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Authors' Rights as a Limit to Copyright Control

- DRAFT -

ONLY FOR CITATION UPON PERMISSION OF THE AUTHOR

Authors' rights in copyright often threaten creativity. While copyright is intended to support the production of creative works, it can be used to restrict that production where the creative works depend upon previous works. Authors' rights are often seen by copyright's critics as part of the problem of copyright's excesses. Giving authors greater control under copyright would allow authors to block the creativity of the creator who relies upon prior works.

By contrast, this paper will argue that authors' rights can be part of the solution to copyright's excesses. The UK and US have a tradition of authors' rights. Strengthening authors' rights will aid authors in conflicts against copyright owners. Where an author has transferred copyright ownership to a corporation or conglomerate, and the author then comes into conflict with the copyright holder, the author can fall back on authors' rights. Moral rights are one example.

Embracing authors' rights also can protect creators of so-called 'secondary' works. Current critics of copyright often avoid using the term 'authors' with respect to the users of copyright works. These creators are labeled 'users', or simply 'the defendants'. Lawrence Lessig prefers the terms 're-mixers', or 're-coders.' Creators who recode or mix past works, and use those past works in their own creative productivity, are often threatened by authors and exploiters of the copyright of the primary works. Yet re-coders are themselves authors. Giving full recognition to authors' rights will deepen the protection that must be given to re-coders for their expression.

I would like in this paper to recall the authors' right tradition on the Anglo-US model of copyright, and to embrace it – for the protection of all authors, the so-called primary and the so-called secondary ones. Authors' rights can aid the author – both primary and secondary - in a conflict against the copyright owner.

While copyright and the freedom of expression often conflict, they also have close parallels. Their historical roots, theoretical backdrop, and certain aspects of current law show this. Once authors' rights are seen as arising from freedom of expression and necessitated by it, the rights of both authors – all authors, even those who expressly refer to earlier authors – will be strengthened.

Many of the concepts discussed here will be familiar; but I am advocating a shift in their legal conceptualisation. The argument put forward here is about more than a nuance in language. Conceptualizing re-coders as authors can effect change. The implications for the development of doctrine itself will be discussed in the final section of the paper. I will discuss UK and US law.

I The Authors' Rights Tradition

The Anglo-US copyright model is often framed as being about creating incentives for creative production. The idea is that where creators and producers have the incentive of financial rewards, they will continue to produce. The creation and communication of works will increase. Given such incentives to disseminate works, authors and media entrepreneurs are thought to be more likely to maximise the information available to society. The Statute of Anne in 1709 was titled: 'An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies'.¹ Under the US Constitution copyright bears the same purpose, to promote the Progress of Science and useful Arts.²

The model of authorial rights is painted as a contrast. That tradition of *droit d'auteur* is at the base of Continental civil law systems, and is seen to differ greatly with the common law system. Yet a number of scholars have shown that the Anglo-US model also entails recognition of authors' rights of expression.

The historical roots of the two systems show that there are great similarities. Paul Edward Geller and Jane Ginsburg have shown that the copyright common law model shares important elements of the civil law authors' rights model, and vice versa.³

In UK and US law, the development of copyright arose alongside the development of the right of freedom of expression. Pamela Samuelson has written of the parallels in the developments of the First Amendment and the Copyright Clause of the US Constitution.⁴

¹ (1709) Anne c.19. The Statute of Anne is often dated 1710. Yet the statute was passed in February, and until 1752 when England went over to the Gregorian calendar, the legal year began in March. Stina Teilmann *British and French Copyright: A Historical Study of Aesthetic Implications* (PhD University of Southern Denmark 2004) n42.

² United States Constitution Art 1 sect 8 cl 8 ('The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.')

³ Paul Edward Geller, "Must Copyright be Forever Caught between Marketplace and Authorship Norms?" in Brad Sherman and Alain Strowel *Of Authors and Origins* (Oxford: Clarendon Press 1994); Jane C Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" in Sherman and Strowel (eds).

⁴ P. Samuelson, "Copyright, Commodification, and Censorship: Past as Prologue – But to What Future?" in N.W. Netanel and N. Elkin-Koren (eds), *The Commodification of Information* (The Hague: Kluwer Law International, 2002), 68.

Neil Netanel has shown copyright to support the system of free speech, from the time of its birth: Copyright allowed the development of art without the need for patronage.⁵

In addition to the historical consonances, copyright and the freedom of expression may be seen to operate in parallel, at least in theory – without copyright’s excesses. The function of copyright to promote expression has been noted in the oft-cited case *Harper & Row, Publishers, Inc v Nation Enter*, calling copyright ‘the engine of free expression...’⁶ Fiona Macmillan calls a possible argument for copyright the encouraging and protecting of cultural output as an expression of human autonomy and diversity, and as a means of communication.⁷

I am not suggesting that there are no points of conflict between copyright and authors’ rights. Those conflicts are many. Nor am I advocating that the UK adopt the European *droit d’auteur* model. Rather, I am pointing to a tradition of authors’ rights that exists on the Anglo-US model. It is coherent with the strong freedom of expression tradition in Anglo-American law, and which continues to be strengthened. Once authors’ rights are seen as a fundamental right of expression, and as present in the free speech principle and doctrine, the protection they offer will be stronger.

