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**FAIRNESS IN COPYRIGHT LAW:
AN ANGLO-AMERICAN COMPARISON**

Ilanah Fhima[†]

Fairness stands at the crossroads of copyright law. The concept of fairness—which seeks to balance the interests of copyright owners and users as well as the needs of the public in receiving information—is present in the copyright exceptions in both the U.S. and the U.K. The U.S. and U.K. adopt different approaches to how the defenses should be structured, with the U.S. having an open list of which types of use can benefit, leaving this for judges to develop in response to specific fact patterns and changing conditions before them. On the other hand, the U.K. has a list, pre-determined by British Parliament, of which uses can benefit.

Both use the notion of fairness to moderate between different interests at stake, and much of this piece is devoted to documenting how the factors used to determine whether use is fair are in fact very similar. However, it is argued that the open-versus-closed list approach does make a big difference to the likely outcomes in the jurisdictions—giving U.S. courts the license to privilege the type of use over the countervailing interests of the copyright owner in a way that is just not available to U.K. judges.

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TABLE OF CONTENTS

INTRODUCTION.....	45
I. OVERVIEW OF FAIR USE/DEALING	46
A. <i>The United States</i>	46
B. <i>The United Kingdom</i>	47
II. THE EUROPEAN INFLUENCE	48
III. THE THREE-STEP TEST	50
IV. THE FAIRNESS FACTORS	51
A. <i>The Purpose and Character of the Use</i>	51
B. <i>The Effect on the Market for the Copyright Work</i>	56
C. <i>The Amount Taken from the Copyright Work</i>	60
D. <i>Whether the Copyright Work has been Published</i>	67
E. <i>Whether the Author/Owner has been Acknowledged</i>	70
F. <i>Human Rights</i>	73
CONCLUSION	76

INTRODUCTION

Fairness stands at the crossroads of copyright law. The concept of fairness—which seeks to balance the interests of copyright owners and users as well as the needs of the public in receiving information—is present in the copyright exceptions in both the U.S. and the U.K. The U.S. and U.K. adopt different approaches to how the defenses should be structured, with the U.S. having an open list of which types of use can benefit, leaving this for judges to develop in response to specific fact patterns and changing conditions before them. On the other hand, the U.K. has a list, pre-determined by the British Parliament, of which uses can benefit. Ultimately, all use the notion of fairness to moderate between different interests at stake, and most of this piece is devoted to documenting how the factors used to determine whether use is fair are in fact very similar, and the evidence used to determine whether they are made out is also very similar.¹ However, it will be argued that the open-versus-closed list approach *does* make a big difference to the likely outcomes in the jurisdictions, by giving U.S. courts the license to privilege the type of use over the countervailing interests of the copyright owner in a way that is just not open to U.K. judges. Consequently, judges in the U.K. pay more attention to the other factors

1. For a similar argument in the Canadian context, see Giuseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309 (2008).

which, although largely common to the U.S., are applied more strictly against second users of copyright works on the side of the Atlantic.

I. OVERVIEW OF FAIR USE/DEALING

This section describes the structure of the fairness defenses in the United States and the United Kingdom. It also explains some of the external instruments that shape those defenses. Both jurisdictions have defenses to trademark infringement, which allow third-party use of copyright work deemed to be “fair.”² However, the way in which these defenses are structured differs such that one potentially leads to differences in the substantive result when compared to the other.

A. *The United States*

The fair use defense in the United States is found in 17 U.S.C. § 107, which codifies prior jurisprudence on this issue. Section 107 reads:

Notwithstanding the provisions of sections 106 and 106A [the infringement provisions], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.³

2. It should be noted though that, additionally, all three jurisdictions have defenses for discrete forms of desirable use, such as use by libraries or educational establishments, which are subject to different conditions.

3. 17 U.S.C. § 107 (2012).

The defense is commonly thought of as an “open” defense, in the sense that it does not contain any limitation as to the type of use that can benefit from the defense, as long as the use is “fair.”⁴ While a list of typical situations where the defense might apply is provided, this is illustrative only, and even when a use fits in to one of these categories, it will still need to be shown that the use is “fair.” This determination is guided by the list of factors given, though this list is not exhaustive. The list does not prescribe the relative weight to be given to each of these factors, although the courts have indicated their relative importance in an evolving jurisprudence that will be discussed below.

B. *The United Kingdom*

The U.K. is often described as having a “closed list” of fairness-type defenses.⁵ The mere fact that a third-party use is arguably fair does not amount to a defense in the U.K. It must first be established that the use is one of those listed in the Copyright Design and Patents Act 1988 (hereinafter “CDPA”). These are “research and private study,”⁶ “criticism, review and news reporting,”⁷ “illustration for instruction,”⁸ and the newly-added “caricature, parody or pastiche”⁹ and “quotation exception.”¹⁰ Even if use is for one of the stated purposes, the third party must then go on to show that the way in which he has used the copyright work amounts to “fair dealing.” The terminology of “fair dealing” has been present in U.K. copyright legislation since 1911.¹¹ Fair dealing is not defined in the CDPA and, as such, is left to judicial interpretation, which in turn draws on pre-1988 jurisprudence.¹² A particularly influential definition which has been used as a starting

4. This approach is described in Emily Hudson, *Implementing Fair Use in Copyright Law: Lessons from Australia*, 25 INTELL. PROP. J. 201, 211 (2013), although ultimately, she argues against it.

5. See *id.* at 211. It should be noted that there are a large number of other defenses which are included in the Copyright, Design and Patents Act 1988, c. 48, §§ 31-76 (U.K.). These set out specific conditions that apply to each of the different types of uses.

6. *Id.* at § 29(1).

7. *Id.* at § 30(1).

8. *Id.* at § 32.

9. *Id.* at § 30A.

10. *Id.* at § 30(1ZA).

11. Copyright Act 1911, 1 & 2 Geo. 5, c. 46, § 2(1)(i) (U.K.).

12. For an account of the development of fair dealing post-1911, see Jonathan Griffiths, *Preserving Judicial Freedom of Movement – Interpreting Fair Dealing in Copyright Law*, 2 INTELL. PROP. Q. 164 (2000) and Alexandra Sims, *Strangling Their Creation: the Courts’ Treatment of Fair Dealing in Copyright Law Since 1911*, 2 INTELL. PROP. Q. 192 (2010). Looking further back, see Melissa De Zwart, *A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age*, 1 INTELL. PROP. Q. 60 (2007) and Alexandra Sims, *Appellations of Piracy: Fair Dealing’s Prehistory*, 1 INTELL. PROP. Q. 3 (2011).

point by many courts is found in *Hubbard v. Vosper*, where Lord Denning noted:

It is impossible to define what is “fair dealing.” It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also.¹³

Although ordered differently, it is possible to discern in this statement the various factors mentioned in § 107. The type of use is mentioned (as per the first U.S. factor), the amount taken is mentioned (the third U.S. factor) and whether the use conveys the same information as the author could be seen as a form of market harm (the fourth U.S. factor). However, in this article, we will examine whether the same relative weight is given to each factor in the two jurisdictions.

II. THE EUROPEAN INFLUENCE

Significant elements of U.K. copyright law have fallen under the harmonization regime of the European Union, and the exceptions to copyright are no exception. Article 5 of the Information Society Directive¹⁴ (hereinafter “the InfoSoc Directive”) requires Member States to have certain exceptions. Outside of those exceptions, it provides an exhaustive list of fifteen other instances in which Member States can recognize defenses to copyright infringement in Article 5(3). Those which are closest to the fair dealing defenses in the U.K. are:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

...

13. *Hubbard v. Vosper* [1972] 2 Q.B. 84, 94 (Eng.).

14. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 16-17 [hereinafter *InfoSoc Directive*]. There is a pending proposal to adapt certain of these exceptions to meet the needs of the digital era. See *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 final (Sept. 14, 2016).

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

...

(k) use for the purpose of caricature, parody or pastiche[.]¹⁵

Additionally, Article 5(5) requires that any copyright exemption must be compliant with the three-step test,¹⁶ *i.e.*, they “shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

The CJEU, in interpreting these provisions in *Infopaq*¹⁷ has held that the exceptions detailed in the InfoSoc Directive must be construed narrowly, in accordance with the general European principle that a provision of a directive which derogates from a general principle within the directive must be interpreted narrowly.¹⁸ This has led to concerns about the restrictiveness of post-InfoSoc-Directive user rights,¹⁹ though others have argued that a careful reading reveals flexibilities in how the considerable number of enumerated exceptions can be applied.²⁰ In the recent *Deckmyn* decision, the Court has suggested that

15. *InfoSoc Directive*, *supra* note 14, at art. 5(3).

