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COPYRIGHT VS. FREE EXPRESSION: THE CASE OF PEER-TO-PEER FILE-SHARING OF MUSIC IN THE UNITED KINGDOM

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ABSTRACT

This paper explores the extent to which the peer-to-peer (p2p) file-sharing of music is a form of communication protected from the restrictions of the Copyright, Designs and Patents Act 1988 (U.K.) (CDPA) by the guarantee of free expression enshrined in Article 10 of the European Convention on Human Rights (ECHR) and incorporated into domestic law through the Human Rights Act 1998 (U.K.) (HRA). The paper first examines the protection offered to freedom of expression through the existing copyright scheme. It is asserted that due to a lack of context-sensitivity, mechanisms such as the idea-expression dichotomy must not be relied upon to deny the existence of prima facie breaches of Article 10(1) of the ECHR. Rather, such breaches must be acknowledged and justified (if possible) as being "necessary in a democratic society" under Article 10(2) of the ECHR. Next, the extent to which p2p music file-sharing represents an infringement under the terms of the CDPA (exclusive of any effect of the ECHR) is examined. It is concluded that such sharing does amount to an infringement under the Act and is not subject to any of the enumerated defences. The final part of the paper explores the extent to which the statutory restriction on file-sharing of music may be permitted under Article 10 of the ECHR. It is suggested that, for a number of reasons, the CDPA's restriction on free expression may not be "necessary in a democratic society" under Article 10(2) of the ECHR. As a result, should this statutory restriction be impugned in a U.K. courtroom in the context of p2p music file-sharing, such a court may be under an obligation to exculpate infringing parties under the "public interest" defence or to make a declaration of incompatibility under the HRA.

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I. INTRODUCTION

The passage of the quasi-constitutional Human Rights Act 1998 in the United Kingdom in 2000 marked a significant shift in the nature of judicial review and human rights law in the country.[1] For the first time, courts were not only permitted but in fact *commanded* to read all domestic legislation, insofar as is possible, in a manner that is consistent with the terms of the European Convention on Human Rights.[2] Moreover, if this is not possible, a reviewing court *must* make a (non-binding, yet politically persuasive) declaration of incompatibility.[3] This new legal landscape has necessarily created a host of tensions in the law, as both new and existing legislation must be scrutinised through the HRA for compliance with no less than the 93 Articles of the ECHR (including its five Protocols).

This paper examines one such tension: that brought about by the emergence of pan-global peer-to-peer (p2p) file-sharing networks. These networks are created using an Internet software application that links a series of individual computers, each of which is capable of sharing, searching for, creating and modifying digital copies of particular files.[4] This kind of file-sharing software was recently described a "gigantic engine of [copyright] infringement."[5] The networks created by such software have indeed become global phenomena, with millions of participants sharing millions of files (ranging from music and video to software and eBooks) every second of every day.[6] As such, these networks appear to pose a unique challenge to a number of different industries, though none more well-known than the music recording industry, which claims to have already lost millions of pounds as a result of unauthorised p2p copying.[7] The apparent challenge facing the

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[1] *See* R (Daly) v. Secretary of State for the Home Department, [2001] 2 A.C. 532, 547-549 (H.L.) (discussing the change in judicial review resulting from the passing of the HRA).

[2] European Convention on Human Rights, Nov. 4, 1950, Rome, 213 U.N.T.S. 221; E.T.S. 5 [hereinafter ECHR]. HRA, § 3(1).

[3] HRA, § 4(2).

[4] *See* Metro-Goldwyn-Mayer Studios Inc v. Grokster, 259 F.Supp.2d 1029, 1032-1033 (C.D. Cal. 2003) (describing the operation of the file-sharing programs Morpheus and Grokster).

[5] Petitioners' Oral Rebuttal, Grokster, 259 F.Supp.2d 1029 (No 04-480) (Mar. 29, 2005), *available at* http://music.tinfoil.net/modules.php?name=News&file=article&sid=1202.

[6] *P2P File Sharing Increases*, P2PNET NEWS(Dec. 9, 2004), http://P2pnet.net/story/3246 (noting that in the United States alone there were 5,445,275 users logged on to popular P2P networks at any given moment during November of 2004).

[7] *See* Record Industry Association of America, *The Recording Industry Association of America's 2002 Yearend Statistics*, http://www.riaa.com, (noting that the number of CDs shipped in the US fell from 940 million to 800 million between 2000 and 2002. The Recording Industry Association of America (RIAA) asserts that this fall in sales is the direct result of p2p file-sharing); *see also* British Phonographic Institute, *Online Music Piracy: The UK Record Industry's Response* (July, 2005),

recording industry is one that is distinct from that created by previous methods of unauthorised copying, given that (1) there is no loss of quality with each generation of copied file; and (2) p2p networks permit individuals to locate and obtain desired files within seconds or minutes, at any time of day; and (3) p2p networks permit the individual to obtain particular songs without having to purchase entire albums.[8]

Challenges to the recording industry notwithstanding, p2p file-sharing of copyrighted materials may enjoy at least *prima facie* protection under Article 10(1) of the ECHR, which includes the freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers." It is the purpose of this paper to explore and resolve the apparent conflict between Article 10 of the ECHR and the provisions of the Copyright, Designs and Patents Act 1988[9] with regard to p2p file-sharing. Though online file-sharing routinely involves media of all kinds, this paper only considers the constitutional protection that must be offered to the sharing of music. as the reason for this is that each particular commercial medium (i.e. literature, film, television, software etc.) is associated with unique communicative and economic aspects that ought to be carefully assessed on its own merits.

To determine the extent of the constitutional conflict between Article 10 of the ECHR and the provisions of the CDPA, the true nature of p2p file-sharing– both from economic and constitutional perspectives– must be elucidated. This will involve dealing with three main questions: (1) is p2p music file-sharing the sort of activity that ought to be rigorously protected through freedom of expression rights, or is it merely the atomistic piracy of intellectual property?; (2) is file-sharing an activity that poses the real threat of economic apocalypse for recording companies and artists alike, or can it exist alongside (and maybe even enhance the viability of) the recording industry?; and (3) are there other ways in which the goals of copyright can be accomplished without the imposition of harsh restrictions on p2p file-sharing through the CDPA?

Part II of the paper critically examines the protection offered to freedom of expression rights through the existing copyright scheme. I assert that due to a lack of context-sensitivity, mechanisms such as the idea-expression dichotomy and the fair dealing defences must not be relied upon to deny the existence of *prima facie* breaches of free expression rights under Article 10(1) of the ECHR. Rather, such breaches must be acknowledged and justified (if possible) as being "necessary in a democratic society" under Article 10(2). Part III examines the extent to which, exclusive of any quasi-constitutional requirements, p2p music file-sharing represents an

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http://www.bpi.co.uk/pdf/Illegal_Filesharing_Factsheet.pdf (making similar claims for the UK market).

8 Guy Douglas, *Copyright and Peer-To-Peer Music File Sharing: The Napster Case and the Argument Against Legislative Reform*, 11(1) MURDOCH UNIV. E. J. L.(2004) http://www.murdoch.edu.au/elaw/issues/v11n1/douglas111.html.

9 Copyright, Designs and Patents Act, 1988 c. 48 (UK) [hereinafter CDPA].

infringement under the terms of the CDPA. I conclude that such sharing does amount to an infringement and is not subject to any of the enumerated defences.

Part IV explores the extent to which the statutory impediment to untrammelled p2p music file-sharing wrought by the CDPA may be permitted in light of the requirements of Article 10 of the ECHR. I suggest that such sharing is far more than a mere network of convenience for like-minded musical "pirates." Rather, when viewed in its social and cultural context, p2p file-sharing can be conceptualised as an activity that fosters a number of values underpinning the very protection of free expression itself. After contextualising the nature of p2p file-sharing in this way, I suggest that the CDPA's restriction on free expression may not be "necessary in a democratic society" under Article 10(2). As a result, should the restriction on p2p file-sharing caused by provisions of the CDPA become impugned in a U.K. courtroom as violating Article 10, such a court may be under an obligation to exculpate infringing parties under the public-interest defence or to make a declaration of incompatibility under the HRA.

II. THE CURRENT STATE OF FREEDOM OF EXPRESSION IN COPYRIGHT LAW

Before elucidating the protection offered to freedom of expression rights through the current copyright scheme, the basic structure and character of the CDPA ought to be outlined.

