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Is “fair use” an option
for U.K. copyright legislation?

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Is “fair use” an option for U.K. copyright legislation?

By

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A. Introduction*

U.K. copyright law grants broad exclusive rights to encourage authors to create and to distribute new works. These exclusive rights are counter-balanced by provisions that allow limited use of copyrighted material without requiring permission from the rights holder. The exceptions to copyright infringement contained in the Copyright, Designs and Patents Act 1988 (CDPA) stipulate that certain acts will not infringe copyright in a work; notwithstanding that they would otherwise fall under the normal definition of infringement.[1] The permitted acts strike the balance between the exclusive rights of a copyright owner and the public's need for access.[2]

Perhaps the most significant defences to copyright infringement are the fair dealing provisions that are codified in ss. 29 and 30 CDPA. These defences apply solely to acts that comply with the purposes of an allegedly infringing act specifically listed in the CDPA. The limitedness of the permitted purposes is one of the main reasons why the doctrine of fair dealing has been under attack for some time. Voices calling for an adoption of the more general doctrine of "fair use" grew in the recent past.[3] The concept of fair use is a parallel concept to the fair dealing provisions in the U.K. But in contrast to the fair dealing provisions a fair use provision is not limited to certain purposes of the allegedly infringing act. The most eminent representative of a fair use doctrine is by far the U.S.[4]

In the 2005 Pre-Budget Report the then Chancellor of the Exchequer, *Gordon Brown*, commissioned *Andrew Gowers* to review whether the intellectual property system in the U.K. is fit for purpose in an era of globalisation, digitisation and increasing economic specialisation.[5] In his review *Gowers* identified the current fair dealing provisions as being of low flexibility.[6] Although parallels to the more flexible U.S. doctrine

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* Many thanks are due to *Alexis James*.

1 *Bainbridge*, Intellectual Property[6], 194; *Dworkin/Taylor*, Blackstone's guide to the CDPA, 70; *Flint/Fitzpatrick/Thorne*, User's guide to copyright[5], 113; *Torremans*, Intellectual property law[4], 248.

2 *Bainbridge*, Intellectual Property[6], 194; *Griffiths*, IPQ (2000), 164 (169); cf. *Bently/Sherman*, Intellectual Property Law[2], 190.

3 Other Commonwealth countries, e.g. Canada and Australia, have seen a similar debate on the adoption of a fair use doctrine into their copyright law. In May 2005 the Australian government published an Issues paper calling for submissions on fair use and other copyright exceptions. In particular, the government seeked opinions on whether the fair dealing exceptions stipulated in the Australian Copyright Act should be replaced by an open-ended fair use exception. In December 2006 the Copyright Amendment Act received Royal Assent. Although the Act introduced a series of new exceptions (e.g. parody, satire and a limited private use exception) into Australian copyright law the fair dealing provisions were broadened and not replaced by a model which resembles a fair use exception. The Issues Paper "Fair use and other copyright exceptions" and the various submissions to it are available on the internet: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005> (visited on 3 November 2007). The Copyright Amendment Act 2006, particularly Schedule 6, pages 91 et seq., is available on <http://www.comlaw.gov.au> (visited on 3 November 2007).

4 This article will therefore focus on the law of the United States in regard to the doctrine of fair use.

5 *Gowers* Review, Foreword, 3.

6 *Gowers* Review, 44, 61 et seq.

of fair use were drawn in the *Gowers* Review[7] it was not proposed to adopt such a doctrine. Instead of such a radical overhaul *Mr. Gowers* recommended to increase the flexibility of the current provisions by introducing more permitted purposes such as parody and by introducing a limited private copying exception.[8] Furthermore, he suggested that Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)[9] be amended to allow for an exception for transformative and orphan works.[10] The *Gowers* Review was published in early December 2006. Shortly thereafter the then Prime-Minister-in-waiting Gordon Brown presented his tenth Pre-Budget Report and called on the EU to amend its copyright laws in accordance with the recommendations made in the *Gowers* Review.[11] Meanwhile the European Commission itself had commissioned a study on the implementation and effect in member states' laws of Directive 2001/29/EC in 2005. The Study was published in February 2007. It examined whether the application of the Directive in light of the development of the digital market responds to the question of whether the Directive, as currently formulated, remains the appropriate response to continuing challenges.[12] It was announced in the Study that actual harmonisation for the provisions on limitations and exceptions to copyright infringement has hardly been achieved among the member states. Therefore, action by the EC legislator to remedy this lack of harmonisation was recommended.[13] As in the *Gowers* Review the concept of fair use was considered as an alternative to the current provisions. But again, it did not find its way into the recommendations for legislative activity.[14]

What the *Gowers* Review demonstrated clearly is that the defences to copyright infringement contained in the fair dealing provisions of the CDPA need to be amended. But it stopped short of proposing that a broad fair use doctrine should be introduced. Whether the current fair dealing provisions in the U.K. should be replaced by a simple test of "fair use" is the question that this article will answer. Is "fair use" a desirable option for U.K. copyright legislation?[15]

Chapter B introduces the doctrine of fair use and the fair dealing provisions in the U.K. Chapter C surveys the advantages of a fair use concept on the one hand and the disadvantages of the fair dealing defences in the U.K. on the other hand. Chapter D elaborates on the legal issues which would be entailed by an adoption of a fair use doc-

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7 Cf. *Gowers* Review, 40, 62, 66.