In addition to the historical roots and theoretical points in tandem, recent developments support the coherence between copyright and an Anglo-US vision of authors’ rights. The recent adoption in the US and UK of authors’ moral rights is in line with the recognition of authors’ rights in those jurisdictions. The statutes were passed in respect of those nations’ obligations under the Berne Convention for the Protection of Literary and Artistic Works.⁸

In the UK, the Copyright, Designs and Patents Act 1988, Chapter IV, provides for moral rights: most notably, the right of integrity and the right of attribution. In the United States, the Visual Artists’ Rights Act 1990 provides for limited moral rights protection for visual artists. I have argued at an earlier Network conference that the integrity right protection against distortion of expression is a principle that arises independently in the freedom of expression doctrine.⁹

⁵ N.W. Netanel, “Copyright and a Democratic Civil Society”, 106 *Yale L.J.* 283 (1996), 288. See also Neil Netanel *Copyright’s Paradox: Property in Expression/Freedom of Expression* (OUP forthcoming).

⁶ 471 U.S. 539, 558 (1985).

⁷ Fiona Macmillan “Commodification and Cultural Ownership” in Jonathan Griffiths and Uma Suthersanen (eds) *Free Speech and Copyright* (OUP 2005) 3.40.

⁸ S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 3706 (1986). I am not taking a position here as to whether those statutes sufficiently fulfill the nations’ obligations under Berne.

⁹ Leslie Kim Treiger-Bar-Am ‘The Moral Right of Integrity: A Freedom of Expression’ in Fiona Macmillan (ed) *New Directions in Copyright in Copyright* vol 2 (Edward Elgar Cheltenham, UK and Northampton, MA, US 2005).

The introduction of moral rights into Anglo-US law cannot then be called an anomaly, or a foreign transplant to the Anglo-US copyright model. Rather, it has arisen from growing acceptance of authors' rights, and is in line with principles already existent in Anglo-US law. It can be said to fit in with an already existent Anglo-American authors' rights tradition.

It also develops that tradition. The integrity right, as with other authors' rights, can be used by an author in a conflict with a copyright owner. Even once copyright passes out of the author's hands, the author retains control under moral rights, specifically to prevent the distortion of her work. The author should be able to stop a copyright holder or other owner of a work from using it in distortive ways. This right could give protection against copyright holders who use copyright in abusive ways, for instance by commercializing a work against the wishes of its author.¹⁰

The topic I would like to focus on today is the use of the authors' rights tradition to protect so-called secondary user of a copyright work.

II Embrace that Tradition

There is hesitance among copyright's critics towards embracing the authors' rights tradition. Behind this hesitance appears to lie a fear lest its strength underscore the excessive rights of the copyright holder: imbuing copyright doctrine with the authors' rights trope could strengthen copyright where it is already too strong. The use of copyright material by other creators would be restricted under an authors' rights regime.

The *droit d'auteur* tradition in Europe is often viewed with suspicion in this way in the UK and US. They are seen as reflecting an old, burdensome tradition. It is feared by critics of copyright that seeing authors' rights in such broad scope will threaten re-coders' rights further: The re-coders will be restricted even moreso than at present, by copyright owners but also by the primary authors, even once those primary authors have sold the copyright. It would double the actors who can restrict creative remixing.

An example of authors' rights being expansive may arguably be seen in the successful restriction of creative reinterpretations of a work of art. For example a French court blocked the performance of the play *Waiting for Godot* by women, given Samuel Beckett's instructions that this not be done. (We'll see below however the limits of this expansive doctrine.)

Yet I submit that the authors' rights tradition ought to be embraced. Here we will look not to the Continental tradition, but to Anglo-US doctrine. The authors' rights tradition has a strong place, and rightfully so, as a protection of authorial expression. The authors' rights tradition protects *authors*. Who may be called an author? We will see that the *creator, remixer, re-coder* – is also an *author*. Those creators are rightly labeled

¹⁰ Jane M Gaines, *Contested Culture: The Image, the Voice and the Law* (London: BFI 1992).

so. The term ‘author’ can, and should, be attributed to them. Authors’ rights can, and should, protect them.

III Creativity

Creativity works through influences and inspirations, through borrowing, copying, and using. Creativity generally can be called remixing. Even so-called primary works are remixes of earlier works. The ‘primary author’ is often a user, and in fact a secondary user at some level. Even with a touch of newness in the creation, much will have been influenced by what went before. And the reverse is true as well: the user, or ‘secondary author’, is a primary author as well.

Adaptations are a central means of creativity in all of the art forms. We can see this in each of the artforms: in music, literature, visual arts, and also digital works.

Shakespeare’s works are based upon tales previously told. Of course Shakespeare’s works have then been used and adapted in a variety of ways. This is so with Hans Christian Andersen as well.¹¹ With musical works, adaptations are made of primary works. The Brentano String Quartet’s ‘Bach Perspectives: Ten Composers React to the Art of Fugue’ is an example: the Quartet asked 10 composers to compose pieces responding to the Bach work.

We can see numerous examples of creative transformations in visual art. Raphael and Marcantonio’s *Judgment of Paris* took the assembly of figures from a Hellenistic sarcophagus; and Manet took the assembly as the centerpiece of his *Dejeuner sur l’herbe*.¹² We call Manet the artist, or in copyright terms, the author of his work.

