

Should the UK Adopt Into its Domestic Law a Broad ‘Fair Use’ Defence Instead of the Current ‘Fair Dealing’ Approach?

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Abstract: Copyright is commonly claimed to result in temporary monopoly thereby, generating transaction costs for potential users in obtaining authorization.¹ However, there are certain acts specified by law, which fall outside the coverage of copyright and can legally be performed in relation to the copyright work without the consent of its owner. There are two common approaches adopted by states in framing exceptions and limitations of their copyright law, which are known as “fair use” and “fair dealing” doctrines. This paper argues that both fair use and fair dealing approaches have their limitations and if UK adopts fair use doctrine instead of its current fair dealing approach, certainty and predictability provided by it can be eliminated or undermined and therefore, it is suggested that UK fair dealing exceptions should be supplemented by fair-use style exception rather than adopting it in its entirety.

Keywords: domestic law, fair use, fair dealing, monopoly, copyright, copyright owner, UK copyright law, CDPA, patent, design, TDM.

Introduction

Copyright is based on striking a balance between granting protection to owners of original expressive work and providing public members with access to such protected expression. Any type of copyright-protected work cannot lawfully be reproduced by methods of copying, lending or renting, publicly performing, communicating to the public and making adaptations of the work without the permission of the owner. Therefore, Thus, copyright law framework includes exclusive rights (such as moral and economic rights) granted to the copyright owner as a form of protection, and “exceptions and limitations” to these exclusive rights recognized as a mechanism of providing access.² Specifically, the function of copyright law involves keeping monopoly created by exclusive rights as limited as possible in order to maintain incentives for creativity while simultaneously employing exceptions to prevent adverse effects on objectives such as freedom of expression and large transaction costs.³

There are two common approaches adopted by states in framing exceptions and limitations of their copyright law, which are known as “fair use” and “fair dealing” doctrines. Fair use doctrine is originated in US copyright framework and considered to be a general approach[1-6]. It is heavily based on a case law requiring courts to consider certain non-exclusive factors before deciding whether a particular use of copyrighted work can be justified under fair use defence and qualified as a permitted use of copyright work.⁴ In contrast, the UK’s fair dealing doctrine embodies an exhaustive list of statutory purposes in Copyright,

¹Antony W. Dnes ‘Should the UK Move to a Fair-use Copyright Exception?’ (2013) 44 (4) IIC International Review of Intellectual Property and Competition Law pp. 420 <<https://doi.org.proxy.lib.strath.ac.uk/10.1007/s40319-013-0049-y>> accessed 4 February 2020

²Harbir Singh, AnanthPadmanabhan and Ezekiel J. Emanuel ‘Fair Use and Fair Dealing’ (2017) India as a Pioneer of Innovation pp.2 <<https://www.oxfordscholarship.com/view/10.1093/oso/9780199476084.001.0001/oso-9780199476084-chapter-6>> accessed 5 February 2020

³Brown and others (n1) pp.122

⁴Singh, Padmanabhan and Emanuel (n3) pp.2

Designs and Patents Act (CDPA) 1988⁵, which requires uses of copyrighted work to be made for one of these purposes in order for being exempted from copyright infringement. Thus, fair dealing for any other purpose that does not fit into a category of fair dealing or other copyright exceptions specified in CDPA 1988, constitutes a copyright infringement.⁶ Therefore, US fair use doctrine is frequently regarded as a flexible approach in creating exceptions in the face of technological changes and some scholars even proposed the incorporation of fair use into UK copyright law.⁷

This paper argues that both fair use and fair dealing approaches have their limitations and if UK adopts fair use doctrine instead of its current fair dealing approach, certainty and predictability provided by it can be eliminated or undermined and therefore, it is suggested that UK fair dealing exceptions should be supplemented by fair-use style exception rather than adopting it in its entirety [7-13]. The plan of this paper as follows: firstly, it examines US fair use doctrine and its flexibilities, which made it more favourable than UK fair dealing approach; Secondly, it explores incremental development of UK fair dealing regime; Finally, it presents a comparative assessment of both doctrines and proposes a balanced approach, which is designed to eliminate limitations of both approaches.

US Fair Use Approach and its Favourable Flexibility

Fair use doctrine is embodied in section 107 of the U.S. Copyright Act 1976 (USCA), which provides that ‘the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright’.⁸ Thus, this provision recognizes certain types of activities as examples of fair use and leaves the list of permissible purposes open.⁹ Moreover, section 107 mandates the consideration of four exclusive factors in deciding whether a particular use of the copyrighted work is fair, namely: ‘(1) the purpose and the 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; (4) the effect of the use upon the potential market for or value of the copyrighted work’.¹⁰ It should be noted that factors one and four are of particular importance to evaluate fair use since the US Courts have emphasized them as primary indicators of fairness.¹¹

