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Fair Dealing Under the Copyright Law: A Critical Analysis

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ABSTRACT

The Intellectual Property laws seek to promote creativity and protect creative works. The object of the copyright law is to incentivize the works of the creators. The Copyright laws grant an exclusive right to the owner of creative work, and the unauthorized use of a copyrighted work amounts to infringement of the copyright. Nevertheless, this exclusive right granted to the copyright owner over the creative works is restricted by the “Doctrine of fair dealing.” This concept allows the public to use or access the copyrighted work for specific limited purposes. Section 52 of the Act defines fair dealing and enumerates certain acts that do not amount to copyright infringement. The doctrine of fair dealing is a vital concept under the Copyright act. It aims to establish a balance between the rights bestowed upon the copyright owner and the public, but many instances have come forward where this exception is used in bad faith. Although the Indian legislature has adopted the factor analysis method as established under the U.S. copyright act, there is a difference between the two. The Indian legislation sets out an exhaustive list of provisions that come under the purview of fair dealing and, in a way, restricts the scope of its applicability. On the other hand, the U.S. has a far broader approach and hence provides an open-ended application that is robust and flexible. This paper aims at identifying the concept of fair dealing in India and fair use in the USA by identifying the difference between its application and scope.

Keywords: Copyright, Exceptions, Fair dealing, Fair use, India, USA.

I. INTRODUCTION

Intellectual property is an intangible property, which is the outcome of the creation of the human mind; it includes literary, musical & artistic works, designs, images, symbols, invention, etc., which can be used in trade and commerce.² The Intellectual Property law protects the rights granted to persons over the creations of their intellect. They give an exclusive right to the creators over their creations for a limited period of time. The Copyright law protects the

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²What is Intellectual Property (IP)? Wipo.int, <https://www.wipo.int/about-ip/en/> (last visited Nov 2, 2021).

rights of the creators of original works and gives an exclusive right to the creator. Section 14³ defines copyright as an exclusive right to perform or authorize the performance of any of the following acts in relation to a work or a significant portion thereof, namely:

1. “Reproduce the work in any form, including storing the work in any form.
2. Issue copies of the work to the public.
3. Perform the work in public.
4. Make any cinematographic film in respect of the work.
5. Translate the work.
6. Make an adaptation of the work.”

Copyright protects all original works of literature, art, music, and drama, as well as sound recordings and cinematography. The originality of the work is the most significant consideration when it comes to copyright. In the context of art, original work refers to creations that are not derivatives of prior works. Unique work is protected regardless of its substance or quality.

Using another person’s copyrighted work without their consent is considered a copyright violation. It is the unauthorized use of another person’s work that results in the violation of the copyright holder’s rights, such as the right to distribute, display, reproduce, or publicly perform the protected work. Section 51⁴ of the Act provides for acts that amount to infringement of copyright. Copyright holders’ rights are not unassailable, but they are restricted in specific ways.

There are many acts and works listed in Section 52⁵ that are not considered infringements of copyright and are known as statutory exceptions instead. These works can be accessed by the public at large for specified purposes as enumerated under the section. The main exception to infringement of copyright is the “Doctrine of fair dealing.” This doctrine allows the public to use the copyrighted work for limited purposes as specified in the section without seeking the permission of the copyright owner. The doctrine of fair dealing is recognized in the U.K. and India, while fair use is recognized in the USA. This doctrine was established in the Berne Convention⁶ and the TRIPS agreement.

Article 13 of the TRIPS Agreement states that “Members shall confine limitations or

³ The Copyright Act, 1957, § 14, No. 14, Acts of Parliament, 1957 (India).

⁴ The Copyright Act, 1957, § 51, No. 14, Acts of Parliament, 1957 (India).

⁵ The Copyright Act, 1957, § 52, No. 14, Acts of Parliament, 1957 (India).

⁶ The Berne Convention for the Protection of Literary and Artistic Works, 1886.

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 right holder.”

The Court in *Kartar Singh Giani v. Ladha Singh*⁷ stated that the “fair dealing concept functions as a limitation and exception to the exclusive and in a way monopolistic right granted by copyright law.” Again in the case of *Chancellor Masters and Scholars of the University of Oxford vs Narendra Publishing House and Ors*⁸, fair dealing was established as an integral component of the copyright law.

