MIPLC Studies 8

Sunimal Mendis

Copyright, the Freedom of Expression and the Right to Information

Exploring a Potential Public Interest Exception to Copyright in Europe

Nomos

MIPLC Munich Intellectual Property Law Center
Augsburg München Washington DC

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Edited by

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Preface

With the advent of the modern information based society which is founded the unhindered communication of expression and information; there has been a steady increase in the significance accorded to the freedom of expression and the right to information in legal systems all over the world based upon the democratic ideal.

The steady advancements in the sphere of modern communication and the progress of the media has meant that today it is possible to use and exchange information in ways which would not have been envisioned a few decades ago. With the increase in the importance granted to the exchange of ideas and information between individuals there has been a corresponding increase in the significance accorded to Copyright within legal frameworks and a stricter supervision on the protection of Copyright.

The tension between copyright and the freedom of speech in modern society stems from the inevitability of the clash of opposing interests between those creating information and expression to control its use, dissemination and financial exploitation and the interests of the public in the use, enjoyment, communication of such creations. As such has been a very real interest in different legal systems of finding a means by which the discord between these competing values may be reconciled.

In view of the emerging interest in the exploration of a means by which an equilibrium maybe affected between these competing values, I have sought to explore the possibility of the introduction of a public interest exception to copyright within the European Union Member States.

The research culminating in this thesis was carried out by me while a student of the LLM Program at the Munich Intellectual Property Law Center (MIPLC) during the period from October 2008 to September 2009.

My gratitude goes out to Professor Paul Goldstein Lillick Professor of Law at the Stanford University who directed this thesis and who was also instrumental in channeling my interest to research on this particular topic of copyright law. My heartfelt appreciation also goes out to Mr. Wolrad Prinz zu Waldeck and Seth Ericsson Directors of the LLM program at the MIPLC to Dagmar, Margit and other members of the staff of the MIPLC and all the wonderful people that I met in Munich, especially to my colleagues Bea, Marina, Ni and Gaurav and to my friends Kerry and Jarrod and mainly to my family, my parents Lakshmi and Ranjan Mendis and to my brother Chinthaka for all their love and support and for believing in me at all times.

Colombo, Sri Lanka
February 18th, 2011 *Sunimal Mendis*

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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 approach[1] 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.

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 maybe 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).

prevent a copyright holder from deriving profit from his creation in a manner adverse to the legitimate interests of the public.

D. Seeking a Suitable Mechanism to Achieve the Right Balance

A divergence can be perceived in the views of the copyright community as to the most effective means by which the tension between these competing interests maybe resolved.

One viewpoint expounds that the idea-expression dichotomy of copyright presents a means by which this tension may be reconciled within the inherent conceptual framework of copyright itself. In accordance with this view since the protection granted under copyright extends only to the expression of a work and not to the facts and ideas underlying such expression, this forms a limitation within the conceptual framework of copyright itself which prevents copyright from unreasonably encroaching upon the guarantee of free speech.[6]

However it has been noted that although the line between idea and expression is often hard to discern, the point of divergence between idea and expression is not intended to vary, thus robbing the doctrine of much needed flexibility in developing into an efficient tool by means of which such reconciliation maybe attempted.[7]

It has also been pointed out that although at one point of the evolution of copyright it would have been true to hold that copyright only protected expression and therefore it would have been possible to avoid infringement through merely using the factual or conceptual information contained in the copyrighted work, present day realities do not allow for such a simplistic interpretation.[8] For example in cer-

6 Melville B. Nimmer *Does Copyright Abridge the First Amendment Guarantee of a Free Speech and Press?* 17 UCLA L. REV. 1180, 1189 (1970).

7 Jay Dratler Jr. *Fair Use in Copyright Law* 43 U. MIAMI L. REV. 233, 245 (1988).

8 Alexandra Sims *The Public Interest Defence in Copyrightt Law: Myth or Reality?* 6 EIPR 335, 339 [2006].

tain types of subject matter such as photographic works or phonograms the expression is so inextricably linked with the underlying facts and the ideas that it is difficult to consider a means by which a potential user could extract the information or concept embedded in the work while leaving the expression intact.

On the other hand, an alternative means for bringing about a reconciliation between these competing values has been suggested, by the imposition of suitable exceptions and limitations to the exclusive rights granted under copyright so as to ensure that these would not unduly interfere with the rights of freedom of expression and information of the public.

As Senftleben states,

> *"Limitations which serve the purpose of disseminating information offer members of society the opportunity of receiving the information enshrined in works of intellect. For this reason they can be understood as exponents of freedom of expression values."*[9]

Netanel's argument for a democratic approach to copyright proceeds on much the same basis. As he points out,

> *"The democratic approach would maintain the ideal of a strong copyright, but would allow for a liberal use of exceptions and limitations to copyright holder rights designed to make authors' works more widely available."*[10]

Thus based upon this view it appears that the introduction of a limitation or exception to copyright which would constrain the exercise of exclusive rights granted under copyright from impinging upon the domain of fundamental freedoms, as required for the maintenance of a healthy equilibrium between these competing values, would be the most effective means of resolving the existing tension.

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9 Martin Senftleben *Copyright Limitations and the Three Step Test* 30 Kluwer Law International [2004].

10 Neil Winestock Netanel *Asserting Copyright's Democratic Principles in the Global Arena* 51 VAND L. REV 217, 223 (1998).

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).

Article 10 of the European Convention on Human Rights[32] (ECHR) (which has been ratified by all EC Member States) guarantees the freedom of expression which includes the freedom to receive and impart information. Hence it may be seen that the freedom of expression in Europe is expressed in much narrower terms than in the US.

The fundamental rights guaranteed under the ECHR constitute general principles of Community law which are used as a standard in the interpretation of Community law and a basis for actions against Community institutions.[33]

However the guarantee of the freedom of expression under Article 10 is made subject to qualification by formalities as may be prescribed by law and considered to be "*necessary in a democratic society for the protection of the rights of others"*.

Hence it remains possible to argue that the limitations on the freedom of expression imposed by the copyright laws of Member States fall within the scope of a formality prescribed by law which is necessary for the protection of the rights of others under Article 10 of the ECHR. In fact the term "rights of others" has been held to include a wide range of subjective rights which certainly includes the rights protected by copyright.[34]

With regard to national constitutions, as Professor Hugenholtz points out the protection granted to the freedom of expression does not in most cases reflect the broad scope of Article 10.

However he identifies the German Constitution which provides for a comprehensive three-tiered right to the freedom of expression in-

32 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (1950); *See* Treaty on European Union Article 6(2) 31 ILM 247; 1992 O.J. (C191) 1.

33 Margot Horspool and Matthew Humphreys *European Union Law* 131 Oxford University Press (4th ed. 2006).

34 P. Bernt Hugenholtz *Copyright and Freedom of Expression in Europe* www.ivir.nl/publications/**hugenholtz**/PBH-Engelberg.doc at 5.

corporating the freedom of opinion, the right to information as well as the freedom of the media as a notable exception.[35]

The French Constitution[36] on the other hand does not contain an express bill of rights. However the preamble to the Constitution expressly states its attachment to the Declaration of the Rights of Man and of the Citizen of 1789 which contains a guarantee of the freedom of speech and of the press.[37]

This has been interpreted to imply that the principles laid down in this instrument will have constitutional value within the current legal framework in France and further that it is possible for the Constitutional Court to declare unconstitutional legislation that infringes the principles contained in the said document.[38] Further in the case of *Danone* the freedom of expression was expressly recognized as a right guaranteed under the Constitution of France.[39]

In the UK the rights guaranteed under the ECHR have been implemented into the domestic legal framework by the Human Rights Act of 1998. S. 3 of the Act requires that all primary and secondary legislation must be read and given effect in a way which is compatible with the Convention rights.[40]

Furthermore s.12 of the Act imposes a special safeguard with regard to the freedom of expression. This provision introduces a special consideration for the balancing of the interests of the freedom of expression and copyright in the public interest by requiring courts to have particular regard to the importance of the Convention right to the freedom of expression where proceedings relate to journalistic, literary or artistic material, the publication of which would be in the public interest.

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35 GRUNDGESETZ [GG] [Constitution] art.5 (F.R.G.).
36 LA CONSTITUTION FRANCAISE (1958) [Constitution].
37 *Déclaration des droits de l'Homme et du citoyen* art. 11 (1798).
38 Decisions of the Constitutional Council 71-44 DC of 16 July 1971 and 73-51 DC of 27 December 1973.
39 Paris 30 April 2003, *Ubiquité-Rev dr. techn. Inf,.* 2003/17,81, note J Verbeek and A. Wybo.
40 UK Human Rights Act (1998) s.3 (1).

Hence it appears that although in comparison to the United States it is not possible to always identify a clearly expressed guarantee of the freedom of expression within the domestic legal frameworks of EU Member States, the freedom of expression forms an ingrained value of the normative framework of most of these states.

Thus the existence of a clear conflict can be discerned between the freedom of expression (as recognized within domestic laws as well as under the ECHR) and the laws and principles relating to copyright within these legal frameworks.

III. The US Approach to Resolving the Tension: The Fair Use Exception

A. The Fair Use Exception: A Brief Overview of its Rationale, Scope and Development

One of the basic rationales of copyright law is to afford an incentive to create and disseminate new works, through the provision of exclusive rights to authors in relation to the financial exploitation of their works of authorship for a specific period of time.

However the establishment of a regime of exclusive rights has the counter-effect of hindering creative effort on the part of subsequent authors by fettering their ability to build upon the creativity of existing copyrighted works. As a consequence it imposes limits upon the manner in which such subsequent authors may exercise their freedom of expression and the ability of the public to benefit from the process of creative innovation. The resulting contradiction is considered a fundamental paradox of copyright law.

The US has opted to seek a solution to this fundamental paradox through the introduction of a fair use exception to copyright law which seeks to loosen the chains of exclusivity of copyright in appropriate circumstances.[41] Thus it has in one instance been described as '*a guarantee of breathing space at the heart of copyright*'[42]

The fair use exception applies across the board to any copyright-protected work and has the unique advantage over other statutory exceptions of possessing the necessary degree of flexibility that makes it adaptable to diverse situations and allows the accommodation of diverse policy interests within its scope.

41 Dratler, *supra* at 247.
42 *Campbell v. Acuff-Rose Music Inc.* 510 U.S. 569 at 579.

This inherent flexibility of the doctrine renders it a viable 'balancing-tool' between the conflicting interests of copyright and free speech especially in view of the intrinsic complexity of such issues that often require courts to make value judgments and to accomodate diverse policy arguments.

