

# THE FAIR USE DOCTRINE IN THE U. S. AMERICAN COPYRIGHT ACT AND SIMILAR REGULATIONS IN THE GERMAN LAW

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## Introduction – the Copyright Monopoly and its Limitations

Copyright is often considered “the right of an author to control the reproduction of his intellectual property.”<sup>1</sup> The author loses actual control over his or her work by publishing it. Therefore, copyright assures not only that the author keeps his or her work under control, by preventing unauthorized copying, but it also assures that he or she earns the benefits from the intellectual labor.<sup>2</sup> It can be considered an incentive for publishing his or her work. Copyright also works as a compensation for the financial risks the author accepts by publishing his or her work.<sup>3</sup> Without copyright protection, an author might refuse to publish his or her work, so that, in the end, the public might not enjoy it. American framers recognized the intellectual labor of authors bearing these considerations in mind. Article 1, section 8, clause 8 of the U.S. Constitution provides that “the Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.”

The benefit that the author enjoys through copyright protection is problematic: the author’s sole right to copy her work contrasts with public interests, such as social, political, educational and cultural roles.<sup>4</sup> Some believe that this information should be considered public goods and, therefore, not be protected by copyright law.<sup>5</sup> They claim that copyright protection is a monopoly<sup>6</sup> which prevents others from using the authors’ work. In order to solve this quandary, countries, like the United States and other countries where authors enjoy copyright protection, tried to create a balance between the authors’ sole right of copying on the one hand and public interest in using the authors’ work on the other.

Some of these limitations are already found in the definition of copyright itself. For example, in the United States, as well as in Germany, ideas are not protected by law and the work has to have a minimum of creativity in order to enjoy protection.<sup>7</sup>

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<sup>1</sup> REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6 (1961).

<sup>2</sup> Thomas Froehlich, *Copyright and Fair Use: Fair Use as a Right?* 2, at <http://www.ffzg.hr/infoz/lida/lida2001/present/froehlich2.doc> (last visited April 25, 2005).

<sup>3</sup> Manfred Reh binder, *Urheberrecht*, Rn. 16 (12th ed. 2002).

<sup>4</sup> Thomas Froehlich, *supra* note 2, at 3-4.

<sup>5</sup> See Thomas Froehlich, *supra* note 2, at 5-8.

<sup>6</sup> See Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 506-11 (1945).

<sup>7</sup> See German Copyright Act, §§ 1 and 2, and U.S. Copyright Act, 17 U.S.C. §102(b) (2000).

Even when the author enjoys copyright, his protection is often subject to many limits. An example of these limits is the duration of copyrighted works, or the American first-sale doctrine and the European limitation “exhaustion of copyright,” respectively. Countries have developed a whole catalogue of limitations. In the United States, one of these limitations of copyright protection is the Fair Use doctrine.<sup>8</sup> Fair Use essentially gives the public a right to copy an author’s work for the purpose of criticism, parody, or educational use without her permission. Fair Use is often defined as the “privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner.”<sup>9</sup>

This paper concentrates on the American Fair Use doctrine and compares it with similar German copyright limitations. Both America and Germany are members of the Berne Convention as well as the TRIPS Agreement. According to Article 9 Paragraph 2 of the Berne Convention and Article 13 of the TRIPS Agreement, the so-called “three step test” applies,<sup>10</sup> granting limitations of copyright only when limitations “do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Therefore, a basic similarity already exists in both countries because of these treaties. Nonetheless, the paper will show that German copyright law is unfamiliar with a sole limitation section of the right of the copyright holder like the American Fair Use doctrine. Moreover, the German law provides several limitations in different parts of its code. The paper will show to what extent these limitations are similar with the American Fair Use doctrine and to what extent the American law differs from the German law.

Part I begins with an introduction into American Fair Use and a historical overview of the doctrine, as well as an introduction into the German limitation regulations. Part II discusses the Fair Use doctrine and the German limitations in detail by comparing a number of cases that have been decided in the United States and in Germany. The conclusion answers the question to what extent the law of both countries differs and gives an incentive for both systems to learn from one another.

## **I. Fair Use vs. Limiting Regulations**

### *A. The Fair Use Doctrine in the United States – An Overview*

In the Copyright Act of 1976, the Congress of the United States codified an exception to copyright protection in section 107: the Fair Use Doctrine. At that time, the Fair Use Doctrine was already a judicially created doctrine, first mentioned in 1841 in *Folsom v. Marsh*.<sup>11</sup> In that case, the defendant had used George Washington's private letters to create a fictionalized biography of the President without the owner’s permission.<sup>12</sup> The court found that using the letters without permission did not infringe the copyright of the owner.<sup>13</sup> The court stated that the

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<sup>8</sup> 17 U.S.C. § 107 (2000).

<sup>9</sup> *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (1966).

<sup>10</sup> See Manfred Rehbinder, *supra* note 3, at Rn. 253.

<sup>11</sup> *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass 1841) (No. 4,901).