Rembrandt’s drawing of *The Last Supper* (1635) after of Leonardo Da Vinci’s *The Last Supper* (1495-8) is an interpretation, or variation, or a remixing of the earlier work. We call Rembrandt the artist, or author, of his work.¹³

In Marcel Duchamp’s *LHOOQ* the artist placed a moustache on a copy of Da Vinci’s portrait of the Mona Lisa. This use can be called borrowing, or copying, or remixing of Da Vinci’s work. It came along with a transformation of it: Duchamp wrote that with the moustache, he had turned the Mona Lisa into a man.¹⁴ In Duchamp’s work

¹¹ See Leslie Kim Treiger-Bar-Am, “Adaptations with Integrity”, in Helle Porsdam (ed) *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (2006).

¹² Lisa Pon *Raphael, Dürer, and Marcantonio Raimondi: Copying and the Italian Renaissance Print* (New Haven and London: Yale Univ Press 2004) 1-2.

¹³ See Nelson Goodman and Catherine Z Elgin *Reconceptions in Philosophy and Other Arts and Sciences* (London: Routledge 1988).

¹⁴ cited in Arturo Schwarz, *The Complete Works of Marcel Duchamp*, vol. 1 (2d ed., London: Thames and Hudson, 1997) at 477 (citation omitted).

Rasee, he shaved his earlier work: the moustache is removed. This is a transformation of his earlier transformation of Da Vinci's work.

Picasso's studies of Velazquez's *Las Meninas* (or *The Maids of Honor*)(1656), are another example.¹⁵ At the age of 76, three hundred years after *Las Meninas*, Picasso painted over 40 variations of Velazquez's work. We can see variations of the whole painting, and of the details of the maids and the princess.

Other examples include numerous uses of images of Rodin's *The Thinker*.¹⁶ Another is a creative image arguably using both Barbie and Minnie Mouse, it seems to me, by Jane Fairhurst. It is entitled 'Hybrid Minnie' [2004].

The work of Elaine Sturtevant involves copies, or what the artist calls repetitions, of prior works. She has represented many of Andy Warhol's works. We can see these works as examples of transforming creations, on a spectrum of creativity which has long done just that.

Transformations also abound where different artforms meet – literary, musical and visual - such as with digital works. The remix of Lionel Richie's *Endless Love* as a duet between Bush and Blair is an example.

Images abound. They surround us in culture, and our culture surrounds us in our world. Just like all of us, artists read papers and see films and listen to music, and also view images of previous artworks. The question becomes what the artist does with that previous image.

Transformation can be through a change in context, materials, scale, display. The image itself is just one element of the work. But also, referring to another work is an integral part of art because: Art is about art.

When one artist relies on another, a central question to ask is: why is the artist doing it? The relevant artistic inquiry is perhaps not - is it copied or is it an original or authentic image? But rather – what is happening in that relying? What is the quality of that referral? What is the purpose of the referral?¹⁷

The artist's purpose may often be difficult to ascertain. We can see this for example with respect to the works of Sturtevant. In response to her creations already in the 1960s, Warhol was asked what the works were about, and he famously responded, 'I don't know. Ask Elaine.'

¹⁵ Nelson Goodman and Catherine Z Elgin, *Reconceptions in Philosophy and Other Arts and Sciences* (London: Routledge 1988).

¹⁶ See Albert E Elsen, *Rodin's Thinker and the Dilemmas of Modern Public Sculpture* Exploitation of the Thinker (New Haven: Yale University Press 1985).

¹⁷ I am indebted to discussion with Michael Archer on this point.

Consider the photographs that Sherri Levine has made of other works, and then also the further works based on those photographs, in other media. The questioning of the nature of an original and a copy, that these artists may well be asking, is not the point I wish to address here. Certainly a court should not be asked to determine the meaning of a work of art.¹⁸ Yet the author's intent is central. There is intent to 'copy', yes. But there is also intent to transform.

UK law indeed looks to the object and purpose of defendant's work.¹⁹ The Canadian court's statement in *CCH Canadian Ltd v Law Society of Upper Canada* can be illuminative, albeit from a different context:

courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work.²⁰

A Conflicts

Transformations of artworks often engender conflicts. An example is Christo's *Gates*, erected last year in Central Park. Arguably it was a re-coding of the work of art that the Park represents. Christo's project was in fact rejected twenty years earlier by the NYC Parks Commissioner because of the change in meaning to the Park that his re-coding or transformation would bring about.²¹

A type of creation involving the 'remixing' of earlier works that the law is very familiar with is parody. Authors and copyright holders of earlier works will often claim infringement by other authors parodying those earlier works. An example is the lawsuit that arose over the parody of Annie Leibovitz's photograph of Demi Moore. That work was itself a 'secondary', 'remixed' work, in some sense: the court noted that Demi Moore's position in the photo was evocative of Botticelli's *Birth of Venus*. Nevertheless this work was considered the 'primary' work in the case. The photograph attracted widespread attention, and the issue of *Vanity Fair* in which it appeared became one of the magazine's best selling issues of all time.

Paramount Pictures, in connection with its forthcoming release of the motion picture *Naked Gun 33 1/3: The Final Insult* with the actor Leslie Nielsen, publicised a "teaser" advertising campaign. Nielsen's face was superimposed on readily recognizable

¹⁸ Leslie Kim Treiger-Bar-Am, "Christo's *Gates* and the Meaning of Art: Lessons for the Law" [2005] *European Intellectual Property Review* 389.

¹⁹ Sir Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs* (3rd edn, London: Butterworths, 2000) at 4.54, 3.134, 3.139.