Factor one namely, the purpose and character of the use examines whether a particular piece of the copyrighted work is used in a transformative manner so as to create something new, or merely reproduced for a commercial purpose.¹² For example, in *Campbell v. Acuff-Rose* case, the US Supreme Court held that a parody of the song “Pretty Woman” was a fair use since it was considered to be a transformative use and did not affect the market for the original song.¹³ Furthermore, in *Blanch v. Koons*, pieces of a copyrighted fashion photograph was used by an artist for his painting and it was found to be a fair use due to its transformative artistic nature and the commentary made on fashion.¹⁴ Accordingly, Judge Leval has argued that copyright law is designed to encourage the creativity, which is represented by a “transformative” work.¹⁵ According to Beebe’s case analysis, in most cases finding of a transformative use is sufficient for a court to decide that the action in question is fair use.¹⁶

⁵ Copyright, Designs and Patents Act 1988, s29 (1), s 29 (1C), s 30 (1), s 30 (1ZA), s 30 (2), s 30 A(1), s 32 (1)

⁶ Dnes (n2) pp.423

⁷ ibid

⁸ U.S. Copyright Act 1976, s. 107

⁹ Gluseppina D’Agostino, ‘Healing Fair Dealing – A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use’ (2008) 53 McGill Journal, pp.344

¹⁰ USCA (n9)

¹¹ Dnes (n2) pp.433

¹² D’Agostino (n10) pp.345

¹³ *Campbell v. Acuff-Rose* 114 S.Ct. 1164 (1994)

¹⁴ *Blanch v. Koons* 467 F.2d. 244 2d. Cir. (2006)

¹⁵ Pierre N. Leval, ‘Towards a Fair Use Standard’ (1990) 103 Harvard Law Review, pp.1105

¹⁶ Barton Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions’ (2008) 156 (3) University of Pennsylvania Law Review pp.605 <<https://heinonline.org/HOL/P?h=hein.journals/pnlr156&i=561>> accessed 6 February 2020

As regards factor four, it is aimed at protecting interests of copyright holder by testing whether potential market of the author is affected or undermined as a result of the use of the copyrighted material. For instance, in *Harper & Row* case, extract from unpublished memoirs was published by a magazine, which was found to be copyright infringement as it impacted on potential market and revenue coming from author's publication rights.¹⁷ This factor is considered to dominate all other factors.¹⁸

Thus, US fair use doctrine allows judges to decide whether new activities relating to copyrighted works should lawfully fall within the ambit of copyright protection or not. It provided courts with a legal mechanism to accommodate new innovations and technological changes without enacting a new legislation such as data and text mining, reverse engineering and format-shifting of music, films and e-books.¹⁹ According to Gowers and Hargreaves, fair use approach is more flexible than fair dealing as it can be adapted to new innovations and this is one of the reasons behind favorable environment for innovations in the US.²⁰ Furthermore, transformative element and market-impact analysis embodied in four-factor test of fair use doctrine contributes to the promotion of innovation and creativity by identifying and supporting new benefits of copyrighted work.²¹ For instance, in *Perfect 10* case, the court held that data framing and linking nature of Google's image search engine was a transformative use and amounted to a fair use of Perfect 10's images.²²

Incremental Development of the UK Fair Dealing Regime

Although UK's fair dealing doctrine performs the function similar to US fair use defence, its structure is quite different. Fair dealing exceptions to copyright infringement are narrowly defined as part of the copyright exceptions and limitations included in CDPA 1988.²³ Fair dealing with a copyrighted material will not be a copyright infringement if it is carried out for one of the purposes enumerated in CDPA 1988 and satisfies relevant requirements.²⁴

The UK's fair dealing exceptions have been expanded incrementally so as to cover a variety uses of copyright work as technology developed. Before 2014 reforms, only three purposes were listed by CDPA 1988 namely, research for a non-commercial purposes (Sec.29 (1)), private study (Sec.29 (1C)), criticism, review and news reporting (Sec. 30 (1)).²⁵ This closed list of specific categories did not leave any space for a fair dealing for other emerging purposes including uses of new technologies. This restrictive nature of fair dealing was criticized for being outdated by scholars, who considered it as a barrier to innovation and growth.²⁶ Certain uses of copyright-protected materials were considered to be controversial in the context of rigid framework of fair dealing doctrine in the UK. In particular, activities such as text and data mining (TDM), private copying for format shifting and creative uses of music were not covered by the UK copyright exceptions and were likely to be found automatically unlawful.²⁷ As a result of recommendations made by Gowers and Hargreaves, along with other extensions to fair dealing, these issues were addressed to some extent by 2014 reforms.²⁸ Specifically, a new exception separate from fair dealing was introduced as 'Copies for text and data analysis for non-commercial research', which provides that 'the making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work' as far as it

¹⁷ *Harper & Row Publishers, Inc. v. Nation Enterprises* in D'Agostino (n10) pp.348

¹⁸ D'Agostino (n10) pp.437

¹⁹ Ian Hargreaves 'Digital Opportunity. Review of Intellectual Property and Growth' (2011) pp.44;

