

IS THERE A DEFENCE OF PUBLIC INTEREST IN THE LAW OF COPYRIGHT IN SINGAPORE?

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This article essentially examines the question as to whether there is any basis, in principle, for the existence and application of an extra-statutory defence based on the general public interest in the law of copyright in Singapore. The article begins by tracing the history of the defence of public interest that is sometimes raised by defendants in actions for copyright infringement in England. It looks at how the defence at common law—and whether correctly or not—found its way into the U.K. *Copyright, Designs and Patents Act 1988* and examines the interpretation accorded to it by the English courts. Adopting a comparative approach, the article then examines the issue from the Australian perspective and concludes by asking how Singapore should approach the question of public interest in our domestic law of copyright.

I. INTRODUCTION

Public interest is in itself an elusive concept. As a defence, it has been raised on numerous occasions in actions for breach of confidence and, in England at least, also in actions for copyright infringement. It is fair to say that the whole concept of a public interest defence in the law of confidence is relatively uncontroversial and well established. This paper will therefore focus, from a comparative perspective, on a general discussion of the arguably more controversial defence of public interest in actions for copyright infringement and, more specifically, will attempt to address the question as to whether there is any room, in principle, for the existence and application of an extra-statutory defence based on the general public interest in the law of copyright in Singapore.

Competition in the food industry has always been, and will continue to be, intense. This is especially so in Singapore where citizens and residents alike

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are known to indulge in food as the favourite national pastime. The topic of food is unquestionably of immense public interest in Singapore (and indeed elsewhere). Rather ironically, therefore, the defence of public interest against an action for copyright infringement was raised recently in connection with an intellectual property dispute over a newspaper advertisement on food.¹

II. WHY THE DEFENCE OF PUBLIC INTEREST?

As is well-known, an internal, built-in mechanism is to be found in the copyright legislation of many countries whereby certain acts, if undertaken and which would otherwise amount to infringements of copyright, do not in law give rise to liability. In Singapore, the *Copyright Act 1987*² itself provides for certain statutory defences to copyright infringement, the most well-known of which are the fair dealing defences.³ Nevertheless, case law in England suggests that there is an extra-statutory defence, of uncertain scope and validity, by which courts will sometimes deny the copyright owner enforcement of his copyright on the grounds of public interest.

In the local decision of *Bee Cheng Hiang Hup Chong Foodstuff Pte. Ltd. v. Fragrance Foodstuff Pte. Ltd.*, counsel for the defendants had cited three English authorities⁴ to support their argument that although copyright is today governed by statute, this did not necessarily mean that there was no room for the common law defence of public interest. It was submitted by counsel that the *Copyright Act 1987* ought not to be used as a mechanism to suppress information which the public had an interest, and more importantly, a right to know.

These arguments did not find favour with Lai Siu Chiu J. at first instance,⁵ who was of the view that the public interest defence could not be successfully invoked on the facts of the case simply because “. . . the matter was only of interest to the plaintiffs and the defendants, not to the general public”.⁶ Lai J. accordingly granted the plaintiffs’ application for summary judgment against the defendants for copyright infringement. It is not entirely clear from the judgment itself as to whether or not Lai J. had accepted the availability of

¹ See *Bee Cheng Hiang Hup Chong Foodstuff Pte. Ltd. v. Fragrance Foodstuff Pte. Ltd.* [2003] 1 S.L.R. 305.

² Cap. 63, 1999 Rev. Ed. Sing.

³ See sections 35–37 for authors’ works and sections 109–111 for neighbouring rights

⁴ *Hubbard v. Vosper* [1972] 2 Q.B. 84; *Beloff v. Pressdram Ltd.* [1973] F.S.R. 33; *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526.

⁵ The decision of Lai Siu Chiu J. in the Singapore High Court in *Fragrance Foodstuff Pte. Ltd. v. Bee Cheng Hiang Hup Chong Foodstuff Pte. Ltd.* (Suit No. 141 of 2002) is reported at [2002] 4 S.L.R. 916.

⁶ *Ibid.* at 926.

the public interest defence in an action for copyright infringement. Whilst her Honour had clearly dismissed the defence on the facts of the case before her, she did not (and probably did not have to) express any concluded view on the existence and scope of such a defence. When the case subsequently went on appeal, the views expressed by the Singapore Court of Appeal were equally non-committal.⁷ Chao Hick Tin J.A., in allowing the appeal, disagreed with the trial judge that the case at hand could be disposed of summarily and instead ordered the matter to proceed to trial. His Honour pointed out that the various issues raised by counsel in this case involved “difficult questions of law” which required “mature consideration”.⁸ A full trial was therefore necessary for a proper determination of these issues.⁹

The question which this paper therefore seeks to address (and one which is fraught with controversy) is whether there is any room, in principle, for the existence and application of an extra-statutory defence based on the general public interest in the law of copyright in Singapore.¹⁰ We begin our discussion first with an analysis of the English experience.

III. THE ENGLISH POSITION

Case law in England generally supports the existence of such a defence in actions for copyright infringement. In what must have been one of the earliest pronouncements on the matter, Ungood-Thomas J. in *Beloff v. Pressdram Ltd.*,¹¹ albeit in *obiter dicta*, took the view that there was arguably a defence of public interest to actions for copyright infringement but, at the same time, acknowledged that this defence was of limited scope. His Lordship pointed out that fair dealing was a “statutory defence limited to infringement of copyright only” whereas public interest was a “defence outside and independent of statutes” and one which was “not limited to copyright cases” (since, in his Lordship’s view, the public interest defence was “based upon a general principle of common law”).¹²

In formulating his opinion of the public interest defence in relation to actions for copyright infringement, Ungood-Thomas J. had referred to two

⁷ The decision of the Singapore Court of Appeal in *Bee Cheng Hiang Hup Chong Foodstuff Pte. Ltd. v. Fragrance Foodstuff Pte. Ltd.* (Civil Appeal No. 43 of 2002) is reported at [2003] 1 S.L.R. 305.

⁸ *Ibid.* at 313.

⁹ It is however understood by this author that the disputing parties in this case have since settled the matter out of court. See the announcement made by the disputing parties and the Singapore Food Manufacturers’ Association in the 11 April 2003 issue of *The Straits Times* (page H12).

¹⁰ Jacob J. was of the view that this question, even in the English context, was “somewhat abstract in nature” (*Hyde Park Residence Ltd. v. Yelland* [1999] R.P.C. 655 at 663 [Yelland]).

¹¹ [1973] F.S.R. 33 at 56–58.

¹² [1973] F.S.R. 33 at 56.

earlier English Court of Appeal decisions. The first was *Initial Services Ltd. v. Putterill*,¹³ where the court had refused to strike out a defence which had been raised solely in relation to a claim for breach of confidence. It is clear that copyright was not at all an issue in that case.¹⁴ Ungoe-Thomas J. also considered *Hubbard v. Vosper*,¹⁵ in which the court had refused to grant an interlocutory injunction to restrain an infringement of copyright and a breach of confidence. In dealing with the issue of copyright infringement,¹⁶ Lord Denning M.R. was of the view that the defendant might, at the trial, have an arguable defence under section 6(2) of the U.K. *Copyright Act 1956* (i.e. the statutory defence of fair dealing for the purpose of criticism or review). It is important to note that the defence of public interest was not at all raised nor discussed in relation to this issue. Instead, it was with regard to the issue of breach of confidence that his Lordship decided that it was arguably in the public interest to have the contents of the confidence in question made known (namely, material on Scientology (a cult) described as “medical quackeries” that could be “dangerous in untrained hands”).¹⁷

It is therefore quite clear that neither *Initial Services* nor *Hubbard* actually supported the extension by Ungoe-Thomas J. of the public interest defence (which was more commonly available in actions for breach of confidence) to copyright infringement claims,¹⁸ such extension being expressed by his Lordship, after a review of the authorities, in the following, rather unconvincing terms: “Public interest, as a defence in law, operates to override the rights of the individual (*including copyright*), which would otherwise prevail and which the law is also concerned to protect. Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view, clearly recognisable as such”.¹⁹ It is regrettable that his Lordship did not clarify how, if at

¹³ [1968] 1 Q.B. 396.

¹⁴ “So far as copyright is concerned, the claim in *Initial* was not actually framed in copyright at all, though on the facts it seems it could have been so framed. The claim was only for breach of confidence and the case was decided on the basis that the courts will not grant an injunction to restrain a breach of confidence where the alleged breach will result in disclosure of an iniquity . . .” (per Jacob J. in *Yelland*, *supra* note 10 at 666). See also the remarks of Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 620.

¹⁵ [1972] 2 Q.B. 84.

¹⁶ *Ibid.* at 92–95.

¹⁷ *Ibid.* at 95–96.

¹⁸ Per Jacob J. in *Yelland*, *supra* note 10 at 667: “I have already indicated that I think Mr Bloch was right about the authorities relied upon by Ungoe-Thomas J. in *Beloff*. They do not explicitly support Ungoe-Thomas J.’s *obiter* conclusion The upshot of Mr Bloch’s analysis, which I think is correct, is that in neither *Beloff* nor *Lion* was there any substantial basis in precedent for the judges’ conclusions that a defence of public interest existed.” This view was endorsed on appeal by Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 624.

¹⁹ [1973] F.S.R. 33 at 57.

all, the defence of public interest (rooted, as it is, in the common law) could have overridden an express statutory right provided for by Parliament.²⁰ He merely proceeded on the basis that the defence was available in actions for copyright infringement, but that on the facts of the case before him, the defence would not have been made out. Ungoed-Thomas J.'s remarks on the public interest defence are therefore, it is submitted, neither authority nor persuasive; in any event, they were purely *obiter*.²¹

More than a decade later, the English Court of Appeal again had the opportunity to consider the defence of public interest in *Lion Laboratories Ltd. v. Evans*,²² where all three members of the court appeared to have accepted that the defence was available in actions for copyright infringement. The crux of the litigation in *Lion Laboratories* involved an attempt by the plaintiffs to prevent unauthorised use of their confidential information (which, in this case, took the form of internal company memoranda). These confidential documents (extracts of which were later published in the press through the defendants' leak) had cast doubt on the accuracy of performance of the breathalyser instrument which was manufactured by the plaintiffs and used for measuring the alcohol levels of motorists (for the purposes of prosecuting drink-driving offenders). Whilst the plaintiffs were clearly the owners of copyright in these documents (and who therefore also sued the defendants for copyright infringement), they were nevertheless more concerned with obtaining interlocutory injunctive relief against the defendants on the basis of an action for breach of confidence.

Stephenson L.J. (with whom O'Connor L.J. agreed) appeared to have accepted, without giving any reasons whatsoever, that public interest was as much a valid defence to an action for copyright infringement as it was to an action for breach of confidence (on which there was a plethora of authority). His Lordship opined thus: "Equally there is no dispute that the copyright of these documents [disclosing the inaccuracy of the breathalyser instrument] is in the plaintiffs and to publish them would infringe the plaintiffs' copyright, subject to the *same public interest* being a just cause or excuse for their publication".²³ It should however be noted that the extracts from

²⁰ See, in particular, the critique in Laddie, Prescott and Vitoria, *The Modern Law of Copyright* (London: Butterworths, 1980) at para. 2.107 [emphasis added].

²¹ Ungoed-Thomas J.'s willingness to extend the application of the public interest defence to actions for copyright infringement may be better appreciated if his remarks are taken in context, that *Beloff* actually concerned "an action for breach of confidence under the guise of an action for infringement of copyright—an action springing from breach of confidence but framed in breach of copyright" ([1973] F.S.R. 33 at 56). Even so, the question remains as to the precise position at law in cases where the action brought by the plaintiff is not so "dressed-up".

²² [1985] Q.B. 526.

