

# Aantekeninge

## THE HEDGEHOG, THE FOX AND COPYRIGHT – A DIVERSION

Lord Hoffman, in the context of the expression-ideas dichotomy in copyright law, and while pointing out that originality tends to lie in the detail with which the basic idea is presented, added somewhat enigmatically that copyright law protects foxes better than hedgehogs (*Designers Guild Ltd v Russell Williams (Textiles) Ltd* 2000 UKHL 58, 2001 FSR 11). The point of this note is that for a lawyer of the common or garden variety, the simile is rather perplexing and its relevance elusive.

It is generally assumed that Lord Hoffman had the rather lengthy and learned essay by Berlin, entitled *The Hedgehog and the Fox* (1953), which is available in book form, in mind. As Berlin's subtitle indicates, the essay is about Tolstoy's view of history based chiefly on an analysis of his *War and Peace*, one of those books everyone knows of but nobody reads (*cf* Proust and Joyce). But before dealing with Berlin's use or abuse of the tale of the fox and the hedgehog, let us begin at the beginning.

The Greek poet Archilochus left a fragment (in classical Greek, obviously, and quoted by Plutarch *De Sollertia Animalium* 16), which, like a post-modernist poem, states no more than that *multa novit vulpes, verum echinus unum magnum* (as translated into Latin by Desiderius Erasmus, the great humanist and classical scholar). Berlin's translation into English, which appears to be in conformity with the Latin, at least, is that "the fox knows many things, but the hedgehog knows one big thing". Whether or not Archilochus wished to say more is not known, but it is generally assumed that he did and this opened the door for guesswork.

Erasmus's interest in this fragment arose in the course of the preparation of his *Adagia*, usually conveniently referred to as his *Proverbs*. Erasmus had a fairly simple explanation of what our Greek poet had in mind. Foxes, when pursued by foes, have many tricks up their sleeves to escape (figuratively speaking), and are, accordingly, seldom captured (*et tamen haud raro capitur*), implying that in spite of their devices they may be caught. Hedgehogs, on the other hand, have one stratagem – and that is the big one – namely to roll themselves into a prickly ball, which provides perfect protection against hunters and dogs.

*Echinus* is not only a land urchin (or hedgehog), but also a sea urchin, and Erasmus made it clear that he had the former in mind (*nam hoc loco de terrestri*). He had a dilemma because the moral of the story, whatever it was, was weak, since other classical authors had shown that the hedgehog has more than one stratagem to prevent capture. If it finds itself in dire straits it, unsurprisingly, urinates. This emits such a bad smell that the pursuers lose interest. But if they do not, the urine weakens the spines and makes them useless as hair brushes, the only reason one would have hunted them. Other folklore, South Slavonic and Greek, confirms that the hedgehog has more than one stratagem to save itself.

In his discussion of Erasmus's proverbs Bland gives more prominence to another adage, the one that states that it is the cat that knows one big trick, which is to climb a tree or a building to escape from huntsmen; and this is also said to be of more value than all the stratagems of the fox (I *Proverbs Chiefly taken from the Adagia of Erasmus* (1814) 112-114). This proverb allegedly had its origin with that sage old slave, Aesop, and ended with the cat's retort that "better one safe way than a hundred on which you cannot reckon". Since our present concern is copyright (which now

includes the protection of folklore), it might be mentioned that Jean de la Fontaine (1668-1695) and the brothers Grimm (1812-1857) plagiarised the tale.

According to Bland, the adage about the hedgehog admits of the same explanation as that of the cat, namely “that it is better to rely on the advice of one sensible friend, than to have recourse to many whose contrary and discordant views would be more likely to perplex and confound than to teach us how to escape from our difficulties”. Because Erasmus had listened to the bad advice of friends, Thomas More (the lawyer) and Lord Mountjoy (a student and benefactor), all his money was confiscated by an English customs official. Destitute, he was accordingly obliged to produce something as a matter of urgency – hence the *Adagia* (Eden *Friends Hold All Things in Common* (2001) 1). In this work, sub-titled *Tradition, Intellectual Property and the Adages of Erasmus*, she sought to make out a case that Erasmus was much concerned about the “complex issues of ownership that attach to the intellectual property” in his works (163), a clever thesis that is not very convincing.

