

Comparing Fair Dealing with Fair Use: Why Fair Dealing Can Better Balance Copyright Interests?

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Abstract: This paper conducts a comprehensive comparison of the two pivotal doctrines in copyright law: fair dealing and fair use, highlighting the balance between creators' rights and public access to knowledge. It examines the evolution of these doctrines within different historical and legal contexts, notably in Commonwealth nations favoring fair dealing, and the U.S., a robust advocate of fair use. The paper critically reflects on each doctrine's operational efficacy and practical implications, emphasizing their strengths and potential improvement areas. It argues for fair dealing's superiority in safeguarding creators' rights and fostering innovation while considering its integration with elements of the American fair use system's flexibility. Beyond this, this work also probes the potential of fair dealing to integrate elements of flexibility characteristic of the American fair use system. This contemplative exploration, enriched by legal insights and scholarly debates, paves the way for a proposed hybrid model, seamlessly blending the strengths of both doctrines.

Keywords: Copy Right Law, Fair Dealing, Fair Use, Balance Copyright Interests

1. Introduction

In various countries and regions, the balance between the rights of creators and the public's access to knowledge has been a central concern in copyright law. Two primary doctrines that attempt to strike this balance are "fair dealing" and "fair use." Though both doctrines aim to ensure that copyright does not unduly restrict the public's access to knowledge, they approach this balance differently, shaped by their historical, cultural, and legal contexts. This article analyses the historical and philosophical reasons to comprehensively compare the two theories based on the practices and cases in some countries. In particular, this research pays considconsiders both systems' balance between maintaining intellectual property rights while promoting creativity and innovation, geographical representation, and effectiveness. Fair dealing Is an integral part of UK copyright law which allows the use of copyrighted works in certain circumstances without prior permission from the copyright holder. This system is significant in protecting copyright and balancing the rights and interests of copyright holders with the public interests so that knowledge and creativity is protected and freely circulated in the public domain under certain restrictions. Commonwealth countries chiefly adopt the fair dealing system, while other countries implement the

fair use system, amongst which the United States is the most representative. Meanwhile, China and the EU have similar laws on fair dealing or fair use.

This paper advocates for the fair dealing doctrine to balance competing interests in copyright law. It also suggests a novel strategy that enhances the benefits of fair dealing, improving how society balances copyright interests. Such a hybrid strategy proposes adding flexibility to fair dealing laws, like what is included in the fair use system. This would make adjusting more quickly to the changing copyright landscape possible. Such a strategy might make it easier to take into account more subtle factors, like the use's purpose and character, and would thus better serve the dual goals of copyright law: to reward authors for their creative work while ensuring the free exchange of ideas that is necessary for advancement in both culture and technology. Additionally, regularly reviewing and updating the list of exceptions within the fair dealing doctrine is still an efficient and effective way to improve fair dealing to ensure that the law remains relevant and responsive to the rapidly evolving societal and technological landscape.

This paper posits a critical question: Can there be a middle ground? A harmonized approach that draws from the strengths of both doctrines while mitigating their respective shortcomings? To answer this, we delve deep into the historical evolution, legal interpretations, and practical applications of both fair dealing and fair use. Furthermore, we will examine real-world case studies, legal precedents, and academic discourses to understand the practical implications of these doctrines. By doing so, we hope to offer valuable insights into how they have been applied, interpreted, and challenged in various jurisdictions. Through meticulous research and analysis, we aim to introducing advantages of fair use into fair dealing jurisdictions to help strike a more effective balance between the interests of copyright owners and users. However, these arguments are also cautious in that such an approach must be implemented with care to avoid the potential pitfalls of unpredictability and a surge in fair use-related litigation.

The research methods adopted in this writing encompass literary analysis, case analysis, and comparative method analysis. This study will examine the principles, application scope, and practice of 'fair dealing' and 'fair use' through a review of relevant legal provisions, academic papers, and case law. In utilising the comparative method, the advantages and applicability of these two systems in achieving a balance of copyright interests will be systematically analysed.

2. Fair dealing

2.1. Definition and Distinctive Features

Fair dealing is a limitation and exception to the exclusive rights granted by copyright law to authors of creative works. It is an enumerated collection of defenses against copyright infringement. The aim is to strike a harmonious balance between the rights of copyright owners and societal needs. This ensures that copyright doesn't hinder innovation, scholarly inquiry, or the broad dissemination of knowledge.

