

Chapter 2

Copyright and Freedom of Expression in Canada

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I. Introduction

The year 2002 marked an important date in the history of Canadian constitutional law: the 20th anniversary of the Canadian Charter of Human Rights and Freedoms. Adopted at the same time as the Canadian constitution was 'repatriated' from the UK parliament, the Charter includes section 2 (b) that guarantees freedom of expression: 'Everyone has the following fundamental freedoms: ... (b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'. The relationship between copyright law and freedom of expression is an obvious one and it increasingly attracts much scholarly attention. This has indeed been the case in the neighbouring country, the United States, but not in Canada. Yet, one could have expected that the richness of the discussions in that country would have been quickly borrowed in Canada in order to have a headstart on the analysis when the Charter became a reality. That it did not happen is perhaps another manifestation of the traditional reluctance on the part of some Canadian copyright jurists to a *rapprochement* with US law.¹

Independently of a concern over the importation of foreign understandings, one may wonder why there has been no real homegrown analysis of the impact of the Charter on copyright law in Canada. Perhaps one reason could be that the Charter is very much a public law instrument. The Charter has beyond doubt impacted much on several public law areas, such as constitutional law, criminal law, procedure or administrative law, and perhaps less so on private law matters,

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¹ A recent example of this attitude can be found in the Federal Court of Appeal decision in *CCH Canadian Ltd v. Law Society of Upper Canada*, 2002 18 C.P.R. (4th) 161, where the Court was obviously suspicious of the analysis of the originality concept by the US Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 498 U.S.808 1991.

matters that include copyright law. Such a lesser impact on copyright could further be explained by the hypothesis that copyright law already incorporates freedom of expression values through its own mechanisms. There would then be less need for an open confrontation between the two sets of rules. The first part of this paper will thus examine the situation from the perspective of these private law mechanisms, i.e. seek to understand how the Copyright Act internalises freedom of expression. In the second half, one will attempt to appreciate how the Charter, a public law instrument, has been affecting the relationship between copyright and freedom of expression.

II. Freedom of Expression Within the Copyright Act

Today, copyright law and freedom of expression are generally perceived as conflicting sets of values. Yet, one should not forget that the first modern copyright statutes could be perceived as elements of a certain triumph of the authors' freedom of expression over the control exerted by the stationers, in England, or through the privilege holders, in pre-Revolution France. The idea that copyright protection can act as a vehicle for freedom of expression took on an importance of its own and can be said to have reached its high point with Article 27(2) of the Universal Declaration on Human Rights:

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

This statement is echoed in Article 15(1)(c) of the United Nations Covenant on Economic, Social and Cultural Rights:

'The States Parties to the present Covenant recognize the right of everyone:
[...] (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

In this light, copyright has become a human right equal to freedom of expression.

However, if copyright can be regarded as a human right, a more contemporary understanding of that particular human right can lead one to see it as a human right for the 'happy few', i.e. for a small group within society, authors who are thus protected, that is pitted against the rest of society at large, those to whom their works are destined. It is because of this antagonism that the copyright system can be so often challenged by free speech partisans. Yet if authors are indeed protected, one can readily observe that their protection is already in itself limited by rules whose existence owes much to concerns about the freedom of expression of third parties. It is thus possible to read the Copyright Act with 'freedom of expression glasses' with particular attention to the rules governing (a) the identity

of the protected work; (b) ownership; (c) term; and (d) all the prerogatives comprised within copyright.

II.1. IDENTITY OF THE PROTECTED WORK

Several rules operate together so as to ensure that some works – or products of intellectual activity – do not come within the scope of copyright protection. When this happens, the works or products belong to the public domain and anyone may use them free of copyright considerations.

The first of such rules, of course, is the distinction that is made between ideas and facts, on the one hand, and works or expression, on the other hand. It is a fundamental precept of copyright that has precisely evolved in order to foster the possibility for all to voice their opinions on a shared commons of ideas and facts. Closely related to that premise is the requirement of originality: not only must the work be a 'work' as opposed to an idea or a fact, it must also be endowed with the quality of originality. However originality is defined in a country,² it should not be forgotten that the very existence of a criterion that is meant to determine if a work is protected or not entails that some works will not meet the requirement and thus will not be protected. Part of the concern over the sui generis right for databases, as devised in the European directive on these productions,³ stems from the fact that it is precisely aimed at the creation of a scheme of protection for objects that would escape copyright protection.

In copyright countries, two other factors circumscribe the protection of works. The first one is the requirement of fixation: a work must be fixed in a tangible medium in order to be protected.⁴ Again, depending on how stringently one defines this notion, a greater or lesser number of works will pass the test. The current interpretation of fixation, however, makes for a very broad criterion that encompasses virtually anything that is found on some medium,⁵ though it still has

² It is expected that the forthcoming decision of the Supreme Court of Canada in *CCH Canadian Ltd v. Law Society of Upper Canada* (see *ibid* for the appeal decision) will settle the matter in Canadian law.

³ Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, 11 March 1996, *O.J.* No L 77/20, 27 March 1996.

⁴ On this issue in general, see Y. Gendreau, 'Le critère de fixation en droit d'auteur', in *RIDA* 159 (*Revue Internationale du Droit d'Auteur*) (1994) 111.

⁵ This situation results from the definition of fixation in the US *Copyright Act*: 'A work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration', 17 U.S.C. § 101 (emphasis added). See *MAI Systems Corporation v. Peak Computers Inc.*, 991 F.2d 511 [1993]. The current concern over 'temporary or permanent' reproductions, as well as 'transient or incidental' ones, as found in the 2001 European directive on the information society can be traced back to this interpretation.

not come to terms with problem areas such as oral works.⁶ Copyright countries whose legislations are directly inspired by UK statutes, i.e. essentially Commonwealth countries, face another hurdle: the strict division of works according to specific categories. Should it not belong to any of the defined literary, dramatic, musical, or artistic groups, a 'work' cannot be considered protected by copyright.⁷ When a work can fit in a category, the identification of that category may have an impact on the exercise of copyright in that work.⁸

All in all, it is important to remember that not all products of creativity in the literary and artistic domain obtain protection under the Copyright Act. While the preoccupation with categories in Commonwealth countries can hardly be said to stem directly from a need to ensure that some works are not protected, the other conditions can be perceived as reflections of such a policy.

II.2. OWNERSHIP

It is perhaps less conventional to think of copyright ownership rules as concepts that incorporate freedom of expression values. Yet, this is particularly true in countries that distinguish ownership from authorship and wherever a legal definition of authorship is provided that differs from the traditional understanding of the author as the human creator of a work. The reason why such a link exists is that the award of ownership to someone other than the natural author determines who decides how the work is to be used. An author who is deprived of copyright ownership is being silenced in favour of someone whose judgement as to the exploitation of the work is favoured.

Canadian copyright law is rich in examples. In addition to a standard provision that grants copyright ownership in an employee's work to the employer,⁹ there is an exception to that rule in favour of employed journalists who may want to exploit their works in a context other than a newspaper, magazine, or other periodical.¹⁰ The Canadian statute, unlike the British Copyright Designs and Patents Act 1988, still retains the rule that awards copyright ownership to the person who commissions engravings, photographs, and portraits.¹¹ An examination of the

⁶ See D.J. Brennan & A.F. Christie, 'Spoken Words and Copyright Subsistence in Anglo-American Law', in *IPQ 4 (Intellectual Property Quarterly)* (2000) 309.

⁷ See *Creation Records Ltd. v. News Group Newspapers Ltd.*, in *EMLR (Entertainment and Media Law Reports)* (1997) 444, where the set-up for a photograph for an album jacket could not be classified under any heading.

⁸ For instance, the general classification of cinematographic works as 'films' in the United Kingdom, as opposed to 'dramatic works', leads to different rules with respect to ownership, term, rights, and exceptions.

⁹ *Copyright Act*, section 13(3).

¹⁰ *Ibid.*

¹¹ *Copyright Act*, section 13(2).

case law that has spawned from this rule reveals how important are the privacy concerns of the commissioning parties in those instances.¹²

The most obvious situation is perhaps that of Crown copyright. Like the United Kingdom, Canada has a provision that grants to the Crown the copyright in material that is either prepared for it or published under its authority.¹³ Section 12 of the Act thus allows for a continuing interrogation on the status of court judgements and statutory materials, for instance: to what extent can the State intervene to allow or, more importantly, prevent the dissemination of these texts? A prime example of the control over expression that copyright ownership rule can play can be found in a relatively recent attempt to expand the scope of Crown copyright. In 1997, a bill entitled An Act to amend the Criminal Code and the Copyright Act (profit from authorship respecting a crime) was introduced in Parliament.¹⁴ Its purpose was to deprive convicted criminals, who had prepared or collaborated in the creation of a work 'substantially based on the indictable offence or the circumstances of its commission', of the copyright in that work. The copyright would vest in the Crown for the entire duration that would exist for that person's work. The aim was thus to prevent the convicted person from telling his story again and, at the same time, from profiteering from crime. One can well imagine that ownership of the copyright by the Crown would mean that the work would not be published.

This latter example offers a clear case of state censorship where one person's freedom of expression is thwarted by 'nobler' ideals. Yet, the other cases of employees' works and commissioned works can also be regarded as instances of 'private' censorship that exist for business or privacy reasons.