On the other hand the statutory codification of the fair use exception under s. 107 of the Copyright Act which provides a consistent legal framework within which the fair use exception maybe applied, endows the doctrine with the necessary structure and certainty so as to prevent its application from being abused to suit the subjective preferences of judges.

In its essence the exception seeks to exempt from liability certain modest uses of copyrighted works when those uses will not undermine the economic interests of the copyright owner,[43] by providing a defense to copyright infringement which proceeds on the basis that the unauthorized use of a copyrighted work constitutes 'fair use' of such work.

The cases of *Rosemont Enterprises v. Random House Inc.*[44] and *Williams v. Wilkins*[45] illustrate two instances where the fair use exception was employed by courts to preserve the right to information over the exclusive rights of copyright holders, where there was a strong public interest argument in favor of the preservation of the public's right to information.

The statutory codification of the fair use doctrine under s. 107 of the Copyright Act provides a non-exhaustive four factor test which courts are bound to apply in reaching a determination as to whether a particular use will qualify as a fair use of copyrighted material.[46]

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43 Schechter and Thomas, *Intellectual Property the law of Copyrights, Patents and Trademarks,* 213 Thomson West (2003).

44 *Rosemont Enterprises v. Random House Inc.* 366 F 2 d. 303 (2nd Cir. 1966).

45 *Williams v. Wilkins* 487 F.2 d 1345(Ct. Cl. 1973).

46 The four factors are as follows; the purpose and character of the use, the nature of the copyrighted work, the substantiality of the portion used and the effect of the use upon the potential market.

An important clue towards understanding the legislative intention behind the enactment of the four factor test is provided by the following statement in the House Report preceding its enactment.

> *'Indeed the doctrine is an equitable rule of reason, no generally applicable definition is possible and each case raising the question must be decided on its own facts.'*[47]

Thus as argued by one commentator, the language of the statute coupled with the foregoing statement indicate that the objective of Congress in enacting the four factor test was to provide a solid analytical basis for the application of the doctrine, without curtailing the ability of the doctrine to achieve further development and transformation at the hands of the judiciary.[48]

Hence the fair use exception has been preserved within US law as a flexible doctrine capable of adaptation, interpretation and development, to suit changing socio-economic needs and advancements in the field of technology. Thus courts in the US have been bestowed with the ability to effect such development to the doctrine as and when necessary.

Therefore considerable discretion has been vested with the judiciary to develop and to utilize the fair use exception as a mechanism to bring about an effective equilibrium between the competing values of copyright on the one hand and the freedom of speech and the right to information on the other.

B. Seeking a Comparable Doctrine in Europe

The basic approach to copyright limitations within the continental legal systems has been through the enactment of statutory limitations and exceptions to the exclusive rights granted therein. A consistent characteristic of these limitations is that they are of a specified and well defined scope and are therefore of inherent rigidity, robbing

47 H.R REP no.1476 94th Cong. 2 d Sess. 65.
48 Dratler, *supra* at 260.

them of the much needed flexibility to be used in accordance with the discretion of judges.

In England where the copyright framework is based on the common law, limitations and exceptions to copyright are based upon the statutory limitations introduced under Chapter III of the Copyright, Designs and Patents Act of 1988 ("CDPA") as well as a number of common law defenses.

With regard to the statutory limitations under the CDPA it has been noted by Laddie J that these "consist of a collection of provisions which define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection."[49] Thus it is evident that as far as the statutory limitations are concerned, these to a large extent follow the model presented by the civil law tradition of continental Europe and thus do not offer a comparable mechanism to the fair use exception.

On the other hand one of the most widely used defenses to copyright infringement in England is the fair dealing defenses which are found in s.29 and s.30 of the CDPA.

Under the fair dealing defenses, a person cannot be liable if they can show that the infringing use of copyright constitutes:

(i) fair dealing for the purposes of research or private study – s.29 (1) and (1C)
(ii) fair dealing for the purposes of criticism or review – s.30 (1); or
(iii) fair dealing for the purpose of reporting current events – s.30 (2)[50]

Although the defense does attempt to strike an equilibrium between copyright and the freedom of expression and the right to information and seeks to permit certain uses of copyright-protected material which are characteristically regarded as those which promote the

49 *Pro Sieben Media v. Carlton UK Television* [1997] EMLR 509 *cited in* Lionel Bentley and Brad Sherman *Intellectual Property Law* 199 Oxford University Press (3rd ed.,2009).

50 *See Bentley and Sherman*, 202.

public interest, the fair dealing defense cannot be used as a general exception to copyright in the public interest.

Unlike the fair use exception in the US which is an exception of general application the fair dealing defense is permitted only for the purposes specifically listed under CDPA. It is thus irrelevant that the use might be for a purpose not specified in the Act, or that it is fair in general.[51] As Ungoed-Thomas J pointed out in the case of *Beloff v. Pressdram Ltd.*[52] the relevant fair dealing must be fair dealing for the approved purpose and not dealing with what might be fair for some other purpose or fair in general. Thus the scope of the defense is limited to the particular categories of uses as defined under s. 29 and s.30 of the CDPA.

Hence it is clear that the prevailing established limitations and exceptions to copyright within Europe do not offer the inherent flexibility or scope of the fair use exception in the US which would enable them to achieve an efficient balance between copyright on the one hand and the freedom of expression and the right to information on the other.[53]

51 *Id.*

52 *Beloff v. Pressdram Ltd., (1973) 1 All E.R. 241.*

53 Althought the fair use exception specifies certain categories of uses which would normally constitute fair use of copyrighted material these form mere guidelines that are designed to assist in the determination as to whether a particular use is fair or not, unlike under the fair dealing exception they do not in any way limit the categories of uses to which the fair use exception applies.

IV. The Emerging Public Interest Exception to Copyright in Europe

In the light of the foregoing discussion it is useful to consider the possibility of the introduction of a public interest exception to copyright in Europe.

The envisaged exception would ideally be based upon the normative framework of the fundamental freedoms contained in the domestic legal frameworks of the Member States as well as the overall guarantee of the freedom of expression and the right to information under the ECHR. It would be framed in broad and general terms akin to the fair use exception of the US but be similarly subject to a basic framework of operation so as to prevent it from being used for the arbitrary curtailment of the individual rights of the copyright holder.

The remainder of this Chapter shall constitute an analysis of efforts taken in the jurisdictions under review, namely England, France and Germany, to introduce a public interest exception to copyright within their domestic legal frameworks. It shall strive to analyze the normative structure and conceptual underpinnings of these legal frameworks in terms of their conduciveness to the introduction of a broad based public interest exception to copyright and the manner in which current judicial and legislative approaches to copyright and the freedom of expression in these jurisdictions may herald the development of any future exception to copyright based upon the public interest.

A. England

The emergence of a fledgling public interest defense in English law can be traced back to the breach of confidence claims where it operated as a defense to the unauthorized disclosure of confidential information, in instances in which the information concerned and the

continued maintenance of its secrecy was considered iniquitous and its disclosure was considered to be in the public interest.

Hence the defense was originally limited to instances where the information which was sought to be disclosed was linked with some sort of iniquity or misconduct on the part of the plaintiff.[54]

With the passage of time, the defense gradually evolved into an independent common law defense of public interest which would apply even in the absence of misconduct on the part of the plaintiff where any "higher duty" for disclosure was seen to exist.[55] It has been described as a defense outside and independent of statutes, not limited to copyright cases and based upon general principles of common law.[56]

The development of the public interest defense in the Copyright law of England was triggered with the express recognition by Ungoed-Thomas J in the case of *Beloff v. Pressdram*[57] that,

> *"Public interest as a defence in law, operates to override the rights of the individual* ***(including copyright)****, which would otherwise prevail and which the law is also concerned to protect."* (emphasis added)

The case of *Lion Laboratories Ltd. v. Evans* marked the further expansion and refinement of the doctrine where it was for the first time directly applied to an action for copyright infringement. The case involved the unauthorized disclosure of confidential documents containing information which went to reveal that the intoximeters used by the police to measure the blood alchohol levels of motorists were faulty and that therefore a significant number of motorists may have been wrongly convicted.

In this case it was conclusively held that there was no requirement of evidence of an immoral act or inequity on the part of the Plaintiff

54 Rachel A.Yurkowski *Is Hyde Park Hiding the Truth?* 51 VUWL REV. 4 (2001) http://www.austlii.edu.au/nz/journals/VUWLRev/2001/51.html.

55 *Lion Laboratories v. Evans* (1985) QB 526 cited *id.*

56 *Beloff v. Pressdram Ltd., (1973) 1 All E.R. 241* at 260.

57 *Id.*

in order to give rise to the defense. Thus this decision did much to bring closer the possibility of founding an independent public interest defense in copyright law.

The introduction of a public interest defense to copyright under English law gained further impetus with the enactment of the Copyright Designs and Patents Act of 1988. The 1981 Green Paper preceding the Act stated that,

> *"...the public interest demands that not every unauthorized reproduction of copyrighted material should constitute an infringement of copyright."*[58]

When the Act finally came into being s.171 (3) seemingly introduced a statutorily codified public interest defense to English copyright law.

> *"Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise."*

Despite this gathering momentum in favour of the recognition of a defense to copyright law based upon the public interest the development of the exception suffered a considerable setback with the decision of the Court of Appeal in the case of *Hyde Park v. Yelland.*[59]

The case concerned an application for summary judgement against the *Sun* newspaper for the unauthorized publication of video stills of Diana Princess of Wales and Dodi Al Fayed which had been taken from a video film of which the Plaintiff was the copyright holder.

The Defendant argued that the unauthorized publication of the images were in the public interest since it sought to expose the falsity of a statement made to the media by a third party, Mohammed Al Fayed.

In the High Court, the Plaintiffs argued that no public interest exception to copyright existed in English law and that the fair dealing

58 Reform of the Law Relating to Copyright, Design and Performer's Protection, Cmnd 8302, HMSO, July 1981.

59 *Hyde Park v. Yelland* [2000] RPC 604 (CA); [1999] RPC 655 (HC).

exception to copyright under the CDPA expressed the extent to which infringement could be justified.

They further argued that s.171(3) of the CDPA did not provide a public interest defense to copyright infringement but was a mere statement to the effect that if such a defense existed under the present legal framework it was preserved.