A. THE PREVAILING COPYRIGHT SCHEME

The CDPA creates a statutory property right with respect to various works of authorship.[10] The property interest granted by the Act gives owners certain exclusive rights that differ depending on the type of work at issue. These include the right to copy the work,[11] issue copies to the public,[12] perform, show or play the work in public,[13] broadcast the work or include it in a cable programme service,[14] make an adaptation of the work or do any of the above in relation to an adaptation.[15] The Act explicitly labels as an "infringement" the situation in which a person directly or indirectly does,[16] or authorises anyone to do, that which the Act recognises as the exclusive right of the owner.[17]

[10] CDPA, § 1.
[11] CDPA, §§ 16(1)(a), 17.
[12] CDPA, §§ 16(1)(b), 18.
[13] CDPA, §§ 16(1)(c), 19.
[14] CDPA, §§ 16(1)(d), 20.
[15] CDPA, §§ 16(1)(e), 21.
[16] CDPA, § 16(3)(b).
[17] CDPA, §16(2).

The CDPA provides for a number of defences under Chapter III that serve to exculpate uses of works that would otherwise represent infringements. These exceptions include "fair dealing" for the purposes of research, private study, criticism, review and news reporting (sections 29-30); various educational uses (sections 32-36A); use in connection with library/archives (sections 37-44) or public administration (sections 45-50). These defences amount to "a collection of provisions which define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection."[18] The available defences do not provide the courts with *carte blanche* to carve out exceptions to copyright protection where doing so would be fair or reasonable.[19]

Another defence available under the CDPA exculpates breaches of copyright where such can be said to be in the "public interest." This defence arises at common law but subsists by virtue of section 171(3) of the CDPA. This includes cases where the work at issue is: "(i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; or (iii) incites or encourages others to act in a way referred to in (ii)."[20] Commenting on this defence, the UK Court of Appeal in *Ashdown v. Telegraph* (2002)[21] held that the various circumstances in which the public interest may override copyright are "not capable of precise categorisation or definition."[22] Regarding the general effect of Article 10 of the ECHR on the defence, Phillips M.R. held:

> Now that the [HRA] 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]. In such circumstances, we consider that section 171(3) of the Act permits the defence of public interest to be raised.[23]

Thus, the Court reserved the possibility that in those "rare cases" where freedom of expression, as mandated by the HRA, requires that individuals gain access to the exact form of a copyrighted work, such individuals will be able to do so through the use of the public interest defence.

There are two primary remedies for breaches of a copyright interest: an injunction and compensatory relief.[24] When seeking the latter, a claimant has the option of seeking either damages, which must represent the loss

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[18] Pro sieben Media AG (formerly Pro sieven Television AG) v. Carlton UK Television Ltd. & anor [1997] E.M.L.R. 509, 516 (Chancery).

[19] *Id.* Note that the defences available under the CDPA may be further restricted by the operation of European Council Directive 2001/29/EC, 2001 O.J. (L 167) 10, which purports to limit and narrow the available defences under UK law. This Directive was implemented in the UK through the Copyright and Related Rights Regulations 2003 (2003 No. 2498) (UK).

[20] Hyde Park Residence Ltd v. Yelland, [2001] Ch. 143, para. 66.

[21] Ashdown v. Telegraph [2002] Ch. 149 (C.A.).

[22] *Id.* para. 58; *Yelland* para. 172.

[23] *Ashdown*, paras. 58-59.

[24] CDPA, § 96.

caused to her by the breach, or an account of the profits made by the defendant from the use of the claimant's work. The CDPA creates several criminal offences for those infringing valid copyright interests. Though most of these apply to cases of traditional commercial exploitation, subsection 107(1)(e) of the CDPA creates an offence of distributing works which the accused ought to have known were protected by copyright, other than in the course of business, and to such an extent as to prejudicially affect the owner of the copyright. It is thus conceivable that private persons engaged in p2p music file-sharing could be subject to criminal sanction through the operation of the CPDA.

B. FREEDOM OF EXPRESSION AND THE CURRENT INTERPRETATION OF THE ACT

There are a number of ways in which copyright law, outside of any reference to the ECHR or the HRA, already incorporates notions of free expression into its provisions. This section outlines and evaluates the quasi-constitutional sufficiency of some examples.

1. THE PUBLIC INTEREST DEFENCE

As noted above, the rare circumstances in which the public interest may override copyright are not capable of precise categorisation or definition, but the defence certainly includes those cases where the copyright interest at issue is immoral, injurious to various prescribed interests or has a tendency to incite such prescribed injuries.[25] This facet of the public interest defence corresponds directly to an extremely limited (and therefore relatively insignificant) zone of free expression that exists in copyright law regardless of any other external constitutional strictures. This zone of free expression may be limited indeed as the immoral/injurious speech that is not restricted by copyright will often be circumscribed through other legal mechanisms (for example, criminal hate speech provisions or civil defamation law).

By contrast with the immoral/injurious prong of the public interest defence, the second set of cases in which the public interest defence may be available explicitly involves assessing the impact of Article 10 of the ECHR on the interpretation of the CDPA.[26] It is thus not one of the cases in which copyright law, on its own, serves to protect free expression. As a result, the proper contours of the public interest defence can be drawn only after explicit consideration of Article 10 itself (see Part IV below).

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[25] *Yelland*, at para. 66.
[26] *Ashdown*, at ¶ 58.

2. THE ENUMERATED DEFENCES AND THE IDEA-EXPRESSION DICHOTOMY

Another element of copyright law that protects freedom of expression independent of any applicable quasi-constitutional rights involves the various defences enumerated in the CDPA. For example, as noted above, the fair dealing defences provide that for the purposes of research, private study, criticism or review, certain uses will not constitute infringements of otherwise valid copyright interests. According to the Court of Appeal in *Ashdown*, in these cases "freedom of expression displaces the protection that would otherwise be afforded to copyright."[27] In other words, to the extent of the operation of these defences, a zone of free expression is implicitly carved out by the CDPA. The question to be answered is whether this zone is sufficiently broad and flexible to satisfy the requirements of Article 10 of the ECHR. This question is addressed following a discussion of the second major free expression mechanism internal to copyright law: the idea-expression dichotomy.[28]

Although mentioned nowhere in the CDPA, the idea-expression dichotomy has been characterised as the "central doctrine of copyright law."[29] According to this doctrine, the owner of a copyright interest has only the limited capacity to control the expression (i.e., the form) of her ideas. The copyright owner cannot restrain the use of the underlying ideas themselves (i.e., the content). Commenting on the idea-expression dichotomy and its relation to free expression, Phillips M. R. held in *Ashdown*:

> Copyright does not normally prevent the publication of the information conveyed by the literary work. Thus it is only the freedom to express information using the verbal formula devised by another that is prevented by copyright. This will not normally constitute a significant encroachment on the freedom of expression… It is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form of words devised by someone else.[30]

The Court then went on to conclude that the idea-expression dichotomy (along with the fair dealing defences) solves any freedom of expression problem in "most cases."[31] In discussing the remaining cases, Phillips MR held:

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[27] *Id.* at 33.
[28] WILLIAM R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS, 382 (4th ed., 1999).
[29] Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3, 4 (2003).
[30] *Ashdown*, para. 31.
[31] *Id.* para. 39.

> there will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest.[32]

Unfortunately, while recognising the limited capacity of the idea-expression dichotomy and the fair dealing defences to fully protect free expression, the Court offered very little principled guidance as to when (and for what reasons) these mechanisms would be inadequate guardians of the Convention right.

I would suggest that by relying on the idea-expression dichotomy and the fair dealing defences to eliminate any free expression conflict (in most cases), the Court in *Ashdown* committed a quasi-constitutional error. To properly appreciate the nature of this error, it is worth examining the actual text of Article 10:

> *Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society…for the protection of the reputation or rights of others.

Note that Article 10(1) is drafted in the broadest of terms. It refers to "expression" in the widest sense without drawing any distinction between the forms of expression that do or do not enjoy *prima facie* protection.[33] For this reason, the European Court of Human Rights has repeatedly held that *all* expression, regardless of its form, is presumptively protected by Article 10(1),[34] leaving the primary locus of controversy for the justification analysis under Article 10(2). In the context of copyright law, this means that where the CDPA prevents individuals from using the exact form of the works of others, a *prima facie* violation of the ECHR must be found.

With regard to the analysis under Article 10(2), courts must look to whether or not the restriction in question is (a) prescribed by law; (b) directed to one or more of the objectives specified in the article; and (c) is shown to be necessary in a democratic society.[35] The test for ascertaining necessity in a

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32 *Id.* para 43.

33 *See, e.g.*, Müller v. Switzerland, 13 Eur.Ct. H.R.Rep. 212 at para. 27 (1994).

34 Amihalachioaie v. Moldova, Eur. Ct. H.R. (April 20, 2004) (No. 60115/00) (2005), para. 28; Schöpfer v. Switzerland, 33 Eur. Ct. H.R. Rep. 34, para. 33 (2001); De Haes and Gijsels v. Belgium, Eur. Ct. H.R. (Feb. 24, 1997) (No 19983/92) at para. 48 (1997) .