The concept of fair dealing in the United Kingdom is restrictive and enumerates an exhaustive list of exceptions in the Copyright, Designs and Patents Act, 1988. Fair dealing in India is majorly based on the U.K. copyright laws and hence is inflexible.

This paper is divided into five chapters. The first one deals with the introduction of the topic, state the existing problems in the topic and also deals with the objectives and questions. Chapter two deals with a review of the related literature. Chapter three takes into consideration the research methodology used and the research tools used. Chapter four deals with analysis and discussions. Chapter five deals with the conclusions suggestions, followed by the references.

(A.)Statement of Problem:

The copyright establishes and preserves rights in creative works by allowing certain exclusive rights to reproduce, modify, distribute, publicly perform, and exhibit copyrighted works. It grants an exclusive right to the creator of a work. Nevertheless, this right granted to the owner is restricted by the concept of fair dealing, which puts a limitation on such a right and allows the public to use such protected works under the ambit of fair dealing. However, to establish a balance between the users and the owners, various disagreements emerge, leading to disputes. Nevertheless, the line between fair dealing and infringement is very thin. It is difficult to evaluate this access of fair use worldwide, which often leads to piracy. The malafide intention is also a huge concern as it is difficult to establish it while using a copyrighted work. There exists a failure to specify what constitutes a significant or insubstantial section of work; the extent of copying and reproduction has also not been clarified.

(B.)Literature Review:

1. Archana. K, “An Analysis on the Principle of Fair Dealing with Special Reference to

⁷ *Kartar Singh Giani v. Ladha Singh*, AIR 1934 Lahore 777.

⁸ 2011 (47) P.T.C. 244 (Del).

Delhi University Photocopy Case.”⁹

The author states that it has become easy to make photocopies of the published materials since the invention of the photocopy machine. Since then, there has been a violation of the copyright as more and more people are making photocopies of printed materials without authorization. However, the copyrighted work was utilized to make unauthorized copies of the same, and it was passed off under “fair use.” The copyright act fails to define the extent of fair use, and hence there have been increased instances of copyright violation. The author analyzes the concept of fair dealing and suggests reforms pertaining to the existing legislation.

2. Elizabeth Verkey, *Intellectual Property Law and Practice*.¹⁰

The author discusses that the doctrine of fair dealing is a vital part of copyright law and needs to be interpreted carefully. It legalizes the reproduction of a work that is protected under the copyright act without the permission of the copyright owner. This provision must be interpreted to establish a balance between the rights of the copyright owner and the general public. Several other factors are taken into consideration while determining fair dealing.

3. Ayush Sharma, “Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?”¹¹

The author states that although India has tried to take inspiration from the USA regarding the fair dealing concept, it has taken a restrictive view and dealt with only limited issues. The courts have failed to address several other issues, such as malafide intention. This concept is a vital part of the Act, but its widespread application is not clearly defined. The provision of fair dealing in the Copyright Act is concise and hence does not explicitly define the ambit of its application.

4. Dr Prashant Kumar, “Understanding Copyright and the Principle of Fair Use.”¹²

The author points out the doctrine of fair dealing is based on the notion that the public needs to have access to copyrighted work for the purpose of reviewing, criticizing, or creating a parody for the same. Certain factors are taken into consideration while deciding fair use, such as the manner in which the copyrighted work is used, the kind of the work, the extent of the reproduction, and the financial impact of the same on the owner. The researcher construes this

⁹ Archana. K, An Analysis On The Principle Of Fair Dealing With Special Reference To Delhi University Photocopy Case, 7 *European Journal of Molecular & Clinical Medicine* (2020).

¹⁰Elizabeth Verkey, *Intellectual Property Law and Practice* (Eastern Book Company).

¹¹ Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?, 14 *Journal of Intellectual Property Rights* , 523-531 (2009).

¹² Dr. Prashant Kumar, Understanding Copyright and the Principle of Fair Use, 22 *IOSR Journal of Humanities and Social Science*, 104-106 (2017).

to be true and hence states that deciding the quantum fair use is subjective.