This argument was effectively rejected by Jacob J who made an express statement to the effect that a public interest defense to copyright existed and was recognized -not merely preserved- by s. 171 (3) of the Copyright Act.[60]

A further argument was made against the recognition of a public interest defense on the basis that for the court to go outside the specified exceptions to copyright provided under the CDPA and to enforce some undefined public interest limitation would amount to judicial legislation, involving the court in controversial questions of public policy and thereby bring the law into disrepute.

This argument was also refuted by Jacob J, who observed that the need to balance the freedom of expression and the right to respect for private life under the Articles 10 and 8 of the ECHR would involve judges in the same or similar sort of exercise as was involved in the application of a public interest defense.[61]

Thus the decision of the High Court in this instance constituted an unequivocal statement by English courts recognizing a statutorily granted public interest defense to copyright under s.171(3) which could be applied in order to bring about about an equilibirum between the interests of copyright owners and the freedom of expression and information of the public.

In the Court of Appeal however Aldous J having ruled on the inapplicability of the defense of fair dealing upon the basis that the information which was reproduced did not relate to current events, rejected the existence of a public interest defense to copyright based upon s.171(3) on the following grounds.

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60 *Hyde Park v. Yelland* [1999] RPC 655 at 667.
61 *Id.* at 671.

Firstly he determined that copyright being a property right granted under the CDPA which also provides for express exceptions to this right in the public interest, it would be wrong for a court having rejected the application of these statutory exceptions to further restrict such right based upon an independent defense of public interest. In his view s. 171(3) was a mere recognition of the court's inherent jurisdiction not to allow its processes to be used in a way contrary to the policy of the law.

Secondly he referred to the idea expression dichotomy in copyright law, and stated that copyright seeks to protect the expression of information and not the information itself. Hence in his view there could not be a rational basis for the extension of the public interest defense existing in relation to breach of confidence claims which seek to protect the unauthorized disclosure of *information* to acts of copyright infringement which were concerned with the unauthorised use of the *expression* of information.

Thirdly he also referred to the fact that the acceptance of a general defense of public interest could be contrary to the international obligations of England i.e. the Berne Covention and TRIPS Agreement three-step test relating to copyright exceptions.

Mance J delivering an independent judgment, also denied the existence of a public interest defense to copyright based upon the disparity between the interests that were protected by the breach of confidence action and copyright infringement. He noted that copyright being a proprietary right and confidence being a personal interest it was not possible to collaborate them into one claim and to defend them with the same defense i.e. the defense of public interest. However he did accept the view that Parliament had intended via s.171(3) for the courts to retain some discretion to refuse copyright protection on public interest grounds.[62]

While the decision of the Court of Appeal in *Hyde Park v. Yelland* seemed to put an effective stop to the continued recognition of a public interest defense within the English copyright law system, a further

62 *Hyde Park v. Yelland* [2000] RPC 604 at 628.

twist was effected to this already convoluted tale by the decision given by the Court of Appeal in the case of *Ashdown v. Telegraph Group*[63] which allowed the court the opportunity to reconsider the stance it had taken in *Hyde Park.*

This case related to the publication in the *Sunday Telegraph* newspaper of excerpts of a secret memorandum concerning a possible pact between two British political parties i.e. the Labour Party and the Liberal Party. Upon the failure of sufficient grounds to establish a defense based upon fair dealing, the newspaper brought up the defense that the publication was in the public interest.

The Court of Appeal although it refused to uphold the application of the public interest defense to the facts under review, rejected Aldous J's dicta on the public interest defense in English law.

The Court reviewed the law relating to the public interest defense in the light of the Human Rights Act of 1998.[64]

It stated that the principles laid down in *Hyde Park* could not be held binding on the courts since the decision had been tendered prior to the coming into force of the Human Rights Act of 1988, and further stated that that the restriction imposed upon the freedom of expression under the CDPA had to be considered individually in every case in order to determine whether such restriction was necessary in a democratic society.

The Court of Appeal went on to state that the restriction on the freedom of expression can be justified where it was necessary for the protection of copyright, since the infringement of copyright constituted an interference with the peaceful enjoyment of possessions and with rights recognized under international conventions and under EU law.

While referring once more to the idea-expression dichotomy in copyright to support the view that on the face of it copyright would not normally impinge upon the freedom of expression since it did not prevent the publication of information, it recognized that such a con-

63 *Ashdown v. Telegraph Group* [2001] 3 WLR 1368.
64 *See* Bentley and Sherman at 220.

flict could arise in instances where the expression of the information necessitated the reproduction of specific texts or images.

The Court held that in such cases if the defenses of fair dealing and refusal of discretionary relief would not protect the public interest, a defendant could invoke the public interest defense as developed by common law and acknowledged under s.171(3).

Thus the Court expressly stated that in rare circumstances the right to the freedom of expression could override rights conferred under the CDPA as a matter of public interest. On the other hand it acknowledged the fact that the circumstances in which the public interest may override copyright are not capable of precise categorization or definition.

This is significant by virtue of the fact that it consitutes an acknowledgement by the court that the statutory exceptions stipulated in the CDPA may not always be sufficient in striking a balance between copyright and the freedom of expression, and a recognition of the need for a general public interest defense which would function in situations where other exceptions were not applicable.

It also reflects an acceptance by the courts of the need for a general public interest exception to copyright which is flexible and capable of being applied at the discretion of the judges where the specific statutory exceptions are not capable of balancing the competing interests of copyright and the freedom of expression.

Hence the present stance of English law as regards the public interest exception to copyright maybe summarized as follows.

Following *Ashdown* it may be stated that courts have recognized the fact that a public interest defense does in fact exist under English law. It has further acknowledged the need for such a defense based upon the obligation to balance the interests of copyright and the freedom of speech as required under the Human Rights Act of 1998.

However the scope of the defense as currently defined by the courts is considerably narrow. Firstly notwithstanding the substantial development that it has undergone following its intial application to actions relating to copyright infringment in *Lion Laboratories v. Evans* it has consistently been interpreted in relation to its original

application *vis a vis* claims for breach of confidence. Its present application in English law demonstrates the use of the public interest defense more as a supplementary defense to breach of confidence actions where such actions involve a claim of copyright infringement pleaded as an alternative claim to the action, as opposed to an independent defense to copyright infringement. As such its application has been restricted to instances of unauthorized publication of *unpublished works* and to the *disclosure of information* as opposed to the gamut of possible uses of copyrighted materials. Further it has been interpreted to apply only in instances where other statutory exceptions notably the defense of fair dealing is not applicable.

Thus for example as regards the illustration in Hypothetical I the unauthorized use of the copyright protected footage by Scoop Times and Explore Inc. and its uploading onto the internet by David Fans would come within the scope of the public interest exception to copyright in English law, since the footage consitutes an unpublished work the dissemination of which is in the public interest. The same reasoning may apply with regard to the situation in Hypothetical 2 on the basis that the drawing although it consitutes published material in the sense that it has been presented at a conference, has not been made accessible to the public at large.

Hence at present the public interest exception to copyright in English law represents a narrow doctrine which applies in relation to the very specific aspect of the public's right to information which has not been disseminated to the public, where it cannot be reasonably anticipated that such information will be disseminated by the copyright owner.

In its current state of development through case law, it is thus of considerably diminished value as a tool by which to achieve an equilibirum between copyright and the freedom of expression in comparison with the fair use exception in the US.

In view of the preceding discussion the issue arises as to the possibility of developing a public interest exception to copyright which could serve as a defense to copyright infringement in any form, where

such infringement can be proven to be supported by a substantially strong degree of public interest.

The foregoing analysis makes it clear that within the present legal framework of English law there is evident scope for the introduction of a public interest defense to copyright.

As discussed above the statutory limitations to copyright under the CDPA are sadly inadequate to effect a sufficient balance between copyright and the freedom of expression and the right to information.

Apart from the fact that the inherent rigidity of these limitations considerably limits the scope of their application many of these are poorly drafted[65] and others have not been updated to keep up with technological developments,[66] while some are so complicated that it is difficult to imagine anyone seeking to rely on them.[67]

One of the primary issues that arise in considering the introduction of a possible public interest exception to copyright in English law is whether s. 171 (3) does in fact provide for the possibility of the introduction of a broad-based public interest defense to copyright.

In this regard it is of worth to consider the legislative history preceding the enactment of the Copyright Act of 1988 and s.171(3).

The Whitford Committee[68] which was established to consider amendments to the Copyright Act of 1956 was presented with several proposals as to the the clarfication and enlargement of existing limitations to copyright law. One such proposal from a newspaper publishing group was to the effect that publication in the public interest

65 Burrell, *Defending the Public Interest* 9 EIPR 394,397
Id. note 31 See for example CDPA 1988 s.62 "Representation of Artistic Works on Public Display".

66 *Id.* note 32 See in particular CDPA 1988 s.29 "Fair Dealing for Purposes of Research or Study".

67 *Id.* note 33 See for example, CDPA 1988 s.33(1) "Anthologies for Educational Use".

68 *Committee to Consider the Law of Copyright and Designs*. Chairman Mr. Justice Whitford.

should be admitted as a defense, possibly subject to some limit on the quantity or quality of the material published.[69]

Significantly however, an amendment which would have expressly incorporated a general public interest defense into the Bill was withdrawn after the Government argued that the amendement was both superfluous and counterproductive.[70]

In its place s. 171(3) was inserted into the Bill during its Third Reading.

In arguing against the inclusion of a statutory public interest defense to copyright, Lord Beaverbrooke made the following observations.

> *"There is little point in codifying in a statute what is already achieved by the courts, unless decisions need developing or refining. The amendment does not add to the principle already established by the courts in any way, and I am not aware of any pressing need. On the other hand, there is a danger in attempting codification since one loses the flexibility of case law. Consequently we feel it right to leave the [permitted acts] chapter as it stands without this amendment. The Chapter sets out specific exceptions to copyright, all of them judged to be in the public interest, and does so in a way which, as far as possible, puts clear limits on the scope of the exception. It leaves in the hands of the judges those exceptional cases where it is necessary to balance public interest criteria with the rights of copyright owners."* [71]

Hence as Burrell points out this indicates that a public interest defense to copyright in English law was universally accepted by the legislature and that the reluctance to introduce an express statutory exception to copyright stemmed from the perceived need to preserve the inherent flexibility of the exception as developed by case law.[72]

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69 Report of the Committee to consider the Law on Copyright and Designs. March 1977.Cmnd 6732 page 170 Paragraph 667.

70 *See* Burrell at 403.

71 *Hansard* H.L. Vol.491 col.77 as cited in Burrell at 403.