II.3. TERM OF PROTECTION

In contrast to ownership rules, term of protection is one of the classic examples of the trade-off between copyright protection and freedom of expression. At the end of a set period of time, works are no longer protected and anyone may use them as the basis of their own expression. People get used to the expectation that the works will become free of all copyright control at the end of a well-known length of time. The familiarization is shared by all and any change to the accepted rule can ignite emotionally charged debates, particularly when the term of protection is increased. Maybe because of the very real need for harmonization of term of protection, the change from 'life plus 50' to 'life plus 70' in 1993 in the European Union did not provoke the same furor as in 1998 in the United States. The European countries

¹² See, in general, Y. Gendreau, 'Copyright Ownership of Photographs in Anglo-American Law', in *EIPR* 15 (*European Intellectual Property Review*) (1993) 207.

¹³ *Copyright Act*, section 12.

¹⁴ Bill C-220, 36th Parl., 1st Session, 46 Eliz. II, 1997 (passed by the House of Commons: 1 October 1997).

were used to the 'life plus 50' rule for quite some time: it had been introduced in the Berlin 1908 revision of the Berne Convention and become compulsory with the 1948 revision in Brussels. In contrast, US law provided for a set term of 28 years upon publication renewable for another similar period until the coming into force of the Copyright Act 1976. It was only at that time that the 'life plus 50' rule was introduced. Less than twenty-five years later, that term was extended, partly in reaction to the European move, to 'life plus 70'. In a much shorter period of time, then, than in countries that have belonged to the Berne Union for a long time, the US term of protection changed from '28 + 28' to 'life plus 70'. It is hardly surprising, in such circumstances, that the debate on the relationship between copyright and freedom of expression, as expressed through the issue of the term of protection, took on such intensity.¹⁵

Special terms of protection for particular instances reflect similar policy considerations on a smaller scale. The Phase II amendments to the Canadian Copyright Act in 1997 changed the term for posthumous publications. Whereas it used to provide for a protection of fifty years from publication, the Act now has a series of rules that should gradually bring those cases in line with general rule on the term of protection.¹⁶ At the other end of the spectrum is the issue of Crown copyright, which has a term of fifty years from publication.¹⁷ One of the consequences of this rule is that a Crown copyright work that is never published, never has the opportunity to fall in the public domain. When one considers the potential scope for the application of this provision, it becomes clear that Crown copyright can be exercised to silence some authors whose opinions would be judged undesirable by public authorities.

II.4. COPYRIGHT PREROGATIVES

Just as not all creations are protected by copyright for eternity, not all acts that are done in relation to a work come within the scope of the copyright prerogatives. Of course, limitations on the exercise of copyright prerogatives are usually conceived in light of economic rights; but, especially in copyright countries, limitations also exist with respect to moral rights with the avowed aim to give greater freedom to third parties.

¹⁵ The *Eldred* case has marked the judicial highpoint of this debate: *Eldred v. Ashcroft*, 123 S.Ct. 769 [2003].

¹⁶ *Copyright Act*, section 7. In light of the looming end of a first transitional period, pressure has been brought on the government to postpone the expiration of the protection period. It has led to the introduction of a bill to that effect which breeds similar reactions, but on a much smaller scale of course, as the 'life plus 70' debate in the United States. See *An act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, Bill C-36, 37th Parl., 2nd Session, 51-52 Eliz. II, 2002-2003 (1st reading: 8 May 2003).

¹⁷ *Copyright Act*, Section 12.

Exceptions to economic rights are not the only method through which the freedom of expression of others can be seen to thwart the copyright owner's rights. The very definition of the rights themselves can provide inherent containment. For instance, the performing right is always a shortened form of the 'right of public performance'. A recent Canadian example of definitional harness came with the Supreme Court decision in *Théberge v. Galerie d'art du Petit Champlain* where the right of reproduction was at stake.¹⁸ The issue was the lamination onto blank canvases of posters and greeting cards based on the plaintiff's paintings. The majority of the Court found that no reproduction took place in the process because the colors were transferred from one medium to the other and the 'originals' were left blank: no multiplication of copies took place. Since no reproduction occurred, the copyright owner could not rely on the corresponding right to seek redress for what he perceived had been an encroachment of his rights. For the dissenting judges, however, the defendant's activities did constitute reproductions because, over time, new manifestations of the work were made. The definition of the right can thus determine in a very concrete manner the extent to which third parties may include a work in their own expression.

