful who impose strict rules on others) and a lack of cooperation from members of that society to abide by such strict laws where there is no reduced rule-regulation where ‘release’ or ‘relaxation’ is possible.

Therefore, just as much as rules are significant and important for the creation and existence of organised societies, so are exceptions to these rules - to ensure the smooth running of a society. Rules, and rules about exceptions to rules, can never control all behaviour effectively as there will always be some disruptive behaviour that is neither regulated nor capable of punishment, and as a result there will be conflict. But to bring most behaviour under the regulation of rules, including rules about exceptions to rules, is a necessary step toward the creation of social order - and ‘even imperfect social order is a supreme human achievement’.  

3. The Thin Red Line

The need to balance the interests of intellectual creators and the public was recognised not long after the British Parliament introduced the first piece of copyright legislation in 1709. The Preamble to the Berne Diplomatic Convention for the Protection of Literary and Artistic Works 1886 states that ‘the countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible . . .’ (emphasis added). This has remained the same basic element in the preambles of the subsequent acts of the Berne Convention, which has been interpreted to mean that not only the creators’ rights have to be taken into account, but also the public interests must be given due consideration. At the first 1884 Berne Conference, the Chairman of the Conference, Numa Droz, re-iterated this point in his closing speech:

. . . due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually on the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses . . .

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10 The same principle has been voiced in the Preamble to the WIPO Copyright Treaty - ‘recognizing the need to maintain a balance between the rights of authors and the larger public interest . . .’; Preamble to the WIPO Performances and Phonograms Treaty - ‘recognizing the need to maintain a balance between the rights of performers and producers of phonograms . . .’.

However, why have exceptions\textsuperscript{12} to copyright attracted so much attention, as opposed to other forms of intellectual property protection such as patent, trademark or design laws? In 1945, Professor Zecheriah Chafee put forward six ideals of copyright law in his well-known article ‘What Is It that the Law of Copyright Is really Trying to Accomplish’?\textsuperscript{13} The fifth ideal titled ‘copyright should not stifle independent creation by others’ answers the above question. Under this heading, Professor Chafee explains that whilst nobody else should market the authors’ book, other people should be able to use it (emphasis added). It is the expression in a book and not the ideas which are protected under copyright law, as opposed to patent, trademark or design laws where it is the idea which is protected.

It is this explanation, accurately presented by Professor Chafee, which has led to the inevitable confusion of the idea/expression fallacy. The idea/expression fallacy arises from the argument that copyright law protects the form in which ideas are expressed.\textsuperscript{14} This in turn leads to the confusion of the ‘boundaries’ of copyright and the all-important balance that needs to be struck. The rhetoric of Mark Rose makes these points clear -

Copyright depends on drawing lines between works, on saying where one text ends and another begins. What much current literary thought emphasizes, however, is that texts permeate and enable one another, and so the notion of distinct boundaries between texts becomes difficult to sustain.\textsuperscript{15}

Professor Chafee’s and Mark Rose’s arguments of striking the correct balance and finding the boundary between creator and user are further reinforced by an interesting argument delivered by Raymond Irwin. At an inaugural lecture delivered at University College London in 1957,\textsuperscript{16} Irwin stated that unlike in music and art, ‘reproduction’ has no effect in the case of books. By this he meant that a painting if reproduced is in some way altered, and generally for the worse. In architecture, especially in those forms that depend for their value on the movement of light and shade, such as the curved Byzantine mosaics, photographic reproduction can give but a partial and imperfect reflection of the original. However, a typographical reproduction

\textsuperscript{12} Often, the words, ‘exceptions’, ‘limitations’ are used interchangeably. It is interesting to note that the Berne Convention does not use the words ‘exceptions’ or ‘limitations’, but employs the verb ‘to permit’ or the adjective ‘permissible’ when referring to ‘free uses’. It is the Rome Convention, in Article 15, which initially uses such terminology - ‘exceptions to the protection . . .’ and the words ‘limitations’ and ‘compulsory licences’ are used in this Convention. All of these words basically mean the same although ‘exceptions’ seems to mean free uses whilst ‘limitations’ seem to cover both free uses and non-voluntary licences and ‘compulsory licence’ covers any kinds of non-voluntary licences.

\textsuperscript{13} For a detailed analysis of Professor Chafee’s six ideals, see Davies G., Copyright and the Public Interest (2nd edn.) (London: Sweet & Maxwell; 1994), chapter 9, pp. 244-247.


of a book has no more effect on the original work than the printing of a piece of music has on the original composition. However, Irwin does go on to state the ambiguity in the use of the word ‘reproduction’. He explains this by saying that the printed page is not a reproduction of the original creation, but an arrangement of conventional symbols of commonly accepted meaning intended to serve as a key to the interpretation of the original. The principal agent in the production of a book is, of course, its writer or author. His literary offspring are always the result of a marriage between his own mind and the communicated experience of other minds, either contemporary or in past time. And since this communicated experience is, in the main, received through the medium of books, the conception and birth of the new book commonly takes place in the author’s study.

Irwin’s lecture makes it clear that ‘reproduction’ is a necessary tool for the development of literary society. Reproduction, according to Irwin, is an essential element for an author and it cannot be stressed enough that the work of an author is always the ‘result of a marriage between his own mind and the communicated experience of other minds, either contemporary or in past time’.

In light of Irwin’s argument, it is interesting to quote Benjamin Kaplan, who takes a contrary view:

The author was not, like a crow, to try to patch up a disguise with peacock’s feathers; like a bee, he must steal, but then he must transform the sweetness of the flowers. Still in the final count, imitation was essential; innovation was dangerous . . . The literary hero is one who, having little learning or disdaining whatever learning he has, takes a fresh look at nature and feeds his art direct from that source. The confrontation must be personal, not filtered through past authority.17

Whether the reader favours the arguments of Chafee, Rose and Irwin or Kaplan, ultimately the underlying theme is the same - the literary hero must have some freedom to create and re-create. He must be permitted to ‘steal’ under certain conditions but then, through his creativity, must transform the stolen property into something original. It is these conditions to ‘steal’, which are known as ‘exceptions’, in the present context.

