

COPYRIGHT AND HUMAN RIGHTS

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INTRODUCTION

1. Professor Herman COHEN JEHORAM was among the first scholars - probably the very first European one writing in English - to draw attention to the implications of copyright for the exercise of human rights. His contributions in this respect were both enlightening and - how could it be otherwise - critical of the trend to overextend the protection of copyright to the detriment of the freedom of expression¹.
2. The aim of the following observations is to take up again the balancing exercise² between Copyright and Human Rights at a time when the spreading of copyright throughout the world in the wake of the TRIPs and the WIPO Treaties of 1996 should be paralleled by more respect for the right of journalists to investigate and the right of artists and intellectuals - and indeed all other human beings - to express themselves.

¹ See e.g. H. Cohen Jehoram, *Freedom of Expression in Copyright and Media Law*, in [1984] EIPR 3 *et seq.* (excerpt from his contribution to *Festschrift für Eugen Ulmer*, GRUR Int. 1983, at 385-389). See also in Dutch : Auteursrecht contra vrijheid van meningsuiting ? N.J.B. 1974, 1391-1405.

² See M. Sayal, *Copyright and Freedom of the Media : A Balancing Exercise ?* [1995] 7 Ent. L. Rev. 263 *et seq.*

I. COPYRIGHT AS A HUMAN RIGHT

A. Mercantilism vs. Human Rights

3. Copyright was first introduced as a privilege to favour printers and authors, both in England³ and in France⁴. The copyright model still has a flavour of indirect help by the State to the creation and marketing of cultural goods. This model revives in the TRIPs and displays the great advantage to make copyright as palatable to government officials and consumers advocates as the protection of trademarks and patents for inventions, since it is premised on the same economic assumptions. As a side effect, however, the *droit moral* is lost for all developing countries; they shall be bound by TRIPs and shall feel free to disregard moral rights as Article 9 (I) excludes them from its scope. It sounds paradoxical that the economic arguments for copyright protection are least convincing when looking at the national interests in the less developed countries of the world, however, whilst arguments derived from human rights, the need to protect local folklore and other "moral" considerations should rather strike a chord with the people in those countries, in many of which human rights are still something of a novelty in everyday's life.
4. Article 27 (2) of the Universal Declaration of Human Rights as adopted in Paris on December 10, 1948, solemnly states that :

" Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

In 1960, René Cassin observed that this provision was still shrouded in penumbra⁵. Although Europe had missed the opportunity to take up a

³ See P. Goldstein, *Copyright and the first Amendment*, [1970] 70 Col. L. Rev. 983.

⁴ A. Lucas / H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Paris 1994, n° 7 and fn. 46 *in fine*.

⁵ *L'intégration, parmi les droits fondamentaux de l'homme, des droits des créateurs des oeuvres de l'esprit*, in *Mélanges Marcel Plaisant*, Paris 1960, at 225.

similar provision in the European Declaration of Human Rights in 1950, Article 15 (1) (c) of the U.N. Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966 mentions intellectual property.

5. To some extent, the Universal Declaration and the U.N. Covenant mark the apex of the French vision of literary and artistic property, as opposed to the Anglo-American "mercantilist" view as ensconced in the TRIPs. Such opposition should not be overemphasised, however, as it is possible to hope that moral rights deriving from other common-law traditions or newly enacted U.S. or State laws may play an increasing role in the future⁶. Nevertheless, those new developments are less visible abroad. Therefore, the overall significance of the Universal Declaration of Human Rights and of the 1966 Covenant should be made clearer in teaching throughout the world. Although no new impetus towards precise legislations may be expected from the 50-year old Universal Declaration, more understanding for copyright might result among the legal profession and among people in the streets.

B. Precedents

6. Some scattered precedents may show the possible impact of the recognition of copyright as a human right.
7. In the well-known case decided by the Paris Court of Appeal on 29 April 1959⁷, Charlie Chaplin, a British subject, was granted the rights of a Frenchman in France regarding his moral right by way of an assimilation based on Article 27 (2) of the Universal Declaration. This moral right to the integrity of his film had been violated by the unauthorised addition of a sound track. Besides, his financial interests were hurt, too.

⁶ See for all A. Strowel, *Droit d'auteur et Copyright*, thèse, Paris 1993, 538 *et seq.*, at 560 (more than 10 States have followed California's lead in enacting statutory protection for some moral rights).

