



MAX-PLANCK-GESELLSCHAFT

UNA
Universität
Augsburg
University

TUM
TECHNISCHE
UNIVERSITÄT
MÜNCHEN

THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON DC

MIPLC Studies

Edited by

Prof. Dr. Christoph Ann, LL.M. (Duke Univ.)
Technische Universität München

Prof. Robert Brauneis
The George Washington University Law School

Prof. Dr. Josef Drexler, LL.M. (Berkeley)
Max Planck Institute for Intellectual Property and
Competition Law

Prof. Dr. Thomas M.J. Möllers
University of Augsburg

Prof. Dr. Dres. h.c. Joseph Straus,
Max Planck Institute for Intellectual Property and
Competition Law

Volume 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

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at <http://dnb.d-nb.de>.

a.t.: Munich, Univ., Diss., 2010

ISBN 978-3-8329-5849-7

1. Auflage 2011

© Nomos Verlagsgesellschaft, Baden-Baden 2011. Printed in Germany. Alle Rechte, auch die des Nachdrucks von Auszügen, der fotomechanischen Wiedergabe und der Übersetzung, vorbehalten. Gedruckt auf alterungsbeständigem Papier.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich.

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

I. Copyright, the Freedom of Expression and the Right to Information: The Persisting Discord	15
A. Introduction	15
1. The Public Interest Exception to Copyright: A Brief Overview	16
2. The Thesis: Object, Scope and Methodology	18
B. The Discord in Context : A Case of Competing Interests	19
C. The Public Interest Dimension of Copyright	21
D. Seeking a Suitable Mechanism to Achieve the Right Balance	22
II. An Overview of the Conflict in the US and Europe	24
A. The United States	24
B. Europe	28
III. The US Approach to Resolving the Tension: The Fair Use Exception	32
A. The Fair Use Exception: A Brief Overview of its Rationale, Scope and Development	32
B. Seeking a Comparable Doctrine in Europe	34
IV. The Emerging Public Interest Exception to Copyright in Europe	37
A. England	37
B. France	47
C. Germany	52

V. Potential Impediments to the Introduction of a Public Interest Exception to Copyright	60
A. The EC Copyright Directive	60
1. Article 5 of the Copyright Directive	65
2. Overcoming the Bar under Recital 32	66
B. The Berne Convention and the Three-Step Test	72
1. The Three-Step Test	73
2. The Basic Rule: Limitations to relate to “certain” and “special” cases	76
IV. Conclusion	80
Abstract	83

List of Works Cited

- Beldiman, Dana.** *Fundamental Rights, Author's Right and Copyright – Commonalities or Divergences?* The Colombia Journal of Law and the Arts 29 (1): 39:61 (2005)
- Bently, Lionel and Sherman, Brad.** *Intellectual Property Law.* Oxford University Press (2nd Ed. 2007)
- Birnhack, Michael.** *The Copyright and Free Speech Affair: Making and Breaking Up* IDEA 43 (2):233-297 (2003)
- Boutet, M.** *General Considerations* [1958] XIX R.I.D.A. 13
- Cohen Jehoram, Herman.** *Einige Grundsatz zu den Ausnahmen im Urheberrecht* GRUR INT 807 (2001)
- Davis, Gillian.** *Copyright and the Public Interest* Sweet and Maxwell (2nd Ed. 2002)
- Derieux, E.** *Bases de données et droit du public à l'information, 21 Les Petites Affiches* (1998)
- Dratler Jr, Jay.** *Fair Use in Copyright Law* University of Miami Law Review 43 (2):233-341 (1988)
- Dreier, Thomas and Hugenholtz, P. Bernt (eds.).** *Concise European Copyright Law* Kluwer Law International (2006)
- 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->
- Geiger, Christophe.** *Droit d'auteur et droit du public à l'information: Approche de droit comparé* IRPI (2004)
- Geiger, Christophe.** *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
- Heymann, Ernst.** *Die Zeitliche Begrenzung des Urheberrechts* Prussian Academy of Sciences, Berlin (1927)
- Horspool, Margot and Humphreys, Matthew.** *European Union Law* Oxford University Press (4th ed. 2006)
- Hugenholtz, P. Bernt.** *Copyright and Freedom of Expression in Europe* www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc

- Hughenoltz, P. Bernt.** *Why the Copyright Directive is Unimportant, and Possibly Invalid* EIPR 11:501 [2001] <http://www.ivir.nl/publications/hughenoltz/opinion-EIPR.html>
- Netanel, Neil Weinstock.** *Asserting Copyright's Democratic Principles in the Global Arena* Vanderbilt Law Review 51(2):217-349 (1998)
- Nimmer, Melville B.** *Does Copyright Abridge the First Amendment Guarantee of a Free Speech and Press?* UCLA Law Review 17(6): 1180-1204 (1970)
- Postel, Holger.** *The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law* Chicago Kent Journal of Intellectual Property Law 5:142-157 (2006)
- Reinboth, Jörg and von Lewinski, Silke.** *The WIPO Treaties 1996- The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty- Commentary and Legal Analysis* Butterworths (1996)
- Rosenfield, Harry N.** *The Constitutional Dimension of "Fair Use" in Copyright Law*, Notre Dame Lawyer 50 (5):790-807 (1975)
- Schechter, Roger E. and Thomas, John R.,** *Intellectual Property the law of Copyrights, Patents and Trademarks.* Thomson West (2003)
- Sims, Alexandra** *The Public Interest Defence in Copyright Law: Myth or Reality?* European Intellectual Property Review 335:343 (2006)
- Senftleben, Martin** *Copyright Limitations and the Three-Step Test*, Kluwer Law International (2004)
- Strowel, Alain and Tulkens, François (eds.).** *Droit d'auteur et liberté d'expression: Regards francophones, d'Europe et d'ailleurs*, Larcier (2006)
- Sun, Haochen.** *Overcoming the Achilles Heel of Copyright Law*, Northwestern Journal of Technology and Intellectual Property 5(2):265 (2007) <http://www.law.northwestern.edu/journals/njtip/v 5/n2/4>
- Torremans, Paul L.C. (ed.).** *Intellectual Property and Human Rights* Wolters Kluwer (2008)
- Tournier, A.** *An Appraisal of the Law* [1958] XIX RIDA
- Ulmer, E.** *Lettre d'Allemagne* [1965] Copyright 275
- Yurkowski, Rachel A.** *Is Hyde Park Hiding the Truth?* Victoria University of Wellington Law Review 51 (2001)

