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**COPYRIGHT AND FREEDOM OF
EXPRESSION**

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INTRODUCTION

ABSTRACT

This paper is concerned with the effect of section 14 of the New Zealand Bill of Rights Act 1990 on the law of copyright in New Zealand. Section 14 affirms freedom of expression. The first part considers the concept of freedom of expression and its statutory basis in New Zealand. The second part locates the conflict between copyright and freedom of expression, and considers the role of two copyright principles which may themselves protect the right to freedom of expression, the idea-expression dichotomy and the defence of fair dealing. The third part considers the possibility of a separate defence to copyright which promotes the interests of freedom of expression.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,100 words.

¹ [1990] NZLR 91.

² Above 1, 95.

³ Above 1, 95.

I INTRODUCTION

Section 14 of the Bill of Rights Act 1990 states that:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

This paper is concerned with the effect of section 14 on the law of copyright in New Zealand.

In New Zealand to date, there is only one case which has considered freedom of expression in the context of copyright: *Television New Zealand Ltd v Newsmonitor Services Ltd*.¹ This case touches on themes which feature in the international jurisprudence on copyright and freedom of expression. This paper will use *Newsmonitor* as a basis for considering this jurisprudence, and applying it to the New Zealand situation.

Newsmonitor raised the issue of political expression in the context of news reporting. The defendant, Newsmonitor Services, ran a business which involved supplying transcripts of TVNZ news and current affairs programmes to contracted customers. Newsmonitor's customers advised in advance what their areas of interest were. Newsmonitor would videotape TVNZ broadcasts, and use these to make transcripts which it would then supply to its customers for a fee.

TVNZ sued for copyright infringement. Counsel for Newsmonitor argued that the Copyright Act should be interpreted so as to promote the right to freedom of expression guaranteed by section 14 of the Bill of Rights Act. It was argued that the Copyright Act restricted Newsmonitor's right to "receive and impart information and opinions of any kind in any form", by granting a statutory monopoly to the copyright owner. For this reason counsel for Newsmonitor argued that TVNZ news programmes should be available for use by Newsmonitor.²

Blanchard J rejected the defendant's argument on the basis that there is no conflict between copyright and freedom of expression. He argued that copyright protects only the expression of ideas, not ideas themselves, and that freedom of expression protects only the right to disseminate ideas, not the right to copy expression.³

¹ [1994] 2 NZLR 91.

² Above n 1, 95.

³ Above n 1, 95.

In relation to the defendant's argument that it was providing a useful service in increasing the free flow of information, Blanchard J stated that the defendant was not entitled to "free-ride" on TVNZ by using TVNZ's programmes for its own profit. He stated that to allow this would undermine the rationales behind the copyright regime.⁴

Blanchard J's judgment illustrates several themes that run through the international case law on copyright and freedom of expression. In examining these themes, this paper falls into three main parts. The first part⁵ considers the concept of freedom of expression and its statutory basis in New Zealand. The second part⁶ locates the conflict between copyright and freedom of expression and considers the role of two copyright principles which may themselves protect the right to freedom of expression: the idea-expression dichotomy and the defence of fair dealing. The third part of this paper⁷ looks beyond *Newsmonitor* to consider the possibility of a separate defence to copyright which promotes the interests of freedom of expression via the Bill of Rights Act.

II FREEDOM OF EXPRESSION

A What is "Expression"?

"Expression" is a wide term that covers many forms of communication. A useful way to analyse types of expression is to divide them according to their purpose.

One purpose of expression is to disseminate ideas, opinions and information. Another purpose is to express oneself artistically. Another purpose may be to advertise a good or service that is for sale. Many forms of expression will fulfil two or more of these purposes. For example, a newspaper article may have the purpose of disseminating information, but also have a commercial purpose in that the newspaper will make a profit.

B Rationales for Freedom of Expression

It is possible to identify three main rationales for the promotion of freedom of expression in New Zealand: realisation of the democratic ideal, the "marketplace of

⁴ Above n 1, 107-108.

⁵ Sections II to V.

⁶ Sections VI to IX.

⁷ Sections X to XI.

ideas" as a means to truth and the value of individual autonomy.⁸ This section will consider each of these in turn.

1 *Realisation of the democratic ideal*

In New Zealand, the guarantee of freedom of expression is contained in the part of the Bill of Rights Act 1990 ("the Bill of Rights") entitled "Democratic and Civil Rights". This suggests an important rationale for the protection of freedom of expression: the open discussion of public affairs in a democratic society. If voters are to be educated and to make a useful contribution, they must be exposed to as much discussion, information and opinion as possible.

The focus of this paper is expression which promotes the open discussion of public affairs. This ideal will be promoted by expression which aims to disseminate information and opinions to the public.

2 *The "market-place of ideas" as a means to truth*

This is the idea, from US jurisprudence,⁹ that the importance of expression is as a means to truth. Ideas are put forward into the "market-place" to battle with other ideas, and through this means, the truth will be found.

However, the problem with this rationale is that it values the *process* over the *substance* of the right to freedom of expression.¹⁰ An unregulated marketplace is one that does not restrict any expression, meaning even incorrect or hateful expression must be protected. On this view, the remedy for harmful expression is simply more expression. For this reason, the model of the unregulated marketplace of ideas will not necessarily be appropriate for New Zealand.

⁸ These rationales are identified in: MB Nimmer *Nimmer on Copyright* (Matthew Bender Publishers, 1996) 1.72-1.74; G-A Beaudoin and E Ratushny (eds) *The Canadian Charter of Rights and Freedoms* (2 ed, Carswell, Ottawa, 1989) 198-200; PW Hogg *Constitutional Law of Canada* (3 ed, Carswell, Toronto, 1992) 961-963.

⁹ See eg *Red Lion Broadcasting Co v FCC* 395 US 367, 390 (1969).

¹⁰ L Weinrib "Does Money Talk? Commercial Expression in the Canadian Constitutional Context" in D Schneiderman *Freedom of Expression and the Charter* (Thomson Professional Publishing, Canada, 1991) 337, 341; E Barendt "Free Speech in Australia: A Comparative Perspective" [1994] 16 *Sydney Law Review* 149, 151.

3 *Value of individual autonomy*

This rationale focuses on the individual rather than the democratic system. It recognises that each individual has a right to personal fulfilment, and that this can best be achieved by allowing each individual the measure of autonomy necessary to develop her own intellect, tastes and personality.¹¹

Because an individual's exercise of her right to freedom of expression always impinges on other members of society, this rationale will be the least important for the purposes of this paper. It is always possible for a defendant to argue that her personal autonomy is being restricted. The difficult issue is how far this autonomy can justifiably be restricted in the wider public interest.

III INTERNATIONAL PROTECTION OF FREEDOM OF EXPRESSION

The Bill of Rights was enacted in 1990 against an international background of increasing awareness of the need to protect fundamental human rights. Therefore, as there is much guidance to be gained from overseas authority, it is important to consider section 14 in its international context.

A *The International Covenant on Civil and Political Rights (ICCPR)*

The ICCPR was signed by New Zealand in 1968 and ratified in 1978.¹² The long title to the Bill of Rights states that the Act is to affirm New Zealand's commitment to the ICCPR.

Article 19(2) of the ICCPR guarantees a right to freedom of expression which, like section 14 of the Bill of Rights, includes the right to "seek, receive and impart" information.

B *The Canadian Charter of Rights and Freedoms*

In 1982, the Canadian Charter of Rights and Freedoms ("the Canadian Charter") was enacted as an entrenched constitutional document. The New Zealand Bill of Rights draws heavily on the Canadian Charter,¹³ making Canadian decisions useful authority.

¹¹ G-A Beaudoin, above n 8, 198.

¹² Human Rights Commission Act 1977.

¹³ In particular, the Canadian Charter contains a limitations clause (section 1) which is very similar to section 5 of the New Zealand Bill of Rights.

Section 2(b) of the Canadian Charter guarantees to everyone:

... freedom of thought, belief, opinion and other expression, including freedom of the press and other media of communication.

C *The United States Constitution*

The United States Constitution is a founding constitutional document. It imposes restrictions on the powers of Congress, so overrides any inconsistent legislation.

The First Amendment to the US Constitution states that:

Congress shall make no law ... abridging the freedom of speech...or of the press.

There are three important points to note about the First Amendment. First, it uses the word "speech" rather than "expression" as in section 14 and the Canadian Charter. "Expression" appears to be wider than "speech" and to encompass non-verbal expression. However, the US courts have interpreted "speech" widely so that it includes non-verbal forms of expression.¹⁴ The upshot of this is that there is no relevant difference between "speech" and "expression" for our purposes, and these terms will be used interchangeably throughout this paper.

Secondly, the First Amendment (and the Canadian Charter) expressly mention freedom of the media, while section 14 does not. As a result, some New Zealand cases have emphasised that freedom of the press in New Zealand is no more important than the freedom of anyone else to speak.¹⁵

However, the lack of express reference to the media in section 14 has not prevented New Zealand courts from recognising that the media is a special case in the sense that it is in an ideal position to impart information to the public.¹⁶ New Zealand courts

¹⁴ *Texas v Johnson* 491 US 397 (1989) held that the burning of a flag constitutes "expression"; *United States v O'Brien* 391 US 367 (1968) held that the burning of a draft card constitutes expression.

¹⁵ *Solicitor General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 61.