8 *Gowers* Review, 6.

9 Directive 2001/29/EC was implemented into U.K. legislation on 31 October 2003.

10 *Gowers* Review, 6, 68, 71.

11 Cf. *The Times*, 6 December 2006, "Brown will go into battle against film and music pirates", available on the internet: <http://business.timesonline.co.uk/tol/business/industry_sectors/media/article661265.ece> (visited on 3 November 2007).

12 Study on the implementation of Directive 2001/29/EC, Preface, available on the internet: <http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm> (visited on 3 November 2007).

13 *Ibid.*, 166, 168.

14 Cf. *ibid.*, 175, 178.

15 This article will not elaborate on legislative proposals to amend the fair dealing defences or on proposals to create new defences to copyright infringement alongside the fair dealing provisions. This has already been done in detail in the *Gowers* Review and in the Study on the implementation and effect in member states' laws of Directive 2001/29/EC.

trine and which would be omitted, if the fair dealing provisions remained in the CDPA. Chapter E then shows that the mere implementation of a fair use test might not make the law more flexible, unless accompanied by a change of judicial attitudes.

B. The concepts of fair use and fair dealing

I. The fair dealing defences to copyright infringement in the U.K.

Among the exceptions to copyright infringement are the fair dealing provisions that are codified in ss. 29 and 30 CDPA. Pursuant to these provisions, a person is not liable for copyright infringement, if his act amounts to fair dealing for the purposes of non-commercial research or private study (s. 29(1), 29(1C)), for the purposes of criticism or review (s. 30(1)), or for the purpose of reporting current events (s. 30(2)). One characteristic of fair dealing is that it is only permitted for the purposes listed in the CDPA which means that it is irrelevant whether the dealing is fair in general or fair for a purpose not specified in the Act.[16] If a dealing falls within one of the purposes specified in the CDPA, its fairness must then be shown. What is fair is however not defined in the Act. It is rather a question of degree and impression[17]. Guidance can nevertheless be drawn from case law which has developed factors that are considered relevant to determine fairness. The importance given to each of these factors depends on the circumstances surrounding the infringing act and therefore varies according to the case in question.[18] Among the factors are the quantity and quality of what has been taken from the copyrighted work,[19] the use made of the work in question, particularly the question whether the alleged fair dealing is commercially competing with the copyrighted work,[20] and the motives of the alleged infringer[21].

II. The fair use doctrine

The U.S. operates a general doctrine of fair use as a defence to copyright infringement.[22] It is codified in s. 107 of the United States Copyright Act 1976 (USCA). This section stipulates that fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether a use is fair, a judge is required to

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16 *Beloff v Pressdram*, (1973) 1 All ER 241 (262) (Ungoed-Thomas J); *Burrell*, IPQ (2001), 361 (362); *Bently/Sherman*, Intellectual Property Law[2], 193; *Copinger*, para. 9-07; *Dworkin/Taylor*, Blackstone's guide to CDPA, 71.

17 *BBC v BSB Ltd*, (1992) Ch 141 (149) (Scott J); *Beloff v Pressdram*, (1973) FSR 33 (61) (Ungoed-Thomas J); *Hubbard v Vosper*, (1972) 2 QB 84 (94) (Lord Denning MR).

18 *Bainbridge*, Intellectual Property[6], 197; *Bently/Sherman*, Intellectual Property Law[2], 194; *Torremans*, Intellectual property law[4], 253 et seq.

19 *Hubbard v Vosper*, (1972) 2 QB 84 (94) (Lord Denning MR); *Bently/Sherman*, Intellectual Property Law[2], 195.

20 *Newspaper Licensing Agency v Marks & Spencer*, (2001) Ch 257 (280) (Chadwick LJ); *Hyde Park v Yelland*, (2000) EMLR 363 (379) (Aldous LJ); *Bently/Sherman*, Intellectual Property Law[2], 195.

21 *Hyde Park v Yelland*, (2000) EMLR 363 (379) (Aldous LJ); *Pro Sieben v Carlton UK Television*, (1999) FSR 610 (620) (Walker LJ); *Bently/Sherman*, Intellectual Property Law[2], 195 et seq.

