IV. The Emerging Public Interest Exception to Copyright in Europe

In the light of the foregoing discussion it is useful to consider the possibility of the introduction of a public interest exception to copyright in Europe.

The envisaged exception would ideally be based upon the normative framework of the fundamental freedoms contained in the domestic legal frameworks of the Member States as well as the overall guarantee of the freedom of expression and the right to information under the ECHR. It would be framed in broad and general terms akin to the fair use exception of the US but be similarly subject to a basic framework of operation so as to prevent it from being used for the arbitrary curtailment of the individual rights of the copyright holder.

The remainder of this Chapter shall constitute an analysis of efforts taken in the jurisdictions under review, namely England, France and Germany, to introduce a public interest exception to copyright within their domestic legal frameworks. It shall strive to analyze the normative structure and conceptual underpinnings of these legal frameworks in terms of their conduciveness to the introduction of a broad based public interest exception to copyright and the manner in which current judicial and legislative approaches to copyright and the freedom of expression in these jurisdictions may herald the development of any future exception to copyright based upon the public interest.

A. England

The emergence of a fledgling public interest defense in English law can be traced back to the breach of confidence claims where it operated as a defense to the unauthorized disclosure of confidential information, in instances in which the information concerned and the

continued maintenance of its secrecy was considered iniquitous and its disclosure was considered to be in the public interest.

Hence the defense was originally limited to instances where the information which was sought to be disclosed was linked with some sort of iniquity or misconduct on the part of the plaintiff.[54]

With the passage of time, the defense gradually evolved into an independent common law defense of public interest which would apply even in the absence of misconduct on the part of the plaintiff where any "higher duty" for disclosure was seen to exist.[55] It has been described as a defense outside and independent of statutes, not limited to copyright cases and based upon general principles of common law.[56]

The development of the public interest defense in the Copyright law of England was triggered with the express recognition by Ungoed-Thomas J in the case of *Beloff v. Pressdram*[57] that,

> *"Public interest as a defence in law, operates to override the rights of the individual* ***(including copyright)****, which would otherwise prevail and which the law is also concerned to protect."* (emphasis added)

The case of *Lion Laboratories Ltd. v. Evans* marked the further expansion and refinement of the doctrine where it was for the first time directly applied to an action for copyright infringement. The case involved the unauthorized disclosure of confidential documents containing information which went to reveal that the intoximeters used by the police to measure the blood alchohol levels of motorists were faulty and that therefore a significant number of motorists may have been wrongly convicted.

In this case it was conclusively held that there was no requirement of evidence of an immoral act or inequity on the part of the Plaintiff

---

54 Rachel A.Yurkowski *Is Hyde Park Hiding the Truth?* 51 VUWL REV. 4 (2001) http://www.austlii.edu.au/nz/journals/VUWLRev/2001/51.html.

55 *Lion Laboratories v. Evans* (1985) QB 526 cited *id.*

56 *Beloff v. Pressdram Ltd., (1973) 1 All E.R. 241* at 260.

57 *Id.*

in order to give rise to the defense. Thus this decision did much to bring closer the possibility of founding an independent public interest defense in copyright law.

The introduction of a public interest defense to copyright under English law gained further impetus with the enactment of the Copyright Designs and Patents Act of 1988. The 1981 Green Paper preceding the Act stated that,

> *"...the public interest demands that not every unauthorized reproduction of copyrighted material should constitute an infringement of copyright."*[58]

When the Act finally came into being s.171 (3) seemingly introduced a statutorily codified public interest defense to English copyright law.

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

Despite this gathering momentum in favour of the recognition of a defense to copyright law based upon the public interest the development of the exception suffered a considerable setback with the decision of the Court of Appeal in the case of *Hyde Park v. Yelland.*[59]

The case concerned an application for summary judgement against the *Sun* newspaper for the unauthorized publication of video stills of Diana Princess of Wales and Dodi Al Fayed which had been taken from a video film of which the Plaintiff was the copyright holder.

The Defendant argued that the unauthorized publication of the images were in the public interest since it sought to expose the falsity of a statement made to the media by a third party, Mohammed Al Fayed.