<sup>12</sup> *Id.* at 345.

<sup>13</sup> *Id.* at 349.

use in question had been of only a small portion of the letters and had been for semi-scholarly purposes.<sup>14</sup> In finding the use fair, the court stated: "In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects, of the original work."<sup>15</sup> These criteria still form the basic considerations for Fair Use.

The courts have recognized the dilemma that copyright protection faces at an early stage. Since Congress did not provide a solution, it was up to the courts to create a balance between the right of the author on the one hand and public interests on the other. An American district court addressed the issue in *Storm Impact, Inc. v. Software of the Month Club*.<sup>16</sup> The court noted that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. However, for progress to occur, others must be permitted to build upon and refer to the creations of prior thinkers. Thus, there is an inherent tension in the need to protect copyrighted material and to allow others to build upon it."<sup>17</sup>

According to section 102, American Copyright Law protects authors' works when they are "original works of authorship fixed in any tangible means of expression."<sup>18</sup> Unauthorized use of these works constitutes infringement of the rights of the copyright holder unless the use is excused by an exception. Fair use is considered one of these exceptions and is an affirmative defense of a claim of copyright infringement.<sup>19</sup> As the court in *Storm Impact* pointed out, fair use "legally empowers a person to use the copyrighted works in a reasonable manner without the consent of the copyright owner . . . . The uses which are deemed fair have a common theme, each is a productive use, resulting in some added benefit to the public beyond that produced by the first author's work."<sup>20</sup>

When Congress introduced the Fair Use statute in 1976, it stated in its House Report that the Fair Use doctrine "has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it."<sup>21</sup> Congress also stated that there has not been a real definition of Fair Use so far, but noticed that the Courts have put out a set of criteria.<sup>22</sup> These criteria were put into statutory form in the language of section 107.

In finding a use fair, courts have to weigh the four factors set out by section 107. The first factor, "the purpose and character of the work," distinguishes between commercial and non-profit use and asks how much the new works differs from the original (transformative use).<sup>23</sup> Courts interpret the second factor, "the nature of the copyrighted work," as meaning that the

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<sup>14</sup> *Id.* at 348.

<sup>15</sup> *Id.*

<sup>16</sup> *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998).

<sup>17</sup> *Id.* at 786-787.

<sup>18</sup> 17 U.S.C. § 102 (2000).

<sup>19</sup> Thomas Froehlich, *supra* note 2, at 5.

<sup>20</sup> *Storm Impact*, 13 F. Supp. 2d at 787-88.

<sup>21</sup> H.R. REP. NO.94-1476, at 65-66 (1976)

<sup>22</sup> *Id.*

<sup>23</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994).

more creative the original work, the more it enjoys copyright protection.<sup>24</sup> Therefore, copyright protection of derivative work or compilations is thinner than of those who are original and creative. “The amount and substantiality of the portion used” is the third factor, and the test courts apply is how much of the “heart of the copyrighted work”<sup>25</sup> has been used. Finally, the fourth factor, “the effect on the market value for the original,” is considered the most important one of the four factors.<sup>26</sup> The defendant has to show that the new work does not have an impact on either the actual or on the potential market.

Courts examine and weigh all four factors together in the light of the purposes of copyright protection, in order to decide whether use of a copyrighted work is fair. Section 107 of the Copyright Act enumerates a list of purposes, like criticism, educational use or parody, all considered fair use as long as the four factors weigh in favor of the defendant. This list should not be understood as exhaustive. When Congress introduced section 107 of the Copyright Act, it was aware of the development of new technology. In its House report it stated that the intention of section 107 is not to “freeze” the existing judicial doctrine.<sup>27</sup>

### *B. Germany and its Copyright Limitations – An Overview*

German law has its roots in Roman law. Copyright protection did not exist either in the ancient world or during the Middle Ages. Although it was always morally despised, no rules or statute regulated plagiarism.<sup>28</sup> This notion changed in Europe in approximately 1440 AD. With the development of letterpress printing, publishers and printers were faced with higher costs and financial risks and sought protection against unauthorized reprinting. In the Holy Roman Empire of the German Nation, this kind of protection remained an exception, and can be considered more a protection for printed books than for the underlying intellectual property.<sup>29</sup> In 1511, Albrecht Dürer was one of the first German authors who received privileges for his work in order to protect it against unauthorized use.<sup>30</sup> Martin Luther received some privileges for his work as well in 1532, but these privileges remained as exceptions for the next 300 years before the first German copyright law was passed.<sup>31</sup>

While England passed the first statute granting an author the right to control copies of his work in 1710,<sup>32</sup> the situation differed in Germany. After the fall of the Holy Roman Empire of the German Nation at the beginning of the 19<sup>th</sup> century, Germany consisted of more than 35 principalities (the so-called “North German Federation”) which could hardly agree on basic governmental principles. In 1837, Prussia was the first principality that enacted a law in order to protect the property of science and arts.<sup>33</sup> Today, this statute is considered the first German

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<sup>24</sup> *Id.* at 586.

