

Hence these jurisdictions represent examples of the three primary traditions of copyright law. It is hoped that a review of the developments that have been taking place in them would assist in offering a comprehensive view of the issues that would arise in attempting to introduce a public interest exception to copyright law within the Member States of the European Union.

In the course of this analysis, the thesis shall also proceed to consider factors which could potentially limit the expansion of a public interest exception to copyright; primarily the “three step test” to copyright limitations under the Berne Convention as well as the EC Copyright Directive which could pose a potential impediment to the development of a broad-based exemption to copyright.

Throughout this thesis, reference shall be made to the fair use doctrine in the US in considering the scope and expansion the public interest exception may hope to achieve, and parallels will be drawn between the approaches in the US and Europe with regard to copyright and the freedom of expression and information.

B. The Discord in Context : A Case of Competing Interests

The persisting discord between copyright and the freedom of expression and the attendant right to information stems from the primary character of copyright as an exclusive legal monopoly granted to an author in relation to the original, literary or artistic expression embodied in his work.

The exclusive monopoly thus created over original expression has the potential to impose serious limitations upon the manner in which individual members of the public or the public at large may access, utilize or disseminate that expression, or build upon such expression through the creation of derivative works.

The value accorded to the promotion and preservation of the freedom of expression and the right to information in contemporary jurisprudence and its significance to the progress and development of modern democratic society remains unchallenged. As such they have

been expressed and recognized as fundamental human freedoms in a multitude of international instruments, including notably the Universal Declaration of Human Rights (UDHR)³ and the International Covenant on Civil and Political Rights (ICCPR).⁴

On the other hand the significance of copyright as a mechanism by which to secure and promote creative expression and innovation in society has considerably enhanced in the context of the contemporary information based society.

Thus the clash point between these competing values arises in the context of the role each of them play as instruments which ensure the continued generation of creative expression within society, albeit based upon two diametrically opposing viewpoints.

The fundamental freedoms enunciated above seek to achieve this aim by ensuring to all individuals unfettered liberty as to the access and use of creative works in order that they may be enriched by the creativity and artistry contained therein and be further inspired and enabled to continue the process of generating creative expression within society.

Copyright on the other hand seeks to sustain such creative process by offering an incentive to individuals to participate in the process of creative innovation by allowing them the ability to exercise exclusive rights over their works so that they may gain an economic profit corresponding to the personal and financial investment that has gone into the creation of their works.

Hence the issue arises as to the means by which a sufficient equilibrium maybe reached between these adverse viewpoints in a way

3 Universal Declaration of Human Rights (1948) *Article 19* “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*” December 10, 1948 G.A. res. 217A (III).

4 International Covenant on Civil and Political Rights (1966) *Article 19 (2)* “*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*” December, 16, 1966, G.A. res. 2200A [XX1].

that would maximize their common goal of promoting and preserving the generation of creative expression within society.

C. The Public Interest Dimension of Copyright

A possible means of resolving the aforesaid conflict is offered by the school of thought which views both copyright and the freedom of expression as being based upon the same fundamental equilibrium as enumerated above.⁵ Hence the key to resolving the persisting tension depends upon the achievement of the right balance between the private interests and public rights protected through each one of these values.

An indication as to the manner in which such a balance may be achieved is offered by the notion of copyright as a doctrine of public interest or an instrument of social good that seeks to bestow on society as a whole the benefit of the generation of creative expression.

This conception of the need to balance the rights of authors against the legitimate interests of the public is also reflected in Article 27 of the UDHR which provides to everyone the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author, while simultaneously enumerating the right accorded to everyone to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Hence based upon this view of copyright law, if the ultimate aim of copyright is to secure the public interest in the generation of creative and artistic works, it may be argued that the scope of the private exclusive right that is accorded to the copyright owner should be defined within the scope of such public interest and that the exclusive rights accorded under copyright should be suitably limited so as to

⁵ Paul L.C. Torremans *Copyright (and Other Intellectual Property Rights) as a Human Right, in Intellectual Property and Human Rights* 197 Wolters Kluwer (Paul L.C. Torremans ed.2008).