

ATRIP 37th Annual Conference

Title: Reflecting the dynamism of ‘fairness’ in copyright law: a users’ rights perspective

Abstract: Copyright law takes a formalistic approach to fairness, especially in relation to the users’ rights. There is a presumption of fairness in the protection of the owners’ rights. In the circumstances where it is fairer for the users’ rights to be given effect to as opposed to the owner’s rights, this formalistic approach finds expression in most jurisdictions, in specifically crafted and narrowly defined statutory limitations and exceptions. Even if these exceptions have some open-endedness in the form of fair dealing provisions in most jurisdictions, there is an underlying mandate as to the circumstances within which the use should be found fair – such as research, review or criticism. Further, certain jurisdictions such as the EU declare in their laws that the list of statutory limitations and exceptions is a closed list. However, fairness may not always lie within the four corners of the express provisions of the limitations and exceptions. Fairness is far too dynamic to be captured within the statutory provisions or the legislative process, especially in the current technological milieu. In this vein, section 171(3) of the UK Copyright, Designs and Patents Act, 1988 had been enacted to preserve the open-ended powers of the common law judges to prevent or restrict copyright enforcement in public interest. An historical review of cases reveals that the judges have exercised this power to achieve a fair result where no other statutory limitation or exception could assist. Some commentators believe that the implementation in the UK of the Information Society Directive (2001/29) requiring the list of statutory limitations and exceptions to be a closed list has reduced the scope of s 171(3). This paper explores the scope of the common law powers under this provision, its legislative history, its survival since the enactment of the Information Society Directive and its potential role upon Brexit.

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