16. The three-step test is discussed in more detail below.

17. Case C-5/08 *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569.

18. *Id.* at ¶ 56.

19. See, e.g., Jonathan Griffiths et al., *The European Copyright Society's "Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn,"* 37 EUR. INTELL. PROP. REV. 127, 129 (2015).

20. See P. Bernt Hugenholtz & Martin R.F. Senfileben, *Fair Use in Europe: In Search of Flexibilities* (Amsterdam Law Sch. Research Paper No. 2012-39; Inst. for Info. Law Research Paper No. 2012-33, 2012).

it is willing to take an approach that involves a “balancing” of the parties’ rights.²¹

The relationship between U.K. copyright law in this area and the InfoSoc Directive is a complex one. Key cases either predate or are roughly contemporaneous with the entry into force of the Directive. For the most part, it seems to have been assumed implicitly that the U.K. defenses are compliant, and where they were not, legislative amendments have been made. Moreover, at the judicial level, it is argued that the cases described below display a relatively strict approach to the defenses anyway, and the need to consider fair dealing gives an entry-point for the considerations embodied in the three-step test. However, in *English and Wales Cricket Board Ltd. v. Tixdaq Ltd.* (“*ECB v. Tixdaq*”),²² Arnold J. has given a far more prominent and direct role to the InfoSoc Directive and has suggested that domestic authorities must be “treated with a degree of caution,” since they largely pre-date the Directive and do not consider the three-step test.

III. THE THREE-STEP TEST

At a higher level, the outer limits of any fair dealing/use rule, is the three-step test. The test, found in various international copyright instruments,²³ and the InfoSoc Directive,²⁴ requires that all exceptions to copyright be limited to (1) certain special cases; (2) which do not conflict with the normal exploitation of a work; and (3) which do not unreasonably prejudice the legitimate interests of the author. It has been argued that an open-ended fair use defense does not comply with the first step. In a stroke of irony, the Israeli transition from fair dealing to open-ended fair use was challenged on this basis by the U.S.²⁵ However, the U.S. defense has not been challenged on this basis,²⁶ and as our discussion has shown, which the defense is in principle open-ended, the U.S. judiciary has construed the indicative guidance given in § 107 in a way that recognizes the needs of copyright holders as well as users. Thus, the Australian Law Reform Commission, in *Copyright and the Digital Economy*, when considering the introduction of an

21. *Deckmyn v. Vandersteen*, C-201/13, 2014 E.C.J. 458 at [26]-[27], [34].

22. *Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd.* [2016] EWHC (Ch) 575 [53]-[72] (Eng.).

23. Berne Convention for the Protection of Literary and Artistic Works, art. 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), art. 13; WIPO Copyright Treaty, art. 10; WIPO Performances and Phonograms Treaty, art. 16(2).

24. *InfoSoc Directive*, *supra* note 14, at art. 5(5).

25. See Meera Nair, *Canada and Israel: Cultivating Fairness of Use* 11-12 (Am. U. Washington Co. of L. PIJIP Research, Paper No. 2012-04, 2012).

26. Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper No. 79 (2013) ¶ 4.147.

open-ended fair use provision, came to the conclusion that there was no conflict with the three-step test.²⁷

The three-step test has been brought more directly into play in the U.K. by its inclusion in Article 5(5) of the InfoSoc Directive.²⁸ It has also been considered briefly by Arnold J. in *ECB v. Tixdaq*.²⁹ The general tenor of that decision is that fair dealing for the purposes of reporting current events (the basis before the court) was consistent with the test. It remains to be seen whether this decision heralds the (arguably surprising)³⁰ beginning of more frequent references to the three-step test in determining whether a defendant's use of another's copyright work was necessary. At the European level, Article 5(5) has been interpreted by the CJEU in *Infopaq*³¹ as requiring a strict interpretation of the copyright defenses, which would narrow the situations in which it could be considered necessary to use another's work. However, Griffiths has suggested that the CJEU may be stepping back from this approach at least in certain contexts with the introduction of the concept of a "fair balance" in *Deckmyn*.³²

IV. THE FAIRNESS FACTORS

This section considers the key factors used in determining whether use is "fair."

A. *The Purpose and Character of the Use*

The purpose and character of the use is the first factor in the § 107 test. However, in the U.K., the statute limits the types of uses that can benefit from the fair dealing defenses to "research and private study,"³³ "criticism, review and news reporting,"³⁴ and the newly added

27. *Id.* at ¶¶ 4.138-4.149.

28. "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder." *InfoSoc Directive*, *supra* note 14, at art. 5(5).

29. Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd. [2016] EWHC (Ch) 575 [88]-[92] (Eng.).

30. Because of the general reluctance of courts to directly apply international instruments in the normal course of events, see Eileen Denza, *The Relationship Between International and National Law*, in *INTERNATIONAL LAW* 424-25, 430 (Malcolm Evans ed., Oxford Univ. Press, 4th ed. 2014).

31. Case C-5/08 *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569.

32. Jonathan Griffiths, *Fair Dealing After Deckmyn—the United Kingdom's Defense for Caricature, Parody or Pastiche*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT* (Megan Richardson & Sam Ricketson eds., Edward Elgar Publ'g 2017). See also Sabine Jacques, *Are National Courts Required to Have an (Exceptional) European Sense of Humour?*, 37 *EUR. INTELL. PROP. REV.* 134, 137 (2015).

33. Copyright, Design and Patents Act 1988, c. 48, § 29(1) (Eng.).

34. *Id.* at § 30(1).

“caricature, parody or pastiche,”³⁵ and “quotation.”³⁶ Having a closed list of defenses that can be justified by fair use places responsibility in the hands of the legislator to pre-empt the kinds of uses which should be permissible. This stands in contrast to the U.S. position, where the types of use that can be fair have been left open and consequently have been developed by the judges. It is hard to say which is the more desirable approach—while the closed list can give a degree of certainty,³⁷ it can also stifle innovation and the development of new technologies. Technologies which are not foreseen will not be included in the closed list. The then-U.K. Prime Minister, David Cameron, on announcing the Hargreaves Review, noted that the founders of Google had stated that they could not have started their company in the U.K. because:

our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called “fair-use” provisions, which some people believe gives companies more breathing space to create new products and services.³⁸

While this is, to a degree, speculation, it is certainly the case that the Google Books litigation³⁹ would never have got off the ground in the U.K. because the use does not fall within any of the categories listed.⁴⁰ Ultimately, the Second Circuit U.S. Court of Appeals decided that the scanning of the entire text of copyright-protected books to enable functionality for internet users to search for specific words or snippets of text was a transformative use that augmented public knowledge without providing substitutes for the copyright works and so fitted within the fair use defense.⁴¹

35. *Id.* at § 30A.

36. *Id.* at § 30(IZA).

37. *But see* Hudson, *supra* note 4, (arguing that the dichotomy of “closed list = rules = certainty” versus “open list = standards = flexibility” may be overstated).

38. *UK Copyright Laws to be Reviewed, Announces Cameron*, BBC NEWS (Nov. 4, 2010), http://bit.do/BBC_UK-Copyright-Laws.

39. *Authors Guild v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).

40. Perhaps the closest analogy is *The Newspaper Licensing Agency Ltd v. Meltwater Holding BV* [2011] EWCA (Civ) 890, [36]-[41] (Eng.), which involved “scraping” news websites in order to communicate relevant articles to the commercial monitoring organization’s clients. Just five paragraphs were devoted to fair dealing, in a treatment that The Chancellor himself describes as “cursory”. Ultimately, the use was found to be neither criticism or review, nor news reporting with no discussion of any potential benefits from such use of technology. A comparison with *England & Wales Cricket Board Ltd. v. Tixdaq Ltd.* [2016] EWHC (Ch) 575 (Eng.) is also possible, since both are online platforms providing functionality in areas where the copyright holder had not serviced the potential market.

41. *Authors Guild*, 804 F.3d at 202.

Moreover, even if a technology or third-party use of a copyright work is identified as socially desirable, it may take many years and numerous legislative attempts for it to be allowed into the “closed list.” The parody defense is a case in point: parodies can hardly be described as new technologies,⁴² and yet it took eight years from the recommendation to introduce a parody defense in the Gowers Review in 2006⁴³ to its actual entry in to force in 2014.⁴⁴ By contrast, in the U.S., the Supreme Court was able to class parody as fair use when faced with the appropriate factual pattern in *Campbell v. Acuff-Rose*.⁴⁵

The U.S. fair use provision leaves it to the judges to interpret which types of use fall within the fair use defense. A number of illustrative examples are given, which includes various types of use subject to a fair dealing defense in the U.K. However, such uses are not presumptively fair, and still need to be shown to satisfy the four fair use factors to the satisfaction of the courts.