The most direct reflection of freedom of expression concerns in the field of copyright rights is to be found, of course, in the exceptions to these rights. In a Commonwealth country like Canada, the prime example will be the fair dealing exception with its specified purposes of 'research or private study', 'criticism or review', and 'newsreporting'.¹⁹ There are also two specific exceptions that can be said to bear directly on the furtherance of free speech: one is to allow the report of a public lecture for the purposes of news reporting or news summary and the other is to allow the report of an address of a political nature given at a public meeting for similar purposes.²⁰ Both can be regarded, like many of the other exceptions, as specific applications of a general fair dealing principle just like, for instance, the exceptions concerning the public performance of music by religious, educational, fraternal, or charitable organizations in furtherance of their religious, educational or charitable objects.²¹

Compulsory licenses constitute another form of limitation on a copyright owner's rights. Indeed, their use can come in handy when it is judged impractical to request individual consent for the use of a work; but this latter form of approach is already a rationale for collective management without the element of coercion. When one goes beyond the efficiency considerations to set up a system of compulsory license, it is because the legislator wants to deny the copyright owner the possibility to refuse his consent to the use of the work. Those who want to use

¹⁸ *Théberge v. Galerie d'art du Petit Champlain*, [2002] 17 C.P.R. (4th) 161 (S.C.C.).

¹⁹ *Copyright Act*, Sections 29-29.2.

²⁰ *Copyright Act*, Sections 32.2(1)(c) and (e).

²¹ *Copyright Act*, Section 32.2(3).

the work may not do so for free, but at least they need not worry about the copyright owner's whims.

The author's whims were very much at the forefront of the preoccupations of the Canadian legislator when moral rights, initially introduced in 1931, were revamped in the Phase I amendments of 1987. As in all copyright countries, the moral rights that are recognized are subject to important qualifications: the right to paternity can only be asserted 'when reasonable in the circumstances';²² likewise, the right of integrity is only infringed when the use of the work prejudices 'the honor or reputation of the author'.²³ These limits, which are actually part of the definition of these rights, are designed to prevent authors from exercising their rights to the fullest because 'unhindered' moral rights are perceived as instruments that can impede the free flow of works. The right of integrity, in particular, can act as a real break on the re-utilization of a protected work by third parties.

Freedom of expression concerns are perhaps most openly articulated through the exceptions to copyright. Yet one can see that they inherently shape many of the copyright rules to some extent. Nowadays, this kind of barnessing from within is perceived as insufficient, probably because it is not upfront enough. In this kind of context, a text like the Charter of Human Rights and Freedoms has the potential to be an instrument that makes freedom of expression interests more obvious in the interpretation of the Copyright Act.

III. The Canadian *Charter* and the Copyright Act

The question to be put is the following: to what extent does the Charter change the balance that is already struck by the Copyright Act? The short answer is: not much. Copyright legislation has been around for nearly three centuries; the Charter is a much more recent phenomenon and has not yet really managed to make its mark on copyright law.

One should not forget that it is not the first time that a public law rule is likely to come in conflict with copyright law. There is a fairly long history of run-ins with the regulation of obscene works.²⁴ The first Canadian Copyright Act after Confederation in 1867 excluded from protection any 'immoral, licentious, irreligious, treasonable or seditious book or any other . . . work'.²⁵ This prohibition lasted till the coming into force, in 1924, of the Copyright Act that forms the basis of today's legislation. Nevertheless, the obscenity of some works has been questioned in some post-1924 court decisions. In *Pasickniack v. Dojacek*, the trial

²² *Copyright Act*, Section 14.1(1).

²³ *Copyright Act*, Section 28.2(1).

²⁴ On this topic in general, see R.G. Howell, 'Copyright and Obscenity: Should Copyright Regulate Content?', in *IPJ* 8 (*Intellectual Property Journal*) (1994) 139.

²⁵ *The Copyright Act, 1868*, S.C. 1868, chapter 54, Section 3.

judge found a book on the interpretation of dreams obscene and thus denied it protection; on appeal, the court reversed the decision on its facts and thus accepted that the work was protected since it was not obscene.²⁶ Nearly sixty years later and five years after the adoption of the Charter, another defendant raised the obscene nature of videotapes he had copied without authorization to deny accusations of infringement. The court recognized that the prohibition on the protection of obscene works had disappeared from the Act; yet it found that the plaintiff could only be entitled to an injunction and to damages or other monetary compensation because the sale of the tapes was an illegal activity.²⁷ A similar defence was raised in criminal proceedings the following year to deflect the accusations, but to no avail in those circumstances.²⁸ The court did refer to the Charter in that case: the 'supremacy of God', to which it alludes in its opening provision, cannot be thwarted by a freedom of expression that manifests itself through grossly immoral pornographic material that is contrary to the standards of tolerant Canadians.

While they confirm that public law rules may interfere with the application of the Copyright Act, these examples do not really lead to a fundamental challenge of the underpinnings of the statute. With the Charter provision on freedom of expression, however, a potential conflict has indeed emerged over time. Two particular problem areas have become apparent in judicial proceedings: (a) Crown copyright material; and (b) fair dealing.

