

IS FAIR DEALING REALLY FAIR IN INDIA?

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ABSTRACT

The central theme of this article is the conflict between the concept of 'fair dealing' as enshrined in the Indian Copyright Act and a similar concept of 'fair use' as part of American Laws. In contemporary times, this debate gets all the more potent in the backdrop of the controversy generated by legal action taken by the Oxford University Press, Cambridge University Press and Francis & Taylor against a small non-descript photocopy shop 'Rameshwari Photocopiers' located in the heart of Delhi University. This article does not keep its ambit limited to this specific example as just one case cannot & should not act as a catalyst for change in legislation. Hence, we delve into the original thought process behind the genesis of both these concepts and also deal with the contemporary perspectives on them in U.K., U.S.A. & Canada. Finally, analysing the Indian scenario, we find that continuation of the 'Fair Dealing' concept with certain amendments to bring it in line with the 'Fair Use' doctrine is the best possible discourse to adopt for India. There is a dire need to bring life to the Indian fair dealing provisions; fair dealing in India is in the need of some fair healing.

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1. INTRODUCTION

“The secret of life is honesty and fair dealing. If you can fake that, you've got it made.”

--Groucho Marx

Every student in Delhi University, in fact every student in India, has become familiar with the issue of fair dealing of copyright, all thanks to the Rameshwari photocopy case. The case has emerged as one of the most egregious abuses of copyright with leading publishers, Oxford University Press (OUP), Cambridge University Press (CUP) and Taylor & Francis (T&F) filing a lawsuit against Delhi University and Rameshwari Photocopy Service, the licensed photocopier for creating and distributing course packs to the students of the University. They took a clear stand that through this lawsuit they were not targeting the “fair dealing” exceptions provided for under Section 52 of the Indian Copyright Act but only challenging the illegal duplication of copyrighted materials for commercial purposes by the photocopying shop. In their view, they were not targeting the “fair use” of materials by students and teachers. But what they conveniently forgot was that their copyright protected material was very essential for academic purposes and it was photocopied since the students could not buy the course books at such unaffordable prices. It is important to understand the context in which the Rameshwari Press was working. There are two aspects to it. One simple way to look at it is that it was involved in a commercial activity & hence the application of Section 52 in this case cannot be attracted. However, the other, more realistic aspect is the context in which it was operating. There was a proper tender taken out by the Delhi University to select a photocopier for this specific purpose. Hence, Rameshwari Press was acting as an agent of the University & in light of the same, its involvement in producing the course packs was not towards a commercial purpose but rather driven towards meeting the university’s purpose. In this case, Rameshwari photocopy had a license from the University of being the exclusive ‘agent’ for creating and distributing course packs. It is very pertinent to note that use of copyrighted work for the purposes of an educational

institution is an exception to copyright infringement.¹³¹The end purpose of these course packs is the education of the students which falls squarely within the ambit of ‘permissible purposes’ as enshrined in Section 52 of the Indian Copyright Act. On this very point, the Canadian Supreme Court, who have a similar copyright system as that of India have ruled that distribution of extracts for educational purpose comes under the ambit of ‘permissible purpose’ in the case of *Alberta (Education) v. Canadian Copyright Licensing Agency*.¹³²

One of the most clichéd arguments then forwarded by publishers is that, ‘Authors are not philanthropists & publishing houses not charities’. While nobody, and by this we mean no legal jurisdiction, has overlooked the commercial aspect of this whole exercise, one needs to remember that the underlying philosophy of the TRIPS Agreement, Indian Copyright Act & similar enactments world over which expound Fair Dealing/Fair Use as the case maybe is that reproducing parts of a copyrightable work in certain situations without making payments to the copyright holder is permissible on grounds of equity or as laid down by legislature. This is primary purpose of the concept of Fair Use or Fair Dealing.

Now comes the question of the cases where in these course packs are sold by the Press to students not belonging to Delhi University. In such a scenario, one can take a hardline view & propose that this does not fall under the ambit of fair dealing as the Publishers are saying. The other view based on equity would be that even a non-DU student cannot possibly afford such steep prices of all of the individual books. Moreover, another view that has been advanced recently is that the objective which a whole book seeks to achieve & the objective which a course pack, made after selecting different portions of different books seeks to achieve are completely different. In such a case, the existence of cheap course packs is not affecting the sales of books at all since buyers interested in the objectives that can be fulfilled by the book will purchase books only.

