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Was It Author's Rights All The Time?: Copyright as a Constitutional Right in Ireland

Rónán Kennedy^{*}

1 Introduction

If property rights are “the Cinderella of the fundamental rights provisions of the Irish Constitution,”¹ copyright may be its glass slipper, seeking its proper owner. The underlying rationale for copyright in Irish law is rarely examined, despite statements from the bench that place it on a constitutional footing. This would make Ireland distinctive amongst common law jurisdictions and may impact on the copyright regime in ways that may surprise those accustomed to looking to the UK and US for guidance.

In *Phonographic Performance Ireland Ltd. v Cody*, Keane J (as he then was) said:

Section 60(4) of the [Copyright] Act of 1963 provides that no right in the nature of copyright “shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf”. The right of the creator of a literary, dramatic, musical or artistic work not to have his or her creation stolen or plagiarised is a right of private property within the meaning of Article 40.3.2° and Article 43.1 of the Constitution of Ireland, 1937, as is the similar right of a person who has employed his or her technical skills and/or capital in the sound recording of a musical work. As such, they can hardly be abolished in their entirety, although it was doubtless within the competence of the Oireachtas to regulate their exercise in the interests of the common good. In addition and even in the absence of any statutory machinery, it is the duty of the organs of the State, including the courts, to ensure, as best they may, that these rights are protected from unjust attack and, in the case of injustice done, vindicated. The statements in some English authorities that copyright other than by statutory provision ceased to exist with the abolition of common law copyright are not necessarily applicable in Ireland.²

This article examines the issues that arise from this statement. What was the history of copyright in England? What is the position of copyright in other common law countries? How do other constitutions deal with copyright? Can we find a basis for copyright in Irish constitutional theory and practice? Is it therefore correct to say that intellectual property, and specifically copyright, is a property right in Irish constitutional law? What difference does it make that copyright law has a constitutional basis?

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1 Donal O’Donnell, “Property Rights in the Irish Constitution: Rights for Rich People, or a Pillar of Free Society?” in Oran Doyle and Eoin Carolan eds, *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008), 412.

2 [1998] 4 IR 504 (HC), at 511.

It does not examine the constitutional position of other types of intellectual property, such as patents or trademarks. A full exploration of their place in Irish fundamental rights jurisprudence would lead in other directions and must wait for another day.³

2 Phonographic Performance Ireland Ltd v Cody

The *Cody* case involved some tactical manoeuvring in copyright litigation. The plaintiff was acting as representative for its member record companies, on whose behalf it was attempting to collect revenues from the public performance or broadcasting of copyrighted sound recordings. The defendants were the manager and owners of a nightclub which was allegedly allowing for sound recordings to be heard in public without the payment of proper remuneration to the holders of the copyright in those recordings. As an initial skirmish, the plaintiff sought to dismiss the defendant's defence because of a failure to comply with an order for discovery, to strike out so much of the defence as put in issue the plaintiff's ownership of the copyright, or as an alternative, an order permitting the plaintiff to establish certain matters of fact pertaining to these copyrights by affidavit in lieu of oral testimony.

On the issue of inadequate discovery, Keane J held that "while it may be that the plaintiff at a later stage in the action would be entitled to an order requiring the defendants to make further and better discovery, that situation [had] not yet arisen and, in any event, the application ... [was] for the more drastic remedy of an order striking out the defendants' defence on the ground that they have failed to comply with the order for discovery." On that basis, he was "satisfied that such an order should not be made".⁴

On the second issue, the plaintiff's argument was "that the defendants should not be allowed to maintain the wholly inconsistent posture ... of maintaining on the one hand that the plaintiff was not the owner or exclusive licensee of the copyright in any of the sound recordings played in the defendants' premises and on the other hand of contending that the amount of remuneration sought by the plaintiff was not equitable remuneration"⁵ (and thus implicitly accepting the plaintiff's copyright). Keane J was "satisfied that the defendants are correct that there is nothing to prevent a defendant in a case such as this from relying on a number of alternative defences [which is] a well accepted method of pleading" and he was "accordingly, satisfied that this application should also be refused."⁶

The third, and more important, issue was dealt with at some length, and it was in this context that the remarks on the constitutional position of copyright were made. The defendants were seeking to force the plaintiffs to prove that they held the copyright in the sound recordings at issue by way of oral evidence rather than by affidavit. This would significantly increase the complexity and cost of the action for the plaintiffs. Keane J did not regard this argument as "pleas 'going to the gist of the action'," noting that

the defendants have not indicated that, in relation to any of the various averments of fact which it is proposed to adduce by affidavit, they are either in any serious doubt as to the correctness of the averment or are in possession of material on the

3 See, for example, Burkhardt Goebel, "Trademarks As Fundamental Rights – Europe" (2009) 99 *The Trademark Reporter* 231.

4 [1998] 4 IR 504 (HC), at 510.

5 *Ibid.*

6 *Ibid.*, at 511.

basis of which they would wish to cross-examine any of the proposed deponents.⁷

He also pointed out that

where eleven of the thirteen affidavits are from witnesses outside the jurisdiction who cannot be compelled by the process of this Court to attend the hearing, and there is evidence in the case of all the witnesses that they would find it difficult to attend, it seems to me that the plaintiff has clearly established a degree of difficulty and impracticality in the calling of the witnesses leading to a serious risk of real injustice, if their present application is refused. [He gave an order] to enable this evidence to be adduced on affidavit without the necessity of producing the deponents for cross-examination.⁸

On appeal, the Supreme Court overturned the decision of Keane J, but did not mention the statement quoted above on the constitutional position of copyright. Murphy J, giving judgment on behalf of the Court, said:

[R]emuneration is part of the gist of the action but the gist is twofold: it includes the right or title of the plaintiff to receive such remuneration.

At the end of the day remuneration may be the more hotly contested issue but as the defendants deny the title of the plaintiff that issue must be resolved in favour of the plaintiff before any other issue can arise. ... The defendants are entitled, as the learned trial judge has found, to put the plaintiff on proof of its title and as long as that issue remains it is a significant one. The strength or weakness of the case to be made by either party does not reflect upon the importance or primacy of any issue. The case of *Cronin v. Paul* (1881) 15 I.L.T.R. 121, itself illustrates the proposition that the weakness of an argument, in that case its failure on five previous occasions, did not render an issue any the less “the gist of the action” so as to permit proof by affidavit. As I am satisfied that the ownership of the copyrights or the exclusive licence therein is or forms part of the “gist” of the present action I must conclude that the learned trial judge misapplied the principles established in *Cronin v. Paul* and consequently erred in the exercise of his discretion.⁹

This case, therefore, is about technical issues of practice and procedure and the essential question is the extent to which a defendant can create difficulties for a plaintiff by not conceding contestable facts. It has little to do, on its face, with broader questions of property rights and the scope of intellectual property in the Irish Constitution and it does not seem that the constitutional status of copyright was argued before Keane J, meaning that the excerpt with which this article opened is likely to be only an *obiter dictum*. However, it was left to stand without comment by the Supreme Court, who overturned Keane J on another point.

In addition, it has been cited recently by Charleton J in a judgment dealing with an intervention by the Data Protection Commissioner in litigation between the Irish Recorded

⁷ *Ibid.*, at 516.

⁸ *Ibid.*, at 517.

⁹ *Ibid.*, at 524.

Music Association (IRMA) and Eircom, in which he said that “the rights now enshrined in the Copyright and Related Rights Act, 2000 were, under their previous legislative incarnation, identified ... by Keane J. ... as having a pre-legislative origin and super-legislative effectiveness as part of the unenumerated fundamental rights under the Constitution” and that this authority was “both binding and sound”.¹⁰ It therefore deserves full consideration and further exploration.

3 Copyright in Other Common Law Countries

If copyright is a constitutional right in Irish law, this will make this jurisdiction distinctive amongst common law countries. In order to place this distinction fully in context, let us first review (briefly) the history of copyright in English law.

3.1 Copyright under the English Common Law

The full story of its place in the common law of England is one of intense lobbying and poorly-understood litigation (much like today’s “copyright wars”). Then, as now, the development of copyright is a product of the development of technology.