35 R v. Shayler, [2003] 1 A.C. 247 (H.L.), para. 23.

democratic society was originally set out by Lord Clyde in *de Freitas v. Permanent Secretary of Ministry of Agriculture Fisheries Lands and Housing* (1999).[36] Lord Clyde held that such an analysis should question:

> whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than necessary to accomplish the objective.[37]

This formulation has since been endorsed by the House of Lords as the appropriate test to be used in assessing whether limitations on freedom of expression are "necessary" pursuant to Article 10(2) of the ECHR.[38] In fact, in *R v. Shayler* (2003) Lord Hope noted that the three-part *de Freitas* proportionality test is consistent with the "general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate."[39]

Returning now to my assertion that the Court in *Ashdown* erred in its application of the quasi-constitutional test, the crux of this error stems from the Court's holding that the law of copyright's mere restriction on the forms of expression that individuals can take does not amount to a "significant encroachment" on freedom of expression rights. With respect, this holding is patently inconsistent with the important and established general principle that restriction on forms of expression *is* indeed constitutionally significant. This is so in many jurisdictions, including Canada,[40] the United States[41] and (more relevantly) the ECHR.[42] In this regard, the U.S. Supreme Court has aptly held that "[w]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[43] Thus, the Court in *Ashdown* ought to have recognised that copyright's restrictions on mere forms of expression are indeed violations of the broadly worded Article 10(1), which demand justification under Article 10(2).

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[36] de Freitas v. Permanent Secretary of Ministry of Agriculture Fisheries Lands and Housing, [1999] 1 A.C. 6 (P.C.).

[37] *Id.* at 80.

[38] Campbell v. MGN Ltd [2004] U.K.H.L. 22 (May 6, 2004), at para. 115; *Shayler,* para. 60.

[39] *Shayler*, paras. 60-61.

[40] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 968.

[41] Cohen v. California, 403 U.S. 15, 26 (1971) [hereinafter *Cohen*].

[42] *See* Amihalachioaie v. Moldova, Eur. Ct. H.R. (April 20, 2004) (No. 60115/00) (2005), para. 28; Schöpfer v. Switzerland, 33 Eur. Ct. H.R. Rep. 34, para. 33 (2001); De Haes and Gijsels v. Belgium, Eur. Ct. H.R. (Feb. 24, 1997) (No 19983/92), para. 48 (1997)

[43] *See Cohen* 403 U.S. 15.

An important counter-argument to face at this stage can be found in U.S. jurisprudence. The Supreme Court has held both that restrictions on expressive forms do violate the U.S. constitutional First Amendment right to free speech,[44] and, in a separate body of case-law, that copyright protection (due to the idea-expression dichotomy) does *not* violate the First Amendment.[45] How can the Court reasonably hold both that the First Amendment generally protects against restrictions on forms of expression, *and* that copyright law does not violate the First Amendment precisely *because* it only involves the regulation of forms of expression? The way in which this contradiction is reconciled in the American context is important given the obvious parallels to the above-mentioned holding in *Ashdown* (i.e. that, due to the idea-expression dichotomy, Article 10(1) is not violated) and the apparently contradictory ECHR jurisprudence (to the effect that restrictions on forms of expression generally *do* engage Article 10(1)).

The resolution of the American judicial contradiction lies in the Supreme Court's holding that copyright law's encroachment is constitutionally *justifiable* given its propensity to act as an "engine of free expression."[46] Since, according to the Court, copyright tends to promote and encourage speech (through protecting economic incentives to invest in expressive works), the apparent restriction on free speech is constitutionally permissible. As noted by influential American scholar Melville Nimmer, "in some degree [copyright] encroaches upon freedom of speech…but this is justified by the greater public good in the copyright encouragement of creative works."[47] Thus, U.S. jurisprudence implicitly recognises a violation of free speech wrought by copyright law, but finds it to be generally *justifiable* under the First Amendment. Rather than supporting the approach of the Court of Appeal in *Ashdown*, the U.S. jurisprudence actually indicates that, in the U.K. context, the CDPA's restriction on forms of available expression *does* conflict with Article 10(1) and must therefore be justified (using the *de Freitas* standard) under Article 10(2).

It should be noted that comparisons between Article 10 and First Amendment jurisprudence are clouded by an important textual difference. Whereas the First Amendment is couched in absolute terms ("Congress shall make no law…abridging the freedom of speech"), Article 10(2) permits limitations on free expression that are necessary in a democratic society. In the American context, competing interests must be balanced at the same time that the contours of the right are defined, whereas Article 10 bifurcates the definition of the right from the justification of its restriction. For this reason, the American holding that copyright does not violate the First Amendment must not to be confused with a view that there is no conflict between free

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[44] U.S. CONST., amend. I.

[45] Eldred v. Ashcroft, 537 U.S. 186 (2003), Harper & Row Publishers Inc v Nation Enters, 471 U.S. 539, 560 (1985).

[46] *Harper & Row*, 471 U.S. at 558.

[47] Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180, 1192 (1970).

speech and copyright (as was held by the Court in *Ashdown*). Rather, as noted above, American judicial reliance on the notion of an "engine of free expression" implicitly recognises a conflict which, if imported into the U.K. context, must be resolved using the bifurcated Article 10 analysis (and the tripartite *de Freitas* standard). As discussed below, there are indeed important advantages to the use of this bifurcated procedure when assessing the constitutionality of particular copyright provisions.

In addition to being mandated by the House of Lords, there are very good reasons why the tripartite *de Freitas* analysis ought to be used in the assessment of free expression rights in copyright law. First, unlike the reliance on the idea-expression dichotomy and fair dealing defences (as was effected by the Court in *Ashdown*), the *de Freitas* test draws the courts' attention to the fundamental task in all free expression cases–namely, the balancing of expressive rights against other competing values within appropriate constitutional boundaries. The tripartite analysis provides a context-sensitive test that seeks to expose the competing interests at stake in particular cases and balance them in a reasoned manner. In contrast, the idea-expression dichotomy and the fixed fair dealing categories represent relatively predetermined and inflexible legal mechanisms for the protection of free expression that are far less context-sensitive.

The idea-expression dichotomy and the fair dealing defences both involve an implicit balancing act between competing interests. In particular, these mechanisms are designed to reconcile the interests of copyright owners in profiting from the works at issue with those of society at large (including future creators) in having the greatest access to the works.[48] However, due to a lack of flexibility, the balancing act is far more crude than that effected by the tripartite necessity test. With regard to the idea-expression dichotomy, the balance that is struck is once-and-for-all, assuming that in all circumstances freedom of expression is satisfied without the need for using any particular form. But, as noted by the Court in *Ashdown*, there are cases where it is the form and not merely the content that should be protected.[49] Being nothing more than a simple if eminently sensible maxim, the idea-expression dichotomy offers no assistance in identifying such situations. However, fair dealing defences are supposed to fill this gap.

The fair dealing defences, though clearly more context-sensitive and flexible than the idea-expression dichotomy, are still restricted to a narrow class of cases that are defined "with extraordinary precision and rigidity."[50] These defences are unable to accommodate new and unexpected cases,

[48] GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST, 44-45, 135-37, 173-74 (IIC Studies, Vol. 14, 1994).
[49] Ashdown v. Telegraph [2002] Ch. 149 (C.A.),para. 43.
[50] Pro sieben Media AG (formerly Pro sieven Television AG) v. Carlton UK Television Ltd. & anor [1997] E.M.L.R. 509, 516 (Chancery), para. 118.

perhaps brought about by advances in technology or other societal changes.[51] Such shifts may demand (from a constitutional perspective) that the form of a particular work (that is not covered by the existing defences) be permissibly used without infringing copyright. By contrast, the *de Freitas* standard explicitly balances the interests at stake in particular cases and attempts to determine whether the right to free expression is being proportionately restricted by the operation of copyright. As such, the capacity for the fair dealing defences, even in conjunction with the idea-expression dichotomy, to appropriately accommodate individual challenges to the delicate balance struck by copyright law (between creators and users) pales in comparison with the more flexible *de Freitas* standard. In this regard, the comments of Michael Birnhack regarding the CDPA and its relation to ECHR free expression rights are apposite:

> the complex details of the statute should be permitted in as much and only to the extent that they promote copyright law's goals. In other words, copyright law should not be taken for granted as immune from judicial review and its details should not enjoy an *a-priori* immunity. To the contrary: copyright law must not run afoul of freedom of expression and it is the courts' role to ensure this through the interpretation of the CDPA. One practical implication is that the ability and power of the idea-expression dichotomy or the fair dealing defence to "take care" of considerations of freedom of expression should be carefully reviewed.[52]

The *de Freitas* proportionality analysis provides an appropriate mechanism for ensuring that the CDPA's restriction on free expression is limited only to those instances where copyright's underlying goals are sufficiently fostered in practice. Thus, the analysis that follows (Part IV) does not simply evaluate the effects of the CDPA on free expression in the particular context of p2p music file-sharing using the idea-expression dichotomy or the enumerated defences. Rather, it assesses these effects using the tripartite *de Freitas* test.

