



Fair Dealing in Indian Copyright Law

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The object of copyright is to protect the author of the copyrighted work from any unlawful reproduction or exploitation of his or her work by others. On one hand copyright granted extensive rights to the authors and creators whereas on the other hand it sets out some limitations on the rights of the authors. The law does not permit one to appropriate him to what has been produced by the labor, skill and capital of another. This is the very foundation of Copyright Law. A fair dealing is a copying of the copyrighted work without the permission of the author. A fair dealing with a literary, dramatic, musical or artistic work for the purpose of research or private study or criticism or review, whether of that work or any other work shall not constitute an infringement of copyright. Fair dealing is the permitted copying of the copyrighted work. The term fair dealing has not been defined anywhere in copyright law but the court on several occasions elaborated and explained this doctrine. The aim of this paper is to analyze the scope and extent of doctrine of fair dealing with the help of national and international law and judicial interpretation.

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Copyright is a branch of law that grants authors (writers, musicians, artists and other creators) protection over their works. The Copyright Act defines it as an exclusive right to do or authorise others to do certain acts in relation to original, literary, dramatic, musical and artistic works, cinematograph film and sound recording including computer programme. It gives the holder some exclusive rights to control reproduction of works of authorship, such as, books, music, paintings, songs, movies for a certain period of time. The purpose of copyright is “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.¹ The object is to protect the author from unlawful copying and encourage authors, composers and artists to create original works. The primary function of Copyright Law is to protect the fruits of man’s work, labour, skill or test from being taken away by other people.² When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make a profit out of the skill, labour of the original author and it is for this reason the Copyright Act, 1957, gives to the author certain

exclusive rights in relation to certain work referred in the Act.³

Fair dealing is the use of copyrighted material without the permission of the author. These uses are permitted under the law and are considered as fair use. One can use a copyrighted work if it does not amount to infringement. Therefore, a person who reproduces less than a substantial part of the work, it comes within the fair use. A fair dealing with a literary, dramatic, musical or artistic work for the purpose of research or private study or criticism or review, whether of that work or any other work shall not constitute an infringement of copyright. The fair use doctrine, perhaps the most significant limitation on copyright protection, developed out of judicial recognition that certain acts of copying are defensible when the public interest in permitting the copying far outweighs the author's interest in copyright protection.⁴ The doctrine of fair dealing is primarily a British concept in contrast to the doctrine of fair use which is derived from the American law and is more flexible than the former.

History of Copyright Law in India

The history of copyright protection began to appear with the invention of the printing press which made it

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possible to reproduce literary works by a mechanical process. The first law on copyright was the *Statute of Anne* of 1709 which took effect in 1710. This Act acknowledged for the first time the author of a work being the owner of its copyright, and also laid out fixed terms of protection. Before the Act of 1911, the books and literary works were protected under the statute of Anne and other art such as music, painting or photographs were protected under legislation such as the Engraving Copyright Act, 1734 and the Fine Arts Copyright Act 1862. In 1886, however, the Berne Convention was introduced to provide mutual recognition of copyright between nation states, and to promote the development of international norms for copyright protection. The core of the Berne Convention was that each of the contracting countries shall provide automatic protection for works first published in other countries of the Berne Union and for unpublished works whose authors are citizens of or resident in such other countries.⁵ The 1911 Act consolidated all the acts into one and implemented the Berne Convention. The history of copyright law in India can be traced to 1847. The Act of 1847 provides that under a contract of service copyright in “any encyclopaedia, review, magazine, periodical work. Further, work that publishes in a series of books or parts” shall be vested in the “proprietor, projector, publisher or conductor. Before the Act of 1957, copyright protection was governed by the Copyright Act, 1914 which was the extension of the British Copyright Act, 1911. The Act was amended after 1957 in 1983, 1984, 1992, 1994 and 1999. In May 2012, the Parliament passed the Copyright Amendment Bill, 2012.

Criteria of Protection

There is no copyright in ideas, schemes, systems or method. This is the fundamental element of copyright law that it does not grant protection to idea but the expression of idea. Ideas are not copyrightable but that sequence of event is; the identity of impression must be capable of sensory perception by the audience.⁶ The critical distinction between “idea” and “expression” is difficult to draw. Hand J candidly wrote, “Obviously, no principle can be stated as to when an imitator has gone beyond copying the idea and has borrowed its ‘expression’.” Copyright only concerns with the expression of the idea which are original. Originality is the *sine qua non* of Copyright Law. Section 13 of the Copyright Act, 1957 provides that only original literary, dramatic, musical and artistic works are the subject matter of copyright.