In the High Court, the Plaintiffs argued that no public interest exception to copyright existed in English law and that the fair dealing

58 Reform of the Law Relating to Copyright, Design and Performer's Protection, Cmnd 8302, HMSO, July 1981.

59 *Hyde Park v. Yelland* [2000] RPC 604 (CA); [1999] RPC 655 (HC).

exception to copyright under the CDPA expressed the extent to which infringement could be justified.

They further argued that s.171(3) of the CDPA did not provide a public interest defense to copyright infringement but was a mere statement to the effect that if such a defense existed under the present legal framework it was preserved.

This argument was effectively rejected by Jacob J who made an express statement to the effect that a public interest defense to copyright existed and was recognized -not merely preserved- by s. 171 (3) of the Copyright Act.[60]

A further argument was made against the recognition of a public interest defense on the basis that for the court to go outside the specified exceptions to copyright provided under the CDPA and to enforce some undefined public interest limitation would amount to judicial legislation, involving the court in controversial questions of public policy and thereby bring the law into disrepute.

This argument was also refuted by Jacob J, who observed that the need to balance the freedom of expression and the right to respect for private life under the Articles 10 and 8 of the ECHR would involve judges in the same or similar sort of exercise as was involved in the application of a public interest defense.[61]

Thus the decision of the High Court in this instance constituted an unequivocal statement by English courts recognizing a statutorily granted public interest defense to copyright under s.171(3) which could be applied in order to bring about about an equilibirum between the interests of copyright owners and the freedom of expression and information of the public.

In the Court of Appeal however Aldous J having ruled on the inapplicability of the defense of fair dealing upon the basis that the information which was reproduced did not relate to current events, rejected the existence of a public interest defense to copyright based upon s.171(3) on the following grounds.

---

60 *Hyde Park v. Yelland* [1999] RPC 655 at 667.

61 *Id.* at 671.

Firstly he determined that copyright being a property right granted under the CDPA which also provides for express exceptions to this right in the public interest, it would be wrong for a court having rejected the application of these statutory exceptions to further restrict such right based upon an independent defense of public interest. In his view s. 171(3) was a mere recognition of the court's inherent jurisdiction not to allow its processes to be used in a way contrary to the policy of the law.

Secondly he referred to the idea expression dichotomy in copyright law, and stated that copyright seeks to protect the expression of information and not the information itself. Hence in his view there could not be a rational basis for the extension of the public interest defense existing in relation to breach of confidence claims which seek to protect the unauthorized disclosure of *information* to acts of copyright infringement which were concerned with the unauthorised use of the *expression* of information.

Thirdly he also referred to the fact that the acceptance of a general defense of public interest could be contrary to the international obligations of England i.e. the Berne Covention and TRIPS Agreement three-step test relating to copyright exceptions.

Mance J delivering an independent judgment, also denied the existence of a public interest defense to copyright based upon the disparity between the interests that were protected by the breach of confidence action and copyright infringement. He noted that copyright being a proprietary right and confidence being a personal interest it was not possible to collaborate them into one claim and to defend them with the same defense i.e. the defense of public interest. However he did accept the view that Parliament had intended via s.171(3) for the courts to retain some discretion to refuse copyright protection on public interest grounds.[62]

While the decision of the Court of Appeal in *Hyde Park v. Yelland* seemed to put an effective stop to the continued recognition of a public interest defense within the English copyright law system, a further

62 *Hyde Park v. Yelland* [2000] RPC 604 at 628.

twist was effected to this already convoluted tale by the decision given by the Court of Appeal in the case of *Ashdown v. Telegraph Group*[63] which allowed the court the opportunity to reconsider the stance it had taken in *Hyde Park.*

This case related to the publication in the *Sunday Telegraph* newspaper of excerpts of a secret memorandum concerning a possible pact between two British political parties i.e. the Labour Party and the Liberal Party. Upon the failure of sufficient grounds to establish a defense based upon fair dealing, the newspaper brought up the defense that the publication was in the public interest.

The Court of Appeal although it refused to uphold the application of the public interest defense to the facts under review, rejected Aldous J's dicta on the public interest defense in English law.