4. The shaping of copyright law and exceptions to copyright: Its historical development

Copyright has emerged as one method to cope with the issues of cultural and economic life, the social attitude towards intellectual creations and their uses, and the position of the creator in society. It is a means of organising and controlling the flow of information society.

This part of the paper will look at the historical development of copyright in the UK, and the writer will draw particular attention to the development of the public interest debate and the emergence of statutory exceptions to copyright law.

4.1 Once upon a time . . . information was completely free . . .

Before the right of copyright was recognised, information was circulated amongst

communities and it was believed that such information belonged to the society - not to an individual creator. ‘Strikingly and significantly, early Indian history is the history of societies rather than of persons. Even the great literary and philosophical masterpieces are all anonymous. Not who said it, but what was said - this was what mattered’ (emphasis added).

History records that the first form of protection for intellectual literary creation took place in ancient Egypt. The recording of human communication lay at the hands of the priest or holy man who was considered to be the first to lay claim to knowledge. If persons other than the members of the priesthood were overheard reciting the sacred rituals, they were liable to immediate execution. Where the rituals were recorded in a more permanent form, for example in a manuscript, Mark Rose confirms that the owner of such a manuscript was understood to possess the right to grant permission to copy it. Harry Ransom re-confirms this point but also emphasises the public interest importance in early days and goes on to state that in the exchange and copying of manuscripts, book property might have been controlled; but ‘owners were willing to suspend their powers of control in order to encourage learning, sustain faith, and insure their own opportunities for borrowing books’. Furthermore, at this early stage there was no statute which controlled the contents of manuscripts or regulated their production nor were there any legal decisions on literary property.

As time passed, the individual who created literary works for the education and entertainment of society came to be recognised as the ‘originator’ of that work, and the permission of this originator had to be obtained if an individual wished to copy his work. As more and more ‘authors’ came into being, obtaining permission became essential. In the fourteenth century, Guillaume Degulleville, in his preface to Pélérinage de la vie humaine, states that his dream, which he recorded in 1330, ‘ought not to have travelled without his leave’. Gutenberg’s invention of the printing machine in 1436 meant that there was a proliferation of books and of printers, who at the same time functioned as bookbinders and booksellers. The founding of the press in Westminster in 1476 by Caxton heightened this

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19 Professor J. Z. Young in his Reith Lectures, ‘Doubt and Certainty in Science (1951)’ suggests that three particular achievements marked the first appearance of human civilisation in early times. One was the gathering of men into cities, with all the social organisation that belongs to urban life. Another was the growth of the religious idea, expressed by means of holy places (grove, sacred hill, shrine, temple or church) which served to bind the urban population into a unit. A third was the development of the art of human communication [the art of recording communications - which distinguishes human communication more sharply from animal communication]. See op. cit., Irwin R., at p. 4.


The earliest accepted form of legal ‘permission’ was the printing privileges in fifteenth-century Venice. ‘Privileges’ were exclusive rights granted by the state to individuals for limited periods of time to reward them for services or to encourage them in useful activities. Privileges were initially awarded for protecting mechanical inventions in Venice and it seemed logical to extend this protection to books - which we would, today, call patents. The first and most famous privilege was a monopoly on printing itself granted in 1469 for a term of five years to John of Speyer; the first author’s privilege was granted in 1486 to Marc’ Antonio Sabellico, the historian of Venice. According to this privilege, Sabellico could choose which printer would publish his book, and any other printer who published it would be fined 500 ducats (emphasis added). It is important to note at this stage that the privileges were in favour of the printers and it was also the printers who would be liable in cases of piracy. Authors as the creators of manuscripts or users as those using and possibly dealing in these pirated manuscripts were out of the picture.

4.2 Many years later, in England, information belonged to printers: Sixteenth-century Britain

Printing privileges, which originated in Venice, spread to other European states in the sixteenth century. In England, the first printing privilege was granted in 1518, but as in Venice most of the privileges were issued to printers. A Royal Printer appeared in 1485, and from 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books. The first author’s privilege, in the form of a seven-year patent, was awarded to the royal chaplain, John Palsgrave in 1530, for a textbook on the French language.

The setting-up of the Stationers’ Company, the ‘literary Constables’ as Kaplan called it, created a second method of regulating the press and printing in England. This method permitted the printing of a book by entry in the company’s register. The traditional stationers’ term employed in the register was ‘copy’: a word that referred both to the original manuscript and the right to make copies of it. Once again, though, only members of the guild - that is booksellers and printers, not authors - could own copies.

The advancements brought about by printing and the press had almost given a right to piracy. Following the setting-up of the Stationers’ Company in England, Queen Elizabeth introduced the Injunction of 1559, which was directed against the publication of ‘unfruitful, vain and infamous books and papers’, and on 29 June 1566, seven years after the Injunction, a Council Order preserved the licensing provisions of 1559 which defined penalties for
violating printing regulations.\textsuperscript{30}

The third major development in this period to deal with growing piracy was the Star Chamber Decree of 23 June 1586, which ordered that all published works be licensed, by registering with the Stationers’ Company.\textsuperscript{31} Its chief purposes were the suppression of both the press and the printers, the concentration of the trade in London, the support of the Stationers’ Company and the enforcement of the Queen’s Injunctions.

The developments in sixteenth-century England reveal one important factor - the printing privileges, the Stationers’ Company, Injunctions and Decrees were created with the rights of the printer in mind and not those of the author. Most privileges were issued to printers and only a handful - such as Sabellico, Petro Francesco da Ravenna of Venice and Palsgrave of England - were issued author’s privileges.\textsuperscript{32} The Stationers’ Company was set up with printers in mind and the Injunctions stated the ‘rights and wrongs’ of the printers - the right to copy by ‘which’ printers. Nowhere were the authors’ rights mentioned nor were the authors remunerated in any way for their creative efforts. The need for protection of literary works had certainly been recognised, but not necessarily with authors in mind. Although the privileges were aimed at protecting authors’ manuscripts, the ‘right’ rested with the printers and hence the authors were at the mercy of the printers.

What can be said of public interest at this stage? First, it must be understood 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’.\textsuperscript{33} In the development of copyright law, in the UK, it is correct to state that until the twentieth century, the common law right of public interest was the defence to copyright infringement. It was not until 1911 that exceptions, as a defence to copyright, appeared in a Statute.