Instead, perhaps the greatest impact in recent years on the fair use defense has been from the first factor, “the purpose and character of the use.” In particular, judges have considered whether the use is “transformative.”⁴⁶ The language of transformative use is not found either within the legislation or, indeed, the legislative history. Instead, it owes its origins to an article written by Second Circuit U.S. Court of Appeals Judge Pierre Leval, writing extra-judicially in 1990.⁴⁷ He argues:

42. Its origins have been traced back to ancient Greece. See Eileen Gredley & Spyros Maniatis, *Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright*, 19 EUR. INTEL. PROP. REV. 339 (1997).

43. ANDREW GOWERS, THE GOWERS REVIEW OF INTELLECTUAL PROPERTY 68 (Dec. 2006). A parody exception was again recommended in IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 51 (May 2011).

44. The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 SI 2014/2356 (Eng.).

45. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). Although it should be noted that the question of whether parody was fair use was put to the Supreme Court in the 1950s in *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958), the Court was split and did not reach a conclusion—highlighting the risk of uncertainty that can arise from deciding such issues judicially—which can ultimately also have a chilling effect. Moreover, this argument rests on the assumption that the judiciary will be willing to take a flexible approach to expanding the reach of fair use. ROBERT BURRELL & ALISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT, 253-67 (2005). Historically, the U.K. judiciary has repeatedly failed to exercise flexibilities open to them and has instead narrowed the potential scope of the fairness defenses. *Id.*

46. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 745 (2011) (explaining that once use is found to be transformative, then that determination shapes a court's analysis of the other factors).

47. See the account in Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 550 (2004). But see the discussion of productive use in Laura G. Lape, *Transforming Fair Use: the Productive Use Factor in Fair*

Factor One—The Purpose and Character of the Secondary Use.

Factor One's direction that we "consider[] . . . the purpose and character of the use" raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner. I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.⁴⁸

Judge Leval's approach was adopted by the Supreme Court in *Campbell v. Acuff-Rose*,⁴⁹ a case involving a parody of Roy Orbison's "Oh, Pretty Woman."⁵⁰ After noting that the wording of § 107 makes it clear that what is needed is a case-by-case (and hence implicitly judicially led) analysis, Justice Souter found that:

Use Doctrine, 58 ALB. L. REV. 677, 702-22 (1994).

48. Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

49. *Campbell*, 510 U.S. at 578-79.

50. While the original describes a pretty woman, in the defendants' version, she is replaced by a hairy woman and a bald-headed woman—both ladies of the night. In the words of Judge Nelson, the later version "was clearly intended to ridicule the white-bread original" and "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses." *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting), *rev'd*, 510 U.S. 569 (1994).

[t]he central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, *Folsom v. Marsh*, *supra*, at 348; accord, *Harper & Row*, *supra*, 471 U.S., at 562 ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."⁵¹

This shifted the focus from where it had hitherto been, on the effect on the market for the copyright work, to whether the secondary use created a "new" work which was socially desirable. This though is a subjective question, which implies a level of unpredictability, or "murkiness" as Sag describes it.⁵² This may in turn have a chilling effect on the development of new uses, given the uncertainty as to whether any particular use will be found to be transformative. Scholars have argued that it also privileges a particular kind of secondary use, which alters the copyright work, potentially at the expense of uses which involve "pure copyright" for a socially-beneficial purpose, such as photocopying works for use in education.⁵³ However, as has been discussed above, the freedom in deciding which uses are transformative does allow courts to be able to shield certain new technologies from the reach of copyright as in the Google Books litigation,⁵⁴ or even to classify existing uses as socially beneficial and transformative and hence within the defense.⁵⁵

Additionally, in some circumstances at least, U.S. courts have taken a relatively liberal approach to what counts as transformative, concentrating on the context of the use in order to find third-party use which copies the entire original work without making any addition to be transformative. This is particularly visible in the search engine cases: in *Perfect 10 v. Google*,⁵⁶ Google's use of the entirety of the copyright owner's images, albeit in "thumbnail" size was found to be transformative because "a search engine transforms the image into a pointer directing a user to a source of information"⁵⁷ and "a search engine provides social benefit by incorporating an original work into a

51. *Campbell*, 510 U.S. at 579 (citation omitted).

52. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 57 (2012).

53. Tushnet, *supra* note 47, at 550-53. See also the discussion in Dianne Zimmerman, *The More Things Change the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y USA 251, 260-69 (1998).

54. *Authors Guild v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).

55. As was the case in relation to parody in *Campbell v. Acuff-Rose Music* itself.

56. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

57. *Id.* at 1165.

new work, namely, an electronic reference tool.”⁵⁸ While there is no doubt to the social utility of search engines, to class Google’s search engine as a “work” seems artificial and it takes an esoteric state of mind to consider the copyright images “transformed” in the way the court describes, adding to the general uncertainty about the meaning of transformative use.⁵⁹ Similarly, in the Google Books litigation,⁶⁰ the entire text of the books in question were copied, but the fact that the search engine allowed users to search for words in a specific work, or across a corpus of books,⁶¹ and to view those words in context of the text to determine whether the book was relevant to them, meant that the use was transformative.⁶² By contrast, the Ninth Circuit did not consider the arguably analogous creation of Napster to be a transformative use, characterizing Napster as a “retransmission.”⁶³ Arguably though, the platform could be viewed as a form of search engine for music. If one views these cases as situations in which copyright has intervened with an effect on the ability of third parties to develop novel technological platforms in fields that are not being fully exploited by the copyright owner, a U.K. parallel might be seen in *ECB v. Tixdaq* (which will be discussed further below), where it was found that the defendant’s development of an app that allowed users to upload eight-second clips was infringing and could not benefit from any of the fair dealing defenses.⁶⁴

B. The Effect on the Market for the Copyright Work

The fact that the later use has or may have a negative impact on the market for the copyright work has often been used to limit the applicability of fair use/dealing. It is important to note at the outset that there can be various reasons why the market is damaged: (i) the second use may provide a direct substitute for the primary work; (ii) the second use may damage demand for the primary mark through criticizing it, e.g., a parody or critical review, and (iii) the second use may damage a derivative or potential unexploited market connected to the primary mark.

The difficulty with this factor is that by definition, use that is critical of earlier work, or the ideas contained therein, will damage the

58. *Id.*

59. *See Sag, supra* note 52, at 57.

60. *Authors Guild*, 804 F.3d 202.

61. *Id.* at 216-17.

62. *Id.*

63. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2003).

64. *Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd.* [2016] EWHC (Ch) 575 [53]-[72] (Eng.).

market for it and yet this use and the damage caused will be necessary to achieve the objective of the criticism. Arguably, the transformative use consideration makes this balance better by focusing on the nature and desirability of the second use, rather than the impact on the copyright work. Inevitably though, considering transformative use will implicate the impact on the market because a use which is a direct substitute for the copyright work will not be transformative because it has not added anything, but a use which had altered the original, albeit in a commercially-harmful way, can be transformative. Impact on licensing raises the vexed question of the extent to which creating a work is one market that should automatically give the author/owner the right to block innovations and uses in markets that it may not even have thought of entering, but where the use of its copyright work is necessary for the innovation to take place.

The fourth factor in § 107 is “the effect of the use upon the potential market for or value of the copyrighted work.” In *Harpers & Row Publishers v. Nation Enterprises*, the Supreme Court stated that this was “undoubtedly the single most important element of fair use.”⁶⁵ A year earlier the Supreme Court had explained the scope of the factor against the context that the commercial benefit of copyright is what incentives authors to produce,⁶⁶ noting that:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.⁶⁷

The importance of this factor in the U.S. has arguable reduced considerably (particularly in relation to commercial uses) since the increased emphasis on transformative use under the first factor.⁶⁸ Indeed, the Supreme Court in *Campbell v. Acuff-Rose* limits the presumption that commercial use will be harmful to cases involving

65. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

66. *Id.* at 546 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

67. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

68. See WILLIAM F. PATRY, *PATRY ON FAIR USE* § 6.5 (2016).

“mere duplication.”⁶⁹ However, harm to the market still forms part of the test, even after *Campbell v. Acuff-Rose*, and so it is worth noting the breadth of the scope of harm that may contribute to a lack of fairness, taking in actual harm and future harm, seemingly at a relatively low level.