²³ [1985] Q.B. 526 at 535 [emphasis added]. See also Stephenson L.J.'s reiteration of the point at 536.

the various cases relied upon by his Lordship in support of this conclusion were from cases concerned with allegations of breach of confidence, and not infringement of copyright.²⁴ Furthermore, nowhere in the judgment did his Lordship refer to the fair dealing defences to copyright infringement (as provided for in section 6 of the U.K. *Copyright Act 1956*), although this issue had been canvassed before the trial judge. Could the defendants not have successfully argued, on facts such as these, that they were after all dealing fairly with the plaintiffs' confidential documents for the purpose of reporting current events in a newspaper? Surely, the accuracy and reliability of an instrument such as the breathalyser, if already a matter of serious public concern, must, on any definition, have constituted a "current event" within section 6(3) of the U.K. *Copyright Act 1956*.²⁵ Indeed, Mance L.J. in *Hyde Park Residence Ltd. v. Yelland*²⁶ expressed surprise at the apparent lacuna:

One question which may be raised in relation to *Lion* is why no defence of 'fair dealing' was mounted. The report indicates that the recently introduced Intoximeter 3000, to which the case related, and the convictions founded upon it were already the subject of *lively public controversy*. Be that as it may, the case was argued and decided on the *sole* basis of public interest. *But the fact that section 30 was not even considered does to my mind throw some further doubt on Lion as an authority that there is a general public interest exception to copyright equating with that applicable to confidence.*²⁷

It also appears that Stephenson L.J. had treated the action for copyright infringement, clearly a statutory cause of action at the time the case was heard, as though it were akin to the common law action for breach of confidence. This view is bolstered by his Lordship's remarks as follows: "[The trial judge] was in my judgment right to make no difference between confidence and copyright for the purposes of this case, and I shall not consider

²⁴ See Aldous L.J.'s observation in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 623.

²⁵ *Cf. Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.* [1999] F.S.R. 610 where the English Court of Appeal held that Ms Mandy Allwood's multiple pregnancy (involving eight live embryos as a result of fertility treatment) was a matter of great public interest, possibly because of the consequential uncertainty in continuing a pregnancy with all eight embryos (as was the opinion of Ms Allwood's obstetrician). Robert Walker L.J. opined at 625 that "Ms Allwood's multiple pregnancy, its progress and its eventual outcome were on any view current events of real interest to the public", such that the defendant's own media coverage of Ms Allwood's story, which would have otherwise amounted to an infringement of the plaintiff's copyright, was treated by the court as, *inter alia*, fair dealing for the purpose of reporting current events within section 30(2) of the U.K. *Copyright, Designs and Patents Act 1988* (CDPA).

²⁶ [2000] R.P.C. 604 [emphasis added].

²⁷ *Ibid.* at 629.

them separately”.²⁸ Clearly, his Lordship’s conflation of these two causes of action is conceptually misleading. The action for copyright infringement and that for breach of confidence are, in principle, distinct causes of action. The former is statute-based, whilst the latter is rooted in the common law. This is an important distinction to make and one which will receive greater exposition below. One possible explanation for the analysis that was adopted by Stephenson L.J. is based on the view that this case was essentially concerned with the defendants’ misuse of confidential information (and hence the defendants’ breach of confidence) and only incidentally with the defendants’ infringement of the plaintiffs’ copyright in the various confidential documents. As O’Connor L.J. explained: “The plaintiffs may have causes of action for breach of copyright and conversion, and after publication for libel or slander of goods; but *the heart of the matter* is the unauthorised use of the confidential information, and that can be protected by the equitable remedy of injunction”.²⁹ Similar observations have been made by commentators.³⁰ Nevertheless, it is submitted that the better approach would have been for his Lordship to consider the two causes of action as distinct and to have at least considered the fair dealing defences provided for in section 6 of the U.K. *Copyright Act 1956* (particularly section 6(3)).

The third member of the Court of Appeal, Griffiths L.J., was arguably the most explicit on the point. His Lordship felt “quite satisfied” that the defence of public interest was now “well established in actions for breach of confidence” and that whilst there was “less authority on the point”, the defence extended also to actions for copyright infringement.³¹ Regrettably, the various authorities relied upon by his Lordship in support of the latter view (*viz. Fraser v. Evans*,³² *Hubbard v. Vosper*,³³ *Woodward v. Hutchins*³⁴ and *British Steel Corporation v. Granada Television Ltd.*³⁵) had nothing to do with the defence of public interest in actions for copyright infringement—they

²⁸ [1985] Q.B. 526 at 536.

²⁹ *Ibid.* at 547 [emphasis added]. See also Aldous L.J.’s explanation of this phenomenon in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 623.

³⁰ See, *e.g.*, R. Burrell, “Defending the Public Interest” [2000] E.I.P.R. 394 at 395: “Indeed, an interesting feature of the sorts of work that will usually be involved in public interest cases is that the subsistence of copyright will be almost entirely accidental.” The plaintiff’s “underlying grievance” in such cases is usually the defendant’s unauthorised use of confidential information. See also the observation made in Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 3rd ed. (London: Butterworths, 2000) at para. 20.9: “Usually these have been cases where the real or principal claim has been one for misuse of confidential information and a copyright infringement claim has been tacked on almost as an afterthought.”

³¹ [1985] Q.B. 526 at 550.

³² [1969] 1 Q.B. 349.

³³ [1972] 2 Q.B. 84.

³⁴ [1977] 1 W.L.R. 760.

³⁵ [1981] A.C. 1096.

were either cases which concerned confidential information or, if copyright was involved, cases in which the statutory defence of fair dealing was asserted.³⁶

The decision of the English Court of Appeal in *Lion Laboratories* cannot therefore stand for the proposition that the defence of public interest is, in principle, available in actions for copyright infringement. Whilst it is not disputed that the defence of public interest is more commonly available in actions for breach of confidence and that there may be, on occasion, overlap between actions for breach of confidence and actions for copyright infringement, the extension made of the public interest defence to actions for copyright infringement is, it is submitted, not at all supported by authority.³⁷ Indeed, it has been observed of the evolution of authority in England that the English courts have not (thus far) considered the existence of the public interest defence in actions for copyright infringement as a matter of “fundamental principle”.³⁸ After all, in many of these cases involving applications for interim relief, the conclusion that a defence of public interest was available in actions for copyright infringement would have been reached without the benefit of full argument.³⁹

Nonetheless, several first instance judgments following *Lion Laboratories* continued to evince the general tendency of the English courts towards recognising the public interest defence in actions for copyright infringement.⁴⁰ It was not until the landmark decision of the English Court of Appeal in *Hyde Park Residence Ltd. v. Yelland*⁴¹ that the defence of public interest received its fullest consideration. However, before turning to a discussion of *Hyde Park*, it is apposite at this juncture to introduce to the reader section 171(3) of the U.K. *Copyright, Designs and Patents Act 1988* (CDPA) and to briefly discuss the implications of this provision.

³⁶ See also Jacob J.’s remarks in *Yelland*, *supra* note 10 at 667.

³⁷ See G. Wei, *The Law of Copyright in Singapore*, 2nd ed. (Singapore: S.N.P. Editions, 2000) at 861 and Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 2nd ed. (London: Butterworths, 1995) at para. 2.152.

³⁸ *Collier Constructions Pty. Ltd. v. Foskett Pty. Ltd.* (1990) 19 I.P.R. 44 at 56 (*per Gummow J.*). See also Jacob J. in *Yelland*, *supra* note 10 at 667: “It seems to me that judicial authority in England and Wales over the years up to the [CDPA 1988] had, *albeit with little basis*, been tending towards the recognition of this defence”; and at 669: “the pre-[CDPA] authorities had *inadequate foundation*. . . .” [emphasis added]. See further note 18, *supra*.

³⁹ See also the view expressed in Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 2nd ed. (London: Butterworths, 1995) at para. 2.150: “. . . these cases were not actual judicial determinations of the point, but only obiter dicta or concessions by counsel . . .”.

⁴⁰ *Beggars Banquet Records Limited v. Carlton Television Limited and Another* [1993] E.M.L.R. 349 at 371–372 (Warner J.); *P.C.R. Limited v. Dow Jones Telerate Limited* [1998] F.S.R. 170 at 187 (Lloyd J.); *Service Corporation International plc. and Another v. Channel Four Television Corporation and Another* [1999] E.M.L.R. 83 at 91 (Lightman J.).

⁴¹ [2000] R.P.C. 604. The first instance decision of Jacob J. is reported at [1999] R.P.C. 655.

Section 171(3) of the U.K. CDPA 1988 provides that nothing in the relevant Part of the statute “affects any rule of law preventing or restricting the enforcement of copyright, on the grounds of public interest or otherwise”. No such provision existed under the U.K. *Copyright Act 1956*. What then is the effect of Parliament’s enactment of this provision? Does section 171(3) create or provide for the defence of public interest in the law of copyright or does it merely preserve one that is already in existence in the case law?

Professor Wei proffers this succinct explanation: the enactment of the U.K. CDPA 1988

at first sight appears to settle the matter in favour of the existence of the [public interest] defence through a statutory mandate in section 171(3). However, this depends on a finding that there is [first and foremost] a rule of law preventing or restricting the enforcement of copyright on the grounds of public interest. Section 171(3) of the English Act at first sight appears to be a *savings provision* and on this basis *it is not a provision which actually creates or crafts a rule of law*. The rule of law must be shown to exist first before section 171(3) is relevant.⁴²

A reference to *Hansard* clearly supports this interpretation of section 171(3). Although by legislative amendment, a general defence of public interest could have been expressly incorporated into the statute,⁴³ this was categorically resisted after the Minister responsible, Lord Beaverbrook, argued that the amendment was both superfluous and potentially counterproductive.⁴⁴ Lord Beaverbrook clarified that “[section 171(3)] acknowledges the *continuing effect of case law* without attempting to codify it, thus leaving the law on this matter where it has always been, *in the hands of the courts*”.⁴⁵

The question which naturally arises is whether the English courts themselves have clearly established—whether correctly or not—the defence of public interest in the law of copyright. What is clear from the authorities is that in decisions after *Beloff* and *Lion Laboratories*, the English courts have, rather conveniently, assumed that case law in England generally recognises the existence of the public interest defence in actions for copyright infringement and that with the subsequent enactment of section 171(3) CDPA, the U.K. Parliament must have intended to preserve the defence as created and established by the courts through the years.⁴⁶ It has however been argued above that in neither *Beloff* nor *Lion Laboratories* was

⁴² G. Wei, *The Law of Copyright in Singapore*, 2nd ed. (Singapore: S.N.P. Editions, 2000) at 859–860 [emphasis added].

⁴³ The proposed amendment to the Bill read as follows: “Copyright is not infringed by anything done in the public interest.”

⁴⁴ *Hansard*, H.L., vol. 491, col. 77 (8 December 1987).

⁴⁵ *Hansard*, H.L., vol. 495, col. 632 (29 March 1988) [emphasis added].

⁴⁶ *P.C.R. Limited v. Dow Jones Telerate Limited* [1998] F.S.R. 170 at 187 (Lloyd J.); *Yelland*, *supra* note 10 at 667 (Jacob J.); *Imutran Ltd. v. Uncaged Campaigns Ltd.* [2002] F.S.R. 2 at

there any basis in precedent or principle for the courts' recognition of the public interest defence in actions for copyright infringement. As such, if section 171(3) was intended to recognise and preserve what the courts in *Beloff* and *Lion Laboratories* had decided vis-à-vis the existence of the public interest defence in the law of copyright, then it is respectfully submitted that the U.K. Parliament had erroneously imported into the corpus of statutory copyright law in England an unprincipled and unwarranted extension of the common law defence of public interest.⁴⁷

Be that as it may, it is in this spirit that we turn now to consider *Hyde Park Residence Ltd. v. Yelland*.⁴⁸ The facts briefly were these. The claimant, a company providing security services, sought summary judgment against the editor of *The Sun* newspaper for publishing photographic stills of the late Princess Diana and Mr Dodi Fayed at the Villa Windsor which had been taken from security video tape, the copyright in which was owned by the claimant. In defence of the copyright infringement claim, the defendant argued that the publication of the stills (which revealed the exact times when Diana and Dodi arrived at and left the house on the eve of their deaths and therefore exposed the falsity of the claims made by Mr Mohamed Al Fayed as to the duration of the duo's visit to the house) amounted to fair dealing for the purpose of reporting current events (under section 30(2) CDPA) and that such publication was also in the general public interest.

Jacob J. at first instance denied the claimant summary judgment and upheld the defences raised by the defendant. Insofar as the defence of public interest was concerned, Jacob J. was of the view that section 171(3) CDPA was intended by the U.K. Parliament to recognise the defence of public interest in English copyright law—either by way of “refusing to recognise copyright altogether” (via the “preventing enforcement” limb of section 171(3)) or by way of a “defence in the particular circumstances of the case” (via the “restricting enforcement” limb of section 171(3)).⁴⁹

31 (Sir Andrew Morritt V.C.). See also G. Dworkin and R. Taylor, *Blackstone's Guide to the Copyright, Designs and Patents Act 1988* (London: Blackstone, 1989) at 81–82.