¹⁶ *Police v O'Connor* [1992] 1 NZLR 87, 97.

have also acknowledged that this special position of the media implies a correlative responsibility to report news events fairly and accurately.¹⁷

Thirdly, unlike section 14 and the ICCPR, the First Amendment (and the Canadian Charter) do not make express reference to the right to "seek, receive and impart" information. However, the United States courts have held that the right to expression or speech encompasses the public's right to hear,¹⁸ which arguably achieves the same effect.

D *The Protection of Freedom of Expression in England*

England has no formal system for the protection of civil rights, including freedom of expression. However, the common law provides protection to some degree. One view of this protection is that it is residual only.¹⁹ On this view, the right to freedom of expression is available in the "gaps" left by other laws which restrict expression, such as defamation, copyright and breach of confidence.

Recently, some judges and writers have tended toward the view that common law protection of freedom of expression should be a positive principle.²⁰ This development has been heavily influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was ratified by England in 1953. Article 10(1) of this Convention guarantees the right to freedom of expression, including the right to "receive and impart" information.

Some writers and judges have argued that the ratification of the European Convention means that the rights contained within it may be regarded as principles which are already inherent in English law, or which may be incorporated into English law by judges.²¹ This view has been confirmed by the House of Lords in relation to

¹⁷ *Police v O'Connor* above n 16, 99; *TV3 Network v Eveready New Zealand* [1993] 3 NZLR 435, 441.

¹⁸ *Kleindienst v Mandel* 408 US 753, 762-763 (1972); *Red Lion Broadcasting Co v FCC* above n 9, 390.

¹⁹ A Boyle "Freedom of Expression as a Public Interest in English Law" [1982] Public Law 574.

²⁰ See eg Browne-Wilkinson LJ in *Wheeler v Leicester City Council* [1985] AC 1054; J Laws "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] Public Law 59.

²¹ Laws, above n 20, 61.

the right to freedom of expression.²² However, it is yet to be applied in the context of copyright.

E The Protection of Freedom of Expression in Australia

Like England, Australia has no formal system of protection for freedom of expression. Therefore the same common law protections are available, to the extent that the English common law is applicable in Australia.

In addition, some recent cases in the High Court of Australia²³ have indicated that freedom of expression may have a special status. For example, in *Nationwide News v Wills*²⁴ the defendant newspaper published an article which criticised the integrity of the Arbitration Commission, a government body. The defendant was charged with an offence under the Industrial Relations Act 1988 of writing something "calculated ... to bring a member of the [Arbitration Commission] ... into disrepute". The High Court invalidated this offence provision on the ground that it violated an implied constitutional right to "discuss governments and governmental institutions and political matters" which was essential if the Australian people were "to form the political judgements required for the exercise of their constitutional functions."²⁵

IV PROTECTION OF FREEDOM OF EXPRESSION IN NEW ZEALAND

A Status of New Zealand Bill of Rights

As already mentioned, the statutory basis of freedom of expression in New Zealand is section 14 of the Bill of Rights. What makes the New Zealand Bill of Rights unusual in comparison to the formal systems of rights in other countries is its constitutional status. Canada and the United States each have systems of rights that are "entrenched", which means that the rights cannot be overridden by the legislature. The Supreme Courts of Canada and the United States have the power to declare invalid any legislation which they find to be in breach of the constitution.

²² *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011.

²³ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

²⁴ Above n 23.

²⁵ Above n 23, 48.

By contrast, the New Zealand Bill of Rights is an ordinary statute and, as such, does not override any other statute. This is made clear by section 4,²⁶ which provides that if a statutory provision is inconsistent with any provision of the Bill of Rights, then the statute must prevail.

B Interpretation of the Bill of Rights

1 Purposive interpretation

The Court of Appeal has stated that the Bill of Rights should be approached in a manner that is consistent with its subject matter.²⁷ Therefore interpretation of the Bill of Rights should be broad rather than technical. The Court has also stated that a purposive approach to interpretation is called for.²⁸ This means that in deciding the content of a right that is contained in the Bill of Rights, reference should be made to the purpose of the right. So in considering the meaning of freedom of expression, the interests that freedom of expression aims to protect are important.

2 Machinery provisions of Bill of Rights

Part I of the Bill of Rights contains machinery provisions which state how rights, such as the right to freedom of expression, are to be interpreted and applied. The first of these is section 3, which states that the Bill of Rights applies only to acts done:

- (a) By the legislative, executive or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.

Therefore the Bill of Rights applies to the Copyright Act 1994, since that Act is an act by the legislative branch of the government.

²⁶ Section 4 of the Bill of Rights provides that:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights)

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.

²⁷ *Noort v Ministry of Transport; Curran v Police* [1990-92] 1 NZBORR 132, 143.

²⁸ Above n 27, 139, 153, 171.

Sections 4, 5 and 6 of the Bill of Rights are the other important machinery provisions. Section 4 has been mentioned already.²⁹ Section 5 provides that:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 provides that:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The issue is how these provisions influence the effect of section 14 of the Bill of Rights on the law of copyright in New Zealand.³⁰

V APPLICATION OF BILL OF RIGHTS ACT TO COPYRIGHT LAW

A *Aid to Interpreting an Ambiguous Statutory Provision*

Section 6 of the Bill of Rights allows the court to consider whether a provision can be given a meaning consistent with the Bill of Rights. If it can, then this meaning is to be preferred to any other meaning. In *Newsmonitor*, for example, the argument³¹ was that sections 15 and 19 of the Copyright Act 1962³² should be interpreted in accordance with section 14 of the Bill of Rights. However, if the provision is clearly inconsistent with the Bill of Rights, then section 4 of the Bill of Rights means that section 14 cannot apply at all.

The most difficult point is the role of section 5 in interpreting statutes. The difficulty is that section 4 means that a right can be overridden, whether or not this is

²⁹ See text at n 26.

³⁰ There is much judicial and academic debate over the correct interpretation and effect of sections 4, 5 and 6 of the Bill of Rights. See eg P Rishworth "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" in DM Paciocco (ed) *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992). This controversy is beyond the scope of this paper.

³¹ No express reference was made to sections 4, 5 or 6 in the report of the case.

³² The Copyright Act 1962 preceded the Copyright Act 1994. Section 15 dealt with infringement of copyright in television broadcasts, and section 19 with the defence of fair dealing.

reasonable or demonstrably justified, simply by enacting a statute overriding the right. This consideration has led Cooke P to state that section 5 has no part to play in interpreting statutes.³³

However, Richardson J does see a role for section 5 in the context of interpreting statutes.³⁴ His approach is to take the right, consider it against the statutory provision, then to limit the right in accordance with section 5. At this point, the limited right is compared with the statutory provision. There are two possibilities. If an interpretation of the provision consistent with the limited right is reasonably open, section 6 should be applied and the consistent interpretation preferred. Alternatively, if a consistent interpretation is not reasonably open, section 4 applies and the right does not apply at all.³⁵

B *A Principle to Consider in Applying a Statutory Test*

The type of interpretation problem envisaged by the preceding section is one where a statutory provision is ambiguous and the provision can reasonably be interpreted in accordance with the Bill of Rights. Another type of problem which arises in interpreting a statute is where the statutory words are not ambiguous, but vague.³⁶ In this situation, a right contained in the Bill of Rights may be taken into account in deciding the issue at hand.³⁷

This was the real problem in *Newsmonitor*. The particular defence relied on was "fair dealing" for the purposes of "research or private study". Although left undeveloped by defendant's counsel, the argument was not that the terms "fair" or "private study" were *ambiguous* and should therefore be given a meaning consistent with section 14. The argument was really that in applying the test for fair dealing, the court should have regard to the interests protected by section 14.³⁸

³³ Above n 27, 144.

³⁴ Above n 27, 158-160.

³⁵ It is not necessary for the purposes of this paper to reach any conclusion on the role of section 5 and 6 in interpreting statutes.

³⁶ The distinction between an ambiguous provision and a vague provision is noted by Rishworth above n 30, 16-17.

³⁷ See Rishworth, above n 30, 23.

³⁸ This approach to interpreting the fair dealing provisions is discussed further below at section VIII D and E.

This approach involves an application of section 6, albeit a less direct one than deciding between two competing meanings of an ambiguous statutory provision. Furthermore, there appears to be scope for the use of section 5 under this approach. The interests protected by a right contained in the Bill of Rights could be considered to the extent necessary to avoid limiting the right unreasonably, or in a way that is not demonstrably justified in a free and democratic society.

Arguably therefore, it is possible for section 14 to apply to the Copyright Act. The next issue is whether there is in fact a conflict between copyright and section 14. If the Copyright Act is consistent with section 14, the Bill of Rights can have no further application to the case. To consider this, it is necessary first to analyse the law of copyright.

VI COPYRIGHT

A *Historical Origins of Copyright*

In England, control of printing was for many years exercised by the Crown.³⁹ Control was achieved by licensing schemes which meant that only a small group of people were entitled to print material. This monopoly over printing was initially for reasons of censorship. It enabled the Crown to control the printing and dissemination of seditious or blasphemous material. Therefore the historical basis of copyright, in England at least,⁴⁰ was a set of interests directly opposed to those protected by freedom of expression.

The first copyright statute, the Statute of Anne, was passed in 1709. It granted to authors an exclusive right to print their books, and the right to prevent others from doing so. Successive English statutes developed the author's right to copyright protection. The most recent is the Copyright, Designs and Patents Act 1988, on which the 1994 New Zealand Act is heavily based.

