

UNPACKING COPYRIGHT EXEMPTIONS

INTRODUCTION

Copyright is a system that provides a qualified monopoly for creative persons, collectively known as 'authors', in the use of their original works (be they literary, artistic, musical etc.) in the manners in which such works can be commercially used for gain. The purpose of this system is to enable them to make a living out of producing works, and thus to provide an incentive for them to create more and better works.

The protection is granted for a limited period (for fifty years after the happening of a specific event, depending on the category of the work). Once the term of protection has expired, the work falls into the public domain and can be used freely by all for whatever purpose.

The public benefits in two ways from this system. First, works broadening their knowledge, enriching their culture, giving them pleasure and entertainment, and generally enhancing their well-being are produced in abundance on an ongoing basis. Second, after the initial period of protection, during which the works can be used subject to the permission of the copyright owner, the works fall into the public domain and become common property.

During the protected period constraints can be placed by the copyright owner on the manner and circumstances in which the works can be used. In general the copyright owner can exact payment for the use of his/her work. This is her quid pro quo for her granting permission for the use in question, which is in turn the mechanism by which her income from her work is generated.

This imposition of constraints on the use of works impacts on public freedoms because it can inhibit the use of works in circumstances where society feels that the works ought in fairness to be more freely available. There is a tension between the property rights and entitlements of the copyright owner and the interests of the public at large. A weighing up between these conflicting interests is desirable. Copyright law strives to achieve an equitable balance in this respect. This is done by making exceptions to copyright protection. These exceptions exempt certain activities from constituting copyright infringement.

INTERNATIONAL COMMITMENTS

South Africa is a member of two international treaties which regulate copyright, namely the Berne Convention and the so-called TRIPS Agreement. It is bound to comply with these treaties and to incorporate their prescriptions in our domestic law. Any deviation from them would place us in breach of those agreements. The South African Constitution in fact obliges us to apply the terms of international treaties of which we are members in our law.

Both treaties lay down requirements obliging members to grant a prescribed measure of protection to copyright works, both locally and foreign made. Our law meets these requirements in accordance with our obligations. The treaties countenance exceptions to copyright protection, but only in certain strictly circumscribed situations and circumstances. Exceptions in our law cannot go beyond the ambit of those comprised in the treaties. The treaties provide that exceptions can only be allowed if they fall within the limits of the so-called **'Three-step Test'**

In terms of the three-step test an exception can only be granted if:

1. It amounts to a **certain special** case.
2. It does not conflict with a **normal exploitation** of the work.
3. It does not unreasonably **prejudice the legitimate interests** of the rights holder

These tests are applied consecutively. In other words each of them must be met in the order in which they are stated. This means, for instance, that if the first one is not met, that is the end of the matter, and so forth.

The upshot is that an exception in our law cannot be valid if it does not pass the three-step test. Our law would be in breach of the treaties, and therefore unconstitutional, if it seeks to provide an exception that does not meet the three-step test.

SYSTEMS FOR PROVIDING EXCEPTIONS.

Internationally, there are basically two systems utilized in providing exceptions to copyright. They are so-called **'Fair Dealing'** and **'Fair Use'**, respectively.

Fair Dealing

Utilizing **Fair Dealing** entails providing a closed list of carefully formulated descriptions of actions in relation to works that are excused from copyright infringement in copyright legislation. In the case of certain of these specific exceptions there is a qualification that the action in question must be a 'fair dealing' with the work. For instance, an exception enabling a work to be used without the permission of the copyright owner for purposes of private study (a certain special case in terms of the Three-step Test) is qualified to the extent that the use must in addition be a '**fair dealing**' with it. This introduces a value judgment into the equation aimed at making the exception consonant with the second and third components of the Three-step Test. Not all the exceptions used in this system specifically have this additional qualification, thus making the 'Fair Dealing' description for the closed list system something of a misnomer. Accordingly, the expression 'fair dealing' is used in both a wide and a narrow sense, the naming of the system per se being the former manner of use.

Provided specific exceptions in the Fair Dealing system are well chosen by the legislature for inclusion in the Copyright Act, they can meet the Three-step Test comfortably.

The Fair Dealing system was devised by the framers of the Berne Convention, of which it is an integral part. The system is designed to meet the requirements of the Three-step Test. It is utilized widely throughout the world, including in South Africa and Africa in general.

Fair Use.

