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**ANALYSIS ON THE USE OF DE MINIMIS TRANSFORMATIVE
WORKS**

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ABSTRACT

'De Minimis Non-Curat Lex' is a maxim that refers to law not concerning itself with petty matters. De Minimis is a legal doctrine applied by courts in cases of copyright infringements wherein the amount of work in consideration is so minimal and insubstantial that it provides a defense in court by which the act does not constitute an infringement³.

Unlike Derivative works, transformative works in the copyright include works in which the critical aspect is transforming an existing work by adding creative components like criticisms, commentaries, and parodies. They might not always include direct reproductions of an existing material. Transformative work, though not defined in any of the copyright laws around the world, 'transformative use' is defined under the U.S Copyright Act of 1976.

The application of De minimis in Transformative works will be analyzed in this study, as any transformative work should be such that the amount of the existing work used in the transformation should not form a core part or purpose of such work, that is, existing work should have no substantial effect on such work. The utilization of the doctrine of De minimis in such works can, at times, lead to an actual infringement escape or can also lead to clarity in any confusion caused by a case of minimal use of the original material.

The concept of Transformative work is closely associated with 'Fair Use,' which entails the purpose, nature, amount, and effect of using original copyrighted work⁴ as per U.S Copyright Laws. From the Indian perspective, there is not much recognition of De Minimis yet in the

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³Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

⁴Mihir Wagh, Fair Dealings And Fair Use: Critically Analysing The Copyright Exemption Doctrines In Place In India And The United States, <https://Articles.Manupatra.Com/Article-Details/Fair-Dealings-And-Fair-Use-Critically-Analysing-The-Copyright-Exemption-Doctrines-In-Place-In-India-And-The-United-States>, (Last Visited On Oct 17, 2023).

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courts. There are various judgments in the U.S. courts with different reasoning for the application of the doctrine of de minimis in transformative copyright works, which will also be examined to understand the implications of the use of the doctrine to know whether a precisely defined law's application is beneficial or an undefined doctrine provides more scope of interpretation in the cases of minimal use of original works.

KEYWORDS: De Minimis, Transformative works, Minimal use, Fair use, Recognition, Infringement, Implications, Defined Law, Legal Doctrine.

INTRODUCTION

"I feel that copyright should be far more embraced in discussions as an enabler of creativity, an enabler of the diversity of what we publish, or an enabler of innovation." (Said Mr. Michiel Kolman, President of the International Publishers Association and Senior Vice President for Information Industry Relations, Elsevier, during a panel at the 2018 Frankfurt Book Fair).

The above-mentioned statement's relevance is that a Copyright Law intends to protect the Intellect of an innovator (an author, owner, writer, performer, assignees, licensees, and many more such creators). This motive can only be achieved if exceptions and defense are also applied in cases involving the infringement of copyrighted work.

The concept of De minimis is one such defense that can be used under the Copyright Law. '*De minimis non curat lex*' is a legal doctrine that means the law does not concern itself with trifles. Even though not precisely defined or codified under any law or act, this doctrine is used by courts to determine the extent of a copyright infringement. It means that specific uses of a copyrighted work are so minimal that they need not be considered infringement. The law will not look into or resolve insignificant disputes⁵. There are two meanings under which courts use the term De minimis, the first being a very minimal possibility to constitute an infringement and the second being unimportant matters. This research will deal with the first meaning of transformative works under copyright.

Transformative works are not exclusively defined under copyright laws but refer to building upon existing copyrighted material. Some such works are Fan Fiction, Fan Art, Parodies, Remixes, Mashups, Educational Use, Critical Reviews, etc. The creator's creativity, skill, and

⁵Andrew Inesi, A Theory of De Minimis and A Proposal for Its Application in Copyright, Vol. 21 No. 2, Berkeley Technology Law Journal, 950, pp. 945-995 (2006).

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labor transform the original existing materials. The Transformative works are associated with the concept of fair use. The U.S. Copyright Act of 1976, under Section 107, states that 'transformative use' is one of the main factors under fair use, as there is a transformation to the existing copyrighted work in a different manner and for another purpose and thus should not infringe the creator's copyright.