³⁹ The summary of the origins of copyright in this section is taken from Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (2 ed, Butterworths, London, 1995) 18-22 and A Brown and A Grant *The Law of Intellectual Property in New Zealand* (Butterworths, Wellington, 1989) 224-229.

⁴⁰ Patry argues that in the United States, the origin of copyright was not in censorship but in the private property rights model: WF Patry *The Fair Use Privilege in Copyright Law* (Bureau of National Affairs, Washington, 1985) 462-465.

B Rationales for Modern Copyright Protection

1 Encourage creativity

The main rationale for copyright is to encourage and reward authors who create original works.⁴¹ If authors did not have their works protected by copyright, they would be discouraged from releasing them to the public since others could appropriate the author's work and use it for economic gain, to the detriment of the author. Granting a monopoly to the author ensures that the author has an economic incentive to create and disseminate original works. It is this public interest in the creation and dissemination of original works that is the main rationale for copyright protection.

This rationale is reflected in the United States Constitution. Article I, section 8 grants to Congress the power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". This acknowledges the connection between the granting of a copyright monopoly to the author and the promotion of "science and the useful arts".⁴²

This rationale is further reflected in various devices of copyright which limit the exclusive right of the copyright holder to ensure that information is available to the public. Most significantly, the author is not protected unless the work is original and involves more than mere ideas.⁴³ This ensures that the author does not have a monopoly over things which should be in the public domain. For instance, a work does not infringe if it takes a part of the author's work which is not original but merely factual, because the author is not allowed control over facts.

Another device which limits the exclusive right of the copyright holder is the defence of fair dealing.⁴⁴ This defence allows members of the public to make certain uses of the author's work, such as use in news reporting and research, without the author's consent.

⁴¹ Laddie Prescott and Vitoria, above n 39, 4.

⁴² See Patry, above n 40.

⁴³ Laddie et al, above n 39, 46-60, 71-74.

⁴⁴ The defence of fair dealing is discussed further below at section VIII.

2 *Author's control*

The subsidiary rationale for copyright is based on the privacy interest of authors.⁴⁵ This rationale reflects the view that the author should be able to control the dissemination of her work and even prevent it from being disseminated at all if she so chooses. It is related to freedom of expression in that the author has the freedom to express her work or to choose not to.⁴⁶

Therefore, an argument can be made that copyright law itself protects freedom of expression. If this is correct, perhaps there is no conflict between section 14 and the law of copyright.

Blanchard J in *Newsmonitor*, and many writers and judges in the United States, argue that this is the case.⁴⁷ Others argue that there is a conflict, but that it can be resolved.⁴⁸ Those who argue that there is no conflict do so on the basis of one or two principles of copyright law: the idea-expression dichotomy and the defence of fair dealing. These principles will be considered in turn.

VII THE ROLE OF THE IDEA-EXPRESSION DICHOTOMY

A *Blanchard J's View in Newsmonitor*

Blanchard J's conclusion that there was no conflict between the Copyright Act 1962 and section 14 of the Bill of Rights was based on the Copyright Act being interpreted in accordance with the idea-expression dichotomy.

The defendant's argument in *Newsmonitor* was that:⁴⁹

⁴⁵ Laddie et al, above n 39, 4.

⁴⁶ *Harper & Row Publishers Inc v Nation Enterprises* 85 L Ed 2d 588, 606 (1985).

⁴⁷ US writers who argue there is no conflict are WF Patry, above n 40; P Goldstein *Copyright* (Little Brown & Company, USA, 1989) 238-243, and see below at section VIII. Cases which have dismissed the possibility of a conflict are *Sid & Marty Krofft Television Productions Inc v McDonalds Corp* 562 F 2d 1157 (1977); *Wainwright Sec Inc v Wall St Transcript Corp* 558 F 2d 91 (1977); *Walt Disney Productions v Air Pirates* 581 F 2d 751 (1978); *TVNZ v Newsmonitor*, above n 1.

⁴⁸ Most notably Nimmer, above n 8. In *Triangle Publications v Knight-Ridder Newspapers Inc* 626 F 2d 1171, 1180-1181 (1980), Judge Brown adopted Nimmer's reasoning.

⁴⁹ Above n 1, 95.

...the Copyright Act inhibits the free flow of information within the community by granting the originator of various works or products a statutory monopoly whereby that person may prevent others from doing certain acts in relation to them.

In responding to this argument, Blanchard J agreed that:⁵⁰

...TV news and current affairs programmes disseminate information and opinions, ... the defendant is engaged in receiving and imparting that material and ... the plaintiff seeks to prevent the defendant from doing so...

However, he went on to reject the defendant's argument on the basis of the idea-expression dichotomy:⁵¹

...[copyright] is not granted in respect of information itself. It does not prevent the taking and reuse of knowledge itself. Copyright protects not ideas but the form in which they are expressed. Ideas can be appropriated so long as they are not expressed simply by copying the words of the author.

Provided the Copyright Act is interpreted in a manner consistent with this fundamental rule of copyright law there can be no conflict with section 14 [of the Bill of Rights], for what is protected there is the right to express and receive ideas and opinions. Section 14 does not provide a guarantee of a right to appropriate someone else's form of expression. "Freedom of expression" does not mean freedom to copy the form in which authors have expressed themselves.... Yet at the same time, nothing in the Copyright Act, on my interpretation of it, prevents the defendants in this case from summarising the content of the programmes and disseminating their summaries to their customers. The plaintiff's argument relates to the use which may be made of the very words which were broadcast.

Significantly, Blanchard J does not consider in any detail the right to freedom of expression as contained in section 14, nor does he look to the origin or rationales of freedom of expression. Instead, he simply quotes the words of section 14 to support his view that what section 14 protects is "the right to express and receive ideas and opinions". From this he concludes, without analysis, that section 14 does not provide a guarantee of a "right to appropriate someone else's form of expression".

In Bill of Rights terms, Blanchard J's view appears to be that since there is no conflict between section 14 and copyright protection, the Bill of Rights has no application to the infringement provisions of the Copyright Act. On this view, the Copyright Act is

⁵⁰ Above n 1, 95.

⁵¹ Above n 1, 95.

plainly consistent with the right contained in section 14. Therefore there is no need to resort to section 4, 5 or 6 of the Bill of Rights to resolve the issue. Certainly Blanchard J had no desire to undermine the rights and freedoms contained in the Bill of Rights, stating that "it would be undesirable for a Court to make a decision inconsistent with those rights and freedoms."⁵²

B Limitations of Idea-Expression Dichotomy as a Protection for Freedom of Expression

1 Introduction

Blanchard J's conclusion that there is no conflict between copyright and freedom of expression depends on the validity of the idea-expression dichotomy. His view involves an assumption, first, that copyright protection is always limited to "form of expression", and secondly, that freedom of expression is always limited only to "ideas". If it can be shown that copyright protection extends beyond the mere form of expression of ideas, or alternatively, that freedom of expression encompasses the form of expression of ideas as well as the ideas themselves, then one cannot depend on the idea-expression dichotomy to avoid the conflict between copyright and freedom of expression. To consider this, it is necessary to examine each of these assumptions in turn.

2 The idea-expression dichotomy in copyright

The first thing to note about Blanchard J's interpretation of the idea-expression dichotomy is that he appears to reduce the dichotomy to form and content. He states that copyright does *not* protect "information itself", but that it *does* protect "the form in which [ideas] are expressed".⁵³ On this view, the "form" of a literary work is no more than the actual words used.

The distinction between form and content is a valid one. However, "expression" defined as mere form does not represent the scope of what copyright law actually protects. If it did, a person could avoid infringing copyright by simply changing a few of the actual words used, or by translating the content into another language.⁵⁴ Therefore, the distinction between form and content is not valid as an indication of the scope of copyright protection.

⁵² Above n 1, 95.

⁵³ Above n 1, 95.

⁵⁴ Laddie et al, above n 39, 61.

Yet, if the distinction between form and content is rejected as a definition of the idea-expression dichotomy, then the difficulty is to find another valid means to draw the line between what is protected by copyright and what is not protected. Learned Hand, an influential United States judge, has proposed a test for separating idea from expression by reference to a stage play:⁵⁵

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times may consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended.

Laddie et al point out that this test does not indicate that ideas and expression are different in kind.⁵⁶ Rather, it seems to show that ideas are simply more abstract or widely defined than expressions. If there is no difference in kind between the two, then the idea-expression "dichotomy" of itself is no help in drawing the line between material that is protected by copyright and material that is not protected. This was recognised by the New Zealand Court of Appeal in *Bleiman v News Media (Auckland) Ltd*.⁵⁷

In copyright law the conventional distinction between ideas and the expression of those ideas is helpful only up to a point....It is all a matter of to what degree of particularity or generality the idea is taken....It is perhaps more helpful to consider whether the effort, skill and judgment of the copyright owner in the making of his original work has been taken in the making of what appears, on a realistic assessment, to be a reproduction of a substantial part.

In conclusion, the distinction between form and content fails to define the scope of copyright protection since copyright protection clearly extends beyond mere form.

3 *Freedom of expression and the dissemination of ideas*

We have considered the first assumption on which Blanchard J's view is based: that copyright protects only "expression". It is necessary to examine the other assumption

⁵⁵ *Nichols v Universal Pictures Co* 45 F 2d 119, 121 (1930).