72 Burrell at 403.

Lord Beaverbrook went onto state that,

> *"The Bill does not and cannot cover every aspect of the law of copyright."*[73]

Thus the preceding statements indicate an intention on the part of the legislature to preserve and uphold a public interest exception to copyright within the English legal framework, which is designed to act as a mechanism by which to balance the competing interests of copyright holders and the public, where the statutory exceptions introduced for such purpose by the legislature are inadequate to achieve such a balance.

Therefore it is possible to argue that s.171(3) which constitutes a general statement enabling the judiciary to take into account considerations relating to the public interest in enforcing copyright was designed to ensure that the judiciary would remain free to develop a general public interest defense outside the bounds of the statute.[74] This argument is further supported by Lord Beaverbrook's statement that,

> *"[s. 171(3)] acknowledges the continuing effect of case law without attempting to codify it, thus leaving the law on this matter where it has always been, in the hands of the courts. "*[75]

Hence it may be concluded that s.171(3) of the CDPA clearly preserves the possibility of the introduction of a broad based public interest exception to copyright in English law.

B. France

The current legal framework on French Copyright law is based upon the 1957 Law on Literary and Artistic Property[76] as amended by the

73 *Id. Hansard* H.L. Vol.491 col.77.
74 *Id.*
75 *Id.*
76 Law No.57-298 of March 11, 1957, on the Literary and Artistic Property.

1985 Law on Author's Rights and the Rights of Performers.[77] Both copyright and author's rights have further been codified in the 1992 Intellectual Property Code.[78]

The legislative history preceding the enactment of both Laws carry indications as to the need to balance the rights of authors with that of the public interest.

During the Parliamentary debates which led to the adoption of the 1957 Law, Marcel Boutet Vice-President and Rapporteur of the Intellectual Property Committee of the Government described the 1957 legislation as carrying into effect,

> *"...the synthesis of author's rights and the* ***interests of the public****, in the preeminence of the creator.*[79] *"*(emphasis added)

The Law of 1957 introduced certain statutory exceptions to the rights of authors, which were considered by one commentator to represent certain concessions to copyright in the public interest.[80] It was also considered as a recognition of the right of the public to information and culture.[81]

Similarly during the Parliamentary debates preceding the enactment of the Law of 1985, the then Minister of Culture, Jack Lang expressed the belief that the Bill represented a balance between the rights of authors and performers and the needs of various interested parties, including the public interest.[82]

Notwithstanding the sentiments expressed by the promoters of these laws and the strong tradition of cultural heritage in French law

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77 Law No. 85-660 of July 3, 1985 on Authors' Rights and on the Rights of Performers, Phonogram and Videogram Producers and Audiovisual Communication Enterprises.

78 Law No. 92-597 of July 1, 1992, on the Intellectual Property Code.

79 M Boutet, *General Considerations* [1958] XIX R.I.D.A. 13 as cited in Gillian Davis *Copyright and the Public Interest* Sweet and Maxwell (2nd Ed. 2002) at 152.

80 A Tournier *An Appraisal of the Law* [1958] XIX RIDA 79 as cited in Davis at 159.

81 E. Derieux*, Bases de donnés et droit du public à l'information* 21 Les Petites Affiches 1998, 13, as cited in Davis at 159.

82 *Journal Officiel*, session of April 2, 1985.as cited in Davis at 157.

that has consistently viewed copyright as a means by way of which such heritage may be disseminated to the public, French copyright law is considerably tilted in favor of protecting the rights of the author as opposed to the free communication of thoughts and opinions under which each citizen may … speak, write and print freely as guaranteed under Article 11 of the Declaration of Human Rights.[83]

The limitations to the rights of authors in French law are rigidly defined and the creation of novel exceptions is reserved for the legislature, leaving the courts with the limited function of applying such exceptions as provided by statute.[84]

However in recent times there has been greater willingness on the part of the legislature to impose new restraints upon the exercise of exclusive rights.

This is reflected for example by the legal measures introduced under the Intellectual Property Code, which allows for a work to be used without authorization where there is manifest abuse in the exercise of the moral right of disclosure as well as other rights of exploitation by a deceased author's representative.[85]

Further a new statutory exception was introduced to remedy the the restrictive interpretation given by the *Cour de Cassation* to the "brief-quotation exception" in the *Utrillo* case of 1993.[86] The case concerned the reproduction of certain works of the painter Utrillo in a miniature catalogue of a sale by public auction. The Court held that the reproduction of a work in its entirety, regardless of its format, cannot be held as a brief quotation under the brief-quotation exception to copyright. The new statutory exception permits the complete or

83 As noted by Marcel Boutet *"French law had from the beginning to choose between two intellectual tendencies; one which attributed the pre-eminence to the person of the author and the other that envisaged above all the purpose of the book, that is to say it's communication to the public." See* Boutet, *General Considerations* [1958] XIX R.I.D.A. 13.

84 *See* Law No.57-298 of March 11, 1957, on the Literary and Artistic Property L. 122-5-3.

85 *Id.* L.111-3, 121-3 and 122-9 as cited in Davis at 169.

86 *Cass ass. Plen.,* November 5, 1993; [1994] 159 RIDA, 320 as cited in Davis at 164.

partial reproduction of works of graphic or three dimensional art intended to appear in the catalogue of sale by public auction.[87]

In yet another decision the *Cour de Cassation* significantly upheld the public's right to information in allowing journalists to broadcast short extracts of sporting events in news programs notwithstanding the exclusive rights of the copyright holders to broadcast these events.[88]

A new law relating to freedom of communication further extends this approach by specifically limiting the exclusive right to broadcast by providing that major events may not be exclusively broadcast in such a way that an important section of the public maybe deprived of the possibility of following them live or recorded on the free television service.[89]

As noted by Davis the enactment of these new exceptions seem to reflect a welcome tendency towards greater recognition by the legislature of the need to take into account the public's right to information in the copyright context.[90]

In another decision the *Tribunal de Grande Instance* of Paris[91] was faced with the issue as to whether the unauthorized reproduction of twelve paintings of Utrillo in a program sought to be broadcast over television could be permissible use of such works. At the first instance level the Court although recognizing that the complete reproduction of a work could not come under the brief-quotation exception upheld that such use was permissible in the light of the freedom of information of the public under Article 10 of the ECHR which takes precedence over national law.[92] It determined that the right of the public to information included the right to be informed rapidly and in an appropriate manner of **newsworthy cultural events** and that the

87 Law number 97-283 of March 27,1997 Art. 17.
88 Cass lere civ. February 6, 1996 *FOCA v. FR3, Legipresse* Number 133, III, 87.
89 Law number 2000-179 of August 1, 2000 (Art. 21) as cited in Davis 168.
90 Davis at 164.
91 *Jean Fabris v. Ste FRANCE 2* Trib. de grande instance de Paris, 3rd ch, February 23,1999.
92 Davis at 169.

unauthorized reproduction did not interfere with the normal exploitation of the work.

This decision was however overturned by the Court of Appeal,[93] which significantly observed that the inherent principles of author's rights effected an adequate equilibrium between the freedom of expression and copyright by recognizing an exception for the accessory usage of works. It went on to hold that in this instance the Defendants could not proft from such exception since the use of the paintings did not constitute an acccessory use of the copyrighted works. The Court emphasized that under Article 10(2) the freedom of expression and the right to information was subject to the protection of the rights of third parties and that hence permission should have been sought to show the paintings.[94]

This in turn brings us to a consideration as to the conduciveness of the French copyright system to the introduction of a public interest exception to copyright.

The French copyright system has always acknowledged the need to achieve a balance between copyright and the interests of the public. As Davis points out this is reflected throughout the development of French copyright law. However although in recent times there has been a clear trend on the part of the courts and the legislature towards limiting the exclusive copyright in the interests of promoting the right to information, these limitations have by far been introduced in relation to specific situations and to a limited degree. As such there is as yet no doctrine in French law that is capable of general application, that could be applied to a wide variety of situations in order to bring about a balance between copyright and the freedom of expression.

However it is noted that the perceptible trend towards greater recognition of the need to achieve an adequate equilibrium between the rights of authors and performers and the public interest as well as

93 Cour d'appel de Paris, 4th. ch. May 30,2001.

94 Alain Strowel and François Tulkens *Equilibrer La Liberte D'Expression et Le Droit D'Auteur* in *Droit d'auteur et liberté d'expression: Regards francophones, d'Europe at d'ailleurs* 9 at 30 Larcier (2006).

the strong tradition of cultural heritage in French copyright law may furnish the necessary conditions to render the copyright legal framework of France conducive to the introduction of a public interest exception to copyright.

C. Germany

The copyright framework of Germany has strong constitutional underpinnings by virtue of its being derived from the basic rights guaranteed under the *Grundgesetz* (Constitution) of Germany.

The economic rights of copyright holders are protected under the right to property in Article 14 of the *Grundgesetz*. Article 14 (2) however takes cognizance of the fact that 'properties impose duties and that its use should also serve the public interest.'[95]

Under Article 3 of the Constitution expropriation is permitted only in the public interest. It may take place only by or pursuant to law which provides for compensation for such expropriation. The compensation shall be determined upon just consideration of the public interest and of the interests of the persons affected.

In addition the moral rights of authors are grounded upon the constitutional guarantee of human dignity under Article 1 and the right to personal freedom of the individual which is inviolable and may only be encroached upon pursuant to a law.[96]

It is therefore evident that as far as the economic rights of the author are concerned, the constitutional underpinning under Article 14 im-

95 E. Ulmer *Lettre d'Allemagne* [1965] Copyright 275 at 282 "*I believe in particular that the constitutional guarantee of property applies to copyright. The basic law guarantees property. In constitutional language that means that intellectual property is also guaranteed.".*

96 Decision of the Federal Supreme Court, November 26,1945, 15 B.G.H.Z. 249. Recognized the existence of a general right to personality grounded in the Basic Law *(Grundgesetz),* the court reasoned that the expression of ideas is an emanation of the personality of the author and that therefore the author had the right to decide if, and in what form his writings should be distributed to the public.

bues them with a strong notion of public interest and requires the exercise of these rights to be carried out in such a manner as to promote the social good. As Hugenholtz points out the express recognition of the social function of copyright provides a constitutional basis for limiting overbroad copyright protection.

The argument for the limitation of copyright in the public interest gains further momentum under the guarantee of the freedom of expression under Article 5 which as discussed above contains the right to express and disseminate one's opinion, the right of access to information and the freedom of the media.