⁴⁷ See also R. Burrell, “Defending the Public Interest” [2000] E.I.P.R. 394 at 402: “A technical or pedantic construction [of section 171(3) CDPA] focuses on the fact that the wording of the section does not actually provide for a defence. Rather, the section only states that any existing defence is preserved. If one concludes from the pre-1988 authorities that a public interest defence never in fact existed, it can be argued that section 171(3) is in no way sufficient to bring such a defence into being. The fact that Parliament may have been under a misapprehension as to the state of the authorities is not a matter for the courts—if Parliament was genuinely concerned to provide a broad, open-ended public interest defence then it could have done so expressly and, of course, Parliament can choose to revisit this issue at any time.”

⁴⁸ The first instance decision of Jacob J. is reported at [1999] R.P.C. 655 whilst the decision of the English Court of Appeal is reported at [2000] R.P.C. 604.

⁴⁹ [1999] R.P.C. 655 at 667.

The “preventing enforcement” limb of section 171(3) is unexceptional.⁵⁰ Historically, it has been judicially recognised that public policy can, in principle, prevent the enforcement of copyright completely, especially where the work in question was immoral (*Glyn v. Weston Feature Film Co.*)⁵¹ or fraudulent/deceitful (*Slingsby v. Bradford Patent Truck and Trolley Co.*),⁵² or where the work in question reeked of moral turpitude (*Attorney-General v. Guardian Newspapers Ltd. (No. 2)*).⁵³ Indeed, it was accepted by Browne-Wilkinson V.C. in *Stephens v. Avery* that a court of equity will not enforce copyright in works which have a grossly immoral tendency.⁵⁴ Therefore, in such instances where the enforcement of copyright is contrary to the public interest, the intervention of equity (and the consequential denial of equitable relief) appears far less controversial, a point which we will return to below.

It is however with regard to the “restricting enforcement” limb of section 171(3) that the law of copyright is unfamiliar. Under what circumstances (outside those already provided for by statute)⁵⁵ should the courts recognise public interest as a defence to an action for copyright infringement or as a form of “restriction” on the enforcement of copyright?⁵⁶ As the defence of public interest is already relatively well-established in the law of confidence, it appears that the courts will, in this respect, approach the issue in the law of copyright in like manner.⁵⁷ The objections to such an approach have already been alluded to above and will again be re-examined in our discussion of the Court of Appeal’s judgment below.

In an about-turn, the claimant’s action for copyright infringement succeeded on appeal. In reversing the first instance judgment, the English Court of Appeal found that the defendant did not have an arguable defence to the copyright infringement claim as it was not in the public interest for the defendant to have published the security stills to prove that Mohamed Al Fayed’s statements were false (such information could have easily been made available by the defendant without infringing the claimant’s copyright).

⁵⁰ *Ibid.* at 665.

⁵¹ [1916] 1 Ch. 261.

⁵² [1906] W.N. 51.

⁵³ [1990] 1 A.C. 109 at 294.

⁵⁴ [1988] 2 All E.R. 477 at 480.

⁵⁵ See Chapter III of Part I of the U.K. CDPA 1988.

⁵⁶ Indeed, the manner in which the defence of public interest is to be invoked via the “restricting enforcement” limb of section 171(3) appears to be so nebulous that Jacob J., quite understandably, suggested that the defence was unlikely to succeed unless the court could be “reasonably certain that no right-thinking member of society would quarrel with the result” ([1999] R.P.C. 655 at 671).

⁵⁷ Unsurprisingly, Jacob J. had, in the course of his judgment, cited *Beloff* and *Lion Laboratories* as case examples of when the English courts will recognise public interest as a measure of restriction on the enforcement of copyright ([1999] R.P.C. 655 at 665–667).

The Court of Appeal unanimously held, *inter alia*, that the basis of the defence of public interest in an action for copyright infringement (if one exists at all) is not the same as the basis of such a defence to an action for breach of confidence. In other words, the public interest defence cannot be pleaded in the same way in both sets of action. As is well-known, in an action for breach of confidence, the defence of public interest seeks to strike a fair balance between two competing interests—the public interest in maintaining the confidence or in protecting confidentiality on the one hand, and the public interest in favour of disclosure and in knowing the truth on the other.⁵⁸ This balancing exercise, according to Aldous L.J. (with whom Stuart-Smith L.J. agreed), has “particular relevance to an action for breach of confidence”,⁵⁹ although “. . . [t]hat cannot be the test to be applied where copyright infringement has taken place . . .”.⁶⁰ Mance L.J. was of the view thus:⁶¹

Why then is the copyright claim to be viewed differently? The answer lies in my view in distinctions between confidential information and copyright, which are of particular significance in relation to any claim to have been entitled to publish the stills without the claimants’ consent. Confidential information is information about A’s affairs which B possesses, but in respect of which B may owe A a duty not to disclose the information to others. *Confidence and secrecy on the one hand and disclosure and publication on the other lie at opposite ends of one and the same continuum.* Protection of confidence depends on the force of A’s interest in *maintaining secrecy*. Freedom to publish depends on the force of competing considerations such as the *public interest in knowing the truth*.

Copyright is by contrast a property right, conferring on A alone the exclusive right to do certain acts in relation to certain works including sound recordings and films. It protects the form of such works and not any information which they contain as such. And it is regulated by statute. Section 30 of the [CDPA] 1988 expressly allows fair dealing with certain works for the purpose of criticism or review or of reporting current events. *Copyright does not lie on the same continuum as, nor is it the antithesis of, freedom of expression. The force of an owner’s interest in the protection of his copyright cannot be weighed in the same direct way against a public interest in knowing the truth.*

⁵⁸ See Lord Denning M.R.’s speech in *Woodward v. Hutchins* [1977] 1 W.L.R. 760 at 764.

⁵⁹ [2000] R.P.C. 604 at 621.

⁶⁰ *Ibid.*

⁶¹ [2000] R.P.C. 604 at 627–628 [emphasis added].

Clearly, and in this author's view, one important distinguishing factor lies in the fact that confidence and copyright protect different sorts of subject-matter. The purpose of the defence of public interest in the law of confidence is to warrant the disclosure to the public of information which is otherwise protected by an obligation of confidence. How else can the public be in the know of the truth unless the information itself is disclosed? On the other hand, information contained in a copyright document need not necessarily be disclosed to the public in exactly or substantially the same form. As copyright only protects the form in which the information has been expressed and not the underlying information *per se*, the public can still be in the know of the truth by the disclosure of the requisite information in a manner which does not infringe copyright. The underlying rationale for the defence of public interest in the law of copyright cannot therefore be the same as the underlying rationale for the defence of public interest in the law of confidence.

What then is the role of the public interest in the law of copyright? How is the defence of public interest to be raised and applied in actions for copyright infringement?

According to Aldous L.J., with whom Stuart-Smith L.J. agreed, the numerous provisions in Chapter III of Part I of the CDPA (the "permitted acts" provisions) already set out in detail the extent to which public interest overrides copyright.⁶² As such, for a general defence of public interest (falling outside the ambit of the Chapter III exceptions) to exist in the law of copyright, it must arise by some other route. In his Lordship's view, public interest is sufficiently accommodated by the court's exercise of its inherent jurisdiction to refuse to allow its process to be used by the plaintiff (in an action for copyright infringement) to enforce his copyright against the defendant in certain circumstances. This approach, which his Lordship described as the "correct approach to the defence of public interest in a copyright action",⁶³ is, in his Lordship's opinion, supported or preserved by section 171(3) CDPA. Further, the court's inherent jurisdiction to refuse to enforce copyright is to be "limited to cases where enforcement of the copyright would offend against the policy of the law".⁶⁴ The real difficulty, however, is for the court to define the circumstances in which its inherent jurisdiction should be invoked, and Aldous L.J. was of the opinion thus:⁶⁵

The circumstances where it is against the policy of the law to use the court's procedure to enforce copyright are, I suspect, not capable of

⁶² *Ibid.* at 617–618.

⁶³ *Ibid.* at 624.

⁶⁴ *Ibid.* at 625.

⁶⁵ *Ibid.* at 625.

definition . . . In my view a court would be entitled to refuse to enforce copyright if the work is: (i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in (ii).

Mance L.J., on the other hand, did not offer any definitive views as to how the public interest defence should be applied in the law of copyright, except to say that “. . . the different considerations applicable to confidential information and copyright must on any view make the exercise of identifying an overriding public interest a different one”⁶⁶ and that “the circumstances in which the public interest may override copyright are probably not capable of precise categorisation or definition”.⁶⁷ His Lordship did however recognise that “Section 171(3) of the [CDPA] expressly preserves the possibility that the enforcement of copyright may be prevented or restricted on grounds of public interest”.⁶⁸ Ultimately, Mance L.J. decided (in agreement with the other members of the Court of Appeal) that the public interest, based on the facts before him, did not justify the defendant’s infringement of the claimant’s copyright in the stills.⁶⁹

It is interesting to note that whilst Aldous L.J. (with whom Stuart-Smith L.J. agreed) did not expressly or outrightly deny the existence of the public interest defence in the law of copyright, his judgment did effectively curtail the applicability of such a defence in actions for copyright infringement. In his Lordship’s view, public interest is to be accommodated in the law of copyright in one of two ways: (1) by the various statutory exceptions set out in Chapter III of Part I of the CDPA (provisions that are arguably directed towards achieving a proper balance between the protection of copyright and the wider public interest), and (2) by the court’s exercise of its inherent jurisdiction in not allowing its process to be used by the plaintiff to enforce copyright in circumstances where such enforcement of copyright would offend against the policy of the law (this latter category is arguably supported by the “preventing enforcement” limb of section 171(3) CDPA). Outside these categories, however, it appears that there is very little scope, if any, for the application of a more general (and arguably wider) defence of public interest and this decision therefore throws into doubt the continued viability of raising the public interest defence (via the “restricting enforcement” limb of section 171(3)) in the particular circumstances of each copyright infringement case (as was suggested by Jacob J. at first

⁶⁶ *Ibid.* at 628.

⁶⁷ *Ibid.* at 630.

⁶⁸ *Ibid.* at 628.

⁶⁹ See *ibid.* at 629.

instance).⁷⁰ The general rule of thumb appears to be that statutory copyright protection must prevail.

The approach taken by the English Court of Appeal in *Hyde Park* (particularly in the judgment of Aldous L.J.) in respect of the defence of public interest in the law of copyright is to be welcomed.⁷¹ Attention has been drawn to the fact that section 171(3) CDPA essentially comprises two limbs—the first relates to a complete *denial* of copyright enforcement whilst the second relates to a mere *restriction* on the enforcement of copyright. It has also been argued that section 171(3) is merely a savings provision and that the “rule of law” must be shown to exist first before section 171(3) is relevant. Whilst it is not unreasonable to suggest that there is already in existence a “rule of law”, strongly supported by case authority,⁷² which recognises the court’s discretion to refuse to enforce copyright on so-called public policy grounds (and which rule is arguably preserved in English copyright law by the “preventing enforcement” limb of section 171(3)), there is unfortunately no sound principle at law which recognises the role of the public interest in restricting the enforcement of copyright in the particular circumstances of the case. It has been strenuously argued above that *Beloff* and *Lion Laboratories* are highly questionable decisions which do not justify the existence of the public interest defence in the law of copyright.⁷³

Meanwhile, the U.K. Parliament enacted the Human Rights Act (HRA) 1998 which came into force in October 2000, shortly after the English Court of Appeal had given judgment in *Hyde Park*. With the enactment of the HRA 1998, freedom of expression (as enshrined in Article 10 of the European Convention on Human Rights (ECHR)) had, for the first time, gained explicit

⁷⁰ *Per* Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 626: “The driveway stills contained nothing, nor was there any circumstance relating to them which could require the court to refuse to enforce the statutory property right provided by the [CDPA]. The only possible defence in respect of the copyright work, of which the driveway stills were part, was fair dealing.”