22 *Leaffer*, 62 Ohio St. L.J. (2001), 849 (865); *Newby*, Stan. L. Rev. 51 (1998-99), 1633 (1642).

consider four factors: The purpose and character of the use (s. 107(1) USCA), the nature of the copyrighted work (s. 107 (2) USCA), the amount and substantiality of what has been taken from the copyrighted work (s. 107(3) USCA), and the effect of the use upon the potential market for the copyrighted work (s. 107(4) USCA). The House Report accompanying the bill which was enacted as s. 107 USCA indicates that the fair use exception to copyright infringement is a broad and flexible doctrine.[23] The Report states that "since 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. […] the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[24]

Consequently, in respect of the vast scope of the doctrine, the list of uses in s. 107 USCA is not exhaustive, so that a conduct for any purpose may be fair use if it satisfies the requirement of fairness.[25] Moreover, the words "shall include" in s. 107 USCA indicate that the factors specified in this section are not exhaustive either and that a judge must consider the four factors when determining whether a particular use is fair.[26] The listed factors serve as guidelines rather than confining rules and since other considerations are permissible, courts are free to take non-statutory factors into account whenever they appear relevant.[27] Thus, the weight that is given to a certain factor depends on the facts of the particular case.[28]

III. The fairness of a use or dealing

In regard to the question whether a dealing or use is fair, U.K. and U.S. law bear certain similarities. The four factors stipulated in s. 107 USCA resemble the factors that were developed by the English courts. A U.S. court can further rely on any non-statutory factor and as in the U.K. the weighing between the different factors can vary depending on the facts of the case in question. Furthermore, if the fair dealing defences of the CDPA were replaced by a fair use test, there would be no need to integrate any factor that indicates whether a use is fair into the statutory language. A simple fair use test that only deals with the purposes of a use could be enacted and in determining the fairness of such a use reliance on English case law could be made. Therefore, this article will focus on the permitted purposes of a use or dealing. It will elaborate on the advantages and disadvantages of the concept of fair use which applies to all types of work and which is not limited to an exclusive set of purposes.

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23 *Dratler*, U. Miami L. Rev. 43 (1988), 233 (258); *Newby*, Stan. L. Rev. 51 (1998-99), 1633 (1637); *Weatherall*, Fair use, fair dealing, 8; cf. *Stewart v Abend*, 495 U.S. 207 (236) (1990) ("the very creativity which that law [*s. 107 USCA*] is designed to foster").

24 H.R. Rep. No. 1476, 94th Congress, 2nd Session, 65 et seq.; cf. *Sony Corp of America v Universal City Studios Inc*, (1984) 2 IPR 225 (245) (SC(USA)).

25 *Campbell v Acuff-Rose Music*, 510 U.S. 569 (1994); *Cohen*, EIPR (1999), 236 (238); *Newby*, Stan. L. Rev. 51 (1998-99), 1633 (1637); cf. *Stewart v Abend*, 495 U.S. 207 (236) (1990).

26 *Stewart v Abend*, 495 U.S. 207 (236) (1990); *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 U.S. 539 (560) (1985); *Lehman*, US Report of the Working Group on IPRs, 79.

27 *Dratler*, U. Miami L. Rev. 43 (1988), 233 (258, 333); *Newby*, Stan. L. Rev. 51 (1998-99), 1633 (1639).

28 *Dratler*, U. Miami L. Rev. 43 (1988), 233 (258); *Newby*, Stan. L. Rev. 51 (1998-99), 1633 (1639).

C. Advantages of a fair use test / Disadvantages of the fair dealing defences

I. Flexibility of fair use vs. rigidity of fair dealing

One of the features of a general fair use doctrine is its breadth. It is broadly applicable to all kinds and uses of copyrighted work. Thus, the doctrine can apply to an endless variety of cases and the courts can adapt it to new situations through a case-by-case development, if the circumstances so demand. A fair use test offers much greater flexibility than the fair dealing defences in the CDPA which are limited to a specific set of purposes of the use.[29] Through its flexibility a fair use test accommodates the challenges posed by rapid technological developments[30] because judges can determine the existence of additional purposes to which fair use can apply. They are not tied to a statutory language which might become obsolete as technology changes. The capacity of such a dynamic doctrine to retain its relevance even for new demands which are created by the digital environment is proven by the U.S. fair use provision (s. 107 USCA) which did not require constant revision in order to keep pace with technological breakthroughs such as the personal computer and the internet.[31]

1. Inflexibility of the fair dealing defences

To the contrary, the fair dealing provisions in the U.K. are more restrictive in scope as well as in their applicability, since they only apply to uses for specific, finite purposes. Moreover, s. 29(1) CDPA for instance does not include dealings which take place with broadcast, sound recording or film. It would therefore not be possible for a researcher to copy a part of a sound recording without infringing the copyrighted work; although he would not infringe the underlying musical work with his copying. Hence, it can be argued that the limited scope of s. 29(1) CDPA does not appropriately represent the increasing importance of non-textual media for study and research.[32]

The rigidity and the narrowness of the fair dealing provisions are criticized by scholars[33] who opine that these provisions leave no flexibility for the law to adapt itself to future technological changes.[34] Take format shifting for instance. Format shifting refers to an act of an individual changing the format of a copyrighted work with the help of technical devices; e.g., the individual copies a video he or she owns into a digital format or copies music from a CD that he or she purchased onto a computer or MP3 player for personal use. U.K. copyright law lacks a provision which allows copy-

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29 *Copinger*, para. 9-07; *Laddie*, EIPR (1996), 253 (258); cf. *Gervais*, The reverse three-step test, 27; *Weatherall*, Fair use, fair dealing, 8 (for Australian law).