<sup>25</sup> *New Era Publ'ns. v. Carol Publ'g. Group*, 904 F.2d 152, 158 (2nd. Cir. 1990).

<sup>26</sup> *Campbell*, 510 U.S. at 577.

<sup>27</sup> H.R. REP. NO. 94-1476.

<sup>28</sup> Manfred Rehbinder, *supra* note 3, at Rn. 12, 13.

<sup>29</sup> *Id.* at Rn. 14 *et seq.*

<sup>30</sup> *Id.* at Rn. 17.

<sup>31</sup> *Id.*

<sup>32</sup> Robert A. Gorman & Jane C. Ginsburg, *Copyright*, 2, (6th. ed. 2002).

<sup>33</sup> Manfred Rehbinder, *supra* note 3, at Rn. 23.

copyright law.<sup>34</sup> Some of the other principalities adopted the law, and in 1870 the first nationwide copyright law was enacted. This law has been taken over by the German Empire after its declaration in 1871. The statute was extended and revised in 1901 and 1907. Finally, Germany enacted the existing German Copyright Act in 1965, and recently revised it in order to comply with a number of European directives.

There have always been different limitations of the author's sole right to copy his work. The notion that artistic works in public places are common property has its origin in the statute to protect arts from 1876.<sup>35</sup> Throughout the years, courts developed the opinion that limitations should be interpreted narrowly. The reason is that the author should be given a reasonable share of the financial benefits as a result of his constitutional rights.<sup>36</sup> Limitations may only be considered exceptionally, particularly in cases when the constitutional rights of the author are confronted with constitutional rights of others. In these cases, the rights should be weighed against each other and carefully considered.<sup>37</sup>

Another reason for the narrow interpretation is that Germany is a member state of the Berne Convention, as well as of the TRIPS Agreement, which permits limitations only when it is an exception.

## II. Case Comparison: Fair Use vs. Free Use

### *A. Parody*

#### 1. Music Parody

In "*Gaby wartet im Park*", the Bavarian Higher Regional Court had to decide whether a music parody without the license of the owner could be considered legal under the German Copyright Act.<sup>38</sup> The plaintiff, a famous German crooner, composed the song, "Gaby wartet im Park."<sup>39</sup> The plaintiff was subject to several rumors that included an alleged relationship with a 13-year-old girl.<sup>40</sup> The defendant, a broadcast service, played a song called "Omi wartet im Park."<sup>41</sup> The song was sung by a different artist but used the same melody of the song, "Gaby wartet im Park," without the license of the plaintiff.<sup>42</sup> The artist who sang the song, however, changed the words from the original.<sup>43</sup> The new lyrics alluded to the crooner's private life and made fun of his alleged relationship with the girl.<sup>44</sup> The plaintiff sued the defendant for copyright

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<sup>34</sup> *Id.*

<sup>35</sup> German Supreme Court, GRUR 2002, P. 605 (606).

<sup>36</sup> *Id.* at P. 605.

<sup>37</sup> *Id.* at P. 606.

<sup>38</sup> Bavarian Higher Regional Court, ZUM 1991, P. 432 *et seq.*, at P. 434.

<sup>39</sup> *Id.* at P. 432.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at P. 433.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

infringement.<sup>45</sup> The defendant claimed that the version of “Omi wartet im Park” should be considered parody and, therefore, did not violate plaintiff’s rights.<sup>46</sup>

The court held that the defendant infringed the copyright of the plaintiff.<sup>47</sup> The court found that the version played by the defendant was not parody.<sup>48</sup> The court cited section 24 of the German Copyright Act which regulates that: (1) an independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work; and (2) Paragraph (1) shall not apply to the use of a musical work where a melody has been recognizably borrowed from the work and used as a basis for a new work.

The court held that the interpretation of the song “Omi wartet im Park” was not allowed to use the melody of the plaintiff without his permission according to section 24 Paragraph 2.<sup>49</sup> Section 24 Paragraph 2 explicitly states that use of musical work is not subject to free use.

This decision shows that basically no unauthorized parody of musical work is allowed under the German Copyright Act. The only exception is provided in section 51, which provides that “reproduction, distribution and communication to the public shall be permitted, to the extent justified by the purpose, where (1) individual works are included after their publication in an independent scientific work to illustrate its contents.” This means that one could use pieces of music as quotations without the permission of the copyright holder. All other use without a license is prohibited. An artist cannot use a whole song even when the artist’s intention is to create a parody of the original work.

In a similar American case, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*<sup>50</sup> had to decide whether a musical parody of the original work is fair use. In this case, a band named 2 Live Crew, which is a well known popular rap group, had taken parts of the lyrics, as well as parts of the original melody, of the Roy Orbison song, “Pretty Woman,” in order to parody the song.<sup>51</sup> The new version of the song, created without any permission by the rights holders Acuff-Ross, became a financial success.<sup>52</sup> Acuff-Ross sued the band for copyright infringement and the District Court held that the 2 Live Crew version of “Pretty Woman” was within the scope of fair use according to section 107.<sup>53</sup> The Court of Appeals reversed and the case eventually appeared in front of the U.S. Supreme Court.<sup>54</sup> By exercising the four factors of section 107, the Court held that 2 Live Crew’s parody was fair use.<sup>55</sup>

In order to determine whether the song was within the scope of the fair use doctrine, the Court applied the four factors set out in section 107. When the Court turned to the first factor, it

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at P. 434.