In *Harpers & Row*,⁷⁰ former U.S. President Ford had entered into an agreement with *Harpers & Row* and *Reader's Digest* to publish, and also to serialize, his memoirs for a substantial sum. The Nation had managed to get ahold of an unpublished copy of the manuscript and published a 2,250 word article, which included 300 words verbatim from the original manuscript that included information regarding the Watergate scandal. The Nation claimed a justification based on the public interest in reporting current events, but this was rejected by the Supreme Court, which instead focused on the fact that, as a consequence of the publication of the “spoiler,” *Time* had cancelled its contract with Ford, and the associated payment, meaning that there was clear evidence of actual harm to the market.⁷¹

There is an interesting parallel with the British *Ashdown v. Daily Telegraph* case.⁷² The Daily Telegraph had managed to obtain and publish a minute written by former leader of the Liberal Democrat party, Paddy Ashdown, which showed that discussions had taken place regarding a possible coalition between the Liberal Democrats and the Labour party. The minute formed part of his diaries which, after stepping down from the leadership, he had indicated he was considering publishing, although he had taken no formal steps to do so at the time of The Telegraph's publication. After citing commentary by Laddie, Prescott, and Vittoria⁷³ saying that the most important factor of the fair dealing analysis was whether the defendant was commercially competing with the copyright owner by providing a substitute for the probable purchase of an authorized copy,⁷⁴ the Court of Appeal found that:

the publication in the Sunday Telegraph destroyed a part of the value of the memoirs which it had been Mr. Ashdown's intention to sell, and which he did, in fact, sell. Equally we are in no doubt that the extensive quotations of Mr. Ashdown's own words added a flavor to the description of the events

69. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 591 (1994).

70. *Harper & Row*, 471 U.S. at 539.

71. *Id.* at 566-67.

72. *Ashdown v. Telegraph Group Ltd.* [2002] EWCA (Civ) 1142 (Eng.).

73. HUGH LADDIE ET AL., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* (Butterworths Law 3d ed. 2000).

74. *See Ashdown* [2002] EWCA (Civ) 1142 [72].

covered which made the article more attractive to read and will have been of significant commercial value in enabling the Sunday Telegraph⁷⁵ to maintain, if not to enhance, the loyalty of its readership.

This militated against fair dealing. What is striking in both cases is that the courts have privileged the copyright owners' commercial interests over journalists' perceptions regarding what is necessary to report current events in a credible fashion. While it may be true that the market for the memoir was damaged (although this was perhaps doubtful in itself, as otherwise copyright owners would not enter into serialization contracts) there is a latent assumption that there should be a right for those who have held high office to make money in a derivative memoir market by selectively releasing the "juicy" bits at a time that suits them. This is particularly visible in *Ashdown*, given that he had not even entered into a contract at the time and so suffered only potential harm. This right, it seems, overrides the right of the public to be informed about political activities in a credible fashion that, by using the actual words of the politician, carries the least risk of misinterpretation.

Perhaps a more clear-cut case is *ECB v. Tixdaq*.⁷⁶ The defendant marketed an app which allowed users to upload eight-second extracts of sporting events, including the claimant's cricket matches, to be shared with the public online. While the English and Wales Cricket Board ("ECB") engaged in substantial licensing activity, it did not offer at the time a standalone cricket clips service to members of the public. Nevertheless, the defendant's use conflicted with the potential for the ECB to provide such a service in the future, and as such, complicated with normal exploiting of the copyright work in a way that militated against fair dealing.⁷⁷

In other cases though, the courts have taken a relatively robust view of whether damage to the market, or the likelihood thereof, has been proven. The U.S. Supreme Court's *Sony v. Betamax* case involved the question of whether the use of video recorders to record from commercial television channels constituted fair use. As has been described above, the Supreme Court was prepared to place significant importance of the market harm factor. However, in this case it

75. *Id.* at [72].

76. Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd. [2016] EWHC (Ch) 575 [53]-[72] (Eng.).

77. *Id.* at [146]. Additionally, the ECB had licensing coverage of its matches to news publications that offered their own highlights service, and so the defendant's use put this licensing activity at risk. *Id.* at [143]-[145]. See also *Newspaper Licensing Agency Ltd. v. Meltwater Holding BV* [2010] EWHC (Ch) 3099 [64] (where the fact that the defendant's use was "commercial" counted against fair dealing).

concluded such harm was not proven, given that audience measurement technology was imprecise, and it was possible that copyright holders would actually *benefit* from such time-shifting, as it could enable a wider range of people to view the programs and surrounding advertising.⁷⁸

Similarly, in the U.K. case of *Fraser-Woodward Ltd v. BBC*,⁷⁹ Mann J. recognized harm to the commercial value of the copyright work as cognizable within the fair dealing analysis. However, in this case, the harm that was alleged was not made out. The case concerned the inclusion of Mr. Fraser's photographs of the Beckham family in a television program questioning whether Victoria Beckham was manipulating the press, or vice versa. Mr. Fraser argued that if his photographs were included in the program, the mass exposure would "cripple" his ability to license them to newspapers. The judge appears to accept that such loss of licensing opportunity could be relevant to whether use is fair dealing, but he notes that "it does not follow that any damage or any risk makes any use of the material unfair."⁸⁰ In this case, the combination of the fact that Mr. Fraser had licensed others of his photographs to television programs, the fact that the use of the pictures was not "lingering" and that Mr. Fraser had not shown any actual damage, or a significant level of risk thereof, meant that relevant damage was not made out.⁸¹

C. *The Amount Taken from the Copyright Work*

Perhaps the trickiest part of the fair use test, and ostensibly the one that leaves the most discretion in the hands of users is the question of how much of the copyright work that it is fair to take. Rightly, this is a question that needs to be tackled on a case-by-case basis. This inherently leads to a degree of vagueness, as it is neither possible nor desirable for legislators or courts to preempt every instance of use in advance in formulating a test. Thus, in *Hubbard v. Vosper*,⁸² Lord Denning noted that "It is impossible to define what is 'fair dealing.' It must be a question of degree. . . . [A]fter all is said and done, it must be a matter of impression." Similarly, (although admitted not just in connection with this factor) the U.S. Supreme Court noted that the legislative history behind § 107 "eschewed a rigid, bright-line approach

78. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 452-54 (1984).

79. *Fraser-Woodward Ltd. v. BBC* [2005] EWHC (Ch) 472.

80. *Id.* at [64].

81. *Id.* at [63]-[64].

82. *Hubbard v. Vosper* [1972] 2 Q.B. 84, 94 (Eng.).

to fair use.”⁸³ It is argued that this flexibility should be used in a way that gives a margin of appreciation to users. By the time this analysis is taking place, it had been established that the use of the copyright work is for a socially beneficial purpose. Thus, issues of freedom of speech are at stake, and expecting users to exactly preempt judges’ views about the amount of the work that it is legitimate to take runs the risk of chilling that speech.⁸⁴ This is not to say that courts should pay direct attention to human-rights-based arguments in every fair use/dealing case (it is argued elsewhere that this is undesirable), but rather that courts should bear in mind the context in which their decision-making—under sections 29 and 30 of the CDPA and in 17 U.S.C. § 107—is taking place. As we will see below, this does not always happen.

It is under this consideration that courts most directly need to consider whether the use is “necessary,” in the sense that the legitimacy of the form of use (e.g., news reporting, parody, etc.) has generally already been established and so the question becomes whether the extent of the copyright work used is *necessary* to achieve that purpose. Again, this is a slippery question, with the risk being that judges substitute their view of what is necessary for that of journalists, creatives, etc., in a way that makes it difficult for the latter groups to go about their legitimate activities with any degree of certainty about how to avoid copyright infringement.

The dangers of an overly rigid approach to how much of the copyright work can be taken for the taking can be fair can be seen particularly clearly in the British *Hyde Park v. Yelland*⁸⁵ and *Ashdown v. Telegraph*⁸⁶ cases, of which the facts of the latter have already been described. In both, one of the important underlying questions was whether it was necessary to use the original copyright works (respectively, stills from the CCTV camera at Villa Windsor and Paddy Ashdown’s minute) in order to communicate the information contained therein. In *Hyde Park v. Yelland*, the Court of Appeal differed from the first instance judge’s opinion that “it was close to necessary to publish the photographs” to refute statements that Mr. Fayed’s father had made elsewhere regarding the length of the stay and, more generally, that “a picture says more than a thousand words” and so copying the stills was

83. See *Sony*, 464 U.S. at 448; *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

84. See Jonathan Griffiths, *Copyright Law After Ashdown—Time to Deal Fairly with the Public*, INTELL. PROP. Q. 240, 254 (2002).

85. *Hyde Park Residence Ltd. v. David Yelland* [2000] EWCA (Civ) 37 (Eng.).