III.1. CROWN COPYRIGHT MATERIAL

The advent of the Charter has not led to a questioning of the existence of Crown copyright per se. In particular, one could have expected or even welcomed a debate on the relevance of Crown copyright over statutory and judicial materials where the notion of freedom of expression could shed new light on state control over these texts that are so essential to the working of a democratic justice system.²⁹ The discussion that has come the closest to this issue is one that pertains to the access to court judgments. Otherwise, one must mention a fundamental, and rather early, case on a government publication.

In *Wilson & Lafleur Ltée v. SOQUIJ*,³⁰ a private publisher of law reports was at odds with a government agency, SOQUIJ, that both collects and publishes court judgments. As far as the collecting of judgments is concerned, SOQUIJ operates in a state monopoly environment for it is the only entity which is entrusted by law to

²⁶ *Pasickniack v. Dojacek*, [1928] 2 D.L.R. 545.

²⁷ *Aldrich v. One Stop Video Ltd.*, [1987] 17 C.P.R. (3rd) 27.

²⁸ *R. v. Ghnaim*, [1988] 28 C.P.R. (3rd) 463.

²⁹ On this debate, see J.A.L. Sterling, 'Crown Copyright in the United Kingdom and Other Commonwealth Countries', in *IPJ* 10 (1996) 157; J. Frémont, 'Normative State Information, Democracy and Crown Copyright', in *IPJ* 11 (1996) 19.

³⁰ [1998] R.J.Q. 2489.

operate an activity that allows it to obtain all judgments rendered by courts in Quebec. With such 'raw materials', SOQUIJ publishes various series of law reports. A person who wishes to obtain the judgments as they were issued by the courts may ask for a copy and pay a charge of CAN \$ 2.00 per page. This fee applies to published as well as unpublished judgments. The publishing arm of SOQUIJ, however, gets the judgments at cost. Wilson & Lafleur claimed that the situation was discriminatory and prevented it from doing business on the same grounds as SOQUIJ the publisher. In particular, it claimed that it wanted access at cost to judgments that are being left aside by SOQUIJ and that therefore its products would not be competing with those of SOQUIJ.

The freedom of expression argument was used in the following manner. Wilson & Lafleur considers itself a member of the legal press and includes freedom of the press within freedom of expression. The high costs charged by SOQUIJ prevent it from running its business on an equal footing with what is admittedly the largest legal publisher of the province. Therefore, these costs constitute a hindrance to its freedom of expression. The Superior Court of Quebec did not respond favorably to this line of argument. It found that Wilson & Lafleur's expression was not being restrained, but rather that the publisher merely suffered economic harm. Access to judgments was not being denied since it could obtain them like any other person. SOQUIJ's pricing policy does not restrain the right to information, the freedom to gather judgments, access to courts, the freedom to talk about the functioning of the justice system, and so forth. In short, freedom of expression was being trumped up as an excuse for claims of unfair competition. It is nevertheless worth noting that it was used in a context where the subject matter that was being fought over was Crown copyright material.

More to the point – and actually the earliest case on the conflict between copyright and freedom of expression – is the Federal Court of Appeal decision in *R. v. James Lorimer & Co. Ltd.*³¹ The object of contention was a one-volume abridgement of a seven-volume report titled *Canada's Oil Monopoly* that had been prepared by the Director of Investigation and Research under the then Combines Investigation Act (the former Competition Act). According to the Copyright Act, such a text was subject to Crown copyright.³² The defendant raised three separate defences to the infringement action: fair dealing for the purposes of review; public interest; freedom of expression according to the Charter.

All three defences were rejected. The Court did not find that this was a situation where the defence of fair dealing was applicable because the use of the original work was not minimal.³³ Likewise, the common law defence of public interest

³¹ [1984] 77 C.P.R. (2nd) 262.

³² *Copyright Act*, Section 12.

³³ It is often said that it is very difficult to rely on the fair dealing defence successfully. So far, there seems to be only one reported case where the defendant won on the basis of that defence: *Allen v. Toronto Star Newspapers Ltd.*, [1997] 78 C.P.R. (3rd) 115.

could not come into play because enough free copies of the report were available throughout the country; people could thus easily have access to the ideas put forth in the report.³⁴ The innovative aspect of the decision lies in the recognition that the Charter of Human Rights and Freedoms could form a defence to copyright infringement. Moreover, this seems to be the case independently of the other defences that could be available. Despite this openness towards this new type of argument in copyright litigation, the court nevertheless concludes that the Charter was of no avail to the defendant in that particular instance because the abridgement contained so little of its own thoughts, beliefs, opinions, and expression. The defendant's activity had been more akin to an act of appropriation than to one of self-expression. The freedom of expression that was to be protected by the Charter to the benefit of the defendant had to be *Lorimer's* expression and the mere abridgement of another's work could not warrant reliance on the Charter.

