Tensions Between Intellectual Property Law and Freedom of Expression: A UK Perspective

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Abstract. This short paper explores the tensions inherent in intellectual property law and freedom of expression from a UK perspective. It considers the barriers IP law puts in place to creative ideas and free expression, and the impact of the changes in UK law in 2014 that enhanced exceptions for key areas such as criticism, and parody and pastiche. It considers some key case law that tested the boundaries of the law in relation to free expression, and considers whether the 2014 exceptions favor a broader approach to freedom of expression.

Keywords: Intellectual property · Freedom of expression · Fair dealing · Copyright

1 Introduction

By its nature as a property right, copyright protection limits some other freedoms, such as freedom of expression, since in protecting the interests of a copyright holder, limitations are placed on what can be done by others with copyrighted material. Additonally, as technology has improved, the ability to undertake new activities with copyrighted materials has increased, and with it the capacity to open up new ways of working with and delivering content. Such concerns were considered as part of two fundamental reviews of intellectual property law in the UK [1, 2]. Recent amendments to copyright law in the UK regarding exceptions have attempted to bring clarity.

2 Defenses to Copyright Infringement

As a property right, copyright provides a rights holder with very specific and powerful legal rights. Critics of the traditional Anglo-American copyright tradition challenge what they see as a privilege that is not in the interests of wider society. Wheeldon [3] identifies a contested narrative of copyright whereby the prevailing discourse identifies a natural right that should be respected by all, whereby the critical discourse identifies a state-bestowed privilege that is to the detriment of wider society. Craig [4, p. 67] argues that, "the language of property and entitlement pervades copyright rhetoric." Considered

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in this vein, we can interpret copyright as a barrier that prevents wider society from benefitting from creative works.

The allowed uses of copyrighted material are clearly set out within the *Copyright, Designs and Patents Act 1988* (henceforth CDPA) and are known as permitted acts. Outwith the permitted acts as specified, people or organisations are able to negotiate with rightsholders for any uses that do not fall under these categories, and such use can be granted a license permitting the use to be authorized.

2.1 Public Interest

The defense of public interest is not explicitly defined in the CDPA, instead "the public interest defense is based on the court's inherent jurisdiction to refuse an action for infringement of copyright in cases in which the enforcement of copyright would offend against the policy of law" [5, p. 295]. This is specified in s.171 (3) which deals with rights and privileges under other enactments or the common law and states that nothing in the Act prevents the role of law enforcing or restricting, "the enforcement of copyright, on grounds of public interest or otherwise" [6]. Bainbridge defines public interest as "a nebulous concept" [7, p. 216] and at its heart it involves judges determining whether the wider public interests necessitates copyrights being overruled. Torremans offers that, "the circumstances in which the court could invoke its inherent jurisdiction depend on the work at issue, rather on the issue of ownership of the work" [5, p. 295]. To that end public interest can incorporate a range of issues, such as public safety, national security, or matters related to public accountability, as well as issues of immorality, illegality, or scandal.

Freedom of Expression

Freedom of expression has been clearly codified as a human right under Article 10 of the *Human Rights Act 1998* (HRA). Copyright and freedom of expression provide us with a clear potential for conflict in terms of individual rights. Craig charges that the "clash between copyright owners' rights to control expression and citizens' rights to express themselves cannot be adequately resolved" [4, p. 204]. These rights have been reconciled by applying specific tools:

- The idea-expression dichotomy – ideas are not protected, and the same idea can be expressed differently
- The fair dealing defence (to be discussed below)
- The public interest defence (as discussed above) [5]

Torremans suggests that these tools work in most cases to resolve the clashes between the competing rights, however as we will see in the case law, they do not cover all eventualities.

Parody, Pastiche, and Caricature

Parodies can be a controversial element in copyright cases, as they constitute potential breaches of both economic rights and moral rights. For instance, if the parody in question

copies excessively from the original in terms of content or structure, there is a potential objection that can be made with regards to economic impact on the copyright holder; but equally under the CDPA the moral rights of the author include the ability to object to derogatory treatments of work. The right to parody, then, was not a straightforward one under UK law, despite the presence of it as a feature in EU law. Both the Gowers and Hargreaves reviews in the UK stressed the importance of an exception to parody being constituted. For Hargreaves the issue was not merely one of freedom of expression, but also of economic importance too: "Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy [2, at 5.35].

2.2 Fair Dealing

Fair dealing operates on the basis that the usage of some parts of a copyright work are allowable if they fall within the definition of fair. Unless the fair dealing has been clearly specified by virtue of contract, such as through a rights agency like the Copyright Licensing Agency, what is deemed to be fair when accused of infringement will have to be clarified by the court. How much of a copyrighted work that is fair to use is not merely a matter of quantity, it can also be about quality. Six key factors apply when considering if the use of an item could be considered fair dealing, and these are:

- Purpose
- Proportion
- Motive
- Status of other work
- Extent of use
- Prejudice to the copyright owner [7, p. 224]

This is similar in scope to the PNAM test that was part of the USA via the *Copyright Act 1976*. The **purpose** and character of use, the **nature** of the copyrighted work, the **amount** and sustainability of the portion used, and the **market** impact of the copying.