86. *Ashdown v. Telegraph Group Ltd.* [2002] EWCA (Civ) 1142 (Eng.).

the most convincing way to prove how long the visit had lasted.⁸⁷ Instead, Aldous L.J. held that:

the extent of the use was excessive. The only part of the driveway stills relevant to the alleged purpose was the information as to the timing of arrival and departure. That information could have been given in the articles by Mr. Thompson [the newspaper reporter] stating that he had seen the photographs which proved the Princess and Mr. Dodi Fayed only stayed at the Villa Windsor for 28 minutes. If he needed confirmation he could have relied upon the statement by Mr. Cole [the PR director of Mohammed al Fayed's company, who had given the accurate times, though Mr. al Fayed had subsequently publicized different timings].⁸⁸

In so doing, he was applying the test that he set out—that “the Court must judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work, in the manner that The Sun [the defendant's newspaper] did, for the purpose of reporting the relevant current events.” The difficulty is that, in reaching this decision, the Court of Appeal differed from the journalist's perception of what was necessary to make the story convincing to readers, in the light of significant publicity of a countervailing version of events. Clearly, this was not a straightforward assessment, given that the first instance judge had also thought that the use was necessary.⁸⁹

Similarly, in *Ashdown v. Daily Telegraph*, Lord Phillips M.R. noted that “[a] substantial portion of the minute was copied and it is reasonable to conclude, for the reasons given by the Vice-Chancellor at paragraph 29, that the most important passages in the minute were selected for publication” in finding a lack of fair dealing.⁹⁰ This is a somewhat odd point though, in that it would be hard to mount an argument that the use was necessary if the unimportant passages were included and a piece that did not include the “important passages” would not be capable of achieving the objective of reporting current events. Lord Phillips goes on to consider whether Article 10 of the European Convention on Human Rights mandates considerations which go further than the conventional fair dealing test. It is here that the court considers whether the use of the minute *verbatim* was necessary. Interestingly, it found that it might have been in order to

87. See *Hyde Park* [2000] EWCA (Civ) 37 [17].

88. *Id.* at [40].

89. *Id.* at [17].

90. *Ashdown* [2002] EWCA (Civ) 1142 [76].

prove that the newspaper had an authentic copy of the minute but that the extent to which it was employed here was excessive because it was “deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article and thus to appeal to the readership of the newspaper” and “was for reasons that were essentially journalistic in furtherance of the commercial interests of the Telegraph Group.”⁹¹ Again, it is very tricky to draw a line between what is journalistically necessary and what is commercially advantageous, particularly as the two will often be in tandem. It is also a false dichotomy since we can only have a free press if newspapers are given the means to sell newspapers that attract the public.⁹²

What is striking about both cases is that the Court of Appeal’s findings of the extent taken seems to have been infiltrated by alien considerations. In *Hyde Park*, the Court seems to have been particularly influenced by the fact that the taking of the copies of the stills were unauthorized, while in *Ashdown*, the Court of Appeal repeatedly refers to the fact that, even if the use was justified, the Sunday Telegraph could have compensated Mr. Ashdown in order to make the use.⁹³ With respect, both seem to distract from the argument of whether it was necessary to make the use. If the public was entitled to receive the information alleging significant dishonesty in *Hyde Park*,⁹⁴ this should be the case regardless of how it was obtained. Likewise, compensation in *Ashdown* is a hypothetical argument more suited to legislative planning than an actual case, given that a license would have been unlikely to have been granted *ex ante* and compensation *ex post* in the form of damages following litigation would have an obvious chilling effect.

A similarly restrictive approach can be seen in the field of news reporting in *Harpers & Row*. The defendant had copied 300 words describing the pardon of Richard Nixon from former U.S. President Gerald Ford’s autobiography. The editor of the defendant magazine justified the use of verbatim quotes “because simply reciting the information could not adequately convey the ‘absolute certainty with which [Ford] expressed himself,’ . . . or show that ‘this comes from

91. *Id.* at [79]-[82].

92. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 13. Although there is a countervailing question of whether any one copyright owner should need to be the entity that subsidizes this free press.

93. *See Ashdown* [2002] EWCA (Civ) 1142 [68]-[69], [82].

94. On the right to receive information, see Robin E. Herr, *The Right to Receive Information Under Article 10 of the ECHR: An Investigation from a Copyright Perspective*, JURIDISKA FÖRENINGEN 193-211 (2011).

President Ford,’ . . . or carry the ‘definitive quality’ of the original.”⁹⁵ This was used against him though, with the Court stating with implicit disapproval: “In short, he quoted these passages precisely because they qualitatively embodied Ford’s distinctive expression.”⁹⁶ It is also striking that in measuring the substantiality of what is taken under the third factor, the Supreme Court expresses the figure as a percentage of the *defendant’s* work, rather than as a percentage of the copyright work.⁹⁷ This approach seems flawed on the wording of § 107, which calls for an analysis “in relation to the *copyright work* as a whole”⁹⁸ and can be expected to have a particularly deleterious effect in relation to journalistic articles which are, by their nature, short.

It is arguable that what drives both this case and *Ashdown* is the prospect of commercial competition with the copyright work. Thus, the length of what is taken is not particularly relevant, but rather what matters is whether the defendant has taken the “juicy bits.” A similar scenario can be seen in *ECB*,⁹⁹ where the defendant ran a website allowing members of the public to upload eight-second clips from sporting events. Expressed as a percentage of a five-day Ashes cricket match, eight seconds is infinitesimal.¹⁰⁰ However, it was significant that it was the highlights of the match that were featured.¹⁰¹ Again, this was against a background of the provision of a service that could commercially compete with the copyright owner.

Other cases though have taken a more liberal approach to the amount that can be taken for fairness purposes and appear to be guided more by the later user’s perception of what is necessary to achieve the purpose of criticism, review, or news reporting. Given that both *Hyde Park* and *Ashdown* are Court of Appeal cases, it is perhaps of greatest significance that the Court of Appeal took a less strict approach in *Pro Sieben*.¹⁰² The case involved a television program criticizing the practice of “chequebook journalism,” including the treatment by the press and publicists of Mandy Allwood, a lady who had become pregnant with octuplets. The defendant’s television program included

95. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (internal citations omitted).

96. *Id.*

97. *Id.* at 565-66.

98. *Id.* at 588.

99. Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd. [2016] EWHC (Ch) 575 [53]-[72] (Eng.).

100. Since there was no limit on how many of these extracts could be uploaded, it was possible for the extracts to be “mosaicked” together to make something more quantitatively substantial.

101. Eng. & Wales Cricket Bd. Ltd. [2016] EWHC (Ch) 575 [149].

102. Pro Sieben Media A.G. v. Carlton Television Ltd [2000] E.C.D.R. 110, 126.

a thirty-second clip of Ms. Allwood and her partner visiting a toy shop to purchase teddy bears, taken from a German television report which was nine minutes long. The Court of Appeal seems to have found this aspect of fair dealing relatively easy, finding that the extract was “quite short.”¹⁰³ Consequently, it was not held to compete with the original copyright work under the guise of criticism.

A less strict approach is also evident in the somewhat older Court of Appeal case *Time Warner v. Channel Four*. Channel Four intended to broadcast a program about the film *A Clockwork Orange*, and in particular, the decision of its director to withdraw it from circulation in the U.K. The program contained clips that amounted to more than eight percent of the original copyright film. While this was seen as substantial, the Court of Appeal accepted the comment by Channel Four’s commissioning editor for the arts that “serious criticism of a film requires that you spend sufficient time showing the film itself,”¹⁰⁴ and so the length of the extracts did not prevent there from being fair dealing.

The lower courts have also taken a more relaxed approach, guided by what is necessary to achieve the defendant’s purpose. Thus, in *Fraser-Woodward*, which focused *inter alia* on the relationship between Victoria Beckham and the photographer Jason Fraser, Mann J. acknowledged that, in including images of Fraser’s photographs, the BBC program had taken the entirety of the copyright work. However, this was not excessive because any criticism of a photograph is likely to require the reproduction of the photograph. Instead, the judge considered how *long* the photographs was featured for, finding that in this case they were not “lingering.”¹⁰⁵ This sort of approach has recently been put on a legislative basis in relation to quotations for copyright works, where § 30(1)(A)(c) requires that “the extent of the quotation is no more than is required by the specific purpose for which it is used” for the defense to apply. It remains to be seen whether courts will grant users a margin of appreciation in determining how much is needed.¹⁰⁶

Likewise, in more recent U.S. cases, courts tend to take an approach to how much can be taken fairly, based on what is necessary to achieve the legitimate purpose behind the second use. In *Campbell*

103. *Id.*

104. *Time Warner Ent. Co. v. Channel Four Television Corp. Plc.* [1994] E.M.L.R. 1, 12.

105. *Fraser-Woodward Ltd. v. BBC* [2005] EWHC (Ch) 472 [64] (Eng.). In each case, it was three seconds or less.