Notions of property in the written word, and problems of piracy and plagiarism, exist as far back as the Middle Ages.¹¹ As the book trade moved from copying by hand to printing in the 1400s, the up-front cost of capital, skilled labour and raw materials led to pressure for protection of the reproduction rights in particular works, something which was first granted in Venice and then implemented in Milan, France and England. In the latter, the right to control the printing of books (seen as property) was the Royal Prerogative, and Letters Patent were granted on an individual basis to authors and publishers. Originality was not required; patents could be obtained for ancient texts.¹² In addition, Mary I and Elizabeth I gave the Company of Stationers of London (a trade guild of printers) a monopoly over printing providing all books were approved by the Crown’s censors. The “Stationer’s Register” of which publisher had printed specific books (old or new) became, by 1565, a record of a unique right to particular texts, akin to the modern copyright, which were soon treated as tradeable property,¹³ albeit belonging to the publisher rather than of the author.¹⁴ By 1640, these parallel mechanisms had developed into two systems of copy protection.¹⁵

A full history of the development of copyright in Britain is outside the scope of this article, but it is clear that in the 1600s, the conventional understanding of copyright was a system of reward and regulation rather than property,¹⁶ a conception that persisted after the passage of the Statute of Anne in 1709.¹⁷ This legislation, sought urgently by publishers after the demise

10 *EMI Records (Ireland) Ltd. v. Eircom PLC* [2010] IEHC 108, at [28].

11 Harry Hunt Ransom, *The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710* (University of Texas Press, 1956), at 18–19.

12 Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia University Press, 1967), at 4.

13 John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (Mansell, 1994), at 10–18.

14 Kaplan, note 12 **Error! Reference source not found.**, at 5.

15 Feather, note 13 **Error! Reference source not found.**, at 37.

16 Mark Rose, *Authors and Owners: The invention of Copyright* (Harvard University Press, 1995), at 15–17.

17 *Ibid.*, at 50.

of the failing system of censorship, protected existing books for twenty-one years and gave authors a copyright for a term of fourteen years, with an additional fourteen if they were still living at the end of the first term. The vesting of rights in authors rather than publishers was probably a tactical move by the latter in order to pass the legislation and protect their business.¹⁸

In the case of *Tonson v Collins*,¹⁹ which may have been a dispute between two booksellers over copyright or a collusive attempt to get the courts to provide a precedent favourable to the trade, the King's Bench ultimately declined to give judgment because it suspected the latter. Nonetheless, the arguments made in the case highlight the opposing theories of copyright at large at the time: a Lockean natural rights/"sweat of the brow" approach (with perpetual property as a consequence) and a more traditional understanding, based on the Royal Prerogative.²⁰

In *Millar v Taylor*,²¹ Lord Mansfield held that the common law recognised copyright for two reasons: a reward to the author for his labour and a means for him to control his name and his text.²² Two of the other three judges on the Court of King's Bench agreed with him, and the London booksellers obtained—indeed, persuaded the court to create—a perpetual common law copyright.²³

In *Donaldson v Becket*,²⁴ the House of Lords ruled that any common law copyright was extinguished by the Statute of Anne. This ruling was a vote of the lay peers, not of a body of judges only. The peers heard from eleven of twelve common law judges who were summoned to give their opinion on the legal questions involved, but in an advisory capacity only; the decision was that of the peers.²⁵

[I]n the House of Lords a majority of the judges (seven) had acknowledged the existence of a common law copyright and ... a majority of those judges (six) considered this common law right pre-eminent over the Statute of Anne.

The House of Lords, however, was not bound to follow the opinion of the majority of the judges and although in practice it almost always chose to do so, this case proved to be one of the exceptions to the rule. ... However, while five questions had been put to the judges, only one question was put to the peers: should the perpetual injunction previously granted by Lord Chancellor Apsley [preventing the publication of a book that was out of copyright under the Statute of Anne] be overturned? This question approximated most closely to a choice between a perpetual common law right and the time-limited Statute of Anne. The Lords, in finding for the defendant, opted for the latter. And yet, the nature and

18 Kaplan, note 12 **Error! Bookmark not defined.**, at 7–9.

19 1 Black. W. 321 and 1 Black. W. 345

20 Feather, note 13, at 84–86.

21 4 Burr. 2303, 98 Eng. Rep. 201.

22 Rose, note 16 **Error! Reference source not found.**, at 80–82.

23 Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Hart Publishing, 2004), at 178–179.

24 2 Pro. P.C. 129, 1 Eng. Rep. 837, 4 Burr. 2408, 98 Eng. Rep. 257.

25 Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright" (1983) 29 *Wayne Law Review* 1120, at 1160. Lord Mansfield was one of the twelve but seems to have decided not to speak because the appeal was essentially against his ruling in *Millar v Taylor*. Deazley, note 23 **Error! Reference source not found.**, at 197.

substance of this single vote failed to address the issue as to whether the Act had simply created a new right of printing books, or whether it had abrogated a pre-existing common law copyright; the decision to reverse the Lord Chancellor's decree said nothing of this.

However, ... Lord Chancellor Apsley ... explicitly denied the existence of any common law right *ab initio* and it was this position that the majority of the peers embraced.

Moreover, that the House of Lords rejected the existence of the common law right, contrary to the sentiments of the majority of the common law judges, is apparent in the language and success (or lack thereof) of two petitions for legislation that followed in the wake of the decision ...²⁶

Therefore, the original existence (not to mind survival) of a common law copyright in the English common law is questionable.²⁷ However, as legal authors began to present their understanding of the law in a systematic fashion in the years after *Donaldson*, they began to create the conventional narrative of the development of copyright in the laws of England, a story that did not always match the historical facts. *Millar* and *Donaldson* were confused, as was the distinction between what the common law judges gave as advice to the House of Lords and the final decision of the peers (and the meaning of the latter).²⁸

Of course, if Keane J is correct, none of this history is relevant to our enquiry. Copyright under the Irish Constitution may not have the same roots as the English common law. Its position under other constitutions is also probably not a good model.

3.2 Copyright under the American Constitution

Article I, Section 8 of the Constitution of the United States of America provides, in relevant part, that "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". Although this could be interpreted as recognising some pre-existing common law right,²⁹ from the outset, the US Supreme Court has regarded copyright as purely a statutory right and rejected any basis for it in the common law or in natural law.³⁰

3.3 Copyright under Other Common Law Constitutions

In other common law countries, the situation is similar. In Canada, section 91 of the Constitution Act 1867 provides, in relevant part:

... the exclusive Legislative Authority of the Parliament of Canada extends to ...

26 Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing, 2006), at 19–20.

27 L. Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968), at 18–19.

28 Deazley, note 26 **Error! Reference source not found.**, at 28–33.

29 Patterson, note 27 **Error! Reference source not found.**, at 193–94.

30 Tom Braegelmann, "Copyright Law in and under The Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in Germany" (2009) 27 *Cardozo Arts & Entertainment Law Journal* 99, at 105–07.

23. Copyrights.

In Australia, section 51 of the Constitution provides, in relevant part:

The Parliament shall, subject to this Constitution, have power to make laws ... with respect to:—

...

(xviii.) Copyrights, patents of inventions and designs, and trade marks

In both cases, these are not rights but discretionary powers.

The Constitutional Court of South Africa, as part of the certification process for the new Constitution of that country post-apartheid, had to consider whether a right to intellectual property was a “universally accepted fundamental right, freedom and civil liberty”. The Court decided:

although it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies. It is also true that some of the more recent constitutions, particularly in Eastern Europe, do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted.³¹

On the other hand, the Indian courts were willing to recognise intellectual property as an aspect of the fundamental right to property guaranteed under that country’s Constitution until it was removed by amendment.³²

4 Intellectual Property in Constitutions Generally

As the Constitutional Court of South Africa indicates, in order to place Keane J’s remarks in a broader context, it is useful to examine the extent to which intellectual property was recognised in constitutions enacted contemporaneously with the Irish; and then to look at the modern position.

4.1 Intellectual Property in Contemporaneous Constitutions

A search through constitutions enacted in the 1930s in order to discover whether or not they explicitly mention intellectual property (as opposed to simply guaranteeing property rights generally) yields the following:³³

31 Case CCT 23/96, *Certification of the Constitution of the Republic of South Africa*, 1996, 6 September 1996, available at <http://www.polity.org.za/polity/govdocs/constitution/cert.html>, [75]. For commentary, see O.H. Dean, “The Case for the Recognition of Intellectual Property Rights in the Bill of Rights” (1997) 60 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg.* 105, which claims (at 116-117) that 54% of constitutional Bills of Rights protect intellectual property in some way and that 71% of those enacted between 1985 and 1996 do so.