²⁰ Ibid; Andrew Gowers 'Gower's Review of Intellectual Property' (2006) pp. 60

²¹ Dnes (n2) pp.438

²² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F. 3d 1146 9th Cir. (2007)

²³ CDPA 1988 (n 6)

²⁴ Brown and others (n1) pp.175

²⁵ CDPA 1988 (n 6)

²⁶ Hargreaves (n 20) and Gowers (n 21)

²⁷ Ibid

²⁸ The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 SI 2014/2361

is made for a computational analysis and research for non-commercial purpose.²⁹ Another new exception introduced by 2014 reforms was a fair dealing for purposes of caricature, parody or pastiche, which applies to all types of copyright work including parody of a musical composition.³⁰ Moreover, private use exception was introduced³¹, which legitimized format-shifting without a fair compensation in the UK. However, the Court found it to be inconsistent with EU framework (InfoSoc Directive, Art 5 (2) (b)) as it did not impose fair compensation on private use, and ordered this exception to be quashed.³²

Even if the use of copyrighted work is proven to be for one of the statutory purposes, it must still satisfy the test of fairness so as to qualify as a fair dealing.³³ The UK courts have considered several factors in assessing fairness of the particular use namely, the quantity of copyrighted material used, the impact of the use on the market of the copyrighted work, the extent and purpose of the use.³⁴ Factors varied from case to case according to the purpose in question.³⁵

Comparative Assessment of Fair Use and Fair Dealing

In-depth analysis of fair use and fair dealing doctrines reveals that the main difference between them is the scope rather than method.³⁶ Particularly, both doctrines specify certain purposes justifying “fair dealing” or “fair use”, which are very similar in content. However, fair use doctrine represents open list of permissible purposes that can be extended by courts while fair dealing regime embodies closed list of permitted purposes that makes it inflexible to keep up with technological and social changes [14-21]. Moreover, four factors considered to test fairness of the action in fair use doctrine overlap some of the factors considered by the British courts such as market impact, the amount of material used and the nature of the use.³⁷

The examined advantage of the US fair use approach is its ability to realize the benefits of technological advancements without undermining core benefits to copyright holders. Especially, its transformative element greatly contributes to the encouragement of creativity. Legitimization of Google’s search engine, reverse engineering, format-shifting in the US are the best examples of flexibility provided by fair use regime. In contrast, narrow copyright exceptions of fair dealing approach resulted in slower development and late time responses concerning these areas in the UK.³⁸

Nevertheless, uncertainties associated with the flexibility and adaptability of the US fair use doctrine should not be overlooked. According to Cotter, fair use doctrine leaves permissible uses of copyrighted works uncertain, which discourages potential fair users from developing derivative works by making them worried about legal sanctions.³⁹

The adoption of fair use defense into UK’s domestic law could be rejected on the grounds of uncertainty and non-viability. Viability of the fair use adoption into the UK legal framework was doubted as it is based in European context.⁴⁰ Instead, “an exception for creative, transformative or derivative works” within the Berne three-step-test was recommended by Gowers in order to legitimize truly transformative uses of existing copyrighted works.⁴¹ Another option is “an opening clause”, which can be introduced as a general exception

²⁹Ibid s 29A

³⁰CDPA 1988 (n 6) s30A

³¹Ibid s 28B

³²*R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2005] EWHC 2041

³³Brown and others (n1) pp.177

³⁴Ibid

³⁵Ibid

³⁶Dnes (n2) pp.432

³⁷Ibid

³⁸Hargreaves (n 20) pp.47

³⁹Thomas F Cotter ‘Fair Use and Copyright Over Enforcement’ (2008) 93 (4) Iowa Law Review

⁴⁰Hargreaves (n 20) pp.44

⁴¹Gowers (n21)

that would address the uses not covered by existing copyright exceptions.⁴² Although such exceptions are not permitted by the InfoSoc Directive 2001, they can be introduced in case UK leaves EU with a “no-deal” Brexit.⁴³

Conclusion

In conclusion, although US fair use doctrine is considered to be the most flexible approach in structuring copyright exceptions, it simultaneously creates legal uncertainty in terms of permissible uses of copyrighted work [22-25]. As regards the UK’s fair dealing doctrine, it provides greater certainty and predictability with specific exceptions but it is viewed as insufficiently flexible in the face of technological changes. Taking into account limitations of both doctrines, a better approach would be considering fair use doctrine as a supplement or extension rather than replacement to fair dealing doctrine. Thus, adopting fair-use style exception into the UK’s copyright law as a creative use exception or a general exception would allow to import only useful features of fair use doctrine. These balanced approaches could eliminate restrictions of both regimes leading to an effective enforcement.

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⁴²Christophe Geiger ‘Text and Data Mining in the Proposed Copyright Reform: Making the EU making for an Age of Big Data’ (2018) 49 (7) International Review of Intellectual Property and Competition Law pp.11

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