One final point ought to be addressed at this stage. It would seem that an overriding concern held by both the lower and appellate Courts in *Ashdown* was that if it were recognised that freedom of expression (under Article 10(1)) is engaged by copyright protection in every case, a flood of litigation might ensue. If so, it was feared that "the rights which the legislation apparently confers will be of no practical use except to those able

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[51] This is all the more true given the apparent restrictions placed upon the freedom of Parliament to carve out new exceptions to copyright by EC Directive 2001/29/EC, *supra* note 19.

[52] Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression under the Human Rights Act* 2003 ENT L. REV. 24, 29.

and willing to litigate in all cases”[53] In my view, this fear is unfounded. Though some new judicial ground must undoubtedly be traversed, decisions will mostly be made with regards to expressive media on a class-by-class basis, rather than on an individual case-by-case basis. For example, p2p music file-sharing, once adjudicated upon, should be settled for virtually all cases of copyrighted music transmitted through this medium. As my analysis will demonstrate, many if not all of the considerations involved in determining whether particular breaches of free expression are “necessary in a democratic society” (for example, determining the goals of copyright and whether the means used are rationally connected to these goals) are not specific to any one case, but are far more broadly applicable. Thus, the properly broad characterisation of Article 10(1) need not be avoided on the basis that copyright’s protections will be subverted by a flood of litigation.

III. P2P FILE-SHARING AND COPYRIGHT LAW AS IT NOW STANDS

For the purposes of determining whether p2p file-sharing infringes the CDPA, this paper assumes that most instances of such sharing will have a number of common features. In particular, the digital music file at issue will tend to be a song originally copied from a CD that is available for purchase in at least some retail stores. Both parties to the digital transmission will tend to be laypersons, uninvolved in any significant journalistic, critical or educational/research activity (at least insofar as the sharing of the musical file in question is concerned). It is this common scenario that can now be assessed using the CDPA.

A music file transferred on a p2p network benefits from the protections conferred by the CDPA on “literary works” (to the extent that the music is accompanied by lyrics), “musical works” and “sound recordings.”[54] Thus, when one individual shares or uploads a copyrighted music file in the common p2p file-sharing scenario, a number of copyright infringements under the provisions of the CDPA will likely have been made. The uploader (the individual permitting her file to be copied) would likely be found to be issuing copies to the public (even if only indirectly) in contravention of sections 16 and 18 of the CDPA.[55] The downloader (the individual receiving the new copy) engages in an infringement as she makes an unauthorised copy of the work in violation of sections 16 and 17 of the Act.[56] Thus, unless one of the available defences is engaged, both parties involved in the sharing of a

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53 Ashdown v. Telegraph Group Ltd, [2001] Ch. 685, *permission to appeal refused*, [2001] 2 All ER 370, para. [13].

54 CDPA, §§ 3(1), 5(1).

55 The right to communicate to the public includes making available, by electronic transmission, in such a way that the public may access it from a place and at a time individually chosen by them. P2p File-sharing would seem to qualify. *See* LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 145 (2c ed. 2004).

56 *Id.* at 136.

copyrighted file through a p2p network will be found to be infringing the applicable copyright interests at the very moment that the file is "shared" (that is, made available and downloaded).

With respect to the availability of defences, none of the CDPA's enumerated defences are applicable to the standard file-sharing scenario outlined above. The defence of fair dealing for private research or study does not apply as the typical p2p file-sharing scenario does not involve any formal aspects of research or study. Similarly, the defence of fair dealing for the purpose of criticism, review or for reporting current events, along with the defences for educational use, use in connection with library and archives, and use in public administration, are all patently inapplicable to normal file-sharing. So none of the exceptions enumerated in Chapter III of the CDPA appear to be available to exculpate the infringement of copyright interests associated with a typical p2p file-sharing transaction.

With regard to the availability of the public interest defence, as noted above, the defence has no clear test by which one can predict its application. However, the defence certainly includes (a) cases where the copyright is in a work that is immoral or injurious;[57] or (b) the "rare" cases where the public interest in gaining free access to the form of the copyrighted work "trumps" the rights conferred by the CDPA.[58] With regard to the first prong of cases, the typical instance of p2p file-sharing is unlikely to qualify. This is the case given that the work will tend to be generally available for purchase in retail stores, and as such it is unlikely that the work would be sufficiently immoral or injurious to merit exclusion in the public interest. With regard to the second prong of the public interest defence, a full answer can only be given after a more complete analysis of Article 10. It is argued in Part IV that the right to free expression, as guaranteed by Article 10 of the ECHR may very well necessitate that the defence be calibrated to encompass the sharing of digital music files through p2p networks.

In summary, the typical p2p transaction involving a music file will represent an infringement of copyright interests that is not likely to be exculpated by any of the CDPA's enumerated defences–though, as will be discussed below, the public interest defence may in fact be applicable.

IV. P2P FILE-SHARING AND THE ECHR

This section explores the extent to which the statutory impediment to untrammelled p2p music file-sharing ought to be deemed permissible under the strictures of Article 10 of the ECHR (in conjunction with the HRA). As noted above, the assessment of conformity with Article 10 involves a bifurcated analysis. The first step involves determining whether there is a *prima facie* breach of Article 10(1). If such a breach is found, the breach

[57] Hyde Park Residence Ltd v. Yelland, [2001] Ch. 143, para. 66.
[58] *Ashdown*, para. 58.

must be scrutinised to determine whether it is necessary in a democratic society under the terms of Article 10(2).

A. THE CDPA'S TREATMENT OF P2P FILE-SHARING VIOLATES ARTICLE 10(1)

As argued above, the extremely broad ambit of Article 10(1) is engaged by the CDPA's treatment of p2p file-sharing. The legislative restriction involves a clear "interference by public authority" on the imparting and receipt of "information or ideas." By rendering file-sharing an infringement that is not subject to any enumerated defences, individuals imparting and receiving information can be subject to prohibitive injunctions, compensatory damages and criminal sanction. However, as noted, the true controversy will lie in determining whether or not the CDPA's treatment of p2p file-sharing amounts to a restriction that is necessary in a democratic society (pursuant to Article 10(2). To determine whether or not a particular legislative enactment impermissibly violates Article 10(2) of the ECHR, one must ascertain whether (a) the legislation is prescribed by law; (b) is directed to one or more of the objectives specified in the Article; and (c) is shown to be necessary in a democratic society.

1. THE RESTRICTION IS "PRESCRIBED BY LAW"

As the restriction at issue emanates entirely from the CDPA, it is accordingly prescribed by law within the terms of Article 10(2).

2. THE RESTRICTION CAN BE LINKED TO AN ENUMERATED OBJECTIVE

The Court of Appeal in *Ashdown* held that restrictions on freedom of expression can be limited through the protection of copyright interests, where necessary in a democratic society, as such protection is linked to the protection of a property right.[59] Thus, the restrictions on freedom of expression wrought by the CDPA can be linked to the enumerated exception under Article 10(2) of protecting the "rights of others."

3. THE RESTRICTION MAY NOT BE NECESSARY IN A DEMOCRATIC SOCIETY

Before determining whether the CDPA's restriction on p2p file-sharing is necessary in a democratic society, the nature of the communication at issue must be briefly examined. To the extent that such speech can be said to be tied to the core values protected by constitutional rights of free expression, restrictions placed on p2p music file-sharing ought to be deemed necessary in a democratic society only following rigorous scrutiny.

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[59] *Id.*, para. 28.

a) THE NATURE OF THE SPEECH AT ISSUE

Most of the many models of free expression, including that of the ECHR,[60] posit one (or more) of three main justifications for free expression, all of which can be traced to the influential First Amendment theorist Thomas Emerson:[61]

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.[62]

With regard to assuring individual self-fulfillment, it should be noted that p2p file-sharing networks have become indispensable components of numerous pan-global virtual *communities* wherein cultural artefacts are both shared and discussed in genre-based chat rooms. For example, according to one network, using "peer-to-peer technology virtual rooms allow you to meet people with the same interests, share information, and chat freely using real-time messages in public or private."[63] For members of these burgeoning online communities, file-sharing is less a convenient vehicle for anonymous and selfish gain, and more an altogether novel forum for the formation and maintenance of music-based relationships.[64] Moreover, even the anonymous downloading and passive sharing of music with strangers from around the world is a form of cultural exchange that is of notable social importance. In his commentary on the value of online music sharing, Joshua Cohen properly suggests that such activity is a "vital element of communication and an essential tool that people use to understand themselves, their society and their place in the world."[65] As such, p2p file-sharing may represent an important component of many individuals' sense of community, identity and therefore self-fulfillment.