5. Revant Ranjan, "THE FAIR DEALING EXCEPTIONS UNDER INDIAN COPYRIGHT LAW: A CRITICAL APPRAISAL."¹³

The author critically analyses the doctrine of fair dealing in India and states that this doctrine is limited and confined in application compared to the USA legislation, which is flexible and broader in the application. The Indian courts are yet to explore this concept fully, which is the need of the hour. The author also says that there is a need to balance the interest of the copyright holder and the general public while interpreting the provisions of fair dealing so that one does not gain at the cost of the other and equilibrium is maintained.

6. Richard W. Stim, "Intellectual Property: Patents, Trademarks and Copyrights."¹⁴

The book establishes fair use as legal teaching that promotes clarity by permitting the unauthorized use of copyright-protected works under certain circumstances. Section 107¹⁵ of the Copyright Act establishes the legal framework for determining whether something is a reasonable use and identifies certain types of employment that may qualify as fair use, including analysis, comment, news describing, educating, grant, and examination.

(C.)Research Objectives:

1. To observe and understand the concept of fair dealing in India.
2. To understand through various studies and landmark cases how Indian courts are dealing with fair dealing.
3. To understand the impact of fair dealing on the publishing industry.
4. To understand whether fair dealing is really fair.

(D.)Research Questions:

1. Whether the doctrine of fair dealing in India has a limited scope?
2. How is India dealing with the issues pertaining to fair dealing?
3. Does fair dealing dilute the protection provided to the copyright owners?

(E.)Research Methods:

The present study involves the doctrinal method of research. This method is considered

¹³ Revant Ranjan, THE 'FAIR DEALING' EXCEPTIONS UNDER INDIAN COPYRIGHT LAW: A CRITICAL APPRAISAL, 5 South Asian Law Review Journal (2019).

¹⁴ Richard W. Stim, Intellectual Property: Patents, Trademarks, and Copyrights (Delmar Cengage Learning 2) (2020).

¹⁵ The Copyright Act, 1976, § 107, 1976 (USA).

appropriate in view of the nature of the topic and the complexities of the problem. The following data is collected from Secondary Sources such as the articles of eminent researchers from several journals. Internet sources such as websites and books by famous authors which help in understanding the concept of fair dealing have been referred to. The information available on the websites of the WTO, WIPO, and Indian Copyright Office, USA, U.K., and India official provides valuable inputs to the study.

(F.) Research Tools:

The tools used are legal databases, law journals, websites, and case law digests. These tools assist in analyzing the present legal system in light of the fair dealing with copyrights.

(G.) Scope and limitation:

This research paper will study the concept of fair dealing, the limitations, and the scope of its application in India. It is limited to India and the USA. It is limited to the exceptions specified in the Copyright Act.

II. FAIR DEALING IN INDIA¹⁶

Fair dealing in India is an exception to the law, which typically safeguards any material which is considered copyrighted under the Copyrights Act (“Act”).¹⁷ It was introduced in India in the year 1914.¹⁸ Although, prior to the conceptualization of this doctrine in India, in *McMillan vs Khan Bahadur Shamsul Ulama Zaka*,¹⁹ it was held that the English Copyright law was applicable in India during the rule of the British. The provision laid down stated that there shall be no copyright infringement by “any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary.” The Indian legislature was considered to be a weak import of the U.K. Copyright laws, and hence it was considered to be restrictive in nature. The current Indian Copyright Law was passed in the year 1957 and was based majorly on the Copyright law of the U.K.

Section 52²⁰ deals with the concept of fair dealing, and it has been amended thrice in 1983, 1994, and 2012. It is a legal doctrine that allows individuals to use any work protected by the Act to a limited extent in order to preserve the originality of such a copyrighted work. In India, judges use common sense to decide what constitutes fair dealing on a subjective outlook by looking at the facts of the cases. The exclusive right afforded to the copyright owner is severely

¹⁶ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

¹⁷ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

¹⁸ The Indian Copyright Act, 1914, § 2(1) (I), No. 13, Acts of Parliament, 1914 (India).