<sup>49</sup> *Id.*

<sup>50</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>51</sup> *Id.* at 572.

<sup>52</sup> *Id.* at 573.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 594.

framed the issue as to what extent parody has to be transformative from the original work.<sup>56</sup> The Court noted that a parody must have - at least to some extent – some similar elements with the original work.<sup>57</sup> “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>58</sup>

When the Court turned to the third factor -- the amount and substantiality of the portion used in relation to the copyrighted work as a whole -- it noted how much music 2 Live Crew took directly from the Roy Orbison song.<sup>59</sup> The court stated that “when parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”<sup>60</sup> The Court concluded that, although 2 Live Crew had taken “the heart” of the song, it did not take more than necessary to make it recognizable as a parody.<sup>61</sup> Finding the second and the fourth factors to also favor of the defendant, the Court concluded that 2 Live Crew’s version of “Pretty Woman” did not infringe Acuff-Rose’s copyright, but rather was fair use of the original work.<sup>62</sup>

*Campbell* shows that there is no distinction between musical work and other forms of work as long as the purpose is in accordance with one of the criteria set out by section 107. While the German Copyright law does not allow an artist to use musical works without the licensee of the copyright holder, the American law does not recognize this distinction.

## 2. Other Forms of Parody

The two decisions also demonstrate some similarities: The German court in “Gaby wartet im Park” had not just rejected the musical work as prohibited under the German law, but had also found that the text, itself, could not be considered parody. Under the German court definition, a parody must “be characterized by an anti-thematic treatment of the original work.”<sup>63</sup> The court found that the lyrics of “Omi wartet im Park” might have made fun of the composer’s lifestyle and allegations, but they did not make fun of the original song, itself.<sup>64</sup> Furthermore, the lyrics were directed to the plaintiff and were not connected with the original work.<sup>65</sup> The court concluded that this was not within the scope of parody.<sup>66</sup>

The American courts have almost the same definition of parody. In *Campbell*, the Court stated that “parody takes aim at a particular original work”.<sup>67</sup> In *Dr. Seuss Enters., LP. v. Penguin Books USA*,<sup>68</sup> the Court rejected the fair use defense by finding that the defendant’s

<sup>56</sup> *Id.* at 579.

<sup>57</sup> *Id.* at 579-81.

<sup>58</sup> *Id.* at 580-81.

<sup>59</sup> *Id.* at 586-87.

<sup>60</sup> *Id.* at 588.

<sup>61</sup> *Id.* at 589.

<sup>62</sup> *Id.* at 594.

<sup>63</sup> Bavarian Higher Regional Court, *supra* note 38, at P. 435.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Campbell*, 510 U.S. at 588.

<sup>68</sup> *Dr. Seuss Enters., LP. v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997).

work is not in concordance with the criteria for parody. In this case, the defendant had used the images and verses from Dr. Seuss's "Cat in the Hat" to tell the O.J. Simpson story and entitled it "The Cat NOT in the Hat."<sup>69</sup> The Court saw no parody of the original in the latter story.<sup>70</sup> The reason of the adoption, the Court concluded, was to tell the O.J. Simpson story, not to ridicule the original work.<sup>71</sup>

Both the American and the German courts provide high standards to find parody. Since both systems recognize free and fair use of work when the derivative work is considered parody, the courts are careful in finding parody. One of the reasons is that limitations of copyright are considered as exceptions to the right of the copyright holder. Courts in both countries interpret these exceptions narrowly. Otherwise, free and fair use would open floodgates to the public in using an author's work. The dilemma courts face is that parody is a form of art and courts are generally cautious in defining art. As the American Court in *Campbell* stated, "whether [...] parody is in good taste or bad does not and should not matter to fair use."<sup>72</sup>

### B. Photocopying

In *American Geophysical Union v. Texaco, Inc.*,<sup>73</sup> the American court had to decide whether photocopying of articles by an employed scientist constituted copyright infringement. The plaintiffs claimed that the defendant infringed their copyright by photocopying a number of articles from their journals, and the defendants argued fair use under section 107.<sup>74</sup>

At the time, Texaco employed between 400 and 500 researchers in the United States. In addition, Texaco subscribes to various scientific magazines and journals that are stored in its library in Beacon. Among these holdings, Texaco had three subscriptions for the *Journal of Catalysis* ("Journal"), whose publisher was among the plaintiffs and the sole owner of the copyright of various articles being published in the Journal.