Hence in comparison with the two jurisdictions discussed above, namely France and England, it appears that the legal basis for the introduction of a public interest exception to copyright is stronger in Germany, owing to the strong constitutional basis of the copyright framework with its emphasis on the social function of copyright.

A consideration of the legislative evolution of the law highlights the consistent interpretation of copyright in terms of its social function as well the emphasis on the need to limit the scope of the exclusive rights of the copyright holders, when it is so required in the public interest.

One instance in which this approach to copyright was reiterated, arose in the context of the debate which concerned the extension of the German copyright term from 30 years to a 50 year period of protection.

A prominent figure among those opposing the extension of the term Professor Ernst Heymann, expressed the view that German law, in contrast with French law, was inspired by social factors; it took account of the interest of the community, to which the interests of the individual should conform and even subordinate itself. He further argued that the period of protection was not envisaged in Germany as a limitation on a presumed perpetual intellectual property right but rather as an additional period prolonging the death of the author. Taking the various interests into account he concluded that **the in-**

terests of the German nation should always take priority in matters of copyright.[97]

> As de Boor noted, *"If we wish to protect the creative personality, it is not sufficient to provide him with a financial reward for his work. Rather personal and cultural interests should be put forward first."*[98]

In a different context he further suggested that the essential task of copyright was the establishment of an equitable balance between authors, commercial intermediaries and the general public.

The foregoing therefore gives an indication that the maintenance of an effective equilibrium between the interests of the freedom of expression and copyright has been a constant concern in the copyright framework of Germany from a very early stage and thus may be considered an inherent characteristic of the basic conceptual framework of German copyright law.

The current framework of German copyright law is contained in the Act on Copyright and Related Rights of 1965[99] as amended.[100]

The Act contains a list of limitations to copyright which have been imposed in the interests of public information in order to serve the needs of cultual life.[101]

These include a specified list of limitations to the exercise of exclusive rights, some of which allow for the free use of copyright-protected material and others which provide for the limitation of rights subject to the right of the copyright holder to the payment of equitable remuneration for such use.

Following the enactment of the 1956 Act the German Federal Constitutional Court was called upon to consider the constitutionality of

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97 E. Heymann *Die Zeitliche Begrenzung desUrhberrechts* (Berlin, Prussian Academy of Sciences,1927) cited in Davis at 189.

98 Hans Otto de Boor *Letters from Germany* (1928-1995) cited in Davis at 192.

99 *Gesetz über Urheberrecht und verwandte Schutzrechte* (*Urhebergesetz)* (1965).

100 Amendments 1972,1985 and 2007.

101 E. Ulmer *Lettre d'Allemagne* [1965] Copyright 275 at 277.

the limitations introduced to copyright, on the basis of the extent to which such limitations could be considered as justifiable in the public interest under Article 14 (2) of the Constitution.

The decisions delivered by the Federal Constitutional Court in these cases exemplify the court's interpretation of the relationship between copyright and the public interest under German law.[102]

For example in the "School-Book Case" which involved s. 46 of the Act the court emphasized that the legislature being bound by the Basic law must, in defining the privileges and duties that make up the content of the right, preserve the fundamental substance of the property guarantee under Article 14 while at the same time also keeping in line with the other constitutional provisions.[103]

It further stated that the recognition in principle of the economic rights to the author for his free disposal does not mean that thereby every conceivable means of exploitation is constitutionally secured. Thus it is for the legislature to establish adequate standards which guarantee an appropriate exploitation and a utilisation that corresponds to the *nature and social meaning of the right.*[104]

The court further stated that the constitutionality of the said provision hinges upon its justification of the public interest.

As Hugenholtz points out therefore, even without directly addressing free speech considerations, the property guarantee under the German Constitution has been held to require that a balance be struck between protecting copyright and the public interest.[105]

However it appears that the Constitutional Court has subjected this balancing of interests to a test of proportionality.

In the Church Music case where the constitutional validity of s. 52 which permitted the unauthorized use of musical works in churches

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102 Davis at 204.

103 Federal Constitutional Court July 7, 1971 Kirchen- und Schulgebrauch [1972] 3 IIC 395.

104 Davis at 206.

105 P. Bernt Hugenholtz *Copyright and Freedom of Expression in Europe* www.ivir.nl/publications/**hugenholtz**/PBH-Engelberg.doc at 4.

was considered, the Constitutional court made the following observation.

> *"The legislature is in principle required to attribute the economic control of the creative work to the author and to allow him the freedom to dispose of it at his own responsibility…legislation moreover has the task of taking the interests of the general public into consideration.* ***Yet the power of the legislative provision is not unlimited. Any restrictions on the right of use that is made in the public interest must therefore be supported on legitimate grounds.*** *An excessive restriction that is not dictated by the social demands on copyright cannot be justified by Article 14 (2) of the Basic law…"*[106] (emphasis added)

Thus as pointed out by Davis the basic rule as regards property in the form of intellectual creation is to give exclusive rights to the author. The public interest exception under Article 14 (2) arises in a negative sense and is subject to a balancing of interests on the basis of proportionality. Hence for the public interest to prevail over the interests of the author that interest must be sufficiently important to override the constitutional guarantee of property.

It is evident that the determination as to whether or not a public interest, sufficient to override the legitimate interests of the author exists is a matter for the determination of the court, and hence the court is allowed a considerable level of discretion in the balancing exercise which must necessarily proceed from the application of the proportionality test. Thus this test allows for a measure of flexibility to the judiciary in making a balanced analysis as to what rights should prevail in the interests of the public.

It maybe that the discretion afforded to the judiciary under Article 14 (2) is even broader than that offered under the fair use exception since unlike the four step test which must be observed in making a determination under the fair use exception, the courts are not ham-

106 Decision of the Federal Constitutional Court, October 25 1978, [1979] 84 U.F.I.T.A 317.

pered by any guidelines as to how the balancing exercise must be carried out.

However in a recent instance the courts did take into account the guarantee of the freedom of expression under Article 5 of the Constitution in determining an issue as to the extent to which the limitation of an author's rights for the purposes of quotation could be permissible based on the constitutional guarantee of the freedom of artistic expression under Article 5(3) of the Constitution.

In balancing the interests of copyright and the freedom of expression the Court engaged in a consideration of the significance of the interference of the author's rights and the commercial disadvantage to the author caused by the unauthorized reproduction i.e the quotation. Following such consideration they concluded that since the interference with the author's rights in the circumstances under review were not significant and did not pose a danger of any noticeable commercial disadvantage the economic rights of the author must take second place to the right of the public for artistic analysis.[107]

Hence under this approach it may be argued that the use of quotations of copyrighted material for a socially useful purpose such as the creation of a novel yet derivative work such as illustrated under Hypothetical 3, may be considered permissible use of such material under the German legal framework.

It is noted that an analogy maybe drawn between the methodology used by the judges in the present case and the four step test employed in considering the fair use exception in the US, in terms of the factors that were taken into account in determining as to whether the unauthorized reproduction of the material could be in the public interest so as to override the exclusive copyright.

Thus it appears that the German copyright framework already includes a well-developed mechanism for the balancing of copyright and the rights of the public based upon the concept of property rights as a social good which must be exercised in the interests of society.

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107 Federal Constitutional Court, 29 June 2000, *Germania 3*, 2001 GRUR149.

On the other hand however, the general trend of the German courts towards the interpretation of statutory limitations to copyright has been that limitations may only be considered exceptionally, and particularly in cases where the constitutional rights of the author are confronted with the constitutional rights of others.[108]

This seems to stem from the idea that a restrictive interpretation of copyright exceptions is warranted in order that the author should be given a reasonable share of the financial benefits as a result of his constitutional rights.[109]

This is illustrated in the decision of the German Federal Supreme Court in the *Covered Reichstag* case.[110] The case concerned an art project undertaken by a well known artist which involved the covering of the Berlin Reichstag in fabric. The Defendant took photographs of the covered Reichstag without the permission of the artist and produced and sold postcards of the same. In his defense he claimed that his act came within the exception under section 59(1) of the German Copyright Act which provided that it shall be permissible to reproduce through photography works which are *permanently* located on public ways, streets or places and to distribute and publicly communicate such copies.

In making its determination the Court balanced the interests of the copyright holder against that of the public interest and stated that the exception being a limitation to the social value that copyright usually guaranteed, it should be interpreted narrowly.[111] On the other hand it observed that the copyright holder who agrees to put his work in a public place dedicates his work to the general public who have an interest in taking pictures of public places without a license from the copyright holder. However it concluded that under the exception the public interest takes a step back when the duration of a work is limited

108 *Supra Covered Reichstag* 605-606 as cited in Postel at 146.

109 *Id.*

110 Federal Supreme Court, *Covered Reichstag* GRUR 605 (2002).

111 Holger Postel, *The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law* 5 CHI.-KENT J. INLTELL. PROP 142, 155.

as it was in this instance and that therefore the Defendant's action did not come within the scope of the exception.[112]

On the other hand the fact that the existing limitations to copyright in German law constitute narrowly defined statutory exceptions which are restrictively interpreted by the Courts, has the result that in certain instances the legitimate interests of the public may be overridden by copyright, notwithstanding the requirement in the Constitution that these rights are to be exercised in a manner so as to promote the social good. For example as Postel points out the exception under section 49(2) of the German Copyright Act which sanctions the use of copyright protected material for the purposes of news reporting is limited to the use of material which has already been publicly disseminated.

Hence under Hypothetical 1 the dissemination of the footage belonging to Sports TV would not be permissible, under German law despite the evident public interest attached to the reporting of such an event.

Thus it is noted that the Constitutional expression of copyright as a social good combined with the guarantee of the freedom of expression within the Constitution has already served to establish within the German legal tradition a strong perception as to the need to balance the competing interests of copyright and the freedom of expression in the public interest, although the manner in which the existing limitations to copyright are framed may in certain instances not enable the achievement of a successful balance between these competing values. As such it may be seen that the prevailing conditions within the German legal framework are exceedingly conducive to the introduction of a broad based public interest exception to copyright.

112 *Id.*

V. Potential Impediments to the Introduction of a Public Interest Exception to Copyright

A. The EC Copyright Directive

The European Community (hereinafter the "EC") does not have direct competency in the field of copyright. Hence the EC legal framework on copyright law is based upon a series of Community Directives which attempt to harmonize certain aspects of the law.

The current EC framework comprises seven Directives relating to copyright i.e. the Computer Programs Directive,[113] the Rental Rights Direcive,[114] the Term Directive,[115] the Copyright Directive,[116] the Satellite and Cable Directive,[117] the Database Directive[118] and the Resale Rights Directive.[119] These Directives have been addressed to all EC Member States and hence are of common application within the EC.