Sixteenth-century Britain did not specifically focus on the public interest. However, what can be implied from the above discussion is that the printers were eager to publish the authors’ works and to get their names on the books; the authors themselves did not put up a fight to be identified or remunerated for their works. The main concern was that a certain printing company or printer had the ‘right’ to publish the authors’ work. What happened after the book was published was nobody’s concern. The first of a number of technological advancements had come between the author and the user - and for the first and last time in the history of copyright, the tug-of-war between the author and the user was almost non-existent. Piracy was committed by printers and/or booksellers, not by users, as it is the case now, and the author who was clearly overshadowed by the printers had no claim to rights.

4.3 Information as property of printers questioned: Seventeenth-century England

Seventeenth-century England saw the face of copyright change dramatically. In 1641 the book trade was thrown into chaos by the abolition of the Court of Star Chambers - the instrument of authority behind both licensing and Stationers’ Company’s monopoly on publishing. The

\begin{itemize}
  \item \textsuperscript{30} Op. cit., Ransom H., pp. 35-36.
  \item \textsuperscript{31} The English Star Chamber was subsequently abolished in 1641.
  \item \textsuperscript{32} Op. cit., Kaplan B., chapter 1.
  \item \textsuperscript{33} Ungoed-Thomas J., Beloff v Pressdram [1973] 1 All ER 241 at 259. Also op. cit, Davies G., at p. 63.
\end{itemize}
Press Regulation Act of 1662 (hereinafter: Printing Act 1662), which restricted printing and re-installed licensing, came to an end and through non-renewal expired in 1695.34 This meant that anything could be printed and anyone with access to a press, legal or surreptitious, could print.

Yet, it was during these years, that copyright took on a different shape. On the same day that the House of Commons rejected the Printing Act 1662, they appointed a new Committee, headed by Edward Clarke, to prepare and bring in a Bill for the ‘Better regulating of Printing and Printing Presses’. The Bill received its first reading in the House of Commons on 7 March 1695, and by 30 March 1695 the House resolved that it should be committed.35 Although ultimately this Bill was rejected by the Commons and is obscured in copyright history by the introduction of the first-ever Copyright Statute shortly afterwards, it was a stepping-stone towards diverting the limelight from printers to authors.

Sections 5-8 of the Bill are particularly relevant in this context as it states that anyone who put their name to a work would be accountable as the author of the work (along with the printer); no one was allowed to sell a book which did not have the name printed on the work and no one was allowed to use another’s name without authority.

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Ss. 5-8. - And be it further Enacted That whosoever shall order his name to be printed to any matter or thing shall be answerable to the Law as if he were the Author of the same nevertheless the Author to be also answerable and punishable for any thing illegal containd therein if such author can be discovered

And be it further Enacted that noe person shall sell or publish any Book or pamphlet pourtraicture or paper hereafter printed in England whereon the printer and publishers name is not printed under the penalty of forfeiting _______ for every offence

And be it further Enacted that noe person shall print the name of any person as publisher of any book pamphlet pourtraicture or paper without authority given in writing for soe doing . . .36

However, a sticky point in the Bill was that it made no attempt to protect any property in books, unlike the Printing Act 1662. Both Stationers’ and independent printers objected to losing the protective features of the Act. Their concerns were voiced by Clarke, who headed the Committee for drafting the Bill and together with Freke wrote to John Locke complaining that, ‘the Court, the Bishops and the Stationers Company take great exceptions to it for they all agree to say that it is wanting as to the Securing of property’.37 Locke’s reply on 18 March 1695

. . . suggested that they might secure the ‘Author’s property in his copy’ by adding a clause either to s.8 allowing a right to reprint any work with the name of the author or publisher upon it for a limited time in years only, or to s.9 suggesting that a ‘receit’ be issued for the delivery

34 For an account of the period between 1641-1662, see op. cit., Ransom H., at pp. 66-75.
37 Id., at p. 291, letter no. 1860.
of the three copies which ‘receit’ . . . shall vest a privilege in the Author of the said book, his executors administrators and assigns or solely reprinting and publishing the said book for _______ years from the first edition thereof.38

As stated above, the House of Commons rejected the Bill, but not before it had opened up two important debates - whether the author was the owner of the property in books and the ‘impassionate debate’ on ‘literary property’, which was to continue for many years to come. Both these debates were crucial in the making of the Statute of Anne 1710 and afterwards. Once again, even although there were no concrete exceptions in place in seventeenth-century UK statutes, two implications are apparent. First, the consequences if the author is recognised as owner of the property and, secondly, consequences if the literary property lasts forever. If both are answered in the affirmative, or even partially affirmative, the defence of public interest would have been weakened considerably and in turn such high protection of literary works would have inevitably opened up the floodgates to litigation.

4.4 Whence came the Statute of Anne 1710: Eighteenth-century Britain

‘They’ - the stationers, whose property by that time ‘consisted of all the literature of the Kingdom; for they had contrived to get all the copies into their own hands’ - ‘came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security’. 39

Accordingly, in 1709 the British Parliament produced the most significant breakthrough in the history of copyright law and introduced the first piece of copyright legislation in the world - ‘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 therein mentioned’ (hereinafter: Statute of Anne). The Statute of Anne 1709, which came into force on 10 April 1710,40 provided that existing printed books would be protected for a period of 21 years and the Stationer’s Company would hold the sole right to these books. More importantly, authors and assigns were to enjoy a term of protection of 14 years from the date of publication for books not yet printed. Following the expiration of 14 years, the sole right was to return to the author if living, and if not, to assignees for another 14 years.41 This was perhaps one of the most significant amendments made by the House of Lords and signifies an attempt to further the interest of the writer as distinguished from the bookseller.42

The Statute was in eleven parts, and although there are many provisions which

38  Id., at pp. 795-796, Appendix no. 3.
40  There has been a great deal of confusion about the date of the statute, the reason being that the legislative and legal year did not end until 24 March 24 1710. See also op. cit., Ransom H., at pp. 98-99.
41  For a comprehensive overview of the history and development of copyright law, see Davies Gillian, Copyright and the Public Interest (2ed edn.) (London: Sweet & Maxwell; 2002), chapter 4.
42  ‘Section XI. - Provided always, that after the Expiration of the said Term of fourteen Years, the sole Right of printing or disposing of Copies shall return to the Authors thereof, if they are then living, for another Term of Fourteen Years.’
concentrate on the rights of printers and their liability, the author, as creator, had finally been recognised and a term of protection during which time the publishers and authors had right to literary property had been established, although this led to much debate based on public interest in the years to come.