The *Lorimer* decision has proved to be a lucid forerunner of the later decisions on copyright and freedom of expression according to the Canadian Charter. Without stating so openly, it set the stage for the conflict between contents and form or, to put it in standard copyright parlance, between idea and expression. The Charter is probably more designed to protect contents (idea) rather than form (expression); since copyright does not protect ideas, it is likely that the spheres of protection do not really clash. A second observation is that the Charter argument, though independent, was made together with arguments based on the public interest defence and on the fair dealing exception. Although the public interest argument is much more difficult to put forward in Canada than in the United Kingdom, fair dealing has been the mainstay of the confrontation between copyright law and freedom of expression.

III.2. FAIR DEALING

One should not expect here a plethora of decisions that finely dissect the relationship between copyright and freedom of expression. Of the five cases that refer to it, only one provides substantial reasoning. Moreover, the relatively cursory dismissal of the Charter argument in the *Lorimer* case, an appeal decision, can only have had the effect of curbing what initial enthusiasm there could have been in the early years. Direct references to the Charter have however been made in cases that all arose during labour disputes. They essentially revolved around corporate logos or trademarks that had been 'distorted' by the employees' unions at times of labour unrest. That a Charter argument has been made in that context is maybe a reflection of the greater familiarity of labour law lawyers with this legal

³⁴ Unlike UK copyright law (*Copyright, Designs and Patents Act* 1988, section 171(3)), the public interest defence in Canada has no statutory connection. On this defence in general, see G. Davies, *Copyright and the Public Interest*, London, Sweet & Maxwell (2nd ed., 2002) 63 *et seq.*

instrument. Only one case in this group of five is not labour-related: it dealt with a porn version of the most popular television soap opera in Quebec where the defendant tried unsuccessfully to rely on the exception of fair dealing for the purpose of criticism.³⁵ In its analysis of the exception, the Quebec Court of Appeal declared that one needed to draw a distinction between humorous imitation for criticism or comment and appropriation for commercial opportunism, having regard to 'copyright protection as well as freedom of expression'. The reference to freedom of expression is here very general and even independent of the Charter itself. Yet, its mere mention may be regarded as a reflection that the inroads into legal reasoning that have been made in the other cases may be starting to produce a more general effect on the analysis of fair dealing beyond the narrower context of labour disputes.³⁶

Soon after the *Lorimer* decision came two other attempts to invoke the Charter protection of freedom of expression as defences to alleged infringement by the workers' union through the modification of company logos. In both instances, the argument was cursorily dismissed, though the courts paid lip service to the possibility that it could be relevant. 'While there may be situations where the guarantee of freedom of expression in paragraph 2(b) of the Canadian Charter of Rights and Freedoms may properly limit the protection otherwise given to the owners of copyright, I do not believe this represents such a situation'.³⁷ Similarly, the Charter was found inapplicable in a case where an injunction was sought to prevent the use of the parodied logo of a roast chicken restaurant chain. The court considered that the grant of the injunction would not prevent the union from informing the public about its position in the labour dispute; thus, the freedom of expression was not violated by the exercise of copyright in the logo.³⁸

Together with the *Lorimer* case, these two decisions seemed to indicate a general unwillingness to explore the reasoning required by this line of argument, an argument which forces all parties to rethink the concepts of infringement and the role that defences that are extraneous to the Copyright Act can play. Although unmentioned, one can again perceive the tension between contents and form where copyright protection and the Charter might be operating on two different fields. The decisions make no reference to the fair dealing defence. Yet, they are regularly

³⁵ *Productions Avanti Ciné-Vidéo Inc. v. Favreau*, [1999] 1 C.P.R. (4th) 129 (Que. C.A.).

³⁶ The *Avanti* decision is but two years after the more fundamental *Michelin* case. See, *infra*, the text accompanying note 40.

³⁷ *Canadian Tire Corporation Ltd. v. Retail Clerk Union, Local 518 of United Food & Commercial Workers Union*, [1985] 7 C.P.R. (3rd) 415, at p. 420.

³⁸ *Rôtisseries St-Hubert Ltée v. Le Syndicat des Travailleurs(euses) de la Rôtisserie St-Hubert de Drummondville (C.S.N.)*, [1986] 17 C.P.R. (3rd) 461, at p. 476.

cited when the next case is discussed, most probably because of the similarity in the fact patterns.³⁹

The *Michelin*⁴⁰ case, about a parody of the Bibendum man, is indeed the most explicit decision on the conflict between copyright protection and freedom of expression as guaranteed by the Charter. Thirteen years after the *Lorimer* decision, it bravely renews with an analysis that combines the freedom of expression defence with a pleading of fair dealing. Once again, the fair dealing exception is set aside: the court refuses to consider that parody can come within the notion of criticism and insists on the technical identification requirements of the statute. The analysis of the Charter argument is handled separately as the Court wonders if the parodies are protected by the Charter provision on freedom of expression. Its answer is both specific to the case and general; and the outcome is, once again, favorable to the copyright owner.