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113 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

114 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

115 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

116 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

117 Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

118 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

119 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

The Directives constitute binding laws which Member States are obliged to implement into their domestic legal frameworks. Hence the provisions contained in these Directives can have a direct bearing on the present discussion in terms of the manner in which they promote or hinder the introduction of a public interest defense within the EC Member States. The Copyright Directive is of particular significance in this respect.

The Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (usually referred to as the EC Copyright Directive) attempts to achieve harmonisation within the EC legal framework with respect to several essential rights of authors and neighbouring right holders, and the limitations and exceptions that may be imposed upon these rights by the national legislatures of Member States.[120]

Although the Directive applies expressly to the protection of copyright and related rights in the context of the internet, its application is not limited to the protection of copyright in the information society and it is of general application with regard to to all categories rights and subject matter that fall within its scope.[121]

It guarantees to authors, performers, phonogram producers, producers of films and broadcasting organisations the exclusive rights to reproduction, communication and making available to the public and distribution in respect of specified subject matter,[122] and was enacted with the primary objective of securing the implementation of two international treaties into the EC legal framework, namely the WIPO Copyright Treaty[123] and the WIPO Performances and Phonograms Treaty.[124]

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120 Stefan Bechtold *Directive 2001/29/EC* in *Concise European Copyright law* Thomas Dreier and P Bernt Hugenholtz (eds.) 343 Kluwer Law (2006).

121 *See* Article 1(1).

122 *See* Articles 2,3 and 4.

123 World Intellectual Property Organization, Copyright Treaty Apr. 12, 1997 S. Treaty Doc. No. 105-17 (1997).

124 World Intellectual Property Organization, Performances and Phonograms Treaty, Apr. 12,1997, S. Treaty Doc. No. 105-17 (1997).

The preamble of the Directive sets a positive note by acknowledging in Recital 31 that a fair balance of rights and interests must be safeguarded between the various categories of right holders, as well as between the different categories of rightholders and users of protected subject-matter.

Hence it appears that the Directive aims towards the achievement of an equilibrium between the rights of copyright owners and the public interest.

Towards this end a series of limitations are introduced under Article 5 of the Directive with respect to the rights granted therein. However the manner in which these limitations are framed and presented pose a serious challenge to the possibility of the introduction of a public interest exception to copyright in Europe.

Firstly these are rigidly defined and aimed to apply within a precisely delimited scope of application.

For example they apply with regard to reproductions made by publicly accessible libraries, educational establishments, museums or by archives which are not for direct or indirect economic or commercial advantage;[125] use of copyrighted works for the purpose of illustration for teaching or scientific research;[126] and reproduction by the press or use in connection with the reporting of current events to the extent justified by the infamatory purpose.[127] It is noted that save the manadatory limitation to the right of reproduction under Article 5(1) all other limitations are merely optional.[128]

Hence it is evident that although the list of exceptions provided for under Article 5 of the Copyright Directive form a comprehensive set of limitations to copyright, the manner in which they are framed do not allow the courts to exercise the necessary level of discretion so as to use them in order to strike an equilibrium between copyright and the freedom of expression.

125 Article 5(2)(c).
126 Article 5(3)(a).
127 Article 5(3)(c).
128 *See* Articles 5(2) and (3).

Further an even more serious challenge is posed to the introduction of a public interest exception, under Recital 32 of the preamble to the Directive which states that,

> "*This Directive provides for an* ***exhaustive enumeration*** *of exceptions and limitations to the* ***reproduction right*** *and the* ***right of communication*** *to the public".* (emphasis added)

Therefore, the limitations set out under Article 5 of the Directive are to be interpreted as being exhaustive with regard to the limitations and exceptions that could be introduced by the EU Member States within their domestic legal systems in relation to the right of reproduction and the right of communication to the public as provided under the Directive.

Thus it appears that with regard to the two categories of rights expressly mentioned therein, Member States are effectively prevented from introducing novel limitations or exceptions apart from those expressly mentioned under Article 5.

Thus the primary issue that arises for consideration is as to whether pursuant to Article 5 read with Recital 32, The EC Copyright Directive forms an effective bar to the introduction of a broad-based general exception to copyright based upon the public interest in Europe.

The legislative history of the Copyright Directive is considerably vague in relation to the objective sought to be achieved by the introduction of the rule in Recital 32.

The Green paper which preceded the enactment of the Copyright Directive deals only incidentally with the issue of the limitation of the rights to be protected under the Directive.[129]

However a consideration of the general discussions which took place during the drafting process as well as the general objective of

129 Green Paper: Copyright and Related Rights in the Information Society. Commission of the European Communities. Brussels 19.7.1995 COM(95)382 final; Hugenholtz *"Why the Copyright Directive is Unimportant, and Possibly Invalid* 11 EIPR 501,501-502 [2001] http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html.

the Directive which as expressed in its long title relates to the harmonization of copyright within the EU Member States, indicate that the rule in Recital 32 was introduced primarily to ensure uniformity in the application of limitations to copyright and neighbouring rights within the EU and to minimize the confusion and the resulting impediment to the free movement of goods and services within the EU that would ensue as a result of the existence of divergent standards of limitations.[130]

As noted in the explanatory memorandum to the proposal on the enactment of the Copyright Directive, it was felt that without adequate harmonization of copyright exceptions and the conditions of their application, Member States might continue to apply different categories of limitations to these rights in different forms.[131]

This serves to indicate that the purpose of Recital 32 was to ensure harmonization of standards of copyright enforcement within the EU Member States in relation to the rights specified in the Recital, as opposed to the desire to merely strengthen the scope of these rights, by ensuring that they would be encumbered by a minimum degree of limitations.

Thus this serves to establish that the primary legislative intention behind the introduction of the Copyright Directive, does not *expressly negate* the introduction of a public interest exception to copyright in

130 See for example the statement on the draft Directive issued by the European Federation of Journalists
EFJ Statement on the Draft Copyright Directive 22 December, 1999. http://europe.ifj.org/en/articles/efj-statement-on-the-draft-copyright-directive-
"The EFJ urges the European Union Member States to ensure that the copyright directive establishes an exhaustive list of non-mandatory limitations in Article 5...The harmonisation of limitations in Article 5 must be exhaustive, because without harmonisation of the limitations, Member States might continue to apply a large number of different limitations and exceptions to these rights and, consequently, apply these rights in different forms. On the other hand, it is crucial for journalists and other authors in the digital environment to have a strong legal protection against different interpretations of limitations and exceptions between Member States in respect of their national laws.

131 *See "EFJ Statement on the Draft Copyright Directive"*, page 3.

Europe although it deems desirable the establishment of a uniform standard of copyright limitations within the EC Member States.

1. Article 5 of the Copyright Directive

Although defined in very specific terms the limitations introduced under Article 5 can be seen to constitute a comprehensive body of limitations to copyright.

As Hugenholtz observes,

> *"The Commission's original aim of limiting the number of exemptions to a bare minimum, enumerated in an exhaustive manner, has backfired dramatically. In the course of the negotiations in the Council Working Group the Member States have managed to maintain most, if not all, of the limitations currently existing in national law. Thus, article 5 now lists no fewer than 20 possible exemptions. An exhaustive list indeed!"*[132]

It is further noted that the limitations set out under Article 5 do succeed in encompassing a wide spectrum of instances where the use of a copyright-protected work would be in the legitimate interests of the public.

For example Article 5(3)(k) which provides an exception with regard to the use of copyrighted material for the purposes of caricature, parody and pastiche offers a basis upon which to balance the economic interests of copyright holders against the freedom of expression of the public and individual artists to utilize copyrighted material for the purposes of jest and social commentary.

Hence although it is admitted that the limitations do not allow the legislature or the judiciary adequate flexibility to engage in a broad-based balancing exercise between the competing values of copyright and the interests of the public, it does offer limited scope for the bal-

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132 Hugenholtz *Why the Copyright Directive is Unimportant, and Possibly Invalid* 11 EIPR 501,502 [2001] http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html.

ancing of the competing values of copyright protection and the legitimate interests of the public with regard to the particular instances defined under Article 5.

However notwithstanding the limited possibility offered under the Directive for the balancing of copyright and the public interest, substantial arguments exist in favour of the introduction of a broad-based general exception to copyright independent of Article 5 of the EC Copyright Directive.

Firstly although the limitations set out under Article 5 are fairly comprehensive in scope they cannot foresee all possible instances which would require the limitation of copyright in the public interest.

Secondly as has been noted earlier, save the mandatory limitation to the right to reproduction under Article 5(1) all other limitations are merely optional and are to be adopted by Member States at their discretion.[133] Thus all the limitations set out under Article 5 may not in fact be available within the legal systems of all Member States, which would necessitate the existence of a general exception to copyright in order to effect an adequate equilibrium between copyright and the public interest.

2. Overcoming the Bar under Recital 32

Hence it remains to be considered as to whether possible means exist by which the bar placed by Recital 32 to the introduction of further limitations and exceptions to the rights enumerated thereunder may be circumvented.

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133 Article 5(2) *"Member States **may** provide for exceptions and limitations to the reproduction right provided for in Article 2 in the following cases…"* (emphasis added)
Article 5(3) *"Member States **may** provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases…"*(emphasis added).

A possible means of achieving this may be by basing the public interest exception to copyright upon the freedom of expression and the right to information as guaranteed under Article 10 of the ECHR.

Since the fundamental freedoms guaranteed under the ECHR form an external and overriding consideration to the principles enumerated within the Directive, this would make it possible to argue that a public interest exception based upon these freedoms form an overriding consideration external to the scope of the rule in the Directive.

Although the EU is not a party to the ECHR, the ECHR does regulate the conduct of the EU within its own legal order since it has been incorporated into the EU Law. Article 6 (2) of the Treaty of the European Union states that 'The Union shall respect fundamental rights, as guaranteed by the European Convention…and as they result from the constitutional traditions common to the member states, as general principles of law.'

As established in the case of *Karner*[134] the possibility exists to challenge the validity of EC legislation on the basis of its incompatibility with fundamental rights as recognized under EU law. In this respect the fundamental freedoms enumerated under the ECHR is of special significance.[135]

The case of *Laserdisken ApS v Kulturministeriet*,[136] was an instance in which Article 4(2) of the EC Copyright Directive which

134 C 71/02 *Herbert Karner Industrie-Auktionen GmbH v. Trootswjik GmbH* ECR I-3025 [2004].

135 *Id.* para. 48 *"...according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; and Case C-112/00 Schmidberger [2003] ECR I-5659 paragraph 71). ".*

136 C-479/04 *Laserdisken ApS v Kulturministeriet* ECR 1-8089 [2006].

provides that the distribution right of copyright holders shall not be exhausted within the Community in respect of the original or copies of the work except where the first sale or other transfer of ownership in the Community is made by the rightholder, was sought to be invalidated before the European Court of Justice.