Chickering, a Texaco chemical engineer, reviewed the Journal regularly in order to catch up with the latest developments in this field. The library usually circulated new Journals among the researchers on request before it stored the issues in its facility. When Chickering found articles that might have been interesting for his future research, he, or other Texaco employees, photocopied the articles before he returned the Journal to the library. There were eight articles in question that the court focused on in order to represent the entire group.

The issue before the court was "whether such institutional, systematic copying increases the number of copies available to scientists while avoiding the necessity of paying for license fees or for additional subscriptions."<sup>75</sup> In weighing the four factors, the court held that such

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<sup>69</sup> *Id.* at 1396.

<sup>70</sup> *Id.* at 1402.

<sup>71</sup> *Id.*

<sup>72</sup> *Campbell*, 510 U.S. at 582.

<sup>73</sup> *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2nd Cir. 1994).

<sup>74</sup> *Id.* at 914-16.

<sup>75</sup> *Id.* at 916.



copying infringed plaintiffs' copyright and that Chickering's photocopies could not be considered fair use.<sup>76</sup>

In examining the first factor, "the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purpose", the court asked whether the purpose of the photocopying was "the same basic purpose that one would normally seek to obtain the original"<sup>77</sup> and weighed this factor in favor of the plaintiffs.<sup>78</sup> In this context, the court emphasized that it made a difference that Texaco was the subscriber of the Journals.<sup>79</sup> The first factor would have favored Chickering if he, himself, would have been the subscriber of the Journal and had then made photocopies for himself. The latter would have been considered "spontaneous" photocopying which would be similar to non-profit classroom copying. But by making copies of Texaco's subscriptions, the primary purpose was to avoid payments.

Turning to the question of whether the photocopying was commercial, the court stated that although Texaco was not gaining direct or immediate commercial advantage, the defendant had gained indirect economic advantage from its photocopying.<sup>80</sup> The court weighed the effect of the use upon the market for the copyrighted work, the fourth factor, in favor of the plaintiffs.<sup>81</sup> The court held that there might have been a possibility that Texaco would have subscribed more to issues of the Journal if it had not copied parts of it.<sup>82</sup>

The case raises two issues that can be compared with German law. The first question is whether German law recognizes photocopying in order to put it in the archives? The second question is whether it makes a difference in German law when someone, other than the owner of the copyrighted material, makes photocopies?

## 1. Archives

Generally, section 53 Paragraph 2 of the German Copyright Act provides that photocopies shall be permissible to be included in personal files, if, and to the extent that, reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction. Thus, to put something in the archives, photocopying is only allowed under German law if the archivist is the owner of the copied material. This solution is similar to what the American court stated in *American Geophysical Union*, when it pointed out that it would have made a difference if Chickering were the subscriber of the Journal and would have made copies to put in his personal file.<sup>83</sup>

## 2. Copying by someone other than the copyright owner

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<sup>76</sup> *Id.* at 931.

<sup>77</sup> *Id.* at 919.

<sup>78</sup> *Id.* at 924.

<sup>79</sup> *Id.* at 922.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 928-29.

<sup>82</sup> *Id.* at 928.

<sup>83</sup> *Id.* at 922.

In *Kopierversanddienst* (“photocopy mail-order”),<sup>84</sup> the German Federal Supreme Court rejected the claim of the plaintiff. In this case, defendant public library offered, in a worldwide advertisement, to photocopy single articles in order to send them to customers.<sup>85</sup> The library is one of four major specialist libraries in Germany whose main aim is to ensure that customers who are interested in science and research get quick and extensive access to relevant literature. The library focuses mainly on Technology, Chemistry, Computer Science, Physics and Mathematics, and collects literature from all over the world. The library mails the copied pages to the customer. A usual request is approximately 20 pages and cost 18 DM. If the customer wishes to have it faxed or sent by express letter, he must pay the double price.

The plaintiff, a German association book trade, claimed that the defendant infringed copyright by offering and sending photocopies to its customers.<sup>86</sup> The German Federal Supreme Court rejected the claim, focusing mainly on Section 53 of the German Copyright Act.<sup>87</sup> Section 53 Paragraph 1 provides that it shall be permissible to make single copies of a work for private use. A person authorized to make such copies may also cause such copies to be made by another person. The court held that the statute expressly states it does not matter whether a third person is making the copies, as long as the requesting person is authorized under the law.<sup>88</sup>

The court never examined the question of whether customers were allowed, under the law, to make such copies of the articles. When the court turned to that question, it found that this is not essential to the decision.<sup>89</sup> Therefore, the court simply ignored that there might have been customers who actually archive the copies. The possibility that a third person can legally copy material differs from the American solution. In *American Geophysical Union*, the court explicitly stated that the first factor would have favored the defendant if Chickering himself had copied the material.<sup>90</sup> Furthermore, in *Princeton University Press v. Michigan Document Service, Inc.*,<sup>91</sup> the court held that a commercial enterprise cannot rely on the fair use doctrine. In this case, the court had to decide whether a commercial copy shop that copied several articles and bound them into “coursepacks” infringed copyright when it did so without having a license with the copyright holders.<sup>92</sup> The court stated that it did not matter whether it would have been fair use if the students, themselves, had copied the material.<sup>93</sup> Moreover, what did matter is “the fact that the copying...was performed on a profit-making basis by a commercial enterprise.”<sup>94</sup>

This general view can also be found in the House Report of Congress: “It would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions.”<sup>95</sup>

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<sup>84</sup> German Federal Supreme Court, ZUM 1999, P. 566 *et seq.*

<sup>85</sup> *Id.* at P. 566.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at P. 567.