Copyright law is not concerned with the originality of ideas, but with the expression of idea. To qualify the protection under the copyright law, the work must be original in the sense that the author has created it by his own skill, labour and judgment. Originality is the central requirement of copyright protection. A work is only protected by copyright if it consists of original expression, and copying will amount to infringement only if original elements of the protected work are taken. In this sense, the originality doctrine is responsible for delineating the nature and the scope of copyright’s subject matter. Further, originality is the foundational concept that defines the relationship between an “author” and her “work”, for copyright in a work comes into existence at the moment when an author produces fixed original expression.⁷

Infringement of Copyright

The benefits of the copyright accrue to the author only if the rights are protected at the exclusion of all others, except where the Act provides for certain uses. These uses by others are permitted uses under Section 52 of the Copyright Act, 1957 and all other uses are deemed as an infringement. An infringement is a trespass over a domain which is the exclusive right of the author of the work. Whereas, Section 51 of the Copyright Act, 1957 deals with the infringement of copyright. The following are some of the commonly known acts involving infringement of copyright: Making infringing copies for sale or hire or selling or letting them for hire; Permitting any place for the performance of works in public where such performance constitutes infringement of copyright; Distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright; Public exhibition of infringing copies by way of trade; and Importation of infringing copies into India.⁸ Infringement of copyright is a trespass on a private domain owned and occupied by the author of the copyright, and, therefore, protected by law. Infringement of copyright or piracy which is a synonymous term consists in the doing by any person without the consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute on the owner of the copyright.⁹ An infringement of copyright is not restrained to literal and strict repetition or reproduction; it includes also the different modes in which the matter of any work may be adopted, transferred, or reproduced, with more or less colourable modification to cover the piracy.

Origin and Development of Fair Dealing

The doctrine of fair dealing is an integral part of copyright law. It permits the use of copyrighted work without threat of infringement. These uses are permitted under the Law. The defence of "fair dealing" initially originated and emanated as a Doctrine of Equity which allows the use of certain copyrightable works, which would otherwise have been prohibited and would have amounted to infringement of copyright. The main idea behind this Doctrine is to prevent the stagnation of the growth of creativity for whose progress the law has been designed.¹⁰ This Doctrine is one of the most important aspects of Copyright Law which draws a line between a legitimate, *bonafide* fair uses of a work from a *malafide* blatant copy of the work. This is the reason why this doctrine was explicitly enshrined in Article 13 of the TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement which runs 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 right holder".¹¹

The Berne Convention allows for exceptions to be made to the rights in works protected under the Convention in certain specified cases. Article 10(1) of the Berne Convention provides that it is permissible to make "quotations" from a work which has already been lawfully made available to the public, provided that the making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

For the first time it was the UK Copyright Act, 1911 wherein fair dealing was explicitly recognized in the imperial copyright legislation. In U.K., introduced in 1911, the fair dealing provisions provide three important limitations to owner's rights, namely, fair dealing for the purposes of non-commercial research or private study, fair dealing for the purposes of criticism or review and fair dealing for the purpose of news reporting.¹¹ The defence of Fair dealing, as found in the British copyright law contains an exhaustive list of exceptions which have been provided in the CDPA, 1988. The exceptions are: - (a) research or private study, (b) reporting current events and (c) criticism or review.

In India, the doctrine of fair dealing has been dealt with under Section 52 of the Indian Copyright Act, 1957 which has been extensively borrowed from the UK Copyright Law. Section 52 of The Copyright Act, 1957 of India elaborately incorporates the defense of fair dealing however the term fair dealing has not been defined anywhere in the Act. A fair dealing with a literary, dramatic, musical or artistic work for the purpose of research or private study or criticism or review, whether of that work or any other work and reporting current events shall not constitute an infringement of copyright. The copyright Amendment Act, 2012 has extended the ambit of works which can be used for private and personal use by incorporating the words "any work". With this Amendment the fair use provision has been extended to cinematograph film and musical works.

Research and Private Study

The rationale for this defence lies in the belief that research and study is necessary to generate new works. It also recognizes that non-commercial research and study does not normally interfere with the incentives and rewards that copyright provides to creators and owners. In effect, the defence helps to achieve copyright's goal of maximizing the production of works.¹² In order to come within the defence the dealing must be for defendant's own research or study. In *Kartar Singh Giani v Ladha Singh*¹³ the Court observed on 'research and scholarship' as:

"All laws which put a restriction upon human action and venture must be interpreted in a sensible and liberal soul. Under the appearance of copyright, an offended party can't request that the Court close every one of the roads of research and grant and all boondocks of human Knowledge".