The arguments put forward in support of the invalidation of the provision proceeded upon the basis *inter alia* that the provision had the effect of depriving citizens of the Union of their right to receive information, as well as the freedom of copyright holders to communicate their ideas and hence was in breach of Article 10 of the ECHR.

The ECJ, citing the case of *Kaner* upheld the principle that in accordance with settled case-law, fundamental rights form an integral part of the general principles of law of the EU[137] and that the freedom of expression, enshrined in Article 10 of the ECHR, is a fundamental right the observance of which is ensured by Community courts[138]

The Court in this instance found that Article 4(2) did not result in an infrignement of the freedom of expression as guaranteed under Article 10 of the ECHR.[139]

However it concluded that the rule under Article 4(2) maybe capable of restricting the freedom of citizens of the Union of their right to receive information under Article 10 of the ECHR.

Significantly however the ECJ cited 10(2) of the ECHR which states that the freedom of expression and the right to information as guaranteed under Article 10(1) maybe subject to limitations justified by objectives of the public interest,

> *"…in so far as those derogations are in accordance with the law,* ***motivated by one or more of the legitimate aims*** *under that provision and necessary in a democratic society, that is to say* ***justi-***

137 *Id* para. 61 citing *Karner.*
138 *Id* para. 62 citing *ERT*C-260/89 [1991] ECR I-2925, para. 44.
139 *Id.* para. 63.

fied by a pressing social need *and, in particular,* ***proportionate to the legitimate aim*** *pursued."*[140] (emphasis added)

Accordingly they held that in this instance, the alleged restriction on the freedom to receive information was justified in the light of the need to protect intellectual property rights, including copyright, which form part of the right to property.[141]

Hence the decision of the ECJ in the *Laserdisken* case forms a recognition that the restriction of the freedom of expression and the right to information under EC law maybe justified if it is necessary for the purpose of the protection of intellectual property, which in the interpretation of the court evidently constitutes a 'pressing-social need' the protection of which may comprise a legitimate reason for the restriction of fundamental freedoms as guaranteed under the ECHR.

Thus the issue arises as to whether the rule in Recital 32 may similarly be found to be justified in the interests of the protection of intellectual property.

It is submitted however that it may be possible to distinguish the rule in Recital 32 from Article 4(2) of the Copyright Directive, and to make an argument against the validity of the restriction imposed upon the freedom of expression and the right of information under Recital 32 on the basis that it contravenes the principle of proportionality, which is a basic tenant of Community law.

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140 Id. para. 64 citing C-71/02 Karner ECR I-3025 [2004], para.50. "Whilst the principle of freedom of expression is expressly recognized by Article 10 ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of *the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. " (emphasis added).*

141 *Id. para. 65.*

The principle of proportionality as recognized under EU law requires that measures implemented through Community law provisions must be,

(a) appropriate for attaining the objective pursued, and;
(b) must not go beyond what is necessary to achieve it.[142]

As per the dicta in the case of *Karner* derogations to fundamental freedoms by provisions in EC law are similarly subject to the test of proportionality.

Hence it follows that in line with the above dicta, derogations in EC legislation from the freedom of expression in the interests of copyright protection should,

(a) be appropriate for attaining the protection required, and;
(b) must not go beyond what is necessary for attaining such protection.

It is submitted that the blanket restriction imposed by Recital 32 upon the introduction of limitations to copyright external to those enacted under Article 5, is neither appropriate nor necessary for the attainment of the objective sought by it which is the achievement of enhanced standards of uniformity in copyright protection within the Member States of the EU.

It is noted that as observed earlier the rule in Recital 32 effectively vetoes the ability of Member States to bring about an adequate balance between the competing values of copyright protection and the preservation of the freedom of expression and the right to information in relation to uses which do not come within the activities enumerated under Article 5. In the light of the public interest dimension of copyright which sees the ultimate aim of copyright as the promotion of social good, such a restriction comprises an unwarranted protection of the interests of copyright holders as against the interests of the public and therefore goes beyond what is 'necessary' for the legitimate protection of copyright.

142 C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* ECR I-11453 [2002], para 122.

Although the limitations set out under Article 5 can be seen to form a comprehensive list of limitations, these cannot be considered to constitute an *exhaustive* list of instances which could give rise to a potential conflict between copyright and the legitimate interests of the public *vis a vis* the preservation of their fundamental freedoms

As Hugenholtz comments in the context of uses of copyrighted materials on the internet,

> *"The last thing the information industry needs in these dynamic times are rigid rules that are cast in concrete for the years to come. How can a legislature in his right mind even contemplate an exhaustive list of limitations, many of which are drafted in inflexible, technology-specific language, when the Internet produces new business models and novel uses almost each day?"*[143]

It is observed that this argument may be held valid not only with regard to uses in the internet but with regard to the use of copyrighted material in all other contexts as well.

It is noted that the three-step test incorporated into the Directive under Article 5 (5) should in combination with the list of copyright limitations, provide a basis for bringing about a sufficient degree of harmony within Community copyright law.[144] Hence the imposition of a further restriction on the Member States in the form of an exhautive list of limitations seems an unwarranted as well as unnecessary measure for the purpose of securing an enhanced level of harmonization of copyright within the EU. The futility of such a provision is further highlighted in terms of the fact that the Directive itself does not succeed in securing any great measure of harmonization

143 Hugenholtz *"Why the Copyright Directive is Unimportant, and Possibly Invalid* 11 EIPR 501,502 [2001] http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html.

144 Article 5(5) "*The exceptions and limitations provided for in paragraphs 1,2,3 and 4 shall only be applied in certain special cases which do not conflict with the normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.".*

within the EU by virtue of the fact that most limitations introduced under it are to be adopted by Member States at their discretion.

Hence it may be argued that Recital 32 read with Article 5 of the Copyright Directive may be challenged upon the basis that it constitutes a derogation from the fundamental freedoms guaranteed under Article 10 of the ECHR in a manner that is not proportionate to the legitimate aim of the provision.

Thus it may be considered that the possibility exists for Member States to circumvent the impediment placed by the EC Copyright Directive and to enact a broad-based public interest exception to copyright within their domestic legal systems.

B. The Berne Convention and the Three-Step Test

All EU Member States are also signatories to the Berne Convention. The EU being a Member State of the World Trade Organization, all EU Member States are bound by the TRIPS Agreement[145] and hence have adhered to the Paris Act of the Berne Convention of 1971.[146]

Thus the provisions of the Berne Convention Paris Act with regard to the the limitation of copyright, particularly Article 9 (2) are binding upon the EU legal framework as well as the domestic legal frameworks of the individual Member States.

As such the "three-step test" to copyright limitations under Article 9 (2) has also been incorporated into several of the EC Directives on Copyright law, namely the Computer Programs Directives, the Database Directive, the Rental Rights Directive and as mentioned earlier the Copyright Directive.

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145 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (Annex 1C to the Agreement Establishing the World Trade Organization), http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

146 Thomas Dreier *Berne Convention for the Protection of Literary and Artistic Works* in *Concise European Copyright law* Thomas Dreier and P Bernt Hugenholtz (eds.) 9 Kluwer Law (2006).

It has also found expression in many of the international agreements and conventions to which the EU (as well as the EU Member States individually) have acceded. For example Article 13 of the TRIPS Agreement, Article 10 (2) of the WIPO Copyright Treaty (WCT) and Article 16 of the WIPO Performances and Phonograms Treaty (WPPT) all incorporate the three step test in some form.

1. The Three-Step Test

The three-step test which was first introduced through the Berne Convention was enacted upon the need to achieve two contradictory goals in the harmonization of international copyright law.

a) To safeguard the general right of reproduction against the corrosive effect of potentially wide-ranging national limitations by the introduction of a framework within which limitations to copyright could be imposed under domestic laws.
b) To avoid encroaching upon the margin of freedom enjoyed by member countries in imposing limits to copyright granted under the domestic legal frameworks. This was achieved by introducing a fairly open-ended norm upon which limitations maybe constructed, in place of a restrictive list of permissible criteria. Thus, legislatures of Member States are bound under the Berne Convention as well as under subsequent instruments into which the test has been incorporated to ensure that limitations to copyright must be imposed in compliance with the three-step test.

The need to achieve these paradoxical goals necessitated that the test be framed in somewhat vague and possibly ambiguous terms, which makes it subject to conflicting interpretations at times.

The three-step test under Article 9 (2) of the Berne Convention is worded as follows,

> *"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works* ***in certain special cases,*** *provided that such reproduction does not* ***conflict with the nor-***

***mal exploitation of the work** and **does not unreasonably prejudice the legitimate interests of the author**."*

Thus the test incorporates three cumulative criteria in determining the compliance of a copyright limitation with the Berne Convention.

1. Basic rule: the limitations introduced to copyright must relate to "certain", "special" cases.

Conditions delimiting the basic rule:

2. The limitation should not conflict with the normal exploitation of the work.
3. The limitation should not prejudice the legitimate interests of the author.[147]

It is significant to note that although the Berne Convention makes the three-step test applicable only in relation to the reproduction right Article 16 of the WPPT, Article 10 (2) of the WCT and Article 13 of the TRIPS Agreement extends it to all categories of exclusive rights protected under these instruments.

In fact as interpreted by the WTO Panel in its decision on s.110 (5) of the United States Copyright Act, Article 13 of the TRIPS Agreement extends to all exclusive rights protected under the Agreement including those rights preserved under the Berne Convention[148] which have been incorporated into the TRIPS Agreement under Article 9 (1).

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147 Martin Senftleben *Copyright Limitations and the Three-Step Test* 131 Kluwer Law (2004).

148 This is however with the exception of moral rights preserved under Article 6*bis* of the Berne Convention which has been expressly excluded from the TRIPS Agreement. It is noted however that that since no similar exclusion can be found under the WCT, it is possible to argue that the three-step test as preserved under the WCT would apply in relation to the moral rights granted under Article 6*bis* of the Berne Convention. Nor does the three-step test apply to the economic rights vested in performer's producers and broadcasting organizations under the TRIPS Agreement. *Vide* Article 14 (6); Haochen Sun. *"Overcoming the Achilles Heel of Copyright Law"* 5 NW. J. TECH. & INTELL. PROP. 265 at page 275.