32 Philippe Cullet, “Human Rights and Intellectual Property Protection in the TRIPS Era” (2007) 29 *Human Rights Quarterly* 403, at 411.

33 Except where noted, these constitutional documents are available through the HeinOnline World

Country	Year	Provision
China	1931 ³⁴	Not mentioned
Spain	1931 ³⁵	Not mentioned
Yugoslavia	1931 ³⁶	Not mentioned
Siam	1932	Not mentioned
Portugal	1933 ³⁷	Article 43 (2): Arts and sciences are protected and encouraged in their development, teaching and dissemination ...
Austria	1934 ³⁸	Article 31: The State protects and encourages science and the arts.
Brazil	1934 ³⁹	Article 20: The authors of literary, artistic and scientific works are guaranteed the exclusive right of reproduction. This right will pass to their heirs as prescribed by law.
The Philippines	1935 ⁴⁰	Not mentioned
Poland	1935 ⁴¹	Not mentioned
Ethiopia	1936 ⁴²	Not mentioned
USSR	1936 ⁴³	Not mentioned
Brazil	1937 ⁴⁴	Not mentioned
Estonia	1938 ⁴⁵	Article 23: Science and arts and their profession are free and under the protection of the State. The State supervises their dissemination.
Lithuania	1938 ⁴⁶	Not mentioned
Romania	1938 ⁴⁷	Not mentioned
First Slovak Republic	1939 ⁴⁸	Not mentioned

We see, therefore, that it was rare for copyright to be an explicit constitutional right in the 1930s. While some constitutions are supportive of science and the arts, only the Brazilian Constitution of 1934 explicitly mentions copyright. Of course, this does not mean that the right could not be implicit in, for example, the property guarantee which many of these documents contain (as Keane J says is true of the Irish Constitution). In addition, it is also true that Irish constitutional interpretation prefers to read the text in the context of contemporary society.⁴⁹ As Walsh J said, “no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.”⁵⁰ As society’s understanding of the importance of intellectual, educational and cultural development grows, so might a view that copyright merits constitutional protection.

4.2 Intellectual Property in Modern Constitutions

What, then, is the dominant view today? The table below is an survey of constitutions enacted since the year 2000, highlighting whether or not they explicitly mention intellectual

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- Constitutions Illustrated service. Some additional sources are also provided for the convenience of the reader. Where necessary, translations are the author’s own, with some assistance from Google Translate. The constitutions found in Mirkine-Guetzévitch are translated into French and have thus been translated twice.
- 34 <http://sites.google.com/site/legalmaterialsontibet/home/communist-constitution-1931> (visited 31 January 2011).
- 35 http://es.wikisource.org/wiki/Constitución_de_la_República_Española_de_1931 (visited 31 January 2011).
- 36 Boris Mirkine-Guetzévitch, *Les constitutions de l’Europe nouvelle* (Delagrave, 1938), at 606.
- 37 *Ibid*, at 465.
- 38 *Ibid*, at 137.
- 39 <http://pdba.georgetown.edu/Constitutions/Brazil/brazil34.html> (visited 31 January 2011).
- 40 <http://www.chanrobles.com/1935constitutionofthephilippines.htm> (visited 31 January 2011).
- 41 Mirkine-Guetzévitch, note 36 **Error! Reference source not found.**, at 441.
- 42 <http://www.archive.org/details/TheEthiopianConstitution> (visited 31 January 2011).
- 43 <http://www.departments.bucknell.edu/russian/const/1936toc.html> (visited 31 January 2011).
- 44 <http://pdba.georgetown.edu/Constitutions/Brazil/brazil37.html> (visited 31 January 2011).
- 45 [http://en.wikisource.org/wiki/Constitution_of_the_Estonian_Republic_\(1938\)](http://en.wikisource.org/wiki/Constitution_of_the_Estonian_Republic_(1938)) (visited 31 January 2011).
- 46 Mirkine-Guetzévitch, note 36 **Error! Reference source not found.**, at 429.
- 47 <http://www.constitutia.ro/const1938.htm> (visited 31 January 2011).
- 48 Not available through the World Constitutions service. A German translation is available at <http://www.verfassungen.eu/sk/verf39-i.htm> (visited 31 January 2011).
- 49 Conor O’Mahony, “Societal Change and Constitutional Interpretation” (2010) 1 *Irish Journal of Legal Studies* 71, at 73–76.
- 50 *McGee v. Attorney General* [1974] IR 284 at 319 (SC).

property or copyright, rather than “property” generally, as a right.⁵¹

Country	Year	Provision
Macedonia	2001 ⁵²	Article 47: The freedom of scholarly, artistic and other forms of creative work is guaranteed. Rights deriving from scholarly, artistic or other intellectual creative work are guaranteed.
Bahrain	2002 ⁵³	Not mentioned
Rwanda	2003 ⁵⁴	Not mentioned
Afghanistan	2004 ⁵⁵	Article 47: The state shall devise effective programs for fostering knowledge, culture, literature and arts. The state shall guarantee the copyrights of authors, inventors and discoverers, and, shall encourage and protect scientific research in all fields, publicizing their results for effective use in accordance with the provisions of the law.
Somalia (transitional charter)	2004 ⁵⁶	Article 27: Copyrights pertaining to the arts, science and technology shall be protected and the law shall regulate its contents and the limits of its exercise.
China, Republic of (Taiwan)	2005 ⁵⁷	Not mentioned
Congo, Democratic Republic of	2005 ⁵⁸	Article 46: ... Copyright and intellectual property are guaranteed and protected by law. ...
Serbia	2006 ⁵⁹	Article 73: ... Authors of scientific and artistic works shall be guaranteed moral and material rights in accordance with the law. ...
Montenegro	2007 ⁶⁰	Article 76: The freedom of scientific, cultural and artistic creation shall be guaranteed. The freedom to publish works of science and arts, scientific discoveries and technical inventions shall be guaranteed, and their authors shall be guaranteed the moral and property rights.
Thailand	2007 ⁶¹	Not mentioned
Cameroon	1996, 2008 ⁶²	Article 27: ... Everyone has the right to the protection of the moral and amend material interests resulting from any scientific, literary or artistic production of which he is the author.
Korea, Democratic People's Republic of	2009 ⁶³	Article 74: Citizens shall have freedom to engage in scientific, literary, and artistic activities. The state shall grant benefits to inventors and creators. Copyrights, patents to inventions, and other patent rights shall be protected by law.
Dominican Republic	2010 ⁶⁴	Article 52: The Right to Intellectual Property. The right of exclusive ownership of scientific, literary, artistic, inventions and innovations, trade names, trademarks, logos and other productions of human intellect is recognised and protected for the durations, in the manner and within the limitations established by law.
Kyrgyzstan	2010 ⁶⁵	Article 49.3: Intellectual property is protected by law.

51 Except where noted, these constitutional documents are available through the Oceana Constitutions of the Countries of the World service. Some additional sources, including official translations, are provided for the convenience of the reader. Where no official translation to English was available, translations are the author's own, with some assistance from Google Translate.

52 <http://www.sobranie.mk/en/default.asp?ItemID=9F7452BF44EE814B8DB897C1858B71FF> (visited 31 January 2011).

53 Available through the World Constitutions service and also at [http://en.wikisource.org/wiki/Constitution_of_the_Kingdom_of_Bahrain_\(2002\)](http://en.wikisource.org/wiki/Constitution_of_the_Kingdom_of_Bahrain_(2002)) (visited 31 January 2011).

54 Not available through the Constitutions of the Countries of the World service. An official translation is available at <http://www.mod.gov.rw/?Constitution-of-the-Republic-of> (visited 31 January 2011).

55 http://supremecourt.gov.af/PDFFiles/constitution2004_english.pdf (visited 31 January 2011).

56 Not available through the Constitutions of the Countries of the World service. A translation is available at <http://www.unhcr.org/refworld/country,,,LEGISLATION,SOM,456d621e2,4795c2d22,0.html> (visited 31 January 2011).

57 <http://english.president.gov.tw/Default.aspx?tabid=1107> (visited 31 January 2011).

58 http://fr.wikisource.org/wiki/Constitution_de_la_République_démocratique_du_Congo (visited 31 January 2011).

59 http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav.php?change_lang=en (visited 31 January 2011).

60 <http://www.legislationline.org/documents/section/constitutions/country/57> (visited 31 January 2011).