²⁰ [2004] 30 CPR (4th) 1 para 54 (citations omitted). For an analogy in libel law, and an argument that the law must there too look to the author's real purpose or intent, see "Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege", 98 *Yale LJ* 1215 (1989).

²¹ Leslie Kim Treiger-Bar-Am, "Christo's *Gates* and the Meaning of Art: Lessons for the Law" [2005] *European Intellectual Property Review* 389.

photographs of famous women. The composite photograph depicting Nielsen as the pregnant Moore announced, 'DUE THIS MARCH'. (The film was to be released in March 1994.) The US Circuit Court protected the parody against Leibovitz's copyright suit.²²

US Circuit courts also have recently upheld the right of the parodist-artist to her expression. In *Mattel Inc v. Walking Mountain Productions*,²³ an artist's use of images of Barbies in ironic positions and situations was again protected as a parody. Parodies of Mickey Mouse have not been so fortunate, such as with the *Air Pirates* case.²⁴

Returning to literary works, the case of *Suntrust Bank v. Houghton Mifflin Co*,²⁵ illustrates the obstacles that copyright poses to creativity when works refer to previous works. The novel 'A Wind Done Gone', followed a similar story line as in the Margaret Mitchell novel 'Gone with the Wind', but as seen through the eyes of the slaves. The new novel was protected as a parody. We'll return to this opinion again below.

Therefore, if the images of a former and a later work are substantially similar, there may well be a claim of copyright infringement. If the images in the two works are closely enough related but with distortive differences, there may be a claim of moral rights violation. But the second work may well be transformative. Creativity is itself transformation of what came before – whether the transforming work is inspired or influenced by, or refers or reacts to the former work and artistic genre. The law must recognise transformative uses of previously created material. One means of limiting copyright's excesses is, then, to recognise authors' rights and fully support them: the so-called 'primary' and 'secondary' authors, the so-called 'original' and 're-coding' creators, who together can be called, the authors..

IV How can Transforming Authors be Protected?

Can a tradition of authors' rights allow for protection of rights of authors who build on the work of earlier authors? France has a strong tradition of *droit d'auteur*. Yet it also protects transformative use. Christophe Geiger has spoken to this Copyright Network of French and other European court decisions upholding the fundamental rights of expression of users of copyright works.²⁶ Alain Strowel has written of the French approach to transformative use.²⁷ France and Belgium have parody exceptions in their

²² *Leibovitz v Paramount Pictures Corp.*, 137 F3d 109 (2d Cir 1998).

²³ 353 F3d 792 (9th Cir 2004).

²⁴ *Walt Disney Productions v Air Pirates*, 581 F2d 751 (9th Cir 1978).

²⁵ 252 F3d 1165 (11th Cir 2001).

²⁶ In particular, Geiger considers the public's right to information.

<http://www.copyright.bbk.ac.uk/contents/workshops/workshopheme5.shtml>

See Christophe Geiger, 'Author's Right, Copyright and the Public's Right to Information: A Complex Relationship', in Fiona Macmillan (ed), *New Directions in Copyright Law* vol 5 (Elgar Publ 2006)(forthcoming)

²⁷ in *Copyright and Free Speech*, Griffiths and Suthersanen (eds) (OUP 2005), at 12.19.

copyright laws. The EC Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright, allows for the protection of caricature, parody or pastiche, against copyright claims (Article 5(3)(k)).

An example of legal recognition of transformative use within *droit d'auteur* systems in civil law countries is the variety of legal responses to interpretations of *Waiting for Godot*. As we have seen, in France in 1992, Samuel Becket won a claim against a director wanting to cast *Waiting for Godot* with women.²⁸ Yet Beckett's estate lost two similar challenges, one in Belgium and one just recently in Rome.²⁹

The focus of the discussion here is the protections offered to transformative creativity in Anglo-US doctrine.

A *Fair Use*

Copyright doctrine has a number of tools to defend users from claims of copyright infringement. The fair dealing exceptions under UK law, and the fair use defence under both UK and US law, offer limited protection to the transforming author. Those doctrines can, I believe, be strengthened by bringing forward the conception of authors' rights. First UK and then US law will be discussed.

1. UK

In the UK, fair dealing enumerates non-infringement for copying, for example for the purposes of criticism and review, and news reporting.³⁰ UK law recognizes fair use as well.³¹ Transformative use is not widely enough protected. Yet arguably the doctrine is present – and should be recognised as such. UK law protects a work that has made sufficient changes to a previous work so that the subsequent work is no longer substantially similar to the previous work. That is in essence a defence of transformative use.

To explain more fully: Under UK law, infringement is found where a substantial part has been taken.³² Courts examining a copyright claim of infringing use will look not at how much has been changed, but how much has been taken from the primary work. UK law holds that no matter how much the defendant added -- and how new or original

See also Frederic Pollaud-Dulian, *The Internet and Authors' Rights* (Perspectives on Intellectual Property series vol 5)(London: Queen Mary Intellectual Property Research Institute, and Sweet and Maxwell 1999).

²⁸ TGI Paris, 3e ch, Oct 15, 1992.

²⁹ *The Guardian* (Feb 4, 2006).

³⁰ Copyright, Designs and Patents Act 1988 s.30).

³¹ Sir Hugh Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs* (3rd edn, London: Butterworths, 2000) at 4.54, 3.134, 3.139.