It should be noted that the creation and reinforcement one's personal identity is one of the core values underlying the model of free expression

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[60] Vogt v. Germany, 21 Eur. Ct. H.R. Rep. 205 (1996).

[61] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

[62] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 976.

[63] Soulseek, Homepage, http://www.slsknet.org/.

[64] *See* Ian Condry, *Cultures of Music Piracy: An Ethnographic Comparison of the US and Japan*, 7(3) INT'L J. CULTURAL STUD. 343 (2004) (providing a recent ethnography on file-sharing culture).

[65] Joshua A. Cohen, *Common Musical Sense: An Intellectual Call to Arms against the Recording Industry, Radio Deregulation, and Media Consolidation and their Threat to our National Culture and Democracy*, *available at* http://www.fitehouse.com/New_web/Released/Common%20Musical%20Sense.pdf ..

espoused by Joseph Raz.[66] Raz argues that freedom of expression can be valued for its unique capacity to validate and indeed create personal identity in modern society. In societies defined by urban anonymity and cultural and ethical pluralism,

> people depend more than ever on public communication to establish a common understanding of the ways of life, range of experiences, attitudes, and thinking which are common and acceptable in their society. They also depend on finding themselves reflected in the public media for a sense of their own legitimacy, for a feeling that their problems and experiences are not freak deviations.[67]

Raz suggests that by permitting the validation of a multiplicity of differing identities, freedom of expression provides a "great service to people's well being."[68] This service would seem to be promoted ably by unfettered p2p file-sharing, as music undoubtedly conveys a multiplicity of visions of life limited in scope only by the bounds of human imagination and creativity.

As a means to the attainment of truth, the transmission and receipt of online music (including the latest Britney Spears hit single) might be suspected of being, at least in most cases, devoid of any traditional *truth-seeking* value. However, it has been persuasively argued that ordinary popular music, along with many other counter-intuitive elements of pop culture, has significant effects on broader cultural and political life and therefore contributes notably to the "marketplace of ideas"[69] and the search for truth.[70] As such, musical expression in general, and thus p2p-file sharing, contributes to the search for truth that underlies the promotion of free expression. One counter argument to this assertion is that individuals engaged in p2p file-sharing do not promote the search for truth as they do not add their own contributions to the marketplace of ideas. Rather, they merely appear to traffic in the ideas of others with no readily apparent added input. However, I would suggest that this is incorrect for three reasons. First, individuals that share music files on p2p networks are given the opportunity to modify the

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[66] Joseph Raz, *Free Speech and Personal Identification* 11 OXFORD J. LEGAL STUD. 303, 312 (1991).
[67] *Id.*
[68] *Id.*
[69] In *Abrams v. United States*, 250 U.S. 616, 630 (1919), Justice Holmes penned the 'marketplace of ideas' model, through which freedom of expression is valued for its capacity to promote the search for truth. This search is promoted as ideas 'compete' against one another for acceptance – with the underlying faith that truth will prevail in such an open encounter.
[70] David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression* 143 U. PA. L. REV. 111, 125-26 (1994) ("It would be difficult to say that a Madonna concert makes a strictly rational 'argument,' yet Madonna's 'communications' have had at least as great an effect on our culture and political life as most books of analytic philosophy or political science.")

description and commentary attached to particular files. This gives future potential downloaders the user's opinion of the nature and quality of a given file – and so creates a real opportunity for added content and expression on the part of the apparently passive file-sharer. Second, even where no such comment is attached, the mere keeping of a particular music file in one's shared directory is not an action devoid of expressive content. By offering the file for public consumption, the uploader implicitly proclaims that the file is at least worthy of consideration. This form of information vetting, along with the addition of explicit commentary, contributes to the marketplace of ideas in a more traditional sense. Finally, the dissemination itself promotes the search for truth, as only through wide dissemination can the marketplace of ideas operate with optimum efficiency. Individuals exposed to more music are better equipped to offer their own ideas (musical or otherwise) into the marketplace. For these reasons, the Emersonian search for truth can be said to be promoted by p2p music file-sharing.

Finally, the capacity of p2p file-sharing to promote participation in democratic decision-making might be questioned on the basis that music is too remote from those activities that comprise the traditional democratic process. These activities might be thought to include voting, media discussions on government policy, campaign advertising, and so on. However, even Alexander Meiklejohn, one of the most ardent supporters of free expression as an instrument of democracy, would not adopt such a narrow definition of democratic decision-making. [71] According to Meiklejohn:

> The First Amendment does not protect a "freedom to speak." It protects those activities of thought and communication by which we "govern." It is concerned not with a private right, but with a public power, a governmental responsibility. [72]

However, even Meiklejohn explicitly argued that the responsibility of democratic governance is made possible by free expression, which must therefore permit citizens to acquire the "intelligence, integrity, sensitivity and generous devotion to the general welfare that, at least in theory, casting a ballot is assumed to express."[73] As part of this instrumental purpose, Meiklejohn continued, freedom of expression must specifically guarantee expression through "literature and the arts" as these media "lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."[74] Thus, one must not dismiss the political and democratic value of p2p file-sharing merely on the basis of its apparent remoteness from traditional democratic processes.

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[71] Helen Fenwick, *The Right to Protest, the HRA and the Margin of Appreciation*, 62(4) MOD.L.R. 491, 492 (1999).

[72] Alexander Meiklejohn, *The First Amendment is an Absolute*, SUP CT. REV. 245, 255 (1961).

[73] *Id.*

[74] *Id.* at 257.

Though music in general can be understood as contributing to the "sensitivity" necessary for self-government, it cannot be denied that a proportion of musical expression is overtly political in nature. In the case of music transmitted through p2p file-sharing, many songs have clear political significance and cannot be regarded as pure entertainment fare. One recent example is Eminem's *Mosh*, a visceral indictment of President George W. Bush's policies, the music video for which was described as "one of the most overtly political pop music videos ever produced, and is easily the most direct anti-Bush cultural statement since Michael Moore's Fahrenheit 9/11."[75] This understanding of music was also at play when the U.S. Supreme Court declared:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.[76]

Thus, given that: (a) appreciation of music, as with all the arts, can be thought of as a precondition for democratic self-governance; and (b) music shared through p2p networks can involve explicitly political messages, it can be concluded that such activity can be understood as promoting participation in democracy, and thus reinforces yet another Emersonian ideal.

To summarise, I have suggested that p2p music file-sharing is an activity that promotes a number of values underlying the protection of free expression itself. These include the shaping of individual identity (as endorsed by Raz), and the search for truth and participation in democracy (as endorsed by Emerson and Meiklejohn). As a result of this congruence, I would argue that p2p-music file-sharing is a form of communication whose restriction should be deemed to be necessary in a democratic society only after being subjected to strict scrutiny. I move on to this assessment below.

As noted, for a restriction to be considered necessary in a democratic society under the terms of Article 10(2): (i) the legislative objective must be sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective must be rationally connected to it; and (iii) the means used to impair the right must be no more than necessary to accomplish the objective.

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[75] Sam Graham-Felsen, *Eminem Aims at Bush*, THE NATION, http://www.thenation.com/doc.mhtml?i=20041108&s=grahamfelsen (Oct. 26, 2004).

[76] Ward v. Rock Against Racism, 491 U.S. 781, 790(1989).

b) LEGITIMATE OBJECTIVE

As the CDPA nowhere mentions file-sharing explicitly, the objective pursued by its restriction has to be inferred from the general objectives of copyright protection. There is no consensus as to any one over-arching objective of copyright law, though stated rationales generally fall somewhere on a spectrum between pure instrumentalism at one extreme and pure natural law at the other.[77] The instrumentalist paradigm conceptualises copyright as a tool geared towards the maximal creation of socially valuable works of authorship.[78] This view seems to have been influential during the formative stages of copyright law, as the first known copyright statute, the Statute of Anne (1709),[79] was dubbed in part "an Act for the encouragement of learning." Similarly, the U.S. Constitution empowers Congress to pass copyright laws "to promote the progress of science and useful arts."[80] Underlying this view is the notion that progress and innovation can only occur where existing works of authorship are disseminated to the public (including future creators whose exposure to existing works enables and enhances subsequent creativity).[81] The second extreme view, with roots in the work of John Locke,[82] characterises copyright protection as being necessary to secure just rewards for creators. Hurt and Schuchman[83] categorise "just reward" justifications into three sub-types:

> (1) the [Lockean] natural property right of a person to the fruits of his creation, (2) the moral right to have his creation protected as an extension of his personality, and (3) his right to a reward for his contribution to society.[84]

Without attempting to conclusively resolve this question, I assume for the purposes of discussion that the objectives of the CDPA may include *both* the promotion of creativity and development in works of authorship for the benefit of society at large as well as the securing of a just reward for the creators of such works. These are aims whose legitimacy ought to be apparent without the need for citing voluminous authority on point.