61 <http://www.senate.go.th/pdf/const.pdf> (visited 31 January 2011).

62 <http://confinder.richmond.edu/admin/docs/Cameroon.pdf> (visited 31 January 2011).

63 Not available through the Constitutions of the Countries of the World service. A translation is available at <http://asiamatters.blogspot.com/2009/10/north-korean-constitution-april-2009.html> (visited 31 January 2011).

64 Not available through the Constitutions of the Countries of the World service. An official translation is available at http://www.suprema.gov.do/PDF_2/constitucion/Constitucion.pdf (visited 31 January 2011).

It would not be wise to draw broad conclusions from this sample: a full survey of the constitutional status of intellectual property is well outside the scope of this short piece. Nonetheless, it is striking that 10 out of 15 constitutions enacted in the last decade, including that of North Korea, give constitutional status to intellectual property and that in all instances that it is mentioned, intellectual property is dealt with separately to property rights generally. This indicates that copyright has gained a significant constitutional status worldwide.

5 Foundations for Copyright as a Constitutional Right

If Keane J is correct and the enactment of the Constitution in 1937 brought to life a new right to copyright, distinct from the common law or statutory rights in English law, what are its roots? Without a number of argued cases on the issue, any attempt to answer to this question can only be speculation, but is interesting nonetheless.

It is tempting, at the outset, to refer to the oft-cited (but perhaps apocryphal) case of Saint Colmcille and King Cormac's maxim "To each cow its calf and to each book its copy".⁶⁸ However, it is difficult to draw any useful conclusions from this rule, which is based more on ownership of a physical item (the manuscript) rather than of an abstract right of duplication in the text which it embodies, something which the common law has long distinguished between.⁶⁹

5.1 Is "Intellectual Property" Property?

A initial question is whether "intellectual property" is, in fact, property at all. Copyright's claim to be a property right is tenuous: is it a metaphor, a recognition of the "propertization" of the creations of authors, or a recognition of a natural right?⁷⁰ Some claim that it would be more useful to regard copyright (and other forms of so-called "intellectual property") as privilege rather than right, a shift in focus which would help to "re-balance" copyright more in the public interest.⁷¹ However, while the 1963 Act (and the Industrial and Commercial Property (Protection) Act 1927, which was in force in 1937) was not specific on the topic, section 17(1) of the Copyright and Related Rights Act ("CRRA") 2000 is quite clear:

Copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description.

65 Not available through the Constitutions of the Countries of the World service. A translation is available at <http://www.mediafire.com/?20nm4kygtejygl> (visited 31 January 2011).

66 Not available through the Constitutions of the Countries of the World service. A translation is available at http://www.worldstatesmen.org/nethantilles_const1954.pdf (visited 31 January 2011).

67 Not available through the Constitutions of the Countries of the World service. A translation is available at <http://www.smn-news.com/st-maarten-st-martin-news/4876-the-official-english-translation-of-the-constitution-of-st-maarten.html> (visited 31 January 2011).

68 Jeremy Phillips, "St. Columba the Copyright Infringer" (1985) 12 *European Intellectual Property Review* 350.

69 Deazley, note 26 **Error! Reference source not found.**, at 88–89.

70 Mary W.S. Wong, "Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights" (2009) 26 *Cardozo Arts and Entertainment Law Journal* 775, at 782–83.

71 Tom W. Bell, "Copyright as Intellectual Property Privilege" (2007) 58 *Syracuse Law Review* 523.

5.2 Property rights in the Irish Constitution

Property rights in the Irish Constitution derive from two sources. The first is Article 40, which provides (in relevant part):

3. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The second is Article 43, which is as follows:

1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

After numerous attempts to clarify the distinction between the two, the courts have abandoned their quest to distinguish clearly between the rights protected by Article 40.3.2° and Article 43, relying initially on a doctrine of proportionality which made little use of natural law perspectives⁷² and, more recently, on a rule of rational means.⁷³ The modern perspective seems to be that “social justice” and “the exigencies of the common good” from Article 43 are to be used as means of determining whether a particular measure is an “unjust attack” to be protected against under Article 40.3.⁷⁴ Although there is much discussion of the natural rights dimensions of the Constitution, the practical application of the property rights provisions, through the doctrine of proportionality, has focused on protecting the rights of the individual without much consideration of the broader social context.⁷⁵

What entitlements are “property rights” for the purposes of these provisions? Real and personal property are included. It also encompasses intangible rights, such as the rights relating to inheritance mentioned in Article 43.1.2°, and can also be used to protect entitlements created by legislation and contract. However, interests created through the

72 Gerard Hogan, “The Constitution, Property Rights and Proportionality” (1997) 32 *Irish Jurist* 373, at 378–96.

73 Rachael Walsh, “The Constitution, Property Rights and Proportionality: A Reappraisal” (2009) 31 *DULJ* 1.

74 Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (LexisNexis, 2003), at 1970.

75 Hogan, note 72 **Error! Reference source not found.**, at 396.

regulation of the market by the State, such as food production quotas,⁷⁶ are not protected.⁷⁷

5.3 Underlying Theory of Property

We must therefore look to the theoretical basis for property rights in the Irish Constitution to see whether copyright is a fundamental right or simply a product of market regulation.

The natural law is seen by some as a fundamental and immutable underpinning for the Irish Constitution, with natural rights as a pre-existing absolute independent of the text,⁷⁸ a view which is criticized by others as unhelpful (as there are both secular and theocratic groundings for natural rights) and anti-democratic.⁷⁹ While Kenny J's famous judgment in *Ryan v Attorney General*,⁸⁰ which first recognised unenumerated rights in Irish constitutional law, mentioned a papal encyclical, the Supreme Court made no such reference when upholding his judgment, and in *McGee v Attorney General*, Walsh J relied on a subjective judicial interpretation of "prudence, justice, and charity".⁸¹ This has left us with different versions of the natural law, religious and secular, to choose from.⁸²

It has been argued that the natural law is not a good basis for constitutional rights, as it allows the judiciary to appeal to some unwritten text as a basis for overruling a written one, such as a constitutional amendment, as Kennedy CJ sought so strongly and futilely to do in his noted dissent in *The State (Ryan) v Lennon*.⁸³ However, the Supreme Court chose not to do this in *In re the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995*.⁸⁴ This led some to claim that it had turned its back on natural law,⁸⁵ which has now run its course and should be replaced with the more positivist approach of reliance on the European Convention on Human Rights and Fundamental Freedoms.⁸⁶

In addition, while there are many theories of what constitutes the "natural law",

[t]he natural law tradition which appears to be most relevant to Irish jurisprudence is itself a hybrid scholastic theory, partly derived from Aquinas and partly derived from later scholastics through the intermediary of early twentieth-century Roman Catholic theology.⁸⁷

76 *Maher v Minister for Agriculture, Food and Rural Development* [2001] 2 IR 139; [2001] 2 ILRM 481 (SC).

77 Hogan and Whyte, note 74 **Error! Reference source not found.**, at 1971–1974.

78 Roderick O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *Irish Law Times (new series)* 8.

79 Tim Murphy, "Democracy, Natural Law and the Irish Constitution" (1993) 11 *Irish Law Times (new series)* 81.

80 [1965] IR 294 (SC).

81 V. Bradley Lewis, "Natural Law in Irish Constitutional Jurisprudence" (1997) 2 *Catholic Social Science Review* 171, at 174–175.

82 Siobhán Mullally, "Searching for Foundations for Irish Constitutional Law" (1998) 33 *Irish Jurist (new series)* 333, at 340.

83 [1935] 1 IR 170. See Desmond M Clarke, "The Constitution and Natural Law: A Reply to Mr Justice O'Hanlon" (1993) 11 *Irish Law Times (new series)* 177.

84 [1995] 2 ILRM 81 (SC). See G.F. Whyte, "Natural Law and the Constitution" (1996) 14 *Irish Law Times (new series)* 8.

85 Adrian F. Twomey, "The Death of Natural Law" (1995) 13 *Irish Law Times (new series)* 270; Gerard Quinn, "The Rise and Fall of Natural Law in Irish Constitutional Adjudication" 1 *American Philosophical Association Newsletter* (2000) 89.

86 Donal Coffey, "Article 28.3.3, The Natural Law and The Judiciary—Three Easy Pieces" (2004) 20 *Irish Law Times (new series)* 319.