⁷ See *Société Roy Export Company Establishment et Charlie Chaplin v. Société Les films Roger Richebé*, RIDA 28 (July 1960) 133; Dalloz 1959, 402, n. Lyon-Caen and Lavigne; JDI 1960, 128, n. Goldman.

8. The direct application of the Universal Declaration was also accepted against the Turnerization of the Asphalt Jungle in the very first judgement which was handed down in that French saga⁸. According to the Tribunal de grande instance of Paris, "the author is the true creator"; thus, "French law conforms to the international legal order" as restated in Article 27 (2) of the Declaration.
9. Not every French judgement admits such a generous applicability of international treaties⁹. French authors are of divided opinion as regards the direct application of Article 27 (2).

The traditionalist approach is "sceptical towards all and every reference to the human rights and, more generally, to the public law in our matter [of copyright], which belongs to private law"¹⁰. The progressive thinking is favourable to the direct application of such a fundamental charter¹¹.

10. To the extent that peculiar French traditions such as a strict separation between public and private law are concerned, this is not the place to dwell upon the controversy. Nonetheless, there is a different side to the direct application of the Universal Declaration and to the 1966 Covenant. The freedoms and human rights that are recognised in the European Convention are considered to be of direct application, even between the

⁸ See Trib. gr. inst. Paris, 23 novembre 1988, RIDA 139 (January 1989) 205, n. Sirinelli; JDI 1989, 1005, n. Edelman; Dalloz 1990, somm. 52, n. Colombet.

⁹ See e.g. Cass. civ. 10 March 1993 (regarding the Convention on the Rights of the Child [New York, 20 November 1989]) : JCP 1993 I 3677.

¹⁰ J. Raynard, *Droit d'auteur et conflits de lois*, thesis Montpellier, Paris 1990, at 619-620, (citing decisions by the French Conseil d'Etat against the direct application of the Declaration, fn. 494 *in fine*).

¹¹ See B. Edelman, note *in* JDI 1989, at 997. On this case, see also A. Françon, note *in* RIDA 143 (January 1990) 339; A. Kéréver, note *in* RIDA 169 (July 1991) 161; J.C. Ginsburg / P. Sirinelli, *Authors and Exploitations in International Private Law : The French Supreme Court and the Huston Film Colorization Controversy*, 15 Columbia VLA Journal of Law and the Arts n° 2 (1991) 135 *et seq*; A. Kéréver, note *in* RIDA 164 (April 1995) 399.

individuals¹². They may play a more important role in the life of companies and economic entities in the future¹³. It may be argued that the direct application of various basic provisions of the Rome Treaty, such as the prohibition of discrimination between E.U. nationals in the *Phil Collins case*¹⁴, opened the way for a more frequent direct application of the European Convention on Human Rights throughout the Continent. Although the countries party to the Rome Treaty are less numerous than those party to the Convention on Human Rights, although the European Union is a quite different institution than the Council of Europe, there shall be in the future a tendency to emphasise the direct applicability of all fundamental provisions of the new European Legal Order to come, allowing therefore private individuals to complain of the behaviour of other private entities which could appear to be in violation of human rights. Why then should the Universal Declaration of Human Rights not benefit from the direct applicability of the European Convention on Human Rights ?

Technicalities or national traditions are a poor ground for denying such a sweeping development. As the *Phil Collins case* demonstrated, copyright law shall not stand preserved of all such awakening to the human right philosophy, as it was not left untouched by the European anti-discrimination provision (which is admittedly not a human right, benefitting all human beings whatever their origin).

11. Besides Article 27 (2) of the Universal Declaration and other similar provisions, copyright might enjoy the protection as a right of property, as

¹² See e.g. for the freedom of investigations and the right not to disclose the source of information the case decided on 27 March 1996, *Goodwin v. United Kingdom* (16/1994/463/544).

¹³ See J.-F. Flauss, *La Convention européenne des droits de l'homme : Une nouvelle interlocutrice pour le juriste d'affaires*, *Revue de Jurisprudence de Droit des Affaires* 1995, 524 *et seq.*

¹⁴ See H. Cohen Jehoram, *The EC Copyright Directives, Economics and Author's Rights*, [1994] 25 IIC 825.

is recognised for example in Germany¹⁵. The protection of property does not appear to be conducive of much progress for the copyright of authors or composers, but may assist in the protection of these neighbouring rights that are premised on financial investment, such as the rights of broadcasting organisations and record producers.