¹⁹ 1895 (ILR) Bom 557.

²⁰ The Copyright Act, 1957, § 52, No. 14, Acts of Parliament, 1957 (India).

curtailed by this measure. The courts have interpreted this by taking into account the economic impact on the copyright owner in various cases. If the user has a negligible economic impact, then it may be considered fair dealing.

The term fair dealing has not been defined under the Act; the courts look up to the case of *Hubbard vs Vosper*²¹ where it was held that “It is impossible to define what is fair dealing. It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them....Next, you must consider the proportions...other considerations may come into mind also. But, after all, is said and done, it is a matter of impression.”

Following are the four elements that determine whether or not a use is fair:

1. “The purpose of such use,
2. The nature of the work,
3. The amount of work used, and
4. The effect of the use of such work on the original work.”

India adopted the “Doctrine of Fair dealing” according to the U.K. Copyright Laws, which is referred to as fair use in the USA. Certain seminal instances, like “*Gyles vs Wilcox*,” which established the notion of “Fair Abridgment,” and “*Folsom vs Marsh*,” which established the concept of “Fair Dealing,” serve as precedents for the Indian cases. The notion of Fair Dealing began to include musical or cinematographic works with the recent amendment to the Act that is the Copyright (Amendment) Act.²² Apart from works in computer programming, personal and private works have been modified since then, and the scope has been expanded to encompass the Indian regime of Fair Dealing. Fair Dealing has aided disabled people, who can now easily access and share research or educational materials with other disabled people for private or personal use.

III. CASES LAWS

1. *India Tv Independent News & Ors v. Yashraj films Pvt. ltd*²³-

The defendant aired a show about the lives of musicians in which they performed their own songs while movie scenes played in the background as the performance was being videotaped. The Plaintiff, in this case, alleged that showing this clip in the documentary’s background

²¹ *Hubbard v. Vosper, (1972) 1 All ER 1023 p. 1027.*

²² *The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).*

²³ *India TV Independent News Services Pvt. Ltd v. Yashraj Films Pvt. Ltd., 2013 (53) PTC 586 (Del).*

violated its copyright. In this case, Section 52²⁴ was invoked by the defendants, and they took the defence of fair dealing. Later, the Court ruled in support of Plaintiff and ordered the defendants to refrain from making, distributing, or transmitting any cinematograph film or sound recording, in whole or in part, that belongs to Plaintiff. This conflict raged for many years, and a variety of viewpoints were considered. Upon review of an appeal arising from this ruling, the High Court of Delhi further found that the usual approach to dealing with Section 52²⁵ must be overridden. The bench then overturned the Judge's orders and tightened the limits that had been placed. Despite this, the appellants were nonetheless barred from airing the film without a license. As a result of the Copyright (Amendment) Act²⁶, fair dealing extended to "musical recordings and cinematograph films." By rejecting its inflexible and conventional approach, this case resulted in significant changes and advancements in the fair dealing approach. It was because of this the courts have begun to realize that there is still a lot of work to be done in order to keep law up to date with the ever-changing technical and scientific backdrop.

2. Civic Chandran v. Ammini Amma²⁷-

"As a result of this precedent-setting case, the Kerala High Court ruled that even significant copying of copyrighted work is acceptable if the copying serves the interests of the public. The objective of reproducing artistic work, i.e., counter drama, was not misappropriation, said the Court. The duplication was to generate a play similar to the original." Instead, the goal was to reveal the original drama's fallacy and condemn the ideas it promoted to the public. Copying for the purpose of criticism did not violate copyright because it constituted fair dealing. A parody was not found to be a copyright violation in this case because the parody was not exploited or misappropriated. For the purposes of determining whether or not a work is infringing on someone else's copyright, the Court established three criteria:

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

Although the Indian courts have time and again established the importance of fair dealing in India and have done away with the traditional approach of dealing with such cases, the provisions of this section are exhaustive and inflexible. There is a need to widen the horizon of

²⁴ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

²⁵ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

²⁶ The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

²⁷ Civic Chandran vs Ammini Amma 16 PTC 329 (Kerala).

this concept and include more acts under the ambit of this concept.