87 Desmond M. Clarke, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 *Irish Jurist (new series)* 187, at 191.

However, despite the prevalence of a particular theory amongst the Irish judiciary, natural law can be used by different judges to support inconsistent conclusions in the same case.⁸⁸ It is therefore difficult to find an objective basis on which to discern what are the fundamental rights protected by Article 40.3.1°: the rights necessary for the State to be ‘democratic’ are limited; the application of ‘Christian’ principles by the courts is uneven; and a ‘human personality’ approach is simply a variant of natural approaches,⁸⁹ although it is possible to look to international human rights norms and Irish social values for guidance.⁹⁰

If there is no clear theory of property rights under the Irish Constitution, can we find guidance in general property theory?

5.4 Theories of Intellectual Property

Much of the literature on property rights from a theoretical perspective deals with physical property rather than intellectual property.⁹¹ Nonetheless, there are a number of different theoretical or philosophical arguments for intellectual property rights (“IPRs”):⁹² the right to the fruits of one’s own labours (Locke), whether justified on the basis of the possession of one’s ideas or on some moral desert theory (Mill); as a foundation and consequence of the liberty of the individual (Nozick); as an element of the development of the individual’s unique personality (Hegel), either as an essential freedom in order to manifest that personality or at the very manifestation of the personality; a utilitarian argument that granting property rights will help to maximise some public good (Bentham);⁹³ as an extension of rights in physical objects; as social and institutional planning in order to maintain a strong civic culture; and the protection of the rights of authors.⁹⁴

Although Locke may not, in fact, make a strong argument for IPRs,⁹⁵ he is the theorist most commonly cited in support of IPRs in common law countries. Do this apply to intellectual property rights under the Irish Constitution? It would seem not, as Keane J indicates that the English view of copyright, with its Lockean and utilitarian grounding, does not necessarily apply in Ireland. We must therefore look more closely at the roots of the property articles.

5.5 Catholic Teaching on Intellectual Property

While the conventional understanding is that the Irish Constitution is a document grounded on Catholic social teaching,⁹⁶ the reality is somewhat different: it is, in many ways, a secular and sometimes even radical text.⁹⁷ However, the influence of Catholic principles on the

88 *Ibid.*, at 204–212.

89 Gerard Hogan, “Unenumerated Personal Rights: Ryan’s Case Re-Evaluated” (1990–92) 25–27 *Irish Jurist (new series)* 95, at 104–11.

90 Richard Humphreys, “Interpreting Natural Rights” (1993–95) 28–30 *Irish Jurist (new series)* 221, at 225.

91 Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth, 1996), at xi.

92 Justin Hughes, “The Philosophy of Intellectual Property” (1988) 77 *Georgetown Law Journal* 287.

93 Tom G. Palmer, “Are Patents and Copyrights Morally Justified—the Philosophy of Property Rights and Ideal Objects” (1990) 13 *Harvard Journal of Law & Public Policy* 817.

94 Lior Zemer, “On the Value of Copyright Theory” (2006) 1 *Intellectual Property Quarterly* 55, at 65–70.

95 Seana Shiffrin, “Lockean arguments for private intellectual property,” in Stephen R. Munzer ed, *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001), 138.

96 Dermot Keogh, “Church, State and Society,” in Brian Farrell ed, *De Valera’s Constitution and Ours* (Gill and Macmillan, 1988), 103.

97 Hogan, note 72 **Error! Reference source not found.**

property rights provisions of the Constitution is significant,⁹⁸ and Article 43 is said to be inspired by the encyclical *Quadragesimo Anno* of Pope Pius XI.⁹⁹ This article is seen as belonging to the “confessional” part of the Constitution,¹⁰⁰ rejecting “communist or utopian visions of a propertyless society on the one hand and unbridled *laissez-faire* on the other”.¹⁰¹ We should therefore examine briefly Catholic social teaching on property.

This is based on three basic principles: property rights are never absolute (as they come from God); property exists to serve the needs of all; and property must be put to its proper use. Property is therefore not an essential institution but an effective way to ensure the sharing of earthly goods. This has its roots in Jewish tradition, which was concerned with providing for the poor. The foundational notion of God as the ultimate and only true owner of all things was expanded in early Christian thought into the concept of stewardship, as illustrated by the parable of the talents. All property and endowments, including intellectual ability, should be put to good use. Property is intended for the use and enjoyment of all. Nonetheless, Thomas Aquinas supported the institution of property, although not an absolute one, and not as a matter of natural law.¹⁰²

In the papal encyclical *Rerum Novarum* (1891), written during the early conflicts between the competing ideologies of capitalism and socialism, Pope Leo XIII put forward a Lockean justification for individual property rights as a part of natural law. In *Quadregesimo Anno* (1931), Pius XI focused instead on justice and the social purpose of property rights. The Second Vatican Council’s *Gaudium et Spes* (1965) continued this theme, omitting any natural law arguments and Pope John Paul II repeated this perspective in *Sollicitudo rei socialis* (1987).¹⁰³

This “social mortgage” perspective on property is, of course, primarily focused on physical property, whether real or personal. Intellectual property is different because it is not exhaustible or rival. However, John Paul II highlighted the importance of “the possession of know-how, technology and skill” in *Centesimus Annus*.¹⁰⁴ The Catholic perspective on property is therefore that it is a useful institution, but not a necessary one. Intellectual property has not been considered very much in this framework, but while the Catholic ethos does not require the existence of IP rights, neither does it prevent them. The “confessional” roots of Article 43 do not, therefore, assist us in finding a grounding for copyright as a constitutional right.

5.6 Copyright as a Human Right

If a religious ethos will not help, perhaps we should look to the “secular faith”¹⁰⁵ of the

98 Dermot Keogh and Andrew J. McCarthy, *The Making of the Irish Constitution 1937* (Mercier, 2007) at 117.

99 Hogan and Whyte, note 74 **Error! Reference source not found.**, at 1969, footnote 1.

100 Ronan Keane, “Property in the Constitution and in the Courts,” Brian Farrell ed, *De Valera’s Constitution and Ours* (Gill and Macmillan, 1988), 137 at 139.

101 *Ibid*, at 149.

102 Gabriel J. Michael, “Catholic Thought and Intellectual Property: Learning from the Ethics of Obligation” (2009–2010) 25 *Journal of Law and Religion* 415, 421–429.

103 *Ibid*, at 429–431.

104 Daniel R. Finn, “Creativity as a Problem for Moral Theology: John Locke’s 99 Percent Challenge to the Catholic Doctrine of Property” (2000) 27 *HORIZONS* 44, 53.

105 Elie Weisel, *The Perils of Indifference: Lessons Learned From a Violent Century* www.pbs.org/eliewiesel/resources/millennium.html (visited 28 January 2011).

modern world? Human rights and IPRs have evolved separately for many years,¹⁰⁶ and the connection between copyright and human rights is rarely explored.¹⁰⁷

5.7 Intellectual Property in International Human Rights Law

In international human rights law, the right to property is not universally regarded as a human right.¹⁰⁸ The European Convention on Human Rights did not originally include such a right (it was added by the First Protocol to the Convention),¹⁰⁹ and even such a relatively homogenous group of states as the parties to that agreement found it difficult to agree on the classification and status of the right as an economic or civil right.¹¹⁰ Claims that copyright is a human right are generally regarded as weak.¹¹¹

While Article 17 of the Universal Declaration of Human Rights states “[e]veryone has the right to own property alone as well as in association with others” and Article 27 (2) states “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”, the latter provision proved controversial, with nations such as the US, Ecuador, the UK and Australia arguing that intellectual property rights were not “basic human rights”.¹¹² Similarly, Article 15 of the International Covenant on Economic, Social and Cultural Rights provides, in relevant part, “The States Parties to the present Covenant recognize the right of everyone ... (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” but during drafting, there were objections to this type of language from both sides of the cold war divide.¹¹³

Even these provisions may not mean that IPRs are human rights: the former can be seen as legal mechanisms in order to give effect to the latter, which are “fundamental, inalienable and universal”.¹¹⁴ This view has been put forward by the United Nations Committee on Economic, Social and Cultural Rights,¹¹⁵ and has been accepted in the past in instances where the rights of authors and inventors have been protected by liability rules and the criminal law rather than IPRs.¹¹⁶

5.8 Intellectual Property in European Human Rights Law

However, the growing importance of IPRs as economic rights have led to human rights

106 Laurence Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence?” (2003) 5 *Minnesota Journal of Law, Science & Technology* 47.