Review and Criticism

The exception is available whether the work reproduced is the work criticised or not. The criticism or review may be of the work as a whole or a single aspect of a work, the thought or philosophy underpinning a work.¹⁴ Thus, in criticizing one work it is permissible to quote from other comparable works for the purpose of exemplifying the criticism.¹⁵ Quotation may be taken from a copyrighted work for the purpose of review or criticism. It is not always easy to say where the line should be drawn between the use which for such purposes may be permitted and

that which may be forbidden.¹⁶ But extracts may be made, sufficient to show the merits or demerits neither of the work, but not so as to supersede the original work, nor to such an extent that the review becomes a substitute for the book reviewed.¹⁷ In *Distillers Co. (Biochemical) Ltd v Times Newspapers Ltd*, it was held that a ‘fair criticism’ of all the ideas and events described in the documents in question would be a “fair dealing”. The copying of reported cases by the writers of legal text book now, no doubt falls to be in the proviso of fair dealing. Also criticizing a work in a foreign language, it is now permissible to quote from an English translation though there is no criticism of the translation as such. Again in criticizing one work, it is permissible to quote from other comparable work for the purpose of the criticism. In *John Stone v Bernard Jones Publication Ltd*,¹⁸ it was held that if the work is set out and criticized, that is enough to bring the matter within the words, ‘purposes of criticism’ and it is not essential that the source should be acknowledged or should be attributed to the author.¹⁹

Reporting Current Events

The defence is intended to protect the role of the media in informing the public about matters of current concerns to the public. In deciding whether the work is being used for this purpose, a useful test may be whether it is reasonably necessary to refer to the work in order to deal adequately with the events in question.²⁰ The reporting of current events defence aims to strike a balance between protection of rights of creative authors and the wider public interest.²¹

Fair Dealing v Fair Use

In the U.S., the term fair use has been used which is not defined in the U.S. Copyright Act, and it is widely accepted that the definition for the same is open to interpretation by courts on a case-to-case basis. As a result of the lack of a statutory definition, fair use is determined in the U.S. on the basis of Justice Story’s four factor test laid down in *Folsom v Marsh*, where it was stated:

“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.”

Judges used these criteria to decide fair use cases until Congress codified the basic elements of Justice Story’s test into Section 107 of the U.S. Copyright

Act in 1976, which enumerates the above relevant factors.²² Section 107 of the Copyright Law, 17 USC 107, makes clear that a fair use does not constitute copyright infringement and is present when the work is used for among other things, criticism, comment, news reporting, and teaching, scholarship or research. Section 107 sets forth a list of four nonexclusive but mandatory factors to consider in determining whether use of a work is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work

In 2004, the Supreme Court of Canada heard *CCH Canadian Ltd. v Law Society of Upper Canada [CCH]*,²³ its first- ever case involving fair dealing, and unanimously declared that fair dealing is a users’ right, which is as integral to copyright law as the rights of copyright owners and therefore should be given large and liberal interpretation.

American fair use can apply potentially to any purposes, and the enumerated purposes in Section 107 of the US Copyright Act are only illustrative, as is clear from the explicit words “such as”. In contrast, Sections 29 and 29.1 of the Canadian Copyright Act, like other descendants of the 1911 UK Copyright Act, do not contain the magic words “such as”, and therefore, the list of enumerated purposes (originally: research, private study, criticism, review or newspaper summary, and currently: research, private study, education, parody, satire, criticism, review or news reporting) is treated as exhaustive. Accordingly, the argument goes, “[d]ealings for other purposes are not covered by the exception, even if they would otherwise be fair”.²⁴

The Concept of Fairness

A number of different factors will influence the decision as to whether a particular dealing is fair. Fairness should be judged by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did, for the relevant purposes.²⁵ Mere dealing with the work for the relevant purpose is not enough; it must also be dealing which is fair for that purpose whose fairness must be judged in relation to that purpose. In *M/s. Blackwood & Sons Ltd. v A. N. Parasuraman*, Justice Rajgopala Ayyangar observed:

“Two points have been urged in connection with the meaning of the expression ‘fair’ in ‘fair dealing’ (1) that in order to constitute unfairness there must be an intention to compete and to derive profit from such competition and (2) that unless the motive of the infringer were unfair in the sense of being improper or oblique the dealing would be fair”.

The courts have on various occasions referred to the authority English case *Hubbard v Vosper*.²⁶ The words of Lord Denning in this case lay down a much descriptive outline of fair dealing-

“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. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come into mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright”.

In *Folsom v Marsh*,²⁷ the defendant had copied 353 pages from the plaintiff’s 12 volume biography of George Washington. Joseph Story J rejected the defendant’s fair use defence and held:

“One may cite fairly from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand it is as clear that if he thus cites the most important parts of the work, with a view, not to criticize but to supersede the use of original work, and substitute the review for it such a use will be deemed a piracy.... In short we must often look to the nature and objects of the selections made, may prejudice the sale or diminish the profits or supersede the objects of the original work”.