⁷¹ For a contrary view, see R. Burrell, “Defending the Public Interest” [2000] E.I.P.R. 394. One commentator has also expressed the view that the decision in *Hyde Park* may “indicate that, at a higher level, there has been a policy decision to curb the perceived “excesses” of the press” and that “[p]erhaps this heralds a new era of tighter judicial control of the press” (R.A. Browes, “Copyright: Court of Appeal Considers Fair Dealing Defence and Rejects Common Law Defence of Public Interest” [2000] E.I.P.R. 289 at 292).

⁷² See, *inter alia*, *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261; *Slingsby v. Bradford Patent Truck and Trolley Co.* [1906] W.N. 51; *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109; *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604. See also the text accompanying note 50, above.

⁷³ See also Aldous L.J.’s criticism of *Beloff* and *Lion Laboratories* in *Hyde Park* ([2000] R.P.C. 604 at 620 and 623 respectively) as well as Mance L.J.’s criticism of *Lion Laboratories* in *Hyde Park* ([2000] R.P.C. 604 at 629).

recognition in the English legal landscape. Insofar as the law of copyright in England is concerned, it is important to determine at the outset the precise relationship between the Convention right to freedom of expression and the statutory property right which is conferred on the owner of copyright by the CDPA 1988.⁷⁴ How will the two rights fall to be balanced when they come into conflict? To what extent, if at all, does the HRA 1998 impact upon the protection afforded to owners of copyright by the CDPA 1988? More specifically, what is the impact of the HRA 1998 on the scope of the defences available in actions for copyright infringement—should the courts now recognise, in addition to the existing statutory exceptions in the CDPA, further or new exceptions in English copyright law based upon the right of freedom of expression?

These were the sorts of questions which confronted the English Court of Appeal in *Ashdown v. Telegraph Group Ltd.*⁷⁵ In *Ashdown*, the claimant was a member of the British Parliament who, after a meeting with the British Prime Minister, had kept in his secret diary a minute of that meeting. The defendant later obtained through an unknown source a copy of the claimant's minute which the defendant subsequently published in the *Sunday Telegraph*. Unsurprisingly, the claimant instituted proceedings against the defendant for copyright infringement and sought summary judgment. The defendant, in contending that it had arguable defences to the claimant's copyright action under section 30 CDPA (on fair dealing) and section 171(3) CDPA (on public interest), sought to rely on the provisions of Article 10 ECHR in order to influence either the interpretation or the application of these defences. The defendant submitted that it was entitled to the right to freedom of expression provided for in Article 10 and that the court should interpret and apply the provisions of the CDPA to give effect to it (*i.e.* in a way which preserves its right of freedom of expression under Article 10).

At first instance, Sir Andrew Morritt V.C. was of the view that the provisions of the CDPA alone (in particular, section 30 on fair dealing) could and did satisfy the requirements of Article 10 ECHR and were sufficient to give effect to the Convention right to freedom of expression. He saw no reason why courts should "travel outside the provisions of the CDPA and recognise on the facts of particular cases further or other exceptions".⁷⁶ Indeed, his

⁷⁴ Indeed, as one commentator declared: "While copyright law as a whole withstands scrutiny, its particular details and interpretation should be subordinated to and influenced by the now higher normative status of freedom of expression" (M. Birnhack, "Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act" [2003] Ent. L.R. 24 at 31).

⁷⁵ [2002] R.P.C. 5. The first instance judgment of Sir Andrew Morritt V.C. is reported at [2001] R.P.C. 34.

⁷⁶ [2001] R.P.C. 34 at para. 15.

Lordship reiterated this point thus:⁷⁷

. Article 10 [ECHR] cannot be relied on to *create defences* to the alleged infringement *over and above* those for which the CDPA provides. The balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic State itself in the legislation it has enacted. *There is no room for any further defences outside the code* which establishes the particular species of intellectual property in question.

In short, Morritt V.C. was of the view that the CDPA 1988 in itself had already struck the appropriate balance between the rights and interests of copyright owners on the one hand and the public interest in freedom of expression on the other and that it was not necessary, in order to comply with Article 10 ECHR, to do more than apply the relevant provisions of the CDPA to the facts of each case.

The defendant in *Ashdown* had further contended that the Convention right to freedom of expression also came within the rule of law preserved by section 171(3) CDPA and that the principles laid down in *Hyde Park Residence Ltd. v. Yelland* in relation to the defence of public interest were not binding on Morritt V.C. because that decision of the English Court of Appeal had been given prior to the coming into force of the HRA 1998. Morritt V.C. was clearly unpersuaded by this argument:

As I have already held the Human Rights Act is not a reason for interpreting the CDPA any differently. It follows that the decision of the Court of Appeal [in *Hyde Park*] on the scope of section 171(3) is binding on me. Accordingly I conclude that section 171(3) does not afford any defence to the copyright claim either.⁷⁸

The English Court of Appeal in *Ashdown* was however less supportive of the *Hyde Park* decision (particularly the judgment of Aldous L.J. in *Hyde Park*). Lord Phillips M.R., in delivering the judgment of the court, felt that Aldous L.J.'s formulation of the public interest defence in *Hyde Park*⁷⁹ was unduly restrictive and was not justified on the authorities.⁸⁰ It is however respectfully submitted that Aldous L.J. in *Hyde Park* did not specifically restrict the application of the public interest defence in copyright infringement actions to those three categories of cases. Rather, those

⁷⁷ *Ibid.* at para. 20 [emphasis added].

⁷⁸ *Ibid.* at para. 32. Similar sentiments were also expressed by his Lordship in *Imutran Ltd. v. Uncaged Campaigns Ltd.* [2002] F.S.R. 2 at 32.

⁷⁹ See [2000] R.P.C. 604 at 625 and the text accompanying note 65, above.

⁸⁰ Lord Phillips M.R. opined thus: "In the light of these judgments, we do not consider that Aldous LJ was justified in circumscribing the public interest defence to breach of copyright as tightly as he did." ([2002] R.P.C. 5 at para. 58)

categories were but examples of circumstances where the enforcement of copyright would offend against the policy of the law and therefore examples of when the defence of public interest may be legitimately raised. Indeed, Aldous L.J. made it quite clear that the circumstances in which it would offend against the policy of the law to use a court's procedure to enforce copyright were not capable of precise definition.⁸¹ Further, it would appear that in reaching its own conclusion on the status of the public interest defence in English copyright law prior to the coming into force of the HRA 1998, the court in *Ashdown* had principally relied on the authority of the earlier English Court of Appeal decision in *Lion Laboratories Ltd. v. Evans*.⁸² It is again respectfully submitted that this is highly regrettable because, as argued above, the decision in *Lion Laboratories* simply cannot stand up to scrutiny for its recognition of the public interest defence in actions for copyright infringement.

More importantly, these differences in opinion as to the existence and scope of the public interest defence in English copyright law had probably arisen because *Hyde Park* was decided at a time when the HRA 1998 was not yet in force. As Lord Phillips M.R. in *Ashdown* emphatically declared: "Now that the Human Rights Act is in force, there is the *clearest public interest* in giving effect to the right of freedom of expression in those *rare* cases where this right trumps the rights conferred by the [CDPA 1988]. In such circumstances, we consider that section 171(3) of the Act permits the defence of public interest to be raised".⁸³ In other words, there will be instances, albeit rare, where the right of freedom of expression will, notwithstanding the express exceptions to be found in the Act, still come into conflict with the protection afforded to owners of copyright by the CDPA. Therefore, in order to accommodate the right of freedom of expression in these circumstances, the defence of public interest, which is preserved in section 171(3) CDPA, may be raised in actions for copyright infringement.

Whatever may have been the position at law before October 2000, it appears that, with the coming into force of the HRA 1998 coupled with the savings provision in section 171(3) CDPA, it is now easier to justify, so as to recognise and give effect to the right of freedom of expression, the existence of the defence of public interest in English copyright law. The difficulty however with the approach taken by the English Court of Appeal in *Ashdown* is that it is by no means certain how and when the defence of public interest may be raised in actions for copyright infringement in order to accommodate the right of freedom of expression. How "rare"

⁸¹ See [2000] R.P.C. 604 at 625.

⁸² [1985] Q.B. 526; see [2002] R.P.C. 5 at paras. 53–57.

⁸³ [2002] R.P.C. 5 at para. 58 [emphasis added].

indeed will such cases be?⁸⁴ Does this therefore mean that the defence of public interest, even though available in actions for copyright infringement, may only be raised in a very limited range of circumstances? The English Court of Appeal preferred to leave these questions open with Lord Phillips M.R. saying, rather unhelpfully, that “. . . the circumstances in which public interest may override copyright are not capable of precise categorisation or definition”.⁸⁵

The decision in *Ashdown* has been criticised for its failure to appreciate the true import of the Convention right to freedom of expression (which has since taken on added significance in English domestic law in light of Parliament’s enactment of the HRA 1998). As one commentator argued, the English Court of Appeal, whilst trying to reshape English copyright law to ensure compatibility with Article 10 ECHR, nevertheless adopted a particularly restrictive approach to the traditional statutory exceptions which allow for the reproduction of copyright works and also demonstrated a somewhat uncanny reluctance to engage substantively with the demands of Article 10.⁸⁶ The result would therefore have been highly disappointing to those who had hoped for more significant change to English copyright law. One commentator, in donning a more robust attitude, has even suggested the introduction of a more general defence in English copyright law to be modelled after the “fair use” defence in the United States (as codified in section 107 of the U.S. *Copyright Act* 17 U.S.C. (1976)).⁸⁷ We have certainly not heard the last word on the matter.

IV. THE AUSTRALIAN POSITION

The existence of the defence of public interest in the law of copyright has also been thrown into doubt in Australia. It is important however to state at

⁸⁴ Per Lord Phillips M.R. in *Ashdown v. Telegraph Group Ltd.* [2002] R.P.C. 5 at para. 59: “We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be *very rare* for the public interest to justify the copying of the form of a work to which copyright attaches” [emphasis added]. Cf., in this respect, the analysis adopted by Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 625, which, it is submitted, is somewhat more instructive (see the text accompanying note 65, above).

⁸⁵ [2002] R.P.C. 5 at para. 58, echoing the views expressed by Mance L.J. in *Hyde Park* ([2000] R.P.C. 604 at 630).

⁸⁶ See J. Griffiths, “Copyright law after *Ashdown*—time to deal fairly with the public” [2002] I.P.Q. 240 at 241, 250. The author further notes at 263 that “. . . it should perhaps not be surprising that the Court of Appeal appeared to be primarily concerned to ensure that the existing structure of copyright law was disrupted as little as possible by the implementation of the Human Rights Act.”

⁸⁷ R. Burrell, “Reining in Copyright Law: Is Fair Use the Answer?” [2001] I.P.Q. 361.

the outset that the Australian *Copyright Act 1968* (Cth.) does not contain a savings provision similar to section 171(3) CDPA.

In *Commonwealth of Australia v. John Fairfax & Sons Ltd.*,⁸⁸ Mason J., having referred to the earlier English authorities of *Beloff v. Pressdram Ltd.*⁸⁹ and *Fraser v. Evans*,⁹⁰ merely assumed that, whilst copyright was regulated by statute in Australia, the defence of public interest was nonetheless available in actions for copyright infringement.⁹¹ *Beloff*, as an authority for the existence of the public interest defence in English copyright law, has been severely criticised above. It is submitted that Mason J.'s reliance on the *Fraser* decision, and in particular on Lord Denning M.R.'s judgment at pages 362–363, is also misconceived. This is because the defence of public interest (as it relates to actions for copyright infringement), though raised by counsel for the defendants in argument, was not at all considered by the English Court of Appeal in its judgment (Lord Denning M.R. in the Court of Appeal had only considered, in relation to the action for copyright infringement, the defendants' arguments on fair dealing pursuant to section 6(3) of the U.K. *Copyright Act 1956*).⁹² In any event, the decision in *John Fairfax* only concerned an interlocutory application and it may reasonably be said that Mason J. did not have the opportunity to fully consider the authorities.

In contrast, Gummow J., sitting in the Federal Court of Australia in *Collier Constructions Pty. Ltd. v. Foskett Pty. Ltd.*,⁹³ gave detailed consideration to the matter and eventually came to the conclusion that the common law defence of public interest did not exist in the law of copyright in Australia.⁹⁴ His Honour opined thus:

Notwithstanding the recent developments in the United Kingdom, the objections in principle, taken by Messrs Laddie and Prescott and Miss Vitoria in their work, to the introduction of a 'public interest' defence to infringement of copyright are compelling; in my view, there is no legislative or other warrant for the introduction of such a concept into the law of this country. This is so whether the plaintiff's work is published

⁸⁸ (1980) 147 C.L.R. 39 (High Court of Australia).