107 Paul Torremans, “Copyright as a Human Right,” in Paul Torremans ed, *Copyright and Human Rights: Freedom of Expression, Intellectual Property, Privacy* (Kluwer Law International, 2004) 1, at 1–2.

108 Robert L Ostergard, “Intellectual Property: A Universal Human Right?” (1999) 21 *Human Rights Quarterly* 156.

109 James Kingston, “Rich People Have Rights Too? The Status of Property as a Fundamental Human Right,” in Liz Heffernan and James Kingston ed, *Human Rights: A European Perspective* (Round Hall, 1994) 285.

110 *Ibid.*, at 290.

111 Torremans, note 107 **Error! Reference source not found.**, at 9.

112 Peter K Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 *UC Davis Law Review* 1039, at 1054–1058.

113 *Ibid.*, at 1063–1069.

114 Wong, note 70 **Error! Reference source not found.**, 809.

115 *Ibid.*, 811–812.

116 Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar Publishing, 2008), at 219.

litigation which have seen such rights recognised as human rights under the European Convention on Human Rights. After many years without any such cases, the European Court of Human Rights has recently given three judgments that deal directly with IPRs under the ECHR.¹¹⁷ In *Anheuser-Busch Inc. v. Portugal*,¹¹⁸ a dispute between two brewers over the trademark “Budweiser Bier” in Portugal, the Court held that intellectual property was a form of property protected by Article 1 of Protocol Number 1 to the Convention. In *Dima v. Romania*,¹¹⁹ the Court held that copyrights were protected on this basis, although they declined to impugn domestic legislation that placed symbols of the State outside this form of IPR (leaving a designer owed money by the Romanian Parliament for the design of the state emblem and seal without recourse). In *Melnychuk v. Ukraine*¹²⁰ the Court rejected a claim that the dismissal of a copyright claim as “unsubstantiated” did not, by itself, engage the responsibility of the State for a breach of the Convention.

5.9 IP in European Constitutional Law

Article 17.2 of the European Union’s recently-enacted Charter of Fundamental Rights¹²¹ provides, without elaboration:

Intellectual property shall be protected.

This is the first explicit reference to intellectual property in international human rights agreements.¹²² What it means is unclear. Seemingly driven by the increasing economic importance of IP,¹²³ this may be an indicator that European IP policy is becoming “absolutist”—disconnected from any particular social or economic goals.¹²⁴ However, we must wait to see how jurisprudence on this provision develops.

5.10 Constitutional Copyright as Author’s Rights

Copyright, therefore, is considerably more accepted as a human right than it was in the 1930s. In *Norris v Attorney General*, speaking on the right to privacy, Henchy J had this to say about the role of fundamental rights in the Irish Constitutional system:

... there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society

117 Laurence R. Helfer, “The New Innovation Frontier? Intellectual Property and the European Court of Human Rights” (2008) 49 *Harvard International Law Journal* 1.

118 [2007] ETMR 24; (2007) 45 EHRR.36; 23 BHRC 307. For commentary, see Beiter, “The Right to Property and the Protection of Interests in Intellectual Property: A Human Rights Perspective on the European Court of Human Rights’ Decision in *Anheuser-Busch Inc. v. Portugal*” 2008 (39) *International Review of Intellectual Property and Competition Law* 714.

119 App. No. 58472/00 (2005).

120 App. No. 28743/03 (2005).

121 OJ 2000/C 364/01.

122 Deazley, note 26 **Error! Reference source not found.**, at 136.

123 Christophe Geiger, “Intellectual Property Shall Be Protected!? Article 17 (2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope” (2009) 31 *European Intellectual Property Review* 113.

124 Alexander Peukert, “Intellectual Property as an End in Itself?” (2011) 33 *European Intellectual Property Review* 67.

envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.¹²⁵

In addition, according to the Supreme Court in the *Health (Amendment) (No 2) Bill case*, “[t]he right to the ownership of property has a moral quality which is intimately related to the humanity of each individual.”¹²⁶

This connection between property rights and the integrity of the human personality as she interacts with others in society is very close to the Hegelian notion that property is an essential aspect of the individual’s assertion of her will on the outside world. This gives rise to moral rights, such as disclosure, attribution, integrity and withdrawal (all of which allow a creator to control how a work is presented to the public), which are much more closely associated with civil law systems than common law systems. They have their roots in ancient Roman laws prohibiting plagiarism but have found a modern basis in the philosophies of Kant and Hegel, embodied most prominently in the legal systems of France and Germany.¹²⁷ In recent times, these have been adopted into common law systems.¹²⁸ Continental legal systems use the term “author’s rights” (*droit d’auteur* or *Urheberrecht* in French and German) instead of copyright for this reason. Should Irish law do the same? Should the CRRA 2000 be, in fact, the Author’s Rights Act 2000? As changes in Irish copyright law motivated by our membership of the European Union have provided for moral rights through legislation,¹²⁹ this question is unlikely ever to be litigated and we are left with another interesting but academic question that may never be answered.

6 Implications

If the Irish courts were to take such a human rights approach to copyright, it would have important implications which merit further consideration. There is considerable controversy in copyright law at present, with many criticising the direction in which it is developing: ever-increasing terms, over-extension through digital rights management and large awards of damages against individual infringers.¹³⁰ Those who are concerned about these issues are not likely to welcome the placing of copyright on a constitutional basis, as it may be seen as another means by which copyright can be protected from badly-needed challenges.

However, copyright law also attempts to strike a difficult balance between the economic interests of creators and content owners and the rights of individuals to gain access to knowledge, freedom of expression, and to participate in the cultural life of the community.¹³¹

125 [1984] IR 36 at 71 (SC).

126 [2005] 1 IR 105, at 201–202 (SC).

127 J. Carolina Chavez, “Copyright’s ‘Elephant in the Room’: A Realistic Look at the Role of Moral Rights in Modern American Copyright” (2008) 36 *American Intellectual Property Law Association Quarterly Association* 125, at 131–134.

128 Cyrill P. Rigamonti, “Deconstructing Moral Rights” (2005) 218 *Harvard International Law Journal* 218, at 223–24.

129 Chapter 7 of the Copyright and Related Rights Act 2000.

130 See, for example, James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008) and Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage, 2002).

131 Patricia Akester, “The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture” (2010) 32 *European Intellectual Property*

Recognising copyright as a fundamental right may actually assist by forcing lawmakers to properly balance copyright against other rights with which it may come into conflict, such as the right to free expression or the right to education.¹³²

Human rights could be used as a tool to expand intellectual property protections or as a corrective, through (for example) appeals to the right to freedom of expression.¹³³ A human rights approach to intellectual property would differ from an economic perspective in a number of ways: it would recognise group or community authorship, the intrinsic value of creativity, and the need for a balance between the rights of individuals and those of society as a whole. It would also promote cultural participation and scientific progress while safeguarding citizens (particularly the disadvantaged) from negative effects.¹³⁴

The outgoing Taoiseach has called for a review of Irish copyright law,¹³⁵ although whether this will be carried out by the new government remains to be seen. However, if we are to review our copyright regime, does the constitutional regime present any issues that must be considered? This does not mean that there is a conflict between different rights: copyright regimes can accommodate rights such as freedom of expression and education and privacy through exceptions to strict restrictions and may even, by providing economic incentives, support these rights,¹³⁶ but we should not simply assume that copyright does not need to be examined carefully to take account of other rights.

6.1 Constitutional Copyright and Freedom of Speech

The most obvious right with which copyright comes into conflict is the right to freedom of speech.¹³⁷ Copyright can serve as a great barrier to freedom of speech, particularly when commercial enterprises find that their interests are under threat and they can use copyright as a means to control what is being said about them in the media.¹³⁸ While this conflict is commonly the subject of litigation in the United States, such cases are rarer in Europe, perhaps because of the natural law origins of civil law conceptions of author's rights, a reluctance to apply fundamental rights in conflicts between citizens and the comparative rarity of constitutional courts with the power to overrule national legislation.¹³⁹

What few decided cases there are have tended to favour copyright rather than freedom of

Review 372.

132 Christophe Geiger, "Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union" (2006) 37 *International Review of Intellectual Property and Competition Law* 371, at 386.

133 Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 *UC Davis Law Review* 971, at 1015–1018.

134 Audrey R. Chapman, "Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c) 1" (2001) 25 *Copyright Bulletin* 4, at 13–15.