106. The use of the quotation must also be “fair dealing” under § 30(1ZA)(b). Thus, there is potential for overlap considering the amount needed under fair dealing and under the specific factor related to this. § 30(1ZA)(c).

v. Acuff-Rose, the Supreme Court explained that the amount that it is necessary to take will depend on the character of the use under the first factor and the fourth factor, since a piece that reproduces most of the copyright work may be a market substitute.¹⁰⁷ Here, the legitimate use was parody. For that parody to work, it had to “conjure up” the original, which necessitated “quotation of the original’s most distinctive or memorable features, which the parodist can be sure the audience will know.” Over and above that, it may also be permissible to take more to achieve the objective of making a parody, but not so much that the parody is a market substitute. In that case, while the parodist copied the bass riff and first line, the rest of its version was composed of its own lyrics and sounds and a different drum beat were added, meaning that “no more than was necessary” was taken. There is a parallel to be drawn here with the CJEU’s *Deckmyn* case, where the Court found that “the concept of ‘parody’, within the meaning of [Article 5(3)(k) of Directive 2001/29], is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work.”¹⁰⁸

In some U.S. cases, it has also been recognized that reproducing the entirety of the copyright work may be fair. This was the case in *Sony v. Betamax*, though the justification offered for this was viewers were just time-shifting what they had already anyway been invited to view free of charge, meaning that the case is rather exceptional.¹⁰⁹ However, in more recent years, courts¹¹⁰ have been willing to recognize the reproduction of the entirety of copyright works as necessary to facilitate the operation of search engines, which are highly transformative. Consequently, the fact that the whole work was taken did not weigh against fair use. The most prominent example of this is the Google Books litigation, where the court noted:

not only is the copying of the totality of the original reasonably appropriate to *Google’s* transformative purpose, it

107. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 587-89 (1994); Netanel, *supra* note 46, at 745 (“Under the transformative use paradigm, factor three—the amount of the copyrighted work that the defendant had used—becomes a question not of whether the defendant took what is the most valuable part of the plaintiff’s work (as it was under the market-centered paradigm), but rather whether the defendant used more than what was reasonable in the light of the expressive purpose driving the transformative use.”).

108. *Deckmyn v. Vandersteen*, C-201/13, 2014 E.C.R. 458.

109. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

110. See PATRY, *supra* note 68, § 5.2; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 616 (2008) (arguing on the basis of his statistical analysis that the courts have placed more emphasis on whether the “heart” of the work has been taken, rather than on whether the entirety of the work has been lifted).

is literally necessary to achieve that purpose. If *Google* copied less than the totality of the originals, its search function could not advise searchers reliably whether their searched term appears in a book (or how many times).¹¹¹

The greater flexibility of the Court's approach is also apparent from its unwillingness to stop at the bald percentage figures of how much was taken, noting that just as important is the order in which they are revealed, as this will determine the extent to which the defendant's offering is a substitute. Thus, 16% of the text of a copyright work was not considered presumptively unfair¹¹² which seems rather inapposite compared to the approach that might have been taken in the past.

D. Whether the Copyright Work has been Published

In order to implement the InfoSoc Directive, under § 30(1) of the CDPA, the criticism and review defense is *only* available where the work being critiqued has been "made available to the public" since 2003. There is no such statutory restriction in relation to news reporting¹¹³ or parody.¹¹⁴ Nevertheless, in analyzing whether use is fair dealing, for many years, judges have considered whether the work in question has been published. Thus, in *British Oxygen*, a case dating from 1925, Romer J. found that "it would be manifestly unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism, review or newspaper summary. Any such dealing with an unpublished literary work would not, therefore, in my opinion, be a 'fair dealing' with the work."¹¹⁵ Requiring works to be published to benefit from the defense seems particularly undesirable, given that the fair dealing defense would be the first resort for "whistleblowers" hoping to publish copyright information that the authors would prefer to remain secret. It also allows authors to control information by "cherry picking" what to release to the public. On the other hand though, as an author, the thought of having endless "first drafts" that have ultimately been reworked being publicly critiqued is

111. *Authors Guild v. Google Inc.*, 804 F.3d 202, 221 (2d Cir. 2015) (emphases added).

112. *Id.* at 223.

113. See Copyright, Designs and Patents Act 1988, c. 48, § 30(2) (Eng.).

114. See *id.* § 30A(1), though a parody is unlikely to be effective unless the public are already familiar with the source material.

115. *British Oxygen Co. Ltd. v. Liquid Air Ltd.* [1925] Ch 383 at 393 (Eng.). Somewhat unconvincingly, Judge Romer argued that a publication requirement had been omitted from the statutory fair dealing requirements because a dramatic or musical work would be performed in public rather than published. See generally Sims, *Strangling Their Creation*, *supra* note 12, at 196.

a disquieting one, particularly as discarded drafts may not accurately reflect the views and standards of the author.

The overinclusiveness of the no unpublished works position was recognized in *Beloff v. Pressdram*,¹¹⁶ where the judge doubted whether Romer J. could have meant that unpublished work should be “automatically” outside the fair dealing provisions, rather than an “important factor.”¹¹⁷ Nevertheless, the basis of the decision that there was no fair dealing in *Beloff v. Pressdram*, which involved a memo from the political editor of the *Observer* newspaper to her editor describing a discussion with a cabinet minister about the next prime minister if the incumbent was run over by a bus, was that it was “unpublished and indeed it was never intended to be published.”¹¹⁸ More recently, the fact that the minute had not been published contributed to the finding of no fair dealing in *Ashdown v. Telegraph*.¹¹⁹

It should be noted though that measures short of publication by the author may remove the problem of the work being unpublished, if the result is that the information contained therein becomes public knowledge. Thus, in *Hubbard v. Vosper*, Lord Denning found that while Scientology founder L. Ron Hubbard’s writings had not formally been published, the same effect may be present where a work has been “circulated to such a wide circle that it is ‘fair dealing’ to criticize it publicly in a newspaper, or elsewhere.”¹²⁰ On the other hand, the fact that the *ideas* as opposed to the expression are already in circulation may mitigate against fair dealing. Thus, in *Ashdown v. Telegraph*, one of the reasons why there was no fair dealing was much of the information in the minute was already public, so there was not the same need to use the memo itself.¹²¹

In the background to this group of cases are arguably two underlying concerns.¹²² First, the way in which the published works

116. *Nora Beloff v. Pressdram Ltd.* [1973] R.P.C. 765 at 786-78 (Eng.).

117. *Id.*

118. *Id.* at 787.

119. *Ashdown v. Telegraph Group Ltd.* [2002] EWCA (Civ) 1142 (Eng.).

120. *Hubbard v. Vosper* [1972] 2 Q.B. 84, 94 (Eng.).

121. *See Ashdown* [2002] EWCA (Civ) 1142 [74] (Eng.).

122. An analogous concern can be seen in Israel in the “Dead Sea Scroll” case, in which a philologist who created intelligible text out of the fragments of the scrolls objected to the publication of the text and argued that that was not fair use. C.A. 2790/93 *Biblical Archaeology Soc’y v. Elisha Qimron* 54(3) PD 817 (2000) (Isr.) reprinted in *Biblical Archaeology Soc’y v. Elisha Qimron* [2001] E.C.D.R. 6. The Supreme Court agreed, noting: “The appellants published the deciphered text in its entirety, without mentioning Qimron’s name, and by this they knowingly infringed his right to be the first to publish the deciphered text”. As our discussions in relation to market harm have shown, this will generally only be accepted where a strong countervailing

have reached the defendants often involves some form of suspect activity, or even theft and dishonesty. This is difficult, because such practices are often part and parcel of whistleblowing. Secondly, where the reason that the work is unpublished is that the author has plans to release it at a later date, this interferes with the copyright owner's ability to market his work.

In the U.S. too, lack of publication has historically played a significant role in determining whether the use is fair. In *Harper & Row v. Nation*,¹²³ the Supreme Court found, by reference to the legislative history of the 1976 Copyright Act that "the unpublished nature of a work is "[a] key, though not necessarily determinative, factor" tending to negate a defense of fair use." The Court identifies the potential interests at stake as both privacy and the commercial interest of giving the author the right to choose when he will publish. This implicates the author's persona interest in creative control, his property interest in exploiting the work and the benefit to the public of enabling authors the time to develop their ideas free from expropriation.