⁸⁹ [1973] F.S.R. 33.

⁹⁰ [1969] 1 Q.B. 349.

⁹¹ (1980) 147 C.L.R. 39 at 56–57. Mason J. did however acknowledge that the defence of public interest to a copyright infringement claim was of limited scope and arguably narrower than the same defence to an action for breach of confidence.

⁹² See also the criticisms of Mason J.'s judgment in Y. Cripps, *The Legal Implications of Disclosure in the Public Interest*, 2nd ed. (London: Sweet & Maxwell, 1994) at 187–188.

⁹³ (1990) 19 I.P.R. 44.

⁹⁴ Indeed, Gummow J. had, on other occasions, also cast doubt on the existence of the public interest defence in actions for breach of confidence. See, for example, *Corrs Pavey Whitting & Byrne v. Collector of Customs (Vic)* (1987) 10 I.P.R. 53 and *Smith Kline & French Laboratories (Australia) Ltd. v. Secretary, Department of Community Services and Health* (1990) 17 I.P.R. 545.

or unpublished. I should add that it is by no means settled that even as regards equitable obligations of confidence, there is a 'public interest' defence of the scope as is suggested in the English decisions. . . . I would hold that in this country there is no such defence known at law.⁹⁵

The salient reasons given by Gummow J. for such a conclusion, which will be considered again in greater detail below, may be summarised, for present purposes, as follows:

- (1) With the enactment of the U.K. *Copyright Act 1911*, common law copyright was abolished in England and replaced by purely statutory copyright. In Australia, copyright is also regulated by statute, viz. the *Copyright Act 1968* (Cth.) which came into force in 1969.
- (2) Part III of the *Copyright Act 1968* (Cth.) sets out detailed provisions which specify a whole range of activities which do not constitute an infringement of copyright (e.g. the fair dealing defences⁹⁶ and provisions which permit the copying of works in educational institutions and in institutions assisting handicapped readers). "It would be an odd result if this complex of provisions, reflecting an accommodation by the legislature of a range of competing interests, were overlaid with some defence springing from the general law and defined with none of the precision apparent in the legislation".⁹⁷
- (3) It was observed that although there were several English authorities which supported the defence of public interest in actions for copyright infringement, these did not involve any consideration of fundamental principle.
- (4) Despite such an observation, the British legislature had apparently intended to preserve the common law position as regards the availability of the public interest defence in actions for copyright infringement by the enactment of section 171(3) CDPA. Unfortunately, such a provision does not exist in the Australian copyright statute.

Further, it is important to mention that Gummow J., apart from considering the defence of public interest in the law of copyright, also appeared to have accepted in *Collier* the relevance of equitable defences (such as the want or lack of "clean hands")⁹⁸ in relation to claims by the plaintiff for equitable, discretionary relief in copyright law.⁹⁹ In this respect, Gummow J. was of the view that in order to make out the defence of want of "clean

⁹⁵ (1990) 19 I.P.R. 44 at 57.

⁹⁶ See, for example, sections 41 and 42 of the *Copyright Act 1968* (Cth.).

⁹⁷ (1990) 19 I.P.R. 44 at 55 [emphasis added].

⁹⁸ The equitable maxim states that "he who seeks equity must come with clean hands".

⁹⁹ For example, the award of an injunction, being an equitable remedy, is discretionary in nature.

hands”, it was necessary for the defendant to show that the conduct complained of had “an immediate and necessary relation” to the equity upon which the plaintiff sought an injunction.¹⁰⁰

It is this latter aspect of Gummow J.’s judgment that struck a chord with Merkel J. in *Acohs Pty. Ltd. v. R.A. Bashford Consulting Pty. Ltd. & Ors*,¹⁰¹ another decision of the Federal Court of Australia. Merkel J. was of the view that “[t]he *true underlying principle* acted upon by the courts for refusing relief on grounds of public interest might lie in the *discretion* conferred as to the *appropriate form of relief*, rather than whether a *defence* disentitles the copyright owner to any relief”.¹⁰² In other words, it appears that in the final analysis, the effective role of the public interest in the law of copyright is not in its functioning as a defence which defeats the plaintiff’s claim of copyright infringement (or which prevents or restricts the plaintiff’s enforcement of copyright, to borrow the language of section 171(3) CDPA); rather, considerations of public interest or public policy (just like the application of equitable principles) may well factor in the court’s overall determination, in its discretion, of the most appropriate form of relief for the plaintiff, if any. In this respect, it may be said that the public interest will serve not as a defence to an action for copyright infringement but as a “defence” to the court’s grant of discretionary relief in copyright law.¹⁰³ The implications of such an approach to the issue of public interest in the law of copyright will be examined in greater detail below.

V. WHAT THEN IS THE POSITION IN SINGAPORE?

In the U.K., despite the numerous criticisms which have been levelled at the pre-CDPA authorities (in particular at *Beloff* and *Lion Laboratories*) and, more generally, at the development by English case law of the public interest defence in the law of copyright, the decision of the English Court of Appeal in *Ashdown* has helped to clarify the extent to which the HRA 1998 has impacted upon the protection afforded to owners of copyright under the

¹⁰⁰ (1990) 19 I.P.R. 44 at 57–58. More recently, Drummond J. in the Federal Court of Australia decision in *A-One Accessory Imports Pty. Ltd. v. Off Road Imports Pty. Ltd.* (1996) 34 I.P.R. 332 at 335 also accepted that close regard could be paid to the equitable principles which generally govern a court’s grant of equitable remedies. *Cf.* also *Hubbard v. Vosper* [1972] 2 Q.B. 84 at 101 where Megaw L.J. in the English Court of Appeal adopted a similar view in relation to claims for injunctive relief in the law of confidence. In *Hubbard*, the plaintiff had employed “deplorable means” to protect his secrets and Megaw L.J. was therefore of the view that the plaintiff was not entitled to injunctive relief because of “unclean hands”.

¹⁰¹ (1997) 37 I.P.R. 542.

¹⁰² *Ibid.* at 567 [emphasis added].

¹⁰³ *Cf.* Jacob J. in *Yelland*, *supra* note 10 at 670 where his Lordship opined thus: “So in my opinion if equity prevents relief on the grounds of public interest, it *in substance* provides a complete defence to the entire claim [emphasis added].”

CDPA 1988. Whilst the existence of the public interest defence in English copyright law may now be easier to justify in light of the coming into force of the HRA and on the basis of the savings provision in section 171(3) CDPA, it must be emphasised that the defence nevertheless appears to be applicable only in a very limited range of circumstances.¹⁰⁴ There is indeed much to be said of the guarded approach adopted by the English judiciary in its reluctance to recognise a full-blown defence of public interest of unqualified scope, notwithstanding the coming into force of the HRA and the corresponding significance of the Convention right to freedom of expression (as enshrined in Article 10 ECHR). The English courts appear to be more comfortable at reflecting the whole concept of freedom of expression through existing statutory mechanisms.

In Singapore, we do not have the equivalent of the HRA 1998 (nor a piece of legislation which specifically recognises and gives effect to human rights issues). It is true that freedom of expression in itself is guaranteed under the Singapore Constitution.¹⁰⁵ However, the constitutional setting in Singapore is somewhat different and issues concerning freedom of expression are usually discussed and raised in the Singapore courts in connection with the laws of defamation.¹⁰⁶ In any event, it must be emphasised that the right to freedom of expression, although considered a fundamental liberty, is not unfettered and that it must be balanced against other rights and interests. Indeed, Article 10(2) ECHR itself provides that the exercise of the freedom of expression may be “subject to such . . . *restrictions* . . . as are prescribed by law and are necessary in a democratic society . . . for the *protection* of the . . . *rights of others* . . .”¹⁰⁷ Arguably, the “rights of others” refer also to those of the owner of copyright such that the needs of a democratic society must necessarily include the recognition and protection of private property, including copyright. It is therefore submitted that insofar as the law of copyright in Singapore is concerned, the Singapore courts (which are clearly not obliged to have regard to the importance of the Convention right to freedom of expression nor indeed to the jurisprudence of the European Court of Human Rights in Strasbourg) will be less persuaded by the decision of the English Court of Appeal in *Ashdown* and will,

¹⁰⁴ See note 84, above. Indeed, as one commentator observed: “Even if the defence has been saved from outright abolition, we have seen that its scope has still almost certainly been narrowed by the combined effect of *Ashdown* and *Yelland*. Thus we are left in a situation where an exception appears to have become more limited than Parliament intended and this has occurred *despite the coming into force of the Human Rights Act*” (R. Burrell, “Reining in Copyright Law: Is Fair Use the Answer?” [2001] I.P.Q. 361 at 381) [emphasis added].

¹⁰⁵ See Article 14(1)(a) of the Constitution of the Republic of Singapore (1999 Rev. Ed.).

¹⁰⁶ See, for example, *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 S.L.R. 310; *Tang Liang Hong v. Lee Kuan Yew & Anor and other appeals* [1998] 1 S.L.R. 97.

¹⁰⁷ See also the remarks of the English Court of Appeal in *Ashdown* [2002] R.P.C. 5 at paras. 30–31 [emphasis added].

if necessary, look to the decision of the English Court of Appeal in *Hyde Park* (and possibly the first instance decision of Morritt V.C. in *Ashdown*) for guidance instead.

To further understand why it is difficult to justify the existence of a general defence of public interest in the law of copyright in Singapore, it is necessary to consider first the legislative history of copyright protection in Singapore. Copyright in Singapore, as it is in many other parts of the world, is regulated by statute, viz. the *Copyright Act 1987*. Before the enactment of the *Copyright Act 1987*, copyright law in Singapore was governed by the (U.K.) *Imperial Copyright Act 1911*, as modified in its application to Singapore by the *Copyright Act* (Cap. 63, 1985 Rev. Ed. Sing.), the *Copyright (Gramophone Records and Government Broadcasting) Act* (Cap. 64, 1985 Rev. Ed. Sing.) and section 38 of the *Singapore Broadcasting Corporation Act* (Cap. 297, 1985 Rev. Ed. Sing.). The *Imperial Copyright Act 1911* (together with its various amendments) was only repealed on 10 April 1987 by the coming into force of the *Copyright Act 1987*, which is modelled largely on the Australian *Copyright Act 1968* (Cth.). Therefore, with the *Copyright Act 1987* in force, are extra-statutory defences (or defences recognised at common law) at all applicable within the statutory framework of Singapore's copyright laws to override the protection afforded to owners of copyright? To what extent should statutory intellectual property rights be overridden by general invocations of public policy?

One argument against the existence of the common law defence of public interest in the law of copyright stems from the fact that copyright in Singapore (unlike the law of confidence) is regulated by statute. Since this property right is a creature of statute, the statute itself must also spell out the range of permissible exceptions to the rights of the copyright owner. Therefore, unless preserved by statute, it may be argued that there is no room for the application of any further defences which fall outside the ambit of the *Copyright Act 1987*.¹⁰⁸ An argument may of course be made that the various cases emanating from England which had recognised the existence of the

¹⁰⁸ The infamous exception to this principle is of course the *British Leyland* non-derogation from grant defence which itself has been severely criticised as an example of judicial legislation. Lord Hoffmann in the Privy Council in *Canon Kabushiki Kaisha v. Green Cartridge Co. (H.K.) Ltd.* [1997] F.S.R. 817 took the view that the *British Leyland* defence was effectively based upon overriding public policy and that it was questionable in a constitutional and jurisprudential sense for such a judicially-declared head of public policy to override an express statutory right. Clearly, any prospect of extending the *British Leyland* exception "should be treated with some caution" or perhaps even eschewed. In any event, the *British Leyland* defence has in recent times been qualified to such an extent that some commentators have actually suggested that the defence is now effectively abolished (see G. Llewellyn, "Does Copyright Recognise a Right to Repair?" [1999] E.I.P.R. 596 at 599).

public interest defence in actions for copyright infringement (*e.g. Beloff and Lion Laboratories*) are of some precedent value.¹⁰⁹ However, it has already been observed above that these English cases ought, in the first instance, to be treated with some circumspection. The fact remains, therefore, that the *Copyright Act 1987*, like the Australian *Copyright Act 1968* (Cth.), does not have a savings provision equivalent to section 171(3) CDPA.¹¹⁰ As such, the common law defence of public interest, even if one were to exist, is not at all recognised or preserved within the statutory framework of Singapore's copyright laws.