<sup>88</sup> *Id.* at P. 568.

<sup>89</sup> *Id.*

<sup>90</sup> *American Geophysical Union*, 60 F. 3d at 921.

<sup>91</sup> *Princeton Univ. Press v. Mich. Document Serv., Inc.*, 99 F. 3d 1381 (6th Cir. 1996)

<sup>92</sup> *Id.* at 1383.

<sup>93</sup> *Id.* at 1389.

<sup>94</sup> *Id.*

<sup>95</sup> H.R. REP. NO.94-1476, at 74 (1976).

### 3. Commercial vs. Non-Profit Use

The copy shop issue raises a third problem that is not limited to photocopies: whether it makes a difference for finding fair use when the use serves a commercial purpose? The German court in *Kopierversanddienst* discussed this question.<sup>96</sup> It stated that this consideration is irrelevant within the scope of section 53 of the German Copyright Act. As the court held in its earlier decision, “the consideration, whether utilization serves for commercial use or not, is not important for the copyright reflection and only considered when explicit regulated by law.”<sup>97</sup>

Section 107 of the American Copyright Act explicitly asks whether the purpose of the use is commercial or for non-profit usage. In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court held that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>98</sup> The Supreme Court stated one year later that news reporting, comment, and criticism would almost always be found unfair since these listings in Section 107 of the American Copyright Act “are generally conducted for profit in this country.”<sup>99</sup> After these decisions, however, the courts distance themselves from this ruling. In *Campbell*, the Court stated that commercial use does not automatically bar from finding a use fair but it might tend to weigh against fair use.<sup>100</sup> While the American courts have struggled with this question, the German courts never really questioned it.

As the American courts have pointed out, a distinction between commercial and for non-profit use is not rational. The purposes listed in section 107 of the American Copyright Act are hardly considerable as only for non-profit use. Commercial use of a copyrighted work should, therefore, not automatically be considered unfair.

#### *C. News, Videotaping, and Computer Programs*

Parody and photocopying for research and teaching are just two categories listed in section 107 of the American Copyright Act. Additional categories are criticism, comment and news reporting. The German Copyright Act provides similar regulations in these fields, but sometimes with a different result.

#### 1. News Reporting, Criticism, and Comments

News reporting is one of the examples enumerated in section 107 of the American Copyright Act and can be found as fair use if the report is in accordance with the four factors. The German Copyright Act provides a similar limitation. According to section 49, paragraph 2 of the German Copyright Act, the reproduction, distribution and publication of information relating to facts or news of the day which have been publicly disseminated by the press or by broadcasting shall be permissible without limitation. The German law expressly states that it is

<sup>96</sup> German Supreme Court, *supra* note 84, at P. 569.

<sup>97</sup> German Supreme Court, GRUR 1997, P. 459 *et seq.*, at P. 463.

<sup>98</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>99</sup> *Harper & Row Publishers, Inc v. Nation Enter.*, 471 U.S. 539, 592 (1985).

<sup>100</sup> *Campbell*, 510 U.S. at 584.

only permissible when the news has been “publicly disseminated.”<sup>101</sup> Therefore, the limitation does not apply when the work is not published. This notion can also be found in section 12 of the Copyright Act, which allows criticism and description of the content only after the work has been published with the author’s consent.

In *Harper & Row Publishers, Inc. v. Nation Enterprise*,<sup>102</sup> the American Supreme Court faced the issue of whether unpublished work can be subject to the fair use doctrine. The Court noted that the author’s right to control the first public appearance could outweigh fair use, but it does not do so automatically.<sup>103</sup> Moreover, the Court found that both published and unpublished works are subject to the fair use doctrine, but “the scope of fair use is narrower with respect to unpublished works.”<sup>104</sup>

Both the American and the German Copyright law provide limitations for quotations. These quotations, however, are only allowed “to the extent justified by the purpose.”<sup>105</sup> In *Craft v. Kobler*,<sup>106</sup> an American district court held that the fair use doctrine gives an author the right to quote extracts, but this right is not unlimited and must be considered in the light of the “number, size and importance of appropriated passages, as well as their individual justifications.” This approach is similar to the German Copyright Act.