In *Ashdown v Telegraph Ltd.*²⁸ the question was whether the publication of certain extracts from a political leaders diary leaked to the defendant and published in the defendant’s newspaper was infringement of copyright or whether it came within

the scope of the defence of fair dealing. The court held that the publication did not come within the scope of the defence of fair dealing. In *Williams & Wilkins Co. v United States*,²⁹ the Court held that it was fair use for the litigant to photocopy articles from offended party’s medicinal diaries for circulation to therapeutic scientists in light of the fact that the copyright proprietor had not demonstrated that it was, or would be, considerably hurt by the practice.

In *Civic Chandran v Ammini Amma*³⁰ the Court observed:

“The term fair dealing has not been defined as such in the Act, but Section 52 (1), (a) and (b) specifically refers to ‘fair dealing’ of the work and not to reproduction of the work. Accordingly, it may be reasonable to hold that the reproduction of the whole work or a substantial portion of it as such will not normally be permitted and only extracts or quotations from the work will alone be permitted even as fair dealing. In the circumstances, the quantum of extracts or quotations permissible will depend upon the circumstances of each case. It may not be proper to lay down any hard and fast rules to cover all cases where infringement of copyright is alleged on the basis of extracts or quotations from the copyrighted work. The court will have to take into consideration the quantum and value of the matter taken in relation to the comments or criticism”.

In *ESPN Star Sports v Global Broadcast New Ltd.*³¹ Justice S. Ravindra Bhat held:

“As observed in Vosper, whenever a court has to see whether a particular conduct is fair dealing or not, the context, the length of the original work borrowed, and the purpose, can never be ignored. No universal rule or standard exists; cases have to be decided on the peculiar facts. What may be unfair in one context may be perfectly fair in another and vice versa. There is a certain amount of elusiveness in evolving a thumb rule”.

In the case of, *The Chancellor Masters and Scholars of the University of Oxford v Narendra Publishing House & Ors.*,³² Delhi High Court observed:

“Law mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of

creativity." ... "The doctrine of fair use legitimizes the reproduction of a copyrightable work provided the purpose served by the subsequent or infringing work is substantially different from the purpose served by the prior work."

In *Super Cassettes Industries Ltd. v Chintamani Rao*,³³ the Court held:

"Therefore firstly it has to be 'fair dealing' of the or in question. This means that the dealing with the copyrighted work is not an unfair dealing. Only that part of the literary, dramatic, musical or artistic work may be utilized for the purpose of criticism or review, which is absolutely necessary, and no more. The purpose-ostensibly or obliquely, should not be to ride piggyback on the work of another. The focus of attention, an interest of the producer/author work created by the person who may, bona fide be using the work of another for the specific purpose of criticism or review of that work, or of any other work. The work of another cannot be used out of context. There has to be an intellectual input an original mental exercise undertaken by the person bona fide lifting or copying the literary, dramatic, musical or artistic work, which should involve either the criticism or review of the lifted/copied work, or of any other work. Copying of the work of another for any other purpose, such as, to make one's own programme more interesting, attractive or enjoyable is to permitted. The underlying theme and focus of; and in substance, the new work should necessarily be an exercise to either criticize or review either the bona fide copied work, or any other work. A person cannot, in the name of "fair dealing", lift or copy literary, dramatic, musical or artistic work of another to such an extent that it ceases to be a "fair dealing", and becomes a blatant act of copying the work of another".

Fair Dealing of Digital Works

The interaction between copyright and technology represents one of the greatest challenges for copyright owner. Technology has widened the possibilities in different areas like media, entertainment, communication, advertisements and education. However, the easy access to copyrighted works available on the Internet has posed a great concern for copyright infringement. The prominent copyright issues in the digital era can be classified into three groups:

- (i) Issues relating to a whole new set of work, namely, computer programs, databases and multimedia works;
 - (ii) Issues relating to reproduction, distribution and communication to the public of a work through digital media; and
 - (iii) Issues relating to the management and administration of copyright in the digital environment.³⁴
- A major challenge posed by digital technologies to a user who is a member of the public is to the right to "informed decision making".

Conclusion

The objective of law, in relation to the intellectual property rights, is to serve the dual purpose - protection of individual rights and also interests of the society. There should be remarkable balance between the two. TRIPS Agreement has laid down the guidelines in this direction to balance the interests of the individual members. The age old land mark decision in *Folsom v Marsh* has given some meaningful direction to the doctrines of fair dealing and fair use. The fair use doctrine requires frequent analysis and reformulation of limitations with changing time and technology. It should be revisited in the light of the new developments in computer and digital technology. The right of the owner of copyrighted work should be adequately protected irrespective of whether it is a digital or non-digital work. The quick access of the work without any restrictions due to technological advancements should be regulated. There is a need to amend the copyright law in order to secure and promote creativity in any form for the cultural and literary progress of the society.

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