³² *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210; *Williamson Music Ltd v P Carson Partnership Ltd* [1987] FSR 97.

her work is -- if she has copied a substantial amount from the primary work, then copyright infringement will be found.³³

This was not always the case. Copyright doctrine started by prohibiting the copying – ie printing – of whole books or articles.³⁴ This was also the case with visual works, where reprinting came to be restricted. One of the earliest copyright cases involved direct reprints: Vasari writes of Albrecht Dürer’s prints being reproduced by Marcantonio in the 16th century, with Dürer’s monogram being reproduced as well. The relief Dürer won at the Senate was that while the reproductions could continue, they could not bear his monogram.³⁵ Hogarth’s prints were copied and sold cheaply, and his efforts resulted in passage of the 1735 Engravers' Copyright Act, often called ‘Hogarth's Act.’ For law, the work is the image. But it is much more as well, as we saw above.

Even as copyright expanded, UK law allowed transformative use more broadly than at present: The question was not necessarily how much was copied, but how much was changed. The case of *Joy Music* allowed for parodies, on that line of reasoning.³⁶ That legal doctrine has changed. Now UK law looks to how much was taken.

Yet it can be said that there is still a transformative use defence. Where a secondary work sufficiently changes the (copied) elements of the primary work, the copying may well be found *not* to be substantially similar to the primary work. Even where the change is one of context – if original elements of the primary work are removed from their context and given a sufficiently different context, that change may alone be sufficient for the secondary work to be considered non-infringing.

In *Designers Guild*, Lord Scott essentially acknowledged transformative use when he said that with altered copying, if ‘the alterations are sufficiently extensive it may be that the copying does not constitute an infringement at all.’³⁷ Even where there is direct

³³ Cf *Campbell v Acuff-Rose Music Inc*, 510 US 569, 570, 579, 599 (1994), where a ‘new work’ is protected. The outcome of UK and US law may however be similar in that if ‘a work targets another for humorous or ironic effect,’ it will be protected as it ‘is by definition a new creative work’, *ibid* at 598-9.

³⁴ Benjamin Kaplan *An Unhurried View of Copyright* (Columbia Univ Press NY 1967); Stina Teilmann ‘On real nightingales and mechanical reproductions’ in Helle Porsdam (ed) *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (2006).

³⁵ G Vasari *The Lives of the Painters Sculptors and Architects* (AB Hinds transl) (London: JM Dent and Sons Ltd 1927) (vol 3) 71-2. Pon gives a somewhat different account, taken from the Nuremberg council’s records. L Pon *Raphael, Dürer, and Marcantonio Raimondi: Copying and the Italian Renaissance Print* (New Haven and London: Yale Univ Press 2004) 139-40.

³⁶ eg *Joy Music Ltd v Sunday Pictorial Newspapers Ltd* [1960] 2 QB 60. See Laddie 3.142 (on parodies); see also Kaplan 17 (on adaptations).

³⁷ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11 para 64 p 131.

evidence of copying, 'the differences between the original and the copy may be so extensive as to bar a finding of infringement.'³⁸

Commentators note this as well. Cornish and Llewelyn note that the 'fact that the defendant has himself added enough by way of skill, labour and judgment to secure copyright for his effort does not, under present law, settle the question whether he has infringed.'³⁹ Yet as long as what he has taken he has changed enough so that no 'substantial part of the plaintiff's work survives in the defendant's work', then a defence will stand.⁴⁰

Laddie suggests that the device of substantial part doctrine will often be used to protect a transformative use such as a parody or a change of context, namely the court will find that no substantial part has been taken – *because* of the alteration to the material.⁴¹ In borderline cases, it may make a difference how much further skill and labour the defendant bestowed on his own work so as to give it original character; it is a question of fact and degree.⁴²

I do not believe that Laddie's reference to a 'device' that courts will use implies that it is underhanded. Rather, it is pointing out a judicial methodology for identifying transformative works, within the UK doctrinal structures.

Yet a bolder doctrinal development should be made. The protection of transformative use is ought to be made more explicit. It must be recognised that creativity relies upon transformation. The protection of the expression of authors who are influenced by and borrow from prior authors, should be expressly formulated in legislation and/or judicial determinations.⁴³

Legal doctrine already protects transformative authorship, as I have argued: the law ought to, as well, directly provide for such protection, and call it not a device, but a legal doctrine by a proper name. And that name ought to be authors' rights.

³⁸ Ibid at para 65 p131.

³⁹ WR Cornish and D Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th edn Sweet and Maxwell London 2003) 11-09.

⁴⁰ Cornish and Llewelyn 11-09.

⁴¹ Laddie 3.142 on parody; Laddie 3.139 (alteration of material or removal from its context); Laddie 4.54 (where use is considered fair, the formal legal conclusion would be that no substantial part of claimant's work had been taken);.

⁴² Laddie 4.55.

⁴³ Christophe Geiger discusses the hesitance of legislatures, and the judicial solutions found to limit copyright's excesses, Christophe Geiger, 'Author's Right, Copyright and the Public's Right to Information: A Complex Relationship', in Fiona Macmillan (ed), *New Directions in Copyright Law* vol 5 (Elgar Publ 2006)(forthcoming) [text at nn49-50, 73].

Is the name fair use any better? It also has its weaknesses where it is devoid of an authors' right framework, as we will see in looking at US law. This discussion is relevant for UK law as well, insofar as the UK law relies on fair use balancing as well, as seen above.