The Panel determined that the 'minor exceptions doctrine' introduced with regard to the public performance right under Articles 11*bis*(1) and 11(1) of the Berne Convention had been carried onto the TRIPS Agreement under Article 9 of the Agreement. Hence they concluded that the three-step test as incorporated under Article 13 of the Agreement would apply in relation to limitations to the reproduction right as articulated in the Berne Convention *as well as* to limitations and exceptions placed on the public performance, in accordance with the minor exceptions doctrine.[149]

The three-step test directly constrains the ability of member states to introduce limitations to copyright which are not in compliance with the above criteria. As Geiger points out,

> *"It would not only be the legislator's freedom of adaptation of the system of exceptions that would be "limited" by the imprecise rule of the three- step test but, also the judge's discretionary power."*[150]

The issue arises therefore as to whether the test can impose a barrier to the introduction of a broad and open ended public interest exception to copyright.

In this regard the decision delivered by the World Trade Organization Panel on *United States-Section 110 (5) of the US Copyright Act*[151] is of considerable relevance as this is the first instance in which a definition of the criteria of the test was offered at the international level.

149 WT/L/160/Rev. 1 para. 6.35.

150 Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*. E-Copyright Bulletin. January-March 2007. http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf.

151 Report of the Panel on *United States-Section 110 (5) of the US Copyright Act*. 15 June, 2000. (WT/L/160/Rev. 1).

The WTO Panel decision involved a determination as to the compatibility of the "home-style"[152] and "business-style"[153] exemptions to copyright under s.110(5)(A) and s.110(5)(B) of the US Copyright Act with Article 9(1) of the TRIPS Agreement. The determination of this issue necessarily required an inquiry as to the interpretation of the three-step test under Article 13 of the TRIPS Agreement. In this instance the Panel interpreted the three-step test under the TRIPS Agreement as follows.

2. *The Basic Rule: Limitations to relate to "certain" and "special" cases*

The first criterion of the test lays down the basic rule upon which limitations should be imposed. As Senftleben points out copyright limitations which are incapable of fulfilling this basic rule are inevitably doomed to fail.[154]

As such it is imperative to consider whether a general exception to copyright in the nature of the public interest exception does in fact comply with this basic rule.

One approach has been to interpret special cases to mean definite, fixed, non-variable limitations to copyright. According to Reinboth

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152 The so-called "homestyle" exemption, provided for in sub-paragraph (A) of Section 110(5), allows small restaurants and retail outlets to amplify music broadcasts without an authorization of the right holders and without the payment of a fee, provided that they use only homestyle equipment (i.e. equipment of a kind commonly used in private homes).*World Trade Organization. United States-s.110(5) of US Copyright Act http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.*

153 *Id.* The so-called "business" exemption, provided for in sub-paragraph (B) of Section 110(5), essentially allows the amplification of music broadcasts, without an authorization and a payment of a fee, by food service and drinking establishments and by retail establishments, provided that their size does not exceed a certain square footage limit. It also allows such amplification of music broadcasts by establishments above this square footage limit, provided that certain equipment limitations are met.

154 Senftleben at 132.

and von Lewisnki the term "certain special cases" is to be interpreted as requiring national laws to contain sufficient specifications which identify the cases to be exempted from these rights.[155] Unspecified wholesale exemptions are not permitted. Based upon this interpretation it is clear that the public interest exception would not succeed in passing the test, since the limitations it places upon copyright would necessarily be based upon value judgements which would not necessarily be capable of prior specific identification.

However Senftleben argues that this in fact is not the proper interpretation to be given to the term "certain special cases". In his view the term "certain" is to be interpreted as "some special cases". He justifies his argument by pointing out that the interpretation of the term as referring to "definite", "fixed and non-variable limitaitons" would effectively go against the common law Anglo-American legal tradition which necessarily prefers to impose open-ended limitations of copyright.[156]

The WTO Panel decision interpreted the first criterion of the three-step test as involving the following elements.

Firstly that the exception or limitation in national legislation should be clearly defined.[157] Significantly however the Panel proceeded to observe that this did not require national legislatures to,

> *"…identify explicitly each and every possible situation to which the exception could apply,* ***provided the scope of the exception is known and particularized.*** *This provides a sufficient degree of legal certainty."*[158]

Hence it may be argued that what is in fact required under the three step test is that the limitation to be placed upon copyright should be of a defined and specified scope in order that there may be certainty

155 Jőrg Reinboth and Silke von Lewinski *The WIPO Treaties 1996- The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty-Commentary and Legal Analysis* 124 Butterworths (1996).

156 Senftleben at 136.

157 WT/L/160/Rev. 1 Para 6.108.

158 *Id.* para. 6-108.

as to the manner in which it may be applied by courts. This does not however necessitate that there should be certainty or foreseeability as to the result that would be reached through its application.

The same argument has been made with regard to the fair use exception in the US. Several scholars have pointed out that the very flexibility of the doctrine forms an obstacle to it being "certain".[159]

However as Senftleben points out the case-by-case analysis is a typical feature of the common law approach to copyright limitation. Each holding of a US Court rendered on the basis of the fair use exception clarifies whether or not a given specific use under examination maybe fair. Thus upon this argument the limitation placed by the fair use exception would be specific as regards that particular case.

Secondly it is required that an exception or limitation should be limited in its field of application or exceptional in its scope. In other words it should be narrow in a quantative as well as a qualitative sense.[160]

In its decision the WTO Panel while holding that the "business-style exemption" to copyright was not in compliance with Article 13 since *"...a substantial majority of eating and drinking establishments and close to half of retail establishments are covered by the exemption...",*[161] held that the "home-style exemption" to copyright was in compliance with the three-step test since from a quantative perspective the reach of such exemption was limited to a comparably small percentage of establishments.[162] It thus constituted a "certain special case" within the meaning of the first criterion of Article 13.

It would appear that upon this reasoning it may be possible to argue that the public interest exception to copyright consitutes a quantatively and qualitatively sufficiently narrow doctrine so as to satisfy the three-step test under the TRIPS Agreement.

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159 Herman Cohen Jehoram *Einige Grundsatz zu den Ausnahmen im Urheberrecht* GRUR INT 807 (2001).

160 WT/L/160/Rev. 1 para. 6.109.

161 *Id.* para. 6.133.

162 *Id.* para. 6.143.

Firstly the exception would not possess an expansive reach since its application would be limited to those special cases which necessitates a balance between copyright and the legitimate interests of the public. As demonstrated by the case law in the three jurisdictions discussed above the instances that could give rise to such a consideration of competing values are not so frequent as to render the exemption to be one of an expansive scope.

On the other hand it is possible to argue that as discussed above, since the Copyright Directive already sets out quite a comprehensive list of limitations to copyright largely based upon the public interest, the public interest exception would apply largely as a supplementary doctrine to these limitations and the other statutory limitations and exceptions introduced by the national legislatures of Member States. Hence it would be possible to argue that its application is limited to a sufficiently restricted scope of instances as to make it a "certain special case" within the first criterion of the three-step test.

Thus it appears that a public interest exception to copyright containing a definite scope and operating within a well-defined framework which is applied by courts in such a way that takes the legitimate interests of the rightholder into account so as not to conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author would be compliant with the three step test.

IV. Conclusion

The preceding discussion serves to demonstrate that considerable scope does in fact exist within the copyright frameworks of England, France and Germany for the introduction of a broad-based, general exception to copyright based upon the legitimate interests of the public.

In England in particular, the groundwork for the introduction of a public interest exception has already been laid with the enactment of section 171(3) of the Copyright Act, which is further supported by a substantial body of case-law that outlines the manner in which such an exception maybe constructed. In combination these serve to establish a solid jurisprudential foundation for the introduction of a potential public interest exception within the English legal system.

On other hand the discernible trend on the part of the legislature and the judiciary of France towards granting greater consideration to the freedom of expression and the right to information of the public in the application of copyright law, coupled with the strong philosophical underpinnings of copyright as a mechanism for the promotion of cultural heritage, form positive elements which could prove conducive to the introduction of a public interest exception to copyright within the French legal tradition.

As observed earlier the strong constitutional basis of the copyright legal framework of Germany with its focus on the achievement of an effective equilibrium between copyright and the freedom of expression and the right to information provides an ideal basis for the introduction of public interest exception to copyright.

It is noted that of the three European jurisdictions reviewed in the course of the thesis Germany provides by far the most conducive framework for the introduction of an exception to copyright based on the public interest.

The need for a mechanism by which to achieve an effective equilibrium between the competing values of copyright and the freedom of expression and the right to information constitutes an imperative concern, in the light of the exponential growth of the information and communications industry in recent times which herald the gradual transition of the modern social order to a knowledge based society.

The success of such a social order would hinge upon the ability of its members to freely access information as well as to use and disseminate such information in the public interest. Thus the freedom of expression and the right to information would constitute the vital linchpin upon which a modern knowledge-based society is founded.

It is submitted that the traditional exceptions and limitations to copyright which exist within the legal frameworks of EU Member Countries are not equipped to adequately preserve and further these fundamental freedoms nor to face the rapid advancements and transformations taking place in the manner in which copyright protected works are created and disseminated in modern society.

Hence in the overall context of Europe there is considerable need as well as scope for the development of a public interest exception to copyright, although the necessary political and jurisprudential will for the development of such an exception seems largely lacking.

Hence it is hoped that the foregoing discussion would serve to contribute towards the stimulation of a general discussion as to the potential introduction of a public interest exception to copyright in Europe, in order that the future copyright framework of Europe may be well equipped to face the challenges of today's world.

Abstract

This paper constitutes an exploration of the prevailing discord between the competing values of copyright and the freedom of expression and the right to information in Europe. It seeks to analyze the possibility of resolving this discord through the introduction of a public interest exception to the legal framework on copyright in the European Union. In the course of this analysis, it engages in a comparative survey of the developments taking place in the copyright law systems of England, Germany and France *vis a vis* copyright, the freedom of expression and the public interest. Throughout the analysis, reference is made to the fair-use exception in the US as a model for the introduction of a potential public interest exception to copyright in Europe and parallels are drawn between the approaches taken in the US and Europe with regard to copyright and the freedom of expression.

Keywords: Freedom of Expression, Right to Information, Public Interest Exception, the Fair-Use Exception, EC Copyright Directive the Berne Convention, the Three-Step Test.