II. An Overview of the Conflict in the US and Europe

A. The United States

The First Amendment to the U.S. Constitution decrees that *"Congress **shall** make no law...abridging the freedom of speech or the press.....*[11]*"* (emphasis added). In its overall effect this provision constitutes an implied constitutional guarantee of the freedom of expression.

Over time this constitutional guarantee has been further expanded and developed through judicial interpretation with the effect that at present it is considered to encompass both the right to receive and to access information[12] as well as the right to refrain from speech or expression.[13]

Hence in terms of the primacy granted to the Constitution within the legal framework of the United States, this constitutes a guarantee of the freedom of expression and the right to information, accorded at the highest level of the law.

The copyright clause of the Constitution that empowers congress to secure *"for limited Times to Authors…the exclusive Rights to their…Writings…"*[14] provides legitimacy for the protection of copyright within the US legal framework.

Accordingly the Copyright Act[15] grants to authors exclusive rights in copyrighted works in relation to their reproduction, distribution, public performance or display and the preparation of derivative works based upon them.[16]

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11 U.S CONST. amend I.

12 *Griswold v. Connecticut, 381 U.S. 479, 482 (1965); N.Y Times Co. v. Sullivan 376 U.S 254 (1964).*

13 *Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539(1985).*

14 U.S. CONST. art.I s.8 cl.8.

15 U.S. Copyright Act of 1976, 17 U.S.C ss. 101-1332.

16 *Id* s. 106.

Following the enactment of the Copyright Act of 1976, it may now be convincingly stated that copyright protection in the US is solely a creature of statute and is nothing more than a privilege or franchise[17] granted by state to the author of "*an original work of authorship fixed in a tangible medium of expression*[18]*"*.

Thus the discord between the freedom of expression and copyright arises through the existence of these competing constitutional values within the US legal framework.

The constitutional guarantee of the freedom of speech and the right to information established under the First Amendment unequivocally reinforces the argument in favour of effecting an equilibrium between these fundamental freedoms and copyright within the US legal framework, and over time various efforts have been made to reconcile the persisting discord between these competing values.

However it is observed that in certain instances the US Courts have sought to interpret the conflict between copyright and the fundamental freedoms guaranteed under the First Amendment in a more restrictive manner.

A particularly notable example is the approach taken by the US Supreme Court in the case of *Harper & Row Publishers Inc. v. Nation Enterprises,*[19] where the Court attempted to locate copyright within the constitutional bounds of the First Amendment by modeling it as an *"engine of free speech"* which encompasses the freedoms guaranteed under the Amendment within its scope; thereby making further application of the First Amendment to copyright superfluous.

This approach which seeks to deny the existence of a conflict between these competing values was recently reaffirmed by the Supreme Court in the case of *Eldred v. Ashcroft.*[20]

The case concerned an application for a declaratory judgment that the Copyright Term Extension Act of 1998 (CTEA) which sought to

17 Harry N. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law,* 50 NOTRE DAME L. REV.790,792 (1975).

18 17 U.S.C. s.106.

19 *Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539(1985)*.

20 *Eldred v. Ashcroft, 123 S.Ct. 769 (2003).*

extend the copyright term in the US by twenty years was unconstitutional.

One of the arguments that was raised in the course of the proceedings was that the extension of the copyright term was in violation the First Amendment by reason that it forms a restriction on the freedom of speech by limiting the opportunity to make use of works, which if not for the extension of the copyright term, would be in the public domain.[21]

The Supreme Court held that the CTEA did not violate the First Amendment. Citing the dicta in *Harper & Row Publishers* it observed that the idea-expression dichotomy of copyright law constituted an in-built First Amendment accomodation which strikes a definitional balance between the First Amendment and copyright law by permitting the free communication of facts while still protecting an author's expression.[22]

Accordingly it held that where the traditional contours of copyright protection have not been altered, further First Amendment scrutiny was unnecessary.[23] However, it significantly expressed a reservation from the comment made by the Court of Appeals in the same case that copyright is *"categorically immune from challenges under the First Amendment*".[24]

Thus the case of *Eldred* reserved to courts the possibility of First Amendment scrutiny of copyright law where the the traditional contours of copyright have in fact been altered, although it notably failed to provide a definition as to what would constitute a departure from the traditional contours of copyright.