## 2. Videotaping

In the American *Sony* decision, the Court decided whether distribution of video tape recorders infringes copyright.<sup>107</sup> The Court held that the purpose of videotaping “is to create incentives for creative effort” and found that all four factors weigh in favor of fair use.<sup>108</sup> The German Copyright Act, however, regulates this issue in sections 53 and 54, paragraph 1. Section 53 allows third parties to copy for authorized persons, regardless of whether the third parties are commercial enterprises. In addition, section 54 of the German Copyright Act entitles the author of a work to payment from manufacturers of copy machines when it is probable that the medium could be used to make such recordings. The approaches in the United States and in Germany differ, but the outcome is similar. The manufacturers of video recorders do not infringe copyright.

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<sup>101</sup> German Copyright Act § 49.

<sup>102</sup> *Harper & Row Publishers, Inc. v. Nation Enterprise*, 471 U.S. 539 (1985).

<sup>103</sup> *Harper & Row*, 471 U.S. at 564.

<sup>104</sup> *Id.*

<sup>105</sup> German Copyright Act § 51.

<sup>106</sup> *Craft v. Kobler*, 667 F. Supp 120, 128 (S.D.N.Y. 1987).

<sup>107</sup> *Sony*, 464 U.S. at 450.

<sup>108</sup> *Id.*

### 3. Computer Programs

In *Sega Enterprise, Ltd. v. Accolade, Inc.*,<sup>109</sup> an American court found the act of disassembling a computer program in order to get access to the source code to be fair use. The court noted that “the fact that computer programs are distributed for public use in object code form often precludes public access to the ideas and functional concepts contained in those programs, and, thus, confers on the copyright owner a de facto monopoly over those ideas.”<sup>110</sup> The same underlying idea can be found in section 69(e) of the German Copyright Act, which permits reproduction of the code and translation of its form in order to obtain the information necessary to achieve the interpretability of an independently created computer program with other programs. Regardless of country, the idea is the same: big enterprises should be excluded from the possibility to create a monopoly.<sup>111</sup>

#### *D. Photos of Artistic Works in Public Places*

Another copyright issue arises when artists exhibit their work in a public place. Although the artist usually still holds the copyright of his work, the question is to what extent a third person can take commercial photos or video without a license. The German law provides a concrete solution for this issue while the American Copyright Act does not. Therefore, when the issue was in front of an American court, the court had to come up with a solution that differs from the German one and cannot be considered fair use.

The German Federal Supreme Court faced this issue in 2002.<sup>112</sup> The plaintiff, the well-known artist Christo, covered the Berlin Reichstag as part of his art project in June/July 1995. The project was called “Covered Reichstag” and the artist financed his work by selling models and pictures of the Reichstag; he did not sell postcards. The defendant took pictures of the covered Reichstag and produced and sold postcards. The plaintiff sued the defendant for infringing his copyright. The defendant claimed that plaintiff’s work was in a public place and, therefore, section 59 allowed him to take these pictures.<sup>113</sup> Section 59 of the German Copyright Act provides that (1) it shall be permissible to reproduce, by painting, drawing, photography or cinematography, works which are permanently located on public ways, streets or places and to distribute and publicly communicate such copies. For works of architecture, this provision shall be applicable only to the external appearance.

The German Supreme Court found that defendant’s postcards infringed plaintiff’s copyright.<sup>114</sup> The court stated that section 59 of the German Copyright Act does not apply because the time plan of the plaintiff’s project was two weeks and, therefore, cannot be considered “permanent.”<sup>115</sup> One might think that the outcome should have been obvious, since the statute expressly contains the word “permanent.” However, the defendant had a strong argument: He claimed that it cannot be up to the artist to decide whether a work is permanent or

<sup>109</sup> *Sega Enter., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992).

<sup>110</sup> *Id.*

<sup>111</sup> See Manfred Rehbinder, *supra* note 3, at Rn 271 (Discussing German Law).

<sup>112</sup> German Federal Supreme Court, GRUR 2002, P. 605 *et seq.*

<sup>113</sup> *Id.* at P. 605.

<sup>114</sup> *Id.* at P. 606.

<sup>115</sup> *Id.*

not.<sup>116</sup> What would happen if the artist decides to distribute his work to the public for a time period of four decades? In this case, the work cannot be considered “permanent” in the meaning of the statute, either, and the statute would not apply. Neither can it be considered permanent when the work gets destroyed because of weather conditions. The defendant claimed that then the statute would actually be to no avail.<sup>117</sup> The court ruled that two weeks does not constitute “permanent” in the meaning of the law.<sup>118</sup>

In its decision, the court balanced the public interest against the rights of the copyright holder. It stated that section 59 is a limitation to the social value that copyright usually guarantees and must be interpreted narrowly.<sup>119</sup> On the other hand, the report of section 59 shows that the copyright holder, who agrees to put his work in a public place, dedicates his work to the general public. The public has a great interest in taking pictures of public places without a license from the copyright holder. However, public interests take a step back when the duration of a work is limited, as it was the case in the “Covered Reichstag” decision.<sup>120</sup>

Section 59 of the German Copyright Act is another limitation on the rights of a copyright holder. It can be seen as a specific free-use exception. The American law is unfamiliar with similar regulations. Section 107 of the Copyright Act does not provide a solution for this kind of issue. Indeed, when the American courts were confronted with this problem they had to come up with a different solution.