⁵⁶ Laddie et al, above n 39, 62.

⁵⁷ [1994] 2 NZLR 673, 677-678.

on which Blanchard J's view depends, that "[f]reedom of expression' does not mean freedom to copy the form in which authors have expressed themselves...."

In order to meaningfully consider this assumption, it is necessary to define some terms. It has been argued that a valid distinction between ideas and expression cannot be drawn. However, a distinction between ideas and *form* can be drawn if form is defined so that in relation to a literary work, it means the actual words used, and in relation to a visual work, it means an exact copy of the visual image. Nevertheless it is submitted that the proposition that freedom of expression never requires the appropriation of form can be disproved.

An example is provided by the case of *Time Inc v Bernard Geis Associates*.⁵⁸ This case concerned a home video of the assassination of President Kennedy, which was filmed by an onlooker. The rights to the film were bought by the plaintiff. The defendant wrote a book which was a study of the assassination and included certain still shots taken from the video. The plaintiff sued for copyright infringement.

It was clear that reproduction of the photos constituted a copying of form, since the photos were taken directly from the video, so portrayed exactly the same visual image.⁵⁹ The judgment was focused on the fair use defence, and whether this excused the taking.⁶⁰ The issue for present purposes, and one not addressed in the case, is whether freedom of expression required the use of the photographs themselves, in spite of the fact that this was a copying of form.

Nimmer argues that in a matter of such extreme public importance, freedom of expression demands that the film be freely available to the public.⁶¹ He argues that a verbal description of what happened (a reproduction of the "idea") would hardly compensate for seeing the actual footage. No words could adequately express the idea contained in the film. Nimmer argues that the actual visual impact of the photographs would contribute to the democratic dialogue.

Another example is where the copying of exact words may be necessary for freedom of expression. Consider again the facts of *Harper & Row*,⁶² concerning the memoirs of the former President Ford. The defendant's article contained some material that was

⁵⁸ 293 F Supp 130 (1968).

⁵⁹ Above n 58, 144.

⁶⁰ This aspect of the case is discussed further below at section VIII D.

⁶¹ Above n 8, 1.88-1.89.

⁶² Above n 46.

quoted directly from the memoirs. It is arguable that use of Ford's actual words was necessary to adequately convey Ford's feelings and opinions to the public.⁶³

These examples are sufficient to rebut the proposition that freedom of expression never requires the copying of form. Therefore a distinction between form and content cannot provide adequate protection for freedom of expression any more than it can adequately define the scope of copyright protection. It is necessary to consider other ways to protect the freedom to use copyright material in these examples.

In conclusion, the idea-expression dichotomy which many writers and judges rely on to justify their view that freedom of expression and copyright do not conflict does not work. If one is to argue that the law of copyright already incorporates sufficient protections for freedom of expression, a better justification than the idea-expression dichotomy will be required. Some writers and judges put forward the defence of fair use for this purpose.

VIII THE ROLE OF FAIR DEALING AND FAIR USE

A *The New Zealand Defence of Fair Dealing*

In New Zealand, the defence of fair dealing is contained in sections 42 and 43 of the Copyright Act 1994. Section 42 relates to criticism, review and news reporting. It provides that "fair dealing" with a work for the purposes of "criticism or review" does not infringe copyright if accompanied by a sufficient acknowledgement.⁶⁴ Fair dealing with a work for the purposes of reporting current events by means of a sound recording, film, broadcast or cable programme also does not infringe copyright in the work.⁶⁵

Similarly, section 43 provides that fair dealing with a work for the purposes of "research or private study" does not infringe copyright in the work. Section 42(3) then sets out five factors to which the court must have regard in determining whether a use constitutes fair dealing for the purposes of research or private study. These are:

- (a) The purpose of the copying; and
- (b) The nature of the work copied; and
- (c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and

⁶³ Above n 8, 1.99.

⁶⁴ Subsection (1).

⁶⁵ Subsection (2).

- (d) The effect of the copying on the potential market for, or value of, the work; and
- (e) Where part of a work is copied, the amount and substantiality of the part copied in relation to the whole work.

These factors are also taken into account by the courts in determining whether a dealing is fair under section 42.⁶⁶

B The US Defence of Fair Use

Because of the rich jurisprudence surrounding the corresponding defence in the United States (the defence of fair use) it is useful to consider the scope of the US defence.

The US defence of fair use was developed by judges. It has now been codified in section 107 of the Federal Copyright Act 1976. Section 107 provides that the "fair use" of a copyright work is not an infringement of copyright. The section lists some purposes (criticism, comment, news reporting, teaching etc) but these are not exhaustive. There are four factors which the court must take into account in determining whether any particular use is a fair use. With some minor differences in wording, these are the same factors as (a), (b), (d) and (e) in section 43 of the New Zealand Copyright Act, with some minor differences in wording. So the major difference between the US defence and the New Zealand defence is that the US defence is not limited to specified purposes.

C Fair Use and Fair Dealing as a Complete Protection for Freedom of Expression

There has been much discussion in US judicial and academic writing as to the First Amendment implications of the fair use defence, and how the two concepts inter-relate.⁶⁷ One view is that fair use provides complete protection for First Amendment

⁶⁶ B Brown, D Brown and C Elliot *Intellectual Property in New Zealand: Copyright and Design* (Butterworths, Wellington, 1996) 454-455.

⁶⁷ Goldstein, above n 47; R Denicola "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression" (1979) 67 *California Law Review* 283; Patry, above n 40; L Wang "The First Amendment Exception to Copyright: A Proposed Test" (1977) *Wisconsin Law Review* 1157; H Rosenfield "The American Constitution, Free Inquiry, and the Law" in J Lawrence and B Timberg *Fair Use and Free Inquiry* (Ablex Publishing Corporation, New Jersey, 1980) 287-308; P Hans "Triangle v Knight-Ridder Newspapers" (1979) *Wisconsin Law Review* 242.

values.⁶⁸ On this view, the fair use defence is an internal mechanism of copyright which ensures that all uses which enhance First Amendment values, are not infringing uses.

Part of the reasoning behind this view is the idea that the fair use doctrine espouses the same policies as the First Amendment. Whereas the First Amendment “promotes the dissemination of information by ensuring that Congress will pass no law abridging the freedom of speech”, the fair use doctrine “promotes the dissemination of information by limiting the extent to which the expression of ideas can be monopolised by copyright proprietors.”⁶⁹ Therefore it has been argued that if the fair use doctrine had not been developed, the same goals could have been achieved by using the First Amendment.⁷⁰

However, it may be stretching things somewhat to argue that the fair use doctrine was developed specifically in order to further First Amendment interests. The primary purpose of fair use is to ensure that copyright protection does not stifle the creativity which it is supposed to foster. Fair use is needed to allow subsequent authors to build on what has gone before. Therefore fair use is not directed to information or its dissemination, but to the economic rationale of encouraging creativity.⁷¹

D *Freedom of Expression and the Fair Use Factors: the US Case Law*

In applying the defence of fair use, the US courts must have regard to the four factors in section 107 of the Federal Copyright Act.⁷² The issue is how freedom of expression principles are promoted by these factors.

1 *The purpose of the use*

In the US provision, this factor includes the words “whether the use is of a commercial nature or is for non-profit educational purposes”. Judicial consideration of this factor appears to focus on the actual motive of the defendant in copying the material. Freedom of expression considerations can be relevant here. If the defendant

⁶⁸ One writer who holds this view is Goldstein, above n 47. Cases which have held that the doctrine of fair use ensures protection for freedom of expression in relation to copyright works are: *Harper & Row*, above n 46; and *Triangle v Knight-Ridder Publications*, above n 48.

⁶⁹ Above n 67, 256.

⁷⁰ Above n 67, 256.

⁷¹ Denicola, above n 67, 301.

⁷² The four factors are set out in A and B of this section.

used the material with the intention of disseminating information that is of public interest, the defence of fair use is more likely to succeed than if the defendant intended solely to make a profit.

One case illustrating this is *Keep Thomson Governor Committee v Citizens for Gallen Committee*.⁷³ This case concerned rival candidates in a political campaign. The defendant made a political broadcast which included most of a song which the plaintiff had rights over, and had used in its own political broadcast. Judge Devine emphasised that the discussion of public issues and debate over candidates for an election is integral to the democratic system of government. Considering the purpose of the use, he stated that the purpose was clearly for a political broadcast, and was entirely non-commercial. Judge Devine therefore found for the defendant on the ground of fair use.⁷⁴

Considerations of purpose are also raised where material which is of public importance is published by a newspaper or other organisation for a profit. But here it is not so clear-cut. The motive for publishing may include a wish to disseminate information, but is rarely free from any desire to benefit commercially. Unsurprisingly judicial views on this issue are varied.

An early case considering this issue was *Rosemont Enterprises Inc v Random House Inc*.⁷⁵ In that case, the plaintiff had published some articles on the life of a famous person, Howard Hughes. Twelve years later, the defendant published a biography of Howard Hughes which copied parts of the plaintiff's articles. The court stated that in considering the later publisher's purpose, a defendant's commercial motive is irrelevant where the public interest in the work is substantial and it found that if an injunction was granted, this would deprive the public of an opportunity to learn about the life of Howard Hughes, who had made substantial contributions to his field.⁷⁶

The Kennedy photos case referred to the decision in *Rosemont*, and suggested that it gave too much weight to the "public interest".⁷⁷ Nevertheless, the judge went on to find that the defendant's use of the film of President Kennedy's assassination was a fair use, primarily because of the substantial public interest in the film.