135 Caroline Madden, "Taoiseach Calls For Review of Copyright Law" *Irish Times*, December 16, 2010.

136 Estelle Derclaye, "Intellectual Property Rights and Human Rights: Coinciding and Cooperating" in Paul Torremans ed, *Intellectual Property and Human Rights* (Kluwer Law International, 2008).

137 Michael D. Birnhack, "Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act" (2003) 14 *Entertainment Law Review* 24.

138 See generally Jonathan Griffiths and Uma Suthersanen eds, *Copyright and Free Speech: Comparative and International Analysis* (Oxford University Press, 2005).

139 P.B. Hugenholtz, "Copyright and freedom of expression in Europe," in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman and Harry First eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, 2002) at 343–345.

expression.¹⁴⁰ The UK Court of Appeal considered the impact of the Human Rights Act 1998 on the fair dealing defences to copyright infringement in *Ashdown v Telegraph Group Ltd*¹⁴¹ and indicated that any expansion to that defence due to freedom of speech considerations would be small,¹⁴² but did open “the possibility for the future creation of human rights-based compulsory licenses.”¹⁴³ In addition, experience in Canada suggests that courts will tend to weigh copyright as a greater priority than freedom of speech, even when the former right does not have constitutional status and the latter does,¹⁴⁴ perhaps because (unlike the US), copyright is well-established whereas free speech jurisprudence only begun to develop in recent years.¹⁴⁵

However, human rights law may require some re-consideration of the extent of copyright.¹⁴⁶ For example, the Constitutional Court of South Africa, in *Laugh It Off Promotions v South African Breweries Ltd*,¹⁴⁷ took into account the right of freedom of expression when considering a claim for trademark infringement (involving t-shirts carrying a logo similar in appearance to the “Carling Black Label” trade dress but with the wording “White Guilt Black Labour”), something which might point the way to a re-balancing of copyright in order to take into account the public interest (which is greater than the public domain).¹⁴⁸ For example, fair dealing exceptions may not go far enough to protect freedom of expression.¹⁴⁹

6.2 Constitutional Copyright and Education

Another constitutional right to mention is the right to education. Teachers and students can often find that their access to materials is limited or constrained by copyright. These issues are rarely considered in litigation, but are nonetheless significant for individuals. There is scope for limiting the constitutional recognition of property rights to take account of social justice,¹⁵⁰ and the CRRA 2000 contains a number of exceptions to copyright for the purposes of education.¹⁵¹ In the context of, for example, educational cutbacks, could expanding these be justified (perhaps with a compulsory licensing scheme), as a means of reducing expenditure by schools and universities? Probably not: recent Supreme Court cases on

140 *Ibid*, at 355–58.

141 [2001] EWCA (Civ) 1142; [2002] Ch 149 (CA).

142 Kevin Garnett, “The Impact of the Human Rights Act 1998 on UK Copyright Law,” in Jonathan Griffiths and Uma Suthersanen eds., *Copyright and Free Speech: Comparative and International Analysis* (Oxford University Press, 2005).

143 Yu, note 112 **Error! Reference source not found.**, 1098.

144 David Fewer, “Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada” (1997) 55 *University of Toronto Faculty of Law Review* 175.

145 Ysolde Gendreau, “Copyright and Freedom of Expression in Canada,” in Paul Torremans ed, *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 219 at 233.

146 Graham Smith, “Copyright and freedom of expression in the online world” (2010) 5 *Journal of Intellectual Property Law & Practice* 88.

147 2006 (1) SA 144 (CC).

148 Enyinna S. Nwauche, “The Judicial Construction of the Public Interest in South African Copyright Law” (2008) 39 *International Review of Intellectual Property and Competition Law* 917.

149 Patrick Masiyakurima, “The Free Speech Benefits of Fair Dealing Defences,” in Paul Torremans ed, *Intellectual Property and Human Rights* (Kluwer Law International, 2008), 235.

150 A J van der Walt, “The Protection of Private Property under the Irish Constitution: A Comparative and Theoretical Perspective,” in Oran Doyle and Eoin Carolan eds, *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008), 398.

151 Sections 53 to 58.

planning restrictions indicate that less than market compensation for the limitation of property is constitutionally suspect,¹⁵² making such an initiative pointless.

6.3 Constitutional Copyright and Privacy

In the context of the Internet, copyright enforcement is likely to raise privacy issues. In the *EMI v UPC* case, Charleton J made this interesting statement:

I find it impossible to recognise as a matter of constitutional law, that the protection of the entitlement to be left in the sphere of private communications could ever extend to conversations, emails, letters, phonecalls or any other communication designed to further a criminal enterprise. Criminals leave the private sphere when they infringe the rights of other, or conspire in that respect. ... In the case of internet file sharing to infringe copyright, I am of the view that there are no privacy or data protection implications to detecting unauthorised downloads of copyright material using peer-to-peer technology...¹⁵³

This seems to be founded on an presumption that all of those who engage in the downloading of copyrighted material from the Internet are engaged in criminal activity. This may not be the case, and the learned judge may not take proper account of the right of privacy in this context.¹⁵⁴ This is an indication, therefore, that we need to be careful to consider and balance the constitutional rights of all involved, particularly in copyright cases, which are likely to involve disputes between two private parties rather than an individual and the State.

6.4 The Scope of Constitutional Copyright

In outlining what he saw as the scope of copyright, Keane J said that a creator had the right not have their work “stolen or plagiarised”. This theme, of the “theft” of intellectual property, is one which is picked up by Charleton J in his judgments on file-sharing.¹⁵⁵ Although the use of “theft” in the context of copyright infringement is a common rhetorical device,¹⁵⁶ and part of the use of the rhetoric of property to underpin a gradual extension of the scope of that right,¹⁵⁷ it is difficult to justify the application of the offence of theft to intellectual property. It could apply to, for example, the taking of a unique physical object such as a painting, but it does not fit well with the unauthorised duplication of an easily reproduced digital representation of a musical or cinematic work which remains available for purchase through other means. It is debatable (although unclear) whether the intention to permanently deprive

152 O'Donnell, note 1 **Error! Reference source not found.**, 424–427.

153 [2010] IEHC 108, at [68].

154 Rónán Kennedy, “No Three Strikes for Ireland (Yet): EU Copyright Law and Individual Liability in Recent Internet Filesharing Litigation” (2011) 14(11) *Journal of Internet Law* 15.

155 For example, [2010] IEHC 108, at [1]:

A settlement has been effected in the litigation between the parties. Its purpose is to diminish the theft of copyright material over the internet. ... Nothing suggests any willing infringement of copyright by Eircom, or that they were in any way a party to copyright theft. ... Remuneration for [creative work] is shrinking by reason of copyright theft over the internet.

156 Patricia Loughlan, “‘You Wouldn’t Steal A Car...’: Intellectual Property and the Language of Theft” (2007) 29 *European Intellectual Property Review* 401.

157 Deazley, note 26 **Error! Reference source not found.**, 150–151.

the owner of their intellectual property right exists.¹⁵⁸ The United States Supreme Court has considered this issue and held that under American law,

[T]he copyright owner ... holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections ... The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially liken infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose—‘stolen, converted or taken by fraud’—to describe the sorts of goods whose interstate shipment is proscribed.¹⁵⁹

Given the brief discussion of the scope of copyright under the Irish Constitution in *Cody*, whether Keane J was using “stolen” here as shorthand for the misappropriation of copyrighted content is a matter for speculation but does leave open the question as to whether Irish law is again distinctive in this matter.

6.5 Duration of Constitutional Copyright

As is well-known, the US Supreme Court in the *Eldred* case¹⁶⁰ declined to set aside the Copyright Term Extension Act (better known as the Sonny Bono Act, or less kindly as the Mickey Mouse Protection Act¹⁶¹) on the basis that so long as any extension in the duration of copyright was for “limited times”, it was permitted by the intellectual property clause of the American Constitution. If the Oireachtas (or, more likely, the European Union) were to legislate for longer and longer terms of copyright, would the Irish courts rule in the same way? Perhaps not.

In *Buckley v Attorney-General* (the Sinn Féin Funds case), O’Byrne J said:

Clause 2 of [Article 43.1.2°] introduces a principle of paramount importance. It recognises in the first instance, that the exercise of the rights of private property ought, in a civil society such as ours, to be regulated by the principles of social justice and, for this purpose, (i.e. to give effect to the principles of social justice) the State may, as occasion requires, delimit by law the exercise of such rights so as to reconcile their exercise with the exigencies of the common good. In particular cases this may give rise to great difficulties. It is claimed that the question of the exigencies of the common good is peculiarly a matter for the Legislature and that the decision of the Legislature on such a question is absolute and not subject to, or capable of, being reviewed by the Courts. We are unable to

158 Alex Steel, “Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property” (2008) 30 *Sydney Law Review* 575, 598–603.