The concept of 'Fair Dealing' under the Indian Copyright Act of 1957 is analogous to the Fair Use exception of the U.S. Copyright Act⁶. Also, Section 14 of the Copyright Act of 1957⁷ provides for the Translation and Adaptation of work. Despite not being Transformative work, it closely relates to such work under copyrights.

In the case of *Davis v. Gap Inc.*, the opinion on de minimis was that no breach of law is found in trivial instances of copying because of such doctrine⁸. The common factors the courts consider in applying this doctrine include the amount of harm caused, adjudication costs, purpose of violation, effect on legal rights, and the wrongdoer's intent⁹. The need to apply de minimis was then slowly understood by courts, as are many instances of minimal and trivial copying without any intention of infringing¹⁰.

In almost every copyright infringement case, the amount and substantiality of the portion of original existing work used is considered a central element for testing by the courts¹¹. Hence, the application of de minimis in transformative works containing the transformation of an existing work is significant. In the growing digital era, it is even more challenging to identify whether the effect of copying is trivial or whether that trivial copying will influence the market value of the existing work.

RESEARCH PROBLEM

Transformative works require the use of the existing original work. This might involve minimal copying of existing work, which is very trifling to be substantially effective or might cause infringement of an existing work. Application of de minimis in such works will significantly impact finding the breach. De minimis, when applied as legal doctrine in

⁶Roger D. Blair and Thomas F. Cotter, *Intellectual Property Economic and Legal Dimensions of Rights and Remedies*, 29, (Cambridge University Press, 2005).

⁷The Copyright Act, 1957, Sec. 14.

⁸*Davis v. Gap Inc.*, 246 F 3d 152 (2nd Cir 1998).

⁹*India TV Independent News Service (P) Ltd. v. Yashraj Films (P) Ltd.*, (2012) 192, DLT 502.

¹⁰Elizabeth Verkey, *Intellectual Property Law and Practice*, 153, (Eastern Book Company, 2015).

¹¹2nd edition, Alexander I. Poltorak and Paul J. Lerner, *Essentials of Intellectual Property: Law, Economics, and Strategy*, 31 (John Wiley & Sons, Inc., 2011).

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different cases, gives scope to the judges to interpret on a case-to-case basis. This will lead to many interpretations, which may lead to discrepancies in the purpose of the doctrine.

RESEARCH QUESTIONS

1. What are the factors that contribute to the need for the application of de minimis in transformative works?
2. Whether there are factors that will require the codification of de minimis under copyright?

RESEARCH OBJECTIVES

1. To examine the evolution of the doctrine of de minimis.
2. To decipher factors contributing to the need to apply de minimis in transformative works.
3. To construe measures for applying de minimis in copyright-related works.

RESEARCH METHODOLOGY

This study is primarily based on Analytical and Doctrinal Research Methods. The Primary and Secondary Sources of Data, including Statutes, Caselaws, Articles, Authored Books, and Case Reports, will be used and relied upon.

SCOPE AND LIMITATION OF STUDY

This study is restricted to the statutes of the U.S Copyright Act of 1976, the Copyright Act of 1957, and US and Indian cases where de minimis was applied in judgments. There are many areas in law wherein the doctrine of de minimis is involved, other than the transformative works. Still, this research will only be restricted to the use of de minimis in transformative works.

HISTORY

De minimis was established during the 15th century under the civil law. It was used in facts and cases with petty or insubstantial matters¹². English courts started applying this doctrine in the 16th century. By the 19th century, it was recognized as one of the legal maxims¹³. This

¹²*Supra note 3*, at 948.

¹³Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 537-544, (1947).

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doctrine is applied now in many cases, including tort, civil and criminal matters. Once they started using the maxim, different courts began using various justifications for such use.

Transformative works, as such, have not been defined in any copyright-related laws, but they have their roots in the transformative use recognized under fair use in the U.S. Copyright Act. It is also closely related to fair dealing, translation, and adaptation of work under Indian copyright law¹⁴. The doctrine of de minimis has been applied by courts in a few cases until now, which will also be discussed further.