Before moving on to consider the public interest debate between the Statute of Anne and the next major milestone - The Revision Act of 1842 - it must be pointed out that the Statute of Anne ‘closed the period of experiment and tentative administration of literary property and opened the period of modern copyright law’. 43

4.5 The question of literary property and public interest examined: Eighteenth-century Britain

The question of literary property arose after the expiration of 21 years - in 1731, at which point the Stationers’ Company lost the right to books which were already in print when the Statute of Anne came into force. The booksellers argued that under common law authors had a perpetual right to authorise printing. In other words, it was believed that an author had the right to his manuscript indefinitely before it was printed, at which point the Statute of Anne would regulate it. However, Kaplan questions:

Did the copyright in published works cease at the expiration of the limited periods specified in the statute, or was there a non-statutory, common law copyright of perpetual duration, with the Statute merely furnishing accumulative special remedies during the limited period?

The famous cases of Millar v Taylor (1769)44 and Donaldson v Beckett (1774)45, which followed the two Tonson cases,46 tackled this issue. In brief, while the Court of King’s Bench in Millar v Taylor held that there was a common law right of an author to his copy stemming from the act of creation and that perpetual right was not taken away by the Statute of Anne, the House of Lords in the case of Donaldson v Beckett overturned this decision.

The famous speeches of Mr Justice Wills, Lord Mansfield47 and the dissenting opinion of Mr Justice Yates in Millar v Taylor hold true even today and lay the basis for public interest argument. The speech of Mr Justice Yates especially is thought provoking and visionary:

All property has its proper limit, extent and bounds . . . the legislature had no notion of any such things as copyright as existing for ever at common law . . . [perpetual copyright] would lead to inconvenient consequences the public may feel . . . instead of tending to the advancement and the propagation of literature, I think it would stop it; or at least might be

44 4 BURR. 2301.
45 4 BURR. 2407.
46 Tonson v Walker 4 BURR. 2325; Tonson v Collins 1 Black W. 301, 96 Eng. Rep. 169 (K.B. 1761). The two Tonson cases involved the works of John Milton’s ‘old books’ whose copyright had expired under the statute in 1731.
47 Lord Mansfield was the strength behind respectable stationers. He had appeared as their counsel in the two Tonson cases.
attended with great disadvantages to it.\footnote{48}

The court in \textit{Donaldson v Beckett} considered all the speeches from \textit{Millar v Taylor}, but a majority of judges, agreeing with the dissenting opinion of Mr Justice Yates, found that the Statute of Anne had taken away the common law copyright. The respondents in \textit{Donaldson v Beckett} argued:

\begin{quote}
There is nothing in the Statute of Queen Ann to take away that interest or property, to which authors were before entitled, in the publication and sale of their own works. The object of that statute was to secure literary property, by penalties, from piracy and invasion; and though the protection given is only temporary . . . the statute expressly declares, that \textit{nothing contained in it shall prejudice or confirm any right which the universities, or any person or persons, might claim to the printing or reprinting of any book or copy then printed, or afterwards to be printed}.\footnote{49}
\end{quote}

However, the court dismissed the arguments of the respondents and held in favour of the appellants for a limited period of copyright protection. It is of little surprise then that under Note 2 in \textit{Donaldson v Beckett} it is stated that ‘the universities were so much alarmed by this determination, that in the year 1775, they applied for and obtained an act of parliament for securing to them and the colleges of Eton, Westminster and Winchester, the perpetuity in all copies then, or at any time afterwards given to, or acquired by them’.\footnote{50} \textit{Donaldson v Beckett} appeared to have solved the question of literary property; however, it raised the question about the use of copyrighted works by educational establishments during the term of protection. The fact that, following the case, the above-mentioned educational establishments were successful in securing a legal and perpetual right to all copyrighted works, meant that the question of literary property remained unsolved and the need for creating an exception or a well-defined public interest defence had become important. Copyright law and the public interest defence were slowly but surely developing.

Following these landmark decisions, the Statute of Anne was amended in 1777 to include musical and dramatic compositions as books,\footnote{51} and in 1833 the Dramatic Copyright Act was created to provide for a public performance right in dramatic works.\footnote{52} However, it was not until 1842 that the question of literary property arose again and copyright law took on a different shape.

\subsection*{4.6 The question of literary property and public interest re-examined: Nineteenth-century}

\footnote{48} 4 BURR. 2301 at 2391.

\footnote{49} 4 BURR. 2407 at 2416 (emphasis added).

\footnote{50} \textit{Id.}, at 2419. The Act of Parliament can be found at 15 Geo. III. Vol. 12, c. 53 at pp. 341-343: ‘An Act for enabling the two Universities of England, the four Universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in Perpetuity their Copy Right in Books, given or bequeathed to the said Universities and Colleges for the Advancement of useful Learning and other Purposes of Education; and for amending so much of an Act of the eighth Year of the Reign of Queen Anne, as relates to the Delivery of Books to the Warehouse Keeper of the Stationers Company, for the Use of the several Libraries therein mentioned.’

\footnote{51} \textit{Bach v Longman} [1777] 2 COWP 623.

\footnote{52} Dramatic Literary Property Act 1833 (3 & 4 Will., 4, c. 15).
Britain

The passage of the 1842 Copyright Act opened up the debate of literary property once again and the period of copyright protection was at the heart of this issue. The main proponent in the debate for a natural right of the author was Sergeant Talfourd, a barrister, whilst Lord Macaulay, the famous historian opposed the idea. The outcome of the debate and the Bill was that the period of copyright was extended to life of the author and seven years after his death or a term of 42 years from publication, whichever was the longer. The 1842 Copyright Act had extended the term considerably since the Statute of Anne, but had arrived at a compromise - thus protecting the author for a considerable period of time, after which time the work would belong to the public domain.