2 US

The US copyright statute by its very terms is restrictive: prohibited uses of a copyright work which violate the copyright holder's exclusive right to 'derivative' uses of it, are defined to include uses in which the work is 'transformed'.⁴⁴ Fair use is, however, a defence.

Fair use offers protection to transformative works, as the US Supreme Court stated in *Campbell v Acuff-Rose Music Inc.*⁴⁵ In the US, statutory law enumerates factors for courts to consider to determine if the copying may be defended as fair use: the purpose and character of the allegedly infringing work (commercial? transformative?); nature of the copyrighted work; amount and substantiality of the portion used; and the effect of the market value on the original.⁴⁶

The factors are similar to those considered under fair dealing in UK law: '(1) whether the alleged fair dealing is in commercial competition with the owner's exploitation of the work, (2) whether the work has already been published or otherwise exposed to the public and (3) the amount and importance of the work which has been taken.'⁴⁷

The fair use doctrine needs strengthening. In the US copyright doctrine, fair use is said to protect defendant's expression rights; yet it is often labeled a privilege.⁴⁸ I submit that that is inappropriate. Fair use is a right. As the US Circuit Court wrote in *Suntrust*, the Wind-Done-Gone case:

fair use should be considered an affirmative *right* under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright.... [T]he fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes.⁴⁹

⁴⁴ 17 USC sec 101.

⁴⁵ 510 US 569 (1994).

⁴⁶ 17 USC sec 107.

⁴⁷ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2002] Ch 149 at para 20, citing to *Laddie* at 20.16.

⁴⁸ The description of the defence as a privilege is common, see eg Neil Weinstock Netanel 'Locating Copyright within the First Amendment Skein' (2001) 54 *Stanford L Rev* 1.

⁴⁹ 252 F3d 1165 (11th Cir 2001) n.3, citing, inter alia, *Campbell v Acuff-Rose*, 510 US at 590.

This approach is also evident in the Canadian case of *CCH*:

[I]t is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver ... has explained ...: 'User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.'⁵⁰

B *Freedom of Expression*

The right to transformative use must be seen as a right of expression. Its protection must follow not only from a policy directive, but be seen as rights-based. This distinction may be seen in the writings of Judge Leval on copyright. Leval writes of the importance of fair use; he sees it as an essential part of the copyright system. Nevertheless, despite the importance he gives it, Leval appears to see fair use as an element of policy. Leval writes:

Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law.⁵¹

Rather, it must be seen to follow necessarily from a rights-based conception of expression. (Leval also calls US constitutional protection of freedom of expression a constitutional policy: 'American law ... maintains a powerful constitutional policy that sharply disfavors muzzling speech.'⁵²)

Both the US and UK have a strong freedom of expression doctrine. The transforming creator can be protected in this tradition. That protection has arguably become stronger in the UK with the enactment of the Human Rights Act 1988 ('HRA'). It could be argued that the HRA is not applicable to protect the transforming creator insofar as the HRA is not seen to support an independent cause of action for the expressor, as the HL expressed in *Wainwright v Home Office*.⁵³ Yet even if it is not an independent cause of action, the freedom of expression is a right that courts must take into account in their consideration of claims.

⁵⁰ Para 48, citing Vaver, *Copyright Law* (Irwin Law 2000) at 171.

⁵¹ *Ibid* at 1135.

⁵² *Ibid* at 1130.

⁵³ [2003] UKHL 53, [2004] UKHRR 154.

The HRA underscores the need for strong protection of the freedom of expression. Under s.12, a court ‘must have particular regard to the importance of the Convention right to freedom of expression’. Under s.3, legislation must be read and given effect in a way which is compatible with the Convention rights. As the Court of Appeal held in *Ashdown v Telegraph Group Ltd*,⁵⁴ the HRA requires that the impact on freedom of expression be weighed, in copyright cases. The court also ruled that where the right to freedom of expression comes into conflict with the 1988 Act, it is necessary to have close regard to the facts of the individual case.

The indirect effect of the HRA may arguably be taken to effect the following changes in copyright doctrine.

C Ramifications

The proposed shift to an authors’ rights framework is not only a matter of shifting terminology and nuance. I will suggest a number of doctrinal ramifications that could result from such a conceptual shift.

1. Burden of Proof

First, if the right of the transforming author is understood to be an author’s right of expression – an affirmative right rather than an affirmative defence – then the burden of proof on the parties may shift.

Because fair use is an affirmative defence, the defendant carries the evidentiary burden.⁵⁵ Where defendant-modifier’s autonomy of expression is understood as an affirmative right, the burden of proof should shift. Netanel proposes a shift of burden upon presentation of a fair use defence to claims of copyright infringement.⁵⁶ Where defendant shows that her freedom of expression is at stake, plaintiff should bear the burden of showing that defendant’s expression will not be unduly restricted by upholding the copyright. Alternatively, plaintiff must show that restriction is justified.

2. Damages in Place of Injunctions

As the court noted in *Ashdown*, one of the ways to take account of the freedom of expression is to avoid granting injunctive relief, where the freedom of expression of the defendant may be at risk. The relief of damages after the fact of publication is preferable.

⁵⁴ [2001] EWCA Civ 1142, [2002] Ch 149.