IV. FAIR USE IN THE USA

The concept of fair dealing in India cannot be understood unless compared to Fair use in the USA. This doctrine limits the power vested with the copyright owner and seeks to establish a balance between the copyright owner and the public. The USA does not provide a comprehensive list of acts that constitute fair use as done in India and the U.K. Instead, it provides specific factors that decide fair use and hence has a broader scope.

The case of *Gyles vs Wilcox*²⁸ established the concept of “fair use.” It was because of this particular case the idea of “Fair Abridgment,” which was later renamed “Fair Dealing,” was formed. The Court handed down its first decision on the Fair Use Law principle in this case.

It was found that an abridged version of material that falls under the ambit of copyright can be regarded as a “new work” that would be independent of the original. This new work would not infringe upon the rights of the author as it is a creation of hard work, originality, and creativity. Hence for further clarity, it was construed that two categories of such abridged works would be recognized such as:

1. True Abridgements: It states that the existing work is created in the most authentic and innocent form without violating the rights of the author. This results in new work altogether.
2. Colored Shortenings: It states that the original work is just colored in some way, or other changes are made to the copyrighted work.

In *Folsom v. Marsh*,²⁹ Justice Story set out specific elements for determining whether a particular use of a copyrighted work is fair use or not. This was later codified in accordance with the Copyright Act³⁰ of the USA.

The factors are as follows:

- “The nature and objects of the selections made;
- The nature of the original work;
- The amount is taken; and
- The degree in which the use may prejudice the sale, or diminish the profits, or supersede

²⁸ *Gyles vs. Wilcox*, (1740) 26 ER 489.

²⁹ *Folsom vs. Marsh*, 9. F.Cas. 342, No. 4901 (C.C.D. Mass. 1841).

³⁰ The Copyright Act, 1976, § 107, 1976 (USA).

the objects, of the original work.”

This test is applicable to works that are unpublished and does not exclude them from the purview of this section if they are unpublished as long as the four factors mentioned above are established.

The USA copyright laws on fair use are flexible and broader in the application. This flexible nature enables the inclusion of all types of cases relevant to this concept and doesn't exclude any circumstance. This provision provides for the constantly changing and developing world by keeping its ambit expansive.

V. CONCLUSION

In India, the notion of fair dealing has been largely adopted from the U.K. counterpart, which is restrictive and inflexible. It enumerates a fully comprehensive list of exceptions that are included in the purview of fair dealing. Although there have been several amendments in the fair dealing doctrine in India to increase the purview of its applicability, there is a need to widen its scope. The concept of fair use in the USA has a farther reach as compared to India. Fair dealing matters in India have been dealt with in a limited capacity by the Indian judiciary, despite adopting the “factor analysis” approach from the USA. The courts have failed to explore the malafide intention while handling the fair dealing cases. The exception of fair dealing is taken as an excuse to save face by many; although the courts have tried to deal with such cases with utmost certainty, there are still instances wherein the extent and scope have not been clearly defined. In India, the provision of fair dealing is brief and fails to explain the extent of its applicability, whereas the provision of fair use in the USA is extensive and flexible. When compared to America's well-matured copyright legislation, India's copyright jurisprudence is still in its infancy. The statute providing for the exception from fair dealing is quite detailed, and the courts cannot ignore it. The courts must turn to English law and case law, which are exceptionally adaptive and established. Thus, it is necessary to develop a sound copyright jurisprudence in India. Also, there is a failure to specify what constitutes a significant or insubstantial section of a work. Although, the approach of the Indian Courts in fair dealing has been widened, and the courts apply the checklist by going through each circumstance of the case. The Indian courts have made efforts to widen its ambit, but there still exists an uncertainty. The concept of fair dealing has not been clearly defined in the Indian legislation, but just an exhaustive list of what comes within its ambit has been stated.

Hence, there is a need to make the existing provision wider in its application so that no act is left out of its ambit and there exists an equilibrium between the rights of the creators and the

public at large. It does not aim to dilute the exclusive rights provided to the copyright owner but tries to limit this monopolistic right so that there remains a balance between the rights granted and the rights taken away.

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