¹³¹Section 52 (1) (i) of the Indian Copyright Act,1957

¹³² *Alberta (Education) v Canadian Copyright Licensing Agency* 2012 SCC 37

It is this subjectivity that is sought to be highlighted by means of this paper. The fact that real life circumstances relating to such a subjective aspect tend to get complicated when subjected to a rigid set of exceptions mentioned in a statute. Another case that can be pointed out here is that of *India TV Independent News Services Pvt. Ltd. v. Yashraj Films Private Limited & Super Cassettes Ltd.*¹³³ In this case, the TV Channel broadcasted an exclusive segment focused on singers & when these singers were singing their songs live on TV, certain clips of the movies to which those songs belonged were shown. Infringement of copyright was claimed and the Delhi High Court released a judgment restraining the Channel from distributing, broadcasting or otherwise publishing or in any other way exploiting any cinematograph film, sound recordings or part thereof that is owned by the producers. This is where an interesting points stems up. Would it not be unethical, even cruel, to restrain a singer from singing his own song in front of an audience merely because the legal rights subsisting over it are possessed by someone else? The deficiency of Section 52 of the Indian Copyright Act in this regard thus becomes a handicap which ultimately acts to the detriment of tenets of justice & equity. The division bench of Delhi High Court also somewhat realized this when an appeal was made to the judgment and ended up setting aside the earlier order and removing the restrictions.

In the light of this case, the authors have written this article which deals with “fair dealing” provisions in India and how it is different from fair use, which primarily is a US doctrine. We have also tried to contemplate as to what changes can be made in our law so that such lawsuits do not arise again and students or any other users engaging in fair dealing are not troubled. Ultimately, what suits India the best: fair dealing, fair use or fair healing of fair dealing?

2. FAIR DEALING AND FAIR USE

¹³³ *India TV Independent News Services Pvt. Ltd. v. Yashraj Films Private Limited & Super Cassettes Ltd* FAO (OS) 584/2011

Copyright grants the creator of a creative and original work an exclusive right over its use and distribution. Fair dealing is one of the defences to the exclusive right granted through a copyright to the author of a creative work. The concept of 'fair dealing' is primarily a British 'copyright concept' in contrast to the concept of 'fair use' which is derived from the American law and is more flexible than the former. These concepts have been recognised in the Berne Convention as well as the TRIPS Agreement. Fair dealing permits the reproduction or use of the copyrighted work, which but for this exception, would have amounted to infringement.¹³⁴ The prior permission of the author is not required. This doctrine emerged as an equitable one¹³⁵ which serves an answer to copyright proponents who claim that copyright, not being a patent, is not an absolute right.¹³⁶ Fair dealing counterbalances the rights of creators of original works with the interests of the public at large. It is like a middle ground between right holders and users which can be used to spread ideas. Fair dealing, as found in the British copyright regime is very restrictive and contains an exhaustive list of exceptions which have been defined 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 and faces the same kind of rigidity. The enumerated purposes under Section 52 have been typically interpreted as exhaustive, inflexible and certain, since any use not falling strictly within an enumerated ground is considered an infringement.¹³⁷ There is no thumb rule to deal with such cases and each case depends upon

¹³⁴*S.K. Dutt v. Law Book Co and Ors.*, AIR 1954 All 570

¹³⁵*Harper & Row Publishers v. Nation Enterprises*, 471 US 539

¹³⁶Giuseppina D' Agostino, "Healing Fair Dealing? A comparative copyright analysis of Canada's Fair Dealing to UK Fair Dealing and Fair Use", *McGill Law Journal*, 53 (2008) 309

¹³⁷*Blackwood and Sons Ltd and Others v. A.N. Parasuraman and Others*, AIR 1959 Mad 410

the facts and circumstances.¹³⁸ Lord Denning M.R., in deciding *Hubbard v Vosper*, famously noted that:

*“It is impossible to define what is ‘fair dealing.’ It must be a question of degree. You must consider first 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... Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.”*¹³⁹

But this concept of ‘fair dealing’ which is an integral part of copyright law has not quite developed in India; it continues to be found in its formative stage. What kind of an approach towards fair dealing is required- whether strict or liberal- also needs to be analysed. The problem that is faced with respect to this defence is that Indian courts and legislature have not fully explored the scope of fair dealing which is a very necessary exception. A restrictive approach puts the credibility and efficiency of this exception into question. Fair dealing has not even been defined in the Act. Therefore, we need a more elaborate scheme similar to the US counterpart, that is, fair use. In this paper, the judicial pronouncements on fair dealing will show how it is gradually evolving and what all needs to be further incorporated in its ambit.

1.9. FAIR USE

Section 107 of the US Copyright Act, 1976 lays down four factors for determining fair use:

- i. Purpose and character of work;
- ii. Nature of copyrighted work;
- iii. Amount and substantiality of the portion used;
- iv. Effect on market value of the original.

¹³⁸*ESPN Star Sports v. Global Broadcast News Ltd and Ors.*, 2008 (36) PTC 492 (Del)

¹³⁹*Hubbard v. Vosper* CA 1971 ([1972] 2 WLR 389)

U.S.A. has adopted this doctrine keeping in mind rapid technological advancement. Courts must adapt the doctrine on a case-by-case basis.¹⁴⁰ Fair use of copyright material is the extra-legal use which is usual, reasonable and customary.¹⁴¹ This American concept is now being imported by many countries around the world because of its inherent logical reasoning and better protection ambit.

