



**Testing a framework for freedom of expression in copyright law**  
**Emily Laidlaw, University of Calgary and Daithí Mac Síthigh, Newcastle University**

How does copyright law accommodate freedom of expression? In this paper, we address this question, and raise further questions about the impact of evolving copyright-related business models on this fundamental right. This inquiry is necessary because of the diverse pressures on established copyright law (leading to, for instance, new approaches to enforcement, or the recasting of exceptions), and the increased significance of merely using a work (accessing, reading, etc) as an act governed by intellectual property. Doctrinally, it is only in recent years that significant attention has been paid by scholars of each field to the other; efforts at intergovernmental level have been, to date, inconclusive.

This research was carried out as part of CREATE, the Research Councils UK-funded centre for copyright and new business models in the creative industries. As part of a literature review (including an extensive review of caselaw across a number of jurisdictions, including the UK, European Union, EU member states, the United States and Canada), we identified a complex relationship between copyright and freedom of expression, and highlighted key areas of tension (such as user-generated content, intermediary liability, and transformative uses). Public interest defences could have a role to play in these areas, but have not been articulated or appreciated in detail. Specific statutory exceptions are relevant, but rarely designed or framed with due regard to the protection of human rights. Recent changes (such as that regarding parody in the UK) can be read as somewhat influenced by a desire to promote freedom of expression. Yet in court (especially in the European Union), there is still a tendency to answer questions of copyright law in a way that can be characterised as ‘internal’, i.e. using the points of reference of intellectual property law and only turning to human rights as a last resort.

Following this literature review, we met with various stakeholders to explore the implications of the findings from this review concerning the relationship (if it can be called such) between copyright and free speech models. We tested three propositions: (a) copyright law provides adequate protection; (b) a specific ‘speech exception’ is necessary; (c) copyright law can be re-read in a way that acknowledges fundamental rights. We also tested the benefits and drawbacks of using impact assessment tools to promote freedom of expression within the copyright system, through allowing affected parties outside academic legal studies to assess the adequacy of proposed measures or business models. In this paper we will report on the findings from these meetings and identify our proposal for how human rights law can be given greater effect or status in copyright law.