

COPYRIGHT LAW IN INDIA: DOCTRINE OF FAIR USE

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ABSTRACT

This assignment will specifically deal with the concept of Fair Use Law and how this concept derived its significance in Indian cases. It will also focus on the legislation that deals with this law and to what extent this law can be applicable based on the analysis of certain landmarks judgments of U.K., U.S as well as Indian cases.

Doctrine of Fair Dealing is an exception to the law that would usually protect any material that would be considered to be copyrighted as under the Indian Copyright Act, 1957 (hereinafter known as the "Act"). It is a legal doctrine which permits a person to use any work which is protected under the Act with limited usage of such work so as to maintain the sanctity and originality of such work as well as the registered proprietor of the work.

Keyword: doctrine, law, copyright, legislation, nation, defence, proprietor

1. INTRODUCTION

The meaning of "Fair Dealing" depends on different facts and circumstances. In India, the Court applies basic common sense so that they can determine as to what can be constituted as Fair Dealing on the case- to- case basis. Fair dealing is a significant limitation on the exclusive right of the copyright owner. It has been interpreted by the courts on a number of occasions by judging the economic impact it has on the copyright owner. Where the economic impact is not significant, the use may constitute fair dealing. The fair nature of the dealing depends on the following four factors.

1. the purpose of use;
2. the nature of the work;
3. the amount of the work used, and
4. the effect of use of the work on the original.

In consonance with the UK Copyright laws, India has adopted the concept of Fair Dealing for the past years. On the other hand, the same concept is known as "Fair Use" under U.S. Copyright laws. Cases such as *Gyles v. Wilcox* which had established the concept of "Fair Abridgment" and *Folsom v. Marsh* have established the concept of what Fair Dealing is. These cases acted as precedents to the Indian cases which will be discussed in brief later in this assignment.

In the recent amendment that has been made in the Act known as the Copyright (Amendment) Act, 2012, the concept of Fair Dealing has also included works in the line of musical or cinematographic in nature. The reason for this is that since both personal and private works have

been amended in the recent Act except work done in the line of computer programming, the scope has become much wider to consider what can be considered to be Fair Dealing under the Indian Regime. Also, Fair Dealing has been considered to benefit disabled persons who can now access works including sharing with any person with a disability for private or personal use, research or for any other educational purposes.

2. FAIR USE UNDER THE INDIAN COPYRIGHT ACT

Under Indian regime legal framework being the Copyright Act, 1957, section 52 lays down certain acts or works that cannot be considered as an infringement of copyright namely fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of-

- fair dealing with any work, not being a computer programme, for the purposes of—
 - "private or personal use, including research;
 - criticism or review, whether of that work or of any other work;
 - the reporting of current events and current affairs, including the reporting of a lecture delivered in public.
- the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;
- transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access

or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

- the reproduction of any work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;

3. INDIAN CASES

India TV Independent News Services Pvt. Ltd. vs Yashraj Films Pvt. Ltd

The facts of this case state that the defendants that is, India TV broadcasted a show on its channel documenting the life of the singers wherein the singers were shown to perform their own songs however, while such performance was being filmed clips of a movie scene were shown to play in the background. The plaintiff, that is, Yashraj Films Private Limited claimed that such a scene of the movie in the background amounts to infringement of its Copyright. The defendants took the defence of fair dealing under Section 52. The Delhi Court dismissed the defence of fair dealing and restrained the defendants from the production, distribution and broadcasting or in any way exploiting any cinematograph film, sound recording or part thereof which is owned by the Plaintiff. This litigation battle went on for years, where different angles and viewpoints were considered, in an appeal from the above order, the Hon'ble bench of Delhi High Court also felt the need to overlook the conventional approach of dealing with Section 52 of the Copyright Act, the bench set aside the order passed by the single Judge and uplifted the restrictions so imposed. However, the Appellants were still prohibited from broadcasting any cinematograph film without the appropriate permission. It was through the Copyright (Amendment) Act, 2012 that fair dealing as a concept brought within its scope musical recordings and cinematograph films.

Through this case the Indian legal system made advancement in the field of fair dealing under Copyright by overlooking the rigid and conventional approach and implementing the necessary changes.

Civic Chandran vs Ammini Amma

In this case, the Court considered that a parody did not constitute an infringement of copyright as long as it has not been misused or misappropriated. In consonance with this case, the Court established the following three tests which is to be taken into consideration to determine work to be an infringement of copyright:

1. "the quantum and value of the matter taken in relation to the comments or criticism;
2. the purpose for which it is taken; and
3. the likelihood of competition between the two works."

4. FAIR AS A DEFENSE

When a person is faced with Copyright infringement litigation, he/she can adopt either of the two strategies as a defence;

1. They can challenge the Copyrightability of the work
2. Argue that the work was well within the ambit of fair dealing under Section 52 of the Copyright Act, 1957.

