

### 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.<sup>41</sup> Thus it has in one instance been described as ‘*a guarantee of breathing space at the heart of copyright*’<sup>42</sup>

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.

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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 accommodate 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 may be 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,<sup>43</sup> 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.*<sup>44</sup> and *Williams v. Wilkins*<sup>45</sup> 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.<sup>46</sup>

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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.2d 303 (2<sup>nd</sup> Cir. 1966).

45 *Williams v. Wilkins* 487 F.2d 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.'*<sup>47</sup>

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.<sup>48</sup>

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

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47 H.R REP no.1476 94<sup>th</sup> Cong. 2 d Sess. 65.

48 Dratler, *supra* at 260.