1.10. FAIR DEALING

Fair dealing was statutorily introduced for the first time in the 1911 Act of U.K.

It has not been defined anywhere; rather, it has been acknowledged as a question of degree in the famed case of *Hubbard v. Vosper*¹⁴² which was the first major judicial attempt to define “fairness” which depends upon various factors as already pointed out.

The task of the court is to consider the use to which the work is put and then ascertain what the perceived purpose of that use was. The user’s subjective intention might well be relevant on the issue of whether the dealing was “fair”, but it is wrong for a court to put itself in the user’s shoes to decide what the purpose was.¹⁴³ If the court purports to discover whether the use fell within the ambit of the statute, there seems no good reason why both, the user’s actual intentions and also the impact of the use on the intended recipient should not be of help.¹⁴⁴

¹⁴⁰*Lewis Galoob Toys v. Nintendo Inc.*, 964 F.2d 965

¹⁴¹T.R.S. Iyengar, *The Copyright Act, 1957*, Universal Law Publishing Co., New Delhi, 2001, p.52

¹⁴²Supra note 07.

¹⁴³*Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] 1 W.L.R. 605

¹⁴⁴*Ibid.*

There are no determinative factors to judge whether a purpose is within the scope of fair dealing or not. It also differs from case-to-case much like the U.S. doctrine of “fair use”, the only difference being the enumerated list of purposes in fair dealing. Cases of fair dealing for the purposes of criticism, review and reporting current events are generally trickier to adjudge than cases of non-commercial research and private study. In *Ashdown v Telegraph Group Ltd*,¹⁴⁵ the court laid down the following test which according to us, best fit the purpose of determining fair dealing. It laid down that,

“The success or failure of the defence depends on three factors:

- 1. Whether the alleged fair dealing is in commercial competition with the owner’s exploitation of work,*
- 2. Whether the work has already been published or otherwise exposed to the public*
- 3. The amount and importance of the work which has been taken.”*

1. The degree to which the infringing use competes with the exploitation of the original work of the owner is one of the most important factors. If a criticism or a review of the work competes with it in the sense that the criticism or review will act as an acceptable substitute to the public regarding that work, it becomes highly relevant.¹⁴⁶ The test should be understood as referring not just to competition with the actual form of media in which the claimant exploits his work but any form of activity which potentially affects the value of the copyright work.¹⁴⁷ Mere subsistence of any commercial rivalry is not conclusive of unfair dealing. If in case of research or private study, if the dealing is for commercial purposes then it will fall outside the provisions of the act. But if it is the case of criticism or

¹⁴⁵*Ashdown v. Telegraph Group Ltd.*, [2001] 4 All ER 666

¹⁴⁶Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, London Sweet & Maxwell, London, 2005, p. 498

¹⁴⁷Supra note 11.

review or reporting current events and the use is for commercial purposes, then it does not prevent the dealing from being fair.¹⁴⁸

In *Newspaper Licensing Agency Ltd. v. Marks and Spencer plc*,¹⁴⁹ it was held that a dealing by a person for his own commercial advantage, and to the actual or potential commercial disadvantage of the copyright owner, would not be fair dealing unless there was some overriding element of public advantage which justified the subordination of the rights of the copyright owner.

2. If the work is unpublished, any dealing is unlikely to be fair.¹⁵⁰ This principle speaks for itself. If the author or owner of the copyrighted work has not published it yet, any other person will naturally use the same for his/her own commercial gain. The motive can be clearly culled out from that act. The dealing would be anything but fair.

3. Taking up the most significant and valuable part of the copyrighted work is also an important factor in judging whether the dealing was fair or not. A useful test may be whether it was necessary to use as much as the defendant did for the relevant purpose.¹⁵¹ But this principle should not be used against the defendant unnecessarily in order to make a case of unfair use.

In addition to the above mentioned three factors, some other relevant factors may be,

4. Motive of the alleged infringer.

5. Purpose of the use.

The TRIPS Agreement requires the following:

- i. Reproduction is permissible only in certain special cases;

¹⁴⁸Supra note 14 at p. 499.

¹⁴⁹*Newspaper Licensing Agency Ltd. v. Marks and Spencer plc*, [2001] Ch. 257

¹⁵⁰Supra note 11.

¹⁵¹*PCR Ltd v. Dow Jones Telerate Ltd*, [1998] F.S.R. 170

- ii. It must not conflict with the normal exploitation of the work;
- iii. It must not unreasonably prejudice the legitimate interests of the copyright-holder.¹⁵²

The Berne Convention also deals with fair dealing in its Article 10. Clause 1 of the same permits making “quotations” from a work which has already been lawfully made available to the public, provided that the making is compatible with fair practice, and its extent does not exceed that justified by purpose; this is inclusive of quotations from newspaper articles and periodicals in the form of press summaries. Clause 3 requires the acknowledgement of the source and the name of the author if it appears on the work where such use is made.