The Court reviewed the law relating to the public interest defense in the light of the Human Rights Act of 1998.[64]

It stated that the principles laid down in *Hyde Park* could not be held binding on the courts since the decision had been tendered prior to the coming into force of the Human Rights Act of 1988, and further stated that that the restriction imposed upon the freedom of expression under the CDPA had to be considered individually in every case in order to determine whether such restriction was necessary in a democratic society.

The Court of Appeal went on to state that the restriction on the freedom of expression can be justified where it was necessary for the protection of copyright, since the infringement of copyright constituted an interference with the peaceful enjoyment of possessions and with rights recognized under international conventions and under EU law.

While referring once more to the idea-expression dichotomy in copyright to support the view that on the face of it copyright would not normally impinge upon the freedom of expression since it did not prevent the publication of information, it recognized that such a con-

63 *Ashdown v. Telegraph Group* [2001] 3 WLR 1368.
64 *See* Bentley and Sherman at 220.

flict could arise in instances where the expression of the information necessitated the reproduction of specific texts or images.

The Court held that in such cases if the defenses of fair dealing and refusal of discretionary relief would not protect the public interest, a defendant could invoke the public interest defense as developed by common law and acknowledged under s.171(3).

Thus the Court expressly stated that in rare circumstances the right to the freedom of expression could override rights conferred under the CDPA as a matter of public interest. On the other hand it acknowledged the fact that the circumstances in which the public interest may override copyright are not capable of precise categorization or definition.

This is significant by virtue of the fact that it consitutes an acknowledgement by the court that the statutory exceptions stipulated in the CDPA may not always be sufficient in striking a balance between copyright and the freedom of expression, and a recognition of the need for a general public interest defense which would function in situations where other exceptions were not applicable.

It also reflects an acceptance by the courts of the need for a general public interest exception to copyright which is flexible and capable of being applied at the discretion of the judges where the specific statutory exceptions are not capable of balancing the competing interests of copyright and the freedom of expression.

Hence the present stance of English law as regards the public interest exception to copyright maybe summarized as follows.

Following *Ashdown* it may be stated that courts have recognized the fact that a public interest defense does in fact exist under English law. It has further acknowledged the need for such a defense based upon the obligation to balance the interests of copyright and the freedom of speech as required under the Human Rights Act of 1998.

However the scope of the defense as currently defined by the courts is considerably narrow. Firstly notwithstanding the substantial development that it has undergone following its intial application to actions relating to copyright infringment in *Lion Laboratories v. Evans* it has consistently been interpreted in relation to its original

application *vis a vis* claims for breach of confidence. Its present application in English law demonstrates the use of the public interest defense more as a supplementary defense to breach of confidence actions where such actions involve a claim of copyright infringement pleaded as an alternative claim to the action, as opposed to an independent defense to copyright infringement. As such its application has been restricted to instances of unauthorized publication of *unpublished works* and to the *disclosure of information* as opposed to the gamut of possible uses of copyrighted materials. Further it has been interpreted to apply only in instances where other statutory exceptions notably the defense of fair dealing is not applicable.

Thus for example as regards the illustration in Hypothetical I the unauthorized use of the copyright protected footage by Scoop Times and Explore Inc. and its uploading onto the internet by David Fans would come within the scope of the public interest exception to copyright in English law, since the footage consitutes an unpublished work the dissemination of which is in the public interest. The same reasoning may apply with regard to the situation in Hypothetical 2 on the basis that the drawing although it consitutes published material in the sense that it has been presented at a conference, has not been made accessible to the public at large.

Hence at present the public interest exception to copyright in English law represents a narrow doctrine which applies in relation to the very specific aspect of the public's right to information which has not been disseminated to the public, where it cannot be reasonably anticipated that such information will be disseminated by the copyright owner.

In its current state of development through case law, it is thus of considerably diminished value as a tool by which to achieve an equilibirum between copyright and the freedom of expression in comparison with the fair use exception in the US.

In view of the preceding discussion the issue arises as to the possibility of developing a public interest exception to copyright which could serve as a defense to copyright infringement in any form, where

such infringement can be proven to be supported by a substantially strong degree of public interest.

The foregoing analysis makes it clear that within the present legal framework of English law there is evident scope for the introduction of a public interest defense to copyright.

As discussed above the statutory limitations to copyright under the CDPA are sadly inadequate to effect a sufficient balance between copyright and the freedom of expression and the right to information.