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[77] Michael Rushton, *When in Rome ...Amending Canada's Copyright Act*, 23(3) CAN. PUB. POLICY 317, 318 (1997).
[78] *See* WORLD INTELLECTUAL PROPERTY ORGANISATION, *Preface to* GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY & ARTISTIC WORKS (1978) (stating this rationale).
[79] Statute of Anne, 1709, 8 Ann., c. 19.
[80] U.S. CONST. art. I, § 8, cl. 8.
[81] *See, e.g.*, NORTHROP FRYE, THE ANATOMY OF CRITICISM – FOUR ESSAYS (1957) ("Poetry can only be made out of other poems, novels out of other novels...").
[82] JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT: AND A LETTER CONCERNING TOLERATION (John Wiedhofft ed., Oxford: Blackwell 1948) (1690).
[83] Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON,REV. 421 (1966).
[84] *Id.* at 421- 422.

c) RATIONAL CONNECTION

The rational connection prong is concerned not with the subjective rationality of legislation, but with whether, *given its actual effects*, a rational connection exists between the legislation and its underlying aims.[85] In other words, this stage of the analysis involves an objective assessment of whether the impugned legislation actually promotes (or perhaps even impedes) its legitimate aims. In the present context, this involves determining, given the practical realities of the music recording business, whether the restriction on free expression wrought by the CDPA through its treatment of p2p file-sharing actually serves to advance copyright's two primary aims. If it can be shown that these aims are not promoted (or, worse, are actually obstructed) through the operation of the CDPA, the legislation will not pass rational connection scrutiny.

The rational connection prong in this context must therefore entail a consideration of two empirical questions. First, does p2p file-sharing negatively affect traditional music sales? If it does not then the CDPA's restriction would not seem to promote the development and dissemination of music or the securing of a just reward for creators. In such a case the CDPA's treatment of p2p file-sharing would not pass rational connection scrutiny. Second, if p2p file-sharing does negatively affect record sales, does this actually impact upon the remuneration received by creators or lead to lesser creation/dissemination of music? If the remuneration received by musical creators and the creation of music are not diminished by p2p file-sharing, or if investment in music does not decrease, then the CDPA will fail the rational connection prong (to the extent of its proscription of file-sharing).

(1) DOES P2P FILE-SHARING HURT MUSIC SALES?

The assertion that p2p file-sharing results in an economic loss to the recording industry, and to musicians generally, is based on the (extremely intuitive) assumption that individuals downloading music are doing so *instead* of purchasing such music. This assumption is not necessarily correct as file-sharers might either: (a) substitute downloads for legal purchases, thus reducing sales; (b) learn about music that they would not otherwise have been exposed to, thereby *promoting* new sales; (c) sample music, which will increase or decrease sales depending on whether they like what they hear; and/or (d) lower the overall price of music, which would draw in low valuation individuals who would otherwise not have purchased albums

[85] *See* R. v. Keegstra, [1990] 3 S.C.R. 697, 851 (Can.) (elaborating thoroughly on the rational connection analysis).

(thereby increasing total music consumption).[86] Thus, empirical data is required to determine whether the presumed behaviour of file-sharers is accurate or not.

The empirical data on the nature and effects of file-sharing behaviour has been mixed. Several econometric studies, including that of Oberholzer and Strumpf, conclude that over the past several years p2p file-sharing has had "an effect on sales which is statistically indistinguishable from zero."[87] A similar study from Japan recently found "very little evidence" that file-sharing has reduced record sales in that country.[88] This would seem to indicate that the worldwide decline in recording sales profits between 1999 and 2003 was likely caused by other factors, such as economic recession, new competition from DVD and video game sales, reduction in the quality of available music, etc. Another econometric study found that though p2p file-sharing has indeed had a negative impact on sales, it has been nowhere nearly enough to explain the worldwide dampening of the industry.[89] Other studies, most notably by Liebowitz,[90] have criticised Oberholzer and Strumpf's methodology and concluded (although not after some initial equivocation)[91] that p2p file-sharing has and will likely continue to significantly diminish record sales.[92] The results of survey-based studies, which ask (a) whether (and how much) individuals engage in file-sharing and (b) how many CDs they purchase, has produced similarly variable results and interpretations.[93]

Despite the equivocal nature of the econometric and survey-based studies on the issue, the most recently available data on music sales and file-sharing seem to suggest that such sales may indeed be immune from (or even

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86 Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales An Empirical Analysis*, Mar. 3, 2004, http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

87 *Id.* at 4. *See also*, Eric S. Boorstin, *Music Sales in the Age of File Sharing* (2004) (unpublished A.B. thesis, Princeton University), *available at* http://www.cs.princeton.edu/~felten/boorstin-thesis.pdf.

88 Tastuo Tanaka, *Does file-sharing reduce CD sales?: A case of Japan*, presented at Conference on IT Innovation, Tokyo, Dec. 13, 2004, http://www.iir.hit-u.ac.jp/file/WP05-08tanaka.pdf.

89 Martin Peitz & Patrick Waelbroek, *The Effect of Internet Piracy on CD Sales: Cross-Section Evidence*, CESifo Working Paper No. 1122, 2004, *available at* http://www.merit.unimaas.nl/epip/papers/waelbroeck_paper.pdf.

90 Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-sharing*, 52 CESIFO ECONOMIC STUDIES 439 (2005), *available at* http://www.utdallas.edu/~liebowit/intprop/pitfalls.pdf.

91 STAN LIEBOWITZ, POLICING PIRATES IN THE NETWORKED AGE, (Cato Institute, Policy Analysis No. 438, 2002), *available at* http://www.cato.org/pubs/pas/pa438.pdf.

92 Seung-Hyun Hong, *The Effect of Digital Technology on the Sales of Copyrighted Goods: Evidence from Napster*,Stanford University Economics Ph.D. Candidate's Job Market Paper, 2004, http://www.stanford.edu/~sphong/ddm.pdf.

93 *See* British Phonographic Industry, *Research Shows Impact of Illegal File-sharing* (Mar. 25, 2004), *at* http://www.bpi.co.uk/news/stats/news_content_file_768.shtml; Nielsen//Netratings, *Rap, Dance/Club and Alternative Rock Most Popular with Online Music Downloaders, According to Nielsen//Netratings More Than One in Five Surfers Download Music* (May, 8 2003), *at* http://www.nielsen-netratings.com/\.

bolstered by) p2p downloading. For example, sales in 2004 (in many cases buoyed by new authorised downloading and online retail services) increased by 2.7 percent in the U.S.,[94] 3 percent in the U.K.,[95] 5.2 percent in Ireland,[96] and 18.6 percent in Belgium.[97] This increase in sales has occurred alongside a dramatic increase in the number of people downloading music through p2p file-sharing networks.[98] This strongly suggests that file-sharing may not be the harbinger of doom that recording industry associations claim it to be.[99]

One might object at this stage by noting that all of the above has taken place in a climate where file-sharing is proscribed by statute and widely understood by the public to be illegal. Thus, whatever the results under such a situation, one might argue that the truly pernicious effects of file-sharing would be catastrophically revealed were file-sharing to be officially legitimised. In my view this objection is unfounded as: (a) the very low chance of detection in all jurisdictions and the ballooning rate of p2p network traffic (despite highly publicised law suits) indicates that the illegality of the copying has likely had little effect on consumer behaviour; and (b) even where file-sharing is perceived by the public to be legal, as is currently the case in Canada, music sales have not been depressed. Canadian music sales actually *increased* by 12.4% (compared with the previous year)[100] in the six months following a widely publicised Federal Court decision denying the demand of the Canadian Recording Industry Association that several Internet Service Providers disclose the identities of 29 alleged file-sharers.[101] The decision, and the subsequent rise in music sales, is significant given that the trial judge found no evidence that the activities of the file-sharers violated the Canadian Copyright Act.[102]

In addition to the available statistical data, there is mounting anecdotal evidence to the effect that in many cases, file-sharing appears to have actually *augmented* music sales. For example, the band Wilco, after being dropped from Reprise Records in 2001 over creative differences, decided to release their next album online for free. The very same album's subsequent traditional release (under another record label) debuted higher on the sales charts than any of their prior albums. The band believes that this