Fair Use is a system which developed in American copyright law. It was provided for in the USA before that country joined the Berne Convention or the TRIPS Agreement, and without having any regard to the Three-step Test. It is underpinned by the peculiarities and tenets of American copyright law and the American law and procedures in general, which are significantly different to our own.

American copyright law was not designed to meet the requirements of the Three-step Test. Whether Fair Use can in retrospect be massaged to satisfy the test is a moot question that will be addressed later.

Fair Use prevails in the USA and in six other countries, out of nearly 200 countries in the world that are members of the conventions. It has been considered and found to be wanting and unacceptable, inter alia, in Europe, the UK, Australia, New Zealand, despite being urged by American business interests. It has also not

been taken up into the Copyright Model Law adopted by the African Regional Intellectual Property Office (ARIPO) in 2019.

Fair Use entails the court being given a discretion when passing judgment in a copyright infringement case to decide whether the prima facie infringement by the defendant should be excused or exempted because she was making 'fair use' of the work in the particular circumstances of the case. In evaluating the 'fairness' of the defendants infringing conduct, the court should take account, inter alia, of the following factors:

1. The purpose and character of the use.
2. The nature of the copyright work.
3. The amount and substantiality of the portion used.
4. The effect on the plaintiff's potential market.

It must be emphasized that these four factors are not a **test** for fairness, but rather **guidelines** for the court to follow in assessing the fairness of infringing conduct, and in applying its discretion in deciding whether to grant an exception.

In adopting this approach the court can decide for itself what **actions** ought to qualify as potential exceptions. In this respect the system is in sharp contrast to the Fair Dealing system where the **actions** to which exceptions can be applied are determined and specified in the legislation.

The crucial question that arises is how this general discretion conferred on the court can satisfy the first of the step in the Three-step Test, namely that an exception cannot be granted unless the infringing act is a **certain special case**.

Implementing the Fair Use system does not behave the court to make any finding that the relevant action is indeed a **certain special case**; it is only required to decide whether the infringing **action** in question amounted to use of the work in a manner which is **fair**. The court is free to regard any act of whatsoever nature as being capable of being exempted, according to its discretion. It is difficult to conceive how any 'fair' action of whatsoever nature can be classified as being a **certain special case** and thus pass the first of the three tests required by the Berne Convention and the TRIP'S Agreement.

The treaties expressly require member countries to apply the Three-step Test to the granting of exceptions. South African legislation must therefore specify the

certain special cases which are exempted on pain of being in violation of these treaties, and therefore unconstitutional.

The proponents of Fair Use, including the global American companies that champion and lobby world-wide for this system of exceptions (in general companies that operate vast databases of easily accessible digital information where copyright is a hindrance to their operations) argue that **any action** that is **fair** on the part of a user of a work constitutes a **certain special case**. It is submitted that his proposition defies logic and common sense and is untenable. Freedom to regard **any actions** whatsoever in respect of a work, which are nowhere specified, as suitable subject matter for an exception, according to the judges discretion, cannot be reconciled with the notion that the exceptions must be limited to a **certain** special case or a certain **special** case. A random unspecified action adopted by a judge using his discretion in a particular case cannot from a law-making perspective qualify as a case which is either **certain** or **special** within the meaning contemplated in the treaties.

A worthy academic discussion of Fair Use as a system for providing exceptions to copyright infringement in South Africa by Prof Sadulla Karjiker of Stellenbosch University can be found in the booklet entitled '*A Gift of Multiplication*, published by Juta, at page 41. Copies of this booklet will be made available to members of the Select Committee. It can be accessed electronically at the link:

https://www.juta.co.za/uploads/The_Gift_of_Multiplication_Essays_Amendment_Bill

EVALUATION OF FAIR DEALING AND FAIR USE.

Fair Dealing has the merit of certainty. Whether or not an activity constitutes a **certain special case** and qualifies as an exception is determined by reference to the closed list of exceptions contained in the legislation. If the contentious activity is thus listed or can be regarded as falling within one of the listed exceptions, it follows that it is a certain special case. The public knows what it can do without obtaining consent from the copyright owner and conversely the copyright owner knows what limitation has been placed on her exclusive rights.

The disadvantage of the Fair Dealing system is that it lacks flexibility. In the event that circumstances require the making of further exceptions it is necessary for the legislation to be amended so as to expand the closed list of exceptions, which could be a time-consuming process. In the current South African Copyright Act this is mitigated by Section 13 which empowers the Minister of

Trade and Industry to make new exemptions in regulations, provided they comply with the Three-step Test. New exceptions can thus be created in the short term.