In the future, the protection of property may give legal entities and other investors in the technological market (software producers, multimedia producers) a claim against misuse of their creation. Nevertheless, there should be no opposition against the idea that the protection of vested money is somewhat less important than the freedom for authors and artists to create new works. As we shall be mainly dealing here with the tension between copyright and freedom of creation, no further exploration of these neighbouring rights is necessary.

12. On the other hand, neighbouring rights that are afforded to performers or orchestra may impede the freedom of creation, as was witnessed five years ago by the claims brought against Michael Jackson by a U.S. Midwest Symphony Orchestra because the singer had borrowed approximately thirty seconds of a performance for the opening of a song.

In the future, copyright and performer's rights law shall be confronted to the Freedom to Create.

II. FREEDOM TO CREATE

13. Article 27 (1) of the Universal Declaration states that :

¹⁵ See for all H.-J. Papier, *in* T. Maunz et al., *Grundgesetz*, II, Munich 1994, n° 195-198 *ad* Par. 14, at 111-112. See also M. Vivant, *Le droit d'auteur, un droit de l'homme?*, RIDA 174 (October 1997), 71 *et seq.*; for this author, copyright falls under the constitutional right to the protection of property, as do the patents for invention. See also H. Cohen Jehoram, *Urheberrecht : eine Sache des Rechts oder der Opportunität ?*, GRUR Int. 1993, 120.

" Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".

This is a complement to the freedom of thought, of speech and of opinion (see Articles 18 and 19). The first sentence was seen in 1948 as the principle of freedom to create ("*principe de la liberté créatrice*"); the second as the enjoyment by the consumers of all the ensuing benefits¹⁶.

14. Characteristically, the United States, the United Kingdom, the Scandinavian States and a few more states objected to the adoption of Article 27 (2) on the rights of authors and inventors on the strength of Article 27 (1) : how could the Declaration simultaneously proclaim the freedom to create, the freedom to benefit from the creation and the protection of intellectual property ?¹⁷. It is somehow typical of the American reasoning regarding copyright to oppose the interests of consumers to the interests of authors and performers¹⁸. The TRIPs has fortunately settled many questions in that regard.
15. We are more interested here in the purported conflict between the freedom to create and the protection of intellectual property. If there is such a conflict (A), what method should be applied to solve it (B)?

A. Freedom of Creation viz. Protection of Copyright

16. The freedom of creation is not first and foremost a political right, as is on the whole - but not only - the freedom of speech.

¹⁶ See R. Cassin, at 228, citing P. Valéry.

¹⁷ See R. Cassin, at 230. For other reasons put forward against the proposed provision, see doc. UN/A 2929 (French version) at 355 (ch. 24) (the question would have been too complex to be dealt with in a short provision ...).

¹⁸ See P. Goldstein, *Copyright's Highway : from Gutenberg to the Celestial Jukebox*, New York 1994, at 168 *et seq.*

The freedom of creation is not a freedom of opinion; although a creation may convey an opinion, that fact alone does not justify the freedom of creation. For example, an Asiatic photographer recently organised in Neuchâtel, Switzerland, an exhibition of photos showing various bridges and other locations where suicide could be easy. The message might have been clear. Nevertheless, the right to create is not to be assimilated to the freedom of speech or to the freedom of opinion (which could both entail that the exhibition is permissible *per se*, with given restrictions for the access by people minor of age). In fact, no one will object to the photographers visiting the various spots and taking pictures. Thus, the freedom to create is recognised even if some ulterior steps might well be restricted due to the prevailing ethic¹⁹.