IMPORTANT DEFINITIONS

1. *De minimis non curat lex* – law is not concerned with small things.
2. *De minimis*– lacking significance
3. *Transformative use* – a fair use that builds on a copyrighted work.
4. *Infringement* – to harm one’s right; violation, breach, or illegal act against established laws.

INTERNATIONAL AND NATIONAL LAWS

1. The Berne Convention of 1886.
2. The Buenos Aires Convention of 1910.
3. The WIPO Copyright Treaty of 1996.
4. The U.S Copyright Act of 1976.
5. The Copyright Act of 1957.

ROLE OF JUDICIARY WITH CASES

There have been different justifications by courts regarding using this doctrine in decisions. This comprises the legal discussion of some significant decisions in which de minimis was applied to transformative works and cases other than the involvement of transformative works. The exploration will be on the different legal reasoning for using such doctrine and disparities arising from copyright infringement matters.

The Significant Cases explored are:

¹⁴*Supra note 5.*

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Some courts claim that the maxim does not apply to constitutional, property, or criminal disputes, whereas some believe it can be used in any dispute.

1. *Wis. Dep't of Revenue v. William Wrigley*: The issue in this case was whether the defendant's business activities were enough to attract state tax. It was concluded that replacing stale gum and storing gum were not trifle activities but contributed to significant business activities. Hence, de minimis could not be applied here¹⁵. The case of *Alabama v. Bozeman* (2001) was referred to in this case, in which it was held that the term used in the provision excluded the application of de minimis while interpretation.

2. *Gonzales v. Raich*: The Supreme Court, in this case, identified that Congress has the power to regulate conduct impacting interstate commerce, even if some conduct might amount to de minimis character. There was an evident ambiguity in the meaning of de minimis to be considered in this case, whether as a defense to minor issues or as an insignificant matter as a whole¹⁶.

3. *Campbell v. Acuff-Rose Music, Inc*: In this case, the question was whether the defendant had infringed the lyrics and melody of the plaintiff's song in their song. The Supreme Court applied the four factors (de minimis) under section 107 of the U.S. Copyright Act of 1976 and held that the defendant's work amounted to transformative use for parody¹⁷. While examining and comparing, it was understood that the defendant's primary purpose was to comment and criticize the plaintiff's song and build on it, leading to a transformative work.

4. *Cariou v. Prince*: In this matter, the photographs of the plaintiff were used by the defendant in his artwork. It was observed and held that the artwork of the defendant was a transformative use and that the use of the plaintiff's work was also very insubstantial to affect the market value of the plaintiff's photographs¹⁸. There is always a fragile point of difference to determine whether there is infringement or not of the minimal work used.

5. *India TV Independent News Services Pvt. Ltd v. Yashraj Films Pvt. Ltd.*: In this case, the court pointed out that copyright law constitutes many daily minimal breaches, like singing birthday songs or clicking photographs in public. If each of the acts mentioned earlier would amount to infringement, then it will only increase the number of cases for adjudication. In

¹⁵ *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

¹⁶ *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005).

¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).

¹⁸ *Cariou v. Prince*, 714F.3d 694 (2d Cir. 2013).

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this case, the Supreme Court listed factors to consider while applying the de minimis doctrine. The issue raised in this case was whether the broadcast of the chat show having the singer sing a bit from seven songs in which the producer also had copyright was a violation of rights. It was held that if only a few words were used and there was no singing past a minute, it would amount to de minimis and would not substantially impact the existing copyrighted work¹⁹.

6. *Sony Corpn. Of America v. Universal City Studios Inc.*: The question in this matter was whether the video recording of the television broadcasts for non-commercial viewing purposes amounted to exploitation of the original copyrighted television broadcasts. It was observed, tested, and held that a bit of copying that did not cause any considerable harm to the actual existing work amounted to de minimis and transformative use and not infringement²⁰.

7. *Opinion in Davis v. Gap, Inc.*: It was opined by the court that, if it were not for the doctrine of de minimis, the day-to-day trivial copying and violations would all amount to infringements. The importance of applying this doctrine in our everyday ordinary acts was delivered in this case. In this case, copyrighted eyeglasses were used in an advertisement for a clothing store, forming the ad's core part. Hence, as per analysis, as the copied portion resulted in the core attraction of the ad, it was not held to fall under the category of de minimis and was considered an infringement²¹.