2.3 Updates to the Law – The 2014 Exceptions

Significant amendments were made to exceptions to copyright in 2014 in the UK, introducing new elements to the permitted acts that enhance freedom of enquiry and expression. The "new copyright exceptions for private copying, parody and quotation marked an important milestone in the government's efforts to make UK law 'fit for purpose' for the digital age" [8, p. 1002]. Notable amongst the changes was a new parody exception which situated parody as an issue requiring the fair dealing approach to be applied with regards to deciding on the legality [9]; however, the exception also left the moral rights remedies in place for authors, meaning that creators of parodies still required to be aware of potential derogatory treatment that could be actionable by the original copyright holder. While what parody should be considered to be was not clearly delineated within the exception, the guidance from the Intellectual Property Office grounds the definitions

in EU law, specifically *Deckymyn v Vanderstten* which highlighted that to be recognized as parody a work had "to evoke an existing work, while being noticeably different from it, and to constitute an expression of humour or mockery" [10].

Other relevant amendments related to the new exception for text and data mining, for non-commercial research purposes only, and only where legal access to the data concerned had already been obtained [11]. Additionally, exceptions were added with regards to quotation from copyright materials, as well as the ability to present digital copies of copyright materials on terminals within educational establishments and libraries. These exceptions, then, enhanced freedom of enquiry, but narrowly, to non-commercial research.

3 Relevant Case Law

This section will explore cases that explore the themes discussed above in more detail.

3.1 Public Interest

The use of public interest in a defense is a case of weighing up competing interests [7, p. 217]. In *Lion Laboratories Ltd v Evans* [12] two ex-employees of the plaintiff, a manufacturer of devices that police officers used to measure intoxication levels in suspected drink-drive cases, provided a newspaper with internal company documents that indicated faults in some of the machines may render a positive result even when the subject was not over the prescribed drink-drive limit. Initially successful in obtaining an injunction against the ex-employees and Express newspapers on the basis of breach of confidence and copyright, the appeals judges took the position that public interest in the case applied to both the confidence and copyright elements. Breach of confidence and the press had been visited previously in several cases, including *Initial Services v Putterill* [13] where, again, an ex-employee had leaked to a newspaper confidential company information that was deemed to be in the public interest.

In *Ashdown v Telegraph Group Ltd* [14] the issue at stake was the publication of a private memo of a meeting between politicians Paddy Ashdown and Tony Blair and others. Rather than merely summarize the contents of the memo, the defendant published substantial extracts of the memo itself. Ashdown was successful in arguing that his copyright had been breached from the point of view of his human rights. The clash in the case was between what could be perceived to be the public interest in terms of a significant political meeting, albeit a private one, versus Ashdown's rights to his own private property.

Public interest can also be satisfied by *not* enforcing copyright in a work. This is an example of the state reversing the privilege it bestows on a rights holder by removing said rights. A key example of this relates to the 1980s *Spycatcher* controversy, where in *Attorney General v Guardian Newspapers* [15] the House of Lords decided not to enforce copyright in the book, meaning anyone could copy, republish, or otherwise use the content and not face any sanction. This was an interpretation of public interest by the House of Lords as being damaged by the actions of the author, since in revealing secrets regarding the national security apparatus, he had arguably harmed the country.

This premise can be extended to any situation where someone seeks to use copyright law to benefit from a criminal act. Torremans suggests, "courts are authorized to use the public interest principle to grant an injunction" against any such use of copyright law [5, p. 297]. However, in a recent case the Duchess of Sussex successfully sued the *Mail on Sunday* for both misuse of private information, and breach of copyright for publishing a letter she had sent to her estranged father [16].

3.2 Fair Dealing

Fair dealing is the concept that some uses of copyrighted material can be defended if they are deemed to be reasonable. What constitutes fair dealing is often at the mercy of the courts, but it does not always equate to a significant portion of the work in terms of a percentage of the total. In *Hawkes & Sons (London) Ltd v Paramount Film Service* [17] 20 s of a four-minute musical composition used in a newsreel was deemed to be substantial, since it formed the most recognizable part of the melody (in this case, the march "Colonel Bogey"). If even a small part of a work becomes instantly identifiable in the public mind as representing the whole, then there is an argument for stating that the quality of the material used overrides any concern with the quantity, in copyright terms. The value of the item itself may largely be in that identifiable section, and therefore the rights of the copyright holder would not be served by ignoring this vital.