More importantly, it must be remembered that Singapore has now joined the Berne Convention for the Protection of Literary and Artistic Works¹¹¹ and she is therefore obliged to comply with the provisions of the Convention. Specifically, Article 9(2) of Berne states that: "It shall be a *matter for legislation* in the countries of the Union to permit the reproduction of such works in *certain special cases*, provided that such reproduction does not conflict with a normal exploitation of the work *and* does not unreasonably prejudice the legitimate interests of the author".¹¹² In view of Article 9(2), it will be difficult to justify the existence of the public interest defence in the law of copyright in Singapore because any exception or limitation to the copyright owner's right of reproduction must be sanctioned by the legislature (and not

¹⁰⁹ The common law of England having been incorporated into the corpus of Singapore law via section 3 of the *Application of English Law Act* (Cap. 7A, 1994 Rev. Ed. Sing.).

¹¹⁰ *Cf.*, in this respect, section 6 of the *Copyright Act 1987* (or section 9(3) of the Australian *Copyright Act 1968*) which provides that nothing in the *Copyright Act* "shall affect the operation of the law relating to breaches of trust or confidence". It cannot however be argued (in the same manner as section 171(3) CDPA) that the defence of public interest which is more commonly available in the law of confidence is, because of section 6, also preserved in the law of copyright in Singapore. It is submitted that section 6 of the *Copyright Act 1987* is not intended (at least not on a plain reading of the provision) to import into the statutory copyright regime the whole body of the law of confidence. The very purpose of section 6 is to make it abundantly clear that the law of copyright does not in any way inhibit the operation of the law of confidence, especially in respect of subject-matter which may receive overlapping protection. Section 6 recognises the fact that the various branches of intellectual property, although autonomous and distinct in their own right, do often overlap and that multiple rights can arise in respect of the same subject-matter—for example, whilst copyright protects the form of expression of the work in question, its contents or underlying information, if confidential, may be protected through obligations of confidence.

¹¹¹ Singapore acceded to the Berne Convention on 21 September 1998 and the Convention came into effect in Singapore on 21 December 1998.

¹¹² [Emphasis added]. See also Article 13 of the TRIPS Agreement which is arguably a wider provision than Article 9(2) of Berne because whereas Article 9(2) only applies to the right of reproduction, Article 13 applies to all of the exclusive rights of the copyright owner. Article 13 of TRIPS reads as follows: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

merely by the courts) and must necessarily involve a “special case”.¹¹³ Additionally, can anyone argue with any degree of certainty that the application of the somewhat amorphous defence of public interest will not “unreasonably prejudice the legitimate interests” of the copyright owner? The introduction of a public interest defence in the law of copyright in Singapore may very well conflict with Article 9(2) of Berne.¹¹⁴

In keeping with international norms, Divisions 3–9 of Part III of the *Copyright Act 1987* (and the various corresponding provisions pertaining to neighbouring rights in Division 6 of Part IV of the *Copyright Act 1987*) contain very detailed provisions specifying, quite comprehensively, a range of activities which do not constitute an infringement of copyright in various works. These range from fair dealing to the use of a work for educational purposes as well as use by libraries. Can it not be argued that the sum total of all these provisions already reflect, in realistic terms, the circumstances in which a public interest in using the copyright work in question should rightly override the private interests of the copyright owner? Is it then really necessary for the courts (or perhaps even Parliament) to consider introducing the defence of public interest in the law of copyright to supplement the role already played by this complex maze of provisions?¹¹⁵

It can be observed, from a general survey of preceding case law, that the defence of public interest to an action for copyright infringement is typically invoked to sanction the disclosure of what is essentially newsworthy information (embodied in the copyright work itself) which the public has a genuine interest to know.¹¹⁶ As against the action for copyright infringement (as distinct from the action for breach of confidence, if one is brought), is it not sufficient, in the circumstances, for the defendant to rely on the statutory fair dealing defence for reporting current events (provided for in section 37 of the *Copyright Act 1987*)? After all, the reporting of current

¹¹³ Professor Ricketson has interpreted the word “special” to mean that the permitted exception to the right of reproduction must be “justified by some clear reason of public policy or some other exceptional circumstance” (see S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Kluwer, 1987) at 482).

¹¹⁴ Indeed, as one commentator observed: “Prima facie it must be conceded that, if UK law does allow a ‘public interest’ defence to an action for breach of copyright, it cannot be said to do so under the express authority of any of the existing heads of defence tolerated by the Berne Convention.” (J. Phillips, “The Berne Convention and Public Interest” [1987] 4 E.I.P.R. 108 at 114.)

¹¹⁵ After all, Gummow J., sitting in the Federal Court of Australia in *Collier Constructions Pty. Ltd. v. Foskett Pty. Ltd.* (1990) 19 I.P.R. 44 at 55, had expressed his concern thus: “It would be an odd result if this complex of provisions, reflecting an accommodation by the legislature of a range of competing interests, were overlaid with some defence springing from the general law and defined with none of the precision apparent in the legislation”.

¹¹⁶ See also Jacob J. in *Yelland*, *supra* note 10 at 671 where his Lordship opined that the defence of public interest will probably arise only “in the context of the communication of what is essentially information—information clothed in copyright”.

events must surely entail “the communication of what is essentially information” to the public¹¹⁷—as current events make up that bit of information which is so much still under discussion, is topical in nature and still under public scrutiny that the information ought, in principle, to remain in the public domain.

However, a potential problem which may arise is this. In cases involving the reporting of current events in the media, it is often the information contained in the copyright work which is truly of value to the public. It appears too that in many of these cases, the valuable piece of information so happens to be embodied in copyright documents which are as yet unpublished. It may of course be argued that a defendant is likely to face some difficulty in making out a defence of fair dealing under the *Copyright Act 1987* where the copyright in question subsists in an unpublished work and where the effect of the defendant’s infringing act is to bring about a first publication of that (previously unpublished) work.¹¹⁸ Whilst there is some force in this argument, it is submitted that, at least in theory, an unpublished work is not automatically excluded from the purview of the fair dealing defence.¹¹⁹ Further, the fact that the copyright work in question had not been previously published is merely *one* factor (and not the *only* factor) in the entire enquiry as to whether or not the defendant’s dealing with the copyright work was fair.¹²⁰ As is well-known, the issue of fair dealing is one of fact, degree

¹¹⁷ See note 116, above. See also note 25, above.

¹¹⁸ See Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 615–616 where his Lordship stated, quite rightly, that one of the factors for assessing whether or not a dealing with a copyright work was fair was whether the material in question was previously unpublished. See also Romer J. in *British Oxygen Co. Ltd. v. Liquid Air Ltd.* [1925] Ch. 383 at 393, Ungood-Thomas J. in *Beloff v. Pressdram Ltd.* [1973] F.S.R. 33 at 62 and Mance L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 629.

¹¹⁹ It may still be fair for a defendant to deal with a work which, although as yet unpublished, has nevertheless been widely circulated within a particular group of people. See the example given by Lord Denning M.R. in *Hubbard v. Vosper* [1972] 2 QB 84 at 95: “Although a literary work may not be published to the world at large, it may, however, be circulated to such a wide circle that it is ‘fair dealing’ to criticise it publicly in a newspaper, or elsewhere. This happens sometimes when a company sends a circular to the whole body of shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it, and to criticise them—or review them—without thereby being guilty of infringing copyright.” Cf. also the defence of “fair use” in the United States which expressly recognises the point thus: “The fact that a work is unpublished shall not *itself* bar a finding of fair use . . .” (see section 107 of the U.S. *Copyright Act* 17 U.S.C. (1976)).

¹²⁰ Indeed, this also appears to be the view of Ungood-Thomas J. in *Beloff v. Pressdram Ltd.* [1973] F.S.R. 33 at 61 where his Lordship, in reference to Romer J.’s judgment in *British Oxygen Co. Ltd. v. Liquid Air Ltd.* [1925] Ch. 383, remarked thus: “So I doubt if Romer J. ever intended that his words should be read in the sense that an unpublished work should be automatically outside the provisions of the fair dealing defence rather than a *factor*, although doubtless an important factor, which *with other factors* have to be taken into consideration in considering fair dealing [emphasis added].”

and impression.¹²¹ Although an objective test is generally employed, case law has indicated that the subjective motives of the defendant as well as the purpose behind the copying are also highly relevant factors that ought to be taken into consideration.¹²² The defence of fair dealing therefore entails a holistic enquiry into the facts of each individual case and cannot be determined solely by reference to any one factor mentioned above. Indeed, if the information embodied in the copyright work in question is of such grave public concern and is information which the general public has a right to know, it is highly unlikely that a court will hold that the defendant's dealing with the copyright work in question had not been fair.

Professor Wei has also put forward the following argument: "If the law is that there is a public interest defence which is available only in respect of actions for breach of confidence, anomalies may result. In many cases, where there is an allegation of breach of confidence there may well be a parallel action for copyright infringement. The defendant may escape liability for breach of confidence on the back of the public interest defence but may be liable for copyright infringement unless a statutory defence, such as fair dealing for criticism or review applies".¹²³

Whilst such a scenario may possibly arise in reality, two matters must be borne in mind. Firstly, the overlap between actions for copyright infringement and for breach of confidence is inevitable, because "[t]he act of copyright infringement, especially in the case of unpublished works, may be 'the vehicle' for the breach of confidence".¹²⁴ Secondly, and notwithstanding this overlap, the causes of action are, in principle, separate and distinct and the subject-matter of protection is different.¹²⁵ As is trite knowledge, copyright, unlike confidence, protects the way information is expressed and not the underlying information *per se*. It cannot be the case that just because the public interest defence is more commonly available in actions for breach of confidence that, in view of the possible overlap between the two causes of action, the defence at common law must necessarily also be available in

¹²¹ See Lord Denning M.R. in *Hubbard v. Vosper* [1972] 2 Q.B. 84 at 94.

¹²² *Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.* [1999] F.S.R. 610 at 619–620; *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 614–616.

¹²³ G. Wei, *The Law of Copyright in Singapore*, 2nd ed. (Singapore: S.N.P. Editions, 2000) at 862.

¹²⁴ *Ibid.* at 861. The overlap arises simply because confidential information, which is generally protected under the law of confidence, may also manifest itself in some tangible, material form (e.g. in a literary or artistic work) over which copyright protection may subsist.

¹²⁵ *Per Mason J. in Commonwealth of Australia v. John Fairfax & Sons Ltd.* (1980) 147 C.L.R. 39 at 58: "To say that the enforcement by injunction of the plaintiff's copyright in documents amounts indirectly to protection of the information contained in the documents is to confuse copyright with confidential information. Copyright is infringed by copying or reproducing the document; it is not infringed by publishing information or ideas contained in the document so long as the publication does not reproduce the form of the literary work."

actions for copyright infringement.¹²⁶ Further, even if the defence of public interest were to be available in the law of copyright, the English Court of Appeal in *Hyde Park Residence Ltd. v. Yelland*¹²⁷ has clarified that the basis of the public interest defence in a breach of confidence action is not the same as the basis of such a defence to an action for copyright infringement. Indeed, it bears mentioning that the English Court of Appeal in *Hubbard v. Vosper* was careful to make a distinction between actions for copyright infringement and actions for breach of confidence (and their respective defences), as is clear from the following remarks by Lord Denning M.R. (with whom Megaw L.J. and Stephenson L.J. concurred):

... although Mr Hubbard owns the copyright, nevertheless, Mr Vosper has a defence of fair dealing: and although Mr Hubbard may possess confidential information, nevertheless, Mr Vosper has a defence of public interest. These defences are such that he should be permitted to go ahead with the publication. If what he says is true, it is only right that the dangers of this cult should be exposed. We never restrain a defendant in a libel action who says he is going to justify. So in copyright action, we ought not to restrain a defendant who has a reasonable defence of fair dealing. Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest.¹²⁸

In the final analysis, there may well be no good reason for introducing the defence of public interest in the law of copyright in Singapore because it may be argued that the public interest is sufficiently catered for by Parliament's enactment of, *inter alia*, the fair dealing defences in the *Copyright Act 1987*. The fair dealing defences, amongst other defences provided for by the statute, are arguably directed towards achieving a proper balance between the protection of copyright and the wider public interest and "... would therefore appear to set out in detail the extent to which the public interest overrides copyright".¹²⁹ Indeed, the close correlation between the fair dealing defences in the *Copyright Act 1987* and the wider public interest is well illustrated in the following remarks by Chao Hick Tin J.A. in the Singapore Court of Appeal in the *Bee Cheng Hiang* case: "As is implicit from the wording of the provision [*viz.* section 37 of the *Copyright Act 1987*], fair dealing

¹²⁶ *Cf. Flocast Australia Pty. Ltd. v. Purcell* (1997) 39 I.P.R. 177 where Heerey J. held that it was no defence to an action for copyright infringement to say that the information copied was already in the public domain or was not otherwise confidential.