DETAILED ANALYSIS

The use of the doctrine of de minimis is still expanding in courts. It not being codified does have adverse effects, but at the same time, it also gives scope for interpretation. Transformative works are recognized under various copyright laws under adaptive, translative, and transformative use. There is a significant need to apply this doctrine to such works to examine infringement precisely. *The analysis of the research questions mentioned above will also be discussed here.*

1. Increase in application of the doctrine- Compared to the 15th century and the 19th century, when it was recognized only as one of the legal maxims, the growth in the use of the doctrine in adjudications has improved by a large number. They are used for several issues with

¹⁹India TV Independent News Services Pvt. Ltd. v. Yashraj Films Pvt. Ltd. (21st August 2012).

²⁰ Sony Corporation of America v. Universal City Studios Inc., 78 L Ed 2d 417 (1984).

²¹*Supra note 6.*

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different questions of laws and facts²². An increase in the application of a doctrine calls for its codification for appropriate usage with reasoning.

2. Divergent Legal Reasonings- As seen in the cases analyzed above, the increase in the use of this doctrine in copyright cases has led to various opinions and reasoning for judgments. This can lead to over-interpretation or under-interpretation of the maxim, affecting the purpose behind establishing the doctrine (fair use). There is a skinny line in the identification of minimal copying impacting or not impacting the market value and rights of the original copyrighted work²³.

3. Quantitative and Qualitative Analysis- This doctrine can be used in matters of substantial similarities. In the cases of *Newton v. Diamond*, *Neal Publications v. F & W Publications, Inc.*, and a few cases, as mentioned earlier, the quality and quantity of the copied portions from the existing material in the transformed material were considered to determine the level of infringement²⁴. This is one of the vital points for the application of de minimis in transformative works, as most of the transformative works involve the fragile interpretation of quality and quantity of the existing work adopted for the current work in question.

4. Transformative Use and Intention- The intention behind using the original work, to build on it, is very arduous to determine. The elevation in the purpose behind using the existing work may also involve an attempt to violate the rights, which is ambiguous to study. The intentions can only be examined based on the consequences of the current built-up work. The primary purpose of copyright is to protect the artist's intellect, whereas the confusion in studying the intention might also result in the opposite²⁵. The intention can have dual standards, one being that there is a need for an existing work to build on and another being an existing work used as an inspiration for the transformative work.

5. Transformative Use and Appropriation Art- Appropriation art combines elements from existing works to form a new art piece. Appropriation arts and application of de minimis in transformative use conflict. In this case, there are significant borrowings from existing works

²²*Supra note 11.*

²³Rajmani Mohanty, Copyright and Copywrong: Derivative Works V. Transformative Works, Vol. 5, Pen Acclaims, 14, Pp. 1-15 (2019).

²⁴*Supra Note 3*, at 961.

²⁵Ben Picozzi, What's Wrong with Intentionalism? Transformative Use, Copyright Law, and Authorship, Vol. 126 No. 5, The Yale Law Journal, 1421, pp. 1408-1458 (2017).

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to neglect it as a minimal copying. Hence, many scholars are against de minimis and transformative works recognition in such cases²⁶.

6. Inspiration and Copying-There are a few factors to decide whether a work is of fair use and can fall within the category of de minimis. The factors include the legal harm caused, adjudication costs, violation purpose, effect on legal rights, and the wrongdoer's intent. In this, the ambiguous factors are the intent and impact on the legal rights. It is tough to estimate if the current transformative work is inspired or an infringement on the original work.

It can be identified that there is an essential need to use de minimis in transformative works. The codification of the doctrine might suppress the different justifications for its use by various courts, but it will also be beneficial for setting precedents. Transformative works surely need an existing material to be used to build further. Hence, applying the doctrine in such instances to examine the validity of the work is vital. Notwithstanding, applying this doctrine in cases of appropriations and intention is difficult.

FINDINGS

1. Factors established by courts not inclusive: The factors considered by the courts in determining the element and applicability of de minimis in cases are not inclusive of works like appropriation arts that involve consolidation of borrowings from existing works.