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[94] Richard Menta, *Record Sales Up: Credit File Sharing*, MP3 NEWSWIRE, *at* http://www.mp3newswire.net/stories/5002/salesup.html.
[95] BBC News UK Edition, *UK Music Sees Record Album Sales, last updated* Nov. 26, 2004 *at* http://news.bbc.co.uk/1/hi/entertainment/music/4044303.stm.
[96] *Irish music sales up by 5.2pc for 2004* BUS. WORLD, Mar. 28, 2005. This article is no longer online, but the same information is available in the following IFPI Report, entitled "The Recording Industry World Sales 2005," http://www.nvpi.nl/assets/nvpi/IFPI%20WorldSales2005.pdf at p. 7.
[97] *Id.*
[98] Menta, *supra* note 94.
[99] *Id.*
[100] Michael Geist, *Big Music p2p Stats Don't Tally,* P2PNET NEWS, *at* http://p2pnet.net/story/3140.
[101] BMG Canada Inc. v. John Doe, [2004] F.C. 241 (Can.).
[102] Copyright Act, R.S.C., ch. C-42, (1985) (Can.).

came as a result of the free exposure gained by their online experiment.[103] Similarly, in 2000, a copy of the forthcoming internationally-renowned band Radiohead's experimental album *Kid A* appeared on the Napster network three months before its announced release date. *Kid A* rapidly became the top-downloaded album on the Napster service. However, upon actually being released, and despite the fact that tens of thousands of free copies had already been downloaded (and that *Kid A* was widely regarded as too "non-traditional" to be commercially viable) the album reached the top of the U.S. sales charts in its debut week.[104] Other similar examples in which file-sharing appears to have been directly responsible for increasing music sales continue to emerge.[105]

Though no conclusive answer to this controversial empirical question has yet emerged, there are serious doubts as to the supposed link between p2p file-sharing and (formerly) declining music sales and profits. Such doubts raise the concern that p2p music file-sharing, a practice that promotes several important free speech values, is being restricted by the CDPA in the absence of any real benefit (and with a possible detriment) to copyright holders.

(2) If sales are diminished, is remuneration, creation or dissemination affected?

Even if one assumes that music sales have been and will continue to be reduced by the practice of p2p file-sharing, it remains to be seen whether such a reduction will: (a) reduce the remuneration received by artists; or (b) result in the production and dissemination of less music overall (by, presumably, discouraging investment in music).

Though it is logical to assume that a decrease in sales caused by file-sharing would result in poorer remuneration for artists, the realities of the music business – and the recording industry in particular – call this intuitive conclusion into question. For the vast majority of musicians, the remuneration accrued from the sale of recorded music is nothing short of abysmal. According to the major record companies, released albums only become profitable after sales of 500,000 copies, a level of success reached by less than two percent of albums.[106] In addition, an artist must typically sell *one million* copies of a CD before she receives any royalties, as record companies routinely subtract the costs of production, marketing, promotion,

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103 Xeni Jardin, *Music is not a Loaf of Bread,* WIRED NEWS,Nov. 15, 2004, http://www.wired.com/news/culture/0,1284,65688,00.html?tw=wn_story_related.

104 Richard Menta, *Did Napster Take Radiohead's New Album to Number 1?* MP3 NEWSWIRE, Oct. 28, 2000, http://www.mp3newswire.net/stories/2000/radiohead.html.

105 *See, e.g.*, Janis Ian, *The Internet Debacle – An Alternative View* 9 PERFORMING SONGWRITER (May 2002), *available at* http://www.janisian.com/article-internet_debacle.html.

106 Jennifer Ordonez, *Pop Singer Fails to Strike A Chord Despite the Millions Spent By MCA*, WALL ST. J., Feb. 26, 2002.

and other expenses from the musician's royalty entitlement.[107] Popular recording artist Courtney Love has compellingly described this process, explaining how an apparently lucrative recording contract with a $1 million advance and an exorbitant twenty percent royalty rate in which one million albums are actually sold will result in no ultimate profit accruing to the artists (though a $6.6 million profit will go to the record company).[108] As a result of this prevailing business reality, only a negligible percentage of artists will ever gain sufficient remuneration from record sales alone to subsist without the need for other sources of income.[109] As an illustration, in 1999 only 0.013 percent of all released albums (or 52 out of over 30,000) accounted for the lion's share of all sales, while the vast majority of released albums sold less than 1,000 copies, making such albums woefully unprofitable.[110] Given this bleak economic landscape, p2p file-sharing is unlikely to impact negatively on the finances of most artists, as most of them are, at least to the extent of their reliance on record sales, essentially destitute.

Credible arguments have also been advanced to the effect that many artists will greatly benefit from the unprecedented marketing opportunities generated by p2p technology. These arguments recognise that for most musicians, live performances in particular[111] but also endorsements, advertising, public appearances and secondary licensing of merchandise and "tie-in goods" (such as posters, t-shirts, etc.) remain the primary sources of income to be gleaned from their music.[112] When viewed in this light, file-sharing becomes a free promotional tool that brings artists' music in direct contact with potential consumers and thereby increases overall income from these sources.[113] Many veteran musicians and music industry analysts have

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[107] Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY, Sept., 2000, at 50.

[108] Courtney Love, *Courtney does the Math,* SALON Jun. 14, 2000, http://dir.salon.com/tech/feature/2000/06/14/love/index.html; David Segal, *Aspiring Rock Stars Find Major Label Deals – and Debts*, WASH. POST, May 13, 1995 at A1.

[109] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (2000); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 307 (2002).

[110] John Seabrook, *The Money Note: Can The Record Business Survive?*, NEW YORKER, July 7, 2003, at 42-55; *Music on the Internet: Is There an Upside to Downloading?: Hearing before the* Senate Committee on the Judiciary (July 11, 2000) (statement of Roger McGuinn), *available at*http://judiciary.senate.gov/print_testimony.cfm?id=195&wit_id=253 *Id.* (statement of Sen. Hatch)*available at* http://judiciary.senate.gov/member_statement.cfm?id=195&wit_id=51; Ian, *supra* note 105 ("in 37 years as a recording artist, I've created 25+ albums for major labels, and I've *never once* received a royalty check that didn't show I owed *them* money. So I make the bulk of my living from live touring, playing for 80-1500 people a night, doing my own show." (emphasis in original)).

[111] For example, in 2000, live concerts in North America generated over $1 billion in revenue. Ray Waddell, *Tour Business Should Profit from Big Summer Lineup*, 113 BILLBOARD 1 (Mar. 17, 2001).

[112] Ku, *supra* note 109, at 308-310.

[113] *Id.*

thus reached the conclusion that file-sharing ought to be viewed more as a boon than a bane.[114] The vast majority of artists, whose record sales are well below the threshold of profitability, may in fact greatly benefit from the use of p2p file-sharing.

Although the remuneration received from record sales for the vast majority of artists will not likely be reduced by file-sharing, it is certainly possible that some of the very few "superstar" artists will experience a decline in remuneration as a result of lower record sales. Though Oberholzer and Strumpf actually found that the sales of such superstars' albums were actually *enhanced* by p2p file-sharing[115] (which is consistent with the case of Radiohead's *Kid A* album), as such wildly successful artists are the only recording artists with any notable remuneration to lose from traditional record sales, the possibility remains that they will earn less from such sales due to file-sharing. However, even for these artists, sales of records tend to account for a relatively small portion of their fortune. For example, in a recent article on the state of the music business, the *Economist* reported:

> In the past 12 months, according to a manager who oversees the career of one of the world's foremost divas, his star earned roughly $20m from sponsorship, $15m from touring, $15m from films, $3m from merchandise and $9m from CD sales.[116]

In this regard it should be recalled that one of the two primary objectives of copyright law is the securing of a *just* reward for creators. This does not necessarily mean the securing of a *colossal* reward for the top selling 0.013% of artists where such artists do in fact earn vast sums of income from their music through mechanisms unconnected to record sales. Moreover, the securing of a just reward does not necessarily mean the securing of such a colossal reward at the expense of the vast majority of artists that would actually stand to benefit from untrammelled p2p file-sharing. I would argue that if file-sharing does in fact secure a greater overall reward for most artists, while a small percentage of top-selling artists (whose overall wealth will likely remain intact) might earn somewhat less from the sale of their albums, copyright's general goal of securing a just reward for artists would be better served by permitting p2p file-sharing than by its circumscription.

With regard to the second goal of copyright (i.e. the promotion of the creation/dissemination of works of authorship), it has been argued that the tolerance of file-sharing will result in an overall reduction in the music available to the public. This is supposedly as the case because major record companies depend heavily on a small percentage of highly profitable recordings to subsidise the less profitable types of music, to cover the costs of

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[114] The Big Picture, *Artists Perspective on File Sharing* (Dec. 6, 2004), http://bigpicture.typepad.com/comments/2004/12/artists_perspec.html.