The decision was applied in *Salinger v. Random House*, a case concerning a bibliography extracting letters written by J.D. Salinger and donated to various university libraries. These letters were considered to be unpublished and so, following *Harper & Row*, the Court of Appeals found that the nature of the copyright work factor weighed heavily in favor of the author. The *Salinger* court understood *Harper & Row* to mean that "such [unpublished] works normally enjoy complete protection against copying any protected expression."¹²⁴ The impact of this decision was undone though by a legislative amendment to § 107 in 1992, to add a statement that reads: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Thus, whether the copyright work has been published remained a consideration, but not a determinative one.¹²⁵

What is striking is that both the U.S. and the U.K. have both taken a hardline approach to fairness in cases involving unpublished works.¹²⁶ While the position in both jurisdictions has evolved from

interest is present. *Id.*

123. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985).

124. *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987).

125. For examples of cases where this has been applied, see PATRY, *supra* note 68, at § 4.2. See generally Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1 (1999).

126. Although, in the U.K., the unpublished nature often seems to have shut down the fair dealing inquiry, while Beebe finds in the U.S. that while the unpublished nature was often considered, it was outweighed by the other factors, and in fact what happened was that the fact

effectively allowing no use of such works to allowing use, but only in limited circumstances, it is still surprising that this factor has effectively been allowed to trump the need for the user to access this information to convey messages that are frequently in the public interest. What is even more striking is that the courts tend, in their decision making, to highlight the interests that would be put at risk by allowing the use of unpublished works without considering the countervailing interests of the public in receiving that information.

E. Whether the Author/Owner has been Acknowledged

A further way in which uses may be deemed not to be fair is if the user fails to acknowledge the original copyright owner. In the U.K. acknowledgement is a separate statutory requirement, rather than part of the fairness analysis. Thus, fair dealing for the purposes of non-commercial research,¹²⁷ for criticism and review,¹²⁸ “for illustration for instruction,”¹²⁹ and “for reporting current events”¹³⁰ must be accompanied by “sufficient acknowledgement,” unless this is “impossible for reasons of practicality or otherwise.”¹³¹ However, no acknowledgement is required for parodies, caricatures, or pastiches, presumably in recognition of how parodies are usually presented to the public¹³² or for private study.¹³³ Sufficient acknowledgement is defined as:

an acknowledgement identifying the work in question by its title or other description, and identifying the author unless—
in the case of a published work, it is published anonymously;
in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry.¹³⁴

In practice, the courts in the U.K. have been relatively liberal in their construction of what counts as acknowledgement. Thus, in *Pro Sieben*, the use of the logo of the TV channel that had conducted the interview

that the work was *published* weighed in favor of fair use. Beebe, *supra* note 110, at 612-15.

127. Copyright, Designs and Patents Act 1988, c. 48, § 30 (Eng.)

128. *Id.* at § 30(1).

129. *Id.* at § 32(1)(c).

130. *Id.* at § 30(2).

131. *Id.* at §29(1B) (research); *id.* at § 30(1) (criticism and review); *id.* at § 30(3) (news reporting, but only in relation to the use of sound recordings, films, and broadcasts).

132. *Id.* § 30A; see Griffiths, *supra* note 32, at 4.

133. *Id.* § 29(1C) (private study).

134. *Id.* at § 178.

featured sufficed.¹³⁵ The full name of the TV channel did not need to be used, and the name did not need to be spoken. This was taken further by Arnold J. in *ECB v. Tixdaq*, a case involving the uploading of a large number of clips of cricket matches, who accepted in principle that if the logo had been included in some of the clips from that day, a reasonable user would appreciate that all the footage from that day came from the same source, and so just including the logo on some of the clips was sufficient acknowledgement.¹³⁶ Likewise, in *Newspaper Licensing Agency Ltd. v. Marks & Spencer Plc*, the name of the newspaper, rather than the name of the publisher of the newspaper was sufficient.¹³⁷ A similarly relaxed approach can be seen in *Fraser-Woodward*, where Mann J. found that acknowledgement need not be express:

All that is required is that it is an identification, though I think that I can accept that it probably has to be one that can readily be seen and not require some form of hunting around or detective work It is probably not enough to say that the author can be identified if you look hard enough; the authorship must be more apparent than that.

. . .

I do not think that the concept of identification means that there has to be a precisely or virtually contemporaneous act of identification. Once the identification has been provided then it is capable of operating in relation to a later appearance of the copyright material.¹³⁸

Thus, panning down to the author credits at the bottom of a photograph sufficed.¹³⁹

Acknowledgement (or attribution as it is more likely to be known across the Atlantic) has little formal role to play in the U.S. fairness analysis. The concept of attribution comes with baggage in the U.S. context, given its overlapping content with the moral right of attribution. However, Cameron¹⁴⁰ points to a number of decisions where attribution has been considered by the courts as part of the fair

135. *Pro Sieben Media A.G. v. Carlton Television Ltd.* [1999] WLR 605, 617.

136. *Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd.* [2016] EWHC (Ch) 575 [53]-[72] (Eng.).

137. *Newspaper Licensing Agency Ltd. v. Marks & Spencer Plc* [2001] UKHL 38, [2003] 1 AC 551 (appeal taken from Eng.).

138. *Fraser-Woodward Ltd. v. BBC* [2005] EWHC (Ch) 472 [72], [75] (Eng.).

139. *Id.* at [73].

140. Catherine J. Cameron, *Reinvigorating U.S. Copyright with Attribution: How Courts Can Help Define the Fair Use Exception to Copyright by Considering the Economic Aspects of Attribution*, 2 BERKELEY J. ENT. & SPORTS L. 130 (2013).

use analysis. She cites a handful of cases: *Rogers v. Koons*;¹⁴¹ *Karll v. Curtis Publishing Co.*;¹⁴² *Henry Holt & Co. v. Leggett & Myers Tobacco Co.*;¹⁴³ and *Feiner v. HR Industries*.¹⁴⁴

*Rogers v. Koons*¹⁴⁵ involved the creation of a wooden sculpture based on a photograph of two people holding a number of puppies while sitting on a bench. The defendant, artist Jeff Koons, found this image on a postcard. His fair use argument was rejected in part because the Second Circuit Court of Appeals used the fact that he had torn the copyright details off the notecard as evidence that the purpose and character of his use under the first fact was the bad faith exploitation of the copyright work for personal gain. Thus, lack of attribution militated against fair use, although it should be remembered that this case predates *Campbell v. Acuff-Rose Music*,¹⁴⁶ and there is a good chance that the artistic context may have resulted in this case being decided differently today, given the transformative use doctrine. In *Feiner v. HR Industries*, the lack of attribution of the photograph in question could lead the public to think that it was in the public domain, reducing the photograph's ability to extract royalties.¹⁴⁷

On the other hand, the fact that attribution was present favored fair use in *Karll v. Curtis*. The defendant, in an article about the Green Bay Packers Football team, reproduced the copyright-protected team song. Here, there was fair use in part because the author of the song was acknowledged.¹⁴⁸

Yet another approach is evidence in *Henry Holt v. Liggett & Myers*.¹⁴⁹ The defendant copied an extract from an earlier copyright scientific book in its pamphlet designed to demonstrate that cigarettes are not harmful. The author of the book was identified in the pamphlet by the defendant, and he argued that a link to such a commercial context would be harmful to his reputation. Again, fair use was rejected.

Although the argument is an intriguing one, it is hard to say that this small number of cases over a fifty-year period and all saying slightly different things constitutes compelling evidence of the relevance of attribution in the U.S. context. Indeed, as Cameron herself

141. *Rogers v. Koons*, 960 F.2d 301, 306-14 (2d Cir. 1992).

142. *Karll v. Curtis Publ'g Co.*, 39 F. Supp. 836 (E.D. Wis. 1941).

143. *Henry Holt & Co. v. Leggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

144. *Richard Feiner & Co. v. H.R. Indus.*, 10 F. Supp. 2d 310 (S.D.N.Y. 1998).

145. *Rogers*, 960 F.2d at 308.

146. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

147. *Richard Feiner & Co.*, 10 F. Supp. 2d at 314.

148. *Karll*, 39 F. Supp. at 837.

149. *Henry Holt & Co.*, 23 F. Supp. at 304.

observes,¹⁵⁰ the Supreme Court has never given a role to attribution, so much so that in *Campbell v. Acuff-Rose*,¹⁵¹ the Court observed that defendants had attributed the original rights of “Oh, Pretty Woman” but then failed to connect this to its fair use analysis.

F. Human Rights

Human rights can occasionally act as an adjunct to the fairness defenses. Enforcing copyright means suppressing speech. While freedom of speech is a human right protected by the European Convention on Human Rights,¹⁵² European¹⁵³ and common law principles, and constitutionally-protected in the U.S.,¹⁵⁴ copyright is also designed to stimulate speech and so an overly aggressive approach to allowing third-party speech in this area runs the risk that the very speech that we wish to share is dampened. It should also be remembered that copyright is a form of property, and the enjoyment of property is also protected as a human right.¹⁵⁵ Thus, human rights-based references to freedom of speech tend only to be directly determinative of when use is fair in exceptional cases.