Apart from the fact that the inherent rigidity of these limitations considerably limits the scope of their application many of these are poorly drafted[65] and others have not been updated to keep up with technological developments,[66] while some are so complicated that it is difficult to imagine anyone seeking to rely on them.[67]

One of the primary issues that arise in considering the introduction of a possible public interest exception to copyright in English law is whether s. 171 (3) does in fact provide for the possibility of the introduction of a broad-based public interest defense to copyright.

In this regard it is of worth to consider the legislative history preceding the enactment of the Copyright Act of 1988 and s.171(3).

The Whitford Committee[68] which was established to consider amendments to the Copyright Act of 1956 was presented with several proposals as to the the clarfication and enlargement of existing limitations to copyright law. One such proposal from a newspaper publishing group was to the effect that publication in the public interest

65 Burrell, *Defending the Public Interest* 9 EIPR 394,397
Id. note 31 See for example CDPA 1988 s.62 "Representation of Artistic Works on Public Display".

66 *Id.* note 32 See in particular CDPA 1988 s.29 "Fair Dealing for Purposes of Research or Study".

67 *Id.* note 33 See for example, CDPA 1988 s.33(1) "Anthologies for Educational Use".

68 *Committee to Consider the Law of Copyright and Designs*. Chairman Mr. Justice Whitford.

should be admitted as a defense, possibly subject to some limit on the quantity or quality of the material published.[69]

Significantly however, an amendment which would have expressly incorporated a general public interest defense into the Bill was withdrawn after the Government argued that the amendement was both superfluous and counterproductive.[70]

In its place s. 171(3) was inserted into the Bill during its Third Reading.

In arguing against the inclusion of a statutory public interest defense to copyright, Lord Beaverbrooke made the following observations.

> *"There is little point in codifying in a statute what is already achieved by the courts, unless decisions need developing or refining. The amendment does not add to the principle already established by the courts in any way, and I am not aware of any pressing need. On the other hand, there is a danger in attempting codification since one loses the flexibility of case law. Consequently we feel it right to leave the [permitted acts] chapter as it stands without this amendment. The Chapter sets out specific exceptions to copyright, all of them judged to be in the public interest, and does so in a way which, as far as possible, puts clear limits on the scope of the exception. It leaves in the hands of the judges those exceptional cases where it is necessary to balance public interest criteria with the rights of copyright owners."* [71]

Hence as Burrell points out this indicates that a public interest defense to copyright in English law was universally accepted by the legislature and that the reluctance to introduce an express statutory exception to copyright stemmed from the perceived need to preserve the inherent flexibility of the exception as developed by case law.[72]

---

69 Report of the Committee to consider the Law on Copyright and Designs. March 1977.Cmnd 6732 page 170 Paragraph 667.

70 *See* Burrell at 403.

71 *Hansard* H.L. Vol.491 col.77 as cited in Burrell at 403.

72 Burrell at 403.

Lord Beaverbrook went onto state that,

> *"The Bill does not and cannot cover every aspect of the law of copyright."*[73]

Thus the preceding statements indicate an intention on the part of the legislature to preserve and uphold a public interest exception to copyright within the English legal framework, which is designed to act as a mechanism by which to balance the competing interests of copyright holders and the public, where the statutory exceptions introduced for such purpose by the legislature are inadequate to achieve such a balance.

Therefore it is possible to argue that s.171(3) which constitutes a general statement enabling the judiciary to take into account considerations relating to the public interest in enforcing copyright was designed to ensure that the judiciary would remain free to develop a general public interest defense outside the bounds of the statute.[74] This argument is further supported by Lord Beaverbrook's statement that,

> *"[s. 171(3)] 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. "*[75]

Hence it may be concluded that s.171(3) of the CDPA clearly preserves the possibility of the introduction of a broad based public interest exception to copyright in English law.

B. France

The current legal framework on French Copyright law is based upon the 1957 Law on Literary and Artistic Property[76] as amended by the

---

73 *Id. Hansard* H.L. Vol.491 col.77.
74 *Id.*
75 *Id.*
76 Law No.57-298 of March 11, 1957, on the Literary and Artistic Property.