17. Therefore, it appears that the freedom of creation is a condition precedent to the unfettered exercise of the freedom of speech and of opinion. They stand respective to each other as, *mutatis mutandis*, stood the former common law copyright and the copyright in published materials. By the same token, a wide understanding of the freedom of speech shall encompass the freedom to create, as a wide understanding of copyright shall attach not only to published productions, but also to unpublished ones.
18. Now, the protection of copyright may conflict with the freedom to create each time that a "creator" feels like borrowing. We are here at a more difficult juncture than when copyright protection is invoked against the publication of a series of biographical articles concerning Howard Hughes²⁰. In the case where copyright protection is pitted against the public need for information, a satisfactory answer can be derived most often through the dichotomy *idea* (freely available) vs. *expression*

¹⁹ See H. Cohen Jehoram, GRUR Int. 1983, at 389, for a film entitled The Many Faces of Jesus Christ that could have hurt the feelings of spectators; compare with the decision of the European Court of Human Rights of 25 November 1996, case *Wingrove v. United Kingdom*, (19/1995/525/611).

²⁰ *Rosemont Entreprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), commented upon e.g. by P. Goldstein, [1970] 70 Col. L. Rev. 985.

(reproducible only with the authorisation of the copyright owner)²¹. Thus, the public interest should never allow for the broadcasting of an ever so interesting video without the consent of the author²².

19. On the contrary, when the freedom to create of an artist A means for him that he should take an excerpt (recognisable however) from the work of an artist B, as in so many *collages*; or when the same drive to expression means for artist A that he should make a forgery of artist B's well-known paintings, the conflict cannot be solved by the dichotomy *idea/expression*. Now, the case of the forgery may seem devoid of real interest, because some criminal provisions may apply, at least as soon as steps are taken to market the forged paintings. Further copyright law prohibits forgery as copying, but private use may legitimise this copying. On the other hand, *collages* are not necessarily covered by the exception for private use, and all laws do not know of the exception for excerpts and citations, especially where plastic works are at stake.

20. It would seem utterly ununderstandable to an artist that *collage* should avoid taking excerpts of copyrighted works. For multimedia producers, it is baffling that they should ask for authorisation by every and all copyright holders. For contemporary musicians, they sometimes speak of being stifled by copyright law which favours concentration of rights in the hands of a few rights holders. For a writer, it seems peculiar that the story of another writer cannot be transferred to other times and other places, with other names, without violating the copyright of the first author²³.

²¹ See for all the case of *Escadrille Normandie-Niemen*, Trib. gr. inst. Seine, 9 January 1962, *Roger Sauvage v. Sté Alkam, Sté Cinedis, Sté Franco-London Film*, RIDA 35 (April 1962) 135.

²² For a strange decision to the contrary (the public interest to know about the disastrous consequences of taking drugs during a rave party outweighs any consideration relating to copyright, at least in hearing a preliminary injunctive relief), see *Beggais Banquet Records Ltd v. Carlton Television Ltd and Another*, [1993] EMLR 349, at 372.

²³ See e.g. *Régine Deforges et Editions Ramsay v. Trust Company Bank et consorts Mitchell*, Court of Appeal Paris, 21 November 1990, RIDA 147 (January 1991) 319, and Cass. civ., 4 February 1992, RIDA 152 (April 1992) 196-197.

The common ground of these complaints is that copyright interferes with the ulterior creation : the law does not clearly establish a priority of the artist who is active now vis-à-vis the artist (or his successors in title) who was active before him.

21. Needless to say, copyright law did not set such a priority because the "artistic" drive to originality was thought to preclude the need for copying. It was considered that the most basic instinct to create led artists to do something novel. For the few areas where the need to copy was recognised, copyright law and precedents provided for exceptions, concerning parody and excerpts for instance. As the main thrust of most judiciary actions aimed at prohibiting the piracy, it was a rare event that a court had to analyse counterfeiting through partial reproduction of a pre-existing work within a new work²⁴.
22. It is our understanding that rules for parody, excerpts and fair use - when they exist - suffice to protect the freedom of artist. There is at present no need to go beyond the clearly delineated exceptions to copyright as embedded in the copyright legislation. Nevertheless, the freedom to create may interfere with copyright on the level on constitutional rights rather than mere legislative enactments²⁵.

Therefore, it is interesting to try and outline a method for balancing the freedom to create and the human right to the protection of copyright.

B. Balancing the Freedom to Copy with the Copyright

23. Various requirements may be set up in order to legalise the borrowing of a work :

²⁴ For such a case, see *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164 (1994); Landgericht Berlin, 13 December 1972, GRUR 1974, 231 (case *Marleen Dietrich v. Ulrike Meinhof*); Trib. gr. inst. Paris, 9 January 1970, JCP 1971 II 16645.

