

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 Ungood-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 Although 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.