It is sometimes argued that free speech cannot have a role to play here because copyright only protects expression and others are free to use the ideas communicated therein. Leaving aside the fuzziness of the idea/expression dichotomy, it should be noted that free speech case law holds that, on occasion at least, it is crucial that parties be able to use exact words to make their point. The U.K. must heed the decision of the European Court of Human Rights (“ECHR”) in *Fressoz v. France*. The issue there was whether Article 10 of the European Convention on Human Rights required that the journalists in question be allowed to publish the tax return of a prominent French businessman. The Court found that:

In essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists’ rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and

150. Cameron, *supra* note 140, at 142.

151. *Campbell*, 510 U.S. at 573.

152. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 220 [hereinafter European Convention on Human Rights].

153. Charter of Fundamental Rights of the European Union, art. 11, 2010 O.J. C 364/08. [hereinafter European Charter of Rights].

154. U.S. CONST. amend. I.

155. European Convention on Human Rights, *supra* note 152, at protocol 1, art. 1.; European Charter of Rights, *supra* note 153, at art. 7; U.S. CONST. amend. V.

provide “reliable and precise” information in accordance with the ethics of journalism.¹⁵⁶

This suggests that journalists should be given a significant margin of appreciation in determining whether it is necessary to use an original document, or just the information contained therein. While the claim in *Fressoz* was that the tax return had been published in breach of confidence,² rather than infringement of copyright, it has been suggested¹⁵⁷ that the same principle should apply where the proposed interference with speech is from copyright. The discretion given under Article 10 to journalists in choosing how to frame their articles and which documents to include is not without limit though, as is apparent from *Bédât v. Switzerland*.¹⁵⁸ There, the journalist had included transcripts of police interviews with a man who had ploughed his car into a number of pedestrians, and then attempted to drive off a bridge, as well as statements from his wife, his doctor, and letters he wrote to the judge. The journalist had then been prosecuted under a Swiss law preventing the publication of secret official deliberations. The Court reiterated the fact that Article 10 protects “not only the substance of the ideas and information expressed, but also the form in which they are conveyed” and that it was “not for this Court, or for the national courts for that matter, to substitute their own views for those of the press as to what reporting technique should be adopted by journalists.”¹⁵⁹ However, the ECHR found that this prosecution, while an interference with speech, was necessary and proportionate given the sensationalist way that the article was written,¹⁶⁰ and the countervailing interests of protecting the administration of justice¹⁶¹ and the accused’s private life.¹⁶² Thus, there are two reasons why the use of the expression was not appropriate here: (i) the way it was used and (ii) the importance of the countervailing right. It would be interesting to see the relative weight the court would grant to the protection of copyright, which is after all recognized as giving rise to a human right to the peaceful enjoyment of property, but it is suggested that the outcome would be closer to *Fressoz* than *Bédât*.

156. *Fressoz v. France*, 1999-I Eur. Ct. H.R. Rep. 1 ¶ 54.

157. *See, e.g., Ashdown v. Telegraph Group Ltd.* [2002] EWCA (Civ) 1142 [78]-[83] (Eng.). Interesting, the fact that the businessman’s tax return in *Fressos* had been obtained in breach of professional duty did not affect the court’s willingness to allow the speech. This stands in contrast to the position taken in the U.K. in *Hyde Park* and in *Ashdown*.

158. *Bédât v. Switzerland*, App. No. 56925/08, __ Eur. Ct. H.R. __ (2016).

159. *Id.* at ¶ 58.

160. *Id.* at ¶ 60.

161. *Id.* at ¶¶ 68-71.

162. *Id.* at ¶¶ 72-78.

Analogously in the U.S., but outside the journalistic context, the Supreme Court in *Cohen v. California* recognized that the First Amendment protects expression, as well as ideas. Cohen's crime was his presence in the Los Angeles County Courthouse wearing a t-shirt which said on it "FUCK THE DRAFT," a reference to his views on the Vietnam War. He was convicted of disturbing the peace, despite the fact that he had not acted in any way violently. While Cohen could have communicated his disapproval of the draft using other language, the Supreme Court, in overturning his conviction noted:

much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.¹⁶³

Nevertheless, even free speech advocates counsel caution on overreliance on human rights arguments in the copyright context, given that the law has an built-in balancing mechanism judged appropriate by the legislator in the form of the fair use/dealing provisions. Thus, according to Barendt:

[f]reedom of expression challenges to the enforcement of copyright should only be sustained when copyright law is used to suppress the dissemination of information of real importance to the public or to stifle artistic creativity, parody or satire. . . . The provision of "fair dealing" and other defenses should not preclude an argument that copyright enforcement infringes "freedom of speech" but a court can properly require the infringer to provide strong reasons why it should disregard the balance between the rights struck by the legislation.¹⁶⁴

It should also be noted that overreliance on constitutional arguments is in itself undesirable, and it is simpler for parties all around if the concerns are worked into the legislatively-created balance between IPR holders and users' rights which are worked into the legislation.¹⁶⁵

163. *Cohen v. California*, 403 U.S. 15, 26 (1971).

164. ERIC BARENDT, *FREEDOM OF SPEECH* 261 (2007).

165. See e.g., William McGeveran, *Four Free Speech Goals for Trademark Law*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1205, 1212 (2008).

On the whole, this balancing happens.¹⁶⁶ However, on rare occasions, the courts have been prepared to entertain human rights arguments. These tend to be dealt with as an “add-on” argument to fair dealing, rather than as part of the fair dealing balance. Thus, in *Ashdown*, the Court of Appeal considered the impact of the Human Rights Act after its normal fair dealing analysis, and ultimately decided that both doctrines led to the same result.¹⁶⁷

In the U.S., the Supreme Court in *Eldred v. Ashcroft*¹⁶⁸ noted that speech is generally adequately protected under copyright law: the idea/expression dichotomy protects the communication of ideas and fair use means that, in certain circumstances, the expression itself can be used. Whether there really is a conflict between copyright and the First Amendment of course depends on the assumption that the boundaries of these doctrines are clear and appropriately drawn, though it is worth noting that in recent years, the rise of transformative use, together with the lessened importance of the market harm factor, means that fair use has a greater scope. It should be noted though that some scholars feel that the rise in transformative use has limited free speech by privileging “rebels” at the expense for pure copying for socially beneficial purposes, such as educational use.¹⁶⁹

CONCLUSION

Although it is clear that both the U.S. and the U.K. use similar factors to determine whether the use of another’s copyright work is “fair,” it is equally apparent that they place different weights on the different factors. This is the case, even if each factor is examined in isolation; the two jurisdictions have, at least in some point in time, adopted a similar approach. This is particularly true in relation to harm to the market, and in relation the amount of work taken, as well as prior publication, where both jurisdictions historically have engaged in quite similar analyses, and if anything, in the past, the U.S. has adopted a stricter approach. However, it is argued that ultimately what has made the biggest difference between the U.S. and U.K. approach is indeed the closed-versus-open list. This is not so much because of the structural difference between standards and rules. Rather, in the U.S., the open list has led to the development of the transformative use

166. See Griffiths, *supra* note 19, at 174 (describing free speech as “a background principle which supports the fair dealing provisions”).

167. *Ashdown v. Telegraph Group Ltd.* [2002] EWCA (Civ) 1142 [78]-[83]. See also *HRH Prince of Wales v. Associated Newspapers Ltd.* [2008] Ch 57 [179].

168. *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

169. Tushnet, *supra* note 47.

doctrine under the first factor. This has “swamped” the other key factors of market harm and necessity of use, which still play a key role in the U.K. Once a use has been found to be so strongly in favor of the public’s interest, it is difficult for the court to constrain it. On the other hand, in the U.K., this discussion is predetermined by what is on the “closed list,” leaving more room for a stricter approach to the other factors. As has been mentioned above, there is an interesting contrast between *Authors Guild*¹⁷⁰ in the U.S. and *ECB v. Tixdaq*¹⁷¹ in the U.K.: the finding of social value of Google Books’ services paved the way for a finding that copying the entirety of the works was permissible, while in *ECB*, the step-by-step analysis resulted in a finding that eight-second clips were excessive and harmed a market that was yet to be properly exploited. It seems that perhaps former Prime Minister David Cameron was right after all . . .¹⁷²

170. *Authors Guild v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015).

171. *Eng. & Wales Cricket Bd. Ltd. v. Tixdaq Ltd.* [2016] EWHC (Ch) 575 (Eng.),

172. *UK Copyright Laws to be Reviewed, Announces Cameron*, *supra* note 38.