In *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [17] this important aspect of fair dealing was further explored. In the case, the complainant was seeking redress over the defendant's copying of a football fixed-odds betting coupon, and although some aspects of the original coupon were not copied in their entirety, enough was copied for the court to deem the copying to be substantial. Pearce J offered that:

> Whether a part is substantial must be decided by its quality rather than its quantity. The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected [18].

The issue of quality as a factor in deciding on infringement issues continues to be of concern with regards to case law and fair dealing. In *England and Wales Cricket Board Ltd –v Tixdaq Ltd* [19] the defendant claimed that the use of 8 s summaries of cricket matches qualified under the exemption in the CDPA for reporting current news or events. In this case the court decided that the usage did not qualify under this exemption, since the use was not for the purposes of informing regarding current events, but was instead a reward for activity on a mobile phone application. In addition, the court applied the quality test, and considered the 8 s clips to contain much of the important elements of the matches concerned, which prejudiced the broadcaster who had paid significant monies for the broadcast rights.

3.3 Review and Criticism

A significant case related to review and criticism had obvious freedom of expression implications. In *Hubbard v Vosper* [20] the defendant had reviewed a book by Scientology founder and leader L Ron Hubbard, and within the review itself had made extensive

quotations from the book and, in addition, criticism of the underlying philosophy of the religion. The case was important because it clarified that fair dealing not only can encompass the use of significant parts of a text for review and criticism, but that the critique of the morality and ethos of the underlying philosophy that informed the work was also to be able to call on a fair dealing defense. As Lord Denning states in the decision:

> A literary work consists, not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defense of 'fair dealing' both can be criticized [19].

Here we see a clear example of what Bainbridge summarizes as, "the desire of the courts to protect free speech, particularly as with regards the press, or in a political, or quasi-political sphere" [7, p. 225].

4 Discussion

Do the available defenses to copyright infringement suitably mitigate the threats it poses to freedom of enquiry and freedom of expression? To answer this, we will utilize the three categories summarized earlier by Torremans to facilitate our discussion, namely:

- The idea-expression dichotomy
- The fair dealing defence
- The public interest defence

We will also consider whether free enquiry can be considered to be limited by copyright law.

4.1 The Idea-Expression Dichotomy

As ideas themselves cannot be copyrighted, anyone objecting to how another has expressed a specific idea is free to challenge that idea in their own words. This seems a basic, logical right that is at the heart of free expression in a civilized society.

A flavor of the idea can be found in the case *Baigent v Random House* [20] where the author of a book called *Holy Blood, Holy Grail* had sued Dan Brown, author of *The Da Vinci Code* for using ideas expressed in the former. Brown had created a fictionalized version of Baigent's work, and the appeals judges concluded that what had been inspired from the original text amounted to "generalised propositions at too high a level of abstraction to qualify for copyright protection because it was not the product of the application of skill and labour by the authors of the former book in the creation of their work" [21]. Within the scope of copyright law, then, the opportunity exists to build on existing ideas as long as the execution of them is original in form.

4.2 The Fair Dealing Defense

In terms of fair dealing, one of the largest barriers to freedom of expression is the concept reconfirmed in *England and Wales Cricket Board Ltd –v Tixdaq Ltd* that the issue of fair dealing must be considered not merely in its quantitative terms but also its qualitative terms. This becomes increasingly challenging in the social media age, where highlights of sporting events can be shared via Twitter of Facebook at the click of a mouse. The highlights of such events may well singularly be the goals, or the runs, or tries; therefore, should rights holders who pay many millions of pounds for the rights to broadcast such events not be entitled to protect the most valuable aspects of the broadcasts? Conversely, the restrictions on viewing such events that occurs when media companies purchase rights is a restriction on access, since often only subscribers to that service are able to view the sporting events concerned. There is an argument for stating that restrictions on access to highlights of such events is a block on freedom of access to information, yet it is difficult to justify a wide-ranging fair dealing exemption for content that is so economically valuable.

4.3 The Public Interest Defense

The courts have drawn the defense of public interest narrowly, meaning that only very specific uses of the defense are likely to be successful, which we have seen reinforced in the recent Duchess of Sussex case [16]. Importantly, the areas where the defense is likely to succeed support the free expression and free enquiry categories. The press is able to utilize the defense in key areas related to public safety and the other similar considerations, meaning that matters where the wider public concern is important are likely to see successful defenses from a public interest perspective.

5 Conclusions

The copyright exceptions introduced in 2014 have updated the law in key areas related to free enquiry and freedom of expression. To that end, it is difficult not to argue that the threats to free expression and enquiry have been mitigated to an acceptable extent, both in the historical conception of copyright legislation, the subsequent case law, and the revisions of statute. The balance in protecting the interests of copyright holders and the wider social benefits that accrue from as free an access to knowledge as possible will always be a precarious one, however.

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