2.2. The Three-Step Test

The three-step test was initially introduced in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works . Its primary objective was to establish a universally accepted framework for exceptions to the exclusive reproduction rights enshrined in the laws of member states. The provision dictates that "under specific exceptional circumstances, the legislation of the Union's member states may permit the reproduction of the aforementioned works, provided such reproduction neither hinders the work's customary utilization nor unjustly encroaches upon the

author's legitimate interests.[1] "The Berne Convention" employs a hybrid approach, incorporating both factor-based and rule-based models, alongside a three-step test supplemented by an enumeration. An open-ended legislative model is justified due to its status as a primary source of international law, necessitating a comprehensive consideration of its adaptability. Hence, other pertinent international accords have acknowledged and embraced the "three-step test" as well. However, it is important to consider that in order to effectively shape the legislation of member states, it is necessary to take into account the collective interests of all member states. Consequently, the language used in this context tends to be ambiguous, as it does not represent a universally standardised international substantive law.

2.3. Critical Reflection on Fair Dealing

Firstly, caution must be adopted regarding the fair use doctrine's failure to adapt to new technologies or societal standards. In the English case of *Hubbard v Vosper* 1972, Vosper was accused of copyright infringement because he quoted from Hubbard's work in his criticism. The court ruled that Vosper's activities did not fall under the definition of fair use. However, this decision neglected the significance of journalism and public interest, particularly in the context of political and social criticism. Many academics, including Bently and Sherman, have raised concern that this decision stifles public debate and political engagement.

Secondly, the fair use concept has had difficulty adjusting to new digital-age technology. The application of the fair use theory to web content aggregation and digital teaching aids in Canada has stirred debate. Existing legal constraints limit the scope of these new technologies' development and application. Geist's work investigates this topic, highlighting the potential for fair use regulations to delay scientific and technological progress and the free flow of information, negatively impacting the sharing of knowledge throughout society.[2]

The fair dealing doctrine's narrow breadth may prohibit uses with social value or benefit. In the case of *Ashdown v Telegraph Group Ltd* 2001, a newspaper was found to have violated Ashdown's confidential memorandum when it attempted to cite it to expose government malfeasance since it did not fall within the particular limits of fair use law. The decision ignited a public interest and transparency discussion, with commentators arguing that an overly zealous interpretation of the fair use doctrine limits the public's capacity to hold the government to account. Furthermore, the notion of fair dealing poses a problem in the field of education. Some novel pedagogical methods or technologies may not fit existing fair use rules, limiting educational innovation's potential. Several educational and legal academics agree with this standpoint, emphasising the need for legislation to be more flexible in addressing educational and academic needs.

In light of these issues, many scholars prefer the fair use represented by the United States, which adopts the open-ended system model of factorisation, when considering the balance of copyright interests. However, this paper argues that fair dealing can better balance copyright interests than fair use in today's tightly digitalised and inter-international events. One important basis for supporting this view is in analysing the unique advantages and disadvantages of fair dealing and fair use. The fair dealing concept provides a clear and workable legal foundation in the context of globalisation. For example, in the context of the EU's Digital Single Market policy the clarity of the fair dealing concept aids in ensuring legal consistency among its 28 member states. In contrast, the fair use doctrine's flexibility can lead to inconsistent interpretations, increasing compliance costs, and legal concerns. However, many researchers and legal practitioners remain concerned about its limitations.

In many jurisdictions, the concept is often defined by naming certain situations, such as research, education, or commentaries. This limitation, however, may result in rigidity in the implementation of the law in some circumstances. This paper discusses the unique advantages of fair dealing in more detail in Chapter 4.

3. Fair Use

3.1. Definition and Distinctive Features

The definition of fair use in this chapter refers explicitly to the rational use system of copyright in the United States, which is extended and developed from the basis of the British fair dealing. The U.S. Copyright Office states that fair use is a legal principle that facilitates the exercise of freedom of speech by allowing the utilisation of copyrighted materials without obtaining a license, under specific circumstances[3]. Therefore, fair use is a legal doctrine within the domain of copyright law which allows the utilization of copyrighted materials without the express permission of the copyright owner, if this happens under specific conditions and contexts. This doctrine is marked by its flexibility and is applied on a case-by-case basis, taking into account the distinct characteristics of each situation. The primary aim of this doctrine is to protect and preserve freedoms of expression while simultaneously fostering the widespread dissemination of knowledge and encouraging creativity.

3.2. Fair Use Factors and Application in Practice

Purpose and nature of the use

The purpose and nature of the use is the first criterion for determining fairness. According to the provisions of the law, commercial use will impair the establishment of fair use. Mainly, this is because fair use is a kind of gratuitous use and does not allow others to use the copyright owner's work for profit, although commercial for-profit use impairs the interests of the copyright owner.