⁷³ 457 F Supp 957 (1978).

⁷⁴ Above n 73, 959-960.

⁷⁵ 366 F 2d 303 (1966).

⁷⁶ Above n 75, 309.

⁷⁷ Above n 58, 145.

In contrast, the majority of the Supreme Court in *Harper & Row*, the Ford memoirs case, found that the commercial motive of the defendant was an important consideration. In considering the purpose of the use, Justice O'Connor of the majority identified it as news reporting. However, Justice O'Connor thought that the use went beyond this and "actively sought to exploit the headline value ...of its unauthorised first publication...." The crucial issue here was not whether the use was commercial, since most uses will have some commercial element, but whether "the user stands to profit from exploitation of the copyrighted material without paying the customary price".⁷⁸

In contrast, Justice Brennan of the minority argued that the majority was wrong to place emphasis on the defendant's commercial motive in the circumstances of the case. He stated that the news business is a competitive one, relying for its livelihood on "scooping rivals".⁷⁹

In conclusion, given our earlier observation that fair use is primarily concerned to protect the economic incentive for copyright, it is submitted that the fourth factor, whether the defendant's use will affect the value of, or potential market for, the work, should be given more weight than the factor of whether the use is primarily commercial. This means that freedom of expression considerations can prevail unless the copyright owner's market for the work is substantially diminished by the use.

2 *The nature of the work*

The second factor is the nature of the work. This includes any public interest in the content of the work, and was given prominence in the Howard Hughes and Kennedy photos cases. In those two cases, the public interest involved was the public's right to know or to see certain things, the right to freedom of expression.

In the Kennedy case, the judge placed reliance on the fact that the defendant's book was a "serious, thoughtful and impressive analysis of the evidence" and that the defendant's theory was "serious work on the subject and ... entitled to public consideration".

Therefore this factor could be used to import freedom of expression considerations into the defence of fair dealing.

⁷⁸ Above n 46, 608.

⁷⁹ Above n 46, 627.

3 *Amount and substantiality*

The third factor ((e) in the New Zealand Act) is the amount and substantiality of the portion of the work taken in relation to the work as a whole. It is useful to judge this factor against the purpose of the defendant's use. If the defendant's purpose is to disseminate information which the public has a right to know, the defendant should be allowed to appropriate only as much of the plaintiff's work as is necessary to achieve this purpose.⁸⁰

The assessment of necessity can involve a consideration of what should be protected by freedom of expression. An example is *Harper & Row*, where direct quotes were taken from the President's memoirs. A court could find that the entire quotes were necessary for freedom of expression to be vindicated, because the quotes themselves were needed to express the idea, or because the quotes themselves were something that the public had a right to know. Another example is the Kennedy photos case, where the court would decide whether publication of the actual pictures was necessary for the public to be informed.

The necessity criterion is also relevant to factor (c) in the New Zealand Act: whether the work could have been obtained within a reasonable time at an ordinary commercial price. If there is alternative access to the information, then the public interest in hearing that information will hardly ever excuse a copyright infringement.

The amount and substantiality of the portion of the work taken can therefore incorporate freedom of expression concerns by allowing the defendant to use only portions which are necessary to promote the open discussion of public affairs.

4 *Effect of the use upon the potential market for the work*

The final factor is the effect of the use upon the potential market for, or value of, the work. In the US case law, this factor has historically been the most important of the four factors.⁸¹ This reflects the primary purpose of fair dealing and fair use: to allow authors to build on what has gone before, provided any subsequent author's use does not remove the economic incentive to create.

In summary, freedom of expression concerns *can* be incorporated into consideration of the fair use defence through these four factors.

⁸⁰ Denicola, above n 67, 306-310.

⁸¹ Hans, above n 67, 247.

In New Zealand, section 6 of the Bill of Rights means that the fair dealing provisions can be interpreted in accordance with freedom of expression principles. However, the problem with using the New Zealand defence of fair dealing as a protection for freedom of expression is that it applies only in prescribed situations, so cannot act as a general principle.

E *Fair Dealing in the New Zealand Copyright Act*

The particular exceptions in sections 41 to 43 of the New Zealand Copyright Act are for criticism and review, news reporting and research and private study. Some other permitted uses in the Copyright Act pertain to education, libraries and public administration. It is submitted that all of these purposes are permitted because they are non-profit, or if they involve profit, they do not affect the market for the copyright holder's work.

The terms "criticism and review" are construed narrowly by the courts.⁸² The paradigm situation envisaged by these words is a book review style article which directly criticises the book, and includes some extracts. The criticism and review defence then protects the use of these extracts. However, this is a use which, even if motivated by profit, will not affect the potential market for the copyright holder's work. Therefore it does not threaten the economic incentive for copyright.

The defence of "reporting current events" does allow the dissemination of information which may be in the public interest. However, it is limited in that the events reported must actually be current. The defence cannot apply to events which are of only historical interest.⁸³ This means that in New Zealand, for example, the use of President Ford's memoirs would not be protected because the events described are not current. Further, the news reporting defence in New Zealand does not cover photographs,⁸⁴ thereby excluding the Kennedy photos from immunity.

Although the news reporting defence does further freedom of expression, it is notable that use of a work for the purposes of reporting current events is unlikely to have an effect on the market for the copyright holder's work. Indeed, if anything, it is likely to improve its marketability. Therefore it is unlikely to threaten the economic incentive for copyright.

⁸² Above n 66, 455-456.

⁸³ *Associated Newspapers Group plc v News Group Newspapers Ltd* [1986] RPC 515, 519.

⁸⁴ Section 42(3) Copyright Act 1994.

Lastly, the defence of "research or private study" was considered by Blanchard J in *Newsmonitor*.⁸⁵ He stated that "research or private study" could include research done by a company for its own profit. However, he found that it did not extend to the activities of Newsmonitor, since Newsmonitor did not do any research or study of its own. It simply passed the material on, for a profit, to organisations which used it for research. Blanchard J emphasised the fact that Newsmonitor's activities would destroy the economic incentive for TVNZ to produce transcripts.⁸⁶

Therefore, while the defence of fair dealing can protect freedom of expression to some degree, its usefulness is limited in New Zealand since it is narrowly prescribed. In particular, it cannot protect the two example uses of the Kennedy photos and the quotes from the Ford memoirs. Lastly, an examination of the categories of work that fair dealing applies to has shown that the motivation behind each of them is more likely to be economic than concerned with freedom of expression.

IX THE EFFECT OF SECTION 14

A Introduction

In the United States, some writers have come to the same conclusion, that fair use is not an adequate protection for freedom of expression since fair use primarily protects economic interests. These writers argue that a separate "First Amendment" defence is required for cases where disclosure is desirable in the interests of free speech.⁸⁷

This approach is not possible in New Zealand since, unlike the First Amendment, section 14 of the Bill of Rights cannot override any other statute.

However, the Copyright Act 1994 still leaves scope for the development of a defence to protect the interests of freedom of expression. Section 225 of the 1994 Act deals with "Rights and Privileges under Other Enactments or Common Law". Subsection (3) provides that:

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

⁸⁵ Above n 1, 105-107.

⁸⁶ Above n 1, 108.

⁸⁷ Denicola, above n 67, 304-316; Rosenfield, above n 67. However, the First Amendment defence has not finally been upheld by any court. The defence was relied on in the District Court in *Triangle v Knight-Ridder* 445 F Supp 875 (1978), but the Court of Appeals based its decision solely on fair use.

This section is potentially extremely powerful. It allows the Copyright Act to be overridden, which is not possible using the Bill of Rights alone. However, it is important to note that section 225(3) does *not* state that copyright protection can be ignored whenever this is in the public interest. The section is clear that it does not allow a principle to override copyright protection unless (1) the principle is sufficiently established to count as a “rule of law”; and (2) it is a rule of law relating to the *enforcement* of copyright rather than to its *existence*.⁸⁸

It is necessary to decide which rules of law are preserved by section 225(3). The section is copied from section 171(3) of the English Copyright, Designs and Patents Act 1988, which suggests that guidance can be obtained from English case law. The following section considers the principles of English law which fall within section 225(3), and assesses each of them to decide whether they are relevant to a defence which aims to promote freedom of expression.

B The “Public Interest” in English Case Law

In the English case law, the term “public interest defence” is often used. However, it appears that what is being considered in these cases is not one defence, but a number of principles which relate to the “public interest” and which affect copyright law in some way.

Many of these principles derive from the action for breach of confidence (not copyright) which arises where (1) there is confidential information; (2) that is communicated to the confidant in circumstances which import an obligation of confidence and (3) the information is used by the confidant or a third party to the detriment of the confider.

1 Disclosure of wrongdoing

The origin of this principle appears to be the early breach of confidence case of *Gartside v Outram*.⁸⁹ In that case, Wood VC stated that “...there is no confidence as to the disclosure of an iniquity”. He went on to state that:⁹⁰

You cannot make me the confidant of a crime or fraud, and be entitled to close my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.

⁸⁸ Laddie et al, above n 39, 117.

⁸⁹ (1856) 26 LJ Ch 113.

⁹⁰ Above n 89, 114.

Since *Gartside v Outram*, a public interest defence based on iniquity has developed in the cases.