The United States Copyright Law specifies several factors in order to determine whether the acts fall within the ambit of fair use, the Indian courts have accepted these factors too in order to determine whether an act constitutes a fair dealing as provided under Section 52 of the Copyright Act, 1957 or else it amounts to infringement of a Copyright.

The factors are as follows:

- The purpose and character of the use of such work, it has to be determined whether the work is of commercial nature or for a non-profit/educational purpose.
- Nature of the Copyrighted work.
- The portion used as a part of the Copyrighted work as whole.
- The effect of the use of such work on the market or value of the copyrighted work.
- Not a substitute for the original work.
- Also, is transformative in nature that is, adds new meaning and message to the original.

If these factors are present in a work it can be dealt under the scope of fair dealing and in a Copyright litigation the defence would have to prove how his/her work has incorporated all the above mentioned factors so as to not result in infringement of a Copyrighted work.

The factors are thoroughly considered by the courts before determining as to whether the work can be considered within the scope of fair dealing.

5. FAIR DEALING DISADVANTAGEOUS TO THE OWNER

There has always been a thin line of difference between **Infringement and Fair Dealing**. Section 52 of the

Copyright Act 1957 does not permit the reproduction of the whole work. Such substantial copying and reproduction of the whole of the work would amount to infringement; however, one of the major loopholes present in the Indian Copyright Act is that it does not define what substantial or insubstantial portion of the Copyright work is. As per the legal interpretation of the provision it is clear to one and all that only the insubstantial portion of the original copyright work comes within the ambit of fair dealing. The question of whether a work is fair dealing or not is a qualitative one that differs from case to case.

6. DIFFERENCE BETWEEN FAIR DEALING AND FAIR USE

"Fair dealing" and "fair use" are related concepts pertaining to user's rights under copyright law. It is nevertheless important to understand that fair dealing and fair use are not synonymous terms since their meaning and scope are defined by different legal systems. It is challenging to adequately summarize the shared and divergent underpinnings of fair dealing and fair use succinctly. The following brief comparison aims to merely sketch a broad picture of some of the basic similarities and differences between fair dealing and fair use.

Fair dealing is an exception to copyright infringement laid out in the copyright statutes of common law jurisdictions such as Great Britain, Canada, Australia and New Zealand. The copyright acts of these jurisdictions provide that fair dealing of a copyrighted work will not amount to infringement if such dealing is stated in the act. This means, if a work is copied for a purpose other than the statutory fair dealing purposes, the copying cannot be a fair dealing regardless of the copier's intention.

Fair use is a limitation on exclusive rights in works of authorship granted under U.S. copyright law.

Title 17 of the United States Code states that fair use of a copyrighted work is not an infringement of copyright. Title 17 provides an open-ended list of purposes that may be fair use - "purposes such as criticism, comment, news reporting and teaching (including multiple copies for classroom use)" - instead of listing a finite list of purposes defining the bounds of acts that may be fair dealing.

Another point of divergence is the availability of statutory guidance on how the fairness of a dealing or use should be evaluated. Since fair dealing provisions generally lack statutory definitions or regulations specifying how fairness is to be determined, the appropriate approach to assess the fairness of actual dealings with protected

works is a matter for the courts to decide. In *Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada set out a two-step analytical framework to assess fair dealing in which the second step identifies six fairness factors. The court said the extent to which the factors are relevant may vary from case to case and noted some cases may require consideration of factors beyond the six identified in the framework.

In contrast, the fair use provision in U.S. copyright law prescribes four factors that must be included in a fairness determination: 1) purpose and character of the use, 2) nature of the copyrighted work, 3) amount and substantiality of the portion of the work used and 4) effect of the use on the potential market or value of the work. These fair use factors are similar to the six CCH fair dealing factors (purpose, character, amount, and effect of the dealing, nature of the work, and alternatives to the dealing) but U.S. and Canadian case law have applied the fairness factors in different ways.

In the U.K., a defence to copyright infringement exists in the form of fair dealing. Fair dealing protection is limited to specific uses such as research and private study (both must be non-commercial), criticism, review, and news reporting. Thus, protection is only afforded if the use of the copyrighted work falls into these categories and it does not matter whether the use is fair in general or fair for a purpose not specified in the Copyright, Designs and Patents Act of 1988.

7. CONCLUSION

It can be safely concluded that the test to determine a copyrighted work as a Fair Use of such work indeed differs from case to case since such facts are to be given high priority more than the law itself. Though the legislature has attempted to make law on this concept more flexible but precise, in the Indian scenario, section 52 of the Copyright Act, 1957 makes a legitimate stand for the public to rely upon this provision for now. As mentioned under Article 13 of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) which reads as follows:

"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder".

India has been able to establish a proper ground as for now since the whole idea having an exception as against the protection of copyright is to give rise to creativity and

growth which can be transformed and expressed in many other new ways so as to encourage people to attain such degree of creativity with careful consideration to the original copyrighted work.

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