30 *AU Copyright Law Review Committee*, Simplification of the Copyright Act 1968, para. 6.08; *Carroll*, Fixing Fair Use, 64 et seq.; *Macmillan*, Dig. Tech. L.J. (1999), 13.

31 *Tasini v New York Times Co.*, 972 F. Supp. 804 (816) (S.D.N.Y. 1997); *Ayers*, U. Pitt. L. Rev. 62 (2000-01), 49 (76).

32 *Copinger*, para. 9-08.

33 *Laddie*, EIPR (1996), 253 (258); cf. *Burrell*, IPQ (2001), 361 (365); *Weatherall*, Fair use, fair dealing, 17 (for Australian law).

34 *AU Copyright Law Review Committee*, Simplification of the Copyright Act 1968, para. 6.06-6.08; cf. *Power*, EIPR (1997), 444 (452 et seq).

ing for private or personal use. Therefore, format shifting of copyright material infringes copyright under U.K. law and is prohibited.[35] This situation is out of step with consumer attitudes and the technological development.[36]

Focusing on the very recent past, Google's Book Search is another example to which the fair dealing provisions are unlikely to apply. Google scans into its search database books and other materials from the libraries it cooperates with. When a user enters a search query online Google's Book Search searches the full text of books that are stored in the digital database. In response to the search query, the user will be able to fully browse public-domain works, but only some pages or some sentences of text in books that are still covered by copyright. Google's Book Search includes two actions that raise copyright concerns. Firstly, Google copies the full text of copyrighted books into its search database. Secondly, Google provides the reader with segments of the copyrighted book in response to the search query. Both actions fall within the scope of the doctrine of fair use under U.S. copyright law.[37] Currently, several lawsuits are pending before U.S. courts which were filed against Google's Book Search.[38] Under U.K. copyright law however, Google's Book Search is unlikely to satisfy any of the purposes given in the fair dealing provisions.[39] Since neither the fair dealing defences nor any other defence to copyright infringement would apply, Google's Book Search would infringe U.K. copyright law from the very outset.

Particularly the latter two examples – format shifting and Google's Book Search – demonstrate that it is impossible to predict new uses to which new technologies may give rise. Fair dealing provisions that only allow for a limited number of purposes of an act can never be comprehensive in their coverage and therefore may discriminate against digital technology and the dynamism of the information society. Besides, although Parliament can try to keep the law abreast to current developments, the legislative process can last for years so that the law stays frozen and remains outdated for a long time before its amendment. This is not to say that the law may remain outdated even after its amendment due to novel uses that have evolved in the meantime.

2. Flexibility of fair use: Reverse engineering of computer programs

One example which shows the flexibility of the fair use doctrine in contrast to the fair dealing defences is the method of reverse engineering of computer programs. Generally, reverse engineering requires the deconstruction of the original program's literal code. The results obtained can then be used to create compatible and interoper-

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35 *Gowers* Review, 62.

36 *Gowers* Review, 62 et seq.; cf. *House of Representatives*, Copyright Amendment Bill 2006, explanatory memorandum, 6 (for Australian law), available on the internet: <http://legislation.gov.au/ComLaw/Legislation/Bills1.nsf/0/D052936F5620B888CA25721000039385/$file/06157em.pdf> (visited on 3 November 2007).

37 *Band*, JIBC 10 (2003), no. 3; *Ganley*, Google Book Search, 7 et seq., available on the internet: <http://www.ssrn.com> (visited on 3 November 2007). Cf. *Ganley*, Google Book Search, 12 et seq. and *Travis*, U. Miami L. Rev. 61 (2006), 601 (637 et seq.) for a detailed fair use analysis of Google's Book Search.

38 Cf. *Ganley*, Google Book Search, 5 et seq. and *Travis*, U. Miami L. Rev. 61 (2006), 601 (626 et seq.) for more details on the lawsuits issued against Google.

39 *Ganley*, Google Book Search, 20, 35.

able programs which may contain code of the original program to such a degree that it amounts to copyright infringement.[40] In order to allow reverse engineering of computer programs under fair dealing in the U.K. it would have to qualify as occurring for the purposes of non-commercial research or private study. However, concerning one of the main reasons of the reverse engineering effort which is to use the new standardized product solely for commercial purposes, it seems hardly imaginable that reverse engineering of computer software would be covered by research or private study[41]. Reverse engineering is nonetheless covered by s. 50B CDPA.[42] Likewise, it is covered by a specific provision – s. 1201(f) USCA, introduced by the Digital Millennium Copyright Act 1998 – in the U.S. But before its codification into U.S. law the fair use defence had been applied in reverse engineering cases.[43] Hence, contrary to the fair dealing defences in the U.K., the fair use doctrine has shown itself more flexible and broad to include these cases.