By contrast the Fair Use system is flexible. New exceptions can be created literally on the spur of the moment by judges hearing copyright infringement cases. These exceptions could be ad hoc and do not necessarily lay down new principles that can guide future cases. This is because they will largely be determined by their own facts.

These cases amount to judge-made law. The courts (including the Constitutional Court) have frequently gone on record warning that courts should not venture into the field of law making lest they abrogate the principle of separation of functions and powers and intrude on the terrain of parliament. Parliament is the institution that is best placed to take the policy decisions that play a role in matters such as diminishing the property rights of copyright owners.

The main drawback of Fair Use is uncertainty. Because judges can in the exercise of their discretion decide that just about anything can constitute Fair Use and amount to a new exception, no-one, not copyright owners nor users, can know in advance whether a particular activity can qualify for an exception. This will only become known at the final conclusion of copyright infringement litigation – once the final appeal has been decided (which could take several years after the potential infringement has been committed) -whether particular actions will be judged to be infringement or will be exempted on the basis of an exception created in the litigation. Neither the litigants nor the public will know in the meantime whether the actions in question qualify for an exception. Furthermore, no-one knows when and what new exceptions will come along. This could happen with every single future copyright infringement case, a development which would not necessarily be generally known.

Fair Use is a creature of American copyright law. Our courts do not apply American law and the principle would be applied by them in the context of, and in a manner compatible with, our law. The methodology and the outcome of applying the system in our law would not necessarily be the same as the counterpart in America. It has the potential in our law to grant unchartered exceptions to copyright on a widespread scale.

Suppose under a fair use system in our law, Person X decides that it is acceptable and reasonable to make copies of the latest best-selling novel for the benefit of

the thirty members of her book club, being impecunious and unable to afford buying copies for themselves. Does this amount to fair use and thus qualify for an exception? Bear in mind that in our law the court is obliged to apply the Three-step Test to any prospective exception.

The legislation would be silent on whether this **action** per se qualifies for an exception. In applying the first step of the three-step test (which it is compelled to do) the court ought to approach the matter on the basis of, to begin with, deciding whether copying books for a book club is inherently an activity that actually merits qualifying as a **certain special case** at all, such as to warrant it being exempted from copyright. Different courts might reach different conclusions on this question since a discretion or value judgment is involved. Assuming, for the sake of argument, the court decides that in principle this is a worthy **certain special case**, the next step is to decide whether that activity conflicts with normal exploitation or is unduly prejudicial, as required by the Three-step Test. If it does not fall foul of any of these tests, then prima facie the use of the work is **fair**. However, in reaching a final conclusion on this point the system requires that the court should also have regard to all relevant considerations, including the four factors discussed above, but also others like the financial circumstances of the members of the book club. If they are wealthy, X's conduct would probably not be fair; on the other hand, if they are poverty stricken it might arguably be fair.

Whatever decision the court reaches would have little precedent value and would not create any certainty as to the law, because in the next similar case that comes along the circumstances might be different. There may be more, or fewer copies of the book involved, the book may be difficult to obtain, the price of the book may be different, or the economic circumstances of the members of the book club may be better or worse than in this case. These different factors could prompt a different decision on the appropriateness of an exception. No-one will be any the wiser as to whether copying a book for distribution in a book club can be regarded as a recognized exception and is thus in principle a **certain special case**. This must be contrasted with the situation where it is stated in the legislation that it constitutes a **certain special case**.

CONCLUSION

Fair Dealing is the system that has been part of our copyright law for at least the past century. It is derived from the treaties and, together with the accompanying Three-step Test, is enshrined in, and dictated by, them. It is followed by the overwhelming majority of countries in the world and by and large works well (it must, however, be said that the current list of exceptions in the Copyright Act is inadequate and requires to be expanded by additional items). It provides much needed certainty in the law on the question.

Fair Use is an alien system which has no roots in our law and does not belong in it. It derives from American law which is significantly different to our own law. It has virtually gained no currency outside America, and has been rejected by our peer countries. Incorporating it in our law is fraught with difficulties and will lead to a situation of great uncertainty in the area of copyright exceptions. This is not in the interests of rights holders nor users or the general public. By virtue of its possible excessive and **uncontrolled** generosity to users of copyright, it has the potential to tilt the scales balancing the constitutionally protected property rights of copyright owners with the freedoms available to users too heavily in favour of the latter, thus nullifying the purpose of copyright. In the final analysis it runs the risk of facilitating killing the proverbial goose that lays the golden egg.

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