

# European Intellectual Property Review

2006

## Publication Review

### Copyright Exceptions: the Digital Impact

MARCELLA FAVALE

Doctoral candidate

School of Law,

University of Nottingham

Reviewed by Marcella Favale

**Subject:** Intellectual property

**\*E.I.P.R. 505** Copyright limits are the safety valves that allow fundamental freedoms and the public interest to be acknowledged within the protection of the author's exclusive rights. Among them, copyright exceptions embody those that some define as "permitted uses" of copyright goods and some others describe as "users' rights". Robert Burrell and Alison Coleman side with the latter. They reckon several copyright exceptions to be indispensable for the existence of a political discourse, for furthering artistic creation, and for promoting the circulation of culture. But the current UK copyright system might not be effective enough in protecting them. The solution, according to the authors, does not reside in rewriting the international legislation. While they deplore the effect that the European Copyright Directive (2001/29/EC) had on UK copyright law, they are quite satisfied with the wording of the Directive relating to copyright **\*E.I.P.R. 506** exceptions, and would have welcomed a more literal implementation. In this they depart from the mainstream literature.

In the first part of the book some fundamental copyright exceptions are examined in depth. Starting from the relationship between copyright and freedom of expression, the authors review a few cases in which copyright law has been used as a tool for censorship or has interfered with the public interest. They stress in particular the danger that a narrow interpretation of exceptions like reporting current events, review and criticism represents for the democratic process.

The authors, moreover, examine a series of cases in which a public interest defence has indeed been recognised, but not in relation to copyright protection. They argue that, hitherto, this defence has been reached through different ways, because, as a copyright exception, it has been criticised for being--alternatively --illegitimate, inappropriate, unnecessary or unworkable, objections that the authors, very convincingly, refute one by one.

Furthermore, Burrell and Coleman criticise the exception for education, research and private study, which in the United Kingdom applies only to a limited range of subject-matters. Also, it fails to distinguish between different stages of research and it does not specify the amount of material that can be copied. Confusingly, moreover, the exemption has been restricted exclusively to non-commercial research. Less critical is the position of the authors towards the general exception for education, as long as licences are available. But the exception for libraries and archives in the Copyright, Designs and Patents Act of 1988 is, according to the authors, largely disappointing, again for the limited range of subject-matter which benefits from it and for the limits that it applies to the use of new technologies by libraries, museums and similar institutions.

Burrell and Coleman devote the first sections of the second part of the book to the refutation of three of copyright's theoretical underpinnings: the market failure justification for copyright exceptions, copyright as property, and copyright as a balance between owners and users. Their aim is to make us aware of the origin and nature of such "metaphors", which can lead to unintended outcomes.

The authors maintain further that users received a "poor deal" from copyright regulation, especially after the implementation of the Copyright Directive. This is because the United Kingdom adopted a "bolt-on" approach in translating the Directive into national law, preserving as much as possible the old formulations and adding further specifications. The final result is a stricter system of exceptions, which could have been avoided by paying more attention to the comparatively more flexible original

text of the Directive.

In the third and last part of the book, Burrell and Coleman refute the argument for the adoption of a fair use exemption. Such a fair use exception, they say, which many hail as a "panacea", would replace certainty with flexibility. This is not a bad thing in itself, but it can work only if the judiciary changes the current restrictive attitude towards users. Besides, according to the authors, we need to consider that a fair use exception will probably operate very differently in a diverse legal environment.

The book concludes with the authors' vision of a better copyright discipline, which involves some law reforms and a change of attitude by the judiciary. Moreover, they would wish to see a more selective harmonisation, focused only on the exceptions relevant for the internal market. The others, according to the authors, should be left to local evaluations.

On the whole, Burrell and Coleman provide an exceptionally accurate and well-documented examination of the most fundamental copyright exceptions and their operation within the UK copyright system. However, the work is more focused on the copyright exceptions themselves than on "the Digital Impact" affecting them. It appears, in fact, that the only "digital" thing that "impacts" on copyright exceptions, in their book, is the Information Society Directive. The exemption for caching copy (EUCD, Art.5.1), for example, which is the only one created by the digital environment, is merely hinted at. As for Technological Protection Measures ("TPMs"), Burrell and Coleman appear to be less worried than the mainstream copyright doctrine. They reckon an excessive alarmism is premature. We should wait and see if in practice TPMs will deny protection to copyright exceptions. The only areas in which the EUCD can be seen as "potentially deficient", and therefore in need of some reform, are the number of exceptions with which TPMs have to comply, which should be expanded, and the exclusion of internet goods from the copyright exceptions, which should be eliminated. The latter is an opinion shared by the overwhelming majority of copyright scholars, and rightly so. Conversely, the former opinion of the authors that "Europe has adopted the right *approach* to this issue [TPMs], although ... it may be necessary to expand the coverage of the current provision" is far from being indisputable, and would have deserved a deeper discussion.

Except for--given the title--the relatively scant attention dedicated to purely digital matters, this book is a valuable resource, which deserves the attention of whoever wants to deepen his or her understanding of the fundamental values hidden among copyright exemptions.

## **MARCELLA FAVALE**

**Doctoral candidate**

**School of Law,**

**University of Nottingham**

E.I.P.R. 2006, 28(9), 505-506

© 2019 Sweet & Maxwell and its Contributors

The logo for Westlaw UK, featuring the word "Westlaw" in a blue sans-serif font with a cluster of small dots above the "a", followed by ".UK" in a smaller, lighter blue font.