[115] Oberholzer and Strumpf, *supra* note 86 at 26.

[116] *Music's brighter future*, ECONOMIST, Oct. 28, 2004, *available at* http://www.economist.com/displaystory.cfm?story_id=3329169.

developing new artists, and to keep their businesses operational.[117] Thus, to the extent that this delicate balance is upset by an erosion in the profitability of the most lucrative acts, the welfare of the entire system is threatened. This, the reasoning continues, might lead to the collapse of the music recording business, which would result in a drastic reduction of music available to the public. In my view, there are (at least) four reasons why this scenario is highly implausible.

First, it cannot be denied that advancements in digital recording technology have drastically reduced the cost of producing professional quality music.[118] Second, the advent of widely available high-speed Internet access has similarly slashed the cost of delivering music to customers (as such cost is borne by the customers themselves), and completely obviated the need for producing, warehousing and distributing thousands of tangible copies of musical works.[119] Third, as the example of the bottled water industry illustrates, the existence of a free, *though lesser-quality* alternative (tap water) need not prevent the flourishing of a particular sales industry. In the case of p2p file-sharing, it is clear that the quality of the sound as well as the reliability of the content (including the probability of "viruses, poorly encoded or falsely named music files, hacking attempts, or even the acknowledged theft of…personal information")[120] is grossly inferior to that associated with authorised downloading services and the purchase of physical CDs. Thus, by adding value in the quality of its product, the recording industry can avoid collapse due to competition from file-sharing networks. Indeed, the recent rise in record company sales (buoyed by the commercial success of authorised downloading services such as Apple's iTunes),[121] demonstrates that a willingness to evolve beyond the traditional recording business model can and will lead to altogether new sources of profit for record labels (despite the continued existence of file-sharing networks).

Finally, as I discuss in the following section, governments in over forty countries have begun to tax and redistribute the sale of blank recording media (such as CDs, MP3 players, etc.). The money collected is distributed to copyright holders as compensation for (presumed) lost income from private copying.[122] As a result, even if sales are being dampened by file-sharing,

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[117] RIAA, "*Old as the Barbary Coast, New as the Internet*," http://www.riaa.com/issues/piracy/default.asp.

[118] Eric A. Taub, *Homemade Music with a Professional Sound*, N.Y. TIMES, Dec. 21, 2000, *available at* http://www.nytimes.com/2000/12/21/technology/21musi.html; Ku, *supra* note 109, at 305-06.

[119] Neil Strauss, *A Chance to Break the Pop Stranglehold*, N.Y. TIMES, May 9, 1999 at sec. 2, p. 1.

[120] Eliot Van Buskirk, *Senator "Fritz" Wants Your Bits*, MP3 INSIDER, Mar. 29, 2002, http://reviews.cnet.com/4520-6450_7-5020992-1.html.

[121] BBC News UK Edition, *Apple Doubles Online Music Sales, last updated* May 15, 2003, http://news.bbc.co.uk/1/hi/business/3029613.stm.

[122] Sam Vaknin, *Germany's Copyright Levy*, KNOWLEDGE FINDER, http://www.knowledge-finder.com/society/law/germany-copyright.html.

recording industry profits can be (and in many jurisdictions already are being) bolstered by levies on blank recording media.

To summarise, canvassing the evidence presently available indicates that there are real reasons to doubt whether the restrictions on p2p file-sharing wrought by the CDPA actually advance the goals of securing a just reward for artists and promoting the creation and dissemination of music. First, there are serious questions as to the accuracy of the assertion that file-sharing reduces traditional music sales. Even to the extent that file-sharing can be tied to such a decline, the nature of the music business is such that the financial position of artists will generally be unaffected (or even enhanced) by p2p file-sharing. With regard to the long-term health of the recording industry in an era of file-sharing, prospects of its imminent demise (which would theoretically lead to a decline in the public availability of new music) appear to be drastically overstated. Thus, the limitation on free expression wrought by the CDPA in the case of p2p file-sharing may not be rationally connected to the Act's objectives. If this is the case, the limitation is not "necessary in democratic society" under the terms of Article 10(2).

d) MINIMAL IMPAIRMENT

Even if it can be shown that the restrictions on p2p file-sharing by the CDPA are rationally connected to the Act's underlying goals, it must be shown that the Act minimally impairs freedom of expression. The question to be asked at this stage is whether the statutory means adopted are wider than is necessary to accomplish the objective.[123] Commenting on this prong of the proportionality analysis, Lord Justice Dyson has held that "the essential purpose of this stage of the inquiry is to see whether the legitimate aim can be achieved by means that do not interfere, or interfere so much, with a person's rights under the Convention."[124]

In my view, even if it were conceded that some remuneration to copyright holders would be lost through a reduction in traditional record sales should p2p file-sharing be permitted under the CDPA, the existence of alternative systems of compensation not involving harsh civil and criminal penalties would seem to indicate that the CDPA does not impair free expression as little as is reasonably possible. As noted above, over 40 countries (including the U.S., Canada and several European nations) have already begun implementing differing levy systems associated with the sale of blank audio recording media and digital devices that are routinely used by individuals for private copying (including rewritable CD's, MiniDiscs, MP3 players and even personal computers).[125] The money collected is then redistributed proportionally to copyright holders based on private copying data. According to one study, by 2006 the money collected from just five European countries with private copying levies (Spain, the Netherlands, Italy,

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[123] R. v. Benjafield, [2003] 1 A.C. 1099, para. 15 (H.L.).
[124] R. (on the application of Samaroo) v. Secretary of State for the Home Department, [2001] All ER (D) 215 (Jul); [2001] EWCA Civ. 1139 (C.A.).
[125] Vaknin, *supra* note 122.

Germany and France) will amount to almost €1.47 *billion*.[126] Astoundingly, this figure actually *exceeds* the highly contestable amount claimed to have been lost in these countries due to unauthorised copying of all kinds in 2002.[127]

If the extent of funds recouped through private copying levies is indeed so pervasive, it seems incongruous that copyright law should continue to threaten those engaged in p2p file-sharing of music with various onerous sanctions. These levy systems have the advantage of attempting to secure remuneration for copyright owners without creating the danger of a free expression chill stemming from the imposition of harsh legal consequences. Though the increased costs associated with private copying as a result of the imposed levies also represent a restriction on p2p file-sharing (and thus freedom of expression), this restriction is almost *de minimis* (assuming that the levy is not exorbitant) when compared with the provisions of the CDPA. Thus, it is clear that sustaining and even increasing compensation for copyright holders (as incentive to investment) can be easily accomplished without the need for the CDPA's sanctions. If this is so, it can hardly be said that the CDPA minimally impairs freedom of expression rights under Article 10(2).

In summary, as a result of the questions regarding the CDPA's rational connection to its objectives, as well as the even more patent doubts as to its minimal impairment of free expression rights, the conclusion that the CDPA's restriction on p2p file-sharing of music is not necessary in a democratic society pursuant to Article 10(2) of the ECHR is remarkably compelling. Thus, should the matter present itself before a U.K. court, such a court may be required by the provisions of the HRA to either (a) exculpate the putative infringing party through the public interest defence or (b) make a declaration of incompatibility to the extent of the CDPA's circumscription of p2p file-sharing.

V. BROADER IMPLICATIONS

What are some of the broader implications of the recognition that the strictures of the ECHR and the HRA might require the exculpation of those that engage in p2p music file-sharing? Some might argue that if this accepted, all private copying of music must therefore be similarly exculpated. This is not necessarily the case. As I have attempted to show, p2p file-sharing is a burgeoning phenomenon that is associated with numerous pan-global online communities. This is not so for all private copying. Thus, we may wish to subject other private copying to a less rigorous proportionality analysis. Similarly, not all private copying might have a neutral or positive effect on music sales, or be technically susceptible to taxation through blank media

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[126] Business Software Alliance, *Economic Impact Study: Private Copying Levies on Digital Equipment and Media in Europe*, (September 2004), http://www.hp.es/r_institucionales/pdf/impacto_economico.pdf.
[127] *Id.*

levies. In such cases, it could be argued that there are no other less impairing ways to achieve copyright's goals without the CDPA's traditional penalties. However, to whatever extent the proscription of particular modes of private copying are proven to be unnecessary in a democratic society under Article 10, courts should not hesitate to make appropriate findings under the HRA. This is because the protection of such copying under Article 10 necessarily implies both copyright's success in rewarding creators and maintaining incentives to invest, as well as freedom of expression's success in promoting the search for truth, self-fulfilment and democratic participation. If it is indeed possible to promote both the goals of copyright and the goals of freedom of expression without either one unduly encroaching upon the other, then this ought to be the preferred legal result.