

'The exceptions to copyright infringement do not provide a fair balance between the rights of the copyright owner and users of copyright works. Critically discuss the above statement with reference to statutory provisions, judicial authorities and academic literature.'

Introduction

- This essay will critically discuss the view that the exceptions to copyright infringement do not provide a fair balance between the rights of the copyright owner and users of copyright works.
- Note that the exceptions were greatly expanded in 2014, which will have shifted the balance.¹
- It will be argued that the balance overall is still too heavily in favour of the copyright owner.

What is a Fair Balance in Copyright?

- The starting position is that everything is in the public domain and useable: all human achievement is built on the knowledge and aesthetic achievements of our predecessors, and so by granting someone a monopoly on any part of humanity's work we impede progress and culture.² User's rights in the public domain can also be grounded in free speech, the flourishing of diversity and '*the right to informed action*.'³

¹ E.g. The Copyright and Rights in Performances (Quotation and Parody) Regulations

² Jennifer Davis, *Intellectual Property Law Core Text*, (Oxford University Press, 2012), 24

³ Hugh Breakey, "User's rights and the public domain", [2010] I.P.Q. 312, 314

- The primary justification for copyright is economic: providing an incentive for people to create knowing their works will not be copied, thereby offsetting the damage that will be done by granting monopolies on the public domain.⁴
- Beyond the good to society of the public domain, there is also the need to prevent IP monopolies from impinging human rights⁵, bearing in mind that to an extent copyright is needed to protect an author's human rights of expression and personality (especially moral rights).⁶
- The fair balance will therefore be a situation where the public can use works without detracting disproportionately from the incentive to create copyright works and vice versa. The starting position should be that users are allowed to use the work however they like until it is shown that this would detract from the creation incentive, and then a fair balance must be struck.

Summary of the Current Exceptions to Copyright Infringement

- The most important exceptions are:
 - 'Fair Dealing' exceptions:
 - ❖ Research and private study;⁷
 - ❖ Criticism, review, quotation and news reporting;⁸

⁴ Davis, (n 2), 23

⁵ Benjamin Kaplan, *An Unhurried View of Copyright*, (Columbia University Press, 1967), 2

⁶ Mirela Hristova, "Are Intellectual Property Rights Human Rights?" [2011] *Journal of the Patent and Trademark Office Society* 339, 361

⁷ Copyright, Designs and Patents Act 1988, s.29

⁸ *Ibid.*, s.30

- ❖ Caricature, parody and pastiche;⁹
- Making accessible copies for the disabled;¹⁰
- Exceptions for various uses for educational purposes;¹¹
- Exceptions for copying and lending by libraries;¹²
- Time shifting.¹³

Do the Exceptions Strike a Fair Balance?

- Fair Dealing Exceptions:
 - The exceptions are beneficial to society and enhance free speech in matters of public importance.¹⁴
 - The exceptions are limited in a way which protects copyright holders' interests. E.g. Parody is limited to parody which is humorous or mocking¹⁵, so it can be seen as an extension of criticism, and it cannot be too similar to the original, incentivising creation and dis-incentivising slavish copying.¹⁶ Meanwhile the exceptions protect the author's moral rights by requiring acknowledgement for the use to be fair.
 - In order to be exempted, the dealing must be objectively fair.¹⁷

⁹ Ibid., s.30A

¹⁰ Ibid., ss.31A-31C

¹¹ Ibid., s.32-36

¹² Ibid., ss.37-44A

¹³ Ibid., s.70

¹⁴ *Pro Sieben* [1999] 1 W.L.R. 605, 614

¹⁵ *Deckmyn v Vandersteen* (C-201/13) [2014] E.C.D.R. 21

¹⁶ Ed Baden-Powell, Juliane Althoff, "The parody exception: having the last laugh", [2015] Ent. L.R. 16, 18

¹⁷ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [71]

- Fair dealing is not as broad as the US notion of 'fair use'.¹⁸ Fair dealing only permits justification of a list of acts for a list of purposes, whereas fair use is flexible and allows the justification of any act if it does not have disproportionate impact on the incentive to create. In addition, fair dealing unjustifiably only covers the use of limited types of work.¹⁹
- The UK courts have been conservative in deciding when dealing is fair.²⁰
- The fair dealing provisions begin from the wrong perspective: assuming most things the user does undermines copyright, and only allowing limited justifications. Makes it particularly difficult to justify use where new technology is not accounted for in the law.²¹
- Private copying and time shifting:
 - There was an exception for the purpose of making private copies for personal use²², which was repealed. The EU Directive it was supposed to implement required fair compensation for harm to be given to the copyright owners, which was not included in the law²³ as the government thought the exception was so narrow as to be harmless, plus rights-holders already increased their prices to take into account