The Nature of the Copyrighted Work

In analysing this factor, the courts consider whether the work used is descriptive or fictional and whether the work is published or unpublished. On one hand, the scope of fair use is contingent upon the level of originality present in a work. Consequently, a virtual production may enjoy a higher degree of protection under fair use compared to a documentary work or a work that is primarily the result of physical effort.

The Amount and Substantiality of the Use

The evaluation of this aspect requires both a quantitative study and a thorough qualitative examination. In specific cases, despite using only a small piece of the copyrighted work, the court determined the use to be unfair because the amount employed represented the fundamental substance of the copyrighted work. On the other hand, there were instances when the defendant reproduced the complete copyrighted work.

The Effect of Use upon the Market

The incentive theory posits that providing economic incentives to authors plays a crucial role in the framework of copyright law. Therefore, if an individual adopts a copyrighted work without authorization, resulting in a decrease in the profits for the copyright holder, it may be deemed as unfair. Nevertheless, the Court made a clear distinction between two distinct scenarios in which the profits of the copyright holder were diminished. Firstly, when the defendant engaged in parody and other forms of criticism towards the plaintiff's work, consequently leading to a decline in the

demand for the plaintiff's work. Secondly, when the defendant infringed upon the plaintiff's current and prospective market profits.

3.3. Critical Reflection on Fair Use

U.S. fair use, influenced by utilitarianism, balances right holders' interests with public interest, offering flexibility for technological advancement. This flexibility, as exemplified in the Google Books case, allows for a broad spectrum of uses, from academic research to digital archiving, contributing significantly to the accessibility of information. Google's initiative, which digitized millions of books without explicit permission, was deemed a fair use due to its transformative nature, providing a beneficial tool for researchers, historians, and the general public. This case highlights how fair use can foster innovation and enhance public access to knowledge.[4]

However, its flexibility also leads to unpredictability and legal risk, prompting criticism. The open-ended nature of fair use, reliant on a case-by-case analysis, results in a lack of definitive guidelines for users. This ambiguity can lead to inconsistencies in judicial decisions, making it difficult for creators and users to predict the legality of their actions. Critics argue that this unpredictability creates a chilling effect, deterring potentially lawful uses of copyrighted material due to the fear of legal repercussions.[5]

Critics also point out that the lack of clear rules and the high costs of litigation under the fair use system create an atmosphere of "removal by fear." [6] This environment discourages the use of copyrighted works, even in scenarios where usage might be considered lawful. The financial and temporal burdens of litigation can be particularly daunting for individual creators, small businesses, and educational institutions, who may lack the resources to engage in lengthy legal battles. This aspect of fair use can inadvertently favor large corporations with more substantial legal budgets, thus creating an imbalance in the application of copyright law.

Furthermore, the flexible nature of fair use, while beneficial in adapting to new technological realities, can sometimes lead to overreach. For instance, in situations involving new digital technologies, such as streaming services or content aggregators, determining the boundaries of fair use becomes increasingly complex. This complexity can stifle innovation, as creators and technology developers may hesitate to introduce new products or services due to uncertainty about copyright infringement.

4. Why fair dealing is better?

4.1. Ensuring Balance interests and Legal Certainty

As noted in the previous chapter, the open norm of fair use has the advantage of flexibility, but there are also clear risks and drawbacks to an open legal structure. An open legal structure predisposes to normative ambiguity, and while an ambiguous norm can leave the ultimate construction of the scope of copyright to the courts which allows them to administer justice more fairly in specific cases, this "enhanced" fairness comes at the cost of reduced legal security.[7] Fair use's open-ended nature provides flexibility in applying legal principles to specific situations, but it also leaves users often unable to ascertain in advance whether their actions are legally reasonable. This uncertainty can lead to over-deterrence, as users, in an effort to adhere to copyright legislation or mitigate perceptions of infringement, may restrict their use of copyrighted materials[8]. For instance, the third component of fair use requires courts to assess the extent and significance of the

use of a copyrighted work, establishing liability in cases of excessive copying. This inclines users to err on the side of caution, employing a quantity of work below the permissible limit to avoid infringement allegations[9]. Furthermore, some users, despite knowing that obtaining permission is not necessary, go to great lengths to obtain authorisation from copyright owners to ensure the legality of their use. This approach, while safeguarding against litigation, may incur costs far beyond ordinary licensing fees, inadvertently expanding the copyright owners' interests at the expense of the legitimate rights of users and the public. [10]