*Beloff v Pressdram*⁹¹ was the first to suggest that this "public interest" defence could apply to breach of copyright as well as confidence. In that case, the plaintiff, an employee of a newspaper, wrote a memorandum containing certain allegations about a member of the government. The memorandum was internal, to other employees of the newspaper. Later, the contents of the memorandum were communicated to the defendant by phone. The defendant published an article attacking the plaintiff, and quoting in full the plaintiff's memorandum. The plaintiff sued for breach of copyright in the memorandum, and the defendant argued that it was protected by the defence of public interest.

Ungoed-Thomas J stated that "... public interest is a defence outside and independent of statutes, is not limited to copyright cases and is based on a general principle of common law."⁹² In enunciating this "general principle of common law", Ungoed-Thomas J relied on the case of *Initial Services v Putterill*.⁹³ *Initial Services* involved an action for breach of confidence. In his judgment, Lord Denning had stated that the public interest defence to an action for breach of confidence:

...should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest.

After considering *Initial Services*, Ungoed-Thomas J in *Beloff* stated that the defence extends to:⁹⁴

... matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.

This statement includes three categories of situation covered by the defence: (1) acts in breach of national security; (2) acts in breach of law and (3) matters involving danger to the public. It will be noted that matters involving danger to the public do not necessarily involve disclosure of wrongdoing.

⁹¹ [1973] 1 All ER 241.

⁹² Above n 91, 259.

⁹³ [1967] 3 All ER 145.

⁹⁴ Above n 91, 260.

On the facts of *Beloff v Pressdram*, the defendant argued that the publication of the memorandum was in the public interest since the public should know which minister the plaintiff had obtained her information from. The plaintiff argued that generally, it was against the public interest to reveal media sources.

Ungoed-Thomas J admitted that it was a matter of "public importance". However, in his view the defence failed because the memorandum did not disclose any "iniquity or misdeed".⁹⁵

The decision in *Beloff* was considered by Mason J in *Commonwealth of Australia v John Fairfax & Sons Limited*.⁹⁶ In that case, the Australian government possessed a confidential document which contained material relating to the government's part in the East Timor crisis. The defendant obtained this document and intended to publish extracts from it in its newspaper. Some copies of the newspaper were published, and copies of the book released outside Australia, before interim injunctions could be obtained.

Mason J stated that a limited public interest defence may be available for copyright, as suggested in *Beloff v Pressdram*, but that if it was available for copyright, its scope would be limited to:⁹⁷

... the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm ... the defence applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public.

This statement appears to contain the same three categories of situation identified by Ungoed-Thomas J in *Beloff*: harm to the public, national security and breach of law.

On the facts of *Fairfax*, the information related to the government's motive in a past event. Therefore it was not current so as to be a danger to national security. Mason J stated that to apply the defence in such a situation would "break new ground".⁹⁸

The defence of disclosure of wrongdoing was considered again by the House of Lords in *Attorney-General v Guardian Newspapers Ltd (No 2)*,⁹⁹ the "Spycatcher" case.

⁹⁵ Above n 91, 261.

⁹⁶ [1980] 147 CLR 39.

⁹⁷ Above n 96, 57.

⁹⁸ Above n 96, 57.

Spycatcher was a book written by a former member of the MI5, Peter Wright. The book was essentially Wright's memoirs, and it contained allegations about various members of the British Secret Service. One such allegation was a plot to assassinate a public military figure, Colonel Nasser. The British government brought proceedings in several countries to attempt to prevent the publication of the book or the information contained within it. However, the information was available in several overseas countries before it was released in England, and overseas copies of the book were imported and sold in England.

In England, extracts from the book were printed by various newspapers before interim injunctions could be obtained. In the House of Lords, the issue was whether the Crown was entitled to a permanent injunction for breach of confidence by the newspapers.

Lord Keith found that the defence of disclosure of wrongdoing did not excuse the publication of *Spycatcher*. Although *Spycatcher* contained some allegations of wrongdoing, such as the alleged plot to kill Colonel Nasser, these allegations formed a very small part of the book and were not substantial enough to justify disclosing the whole contents of the book.¹⁰⁰

Lord Griffiths stated that:¹⁰¹

The only possible exception ... would be the public interest defence. ... theoretically, if a member of the service discovered that some iniquitous course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger.

This was not the case in *Spycatcher* since the accusations made up a small proportion of the book and they were not current so did not involve any "impending danger".

2 *Relevance of disclosure of wrongdoing to freedom of expression defence*

It is submitted that the disclosure of wrongdoing is not a suitable criterion to include in a defence which aims to protect freedom of expression. To see why this is the

⁹⁹ [1988] 3 All ER 638.

¹⁰⁰ Above n 99, 644.

¹⁰¹ Above n 99, 650.

case, consider the "public interest" alleged to be promoted by allowing disclosure of wrongdoing.

There are two public interests involved: the prevention of harm, and the effective administration of justice.¹⁰² If the disclosure relates to wrongdoing which is proposed to be done, then it is in the public interest to allow this disclosure so that the harm does not occur. For example, if it were disclosed in confidence that a robbery was to be committed, the confidant would be justified in breaching the confidence to prevent the robbery from occurring.

If the disclosure relates to past wrongdoing, the public interest in the prevention of harm is promoted by catching and punishing the wrongdoer so that she cannot perpetrate further harm.

Consider these public interests against those protected by freedom of expression: the open discussion of public affairs, the marketplace of ideas and the value of individual autonomy. The revelation of past or intended wrongs does not have any special effect on the marketplace of ideas, nor on the right to individual autonomy.

However, the revelation of past or intended wrongs may have an effect on the open discussion of public affairs if the wrongs are committed by public figures or if they have an effect on public affairs. So the revelation that a government Minister is corrupt is a disclosure of wrongdoing which promotes one of the interests behind freedom of expression. However, the importance of the disclosure for freedom of expression is not that it prevents harm but that it enables voters to be informed and therefore the democratic system to be enhanced.

The other public interest promoted by the disclosure of wrongdoing is the effective administration of justice. It is in the public interest that disclosures of wrongdoing be made so that the wrongdoers can be effectively dealt with by the justice system. Generally, the effective functioning of the justice system does not promote the open discussion of public affairs, the marketplace of ideas or individual autonomy. However, *public scrutiny* of the effectiveness of the justice system is an interest protected by freedom of expression. So while freedom of expression is not especially concerned with whether an individual wrongdoer is brought to justice, the justice system as a whole is a public institution about which the public should be informed so that they can fulfil their democratic functions effectively.

¹⁰² J Pizer "The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?" (1994) 20 Monash University Law Review 67, 70, 75.

It is submitted that the limitation of the “public interest defence” to wrongdoing and breaches of national security in *Beloff*, *Fairfax* and *Spycatcher* meant that freedom of expression was not adequately considered. For example, in *Beloff*, Ungood-Thomas J summarily dismissed the defendant’s argument that the public had a right to know about the matters involved in the memorandum because the memorandum did not disclose any “iniquity or misdeed”.

Similarly, in *Fairfax*, the fact that the information related to past events meant that it was not protected by the public interest defence. However, information about past events in government may be a legitimate topic for public knowledge and discussion. In *Spycatcher*, the fact that the allegation of wrongdoing was a small part of the overall publication, and the fact that it was no longer current, led Their Lordships to find that Wright would not have been able to rely on the public interest defence. There was therefore little discussion of whether the public’s right to be informed could justify Wright’s disclosure.

3 *Matters involving danger to the public*

One of the other categories of “public interest defence” mentioned in *Beloff* and *Fairfax* is where the information should be disclosed because it involves danger to the public. This category appears to be based on the case of *Hubbard v Vosper*.¹⁰³ The defendant in *Hubbard* was a member of the Church of Scientology. After leaving the Church, the defendant wrote a book criticising its teachings. The book contained substantial extracts from the writings of the plaintiff, the head of the Church of Scientology.

The plaintiff sued for breach of copyright and breach of confidence. The court found that there was no infringement of copyright since the defence of fair dealing applied. In relation to breach of confidence, Lord Denning stated that “[t]here are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret.”¹⁰⁴

Lord Denning considered that there were good grounds for thinking that the writings of the defendant fell within the category of things which ought to be disclosed in the public interest. This was because they contained “medical quackeries of a sort which may be dangerous if practised behind closed doors.”¹⁰⁵

¹⁰³ [1972] 2 QB 84.

¹⁰⁴ Above n 103, 95.

¹⁰⁵ Above n 103, 96.

The public danger principle was also considered by the English Court of Appeal in *Lion Laboratories Ltd v Evans*.¹⁰⁶ The plaintiff was manufacturer of an electronic device which was used to measure breath alcohol levels for the purposes of convictions for driving under the influence. The defendants obtained some of the plaintiff's internal documents which cast doubt on the accuracy of those devices. These documents were published by the defendants, in newspapers.

The plaintiff sought an injunction on the grounds of breach of confidence and breach of copyright. The defendants raised the defence of public interest. Two of the judges¹⁰⁷ indicated that the public interest defence was available for breach of copyright. One of the two stated that for the purposes of the case, there was no difference between copyright and confidence.¹⁰⁸ The third judge¹⁰⁹ did not mention copyright, but based his decision on breach of confidence.

