

I. Copyright, the Freedom of Expression and the Right to Information: The Persisting Discord

A. Introduction

The persisting discord between copyright protection, the freedom of expression and the right to information, is an inherent feature of every system of modern copyright law.

As such, the exploration of possible means by way of which an adequate equilibrium maybe achieved between these competing values is an issue meriting high priority within any legal framework which values and espouses these fundamental freedoms.

The United States seeks to reconcile this discord primarily through the application of the fair use exception to copyright, arguably with a substantial level of success.

The fair use exception to copyright which proceeds upon the basis that certain unauthorized uses of copyright-protected material may in particular instances be justified on the ground that such use constitutes a “fair use” of such material, is a doctrine of broad scope and great flexibility which is intended to facilitate the maintenance of a healthy equilibrium between these conflicting interests.

It is noted however, that as at present it is difficult to identify a doctrine of comparable dimensions within the legal frameworks of the European Union (hereinafter the “EU”) Member States. This is notwithstanding the high degree of significance conferred upon the preservation and promotion of the freedom of expression and information by the European Convention on Human Rights (ECHR) which has been implemented into the domestic legal frameworks of many of the EU Member States.

However, a salutary feature in the development of copyright law in Europe in recent years has been the recognition of a fledgling “public interest exception” to copyright law, which has hitherto been

confined to a narrow scope of application. This has offered fresh stimulus to the debate surrounding copyright and the freedom of expression by virtue of the potential it offers to develop into a means by which a reconciliation maybe achieved between these competing values.

1. The Public Interest Exception to Copyright: A Brief Overview

The public interest exception to copyright is founded upon the conception of copyright as a doctrine of social good which is designed to promote and preserve the interests of society as a whole. As such it forms a general exception to copyright in accordance with which certain unauthorized uses of copyright protected material may be exempted from liability where it is established that such use qualifies as a reasonable use of that material in the legitimate interests of the public.

Thus akin to the fair use exception in the United States the public interest exception constitutes a defense to copyright infringement which applies across the board to all categories of rights conferred under copyright and to every type of subject matter that maybe protected under copyright. Therefore this holds a definite advantage over existing statutory exceptions to copyright which may operate only in relation to specific types of subject matter and be limited in application to certain categories of rights.

The following hypothetical fact situations may serve to provide a more lucid illustration as to the nature and scope of the uses which could come within the public interest exception to copyright.

Hypothetical 1:

The World Soft-Ball Cricket Championships are being held in Smashville Australia. During one of the matches Sean Spinner makes a comment with allegedly racist connotations to Bobby Blaster from the opposing team. After the game Blaster confronts Spinner inside the Stadium and punches him in the face. The altercation is caught

on camera by the TV-Crew from Sports TV which has exclusive access to the stadium and the private quarters reserved for the players. Sports TV retains the footage in its archives but decides against its immediate release to the public. However an employee of Sports TV releases the footage to Scoop Times a newspaper and to Explore Inc. a film company.

The next day Scoop Times carries a front page story with the heading *Blaster Blows His Cool* carrying a detailed account of the incident which took place in the Smashville Stadium the previous day. The article also includes an image of Blaster punching Spinner in the face which is a reproduction of an image taken from the footage belonging to Sports TV.

Explore Inc. releases a documentary entitled *Racism in the Field: The Ugly Side of Sport* which contains a five minute clip of the footage showing the altercation between Blaster and Spinner, in order to illustrate the manner in which racist remarks on the field could erupt into violence and comments upon the measures that could be taken by international sports committees to prevent racism in sports.

David Fans a 15 year old student who watches the documentary on his home television records the footage containing the altercation between Blaster and Spinner and uploads it to mytube.com a popular internet forum for sharing videos. The video becomes instantly popular and is watched by millions of viewers.

Hypothetical 2:

Professor Isabelle Laroche is a paleontologist. During her research she discovers a fossil of a hitherto unknown species of mammal that became extinct during the last ice age. Using the fossil and cutting edge technology she carefully reproduces a drawing of what the actual animal would have looked like. She presents her findings and the drawing at a paleontology conference, the participation in which is limited to an exclusive group of invitees.

Science Weekly a magazine dedicated to natural science publishes an article concerning the findings made by Isabelle Laroche and reproduces the diagram of the mammal taken from a research paper

distributed among the participants of the conference without the permission of Professor Laroche.

Hypothetical 3:

A music band the *Wannabees* composes a new track. The track is made up of segments of different songs that were popular during the early 1980's arranged and supplemented in intervals by music composed by the *Wannabees*.

Surprisingly the arrangement of the different tracks come together to form a single composite song and it becomes an instant hit.

2. *The Thesis: Object, Scope and Methodology*

The object of this thesis is therefore to analyze the development, interpretation and application of the public interest doctrine in the jurisdictions of England, France and Germany and to consider the potential it offers in developing into a broad and general exception to copyright protection, capable of resolving the existing tensions between copyright protection and the competing values of the freedom of expression and the right to information.

These three jurisdictions have been selected on the basis that they represent three different legal traditions of copyright law. England offers a model of the Anglo-American common law tradition, while France and Germany consist of jurisdictions which reflect the civil law tradition based on the distinction *inter alia* between author's rights and neighboring rights. Of these it may be seen that France adopts a dualist approach¹ to copyright while Germany can be seen to take a monist approach.²

1 French law views the personal and economic and societal interests as separate, yet forming a duality. Dana Beldiman *Fundamental Rights, Author's Right and Copyright-Commonalities or Divergences?* 29 COLUM J.L & ARTS 39, 41 Note 3 (2005).

2 German law views the personal and economic and societal interests as being intertwined. *Id* Note 4.