Case Law

England

- Ashdown v. Telegraph Group* [2001] 3 WLR 1368
Beloff v. Pressdram Ltd. (1973) 1 All E.R. 241
Hyde Park v. Yelland [1999] RPC 655
Hyde Park v. Yelland [2000] RPC 604
Lion Laboratories v. Evans (1985) QB 526
Pro Sieben Media v. Carlton UK Television [1997] EMLR 509

European Union

- C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*
ECR I-11453 [2002]
C 71/02 *Herbert Karner Industrie-Auktionen GmbH v. Trootswijk GmbH*
ECR I-3025 [2004]
C-479/04 *Laserdisken ApS v Kulturministeriet* ECR I-8089 [2006]

France

- Danone*, Paris 30 April 2003, Ubiquité-Rev dr. techn. Inf., 2003/17
Decision of the Constitutional Council, 71-44 DC, of 16 July 1971
Decision of the Constitutional Council, 73-51 DC, of 27 December 1973
Fabris v. Loudmer Cass ass. Plen., November 5, 1993; [1994] 159 R.I.D.A
FOCA v. FR3, Cass Iere civ. February 6, 1996 Legipresse Number 133, III, 87
Jean Fabris v. Ste FRANCE 2 Tribunal de Grande Instance de Paris, 3rd ch. February 23, 1999
Jean Fabris v. Ste FRANCE 2 Cour d'appel de Paris, 4th ch. May 30, 2001

Germany

- Decision of the German Federal Supreme Court*, November 26, 1945, 15 B.G.H.Z. 249

Decision of the German Federal Constitutional Court (Kirchen- und Schulgebrauch), July 7, 1971 [1972] 3 IIC 395
Decision of the German Federal Constitutional Court, October 25 1978, [1979] 84 U.F.I.T.A 317
Decision of the German Federal Constitutional Court (Germania 3), 29 June 2000, 2001 GRUR149

United States

Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 (1994)
Eldred v. Ashcroft, 123 S.Ct. 769 (2003)
Golan v. Gonzalez,. No. 05-CV-1259 (10th Cir. Sep. 4, 2004).
Griswold v. Connecticut, 381 U.S. 479 (1965)
Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539 (1985)
Kahle v. Gonzales, 487 F.3 d 697 (9th Cir. 2007)
Luck's Music Library Inc. v. Gonzales 407 F.3 d 1262 (D.C. Cir. 2005)
N.Y Times Co. v. Sullivan, 376 U.S 254 (1964)
Rosemont Enterprises v. Random House Inc., 366 F 2 d. 303 (2nd Cir. 1966)
Williams v. Wilkins, 487 F.2 d 1345 (Ct. Cl. 1973)

Case Proceedings

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

Statutes

England

Human Rights Act (1998)

France

Constitution de la République française [Constitution] (1958)

Déclaration des droits de l'Homme et du citoyen (1798)

Law No.57-298 of March 11, 1957, on the Literary and Artistic Property

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

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

Law No. 97-283 of March 27, 1997, Transposing into the Intellectual Property Code EEC Council Directives Nos. 93/83 of September 27, 1993 and 93/98 of October 29, 1993

Law No. 2000-719 of August 1, 2000 modifying Law No.86-1067 of 30 September, 1986 on the Freedom of Communication

Germany

Grundgesetz für die Bundesrepublik Deutschland [Constitution] (1949)

Gesetz über Urheberrecht und verwandte Schutzrechte (Urhebergesetz) [Copyright Act] (1965)

United States

Constitution of the United States of America (1776)

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

Legislative Material

United States

House Report no.1476 94th Cong. 2 d Sess. 65

England

Hansard H.L. Vol.491 col.77

Report of the Committee to consider the Law on Copyright and Designs.
March 1977, Cmnd 6732

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

Green Paper: Copyright and Related Rights in the Information Society. Commission of the European Communities. Brussels 19.7.1995 COM (95)382 final

France

Journal Officiel, April 2, 1985

Treaties and Other International and Regional Instruments

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

Berne Convention for the protection of literary, artistic works, 1886 (Paris Text 1971)

Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (1950)

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

International Covenant on Civil and Political Rights, December, 16, 1966, G.A. res. 2200A [XXI]

Treaty on European Union 31 ILM 247; 1992 O.J. (C191) 1

Universal Declaration of Human Rights., December 10, 1948 G.A. res. 217A (III)

Vienna Convention on the Law of Treaties (1969) 17 ILM 1488 (1978)

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

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

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