In *Leicester v. Warner Bros.*,<sup>121</sup> the plaintiff contributed a piece of art to a 24-story office building placed in Los Angeles. In order to comply with the Los Angeles Community Redevelopment Agency policy, the owner of the building was required to have a percent of art expenditure.<sup>122</sup> The plaintiff designed an artistic work that basically consisted of two sets of two towers, representing certain elements of the history of Los Angeles.<sup>123</sup> The four towers are on the south side of the building and form a “streetwall” with the rest of the building.<sup>124</sup>

In 1994, the defendant desired to film the movie “Batman Forever” and was looking for several locations.<sup>125</sup> Warner Bros. agreed with the owner of the building, R&T, to film several sequences of the movie inside and outside the building.<sup>126</sup> Neither R&T nor Warner Bros. asked the plaintiff for permission, although the movies, itself, as well as a number of promotional items like a comic book, posters and tee shirts, included the plaintiff’s work, as well as parts of the building.<sup>127</sup>

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<sup>116</sup> *Id.* at P. 605.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at P. 606.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Leicester v. Warner Bros.*, 232 F.3rd 1212 (9th Cir. 2000).

<sup>122</sup> *Id.* at 1213-14.

<sup>123</sup> *Id.* at 1214.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1215.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

The plaintiff sued the defendant for copyright infringement but the court ruled in favor of the defendant.<sup>128</sup> The court found that the artistic work of the plaintiff, the four towers, is an “architectural work” within the meaning of the American Copyright Act, section 120 (a) (8).<sup>129</sup> Section 120 excludes several actions from copyright protection, including taking photographs of architectural works. By finding the plaintiff’s work an architectural work the defendant was able to take pictures without having a license from the copyright holder. The court held that the towers have functional aspects designed to be part of the building plan and, therefore, are part of the architectural design of the building.<sup>130</sup>

Under the German Copyright Act, taking pictures of artistic works in public places is an explicit limitation on the rights of a copyright holder. It is a specification of the free use regulation. The American court used a different approach and applied section 120 of the American Copyright Act. It was possible because the artistic towers could be considered part of the building. One has to wait and see how the American courts will decide cases where the artistic work is not part of a building. Since the House Report stated that section 107 is not an exhaustive list<sup>131</sup>, the possibility exists to consider such photos fair use even under the American law.

### **Conclusion**

This paper has compared and contrasted approaches taken by American and German courts when dealing with similar issues of fair and free use. Both systems have a long tradition of recognizing the dilemma the monopoly copyright faces. As a result, both systems have regulated a number of exceptions. While the U.S. Copyright Act assembles most of the issues in one section, the German Copyright Act manages it in various places. Nonetheless, both systems award the public the right to use and profit from an author’s work. As it has been shown, these limitations are in some ways both similar and dissimilar. One of the primary differences is that German third parties can copy a work without any license. Therefore, copy shops act legally under the law when they copy by order of an authorized person. Another difference is that U.S. law does not distinguish between music parody and other forms of parody, while German law does not allow for music parodies at all. Yet, although the American law distinguishes between commercial and for non-profit use, courts in the United States have recognized that a use can be fair either way. The German law does not make this distinction. Accordingly, although the law in both systems is different, the basic outcome is similar.

From an outside point of view, both systems can learn from one another. Law, in general, should not be a frozen system. The law should be flexible and develop over decades in order to reflect movements and opinions in society; copyright law is no exception. U.S. and German lawmakers should be conscious of the law in other countries and keep up with developments by comparing their own system with others.

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<sup>128</sup> *Id.* at 1220.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1218-20.

<sup>131</sup> H.R. REP. NO.94-1476, at 65-66 (1976).

By comparing German and U.S. copyright law, the German lawmakers should reconsider their notion that music parody is, per se, excluded from free use. As the American *Campbell* decision illustrates, some forms of parody are not so repugnant. There are some forms of parody, such as when the user changes the melody but keeps the basic music theme, which perhaps should be allowed in Germany. The result is that the parodist actually ridicules the original song.

On the other hand, the German decision in *Kopierversanddienst* to legalize copies by order of an authorized person seems a reasonable way of acknowledging the increasing number of copy shops and their services. Therefore, the U.S. American copyright law should look at the person behind the order and decide whether this person's use is fair.

Finally, the American decision in *Leicester* made sense in that particular case. However, what would be the solution if an artwork is not part of a building, like Picasso's statue in downtown Chicago? It is only a matter of time until such a comes in front of a U.S. court. From the perspective of Congress, the U.S. courts could still develop the fair use doctrine since section 107 should not be considered a "frozen" judicial doctrine.

In conclusion, both systems provide limitations which are seen as exceptions and interpreted narrowly. Both Germany and the United States accept limitations where public interest and values, like education, social, or political roles, need to be supported. Where both systems differ, a further discussion between scholars might be helpful in order to learn from each other and give incentives to improve their own systems.