159 *Dowling v United States*, 473 U.S. 207; 105 S. Ct 3127 (1985) at 3133 cited in Loughlan, note 156 **Error! Reference source not found.**, at 402–403.

160 537 U.S. 186; 123 S. Ct. 769; 154 L. Ed. 2d 683; 71 U.S.L.W. 4052; (2003).

161 Lawrence Lessig, “Copyright’s First Amendment” (2001) 48 *UCLA Law Review* 1057, at 1065.

give our assent to this far-reaching proposition. If it were intended to remove this matter entirely from the cognisance of the Courts, we are of opinion that it would have been done in express terms as it was done in Art. 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas, and are expressly removed from the cognisance of the Courts.¹⁶²

Although this quotation is taken from the context of a case involving the delimitation of property rights rather than their expansion, it would seem that if the term of copyright were to be increased to such a duration that it would no longer be for the “common good”, the courts could step in to prevent this. What this duration might be, how reluctant the courts might be to intervene in the light of the Supreme Court’s statements in the *TD* case¹⁶³ on the degree to which the courts must respect the separation of powers, and whether European law on copyright would come within the exceptions in Article 29.4 are questions to which we may never have answers, but nonetheless point to ways in which Irish copyright law may be quite different to those jurisdictions to which we are inclined to look for guidance.

6.6 Constitutional Copyright and Peer-to-Peer Filesharing

That copyright may be a constitutional right raises the intriguing question of what remedies a rightsholder may have if the state does not take sufficient action in order to protect these rights. In the *UPC* case, Charleton J concluded, with some reluctance, that

The power to block access to internet sites, to disable access, to interrupt a transmission, to divert a transmission, and to cut off internet access in controlled circumstances are amply and clearly provided for in the law of the neighbouring Kingdom and are specifically outlined in the law of other European states and are also highly developed in United States of America law. They are not now available in Irish Law.¹⁶⁴

For that reason, the judge said that “[l]egislative intervention is required, if the Oireachtas see fit, to protect constitutional rights to copyright and foster the national resource of creativity.”¹⁶⁵

However, it may be open to the plaintiffs in that case, or other rightsholders, to force the Oireachtas to fill the gap identified by the learned judge or to seek damages from the State for legislative inaction. In *Byrne v Ireland*, Walsh J. said:

In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitutional obligation imposed. The Oireachtas cannot prevent or

162 [1950] IR 67, at 82–83 (SC).

163 [2001] 4 IR 259 (SC).

164 [2010] IEHC 377, at [131].

165 *Ibid.*

restrict the citizen from pursuing his remedy against the State in order to obtain or defend the very rights guaranteed by the Constitution in the form of obligations imposed upon the State; nor can the Oireachtas delegate to any organ of state the implementation of these rights so as to exonerate the State itself from its obligations under the Constitution. The State must act through its organs but it remains vicariously liable for the failures of these organs in the discharge of the obligations, save where expressly excluded by the Constitution.¹⁶⁶

This would seem to indicate that there might be a cause of action against the State for not legislating in a sufficiently proactive fashion to provide remedies for dealing with the challenges of new technology, such as Internet file-sharing.

In addition, the courts may step in to fill the gaps left by the Oireachtas. In *W v Ireland (No 2)*, Costello P said:

... constitutionally guaranteed rights may, as the court's decisions show, be divided into two distinct classes (a) those which, independent of the Constitution, are regulated and protected by law (common law and/or statutory law) and (b) those which are not so regulated and protected. In the first class are all those fundamental rights which the Constitution recognises that man has by virtue of his rational being antecedent to positive law and are rights which are regulated and protected by law in every State which values human rights. In this country, there exists a large and complex body of laws which regulate the exercise and enjoyment of these basic rights, protect them against attack and provides compensation for their wrongful infringement.

...

The State has a duty by its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizens (Article 40, s. 3, sub-s. 1). This constitutional provision does not require the Oireachtas to enact specific laws protecting constitutionally protected rights, and the State's duty under this Article is implemented by the existence of laws (common law and statutory) which confer a right of action for damages (*or a power to grant injunctive relief*) in relation to acts or omissions which may constitute an infringement of guaranteed rights ... The courts are required by the Constitution to apply the law and the causes of actions it confers and when these *adequately* protect guaranteed rights they are not called upon, in order to discharge their constitutional duties, to establish a new cause of action—indeed it would be contrary to their constitutional function to do so. Furthermore, to do so would be otiose.¹⁶⁷

This leaves open the issue of whether the plaintiffs in the *UPC* case could have argued that the CRRRA 2000 does not “adequately” protect their constitutionally-guaranteed copyrights and that the High Court should therefore have granted the injunction requested, even though there was no provision for it in the relevant statute. Had EMI made such a claim, would

166 [1972] IR 241 at 264 (SC).

167 [1997] 2 IR 141 at 164–167. Emphasis added.

Charleton J have had to so regretfully conclude that incomplete transposition of European law into Irish left him without the power to grant an injunction against UPC?

7 Conclusion

The Constitution Review Group recommends the amalgamation of the two constitutional articles dealing with property into one.¹⁶⁸ However, the revised text that is recommended does not clarify what property is, or whether it includes intellectual property. The All-Party Oireachtas Committee on the Constitution's Ninth Progress Report¹⁶⁹ is focused on real property and does not mention intellectual property.

Copyright is currently in need of reform,¹⁷⁰ with recommendations coming both from the US¹⁷¹ and Europe¹⁷² as to how it might be renewed for the new challenges of widespread information technology, but with little real change as a result.¹⁷³ Scholars are concerned by the dominant trends in the development of copyright internationally: globalisation, harmonisation, 'proprietaryism', TRIPs and the use of contract and technological protection measures to undermine the public domain.¹⁷⁴ A human rights perspective on copyright reform could bring something new and useful to a debate that has been ongoing for some years, particularly in the digital environment where it could have interesting ramifications for the use of contract and technological solutions.¹⁷⁵ Thus, if we are concerned about the use of restrictive terms in contracts for access to copyrighted materials (such as software),¹⁷⁶ and want to restrict these on public policy grounds,¹⁷⁷ we might turn to human rights norms as the basis for both statutory and judicial intervention to protect access to information and culture. If the Constitution is revised in the near future, as some political parties have called for,¹⁷⁸ this might afford us an opportunity to clarify the situation and offer a distinctive Irish vision of a new copyright (or author's rights?) regime for the twenty-first century.

168 *Report of the Constitution Review Group* (Pn 2632, 1996), at 361.

169 Oireachtas Committee on the Constitution, *Private Property* (Pn 2218, 2004).

170 Pamela Samuelson, "Does Copyright Law Need to Be Reformed?" (2007) 50 *Communications of the ACM* 19.

171 Jessica Litman, "Real Copyright Reform" (2010) 96 *Iowa Law Review* 1.

172 Christophe Geiger, "The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information" (2010) 1 *Intellectual Property Quarterly* 1.

173 Graeme W. Austin and Amy G. Zavidow, "Copyright Law Reform through a Human Rights Lens," in Paul Torremans ed, *Intellectual Property and Human Rights* (Kluwer Law International, 2008).

174 Sam Ricketson, "Intellectual Property and Human Rights," in Stephen Bottomley and David Kinley eds, *Commercial Law and Human Rights* (Ashgate, 2002), at 198–99.

175 *Ibid.*, at 203–204.

176 Niva Elkin-Koren, "A Public-Regarding Approach to Contracting Over Copyrights," Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman and Harry First eds, *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, 2002), at 191–221.

177 See Pamela Samuelson and Kurt Opsahl, "Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy" (1999) 21 *European Intellectual Property Review* 386.

178 Harry McGee, "Party Commits to New Constitution Within Year of Entering Government", *Irish Times*, 7 January 2011; Deaglán de Bréadún, "Sinn Féin manifesto main points", *Irish Times*, 11 February 2011; Deaglán de Bréadún, "Greens pledge to reduce TD numbers in Dáil by 46 and create 100,000 jobs", *Irish Times*, 12 February 2011.