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.¹⁵³

An approach similar to that in U.K. has been adopted in India where the purpose of fair dealing has been limited.¹⁵⁴ For the exception of fair dealing to apply,

- i. The purpose must be confined to the ones defined in Section 52 (1) (a).
- ii. The dealing must be “fair”.
- iii. There has to be acknowledgement of the source.

¹⁵²*Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)* (adopted 1994, came into force 1 January 1996)

¹⁵³*Hyde Park Residence Ltd v. Yelland*, [2001] Ch. 143 [1999] R.P.C. 655

¹⁵⁴Section 51(1)(a) of the *Copyright Act*, 1957; *S.K. Dutt v. Law Book Co.*, AIR 1954 All 570; *Civic Chandran v. Ammini Amma*, (1996) PTC (16) 670 (Ker)

In *Blackwood and Sons Ltd v AN Parasuraman*,¹⁵⁵ the Court stated that in order to receive protection the use must be one enumerated in the statute under 'fair dealing'.

It also stated two points in connection with the meaning of the expression 'fair' in 'fair dealing':

1. 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 test is to find out whether the use is likely to harm the potential market or the value of the copyrighted work.¹⁵⁶ If substantial and important works are reproduced then the intention of the infringer to use the labour of the copyright owner for his own profit can be made out.

In India some authors have used "fair use" and "fair dealing" interchangeably though the two concepts are truly like chalk and cheese. Reputed authors like Iyengar have stated that since copyright is provided for the purpose of promoting education also, the use of copyright material even to extent of some copying is not unlawful. It comes under the description of 'fair use'.¹⁵⁷ Before publication, there can be no fair use of works protected under the common law of copyrights. As long as an author keeps his work confidential and non-communicated, no one has the right to use it.

In determining whether there has been fair use or not, the court must find-

- (1) Whether there has been any substantial taking, and

¹⁵⁵Supra note 4.

¹⁵⁶*Civic Chandran v. AmminiAmma*, (1996) PTC (16) 670 (Ker); *Hubbard v. Vosper* [1972] 2 QB 84 (CA); *Sony Corporation v. Universal City Studios, Inc* 464 US 417 (1984)

¹⁵⁷Supra note 8.

(2) Whether there has been any use which might amount to plagiarism.

If it is found that there has been plagiaristic use, then the question arises whether the use has been fair or unfair which depends upon the facts and circumstances of the case. The court must look at-

2. The nature and object of the selection made,
3. The quantity and value of the materials used, and
4. The degree in which the use may prejudice the sale, diminish the profit or supersede the objects of the original work.¹⁵⁸

3. JUSTIFICATION FOR FAIR DEALING/ FAIR USE

The reason for allowing the exception of fair dealing is that an infringing use of the copyrighted work may bring about greater public benefit than its denial.¹⁵⁹ Therefore the public can use the copyrighted work "fairly" without requiring the permission or licence from the copyright owner. It has to balance two competing and equally significant interests i.e. the monopoly of authors which acts as an incentive to create and that such a monopoly must not come in the way of creative ability of others or the right of the public to build upon

¹⁵⁸Ibid. at p. 383

¹⁵⁹T.G. Newby, "What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?" *Stanford Law Review* 51, 1633 (1999); See also *Sony Corporation v. Universal Studios*, 464 US 417, 479-480 (1984). There are jurists who have justified the fair use doctrine in a Lockean framework; See B.J. Damstedt, "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine", *Yale Law Journal* 12, 1179 (2003); Some authors also argue that fair use doctrine does not in any way protect freedom of speech, see W. Lockridge, "The Myth of Copyright's Fair Use Doctrine As a Protector of Free Speech", *Santa Clara Computer & High Tech. Av Journal* 24, 31 (2007)

previous works.¹⁶⁰ The reproduction of some portion of the copyright work is necessary for the purposes of research, private study, criticism, news reporting, teaching, review, etc. If fair dealing is not allowed then the society will become stagnant as there will be no protection for the justified dissemination of information. Who will protect the rights of the public if only the rights of the owner are sought to be protected?

4.1. FAIR DEALING IN INDIA

In India, for the dealing to constitute “fair”, the purposes have to fall within the statutorily entrenched purposes of private use, research, criticism and review given under Section 52 of the Copyright Act.

4.1.1. Private Use

In India, fair dealing is allowed for private use including research after the 1994 amendment. This exception allows private research and not commercial research.¹⁶¹

In *Syndicate Press of University of Cambridge v. Kasturi Lal & Sons*¹⁶², the Delhi High Court observed that:

“Law should encourage enterprise, research and scholarship but such encouragement cannot come at the cost of the right of an individual to protect against the misappropriation of what is essentially a product of his intellect and ingenuity. The law encourages innovation and improvement but not plagiarism. Copyright is a form of protection and not a barrier against research and scholarship. Lifting portions of the original work and presenting it as one’s own creation can in no way be described as any form of bona fide enterprise or activity. Research and scholarship are easily distinguishable from imitation and plagiarism.”