Ashmilan classified fables about foxes, cats and hedgehogs as of the Aarne-Thompson-Uther type 105, which apparently signifies that they are “stories about the danger of being too clever” (*The Fox and the Cat or The Fox and the Hedgehog* [www.pitt.edu/~dash/type0105.html](http://www.pitt.edu/~dash/type0105.html) (13-3-2013)).

So much by way of background. It is now time to revert to Berlin, who began his essay by stating that the famed fragment “may mean no more than that the fox, for all his cunning, is defeated by the hedgehog’s one defence”. This would assume that the fox and the hedgehog were involved in some physical encounter, and not only a verbal one. Not one of the fables that I could find had that connotation.

The only other fox-hedgehog tale is one sometimes ascribed to Aesop (*Aesop’s Fables* (1881) editor unknown; it does not appear in Temple and Temple *The Complete Fables: Aesop* (1998 or 2007)). A fox, according to the 1881 edition, while crossing a river, was driven by the stream into a narrow gorge, and lay there for a long time unable to get out, covered with myriads of horse-flies that had fastened themselves upon him. A hedgehog saw him, and, taking compassion on him, asked him if he should drive away the flies that were so tormenting him. But the fox begged him to do nothing of the sort. “Why not?” asked the hedgehog. “Because,” replied the fox, “these flies that are upon me now are already full, and draw but little blood, but should you remove them, a swarm of fresh hungry ones will come, who will not leave a drop of blood in my body.” The moral is that when we throw off rulers or dependants, who have already made the most of us, we do but, for the most part, lay ourselves open to others who will make us bleed yet more freely.

The parable is in fact that of Themistocles, a general and politician, who used it to dissuade the Athenians from throwing off their yoke of taxation (Erasmus *Praise to Folly*, ed Becker *Lob der Narrheit aus dem Lateinischen des Erasmus von Rotterdam übersetzt und mit Anmerkungen begleitet* (1997) 95 after Plutarch). Since Berlin and Lord Hoffman wrote before the present financial crisis, it is unlikely that they could have had this fable in mind. Berlin then proceeded to take the words figuratively to enable him to divide writers and thinkers and some common mortals into two groups: those who relate everything to a single central vision or system (the hedgehogs) and those who pursue many ends, often unrelated and even contradictory, related to no moral or aesthetic principle (the foxes). Dante, under this classification, was a hedgehog, and Shakespeare a fox.

What he meant with the densely argued essay was apparently this: “According to monism [hedgehogs], a single value or narrow set of values overrides all others, while on the pluralist view [foxes] human goods are multiple, conflicting and incommensurable. Monism, Berlin believed, harbours political dangers that pluralism avoids. While the

great authoritarian visions of politics have all rested on monist foundations, pluralism is naturally aligned with toleration, moderation and liberalism” (Crowder “Hedgehog and Fox” 2003 *Australian Journal of Political Science* 333). Berlin concluded that Tolstoy was a fox who believed in being a hedgehog. Ironically, commentators have since found similar contradictions in Berlin’s ideas.

Tolstoy, by the way, had a low opinion of the fox’s ability to escape hunters and their dogs. In his description of a fox hunt, all the fox did was to run but he was soon caught. So much for knowing many things. The she-wolf and the hare, on the other hand, were able to put up a much better show (VII *War and Peace* ch 5 to 6).

As Berlin took quite some liberties with a simple fragment, so have others done with his classification. For instance, Kilstrom applied it to hypnosis (“Foxes, hedgehogs and hypnosis – Oh my” available on the internet) and Vickers spoke about “The hedgehog and the fox in economic policy”, seriously suggesting that some economists know many things and others one big thing (Oxford Economic Alumni Lecture, 11 June 2002).

Gould’s *The Hedgehog, the Fox, and the Magister’s Pox* (2011) with the sub-title *Mending the Gap between Science and Humanities* also took up the theme. Gould, who was a scientist, was also much more: more particularly, he was a classicist and collector (and reader) of first editions, by which I mean those that appeared soon after Gutenberg invented movable type. His discussion of the fable, with reference to his 1599 edition of Erasmus and particular reference to Gesner’s *Historia Animalium* (1551), is spell-binding, but when he used the image, as he said, to exemplify his concept of the proper relationship between the sciences and humanities and provide a model for how the two should interact, I lost the plot.