Sergeant Talfourd argued passionately about extending the term of copyright from the existing 28-year term provided by the Statute of Anne - to last the life of the author and sixty years after his death. In an eloquent speech he stated:

. . . At the moment when [the author’s] name is invested with the solemn interest of the grave - when his eccentricity or frailties excite a smile or shrug no longer - when the last seal is set upon his earthly course, and his works assume their place among the classics of his country - your law declares that his works shall become your property and you requite him by seizing the patrimony of his children.\(^{53}\)

Talfourd’s eloquent speeches and his suggestion of continuing copyright protection after the death of the author plus sixty years\(^{54}\) makes him a visionary and an individual who was passionate about protecting intellectual creators. One hundred and sixty one years later, Sergeant Talfourd’s suggestion for an appropriate copyright term is not far off from what we have now. However, the compromise that was arrived at ultimately was in line with economic considerations at the time, literary advancement and struck the all-important balance between creators of literary works and users of these works.\(^{55}\)

Following the 1842 Copyright Act, minor legislative amendments were made - in 1862 the Copyright Act 1842 was extended to take into account paintings, drawings and photographs;\(^{56}\) and in 1882\(^{57}\) and 1888\(^{58}\) performance rights in musical works were regulated. During the same time, international copyright law had started to develop with the introduction of the Berne Convention 1886\(^{59}\) - and it was this Convention which brought about significant

\(^{53}\) Stewart S.M., *Two Hundred Years of English Copyright Law* [1977] Copyright 228 in *op. cit.*, Davies G., at p. 34.

\(^{54}\) For a good discussion of Sergeant Talfourd’s views, see Seville C., *Literary Copyright Reform in Early Victorian England* (Cambridge, New York, Melbourne: Cambridge University Press; 1999), pp. 16-32.

\(^{55}\) For the opposing speeches of Sergeant Talfourd and Lord Macaulay and the passage of the 1842 bill, see *id.*, especially chapters 1-3.

\(^{56}\) Fine Arts Copyright Act 1862 (25 & 26 Vict., c. 68).

\(^{57}\) Copyright (Musical Compositions) Act 1882 (45 & 46 Vict., c. 40).

\(^{58}\) Copyright (Musical Compositions) Act 1888 (51 & 52 Vict., c. 17).

\(^{59}\) Berne Convention for the Protection of Literary and Artistic Works 1886.
changes to UK copyright law and opened the gates to copyright exceptions in Statutes.

4.7 Twentieth-century Britain: Striking the balance between public interest and statutory copyright exceptions - Copyright Act 1911

The Copyright Act 1911 brought about major reform and was modelled taking into consideration the provisions of the Berne Convention and its revision in Berlin in 1908. The law was codified. The need for registration with the Stationers’ Company was abolished; the term of protection was extended to life of the author plus 50 years; protection was extended to artistic works and choreographic works as dramatic works and to photographs and sound recordings, hence, stretching copyright law to take into account technological advancements.

However, a first in the history of copyright law in Britain is also featured in this same Act - certain statutory defences were made available in relation to the infringement of copyright, the most important of which is ‘fair dealing’. Section 2(1)(i)-(vi) of the Act sets out six specific circumstances where, as a result of the introduction of exceptions, copyright is not infringed.

(1) The first relates to ‘fair dealing’ with any work for the purposes of private study, research, criticism, review, or newspaper summary.
(2) The second exception applies to artistic works, where an artistic work in the form of a ‘mould, cast, sketch, plan, model, or study’ can be used for the purpose of work as long as it does not ‘repeat or imitate the main design of that work’.
(3) The third exception applies to making or publishing of paintings, drawings, engravings or photographs of a work of sculpture or artistic craftsmanship.
(4) Fourthly, the Act allows for the publication of ‘short passages from published literary works’ for use by schools, ‘provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged’.
(5) Publication in a newspaper of a report of a lecture delivered in public, unless it is stipulated to the contrary.
(6) Reading or recitation in public by one person of an extract of any published works.

Nearly five centuries after literary efforts were first recognised in UK, and nearly seventy years since the British Parliament passed the 1842 Act, during which time various statutory rights passed from printers to authors, but never to users, the time had come to extend rights to users as well. The 1911 Act represents exceptions to copyright in its infancy, but is very important as it created the base upon which the 1956 and 1988 Copyright Acts were finally built. As already set out in the beginning of this paper, the existence of exceptions paves the way for equality, and this too was the case with copyright law. The beginning of the twentieth century re-shaped copyright law altogether.

Following the 1911 Act, protection was extended to photographs in films as artistic works. The author was given new rights with respect to the use of his work in the making of cinematographic films and sound recordings. At the same time, a statutory licence for the

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61 Barker v Hamilton (1912) 28 TLR 496.
reproduction of musical works by ‘mechanical contrivances’ was introduced, known thereafter in the UK as ‘the mechanical license’. In the meantime, international copyright laws were developing and since the Berlín revision of the Berne Convention in 1908, it had been revised twice in subsequent years. Following the Brussels revision in 1928 and the Universal Copyright Convention signed in 1952, the need for further reform of the UK copyright law was felt. Furthermore, technological advances were taking place - the inventions of the radio, television, photocopying machine and camera were all posing challenges to copyright and as such there was an urgent need for reform.

4.8 Copyright Act 1956

The Copyright Act 1956 repealed the 1911 Act and provided for many firsts in UK copyright law. It extended the fifty-year term from publication to films, radio and television broadcasts and in published editions of works. In complying with the Brussels Act of the Berne Convention, it introduced a specific right to object to false attribution of authorship. The Act, in general, represented copyright law in the modern age.

As far as exceptions were concerned, the 1956 Act built upon the 1911 Act and provided for a comprehensive list of exceptions. As opposed to one section, which was devoted to exceptions in the 1911 Act, the 1956 Act provided for six very comprehensive sections dealing with exceptions to copyright. Sections 6-10 of the 1956 Act are detailed in setting out the provisions. The scope of this paper does not allow the writer to carry out an analysis of each of the sections. However, in a broad sense, it can be pointed out that the 1956 Act provided the defence of fair dealing for three purposes: research or private study; criticism or review; and reporting current events; it set out special exceptions in respect of libraries and archives, records of musical works, protection of artistic works, in respect of industrial designs and for use of copyright material for education.