¹²⁷ [2000] R.P.C. 604 at 621 and 625 (*per* Aldous L.J.), 627–628 (*per* Mance L.J.). See also notes 60 and 61 (and their accompanying text), above.

¹²⁸ [1972] 2 Q.B. 84 at 96–97.

¹²⁹ *Per* Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 617. See also the observations made by Chadwick L.J. in *Newspaper Licensing Agency Ltd. v. Marks and Spencer plc.* [2001] Ch. 257 at 280.

can only apply where there is an element of public interest”.¹³⁰ Perhaps it is Lord Phillips M.R. who best sums up the position in *Ashdown v. Telegraph Group Ltd.*¹³¹ where his Lordship, in considering the defence of fair dealing for the purpose of reporting current events in section 30(2) CDPA, opined thus:

Where part of a work is copied in the course of a report on current events, the ‘fair dealing’ defence under section 30 [CDPA] will normally afford the court *all the scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press. There will then be no need to give separate consideration to the availability of a public interest defence under section 171.*¹³²

Whilst it may be argued that the various statutory provisions on fair dealing appear at first sight to be more limited in scope and application than the common law defence of public interest,¹³³ it is also the case that the courts, in recent times, are generally moving towards a less restrictive interpretation of the fair dealing defences (particularly in their interpretation of the expression “current events”), in a manner which suggests that there may no longer be the need for the courts (nor indeed for Parliament) to give separate consideration to the availability of a public interest defence in the law of copyright.¹³⁴

¹³⁰ [2003] 1 S.L.R. 305 at 311.

¹³¹ [2002] R.P.C. 5 at para. 66.

¹³² [Emphasis added.] Even in the English context, it appears that freedom of expression is already accommodated in the spirit of the fair dealing defences. However, in England, there may be some room for the operation of the extra-statutory defence of public interest as the British Parliament has seen fit to provide that a defendant cannot avail himself of the defence of fair dealing for the purpose of reporting current events where the copyright work in question takes the form of a photograph (see section 30(2) CDPA). Fortunately, Singapore is spared of this statutory lacuna as the equivalent fair dealing provision in the *Copyright Act 1987* (*viz.* section 37) is applicable to all forms of artistic works, including photographs (see the definition of “artistic work” in section 7(1) of the *Copyright Act 1987*).

¹³³ It is true that the fair dealing defences will only apply if the copyright work in question is used for one of the approved purposes under the statute (for example for research or private study) and that other forms of use, no matter how “fair” they may appear to be, will not fall within the ambit of the fair dealing provisions. This was specifically acknowledged by Ungood-Thomas J. in *Beloff v. Pressdram Ltd.* [1973] F.S.R. 33 at 60.

¹³⁴ An interesting and somewhat different perspective of the interpretation of the fair dealing defences in English copyright law has been proffered by Mr Robert Burrell. In his paper (“Reining in Copyright Law: Is Fair Use the Answer?” [2001] I.P.Q. 361), the learned author argues that judges and commentators (albeit to a lesser extent) have, on the whole, interpreted the various exceptions to infringement in English copyright law (and in particular the fair dealing exceptions) in an overly restrictive manner. The author however also concedes at 387–388 that although “the judiciary has to bear considerable responsibility for the overly restrictive approach that has been taken towards the copyright exceptions in the United Kingdom., this is not to suggest that judges have systematically tried to undermine the position of users or imply that *there are not decisions that adopt liberal interpretations of the existing exceptions* [emphasis added].”

For example, in *Commonwealth of Australia v. John Fairfax & Sons Ltd.*, Mason J. in the High Court of Australia, in considering the defence of fair dealing for the purpose of reporting news in section 42 of the *Copyright Act 1968* (Cth.), opined thus: “I am inclined to allow that ‘news’, despite its context of ‘the reporting of news’ ‘in a newspaper, magazine or similar periodical’ is not restricted to ‘current events’”.¹³⁵ Over in England and in a similar vein, it was declared by Robert Walker L.J. in the English Court of Appeal in *Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.* that “criticism or review” and “reporting current events” were “expressions of wide and indefinite scope”. In his Lordship’s opinion, “[a]ny attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally. . .”.¹³⁶ This approach was subsequently endorsed by the English Court of Appeal in *Hyde Park Residence Ltd. v. Yelland*¹³⁷ and again in *Ashdown v. Telegraph Group Ltd.*¹³⁸ Although Chao Hick Tin J.A. and Tan Lee Meng J. in the Singapore Court of Appeal in the *Bee Cheng Hiang* case¹³⁹ emphasised that they were not offering any definitive views on the interpretation of section 37 of the *Copyright Act 1987* (*viz.* the defence of fair dealing for the purpose of reporting current events), it appears to this author that their Honours were rather more inclined towards adopting a more liberal interpretation of the expression “current events”.¹⁴⁰ In any case, it must be remembered that the issue of “fair dealing” is ultimately a question of fact, degree and impression, to which factors that are relevant include the extent and purpose of the copying as well as the subjective motives of the alleged infringer. It was in fact even suggested by Megaw L.J. in *Hubbard v. Vosper* that, given the right circumstances, the publication of an *entire* work might still attract a finding of fair dealing.¹⁴¹

In view of the holistic and arguably less restrictive approach taken by the courts in interpreting the fair dealing defences, what would then be the true value and utility of the defence of public interest in the law of copyright today? Indeed, it now appears that if a defendant were to fail in his attempt to plead one (or more) of the statutory fair dealing defences in an action for copyright infringement (save on technical grounds such as the omission of

¹³⁵ (1980) 147 C.L.R. 39 at 56.

¹³⁶ [1999] F.S.R. 610 at 620.

¹³⁷ [2000] R.P.C. 604. See also the first instance judgment of Jacob J. in *Yelland*, *supra* note 10 at 661 where his Lordship was of the view that the phrase “current events” should not take on a strict, chronological meaning (in that the events must have occurred only recently in time)—rather, the question to ask is whether the events are “topical” and are “so much still under discussion that it would be pedantic to regard them as anything other than still ‘current’”.

¹³⁸ [2002] R.P.C. 5.

¹³⁹ [2003] 1 S.L.R. 305.

¹⁴⁰ See *ibid.* at 312.

¹⁴¹ [1972] 2 Q.B. 84 at 98.

a “sufficient acknowledgment” of the work),¹⁴² it is highly unlikely that he will ever succeed in his pleading the common law defence of public interest. This view is bolstered by the following remarks of Mance L.J. in *Hyde Park Residence Ltd. v. Yelland*:

I also agree with Aldous LJ that the case is not one where the public interest can supply a justification for the infringement of the claimants’ copyright. My reasons for this conclusion echo what I have already said in the context of section 30 [CDPA]. If the use made of the stills could not be fair dealing in the context of that section, it is difficult to see scope for a conclusion that it was nonetheless in the public interest that the claimants’ copyright should be overridden.¹⁴³

Professor Wei further argues that: “. . . even if the defendant has infringed copyright, there is always the possibility of his asserting the fair dealing defences. If those defences did not apply, for example, because the dealing was not fair, would it be right to give the defendant a second bite of the cherry in the guise of a general non-statutory public interest defence?”¹⁴⁴

VI. A DIFFERENT MEANS TOWARDS THE SAME END—A SUGGESTED APPROACH FOR SINGAPORE

How then is the public interest to be accommodated in the law of copyright in Singapore? In *Hyde Park Residence Ltd. v. Yelland*,¹⁴⁵ Aldous L.J. in the English Court of Appeal took the view that public interest in the law of copyright in England is accommodated by the various statutory exceptions set out in the CDPA 1988 as well as by the court’s exercise of its inherent jurisdiction to deny the plaintiff enforcement of his copyright in circumstances where such enforcement of copyright would offend against the policy of the law. In Singapore, similar exceptions exist in the *Copyright Act 1987*. However, is it at all possible for the courts in Singapore to deny the plaintiff enforcement of his copyright on the basis of the courts’ inherent jurisdiction?

¹⁴² How onerous a task can it really be for the defendant to simply make a “sufficient acknowledgment” of the copyright work in question (*i.e.* an acknowledgment identifying the work by its title or other description and also identifying the author (if known))?

¹⁴³ [2000] R.P.C. 604 at 629. See also the views expressed by Aldous L.J. in *Hyde Park Residence Ltd. v. Yelland* [2000] R.P.C. 604 at 621: “. . . copyright is a property right which is given by the [CDPA]. Chapter III of the Act provides for exceptions in the public interest. It would therefore be *wrong* for a court which had rejected a defence of, for example fair dealing, because there was not a sufficient acknowledgement, to uphold a defence because publication was in the public interest. That would result in a *disregard* of an important requirement set out in the Act [emphasis added].”

¹⁴⁴ G. Wei, *The Law of Copyright in Singapore*, 2nd ed. (Singapore: S.N.P. Editions, 2000) at 1397–1398.

¹⁴⁵ [2000] R.P.C. 604.

The obvious difficulty with this approach is that even if the Singapore courts were to retain such power, the *Copyright Act 1987* does not contain a savings provision like section 171(3) CDPA which specifically preserves “any rule of law *preventing* or restricting the *enforcement* of copyright” on the grounds of public interest. The problem is further compounded by the fact that in today’s context, the inherent jurisdiction (or the inherent power) of the courts in Singapore is essentially *procedural* in nature; it is part of procedural law and not of substantive law.¹⁴⁶ Indeed, it has been argued that the inherent powers of the Singapore courts cannot be equated with the inherent jurisdiction of the English courts in view of the fact that the Singapore courts, since 1964, no longer retained “an unlimited and general jurisdiction of the kind which engendered the inherent jurisdiction of the English High Court”.¹⁴⁷ As such, it would appear to be difficult for a Singapore court to invoke its inherent power/jurisdiction to establish, modify or affect the *substantive* rights of a party which have been established by statute, as for example where a Singapore court attempts to invoke its inherent jurisdiction to refuse to enforce the plaintiff’s copyright in the work in question.

If, as argued above, the existence of a general defence of public interest in the law of copyright in Singapore appears unjustified (principally because of the absence of a section 171(3) equivalent in the *Copyright Act 1987*), is it then the case that the accommodation of the public interest in Singapore’s copyright laws is solely reflected in the various statutory exceptions set out in the *Copyright Act 1987*? Can the Singapore courts nevertheless deny the plaintiff enforcement of his copyright, at least indirectly, via an alternative route, especially where such enforcement of copyright would “offend against the policy of the law”?

It may be tempting to suggest that the courts should, in such circumstances, refuse to recognise the plaintiff’s copyright in the work altogether.¹⁴⁸ The question here is whether the plaintiff can, in the first

¹⁴⁶ “The inherent power of the court, in the context of Singapore anyway, concerns the mechanism of the legal process. It is a procedural power intended to avoid abuse and to serve the interests of justice.” (J. Pinsler, “Inherent Jurisdiction Re-visited: An Expanding Doctrine” (2002) 14 S.Ac.L.J. 1 at 17; emphasis in the main text.) See also J. Pinsler, “The Inherent Powers of the Court” [1997] S.J.L.S. 1 at 37–39.

¹⁴⁷ J. Pinsler, “The Inherent Powers of the Court” [1997] S.J.L.S. 1 at 5. See also *ibid.* at 2–12 for a general and historical account of the doctrine in the Singapore context.

