

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 Copyright 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.

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).