In contrast, the adoption of clear rules by Fair dealing is typically more effective than vague standards because rules better inform citizens of their rights and obligations in advance and allow those seeking justice to examine the legality of their actions without having to formally resort to the courts. By rectifying any instances of unjustified use, users can then proceed with the fair utilisation of copyrighted works, ensuring a sense of security and confidence in their actions. This measure serves the dual purpose of preventing copyright infringement and addressing the public's apprehensions over the utilisation of copyrighted materials, including concerns about potential legal repercussions and ambiguity surrounding fair use. When individuals take part in fair use and invention within the parameters of a well-defined set of guidelines, it serves to protect the public interest, encourage the well-being of the public and copyright holders and stimulate public innovation while effectively mitigating associated risks. The legislative model of fair dealing in the United Kingdom is to enumerate the circumstances of fair use in a limited way, and the user only needs to rely on the regulations to determine whether the use of its behaviour belongs to the circumstances of fair use, which is more operable. Unlike the openness of fair use, the British fair use system needs to be revised and repeatedly evaluated by the legislature. In the United Kingdom, prior to the enactment of new exceptions, it is usually imperative for the legislative body to engage in policy trade-offs. This involves the establishment of clear delineations between the copyright owner's exclusive rights and the public's demand for utilising copyrighted material. These trade-offs necessitate a thorough evaluation of the costs and benefits, drawing upon economic theory. Additionally, non-economic factors, including the moral rights of authors, must be taken into consideration.[11] This process involves a multiplicity of interests and ensures that each party is able to fully express and defend its own interests. Consequently, any of the statutory exceptions under the UK fair use regime reflect a compromise between the interests of different groups, ensuring legal certainty and authority.

4.2. Establishing Judicial Criteria for Copyright Fairness

Fair dealing offers a clear framework that enables the judiciary to establish a relative criterion for assessing the fairness of copyright usage. In the contemporary era, characterised by digital advancements, the utilisation of copyrighted content exhibits a wide-ranging nature that extends beyond the confines of typical national borders. Thus, when delineating the conditions that meet the criteria for fair dealing, nations commonly place emphasis on fair usage in respect to public welfare. The judiciary, as the interpreter and enforcer of the law, finds itself at the forefront of these evolving challenges. Their role is to both apply the law and also to interpret it in a manner that remains true to its foundational principles while being responsive to the changing digital landscape. The need for precision in judicial decisions is essential. A vague or inconsistent ruling can lead to ambiguity, potentially stifling innovation, or unfairly penalizing content creators. Consequently, it is imperative for the judiciary in every nation to consider the precision and consistency of the criteria when rendering decisions.

The concepts of fair dealing provides a beacon of clarity in this complex milieu. It offers the judiciary a structured framework to assess whether a particular adoption of copyrighted material

falls within the permissible bounds. Rooted in principles of equity and public interest, this doctrine not only offers a set of rules but also embodies a philosophy that harmonizes the interests of content creators with broader societal needs. When confronted with the challenge of determining the legitimacy of a particular use of copyrighted material, courts lean on the foundational pillars of fair dealing. They assess the purpose of the use, be it research, education, criticism, or another socially beneficial objective, and explore the very nature of the copyrighted work in question. Recognizing that certain works, such as factual databases, might be more amenable to fair dealing than rich creative endeavours like novels, the extent of the material used becomes pivotal in their assessment. A brief excerpt for a review is viewed differently from reproducing extensive portions without permission. Equally crucial is the evaluation of the potential market impact, ensuring that creators aren't deprived of rightful revenue. Yet, the true essence of fair dealing lies in its inherent adaptability. As we witness continuous technological advancements and transformative engagement with content, this doctrine ensures that copyright law remains relevant, balancing just rewards for creators while preventing restrictions on public access to knowledge and culture. In this intricate balance between rights and access, fair dealing emerges as a testament to the law's enduring ability to serve both individual creators and the collective good.

Thus, by examining factors such as the purpose of use, the nature of the copyrighted work, the amount used in relation to the whole, and the potential market impact, courts can make informed decisions that reflect the dual objectives of copyright law: protecting creators and serving the public interest. The concept of fair dealing offers a clear framework that enables the judiciary to establish a relative criterion for assessing the fairness of copyright usage.

5. Is there room in existing fair dealing to make it as wide as the American fair use?

5.1. Build a balance mechanism between technical protection measures and rational use

The rise of digital technologies, the Internet and social media has changed the way in which society access, share and use information. The proliferation of these technologies has made it easier than ever to reproduce and disseminate information, thereby posing a substantial challenge to traditional copyright protection mechanisms. As Nithin V Kumar has stated in his academic research, in response to this situation, digital rights management (DRM) technologies have been widely adopted, with the primary aim of preventing the unauthorized copying and distribution of information[12]. While technical protection measures serve to uphold the legitimate rights of copyright holders, they inadvertently curtail the principle of fair use. In the context of modern network technology, these measures render the fair use doctrine inapplicable. This is primarily because, when content is shielded by such measures, users are precluded from accessing it without explicit authorization. Consequently, to foster cultural development and its dissemination, it is imperative to establish a balanced framework reconciling technical protection measures with the tenets of fair use.