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21 *Eric Eldred v. John D Ashcroft No 01-618* Oral Arguments, Wednesday October 9, 2002 at page11, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-618.pdf.

22 *See Harper Row,* 471 U.S. at 788-789.

23 *Id* at 790.

24 *Id.* at *789-90* (citing *Eldred v. Reno, 239 F.3 d 372, 375 (2001)) accord.* Birnhack, *The Copyright and Free Speech Affair: Making and Breaking Up* 43 IDEA 233, 233.

Following the decision in *Eldred* this issue arose for discussion in the cases of *Kahle v. Gonzales,*[25] *Luck's Music v. Gonzales*[26] and *Golan v. Gonzales*.[27] Although in the cases of *Kahle* and *Luck's Music* the term traditional contours was restrictively interpreted to refer to the idea-expression dichotomy of copyright and the doctrine of fair use, the decision of the US Court of Appeals for the 10th Circuit in the case of *Golan v. Gonzalez* marked a significant departure from this interpretation.

The case involved a determination as to the constitutionality of s. 514 of the Uruguay Round Agreement Act (URAA), which sought to effect certain amendments to US law in order to bring it more in line with its obligations under the Berne Convention.[28]

It involved *inter alia* the implementation into US law of Article 18 of the Berne Convention which required the restoration of the copyright of certain foreign works which had passed into the public domain in the US.[29] This was challenged in courts as being a violation of the First Amendment to the US Constitution.

In this instance the Court of Appeal unanimously upheld that the traditional contours of copyright as described in *Eldred* extended beyond the idea-expression dichotomy and the fair use exception and determined that s.514 had altered the traditional contours of copyright protection in a manner that implicated the right to freedom of expression.[30] The decision of the Court of Appeal therefore establishes that First Amendment scrutiny of copyright could in fact be triggered by departures to copyright law other than to the traditional safeguards to the First Amendment i.e. the idea-expression dichotomy and the fair use exception.

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25 *Kahle v. Gonzales* 487 F.3 d 697 (9th Cir. 2007).
26 *Luck's Music Library Inc. v. Gonzales* 407 F.3 d 1262 (D.C. Cir. 2005).
27 *Golan v. Gonzalez,* No. 05-CV-1259 (10th Cir. Sep. 4, 2004).
28 Berne Convention for the protection of literary, artistic works 1886 (Paris Text 1971).
29 *Id.*Article 18.
30 *See Golan v. Gonzales* at 37.

Thus it appears that following the decision in *Golan v. Gonzalez*, there exists far greater potential for the review of copyright law with regard to its compatibility with the fundamental freedoms guaranteed under the First Amendment, thereby offering greater scope for the achievement of a satisfactory equilibirum between copyright and the freedom of speech and the right to information within the US legal framework.

B. Europe

Before embarking on an analysis of copyright and the freedom of expression in Europe, it is useful to consider the nature of the copyright law framework within the EU Member States.

Firstly it is pertinent to note that as opposed to trademark and design law, the EU is yet to introduce a community wide copyright.[31] Rather copyright law in the EU is based upon the individual national copyright laws of the Member States which operate within their respective territories.

However the EU has succeeded in introducing a degree of harmonization in relation to certain specific aspects of copyright law through a series of community directives which relate to such aspects of the law as may have an effect on the free movement of goods and services within the EU.

Hence a consideration of the existing tension between copyright and the freedom of expression in Europe necessarily requires one to consider the nature of the conflict between these competing values as it exists in the individual legal frameworks of specific member states, as well as an overall consideration of European Community (hereinafter "EC") law in relation to the specific areas in which copyright law has been the subject of community wide harmonization.

31 Dreier and Hugenholtz *Concise European Copyright Law* 1 Kluwer Law (2006).