¹⁶⁰*Kartar Singh v. Ladha Singh*, AIR 1934 Lah 777; *Eastern Book Co. v. Navin Desai*, AIR 2001 Del 185

¹⁶¹V.K. Ahuja, *Intellectual Property Rights in India*, LexisNexis Butterworths Wadhwa, New Delhi, 2012, p. 257

¹⁶²*Syndicate Press of University of Cambridge v. Kasturi Lal & Sons* (2006) 32 PTC 487 (Del)

In *Blackwood v Parasuraman*,¹⁶³ principles for determining what constitutes "private use" were laid down. Fair dealing was claimed for the purpose of private study as the defendant had published guides of the plaintiff's books but it was rejected by the Court and it was held that private study covers the student copying the book for his own use, and not circulation of copies among other students. It was given a restricted meaning. Similar were the facts in *Syndicate of Press University of Cambridge v Kasturi Lal*,¹⁶⁴ where the Court held that there was infringement, not falling because Section 52(1) (h) allows reproduction for the purpose of answering questions in an examination and not questions and answers as a whole.

In *University of London Press Ltd v. University Tutorial Press Ltd*¹⁶⁵ also Peterson J. stated that:

“it could not be contended that the mere republication of a copyright work was a ‘fair dealing’ because it was intended for purposes of private study; nor if an author produced a book of questions for the use of students, could another person with impunity republish the book with answers to the questions. Neither case would come within the description of ‘fair dealing’.”

4.1.2. Criticism or Review

This defence is available for criticism or review only when the act is accompanied by an acknowledgement as require under the provision of Section 52 (1). The intention of this provision is to protect a reviewer who wants to put forth his opinion or views or comments on a particular copyrighted work by using extracts from that work. The principle regarding this was probably first laid down in the case of *Hubbard v Vosper* which has already been discussed and was followed in the case of *Associated Newspapers Group v. News Group Newspapers Ltd*¹⁶⁶ where it was held that it is not fair for a rival in the trade to take

¹⁶³Supra note 4.

¹⁶⁴Supra note 28.

¹⁶⁵*University of London Press Ltd v. University Tutorial Press Ltd*, [1916] 2 Ch 601

¹⁶⁶*Associated Newspapers Group v. News Group Newspapers Ltd*, 919860 RPC 515

copyright material and use it for its own benefit. The motive for which the copy is made is the relevant question. For the dealing to be fair in criticism, the use should be made only for criticism or review and not for other incidental purposes. It is permissible to quote from other comparable works for the purpose of exemplifying the criticism.¹⁶⁷

The case of *Syndicate of Press of University of Cambridge v Kasturi Lal & Sons* is a landmark judgement on the issue of fair dealing as it has also set a precedent in case of criticism too. In this case the Delhi High Court has observed that:

“a review, a criticism or guide acknowledges the original authors of the work that they deal with. A review may summarise the original work and present it for perusal to a third person so that such person may get an idea about the work. A criticism may discuss the merits and demerits of the work. A guide may seek to enable students of the original work to better understand it from the point of view of examinations. Verbatim lifting of the text to the extent of copying the complete set of exercise and the key to such exercise can in no manner be termed as a review, criticism or a guide to the original work.”

In *Civic Chandran v Ammini Amma*,¹⁶⁸ it was held that even if the copying is substantial it does not constitute infringement if it is for the purpose of criticism. Criticism or review may relate not only to the literary style, but also to the doctrine, philosophy, ideas or events described by the author.¹⁶⁹

It is not necessary for the parts of the work selected for the criticism or review to be representative of the work as a whole. Criticism of a single aspect of a work is therefore capable of constituting fair dealing.¹⁷⁰

¹⁶⁷Supra note 27 at 259.

¹⁶⁸Supra note 20.

¹⁶⁹Supra note 12 at para. 10-11.

¹⁷⁰*Time Warner Entertainment Ltd v. Channel 4 Television Corporation Plc*, [1994] E.M.L.R. 1

Parodies also fall within the purview of criticism.¹⁷¹ They are a humorous form of social commentary, and while deciding whether a particular work constitutes a valid parody, it must be established that only that much work is to be copied as would be necessary to remind the reader, listener or viewer of the original work.¹⁷²

In U.K. this issue is yet to be addressed directly by the Courts where it has been accepted as a possibility.¹⁷³ But in the U.S.A. it clearly falls within the scope of fair use. In India the stance is not clear as such cases have not arisen yet.