⁵⁵ *Campbell v Acuff-Rose*, 510 US at 590

⁵⁶ Neil Weinstock Netanel, ‘Copyright and the First Amendment: What *Eldred* misses – and Portends’, in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and Intl Perspectives* (OUP 2005). See also Geiger, citing South African case of *Laugh it Off Promotions CC v South African Breweries Int*, CCT 42/04 [Geiger n70], shifting the onus of proving harm for a claimant of trademark dilution, where the freedom of expression is at stake.

The avoidance of injunctive relief which would block a transformative author's publication of a work follows suit. An award of damages *after* publication if the subsequent work is ruled not to sufficiently transform the prior work is preferable to injunctive relief at an *earlier* stage.

3. Greater Weight in Balancing

Second, an authors' rights perspective affects the balancing that copyright claims require. A copyright conflict is often considered to involve a balancing of interests.

This may benefit the transforming author. The parties and society as a whole have a variety of interests that must be taken into account. Upon a copyright conception without an underlying authorial rights framework, the balance would be right v policy, namely: primary author's right v the fair use defence as an element of copyright policy.

By contrast, where an author challenges a transforming author, I submit that the balance considered must be a balance of expression rights. Two expression rights will require balancing. Understanding the transforming author to have authorial rights would lend greater weight in the balance to the side of the transforming author, than has been given to it in the past.

Moreover, an author's rights will be strengthened where a conflict arises with the the copyright holder. The owner of the copyright may be a corporation acting against the interests of the author. With moral rights, the primary author retains some control over the use of the work. Also other aspects of copyright may take on a different light when viewed as an author's right. Conceiving of the copyright as an author's right may dampen the excessive control that corporate copyright holders have been allowed to wield.

As with the shifting burden of proof, here again we may see an indirect effect of the HRA. Greater weight in the balancing of claims could be lent to authors' rights of expression.

Arguably, the necessary consideration of freedom of expression in balancing involving copyright claims, was undertaken by the court in *Ashdown*. (Whether the proper balance resulted is not at issue here.) Also in *CCH*, a conception of authors' rights of expression arguably influenced the Canadian court's determination of the factors it considered in determining whether fair dealing was present. The court wrote:

In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting.... [T]hese allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights.⁵⁷

⁵⁷ Para 54, citing ss. 29, 29.1 and 29.2 of the *Copyright Act*. See also para 51.

4. The Nature of the Balance

An authors' rights conception of copyright can also illuminate the nature of the balance required in copyright cases.

Copyright is often said to protect the expression of the user sufficiently, by virtue of doctrinal structures from *within* copyright - namely the idea/expression dichotomy, the limited duration and the fair use exception.

For instance the Vice-Chancellor in the lower court decision of *Ashdown* took the view that: the Copyright Act already strikes the appropriate balance between the rights of owners of copyright and the right of freedom of expression, and that it is not necessary, in order to comply with Article 10 of the of the European Convention for the Protection of Fundamental Rights and Human Freedoms Convention, to do more than apply the provisions of the Copyright Act to the facts of a case: "There is no room for any further defences outside the code which establishes the particular species of intellectual property in question."⁵⁸

Critics of copyright, myself included, argue for the need to balance copyright with the user's expression rights from *without*, as well – ie, the user's expression rights also must be considered independently of copyright's doctrinal defences.⁵⁹

Yet the relationship between copyright and users' rights of expression proposed here is a different one. Where it is recognised that copyright also has a foundation in authors' rights, it is understood that expression rights comes in to play for the primary author through the copyright doctrine. And where the secondary authors also are understood to be authors, their expression rights come in to play as well, again, from within the doctrine.

The necessary balance is between the primary author's rights in copyright, and the transforming authors' rights of transformative expression. The balancing that is required is then not only an internal balance – relying upon copyright's own doctrinal safeguards of users. Nor is the balance an external one - between copyright and free expression rights outside of copyright. Rather (or additionally), what is proposed here is

⁵⁸ Cited in *Ashdown* (Court of Appeal), at 18 (citing 975F-G).

⁵⁹ See eg Michael D Birnhack 'Copyright Law and Free Speech after *Eldred v Ashcroft*' (2003) 76 S Cal L Rev 1275; Michael Birnhack in Paul Torremans (ed), *Copyright and Human Rights: Freedom of Expression* (The Hague, London: Kluwer Law International 2004). Geiger finds it preferable that a solution to copyright's excesses come from within the doctrine, but points to the limitations posed by fundamental rights from outside of it.

Geiger would 'internalise' the debate by accepting fundamental values as the copyright system's foundation. (text at n74). I agree with his attention to copyright's underlying foundations. I would also agree with an internalization of the debate, yet in the formation of that conception I put forward here.

an internal balance, but internal to the freedom of expression. The rights of both sets of authors are not only within the copyright doctrine, but that doctrine itself – with rights of plaintiff-authors and defendant-transforming-authors – is situated within the freedom of expression doctrine. (Alternatively, the balance could be considered internal to copyright, where copyright is understood as authors’ rights.).

The balancing described here is between expression rights. It would not be the first circumstance where the law is required to balance two fundamental rights. Context specific and fact sensitive balancing is called for in such cases. The necessity of looking closely to the facts of the cases was discussed by the court in *Ashdown*, as seen above.⁶⁰

Other rights might come into play as well. The claimant’s right of property may conflict with the author’s right of expression. Moreover, there could be a claim made of property *in expression*. Also if the copyright owner is not the primary author, but only the property holder, that owner could possibly claim expression rights *in property*. (I will not address the property elements of copyright conflicts here, but only the conflicts of expression.)