It is fair to say that copyright law was developing in the correct direction. Authors had been recognised, users’ rights were given importance and law was keeping up with technology, even though it may have been reactive. John Feather notes of the 1956 Act that ‘the fair dealing rules were a step in the right direction’ and this was certainly true.

4.9 Copyright, Designs and Patents Act 1988

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62 In 1928 in Rome and in 1948 in Brussels.
63 Section 6.
64 Section 7.
65 Section 8.
66 Section 9.
67 Section 10.
68 Section 41.
The Copyright, Designs and Patents Act 1988 (hereinafter: CDPA 1988) is the great consolidated law which the UK has awaited for over a century. The need for the CDPA 1988 was recognised following the Stockholm and Paris revisions of the Berne Convention in 1967 and 1971. Accordingly, a Committee was set up in 1973 under the Chairmanship of Mr Justice Whitford.

Apart from consolidating the copyright law and attempting to strike a satisfactory balance between the creators and users, which was lacking in the 1956 Act, as there was little protection for authors, artists or composers, the Whitford Committee were committed to providing copyright laws which were in the public interest. The Whitford Committee considered public interest within the context of the relationship between national intellectual property rights and the principle anchored in EC law of free flow of goods and services; in relation to the term of protection; with respect to exceptions; uses of copyright works which are considered non-infringing and keeping in step with the Stockholm revision of 1967, Article 9(2) which introduced the Berne three-step test, the Committee recommended a general exception in this regard.

The commitment of the Whitford Committee was re-enforced by the Green Paper in 1981, which stated:

Copyright plays a significant role in commercial life and has a considerable impact in areas such as education where there is also a public interest . . .

The aim of such exceptions is to avoid copyright acting as an impediment to the use of copyright material for certain defined purposes . . .

One of the more interesting recommendations made by the Whitford Committee was to restrict the scope of the term ‘research and private study’ so as to exclude research carried out for the business ends of a commercial organisation. However, this recommendation proved to be controversial and those in industry argued ‘that to exclude commercial research would impose additional costs on industry which would decrease its world-wide competitiveness and that any revenue raised would be swallowed up by the administrative costs of collecting it’. The Government, clearly influenced by this argument, dropped the restriction.

It is interesting to note that the most recent proposed copyright regulations in the UK - the Copyright and Related Rights Regulations 2002, which implements the Information Society Directive (hereinafter: InfoSoc Directive) - excludes commercial research in the suggested amendments to s29 of the CDPA 1988, which deals with fair dealing. The suggested amendment stipulates

70 For a discussion on each of these public interest areas, see op. cit., Davies G., pp. 42-48; 56-60.


72 Cmd 8302.

73 Whitford Committee report, Cmd 6732.

Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

The wording implies that research for commercial purposes is excluded from the meaning of ‘fair dealing’.

The 1988 Act is extremely comprehensive in providing exceptions and, in accordance with the recommendations made by the Whitford Committee, the Act boasts of 56 copyright exceptions in total. However, it must be noted that some of these exceptions have been added on during the past years, in complying with EU Directives.

The Act provides for general exceptions under the ‘fair dealing’ provision, exceptions in relation to education; libraries and archives; public administration; computer programs; designs; typefaces; works in electronic form; miscellaneous exceptions - in relation to literary, dramatic, musical and artistic works; lending of works and playing of sound recordings; films and sound recordings; broadcasts and cable programmes and adaptations.

It is not the aim of this paper to analyse the copyright exceptions within the 1988 Act; however, it is hoped that the present discussion has taken the reader on the journey of the historical development of exceptions and exception to copyright law. The discussion so far has been reflective of the historical developments of the rights of printers, authors and, finally, users - the latter being established first by the common law defence of public interest and thereafter by statute law. The paper will now turn to considering the users’ rights in more detail, especially in the light of some interesting cases and the implementation of the InfoSoc Directive in UK.
5. The present and future: Public interest and statutory exceptions to copyright law

Since the introduction of statutory exceptions in 1911, public interest and statutory exceptions to copyright have gone hand in hand, and the making of the 1988 Act is the most effective example of this fact. For example, prior to 1911 the defence of ‘fair dealing’ had been recognised in case law, and therefore the defence of public interest and fair dealing lay parallel to each other. Similarly, the public interest defence, which had been outside and independent of statutes in relation to copyright law, was given statutory recognition in 1988. Section 171(3) of the 1988 Act states:

Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.

As such, the 1988 Act was instrumental in giving statutory effect to the public interest defence, whilst ensuring that the judiciary would remain free to develop a general public interest defence outside the boundaries of the statute if the need may be. It is the present opinion that giving this ‘half-hearted’ statutory recognition to public interest in copyright law, whilst keeping the doors open to develop the defence at common law, has been the main cause of contention in the post-1988 cases. As Lord Beaverbrook put it during the passage of the Bill:

It acknowledges the continuing effect of case law without attempting to codify it, thus leaving the law on this matter where it has always been, in the hands of the courts.

Two very recent cases shed light on the above opinion. In 2001, in the case of Hyde Park Residence v Yelland & Others the Court of Appeal considered the public interest defence in the light of statutory exceptions. The Court rejected that there was a general defence of public interest to an action for infringement of copyright. They argued that copyright is an intellectual property right provided for by the 1988 Act. The 1988 Act contains detailed provisions of the types of acts which can be carried out by persons without the copyright owner’s consent.

They range from fair dealing to use for education, by libraries and for public administration. They ... set out in detail the extent to which the public interest overrides copyright... The 1988 Act does not give a court general power to enable an infringer to use another’s property, namely his copyright, in the public interest. Thus a defence of public interest outside ... the 1988 Act, if such exists, must arise by some other route.