3. Flexibility of fair use: The importance of the issue of fairness

Moreover, the flexibility of the fair use doctrine to adapt to changing needs is not only secured through its potential boundlessness of purposes of a use that it recognizes. It is also preserved by the fact that an U.S. court can rely on any non-statutory factor when considering the issue of fairness and may vary the weight given to each of the factors according to the specific facts of the case. However, as indicated above, English courts follow a similar approach to fairness as their U.S. counterparts and reliance on case law could be made in regard to fairness, if a simple fair use test was introduced into U.K. law. Thus, the influence of the fairness-determining process towards the advantages and disadvantages of a fair use doctrine is not further scrutinised in this article.

II. Simplicity of fair use vs. complexity of fair dealing

Another advantage of a fair use test is its simplicity. It combines all possible fair dealing exceptions into one single and short provision; thereby simplifying its wording and structure which makes the law simpler to read and easier to understand for users.[44] In contrast, the current fair dealing provisions in the U.K. are a complex set of rules. For instance, according to s. 29(4) CDPA the conversion of a computer program cannot constitute fair dealing. However, s. 29(4) CDPA also refers to s. 50B CDPA which permits such an act if certain conditions are fulfilled. This system of exception to copyright infringement (s. 29(1)), exception to the exception (s. 29(4)(a),(b)) and

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40 *Handa*, McGill L.J. 40 (1995), 621 (632 et seq.).

41 *Burrell*, IPQ (2001), 361 (387).

42 This provision was introduced into the law as a result of the Computer Program Directive (Directive 91/250/EC).

43 *Sega Enterprises Ltd v Accolade*, Inc. 977 F2d 1510 (9th Cir. 1992); Atari *Games Corp. v Nintendo of America, Inc.*, 975 F2d 832 (Fed. Cir. 1992); *Handa*, McGill L.J. 40 (1995), 621 (684).

44 *Ricketson*, EIPR (1999), 537 (537, 549); cf. *AU Copyright Law Review Committee*, Simplification of the Copyright Act 1968, para. 6.02-6.08; *Weatherall*, Fair use, fair dealing, 8.

exception to the exception for the exception (s. 50B) which also contains references to other relevant provisions (cf. s. 29(4),(4A)) was introduced into the CDPA in order to implement the EC Software Directive[45]. It exemplifies the danger that future legislative amendments which are necessary to keep the law in accordance with technological developments provide for more detailed and nested provisions which make the law more complex and more difficult to understand.

A certain degree of complexity in the law may nevertheless be required when legislation deals with technical subjects, such as computer software or telecommunications, because lay language may be inadequate to represent the nuances of these issues.[46] Hence, even a fair use test would not be immune to possible future amendments which may add complexity to its language, if the technological developments so require.

D. Disadvantages of a fair use test / Advantages of the fair dealing defences

I. Uncertainty of fair use vs. predictability of fair dealing

Since a simple fair use test is not restricted to an exhaustive set of purposes and comprises all types of work, its application is a case-by-case determination. Due to this open-ended approach, the contours of the fair use doctrine remain vague and the outcome of fair use cases is said to be hardly predictable.[47] The uncertainty of the doctrine in how a court will finally decide is part of what has led to its reputation as the most troublesome doctrine in U.S. copyright law.[48]

1. The interpretation of fair use depends on the judge's personal perspective

It is therefore comprehensible that the doctrine often fails to provide concrete guidance for the parties[49] and fosters litigation[50] if the interpretation of the fair use defence depends considerably on the judge's personal perspective[51]. The balancing process between the copyright holder's rights and the public interest in the dissemination of the work it thus likely to be influenced by the relative copyright expertise of the court and the personal value system of individual judges[52]. Although this balancing process partly requires the selection among competing values by judges – particularly

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45 *Bently/Sherman*, Intellectual Property Law[2], 200.

46 *Ricketson*, EIPR (1999), 537 (537).

47 *Leaffer*, Ohio St. L.J. 62 (2001), 849 (852, 855); *Leval*, Harv. L. Rev. 103 (1990), 1105 (1106 et seq.); *Okediji*, Colum. J. Transnat 39 (2000), 75 (118); cf. *Burrell/Coleman*, Copyright Exceptions, 250 et seq.; *Carroll*, Fixing Fair Use, 20; *Weatherall*, Fair use, fair dealing, 8 et seq.

48 *Universal City Studios v Sony Corp. of America*, 659 F.2d 963 (969) (9th Cir. 1981); *Dellar v Samuel Goldwyn, Inc.*, 104 F.2d 661 (662) (2nd Cir. 1939); cf. *de Zwart*, IPQ (2007), 60 (87 et seq.).