And then came Dworkin’s *Justice for Hedgehogs* (2011), which is about neither hedgehogs nor justice but about the unity of value because, as he said in the opening lines, “value is one big thing”. Many who have read the work have commented on the philosophy espoused therein, and it has been mentioned that Dworkin presents himself as someone who seeks to establish a consistent and sweeping system of thought, one capable of answering a wide range of questions in the fields of philosophy, morality, ethics, and law. It has also been pointed out that Dworkin did not mask his intention to portray himself as an ambitious hedgehog but that the suspicion lingers that he, like Tolstoy, did not succeed (eg Heyd <http://www.azure.org.il/download/magazine/Az46Heyd> (13-03-2013)). One of the prominent critics was Sumption (*The Spectator*, 28-04-2011) who had to backtrack on some generalizations, leading to a biting riposte by Dworkin that Sumption, who was then about to be appointed to the supreme court, “will of course take much more care on the bench” ([www.justiceforhedgehogs.com](http://www.justiceforhedgehogs.com) (13-03-2013)) – hence my reluctance to say more about Dworkin’s views.

Back then to Lord Hoffman’s adoption, about which Chacksfield said, as I have been doing, that it is perhaps fair to ask what these beasts have to do with the law of copyright, and whether the conclusion is in fact a valid one (“The hedgehog and the fox, a substantial part of the law of copyright?” 2001 *EIPR* 259). It is not clear that Chacksfield sought to answer his own question, although he concluded his case note with a reference to Berlin stating that it “is a comparison of the importance of trivia against the abstraction of grand ideas, and the core concept is that without the detail there is nothing to be abstracted from history. Perhaps, in another sense, the same is true of art”. This may be so, but it does not tell one anything about copyright.

Patry, in an enchanting Stephen Stewart memorial lecture entitled “Metaphors and moral panics in copyright” (2008 *IPQ* 2008), began his discussion with a reference to Lord Hoffman’s use of the fox and his or her mate as an illustration of the fact that

some judges delight in using metaphors. Others, he said, are more wary. For instance, Cardozo had said that “metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it”. Patry, unfortunately, did not revert to the tale and did not explain what the underlying message was supposed to be. Maybe he was inhibited or intimidated because Fysh J had referred to this metaphor as a “sibylline observation” (*L Wooley Jewellers Ltd v A & A Jewellery Ltd (No 2)* 2004 FSR 47 934). Patry thought that Fysh J was praising the metaphor. I tend to think otherwise, considering that Fysh had been counsel on the losing side in *Designers Guild*, something Patry knew without appreciating the implications fully. Dictionaries attach different meanings to the adjective “sibylline”: “mysterious”, “excessive”, “exorbitant” perhaps; “prophetic” hardly, unless the allusion was to the sibylline observation that “the day of wrath (judgment day), that particular day, turned the world to ashes” (*dies irae, dies illa, solvet saeculum in favilla*, recorded by Thomas of Celano (*circa* 1190-1260)). I took some liberties with the tense.

As a result of this perambulation in an attempt to get confirmation from poets, classicists and philosophers that originality tends to lie in the detail with which the basic idea is presented, I know many things about foxes and hedgehogs. But I still do not know the one big thing: do these beasts have anything to do with the law of copyright?

As a postscript, and since we have been taking liberties with metaphors, one could perhaps turn to Solomon Rex, he of many wives and concubines. Apropos of nothing and in the middle of a romantic conversation he mentioned to his “fair Egyptian spouse” (Milton *Paradise Lost* IX 443) that little foxes spoil the vines (*Song of Songs* 2.15). No wonder that Byatt found the work, in heaping up metaphors, fragmentary (“The Song of Songs” in *Revelations* (2005) 157). Using or abusing this metaphor, it would be possible to imagine that the right to information, to knowledge, to freedom of speech, and to communication are vines. If, for instance, headlines and Google-like news snippets (*Newspaper Licensing Agency Ltd v Meltwater Holding BV* 2010 EWHC 3099 (Ch), affd 2011 EWCA Civ 890) or the view of a red bus before the maybe soon to be renamed Big Ben (*Temple Island Collections Ltd v New English Teas Ltd* 2012 EWPC 1) are subject to copyright, or that subconscious copying is actionable (*Mitchell v British Broadcasting Corporation* 2011 EWPC 4), the little foxes, under the protection of copyright, are truly on a rampage, destroying the vineyard.