¹⁴⁸ Interestingly, there is no provision in the *Copyright Act 1987* which prevents copyright from subsisting in works or subject-matter which are immoral or contrary to public policy. *Cf.*, in this respect, section 13(3) of the *Patents Act 1994* (Cap. 221, 2002 Rev. Ed. Sing.) (which provides that if the publication or exploitation of an invention is expected to encourage offensive, immoral or anti-social behaviour, then such an invention is not a patentable invention) and section 7(4)(a) of the *Trade Marks Act 1998* (Cap. 332, 1999 Rev. Ed. Sing.) (which provides that a trade mark shall not be registered if it is contrary to public policy or to morality).

place, receive copyright protection for a work which is immoral,¹⁴⁹ fraudulent or deceitful,¹⁵⁰ or produced under “disgraceful circumstances” (such as in breach of confidence or where the work in question reeked of moral turpitude).¹⁵¹ Unfortunately, this approach of denying copyright to the subject-matter in issue has not, in more recent times, found favour with the courts, although it should be noted that there were a number of early precedents in which the courts had denied copyright protection to works which were alleged to be libellous,¹⁵² blasphemous,¹⁵³ obscene¹⁵⁴ or fraudulent.¹⁵⁵ The general thrust of the more recent decisions¹⁵⁶ appears to be that even though copyright might potentially subsist in such works, the courts would generally not enforce the copyright in them based on public policy grounds (in other words, the author’s copyright in such works is unenforceable and not denied subsistence).

It is instead far more promising to re-consider and perhaps even adopt the approach taken by the Australian courts as to the effective role of the public interest in the law of copyright. Adopting the Australian position may be preferable in view of the fact that the *Copyright Act 1987* is modelled largely on Australian copyright law. It will be recalled that Gummow J. in *Collier Constructions Pty. Ltd. v. Foskett Pty. Ltd.*¹⁵⁷ had expressly rejected the common law defence of public interest in the law of copyright in Australia. In *Acohs Pty. Ltd. v. R.A. Bashford Consulting Pty. Ltd. & Ors*,¹⁵⁸ Merkel J. took the view that public interest or public policy does not in actual fact operate as a “true” defence to an action for copyright infringement (*cf.* the approach generally taken by the English courts), but rather as a “defence” to the court’s grant of discretionary relief in copyright law.¹⁵⁹ In this regard, public interest or public policy as well as equity (and its attendant principles like the “clean-hands” doctrine) may, depending on the circumstances and in the court’s discretion, intervene to either debar the plaintiff from all relief (in cases where the illegality or wrongdoing on the part of the plaintiff is

¹⁴⁹ *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261.

¹⁵⁰ *Slingsby v. Bradford Patent Truck and Trolley Co.* [1906] W.N. 51.

¹⁵¹ *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109 at 275, 294.

¹⁵² *Southey v. Sherwood* (1817) 2 Mer. 435.

¹⁵³ *Lawrence v. Smith* (1822) 37 E.R. 928.

¹⁵⁴ *Stockdale v. Onwhyn* (1826) 108 E.R. 65.

¹⁵⁵ *Wright v. Tallis* (1845) 135 E.R. 794.

¹⁵⁶ See for Younger J. in *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261 at 269 who opined that copyright cannot, in the public interest, subsist in grossly immoral works.

¹⁵⁷ (1990) 19 I.P.R. 44.

¹⁵⁸ (1997) 37 I.P.R. 542.

¹⁵⁹ See *ibid.* at 567, where Merkel J. opined that “[t]he true underlying principle acted upon by the courts for refusing relief on grounds of public interest might lie in the discretion conferred as to the appropriate form of relief, rather than whether a defence disentitles the copyright owner to any relief [emphasis added].”

so serious in nature as to taint the entire copyright work¹⁶⁰—*e.g.* where the work in question is immoral or obscene, libellous or fraudulent)¹⁶¹ or in less serious cases, to merely deprive the plaintiff of equitable relief (such as an injunction).

It is submitted that the issue as to whether the illegality or wrongdoing is sufficient to taint the plaintiff's copyright work in such a manner as to debar him from all relief altogether (including a right to damages) must be a question of fact and degree to be assessed on a case-by-case basis.¹⁶² Further, the latter phenomenon (arising in cases where public policy does not demand that all relief be withheld from the plaintiff or where the illegality or wrongdoing in question is not sufficiently serious in nature as to debar all relief) of depriving the plaintiff of injunctive relief but nevertheless leaving him with the right to damages or an account of profits has been judicially recognised in England and Australia. Indeed, in *Ashdown v. Telegraph Group Ltd.*,¹⁶³ the English Court of Appeal was of the view that in rare circumstances where the right of freedom of expression comes into conflict with the rights conferred by the CDPA 1988 on the owner of copyright, the court may accommodate the right of freedom of expression by refusing, in its discretion, to grant the plaintiff injunctive relief (hence allowing the defendant to reproduce "the very words"

¹⁶⁰ The defendant to an action for copyright infringement is likely to plead the defence of *exturpi causa non oritur actio* in such cases, as for example where the work in question is dishonest and misleading (*Slingsby v. Bradford Patent Truck and Trolley Co.* [1906] W.N. 51), is of a gross immoral tendency (*Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261) or is written in breach of confidence (*Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109).

¹⁶¹ In cases where the plaintiff is, on account of the illegality or wrongdoing, debarred from all relief, the effect of this measure, apparently, is to render the plaintiff's copyright in the work unenforceable. Would this then not constitute an indirect route to denying the plaintiff enforcement of his copyright?

¹⁶² It may of course be argued that an award of damages is usually described as "non-discretionary" because the remedy of damages is after all a traditional common law remedy that is granted as of right. However, in *Acohs Pty. Ltd. v. R.A. Bashford Consulting Pty. Ltd. & Ors* (1997) 37 I.P.R. 542 at 569, Merkel J. in the Federal Court of Australia cited *Kalamazoo (Aust.) Pty. Ltd. v. Compact Business Systems Pty. Ltd.* (1985) 5 I.P.R. 213 for the proposition that "there may be some situations where, acting upon public policy considerations such as illegality, dishonesty or unconscionability, a court may refuse to enforce a legal right including a right to damages." Indeed, in the Singapore context, the choice of words used in section 119(2) of the *Copyright Act 1987* (which sets out the types of relief available to the plaintiff and which is identical in all respects with section 115(2) of the Australian *Copyright Act 1968* (Cth.)) suggests that the court's power to award relief (including damages) is entirely discretionary. Section 119(2) reads as follows: "Subject to the provisions of this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits [emphasis added]."

¹⁶³ [2002] R.P.C. 5.

of the plaintiff in breach of copyright) but instead order the defendant to compensate the plaintiff with damages (for any loss suffered) or to account to the plaintiff for the profits made from exploiting the plaintiff's work.¹⁶⁴ Similarly, Drummond J. in the Federal Court of Australia decision in *A-One Accessory Imports Pty. Ltd. v. Off Road Imports Pty. Ltd.*¹⁶⁵ was of the opinion that even though the plaintiff in that case was denied equitable relief on account of "unclean hands", he should nevertheless be entitled to an award of damages on the basis that his legal rights had been interfered with (notwithstanding the language of section 115(2) of the *Copyright Act 1968* (Cth.) which suggests that the award of damages is discretionary).¹⁶⁶

The upshot of Merkel J.'s approach in *Acohs*, which, it is submitted, is particularly instructive for jurisdictions, like Singapore, which do not have the section 171(3) provision in their copyright legislation, is to serve as a reminder of the fact that equitable remedies are, by their very nature, discretionary¹⁶⁷ and that it is entirely within the purview of the court to take into account all relevant factors, including the application of equitable principles or maxims and considerations of public interest or public policy, in awarding discretionary relief in actions for copyright infringement. Adopting this "relief-oriented" approach to public interest may very well lead to the same consequence as adopting the "defence-oriented" approach to public interest (where, like in England, public interest is generally treated as a complete defence to an action for copyright infringement). As Jacob J. rightly pointed out in *Hyde Park Residence Ltd. v. Yelland*: "So in my opinion if equity *prevents relief* on the grounds of public interest, it *in substance* provides a *complete defence* to the entire [copyright infringement] claim".¹⁶⁸ It can therefore be argued that the adoption, in Singapore, of a "relief-oriented" approach to public interest is at least an alternative or indirect route towards

¹⁶⁴ See *ibid.* at para. 46: "The first way in which the right of freedom of expression could be accommodated was by declining to grant the discretionary relief of an injunction. But if a newspaper considered it necessary to copy the exact words created by another, there was no reason why the newspaper should not indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Freedom of expression should not normally carry with it the right to make free use of another's work."

¹⁶⁵ (1996) 34 I.P.R. 332 at 335.

¹⁶⁶ Drummond J. felt that there was no discretion to deny a copyright owner who has established an infringement of copyright the remedy of damages provided for by statute. *Cf.* note 162, above.

¹⁶⁷ See Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 2nd ed. (London: Butterworths, 1995) at para. 2.151: "... it is rather difficult to see how a separate public interest defence is needed... If it is a claim to an injunction this may be refused in the sound exercise of the court's discretion; but this is not because public interest is a complete defence to the action, but because of the nature of equitable relief."

¹⁶⁸ [1999] R.P.C. 655 at 670 [emphasis added].

achieving the same end—that of denying the plaintiff enforcement of his copyright on grounds of public policy.¹⁶⁹

VII. CONCLUSION

Indeed, public interest in itself is an elusive concept. This paper has explored how the notion of public interest is generally treated in the various jurisdictions and has outlined the difficulties that will be faced if an attempt is made to justify the existence of the common law defence of public interest in the law of copyright in Singapore. Whilst the option clearly remains open for the Singapore Parliament to expressly and unequivocally incorporate the defence of public interest in the *Copyright Act 1987*, it has been argued that this is really not a necessary measure. The flexibility of scope and application that is often associated with the defence of public interest at common law has to some extent been accommodated by the somewhat broader interpretation which the courts have taken of the fair dealing defences in the law of copyright. Further, and perhaps more importantly, this paper has also highlighted the viability of adopting, in Singapore, an arguably more acceptable “relief-oriented” approach to issues concerning the public interest, where the public interest serves not as a defence to an action for copyright infringement but rather as a “defence” to the court’s grant of discretionary relief in copyright law.

Whatever the status of the public interest defence in the law of copyright in Singapore (or indeed in any other jurisdiction), one thing remains certain. In the field of intellectual property (IP), the perennial difficulty lies in maintaining a fair balance (if at all possible) between the rights and interests of the IP owner on the one hand and those of society at large on the other. It is of course never possible to fully satisfy either group of individuals—ultimately, it may be the best way forward for the IP community to adopt a “give-and-take” attitude. Therefore, in trying to achieve some form of equilibrium, we are assisted, in the law of copyright, by the detailed list of exceptions to copyright infringement which is to be found in the copyright legislation of most countries and possibly by fairly diverse considerations of issues pertaining to the public interest. The following remarks by Lloyd J. are a timely reminder of the underlying tension inherent in the

¹⁶⁹ This approach has also received academic support. See, in particular, S. Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, 2nd ed. (Rozelle, N.S.W.: L.B.C. Information Services, 1999) at 104: “Public policy and public interest is always an unruly horse to ride, and *there is a lot to be said* for [the] approach which would leave such matters to be considered under traditional equitable discretionary bars, such as clean hands and fraud [emphasis added].”

law of intellectual property:¹⁷⁰

The defence under section 30(2) [CDPA 1988] with its test of fairness requires a balance to be struck between the rights of the copyright owner and those of the news reporter. In my judgment, one relevant consideration is whether the nature and extent of the copying did or did not go beyond that which was reasonable and appropriate for the report, *having regard not just to the defendant's position but also to that of the plaintiff*. I recognise the importance of news reporting. But I do not see that the reporter can expect to have immunity from a copyright action if he or she takes more of the copyright material than is reasonable or appropriate. The requirement of fair dealing involves some *limitation on the news reporter's freedom of action* in order to *respect the copyright owner's rights*.

The message is therefore clear—that whilst the law recognises that there must be exceptions and qualifications to copyright protection, there is nevertheless still the need for the general public to respect copyright material and to have regard to the competing interests of the copyright owner. The right of freedom of expression, even in the English context, is never served unencumbered on an open platter. It is clearly the hallmark of any democratic society to unabashedly recognise and protect the entirety of disparate rights in intellectual property.

¹⁷⁰ *P.C.R. Limited v. Dow Jones Telerate Limited* [1998] F.S.R. 170 at 186 [emphasis added].