49 *Bently*, Dig. Tech. L.J. (1999), 2; *Carroll*, Fixing Fair Use, 13 et seq., 36; *Leaffer*, Ohio St. L.J. 62 (2001), 849 (855).

50 *Bently*, Dig. Tech. L.J. (1999), 2; *Weinreb*, Fordham L. Rev. 67 (1998-99), 1291 (1309).

51 *Ayers*, U. Pitt. L. Rev. 62 (2000-2001), 49 (76); *Dratler*, U. Miami L. Rev. 43 (1988), 233 (255 et seq.); *Laddie*, EIPR (1996), 253 (258); cf. *Leval*, Harv. L. Rev. 103 (1990), 1105 (1106 et seq.).

52 *Dratler*, U. Miami L. Rev. 43 (1988), 233 (255 et seq.); *Okediji*, Colum. J. Transnat 39 (2000), 75 (119).

when a judge needs to determine the fairness of a use – construing the whole doctrine of fair use on judicial discretion explains why scholars criticize the doctrine for its absence of consistent, principled application.

2. The benefits of the need of legislative activity to add new exceptions

Moreover, even though new purposes can come within the scope of the fair use doctrine, before the contours of a new exception are clearly worked out by the courts, delay and expenses in courtrooms are likely to occur.[53] This delay and additional expenses for "test cases" are omitted by the fair dealing system in the U.K. which requires legislative activity in order to add new purposes to it. Legislative activity also has the advantage that it is best suited to deal with political issues and that is what determining fair use is often about.[54] For instance, if the technical progress creates new uses or purposes, it needs to be clarified where the line is to be drawn between the exclusive rights of copyright owners and the public's need for access. This process often involves rights of large groups; and it is the pre-legislative stage that assures that proponents of each side can expound and defend their interests. Consequently, the fair dealing provisions in the U.K. provide for legal certainty through a catalogue of specifically defined exceptions that can only be enlarged by Parliament. It has further the advantage in that each of the statutory exemptions reflects a legislative compromise between relevant industry groups.

II. Non-compliance of a fair use test with U.K.'s international treaty obligations

If a fair use test were to replace the current fair dealing provisions, it would also have to be consistent with U.K.'s international treaty obligations. The U.K. is a member state of the Berne Convention and of the Agreement on trade-related aspects of intellectual property rights (TRIPS) which both provide for limitations and exceptions to copyright infringement.[55]

1. The "three-step test"

Art. 9(2) Berne Convention contains what is known as the "three-step test": Three conditions which must be satisfied when exceptions to the reproduction right are introduced into national legislation. TRIPS adopted the Berne Convention's three-step test in its art. 13 and broadened its scope since the test is applicable to any limitations and exceptions to any of the exclusive rights guaranteed under TRIPS.[56] The three-step test requires that (a) all limitations or exceptions must be confined to

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[53] *Carroll*, Fixing Fair Use, 10, 36; cf. *Handa*, McGill L.J. 40 (1995), 621 (684); *Ricketson*, EIPR (1999), 537 (543).

[54] *Leaffer*, Ohio St. L.J. 62 (2001), 849 (866).

[55] *Bainbridge*, Intellectual Property[6], 16 et seq.; *Bently/Sherman*, Intellectual Property Law[2], 37-41.

[56] WTO, *United States – Section 110(5) of the US Copyright Act*, Report of the Panel on 15 June 2000, WT/DS160/R, para. 6.74; *Bently/Sherman*, Intellectual Property Law[2], 37-41; *Goldstein*, International copyright, 294; *Sterling*, World copyright law[2], para. 10.13.

certain special cases, (b) do not conflict with a normal exploitation of the work, and (c) do not unreasonably prejudice the legitimate interests of the author.[57]

2. Non-compliance of a fair use test with the three-step test

The crucial question in regard to the compliance of a fair use test with the Berne Convention and TRIPS is whether such a test is confined to certain special cases. Whereas some scholars argue that the fair use provision in the U.S. (s. 107 USCA) meets the requirements of the three-step test,[58] others submit that it is too broad to qualify as a certain special case.[59]

a) Is a fair use defence a certain special case under the three-step test?

Guidance as to how to interpret the phrase "certain special cases" was given by the WTO Panel which ruled on the compliance of s. 110(5) USCA with the TRIPS Agreement, inter alia art. 13 TRIPS.[60] The Panel laid down that art. 13 TRIPS requires that exceptions in national legislation should be clearly defined and narrow in scope.[61] It was argued in the preceding paragraphs that the application of the fair use test is a complete case-by-case determination and that the question of how a court will finally decide a fair use case is uncertain and hardly predictable. Moreover, the fair use test can potentially apply to all types of work and to any purposes of a use which makes it capable of endless expansion by the courts. The breadth of the doctrine was already recognized by the legislature when the doctrine was incorporated into the statute since Congress noted in its House Report that "no generally applicable definition is possible" for fair use.[62] Therefore, considering the WTO Panel's definition of certain special cases, the doctrine cannot be said to be clearly defined or narrow in scope because of its uncertain and broad character. A fair use test is not limited to certain special cases.

b) The relevance of the potential scope of users

Further, the Panel remarked that the potential scope of users who can rely on an exception is also relevant for determining whether the exception is sufficiently limited

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57 Art. 13 TRIPS; Art. 9(2) Berne Convention.