90 Hansard, H.L. Vol. 495 col. 632.
91 [2001] Ch. 143.
92 Id., at para. 43.
However, in the following year, in 2002, the Court of Appeal in the case of Ashdown v Telegraph Group Ltd\textsuperscript{93} stated that where part of a work is copied in the course of a report on current events, the ‘fair dealing’ defence will normally afford the Court all the scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press. The Court emphasised that, following the entry into force of the Human Rights Act 1998,\textsuperscript{94} the considerations of public interest are paramount. The defence of fair dealing was not made out in this case.


The above two contrasting cases, shed two opposing views in relation to the defence of public interest and statutory exceptions to copyright. In the light of these two recent decisions, it is also interesting to consider the position of the statutory exceptions in the InfoSoc Directive and the UK statutory Instrument implementing the Directive, which came into force on 31 October 2003.\textsuperscript{95} The impact of the InfoSoc Directive is such that ‘while there is no obligation on Member States to provide for any of these exceptions in national law, it is not permitted to continue with existing exceptions, or introduce new exceptions, which fall outside the scope of any one or more of the categories defined in articles 5.2 and 5.3’ (emphasis added).\textsuperscript{96} In other words, the Directive provides for a closed set of exceptions, which explicitly excludes the public interest defence, for example in relation to freedom of expression, as was held in the Ashdown case. The question to be addressed in this regard, then, is the position of the public interest and the interpretation of the statutory exception of fair dealing, under the CDPA 1988, following the coming into force of the UK Regulations. This gives rise to two specific questions

1. Is the existing wording and re-wording of ‘fair dealing’ in the UK Regulations too narrow to find in favour of the public interest defence?
2. More importantly, even if the answer to the above question can be answered in the negative, will the UK courts go beyond the closed list of exceptions provided for in the InfoSoc Directive when interpreting ‘fair dealing’ under the new UK law?

The present discussion will look at each of these questions in turn.

6.1 Interpreting ‘fair dealing’ under the present law and the UK Regulations: Too narrow for comfort?

The first point to be made in this regard is that the UK Regulations implementing the InfoSoc


\textsuperscript{94} The Human Rights Act 1998 came into force in the UK, on 2 October 2000. It gives further effect in the UK to the fundamental rights and freedoms of the European Convention on Human Rights.


Directive, in provisions amending sections 29 and 30 of the CDPA 1988, has ‘hung on’ to the ‘fair dealing’ exception, whilst adapting it to suit the provisions of the Directive. These two amending provisions provide:

s29.- (1) Fair dealing with a literary, dramatic, musical . . . for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement . . . (emphasis added)

s30.- (1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public . . . (emphasis added)

A reading of the provisions amending s29 and s30 of the CDPA 1988 makes it clear that the wording has not been changed too much from the existing law, except for the addition of ‘non-commercial’ and ‘sufficient acknowledgement’ in s29 and ‘provided that the work has been made available to the public’ in s30, to keep in step with the Directive. It is the present opinion that the existing fair dealing defence is quite restrictive - the reason why there have been many attempts in the past to rely on the public interest defence. Past case law reveals that there has been strong support for the view that such a defence exists and is available in broadly defined circumstances. The additional conditions under the Regulations, as already mentioned, strikes a fair balance, yet sets out further restrictions, hence narrowing the scope of s29 and s30. The question is whether the courts will continue to take a broad approach in interpreting these sections?

6.2 Playing the game - public interest v. fair dealing: Follow tradition or break the rules?

Simply, future case law will provide a definite answer to the question whether the UK and European courts will go beyond the closed list of exceptions provided for in the InfoSoc Directive when interpreting ‘fair dealing’ under the new UK Regulations. At present, we can

97 Amending provision s29 deals with research and private study.

98 Amending provision s30 deals with criticism, review and news reporting.

99 S30. - (1A) For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including (a) the issue of copies to the public; (b) making the work available by means of an electronic retrieval system; (c) the rental or lending of copies of the work to the public; (d) the performance, exhibition, playing or showing of the work in public; (e) the communication to the public of the work . . .

100 McCarten Turkington Breen v Times Newspapers [2001] 2 AC 277; Attorney-General v Times Newspapers [2001] 1 WLR 885; Ashworth Hospital Authority v MGN [2001] 1 WLR 515; Interbrew SA v Financial Times [2002] 1 Lloyd’s Rep 542; Hyde Park Residence v Yelland [2001] CH 143; please note that the cases cited above are cases where the defendants attempted to rely on Article 10, but not always successfully.

merely speculate and assume certain outcomes based on existing facts. The present discussion will speculate from both national and European perspectives.

6.2.1 National perspective: ‘Based on this approach, we now have an Act in which there are 42 sections of numbingly detailed exceptions to copyright infringement.’

Already, it has been established that there are 42 circumstances (including criticism, review and news reporting and ‘fair dealing’) under the CDPA 1988 where freedom of expression trumps copyright protection. Therefore, if any one of the cases should fall into these 42 categories within the constraints of the CDPA 1988, freedom of expression will win the day. In cases where fair dealing and public interest lie parallel to each other, i.e. in borderline cases, it may be the case that the UK courts will follow in the footsteps of the Ashdown case and use its ratio decidendi to allow a broad scope when interpreting fair dealing, on a case-by-case basis, to take into account freedom of expression and freedom of the press. In addition, the Preamble to the InfoSoc Directive states:

The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

This being the ‘aim’ of the Directive, the hope for the future is that the national courts will use it as a means of guidance to interpret the new law. As far as the UK is concerned, the question that needs to be asked is whether, in interpreting the ‘aim’ or the Preamble to the Directive, the use of the Human Rights Act 1998 will be permitted within the scope of the Directive or whether it will be seen to cross the boundaries of the exhaustive catalogue of exceptions?

The definite circumstances where the courts will avoid a broad interpretation of fair dealing will include where the need to uphold the ‘sanctity of contract’ prevails; national safety, territorial integrity or public safety is at stake; need for prevention of disorder or crime; protection of the reputation or the rights of others and in order to maintain the authority and

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107 Marlow v United Kingdom (Decision of 5 December 2000).

impartiality of the judiciary.\textsuperscript{109}

6.2.2 European perspective: ‘I may disagree with what you have to say, but I shall defend to the death your right to say it’\textsuperscript{110}

The starting point for looking at the relationship between the statutory defence of fair dealing and public interest from a European point of view is to examine the relationship between the ECHR and the European Court of Justice (hereinafter: ECJ).\textsuperscript{111} Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) states:

1. Everybody has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 6(2) of the Treaty on European Union (hereinafter: TEU) states:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 . . .

