Fair Dealing, Moral Rights, and More: A Conversation with Hubert Best

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A partner at the law firm Best & Soames in London, Hubert Best is an internationally-recognized expert in intellectual property and media law, particularly the exploitation of audiovisual and music content in new media environments.

What is the history of copyright in the United Kingdom, and are there any major philosophical differences between how it's viewed there as opposed to in the United States?

In terms of the philosophical and historical origins, it's the same. After all, it was English copyright that made its way across the Atlantic, originating from the Statute of Anne in the beginning of the 18th century… Our first integrated copyright statute… was our Act of 1911, which is more or less the same time as your Act of 1909. I think this was partly in response to the general commercial things that were happening, but very largely in response to the coming into being of the Berne Convention [for the Protection of Literary and Artistic Works] at the end of the 19th century. Of course there were some crucial differences. Your law very clearly preserved common law copyright, which of course it still does. But you've now adopted the Berne Convention arrangements.

Life plus 70 years, whether or not the work is formally registered.

Exactly. Whereas before, the whole issue of publication and registration was totally central and crucial; I suppose that's basically historical now. But nowadays, I think the crucial difference between the U.K. and the U.S. arises from your First Amendment. And also the fact that it's really clearly stated in your Constitution, isn't it—the purpose of copyright is the creation of new works. This really seems to suggest, overall, that it's not generally possible to create, on a large scale, many new works unless one is involving, in some way or other, existing copyright works. Do you see what I mean?

Absolutely. That creative and artistic progress depend on the ability to build new works on the shoulders of prior works.

This really shows up in the whole "fair use" thing [in the U.S.], whereas here, this is not a part of the concept. Copyright [in the U.K.] is there to protect the exclusive rights of authors, full stop. Our copyright grew up from printing; the monarch granting monopolies to print books, music, and the like; giving printers a certain short period of exclusive rights in the works they had printed. When you look at judgments in this area, there seems to be almost a fiction: that it's possible for more or less everything that's protected by copyright to be totally original, unless it contains some acknowledged third-party rights. Obviously, that's not right. It does seem to me that your First Amendment and also this particular Section 8 from Article I of your Constitution does—well, I just think it's more realistic, frankly.

And can you explain how authors' rights, or "moral rights," come into it?

We have to deal with the authors' rights countries a lot here, being now part of the European Union. In Germany and France, it's said that the work is inextricably joined to the personality of the author. This idea arose in France, and it's a mainland continental issue.

The more southern countries are stronger on that; the more northern countries, like the Netherlands and the Nordic countries, their laws don't take that to such an extreme, they're more like ours. But then all the former Soviet Union countries (Russia itself, Ukraine, Armenia, Azerbaijan, and all those different countries), they've all got new copyright laws which are very much in line with this moral rights principle. The primary issue is the author's moral right, [which is] often everlasting and can't be alienated from the author. The economic right, which is what we basically regard as copyright, is for them almost a subsection.

In the United States, we don't have authors' rights, per se. We have moral rights, but they only apply to the work of visual artists.

Yes, specifically a painting or a sculpture or something like that. An author of a book or a composer of a musical work has no moral rights in the States. There was a very well known example, when a John Huston film [*The Asphalt Jungle*] was colorized in the States, and he objected to that and got nowhere; they just went ahead and did it. But in France, [his heirs] took [Channel 5] to court [for broadcasting it] and won on his moral right, on the grounds that he said he hadn't intended them to be seen in color, he'd wanted them to be seen only in black and white. So that shows very clearly this whole difference.

...In countries like France, Germany, and others, where moral rights exceed copyright terms, it seems that moral rights outweigh economic rights.

But what they give you a right to do is, to some extent, limited. Different countries have different ones. For example, in France, there's the *droit de repentir*, which is the right to withdraw your work, but it's not commonly exercised; [you would] have to compensate people who've made investments. Mostly, there are two rights: the right to be named as the author [*droit de paternité*] and the right to object to the work being treated in a derogatory way [*droit au respect de l'oeuvre*]. It's still the case in all the continental countries that the real issue with copyright is the economic right, because that's what enables the author to earn the money. But nevertheless, philosophically speaking, they regard that as only a minor extension of the basic moral right.