I do not claim that understanding the rights of the transforming author within the authors’ rights/freedom of expression framework will negate all conflicts, or solve copyright conflicts easily. Other rights must be balanced as well. But the protection offered under an authors’ rights regime to transforming authors would be strengthened. The authors’ rights conceptualisation brings with it a balance between rights, and lends greater weight to the rights of (all kinds of) authors.

5. Limitations

A further ramification of the conceptualization of authors’ rights put forward here relates to limitations that are sometimes placed on transformative use. First, it may be argued that for a use and modification to be considered transformative, the primary work must no longer be identifiable. I disagree. Secondary works may be transformative even where the primary work is recognisable.⁶¹ A critique or review necessarily identifies the primary work. Duchamp’s *LHOOQ* is transformative even while the Mona Lisa is recognisable in it. Parodies also are transformative, but precisely functions as parody where the primary work is recognisable.

Second, some courts require a transformative use to pose a negative, adverse critique of the primary work. On Jed Rubinfeld’s reading of the standard set by the US Supreme Court in *Campbell v Acuff-Rose Music Inc*,⁶² the Court conditioned protection

⁶⁰ Numerous of the cases discussed rely upon a close consideration of the facts in such cases that require balancing of rights. See *Ashdown*; *CCH*; *Laugh it Off Promotions*.

⁶¹ Spence, in Leslie Kim Treiger-Bar-Am and Michael Spence and “Private Control/Public Speech”, co-authored with Michael Spence, in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy* (Oxford: Hart Publishing 2006)(forthcoming).

⁶² 510 US 569 (1994).

of parody on its level of negative review. I think that the Supreme Court in that case used the term ‘critique’ in the sense of criticism and comment, as used in the US fair use doctrine (§107), not necessarily negative critique. Yet in practice, Rubenfeld’s fear may be realized. For example in *Dr Seuss Ent v Penguin Books USA*, the transformative use defence was denied to a work about the OJ Simpson trial based on the *Cat in the Hat*, where the parody was not found to have ridiculed the primary work.⁶³ Also in *Leibovitz*, the court seems to have examined the level of critique or ridicule too closely.⁶⁴ A parody should not need to be critical rather than laudatory of the primary work. A reference or comment upon an earlier work should not be restricted to taking a certain position.

Third, some courts and commentators write that parodies ought to be protected only if the object of their critique (or shall we say comment) is the primary work itself. A satire, which uses a primary work to critique another work or entity, is said to require more justification for its borrowing from the copyright work. Stronger protection from copyright infringement claims is afforded to ‘target’, rather than ‘weapon’ parodies.⁶⁵ I submit that both weapon and target parodies ought to receive protection, as both are transformative and reflect the speaker’s expression.

These criteria under copyright doctrine (on some interpretations) for determining when works gain protection, are problematic with regard to the transforming authors’ expression. A distinction between critical and non-critical critique unfairly discriminates between them based on the content of the speech. Under US law, this is arguably an unconstitutional content-discrimination, as Jed Rubenfeld has argued.⁶⁶ The weapon/target distinction also seems to fall into this difficulty. Under the freedom of expression doctrine, both parodies and satires are protected.

VI Conclusion

In conclusion, I would like to put forward that while authors’ rights are seen by many critics of copyright as part of the problem, they may in fact be seen as part of the solution. Re-coders are themselves authors. Primary authors are themselves re-coders. Re-coders – so-called ‘secondary’ creators– should be called authors. The author’s rights tradition ought to be embraced. Both primary and transforming authors can benefit from a greater recognition of the principle of authors’ rights.

This may be a matter of nuance: Where a defendant is termed an author rather than a pirate or copier or even user or re-coder, her chances of success improve. Moreover, a shift in terminology and conceptualization may signal doctrinal shifts. The shifts suggested here are (1) in UK law, protecting transformative authorship directly, and

⁶³ 109 F3d 1394, 1401 (9th Cir 1997), cert denied 521 US 1146 (1997).

⁶⁴ 137 F3d 109 (2d Cir 1998).

⁶⁵ *Campbell v Acuff-Rose*, 510 US 569; Michael Spence ‘Intellectual Property and the Problem of Parody’ (October 1998) 114 LQR 594.

⁶⁶ Jed Rubenfeld ‘The Freedom of Imagination: Copyright’s Constitutionality’ (2002) 112 *Yale LJ* 1 at 7, 17, 35-6.

naming it as such; (2) shifting the burden of proof to the plaintiff once a transforming author has stated a colourable claim of transformative expression; (3) preferring the possibility of damages after publication to injunctive relief before or during publication; (4) strengthening the freedom of expression claim of the defendant transformative author in the balance of rights; (5) strengthening the freedom of expression claim of the primary author in the balance of rights with a copyright holder; and (6) mooted distinctions in the transformative use defence which unduly restrict expression.

Once authors' rights are recognised as protection of a fundamental freedom of expression, then both the primary authors *and the re-coders* will find protection. By strengthening the rights of the authors -- against the copyright owners and yes, against the re-coders -- so too the rights of the re-coders -- against the copyright owners and against the primary authors -- will be enhanced.

To limit copyright's excesses, not only must the property rights of exploiters of copyright be weakened, but also the expression rights of the re-coders must be strengthened.