4.1.3. Reporting Current Events

Fair dealing material for the purpose of reporting current events in print or broadcast media is also an exception under Section 52 (1) (b) of the Copyright Act because a person has the right to know (right to freedom of speech and expression).¹⁷⁴In

Ashdown v Telegraph Group,¹⁷⁵ the exception of fair dealing was not granted when a newspaper published extracts of a confidential diary minute of a political meeting.

It was rejected because of the extent of reproduction made for the defendants' commercial interests. The events must be current ones and not history. It must not be for editorials either.

The Berne Convention has certain relevant provisions for the reporting of current events. Article 2 (8) excludes protection for “news of the day or to miscellaneous facts having the character of mere items of press information.” It is also included in the limited class of exceptions provided for under Article 10 of the Convention.

¹⁷¹*Campbell v. Acuff-Rose Music*, 114 S. Ct. 1164

¹⁷²*Woody Allen v. National Video*, (1985) 610 F Supp 1612

¹⁷³*Williamson Music v. The Pearson Partnership Ltd* [1987] F.S.R. 97

¹⁷⁴*Reliance Petrochemicals v. Indian Express Newspapers*, (1988) 4 SCC 592

¹⁷⁵Supra note 11.

4.2. WHY DOES FAIR DEALING EXIST IN INDIA?

The concept of fairness in fair dealing implies that the economic interests of the copyright holder must not be adversely affected. But since a balance has to be maintained between the rights of copyright holder and public interest, a probable reason for India having adopted the fair dealing doctrine is that it attaches significance to research and study, and in spite of a commercial angle being present at times, it must be encouraged.

But quite pain strikingly, Indian courts have always taken a contradictory approach in dealing with this issue. Fair dealing claims alike the ones discussed above have been upheld. In cases like *Forster v Parasuram*¹⁷⁶ and *Ramaiah v Lakshmaiah*,¹⁷⁷ it has been held that publication of guide books even for a profit-making purpose fall within the fair dealing exception. Element of 'fairness' has not been duly considered in these cases since these guides bring about competition in the sales of books and hamper the economic interests of copyright holder despite serving the noble purpose of education.

Moreover, we observe that the law relating to fair dealing in India is not as evolved as it is the U.S.A or the U.K. The latter two have cases or statutes governing almost each and every major aspect of fair dealing although there are some grey areas; in India this is not the case. Most of the times we have followed the principles of the U.K. law and rarely have we tried to build upon our own system. There are many areas (for instance, parodies, current events, reporting of historical facts publishing answers to questions framed by another author and the like) which have not yet been addressed by the Indian judiciary or legislature. Therefore, much needs to be done in this regard.

4.3. COMPARATIVE ANALYSIS

4.3.1. A Canadian Perspective

¹⁷⁶*Forster v. Parasuram*, AIR 1954 Mad 331

¹⁷⁷*Ramaiah v. Lakshmaiah*, (1989) PTC (9) 137 (AP)

Canadian authors are coming up with a new outlook towards “fair dealing” post the decision of *CCH Canadian v Law Society of Upper Canada*¹⁷⁸ and opine that the fair dealing exception to copyright law has become outdated because of two factors:

- the impact that the internet has had on Canadian culture, and
- the decision the Supreme Court of Canada where it held that *"in order to maintain the proper balance between the rights of a copyright owner and users' interests, fair dealing must not be interpreted restrictively."*

The following should judge what fair dealing constitutes- the purpose and commercial nature of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.¹⁷⁹

Subsequent to the decision the National Consultation on Copyright Policy determined that the fair dealing exception required amending.¹⁸⁰ But the federal government, in the form of Bill C-1 1, adopted a rigid approach to the amendments.¹⁸¹ Hence, it can be seen that Canada is

¹⁷⁸*Canadian v. Law Society of Upper Canada*, [2004] 1 SCR 339 [CCH]

¹⁷⁹Giuseppina D'Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair

Dealing to U.K. Fair Dealing and U.S. Fair Use”, *McGill Law Journal* 53, 309 (2008)

¹⁸⁰Michael Geist, "Copyright Consultation Provides Blueprint for Reform" *The Hill Times* (2

November 2009), *available at* <http://www.michaelgeist.ca/content/view/4543/159/> > ¹last accessed 12/04/2014

¹⁸¹An Act to Amend the Copyright Act, 1st Sess, 41st Parl, 2011 (assented to 29 June 2012), now titled

not yet ready to adopt the fair use doctrine or rather a liberal approach to fair dealing even after the judiciary has called for such an amendment.

4.4. A BRITISH OUTLOOK

Fair dealing first appeared in the U.K. in the Copyright Act, 1911 and has been subject to much debate with some scholars arguing that the U.K. doctrine offers no principles or vision and that it contains too many obstacles undermining its operation; its purposes are too rigid and have been interpreted restrictively.¹⁸² Others maintain that U.K. courts "have construed the specific purposes liberally."¹⁸³ The Whitford Committee had recommended that the fair use doctrine should be adopted in the United Kingdom,¹⁸⁴ but this was rejected by the Government, together with a proposal to rename the defence "fair use" or "fair practice".