On the facts of *Lion Laboratories*, the information disclosed did not reveal any wrongdoing. However, the Court held that the defence should be extended beyond the disclosure of wrongdoing. Wrongdoing was held to be merely an example of a situation which might justify disclosure in the public interest.¹¹⁰

The disclosure of information about the breath testing devices was found to be justified because of the potentially serious consequences.¹¹¹ Use of the devices could result in conviction. This meant that it was in the public interest that information which cast doubt on their accuracy be made publicly known. The court found this to be "just cause and excuse" for the breach of copyright and confidence.¹¹²

This statement has led to the public interest defence, previously called the "iniquity defence", being referred to as the "just cause and excuse" defence. However, the Court in *Lion Laboratories* gave little guidance as to the new scope of the defence, except to say that it will be an "exceptional case"¹¹³ where the defence applies.

¹⁰⁶ [1985] 1 QB 526.

¹⁰⁷ Above n 106, 536 (Stephenson LJ); 550 (Griffiths LJ).

¹⁰⁸ Above n 106, 536 (Stephenson LJ).

¹⁰⁹ O'Connor LJ.

¹¹⁰ Above n 106, 537-538, 550.

¹¹¹ Above n 106, 553.

¹¹² Above n 106, 538.

¹¹³ Above n 106, 551.

4 *Freedom of expression and danger to the public*

In relation to danger to the public, similar considerations to those considered above for prevention of harm apply. The facts of *Lion Laboratories* raised a freedom of expression issue in that the public should be aware of a defect which could lead to wrongful convictions. However, the fact that an individual might suffer harm as a result of the faulty device is not a concern of freedom of expression.

5 *Role of the public interest where the plaintiff is government*

There is a line of breach of confidence cases where the "public interest" has been used in determining detriment to the plaintiff, where the plaintiff is the government. In these cases, the public interest is not characterised as a defence, but as an element of the detriment which the plaintiff has to prove in order to restrain the disclosure of confidential information.

One such case is *Fairfax*,¹¹⁴ the Australian case in which the government sought to restrain the disclosure of documents relating to the East Timor crisis. It will be recalled that the case was argued on the basis of breach of confidence and copyright.

When considering breach of confidence, Mason J characterised the issue as what detriment the government needed to show in order to support a breach of confidence action. Mason J stated that:¹¹⁵

It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

Mason J went on to state that detriment where the plaintiff is the government is to be judged according to the public interest, and an injunction is not to be granted unless the plaintiff can show that disclosure would be harmful to the public interest. Mason J stated that it is not sufficient detriment to show that the disclosure will reveal the

¹¹⁴ Above n 96.

¹¹⁵ Above n 96, 52.

workings of government. The disclosure must obstruct the workings of government or threaten national security or foreign relations before it will be restrained.¹¹⁶

On the facts of *Fairfax*, the information had already been released in other countries, including Indonesia and the United States, which had the most interest in the events surrounding the East Timor crisis. Therefore an injunction would have been ineffective to prevent damage to the national security.¹¹⁷

Despite this, Mason J found for the plaintiff on the ground of copyright infringement.¹¹⁸

The House of Lords in *Spycatcher* approved and applied Mason J's approach from *Fairfax*. Their Lordships considered whether the Crown had demonstrated a public interest that justified restraining the disclosure of the information, and unanimously found that since the book had already been published in several other countries "...general publication in [England] would not bring about any significant damage to the public interest beyond what has already been done."¹¹⁹ This was a key point in the case. It was clear that had the information not already been disclosed, the Crown would have been entitled to an injunction because of the danger it posed to the national security.¹²⁰

6 *Freedom of expression and the government's right to restrain disclosure*

The approach of *Fairfax* and *Spycatcher* to the detriment element of a breach of confidence action is not directly applicable to copyright since an action for infringement of copyright does not require the plaintiff to show detriment.

However, the approach is useful in that it highlights the different interests that are involved when the person seeking to restrain disclosure is the government rather than a private individual. In a copyright case, the person seeking to restrain the defendant's use is usually motivated by her own economic interests. However, the documents involved in *Fairfax* were not commercially motivated. The danger was not that the defendant would adversely affect the Crown's market for the documents by distributing copies. Rather the concern was that the Crown did not want the

¹¹⁶ Above n 96, 52.

¹¹⁷ Above n 96, 54.

¹¹⁸ Above n 96, 58.

¹¹⁹ Above n 99, 642.

¹²⁰ Above n 99, 643.

documents to be disclosed at all. The interests of national security are vastly different from the economic interests of most copyright holders.

The approach of *Fairfax* and *Spycatcher* is also useful in that it emphasises that a court should be especially suspicious when it is the government that is seeking to restrain the disclosure of information. The idea of a government keeping its operations secret from the voting public is directly opposed to the open discussion of public affairs which freedom of expression aims to protect. To this extent, a court's consideration of this principle does promote freedom of expression.¹²¹

Fairfax and *Spycatcher* are also useful in that they indicate that the national security is an important overriding concern. In terms of a Bill of Rights analysis, this will be relevant to determining whether a limit on freedom of expression is reasonable and can be demonstrably justified in a free and democratic society in terms of section 5.

C *The Role of the Public Interest in the Balancing Process*

In any action for breach of confidence, the first step is to establish the elements of the cause of action. Once this is done, the court will balance the competing public interests involved to decide whether relief should be granted. In a breach of confidence action, one of these interests is always the public interest in preserving confidential relationships. This interest is balanced or weighed against any countervailing public interest that favours disclosure of the information.

This balancing process was undertaken in *Lion Laboratories*. The public interest in preserving confidences was balanced against the public interest in knowing information relating to the accuracy of the breath testing devices.¹²²

Lord Griffiths undertook a similar process in *Spycatcher*. On the facts of the case, His Lordship balanced the claim of the Crown that disclosure would prejudice national security against the "other countervailing interest of freedom of speech and the right of the people in a democracy to be informed by a free press."¹²³ This balancing was done with reference to the guarantee of freedom of expression contained in Article 10

¹²¹ *Fairfax* and *Spycatcher* are also useful in that they indicate that the national security is an important overriding concern. In terms of a Bill of Rights analysis, this will be relevant to determining whether a limit on freedom of expression is reasonable and can be demonstrably justified in a free and democratic society in terms of section 5.

¹²² Above n 106, 536.

¹²³ Above n 99, 649.

of the European Convention of Human Rights and Fundamental Freedoms.¹²⁴ This suggests that freedom of expression is in itself a public interest to which the public should have regard.

D Freedom of Expression, Copyright and the Balancing Process

The balancing of public interests that occurs in every breach of confidence case as a matter of course does not arise in deciding whether copyright subsists in a work, and whether it has been infringed. Nevertheless, a type of balancing can occur in applying a *defence* to copyright. Applying the defence of fair dealing involves balancing the economic interests of the copyright holder against the public interest in having the material available for use.

It is submitted that in applying a "public interest" or freedom of expression defence to copyright, the balance should be between the public interest in the copying or dissemination of the work, and the public interest in maintaining the author's copyright. The public interest in the copying or dissemination of the work is the interest the public has in freedom of expression. The public interest in maintaining the author's copyright is the public interest in protecting the economic incentive for authors to create and disseminate original works. It is necessary to balance these two interests to see which one should prevail in the circumstances of the case.

In terms of the Bill of Rights, this balancing process can be seen as an application of the purposive approach. The individual economic right of the copyright holder is not considered in isolation, but in light of its purpose: to provide an economic incentive to produce original works. If the public interest in copying or disseminating the work is great, and if it does not undercut, or does not substantially undercut, the public interest in the economic incentive for copyright, then the work should be allowed to be copied or disseminated.

X PROPOSAL FOR A SECTION 14 DEFENCE FOR NEW ZEALAND

A Initial Considerations

The previous section considered the principles of the common law which are preserved by section 225(3) of the Copyright Act 1994. The issue now is to decide how to develop these principles into a defence which protects freedom of expression for New Zealand.

¹²⁴ Article 10(1) of the European Convention was discussed above at section III D.

In applying the common law "public interest" principles to the New Zealand situation under section 225(3), the Bill of Rights is an important consideration. Developing, enunciating and applying principles of the common law are judicial acts which are subject to the Bill of Rights.¹²⁵ Therefore it is legitimate for a judge to consider these rights in deciding a case based on common law principles.

In fact, this use of the Bill of Rights is potentially more powerful than its use as a statutory interpretation tool, because although an inconsistent statute overrides the Bill of Rights, there is no provision stating that an inconsistent common law rule has the same effect. Therefore, in so far as an area of law is not regulated by statute, judges are free to use the Bill of Rights to develop the principles of law in this area.¹²⁶

Therefore, there is scope in New Zealand for the development of a "section 14" defence to copyright for the purpose of protecting the interests of freedom of expression as guaranteed in section 14 of the Bill of Rights.

B Proposal for Section 14 Defence

It is useful to analyse what steps the court would need to take in deciding whether the proposed section 14 defence applies. The first stage in the court's inquiry would be to consider whether the defendant's use of the plaintiff's material, which would otherwise infringe copyright, advances the interests of freedom of expression. If the use genuinely promotes freedom of expression, the second stage would be to consider all the relevant circumstances surrounding the defendant's use. If the circumstances favour the defendant, the final stage would be to balance the interest in protecting freedom of expression against the interest in protecting copyright. If the balancing favours freedom of expression the use would be protected by the defence.¹²⁷

1 The first stage: does the defendant's use advance an interest protected by freedom of expression?

At this initial stage of the inquiry, the task of the court should be to decide the threshold question: whether the defendant's use genuinely advances one of the three interests protected by freedom of expression: (1) the open discussion of public affairs;

¹²⁵ Section 3. See section IV B2.