58 *Geller*, Int'l Law. 29 (1995), 99 (112); cf. *AU Copyright Law Review Committee*, Simplification of the Copyright Act 1968, para. 6.14.

59 *Okediji*, Colum. J. Transnat 39 (2000), 75 (126); *Ricketson*, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 5 April 2003, WIPO doc. SCCR/9/7, 68 et seq., available on the internet: <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf> (visited on 3 November 2007); cf. *Coombe*, DePaul L. Rev. 52 (2003), 1171 (1183).

60 WTO, *United States – Section 110(5) of the US Copyright Act*, Report of the Panel on 15 June 2000, WT/DS160/R (hereinafter: *WTO Panel Report*).

61 *WTO Panel Report*, 33, 34 (para. 6.112).

62 H.R. Rep. No. 1476, 94th Cong., 2nd Session, 65.

in order to constitute a certain special case.[63] The fair use doctrine can be relied on by any user who defends himself against a claim of copyright infringement and is unlimited in the scope of users. This circumstance also fosters the view that a fair use test is not limited to certain special cases.

Consequently, in the light of the foregoing arguments, a simple fair use test does not comply with the three-step test of art. 9(2) Berne Convention and art. 13 TRIPS and is therefore inconsistent with U.K.'s international treaty obligations.

III. Non-compliance of a fair use test with EC law

Due to U.K.'s membership in the European Union, a simple fair use defence must further comply with EC legislation. The legislation which affects the legitimacy of a fair use test is Directive 2001/29/EC.

1. Directive 2001/29/EC provides for an exhaustive list of exceptions

In its art. 5, Directive 2001/29/EC sets out an exhaustive list of exceptions to copyright infringement and thereby prohibits member states to adopt any other new limitation and exception within domestic copyright legislation.[64] A fair use defence thus is incompatible with the limited nature of art. 5 of the Directive because it never becomes truly closed and may recognize any new purpose of a use to fall within its scope. This result is reached under the condition that the InfoSoc Directive is compatible with the provisions of the Community Treaties: A statement that is doubted by some scholars who assert that the InfoSoc Directive lacks a proper legal basis since it does not accomplish its main raîson d'être, the harmonisation of the laws of the member states.[65]

2. Directive 2001/29/EC incorporates the three-step test

Moreover, art. 5(5) of the InfoSoc Directive further incorporates the Berne Convention's and TRIPS' three-step test. It stipulates that all limitations and exceptions to the copyright owner's rights[66] are subject to this test.[67] Hence, whatever exception to copyright infringement the U.K. would introduce into its copyright law, it would be subject to the three-step test which means that the introduction of a fair use test which is – as was shown above – inconsistent with the three-step test would infringe EC law. Consequently, a simple fair use test does not comply with EC legislation.

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63 *WTO Panel Report*, 37 (para. 6.127).

64 *Heide*, EIPR (1999), 105 (108); *Kretschmer*, EIPR (2003), 333 (336); cf. *Burrell/Coleman*, Copyright Exceptions, 273.

65 *Hugenholtz*, EIPR (2000), 499 (501 et seq.); cf. *Vinje*, EIPR (2000), 551 (551). See also the Introduction of this article.

66 Cf. art. 2-4 InfoSoc Directive.

67 *Griffiths*, IPQ (2002), 240 (261); *Koelman*, EIPR (2006), 407 et seq.; *Sterling*, World copyright law[2], para. 26F10; *Torremans*, Intellectual property law[4], 266; *Vinje*, EIPR (2000), 551 (553).

E. The necessity of a transformation of judicial attitudes

If a simple fair use test were to replace the current fair dealing provisions, a key question which needs to be addressed would be how judges would react to the introduction of such a defence. *Burrell* argues that even if a fair use defence were to be adopted, it would be unlikely to largely improve the present situation if it was not accompanied by a change of judicial attitudes.[68] He bases his proposition on the argument that English judges have, on the whole, interpreted copyright exemptions in an overly restrictive manner although means and methods existed which could have been used to constrain copyright.[69]

I. The development of the public interest defence

One example in favour of this position is the development of the public interest defence to copyright infringement. According to this common law defence, a person who makes a disclosure in the public interest may not be liable for copyright infringement.[70] Its existence seemed to have been approved by s. 171(3) CDPA which stipulates that "Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise".[71] However, in *Hyde Park v Yelland*, Aldous LJ stated that there is no general public interest defence to copyright infringement.[72] Contrary to Aldous LJ's opinion, the Court of Appeal, in its later decision in *Ashdown v Telegraph Group Ltd*, accepted the existence of a public interest defence but restricted its applicability to those cases in which "the right of freedom of expression (...) trumps the rights conferred by the Copyright Act".[73] Thus, although the Court of Appeal did not deny the public interest defence a place in copyright law it defined its scope narrowly.