²⁵ See e.g. European Court of Human Rights, 9 June 1997, case *Telesystem Tirol Kabeltelevision v. Austria*, (21/1996/585/640/824) (violation of Article 10 ECHR by the Austrian Law on Broadcasting).

- a. The creation of a second work according to the prevailing standard of originality. For example, Eugen Ulmer advocated the idea that the first work should "fade away" ("*verblassen*") in the second work in order for the borrowing to be permissible²⁶.

This methodology could be named "balancing the originality". The greater the originality of the second work, the more likely it is that the first work "fades away".

- b. The first work or its excerpts may be *unrecognisable*, although technically copied. This may be the case in sound sampling, when sounds are copied, but no recognisable title by a given band²⁷. The requirement of unrecognisability is not suited to the need of the compulsive copiers who asserts his freedom to create through copying ...
- c. The *proportionality* test may help : the question is to define the two terms of the proportion. The proportion may be established between the part which is borrowed and the part which is new²⁸. The proportion may also be made between the market lost (if at all) by the author of the first work and the gains of the second author. Some works that are rather utilitarian may be substituted to the original one²⁹. There should be consensus that no freedom to copy may then be invoked³⁰.

²⁶ See E. Ulmer , *Urheber- und Verlagsrecht*, 2nd ed., Berlin 1960, at 140.

²⁷ Cf. R. du Bois, *Les aspects juridiques du sound sampling*, Bull. du droit d'auteur 1992 (2), at 6.

²⁸ See a Swiss case stating that defendant's computer software was different to 90 % from the allegedly infringed program; therefore no copyright violation was found to exist : Sup. Trib. Aargau, 31 July 1990, Rev. Suisse Prop. Int. 1991, 79 *et seq.*, at 86.

²⁹ See for a French version of a software, Court of Appeal Paris, 11 January 1990, PIBD 1990 III 157; for a photography scanned and reworked without authorisation. Trib. gr. inst. Paris, 22 March 1989, in B. Edelman, *Chronique de propriété littéraire et artistique*, JCP 1990 I 3433.

³⁰ See I. Cherpillod, *L'objet du droit d'auteur*, thesis Lausanne 1985, at 168 (and for the proportionality test in parody, at 159-160).

It shall be noted that the *proportionality* test (whether on the portion of the original work which has been copied or on the market shares and power of substitution) is at the core of Sec. 107 of the U.S. Copyright Act on the fair use. Would it be simpler to enact a test of fair use in all European legislations ?

- d. Fair use is a multi-faceted concept that may help courts that did not internalise the rule "*de minimis non curat praetor*"; it may even make WIPO Copyright Treaty more agreeable to developing countries³¹. Nevertheless, the fair use doctrine is not directed mainly toward the creation of derivative works. Rather it purports to find a just balance between copyright and teaching, education and access to the information.

Fair use may be an escape out of the conflict between freedom of education, freedom of information and protection of intellectual property. It is too general a concept to give an answer where the freedom to create is at stake - not to mention its lack of foreseeability³², which should perhaps not be held against it as it is shared by all general tests. The basic idea of fair use is nowhere more appropriate than in the case of a creator who is a compulsive copier. But is he deserving of protection ?

CONCLUSION

Copyright as a human right conflicts with the right to copy, to make *collages*, to cite, to enrich one's work with the shining feathers of another's peacock. There is undoubtedly a freedom to create, and copyright cannot prohibit any and all borrowings. Style is free, ideas are free, and sometimes even plagiarism could be allowed. The only remaining question is therefore : can an author validly plead his own imaginative deficiency ? Could he be heard arguing for his compulsive copying habit ? Is this the freedom that the Universal Declaration of Human Rights

³¹ See the Preamble *in fine*.

³² See D. Nimmer, *United States, in International Copyright Law and Practice* (P.E Geller, M.B. Nimmer, ed.), New York 1996, § 8, at 146 fn. 170 *i.f.*

purports to protect ? Of course, true parallel creations shall remain free³³.
Otherwise, no freedom should prevail on the rights of the copyright owner.

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³³ See G. Karnell, *Die Doppelschöpfung als urheberrechtliches Problem*, in *Mélanges Joseph Voyame*, Lausanne 1989, at 149.