The first step in the reasoning is a property argument. The Court considers that one cannot use another's private property right (copyright protected material) to express one's self. If one does use such property, then he must demonstrate a use that is compatible with the function of that good. That function of copyright calls into question a second consideration, i.e. the general purpose of copyright protection. Framed in a Charter perspective, it leads to an interrogation as to the nature of copyright law along the following lines: is the object or effect of the Copyright Act to restrict freedom of expression? The answer to that question is negative because the rights that are granted by the Act are justified in a free and democratic society (language that directly refers to the first article of the Charter). The objectives sought by a statute like the Copyright Act are important enough to justify the suppression of a fundamental right and the means that are used to implement these objectives are in themselves reasonable and justified.

In comparison with the earlier case law, the *Michelin* decision is more explicit and articulates its reasoning according to a more usual Charter language. It also avoids the contents/form discourse that underlay the conflicts as they were presented. However, the conclusion it draws with respect to the general appreciation of the Copyright Act in light of the Charter seems to put a break on any further analysis of the relationship between the two sets of rights. If copyright law as a whole can withstand the pressure of the freedom of expression value that is enshrined in the Charter, how can a single notion within copyright law itself, however fundamental it is, fare better? One can only expect that

³⁹ See D. Vaver, *Copyright Law*, Toronto, Irwin Law (2000) p. 193, footnote 109; J.S. Mc Keown, *Fox on Canadian Law of Copyright and Industrial Designs*, 3rd ed., Toronto, Carswell (2000), p. 585, footnote 118. One should also appreciate that the fair dealing defence has been almost ignored by litigants until the 1990s.

⁴⁰ *Cie Générale des Établissements Michelin – Michelin & Cie v. C.A.W. Canada*, [1996] 71 C.P.R. (3rd) 348.

copyright litigants and courts will pay lip service to the Charter, just as happened in the *Avanti* decision two years later.⁴¹

Indeed, the last case in this Canadian survey is already a reflection that the Charter argument does not lead anywhere in a copyright analysis; it may however become more useful in 'peripheral' reasoning. During interlocutory injunction proceedings over alleged copyright infringement by a union whose web site had similar interface, logos, addresses, etc. as the plaintiff's own, a fair dealing defence was raised and met with the same result as *Michelin*.⁴² The Charter right to freedom of expression was also pleaded by the union, but in a different manner than what had been done previously. The union argued that its right to freedom of expression was being limited by its inability to appropriate or get at the plaintiff's intellectual property rights. The argument was rejected in relation to copyright, but accepted with respect to passing off: the common law was not to be interpreted in a way that unreasonably infringes a person's freedom of expression. Consequently, the injunction sought by the plaintiff was not granted because, furthermore, the balance of convenience favored the union.

IV. Conclusion

At the end of this exercise, it feels like being back to square one. Although there have been some attempts to come to grips with a fundamental right like freedom of expression, Canadian copyright law remains unaffected. Is this Canadian experience unique? At this point, it might be worth looking at recent developments in this area in the United Kingdom, a country that shares with Canada both constitutional and copyright roots. Moreover, despite some differences, there are interesting similarities in the way copyright law is confronted with freedom of expression in both countries. The European Convention on Human Rights was signed in 1950, but implemented in the United Kingdom only through the Human Rights Act 1998 which came into force in 2000. The Human Rights Act thus incorporates the right to freedom of expression in a statute separate from the Copyright Act and, like its Canadian counterpart, allows for this right to be overridden by other concerns.⁴³ However, that separate statute does not have in

⁴¹ *Production Avanti Ciné-Vidéo Inc. v. Favreau*, *supra*, note 35.

⁴² *British Columbia Automobile Association v. Office and Professional Employees' International Union, Local 378*, [2001] 10 C.P.R. (4th) 423.

⁴³ On this issue in UK law in general, see J. Griffiths, 'Copyright Law and Censorship – The Impact of the Human Rights Act 1998' in E.M. Barendt & A. Firth (eds.), *The Yearbook of Copyright and Media Law 1999*, Oxford, Oxford University Press (1999), p. 3; T. Pinto, 'The Influence of the European Convention on Human Rights on Intellectual Property Rights', in *EIPR* (2002) 209; M. D. Birnhack, 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act', in *Entertainment Law Review* (2003) 24; C. Ryan, 'Human Rights and Intellectual Property', in *EIPR* (2001) 521; J. Griffiths, 'Copyright in English Literature: Denying the Public Domain', in *EIPR* (2000) 150. From a

UK law the constitutional stature of the Canadian Charter of Human Rights and Freedoms. Another difference in this debate is that the public interest defence in the United Kingdom has some statutory basis in the Copyright, Designs and Patents Act 1988.⁴⁴ It is relevant in the present context because many cases that are brought to court and that pit copyright against freedom of expression combine arguments based on both fair dealing and public interest. Lastly, the UK cases often refer to breach of confidence or breach of fiduciary duty, as well as to passing off, something to which the Canadian fact patterns did not lend themselves easily.