II. Even a flexible fair use defence may ossify

It can be said that even a doctrine as flexible as the fair use test may ossify, if it is interpreted in a restrictive fashion by judges. That certainly does not exclude that the adoption of a fair use test might be understood by the judiciary as a sign of Parliament's desire for a more liberal interpretation of exceptions to copyright infringement and therefore might entail in itself a transformation of judicial attitudes. But it should be borne in mind that when Parliament signalled its confirmation of the existence of a

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68 *Burrell*, IPQ (2001), 361 (388); *Burrell/Coleman*, Copyright Exceptions, 253. *Weatherall*, Fair use, fair dealing, 9 makes a similar – but more cautious – point when she argues that "we cannot be sure how courts in Australia would react to a fair use doctrine until case-law develops".

69 *Burrell*, IPQ (2001), 361 (365, 388).

70 *Beloff v Pressdram*, (1973) 1 All ER 241 (259 et seq.) (Ungoed-Thomas J); *Bently/Sherman*, Intellectual Property Law[2], 208 et seq; *Burrell/Coleman*, Copyright Exceptions, 81 et seq.

71 *Hyde Park v Yelland*, (2000) EMLR 363 (392) (Mance LJ); *Bently/Sherman*, Intellectual Property Law[2], 209 et seq.

72 *Hyde Park v Yelland*, (2000) EMLR 363 (383-385, 389) (Aldous LJ).

73 *Ashdown v. Telegraph Group Ltd*, (2001) EMLR 44, para. 58. (Lord Phillips MR).

public interest defence by introducing art. 171(3) CDPA, judges showed reluctance to follow this "call".

F. Conclusion

One the one hand, it was shown that the features of a fair use test are its flexibility, breadth, and simplicity, whereas the fair dealing defences appear rather rigid and complex. On the other hand, it was also shown that the advantages of a fair use doctrine directly entail disadvantages, such as its uncertainty and unpredictability. Moreover, it was demonstrated that a simple fair use test is inconsistent with art. 9(2) Berne Convention, art. 13 TRIPS, and Directive 2001/29/EC. It was further argued that in order to benefit from the flexible and broad nature of a fair use test judicial attitudes towards the interpretation of copyright exceptions need to change. This change however might not be achieved by the mere introduction of a fair use test. In the light of these arguments, it is submitted that the considerable disadvantages of a fair use test are too high a price to pay for its simplicity and flexibility. Therefore, the defences to copyright infringement contained in the fair dealing provisions of the CDPA should not be replaced by a simple fair use test. "Fair use" is not a desirable option for U.K. copyright legislation.

Instead, in order to fulfil the desire for a more flexible approach to the existing exceptions to copyright infringement, judges should construe the fair dealing defences more liberally. Beginnings of such a development can be seen in decisions like *Newspaper Licensing Agency v Marks & Spencer*[74] and *Pro Sieben Media v Carlton Television*[75] where it was held that fair dealing for the purpose of criticism or review (s. 30(1) CDPA) and for the purpose of reporting current events (s. 30(2) CDPA) should be interpreted liberally. Although such an approach would not be as open-ended as a simple fair use test it would shape the current fair dealing provisions broader and would create a certain degree of flexibility for the law to adapt itself to technological changes. It would also comply with U.K.'s international treaty obligations as well as EC law.

[74] (1999) EMLR 369 (381) (Lightman J); (2001) Ch 257, para. 75 (Chadwick LJ).
[75] (1999) FSR 610 (620) (Walker LJ).

TABLE OF STATUTES

U.K. legislation

Section 29 CDPA 1988: Research and private study

(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(1B) No acknowledgement is required in connection with fair dealing for the purposes mentioned in subsection (1) where this would be impossible for reasons of practicality or otherwise.

(1C) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of private study does not infringe any copyright in the work.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes of research or private study does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if –

(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or

(b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

(4) It is not fair dealing –

(a) to convert a computer program expressed in a low level language into a version expressed in a higher level language, or

(b) incidentally in the course of so converting the program, to copy it, (these being acts permitted if done in accordance with section 50B (decompilation)).

(4A) It is not fair dealing to observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program (these acts being permitted if done in accordance with section 50BA (observing, studying and testing)).

Section 30 CDPA 1988: Criticism, review and news reporting

(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.

(1A) For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including –

(a) the issue of copies to the public;

(b) making the work available by means of an electronic retrieval system;

(c) the rental or lending of copies of the work to the public;
(d) the performance, exhibition, playing or showing of the work in public;
(e) the communication to the public of the work, but in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.

U.S. legislation

Section 107 United States Copyright Act 1976, 17 USC: Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

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