4.5. WHAT IS THE FAIREST APPROACH FOR INDIA?

4.5.1. Why Fair Use?

Furthermore, the courts in USA in the case of Cambridge University Press v Becker¹⁸⁵ underlined that there won't be any requirement of a license for less than 10% reproduction of the copyright work. If such a strong economy like that of USA, can give such a wide leeway to its inhabitants on grounds of equity under fair use, it becomes fairly easy for the Indian lawmakers to amend Section 52 in order to relax the restrictions & to justify these measures in the backdrop of the

Copyright Modernization Act, SC 2012, c 20 [Bill C-11]

¹⁸²Supra note 12 at p. 481

¹⁸³Lionel Bently & Brad Sherman, *Intellectual Property Law*, Oxford University Press, Oxford, (2004), p. 193

¹⁸⁴Report of the Committee to Consider the Law on Copyright and Designs, Cmnd. 6732, paras 672-677

¹⁸⁵ Cambridge University Press v Becker Civil Action No.. 1:08-CV-1425-ODE

comparatively weak socio-economic situation of India. This thus would end up entailing certain activities not strictly non-commercial but still nevertheless justifiable on grounds of reason, logic & equity. The end result would be a piece of legislation ready to adapt to fast changing dynamics of the Indian economy while aiding the inhabitants in doing so without compromising the business potential of publishers & the ilk.

It offers a permissible list as opposed to the exhaustive list of the U.K., Canadian and Indian statutes. The argument against a codified system such as that in the United Kingdom was that a more flexible approach allows the courts to develop the law on a case-by-case basis as new problems emerge.¹⁸⁶ The burden of proof also lies on the defendant to prove that his infringing acts were fair dealing for the purposes permitted under the Act. This burden is quite a heavy one and has to be within the four corners of the statutory provisions.

Fair use laws facilitate increase in creative and ingenious productivity, which is the primary objective of the law of copyright. A set of factors assist in the decision making process. It is based on judicial discretion rather than on any exhaustive list. Fair dealing, on the contrary, is a right with limitation. Unlike fair dealing, fair use is a more flexible model. It allows the expansion of the exception to cater to the requirements of the evolving technological and economic practices in the society. Even though the purview of the Indian concept of fair dealing is larger than that of the Canadian model, from where the doctrine emerged, the exceptions are becoming redundant due to the rapid nature of technological changes. The material link between technology and copyright cannot be ignored. And as already observed, the fair dealing doctrine has not been correctly interpreted by Indian Courts even after laying down such an exhaustive list for the determination of fair dealing thus suggesting that Courts actually do not attach a lot of significance to the enumerated exceptions. The grey areas pertaining to this field are also quite a number. Since the fair use model does not have a very strict approach, a number of principles and guidelines have developed through case laws and precedents

¹⁸⁶Weinreb, "Fair's Fair: A Comment on the Fair Use Doctrine," *Harvard Law Review* 103, 1137 (1990)

which has not been the case in fair dealing. Considering all these circumstances, the U.S. fair use provision has proven to be the "fairest" of them all.¹⁸⁷

4.6. WHY FAIR DEALING?

There have been a number of objections to follow the fair use doctrine universally. As has already been pointed out earlier, even though Canada laid down a lithe approach in the form of the CCH decision, the government was not ready to adopt the proposed amendments into the statute. Even in the U.K., although the Courts have a digressed a tad bit while interpreting the statues and deciding the cases, those factors have not been formally entrenched in to the statutes. In India also no such approach has been attempted yet. The biggest problem that has been identified with the fair use doctrine is "case-by-case" approach as it gives rise to huge amount of litigation and thus pendency in case. Furthermore, fair use is said to be "ill, though hardly dead yet."¹⁸⁸ It has been said that claims of U.S. fair use superiority are often misguided, and many others have called on the United States Congress to clarify fair use."¹⁸⁹ The courts have also failed to simplify fair use despite attempts to establish bright-line presumptions that (1) commercial uses are unfair,¹⁹⁰ (2) the plaintiff's unpublished works should be favoured,¹⁹¹ and, more recently, (3) works must be

¹⁸⁷David Nimmer, "'Fairest of Them All' and Other Fairy Tales of Fair Use", *Law &*

*Contemp. Probs.*66, 263 (2003)

¹⁸⁸Wendy J. Gordon, "Keynote: Fair Use: Threat or Threatened", *Case W. Res. L. Rev.* 55, 903 (2005), p.912

¹⁸⁹Michael Carroll, "Fixing Fair Use", *N.C.L. Rev.* 85, 1087 (2007)

¹⁹⁰*Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 104 S. Ct. 774 (1984)

¹⁹¹*Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 at 546, 105 S. Ct. 2218

(1985)

transformative to constitute fair use.¹⁹² It is increasingly expensive and painful to mount litigation to clarify the scope of the use, and some users also consider it risky because of these reasons. The fear is that due to such reasons, the claimants may not even come to Courts to have their disputes settled. In addition to proving this theoretical point, the American Intellectual Property Law Association has noted that the average cost of defending a copyright case is just less than one million U.S. dollars. Since fair use is very case specific, it does not leave any room for remedy common to all, thus giving rise to a lot of confusion and chaos too.