¹²⁶ Compare this to the approach taken by recent English cases in relation to the European Convention at section III D.

¹²⁷ This three-stage structure for the defence was suggested in G Johnston "Copyright and Freedom of the Media: A Modest Proposal" [1996] 1 EIPR 6, 11.

(2) the attainment of truth through the marketplace of ideas; and (3) the value of self-expression.

2 *The second stage: the circumstances surrounding the defendant's use*

It is useful to consider which circumstances would be relevant for the purposes of a section 14 defence.

(a) *identity of person making disclosure*

This factor is important in breach of confidence cases.¹²⁸ This is because a confidential relationship is formed between the confider and the confidant, and disclosure by the confidant can be justified only on limited grounds. The duty of confidence is primarily owed by the confidant, and extends to third parties only in limited circumstances.

In the case of copyright, the position is different. The duty not to breach copyright does not arise from any special relationship between the copyright holder and another person. Therefore the identity of the person making use of the copyright material is less important than the identity of the person making the disclosure in a confidence case. The identity of the person making use of copyright material becomes relevant only if there is some special permission for that person to do so.

In the context of freedom of expression, the issue is usually disclosure by a third party. A party to a confidential relationship may be taken to have waived his or her right to freedom of expression by entering into the relationship. It is also arguable that a limitation on freedom of expression which prevents the immediate parties to a confidential relationship from breaching that confidence is "reasonable" and can be justified in a free and democratic society. It is more difficult to argue that a limitation which prevents third parties from disclosing information satisfies the requirements of section 5.

In considering freedom of expression issues, the identity of the person making the disclosure is relevant only to establish the nature and extent of that person's right to freedom of expression. For example, it may be relevant that the person making the disclosure is the media.

(b) *identity of person to whom disclosure is made*

Another circumstance that courts consider in relation to the public interest defence to breach of confidence is the identity of the person to whom the disclosure is made.¹²⁹

¹²⁸ J Pizer, above n 102, 79.

¹²⁹ *Initial Services v Putterill*, above n 93.

The origin of this appears to be in cases of disclosure of wrongdoing, where disclosure to the authorities is more appropriate and serves the public interest better, than disclosure to the media or to the public at large.¹³⁰

Following this, some writers argue that public disclosure should be protected only where disclosure to the proper authorities is not practical.¹³¹ This could be because the public has a right to know, because the information affects a significant proportion of the community. It could also be because the authorities have an interest in restraining the disclosure. An example of this would be where corruption in government is alleged. It would be pointless to suggest that government authorities should be notified.

In some situations, disclosure to the authorities serves "the public interest". But *which* public interest is being served? It must be the interest in the prevention of harm and the efficient administration of justice. Disclosure solely to the authorities can never further the interest in promoting the open discussion of public affairs and the realisation of the democratic ideal. We have decided that this is the most important interest to be protected by the public interest defence. Therefore disclosure to the authorities should not be taken as a substitute for informing the public.

(c) *defendant's behaviour*

In considering the public interest defence to breach of confidence, courts may have regard to the method by which the material was obtained by the defendant.¹³² This is important where the focus of the defence is iniquity. If the defendant has engaged in dishonest activities, or is seeking to exploit the material for his or her own financial gain, the defendant does not "come to equity with clean hands", and therefore cannot demand the protection of equity.¹³³

However, the focus of the proposed section 14 defence is promoting the open discussion of public affairs. Therefore the actions of the defendant in obtaining and disclosing the material are not directly relevant. It is of course not desirable to encourage people to break in and steal in order to obtain information. But any dishonest or criminal behaviour in obtaining the information can be punished

¹³⁰ A Coleman *The Legal Protection of Trade Secrets* (Sweet & Maxwell, London, 1992) 72.

¹³¹ Above n 102, 81.

¹³² Coleman, above n 150, 72.

¹³³ Pizer, above n 102, 72-73.

separately by the criminal or civil law.¹³⁴ The behaviour of the defendant should not be the focus of the section 14 defence.

In breach of confidence cases, the defendant's motive can be taken into account.¹³⁵ It can be relevant whether the defendant has deliberately exploited the plaintiff's material for economic gain, or has used the material with the genuine belief that the use will further the open discussion of government affairs.

Again, this is partly connected to the principle that the defendant should not be allowed to take advantage of his own wrongdoing. It has already been argued that the defendant's wrongdoing is not relevant to a section 14 defence.

It is submitted that if the defendant uses copyright material in a manner which promotes the open discussion of public affairs, the fact that the defendant makes a profit from the use is not directly relevant. The important factor to be considered is whether the use threatens the economic rationale for copyright. This factor is to be balanced against the public interest in freedom of expression at the third stage of the inquiry.

(d) whether the information is already public

The Copyright Act 1994 protects both published and unpublished works. It also protects the author's right to issue the work to the public, that is, to publish the work first. It follows that the information contained in a copyright work may already be public in the sense that it has been published.

The significance of this lies in the fact that it will be difficult to argue that the open discussion of public affairs justifies an infringing use of a copyright work where the work is already published. If the work has not been published widely, an infringing use may be justified where it would serve to disseminate the information to a wider section of the public. Similarly, if the work is about to be published, it will be difficult to argue that freedom of expression requires its publication earlier.

Therefore, arguably the most important application of a defence protecting freedom of expression would be where the work is unpublished and the author intends for it to remain unpublished.¹³⁶

¹³⁴ See Coleman, above n 130, 73.

¹³⁵ Pizer, above n 102, 83.

¹³⁶ See M Sayal "Copyright and Freedom of the Media: A Balancing Exercise?" [1995] 7 Ent LR 263, 274.

(e) *the existence of reasons against publication of the work*

At this stage of the inquiry, the court would also need to consider any factors which would make publication or disclosure harmful to the public interest. An example is the existence of national security concerns.

4 *The third stage: balancing the interests*

At this final stage of the inquiry, the task of the court would be to balance the competing interests in order to finally decide whether the defendant's use ought to be excused under the defence. The interest protected by freedom of expression, which is promoted by the defendant's use of the plaintiff's material, must be balanced against the public interest in maintaining copyright protection.

The result of this balancing would depend on the individual circumstances of the case, as identified by the court at the second stage of the inquiry. However, it is possible to make some general observations about the nature of the interests to be balanced.

The interests protected by freedom of expression are first, the promotion of open discussion of government affairs; second, the attainment of truth through the marketplace of ideas; and third, the value of individual self-expression.

It is submitted that the open discussion of public affairs is the interest which provides the strongest case for the development of a defence to protect freedom of expression. It is difficult to imagine a situation where the marketplace of ideas or the value of self-expression could ever outweigh the public interest in the maintenance of the economic rationale for copyright protection.

This is illustrated by cases of the Kennedy photos and the Ford memoirs. Earlier sections of this paper argued that: (1) the open discussion of public affairs requires the appropriation of the actual form of the plaintiff's work;¹³⁷ and (2) the defence of fair dealing would not allow the use of this form in New Zealand.¹³⁸ Therefore, these cases are examples of situations where a public interest defence is necessary in the interests of the open discussion of public affairs.

Secondly, the marketplace of ideas rationale values freedom of expression as a means to truth. It is in the public interest that the truth be discovered, and in some cases discovering the truth may be a necessary concomitant of promoting the open discussion of government affairs.

¹³⁷ See section VII B3.

¹³⁸ See section VIII E.

However, it is unlikely that the value of truth by itself could outweigh the public interest in maintaining copyright protection. For example, the rationale of truth could justify a use of material which does nothing more than correct an error in a previously distributed work. If uses which advance this interest only are allowed, this is likely to undermine the rationale for copyright protection.

Thirdly, the private nature of the value of individual self-expression means that it is unlikely to outweigh the public interest in maintaining copyright protection. The value of self-expression will have no application to material such as the Kennedy photos or the extracts from the Ford memoirs. It will also have no application to material such as government documents.

Therefore it is submitted that this final stage will usually involve a balancing of the interest in the open discussion of public affairs, with the public interest protected by copyright. Section 5 of the Bill of Rights should be relevant in this process. This would ensure that the copyright interest will prevail only in cases where that interest constitutes a limit which is reasonable and justified in a free and democratic society.

C *Conclusion*

It is submitted that the above proposal for a section 14 defence protects freedom of expression where the idea-expression dichotomy and the defence of fair dealing do not, namely where the appropriation of actual form is positively required by a non-economic interest of freedom of expression. The situations of the Kennedy photos and the Ford memoirs can then be justified on this defence.

XI CONCLUSION

As we have seen, section 225(3) of the Copyright Act 1994 provides an opening for the development of a defence to copyright, based on the "public interest". The existence of the section 14 guarantee of freedom of expression in the Bill of Rights means that it is open to a New Zealand court to develop a "section 14 defence", a defence to copyright which promotes the interests of freedom of expression, especially the open discussion of public affairs.

This paper has argued that such a defence should be available only where the defendant's use of the copyright work was necessary in order to promote the right to freedom of expression. The defence should succeed only where the public interest in freedom of expression outweighs the public interest in maintaining the economic incentive for copyright.

Provided that the defence is kept within these limits, a section 14 defence to copyright could be a powerful tool to protect the right to freedom of expression.

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