¹⁸ Copyright Act 1976, s107

¹⁹ Jason Haynes, "Critically reconceptualizing the United Kingdom's fair dealing exception to copyright infringement in light of the government's most recent proposals for reform and lessons learnt from civil law countries", [2012] E.I.P.R. 811

²⁰ See e.g. *Hyde Park Residence Ltd v Yelland* [1999] R.P.C. 655 Ch D; *Ashdown v Telegraph Group* [2001] Ch. 685 Ch D

²¹ Zita Casserly, "The more things change the more they stay the same? An analysis of the new fair dealing provisions in UK copyright law", [2016] C.T.L.R. 114, 118

²² CDPA, (n 7), s.28B

²³ Yin Harn Lee, "United Kingdom copyright decisions 2015", [2016] IIC 193

private copying²⁴. The High Court thought there was insufficient evidence that the exception would be harmless, and so deemed it an unlawful implementation.²⁵

- On the one hand, as explained above, the starting position should be that users can use a work in a certain way, so the onus is on the rights holder to show that there would be harm. On the other hand, private copying is primarily meant to merely making user's lives more convenient and so does not add much value to user's rights. However, private copying is endemic, and rights-holder do not do anything about it, indicating that it does not detract from the creation incentive.²⁶
- As such fair balance is not provided for by the non-existence of an exception.
- The same reasoning applies to the time-shifting exception, which is a convenience-enhancing exception which is no proven disincentive which is largely ignored by rights-holders, so it strikes a fair balance by existing.
- Education and Library exceptions:
 - Education is a human right, so this exception enhances human rights. Allowing access to knowledge of many works enhances the ability of the public to create.
 - No evidence of disincentive to creation.
 - Requires author acknowledgement, so moral rights are protected.²⁷

²⁴ UK IPO, 'Modernising Copyright - A Modern, Robust and Flexible Framework', (UK IPO, 2012), <<http://www.allpartywritersgroup.co.uk/Documents/PDF/Modernising-copyright.aspx>> accessed 22 July 2016, 23-24

²⁵ *R. (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723

²⁶ Joel Smith, Heather Newton, "A pause in private copying: judicial review holds the UK private copying exception to be unlawful because there was no evidence to support the decision not to provide compensation to rights holders", [2015] E.I.P.R. 667, 669

²⁷ E.g. CDPA, (n 7), s.32(1)(c)

- However, the exception does not allow the circumvention of technical protection measures (explain what this is) that might make it possible to do the permitted acts.²⁸
- A fair balance is not struck, as copyright owners can legally prevent use of the exception.
- Accessibility exceptions:
 - This exception enhances overall creativity greatly, as it increases the ‘*social and cultural participation*’ of the disabled²⁹, given the number of accessible copies of works is very low.³⁰ It also enhances their human rights and quality of life.³¹
 - No evidence of disincentive to creation.
 - Requires author acknowledgement, so moral rights are protected.³²
 - However, the exception does not allow the circumvention of technical protection measures that might make it possible to do the permitted acts.
 - A fair balance is not struck, as copyright owners can legally prevent use of the exception.

²⁸ Zita Casserly, (n 21), 118

²⁹ Jingyi Li, Niloufer Selvadurai, “Reconciling the enforcement of copyright with the upholding of human rights: a consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled”, [2014] E.I.P.R. 653

³⁰ World Blind Union, ‘June 17 Press Release for WIPO Book Treaty’, (World Blind Union, April 20, 2013), <<http://www.worldblindunion.org/English/news/Pages/JUNE-17-Press-Release-for-WIPO-Book-Treaty.aspx>> accessed 22 July 2016.

³¹ Ibid.

³² E.g. CDPA, (n 7), s.31B(7)(b)

Conclusion

- To a degree, whether a fair balance is struck must be decided on an exception-by-exception basis, but most are too heavily in favour of the copyright owner.
 - The overall scheme inflexibly assumes that only some, limited exceptions can be justified, rather than focusing on whether the act (whatever it is) detracts disproportionately from the incentive to create.
 - Many are incomplete, failing to provide an exception to TPMs which can be used to prevent the user from being able to perform the acts.

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