Fair dealing on the other hand is what we need in the present day since there are a number of cases being filed on this issue. The basis of interpretation of statutes is that law should be interpreted strictly. We do not follow an open ended system like the U.S. Therefore, keeping in mind the nature of our legal system, fair dealing is the most appropriate method.

4.7. CONCLUSION- FAIR DEALING OF FAIR DEALING

While UK developed a mature licensing system, Canada & USA saw the courts intervene in order to protect the interests of the public at large & considering the overall socioeconomic status of India, it's high time for India to follow suit. To this end, while the Court can come up with guidelines in the present Rameshwari case but the best course of action would be to amend the law & taking cue from the other major democracy of the world by adopting a more fair-use biased model in India.

Probably the only difference was that fair use applied to any situation and not merely to an enumerated purpose. Post the CCH decision in Canada, it can be said that the Canadian model is in fact more flexible than the one in the U.S. The CCH decision has not yet been followed in India.

¹⁹²*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 114 S. Ct. 1164 (1994)

Also if right now, we had fair use provisions instead of fair dealing, there might have been a possibility that the dispute between the publishers and the University and Rameshwari Photocopy Service might not have arisen. But that is only a mere possibility. Since the Indian judiciary has never dealt with the “limit of permissible copying” for educational purposes in India, we would have to refer to decisions from other jurisdictions. In 2012 one of the US courts decided in Cambridge University Press v Becker, that the University would not require a license for reproduction of less than 10% of the total page count of the book. Following this example, we should also permit copying of at least 15-20% of the total page count of the book to accommodate the needs of the Indian educational system. Permissible purpose and a permissible limit would definitely bring in some life to our fair dealing provisions. Fair dealing also needs to be defined somewhere to bring out more clarity in Section 52 of the Copyright Act.

We conclude that, such a rigid approach to fair dealing should not be followed in India keeping in mind the technological and societal changes. Intellectual Property Laws have not fully taken their shape yet and therefore, confining them to such strict interpretation of statutes would leave no room for fairly judging the cases and for judicial creativity. Agreed that the freedom of speech and expression does not allow the misappropriation of another’s work, but these two interests have to be balanced. We do not seek to propose that the fair dealing provisions be completely done away with but simply that the flexibility of the ‘fair use doctrine’ be adopted. An amendment in line with the CCH decision of Canada could do use some good. Fair dealing should be allowed for purposes beyond the statute as well. The American model has been more effective in balancing the interest of the user and the owner. Though it has its own problems, it is still better than our present system. What we should do is come with a more efficient model which can help us tackle our disputes better. At present, this issue has not been subject to much judicial interpretation but it is not long before it will be exposed to judicial examination and we should be prepared for any such scenario. Judicial discretion should be allowed to avoid any misuse of the flexibility and to accommodate technological changes. Instead of adopting the ‘fair use doctrine’ in its entirety, an alternative ‘such as’ approach or the expansion of fair dealing should be adopted. Since we are already referring to parameters laid down in

different judgements to judge fair dealing, why not incorporate them into the statute and simultaneously introduce a “such as” clause in the provision. Fair use is based on utilitarian principles and fair dealing is based on the natural law theory where author takes centre stage. The view of the authors is in favour of adapting the fair dealing doctrine with certain features of the ‘fair use’ system. It is now up to the legislators, in the present day circumstances, to approach & analyse this issue so as to best serve our interests.

CLASH BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW A CRITICAL ANALYSIS

- Ruchi Verma¹⁹³ and Shanya¹⁹⁴

Abstract

Competition Law and Intellectual Property Law prima facie appear to have conflicting objectives and goals. These conflicts have in turn brought the emergence of a long debated topic, which has to be resolved for better understanding of the subjects. Thus, with evolving of jurisprudence in this area and the emergence of a plethora of cases, the author intends to understand the interface between two streams of law i.e. Intellectual Property Rights (IPR) and Competition law. Competition law operates towards facilitating the market growth by curbing anti-competitive practices in the market. On the other hand, IPRs confer exclusive monopoly to the proprietor. However, there have been wide changes in the recent times that have changed the course of debate. The latest trend and dispute has shifted from conflict between the domain of IPRs and completion law to the exercise of rights in IPR affecting competition law. This flows from the fact that the both are intended towards furthering innovation and consumer welfare.

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