As to how to establish a balancing mechanism between technological protection measures and fair use of copyright, this paper puts forward suggestions from two dimensions: namely legislation and practical operation. At the legislative level, the scope and duration of the implementation of technical protection measures should be regulated in two main segments. It should be made clear that the implementation of technological protection measures must be based on lawful purposes, so that the lawful rights and interests of copyright holders will not be harmed, and that any technological measures exceeding the necessary limit should be regarded as unlawful technological measures, or the use of technological measures to engage in unfair competition. In addition, in referring to the

practice of Australia's copyright law, which excludes bundling and zoning of sales areas from technological protection measures, it is notable that such a system adds a provision that "no technological protection measures shall be applied to non-copyrighted works".

On the other hand, in practice, it is recommended that specialized application clients be developed to centralise the management of copyright-protected works. Users are required to register with their real names when using these works, and are given fair use instructions for their copying and redistributing behaviour. If the users' copying or redistributing behaviour exceeds the prescribed scope, restrictions should be imposed. In addition, in the age of digital Internet copyright, copyright works can be accompanied by a real-time communication window, enabling users to communicate instantly with copyright owners, collective management organisations and court officials. This communication mechanism helps both parties to reach consensus on the lifting of technical protection measures. To further clarify the roles and interests of all parties in the process of technology application and research and development, it is recommended that technology protection measures be clearly defined and that a credit scoring system for copyright holders is established. Japanese scholar Kitagawa Zentaro proposed that in order to resolve the contradiction between technological protection measures and the free circulation of works, two copyright trading markets could be established: one for information disclosure on works and the other for the trading of works, and that these two markets be closely integrated with the Internet[13]. Finally, the judiciary should strengthen the professional training of its staff to ensure that they are able to adhere to the core principle of fair use of copyright when dealing with relevant cases, balancing individual rights and interests with the public interest, and improving the fair trade system.

5.2. Expand the scope of fair dealing

Fair dealing in copyright law determines whether the use is "justified" by listing specific purposes, and this explicit enumeration provides clear guidance for the adoption of copyright protected works but may in some cases be too strict or restrictive. Many countries have rejected the legislative proposal of adopting a free and rational use model, like Australia, The United Kingdom, or New Zealand. Therefore, with technological and social developments, especially in the context of the widespread use of digital technologies, it is necessary to consider expanding the list to reflect the needs and changes of modern society – a constantly evolving system. For example, the category "Commentary" could be introduced, which covers a broader range of views and interpretations for a particular work or event, providing greater scope for those wishing to explore a subject in depth. Also, it is worth considering the category of "transformation", which implies some form of adaptation or modification of the original work so to create new and unique content. In the technological and digital age, consideration could also be given to the inclusion of "innovation" for the purpose of encouraging the use of copyrighted material for the development of new applications.

By expanding the list of purposes allowed for use, it can provide greater flexibility for creators and the public, but also ensure that the rights of creators are properly protected. In turn, this respects the rights of original creators while encouraging creativity and innovation. In this process, we can learn from the experience of other countries, combined with their actual situation, to develop a more suitable copyright protection system.

6. Conclusion

In the intricate domain of copyright law, the balance between creators' rights and the public's access to knowledge stands as a central concern. The dissertation findings illuminate the inherent strengths of fair dealing in multiple dimensions. Specifically, fair dealing stands out as a robust mechanism

that effectively champions the rights of creators, ensuring that their intellectual contributions are recognized and protected. Beyond safeguarding individual rights, it also acts as a catalyst for innovation, fostering an environment where creativity thrives. This not only benefits creators but also enriches the broader public domain, ensuring that society at large benefits from a diverse array of creative works.

This dissertation concludes that fair dealing is more advantageous in the balancing of copyright interests, but we cannot sever fair dealing from fair use and need to adopt a coordinated approach that combines the strengths of the two doctrines to construct a more adaptive copyright framework based on fair dealing. In our evolving world, where the intricacies of copyright continue to be woven, it is incumbent on legal practitioners and professionals to remain agile and responsive. Their ability to adapt ensures that the legal framework is fair and meets the needs of both talented creators and the public at large.

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