A reading of Articles 10 and 6(2) of the Convention and the TEU, respectively, makes it clear that the public interest right and other rights such as freedom of expression and freedom of the press will prevail above Community law as guaranteed by the Convention, in so far as the conditions under Article 10(2) are met and proved.\textsuperscript{112} The question is: Has this been the case in practice? European case law in this context generally reflects that where there has been a conflict between the ECHR and the ECJ, the ECJ has abided by the laws of the ECHR and viewed Article 10 ‘among the general principles of law the observance of which is ensured by the Court of Justice’.\textsuperscript{113}

In practice, the application of freedom of expression by the ECJ, over and above

\textsuperscript{109} Nikula v Finland (2002) 12 BHRC 519.

\textsuperscript{110} François Marie Arouet (pen name Voltaire), 1694-1778, (Attributed); originated in Tallentyre S.G. (Evelyn Beatrice Hall), \textit{The Friends of Voltaire} (1906).


Community law was seen in the cases of Ter Voort, Commission v Netherlands and the most recent case of Philip Morris International, Inc. Under the freedom of commercial expression, the Court interpreted Article 10 once again, in R v Secretary of State for Health, ex p Imperial Tobacco Ltd. finding in favour of freedom of expression.

These cases establish that where there is a conflict between Community law and a fundamental human right such as freedom of expression, the ECJ has found in favour of the fundamental right, although this has not always been the case. Restrictions on the freedom of expression on the ground of protection of health were permitted and as such the Court ruled that restrictions on the advertising of alcoholic beverages to consumers under Swedish law were justified on this ground.

The present discussion will not be complete without making reference to the most recent Charter of Fundamental Rights of the European Union, proclaimed at the European Council in Nice in December 2000. The European Charter of Fundamental Rights sets out in a single text, for the first time in the European Union’s history, the whole range of civil, political, economic and social rights of the European citizens and all persons resident in the EU. They are based in particular on the fundamental rights and freedoms recognised by the European Convention on Human Rights and other international conventions to which the European Union or its Member States are parties. As such, the Charter states in Article 11:

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 freedom and pluralism of the media shall be protected.

A reading of Article 11 reveals that it is not too different from Article 10 of the Convention. The main difference is in Article 11(2) of the Charter, where special mention is made of the freedom of the press. This may be the cause of future fair dealing conflicts from the point of view of copyright law. It is difficult to speculate as to the outcome of this latest development at present, especially because the Charter does not yet have full force of the law, which has been a point of criticism and which will be discussed at the Intergovernmental Conference in 2004. At present, the hope is that with cases such as Ashdown and developments such as the Charter, fair dealing will give the courts all the scope that is necessary to take into account

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116 T - 377/00, 13 January 2003 (unreported).
119 O.J. 2000 C 364/01.
120 The Charter can be found at http://www.europarl.eu.int/charter
public interest and to interpret each case fairly.

7. Conclusion

In drawing a conclusion, it is clear that a fair society will always provide for exceptions to rules. The present discussion established this fact before proceeding to look at the UK, which recognises exceptions to intellectual property rights, and hence copyright laws, as paramount. The discussion further attempted to trace the development of the public interest defence and it must be emphasised that up until the twentieth century (in particular 1911), the common law right of public interest was the defence to copyright infringement. This common law defence played a vital role and was developed especially throughout the eighteenth and nineteenth centuries by visionaries such as Mr Justice Yates in Donaldson v Beckett and Sergeant Talfourd during the passage of the 1842 Copyright Act.

The 1911 Act brought about major reform and, whilst it gave effect to the Berne Convention, it also provided for statutory exceptions to copyright law. These exceptions have been developed and re-modelled throughout the twentieth century, at the expense of public interest almost taking a back seat, against the growth of statutory exceptions in copyright law. However, the latter part of the twentieth century (in particular 1988) saw copyright law embracing the common law public interest defence and incorporating it into statute law even though it was a half-way house, as already discussed.

The twenty-first century has turned things round again. As the law stands now, the position is such that there is a risk of this important public interest defence being ousted from copyright laws, as a consequence of the InfoSoc Directive. The above discussion speculated on the matter and established that there is a possibility that the UK and European courts will follow tradition and interpret ‘fair dealing’ in a broad sense, if the need may be, at the risk of going past the closed set of exceptions provided in the InfoSoc Directive.

However, only time will tell whether the national or European Courts will take a different stance once the Directive and UK Regulations are put to the test under case law. As such, the questions that the writer will leave open is whether Ashdown confirmed this broad interpretation of fair dealing to allow the public interest defence in copyright law or whether this recent ruling will be stifled by the InfoSoc Directive, which does not provide for a public interest defence within its catalogue of closed exceptions. Finally, what effect will the Human Rights Act 1998 have on the UK copyright Regulations now that it is implemented?

The hope for the future is that the public interest defence and fair dealing continue to lie parallel to each other with the public interest defence being considered if the need may be. After all, laws and exceptions to laws are created with the public interest in mind and it would go against the entire grain of law making if this concept was to be ignored.

In drawing a conclusion, it is timely and appropriate to bridge the time between the eighteenth and nineteenth centuries and twenty-first-century Britain. In 1883, Scrutton in the first edition to his text concluded that his lengthy treatise had ‘... tended to show the “communistic” character of the Law of Copyright’. ‘Literary and artistic productions,’ he reminds us, ‘are treated as property, but that property is created in, and limited by, the

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122 See supra p. 16.
interests of the community.'

One hundred and twenty years later, his words have been given effect by modern statute law and have been echoed in recent case law, thus confirming that ‘property is created in, and limited by, the interests of community’.

The . . . courts may now have to consider the public interest in freedom of expression when they assess copyright infringement on a case-by-case basis. Furthermore, the public interest defence retained by section 171(3) has been opened up. Notwithstanding that greater uncertainty may result, the Court of Appeal was probably right in thinking that there will not be a flood of novel cases. Instead, we now have a copyright regime which is more sensitive to Strasbourg jurisprudence.  