Are the countries in the Commonwealth of Nations—Canada, the United Kingdom, Australia, etc.—consistent on this?

No, they're not quite. Every Commonwealth country that's a member of the Berne Convention does have to have moral rights, but I would say that they have a different force in the different countries. Canada has been very much influenced by the French, and so Canadian copyright law does have a lot of authors' rights influence in it. A good example of that is a case called Tariff 22. And it was about music, licensing of music rights.

SOCAN, the Society of Composers, Authors and Music Publishers of Canada, wanted to compensate its members by charging Internet service providers royalties for SOCAN music cached on their servers. The courts eventually said they couldn't.

…[SOCAN took] a kind of maximal approach [to protecting artists' rights, even across borders], which is a real reflection of the French view. This question originated with satellite broadcasting. In the Netherlands, for example, their position is that an Internet transmission is only made available in the place where it is actually made available. If somebody receives it somewhere else, well, "I can't help that." They call that the emission theory. The maximal approach [communication theory] is very typical of the authors' rights countries.

[T]he issue of licensing for the Internet is far reaching. Where does the World Intellectual Property Organization stand?

The two WIPO treaties, which were meant to supplement the Berne Convention when it came to Internet and online stuff—the WIPO Copyright Treaty [1996] and the WIPO Performances and Phonograms Treaty [1996]—they dealt with questions like: What happens when something is put on the Internet? Is copying happening? Is distribution happening? But they never produced a conclusion about, Where is it happening? So this huge issue is up in the air, and it has a very big impact on, for example, music licensing.

So we have a global market dealing with national and regional approaches to copyright and moral rights, strongly driven by the American entertainment industry and its perspective.

I find I'm dealing with so many things—music, science, user-generated content websites, and all sorts of things which have been originated in America by people (including lawyers), who are steeped in U.S. copyright law, and they start from that basis: that copyright is an economic right, which can be traded any which way, as opposed to the authors' rights/moral rights approach. These things like the takedown provisions, this whole question of ISP liability and so on—what for us is completely outside copyright law—have made it, very sensibly, into your copyright law. The business models which are an outworking of the U.S. provisions migrate to Europe, where they just don't fit and don't work anymore.

…Are there exceptions to copyright for certain uses, such as satire?

This is taking us on to fair use versus fair dealing. [In the U.S.] you have fair use, and this encompasses its four tests and all that. Here, we don't have anything like that. Fair dealing basically only applies in four situations: making copies for private study; copying for criticism or review; fair dealing for reporting current events; and some very specific aspects of educational use. That's it. And in each of those cases, fair dealing is like a little subsection of the exception, where it's saying that you can use it for this very limited purpose, and in addition, it has to be fair dealing. Each exception to copyright has to be very specifically framed in specific terms….[I]t goes on to say that the authors of the original work have to be acknowledged.

Attribution.

Attribution is a really important part of it. There is a section which says if it's news in audiovisual media, if it's impossible—not just inconvenient or difficult—to give an attribution, then that's okay. But that exception doesn't apply to fair dealing for criticism or review.

U.S. copyright law is somewhat vague when it comes to fair use, but intentionally so, so that courts can decide on a case-by-case basis. Whereas fair dealing, it seems, is so spelled out that artists may know better where they stand, but their hands are tied much tighter.

It's almost impossible to imagine a situation where an artist could use one of the fair dealing exceptions. Of course they could use it for their private study. But to make a public work of art, the only two possibly applicable [exceptions] would be reporting current events or criticism or review. Well, obviously, reporting current events would be of a very limited time period because the event would cease being current, and then the exception would no longer apply. In terms of criticism or review, I suppose you could say that you were making a criticism or review by way of satire. But it would be very clunky because you would still

have to have all those acknowledgments and everything, which would undo a whole lot of the cleverness of what satire usually is.