Before the coming into force of the Human Rights Act, allusions have been made to the protection of the freedom of expression guaranteed by the European Convention on Human Rights in some major cases of copyright infringement. In both the *Spycatcher*⁴⁵ and the *Blake*⁴⁶ decisions, defences that were somewhat related to freedom of expression were of no serious avail. The situation changed, however, with the Human Rights Act since that statute had become very clearly part of the law of the land. So far, the high point of judicial analysis on the relationship between the freedom of expression of the Human Rights Act and copyright law has been the appeal decision in the *Ashdown* case.⁴⁷ In this case about the publication of the verbatim transcript of private meetings between high profile politicians, both the fair dealing and the public interest defences even rejected. The Court then examined the impact of the Human Rights Act on copyright law. It found that the Copyright Act already restricts rights in a necessary fashion in light of freedom of expression concerns and that conflicts will occur only in rare cases. It seems to tie freedom of expression to the public interest defence, but recognizes that it may stand alone as a factor to consider, especially when an injunction is sought. Similar general observations are made, but with an even less interventionist approach, in a subsequent case where an interim injunction was sought to restrain the publication of some confidential

cont.

more general European perspective, see H. Cohen Jehoram, 'Freedom of Expression in Copyright Law', in *EIPR* (1984) 3; C. Caron, 'La Convention européenne des droits de l'homme et la communication des œuvres au public: une menace pour le droit d'auteur?' in *Communication, Commerce Électronique* No. 1 (1999) 9; F. Dessemontet, 'Copyright and Human Rights' in J.J.C. Kabel & G.J.H.M. Mom (eds.), *Intellectual Property and Information Law-Essays in Honour of Herman Cohen Jehoram*, The Hague, Kluwer (1998), p. 113; P.B. Hugenholtz, 'Copyright and Freedom of Expression in Europe' in R.C. Dreyfuss, H. First & D.L. Zimmerman (eds.), *Innovation Policy in an Information Age*, Oxford, Oxford University Press (2000), p. 1.

⁴⁴ See, *supra*, note 34.

⁴⁵ *Attorney General v. Guardian Newspapers Ltd.*, [1990] 1 A.C. 109.

⁴⁶ *Attorney General v. Blake*, [1998] 1 Ch. 439.

⁴⁷ *Ashdown v. Telegraph Group Ltd.*, [2001] 4 All E.R.618. See L. Joseph, 'Human Rights versus Copyright: the Paddy Ashdown Case', in *Entertainment Law Review* (2002) 72.

documents.⁴⁸ There, the fair dealing defence is immediately rejected and the consideration of the public interest defence leads to the conclusion that the end result would favour the plaintiff. The Court is also of the opinion that courts have already been taking into account freedom of expression interests well before the Human Rights Act and that this Act does not change the emphasis that is to be put on that principle in the interpretation of the law.

From the foregoing, one cannot say that, in Canada as well as in the United Kingdom, the official recognition of freedom of expression has revolutionized copyright law. There is no enthusiastic embracing that has led to the revisiting of the statutes. Because of a very weak public interest defence in Canada, recourse to freedom of expression analysis is less extensive in that country than in the United Kingdom. Yet, despite the possibilities to reason in the context of special doctrines within copyright law, the courts in both countries have not hesitated to comment on the overall scheme of the copyright statutes. Given the kind of language that can be found in the latest decisions, one suspects that the high point in this debate has already been reached and that freedom of expression arguments will be relegated to last ditch marginal pleadings.

This attitude is quite different from what continues to happen in the United States where references to free speech arguments continue to be made regularly.⁴⁹ How can one explain such a phenomenon? The reason may lie in the history of the relationship between copyright law and freedom of expression. The first US copyright statute dates from 1790 while the First Amendment to the Constitution, which protects free speech, came the following year. Not only have both concepts evolved along each other from their very beginnings, but both share a constitutional legitimacy which has no equivalent in Canadian and, *a fortiori*, in UK copyright law. It should take a very long time before Canadian law evolves to such a point as to close the gap between such differences.

⁴⁸ *Imutran Ltd. v. Uncaged Campaigns Ltd.*, [2001] All E.R.(D) 08.

⁴⁹ See, for instance, the case about *The Wind Done Gone*, the novel based on Margaret Mitchell's *Gone With the Wind*: *Suntrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257 (11th Cir. 2001).