2. No steps to identify the intention and level of harm: There is an ambiguity in finding out the level of damage caused compared to the intention. All kinds of transformative works involve the core intention of using an original work to be transformed into a current transformative material. The thin line between inspiration and violation cannot be drawn easily without a proper procedure to examine or test the work.

3. Present scenario and future perspective:The level of usage of the original work might have minimal consequences on the original work during the adjudication stage (at present) but might slowly impact the market value of the original work based on the increased awareness of the transformed work. The future perspective is not considered in cases of de minimis by courts.

²⁶*Id.*, at 1422.

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4. Quantitative and Qualitative analysis: This doctrine can prove precise in cases requiring quality and quantity analysis. Transformative works validity requires examination of quality and quantity adapted from the original work and the quality produced by the built-in work.

5. Impact on third parties involved: The application of these doctrines does not clarify the impact on third parties to the original work, like the assignees, licensees, legal heirs, etc., who have a stake in the actual existing work. The focal point of copyright being the protection and passing on rights of the creator might have a negative influence due to the confusion in its application.

6. Authorship and Ownership: It is highly ambiguous as to a proper distinction between whom to be identified as the author and whom to be identified as an owner in cases of transformative works. Application of de minimis may make this even more ambiguous as it is not codified and gives a lot of scope to interpretation.

CONCLUSION AND SUGGESTIONS

1. Scope of Application: There is more scope for applying de minimis in copyrights, mainly in transformative works. There is a need for precise standards, procedures to apply this doctrine by courts, and the determination of valid methods to provide justifications in support of such use in cases.

2. Expansion of the regulations established: It can be very well pointed out that the procedures followed and factors established until now by the judiciary are exhaustive and not inclusive of all types of transformative or adaptive works. There is a need for detailed regulations on the same.

3. Need for Definitions: Clear and precise definitions can be assigned to de minimis and transformative works to reduce the ambiguity in adjudication. Descriptions must be such that they do not curtail the interpreting scope of the judiciary in cases where there is a transformative work without an actual infringement.

4. Calculation of damages: Proper demarcation can be done to calculate and settle damages in such cases. In cases of seizure of materials and injunctions, a proper division of the copied portions causing violation and the self-developed parts must be considered to decide the penalties.

5. Committee with specialists: A committee comprising specialists in identifying minimal or core infringements can be appointed to study thoroughly and inform the committee's findings. This can aid in effectively applying and implementing the doctrine in adjudication.

6. Conflicts in infringement and de minimis: There are always high chances of conflicts between the purpose behind infringement, penalty for infringement concept, and use of de minimis. De minimis allows minimal and insubstantial use of original work, whereas infringement prohibits copying or violation unless done for fair use. There is a need for a crystal clear description of terms like de minimis and transformative works to avoid such conflicts.

REFERENCES

BOOKS:

1. Roger D. Blair and Thomas F. Cotter, Intellectual Property Economic and Legal Dimensions of Rights and Remedies, (Cambridge University Press, 2005).
2. Elizabeth Verkey, Intellectual Property Law and Practice, (Eastern Book Company, 2015).
3. 2nd edition, Alexander I. Poltorak and Paul J. Lerner, Essentials of Intellectual Property: Law, Economics, and Strategy, (John Wiley & Sons, Inc., 2011).

ARTICLES:

1. Andrew Inesi, A Theory of De Minimis and A Proposal for Its Application in Copyright, Vol. 21 No. 2, Berkeley Technology Law Journal, pp. 945-995 (2006).
2. Max L. Veech & Charles R. Moon, De Minimis Non Curat Lex, 537-544, (1947).
3. Rajmani Mohanty, Copyright and Copywrong: Derivative Works V. Transformative Works, Vol. 5, Pen Acclaims, Pp. 1-15 (2019).
4. Ben Picozzi, What's Wrong with Intentionalism? Transformative Use, Copyright Law, and Authorship, Vol. 126 No. 5, The Yale Law Journal, Pp. 1408-1458 (2017).

CASE REPORTS AND COMMENTS

1. Ashish Mishra, Case Comment on the Infamous Case of T-Series: Super Cassettes Industries V. Myspace Inc and anr., Vol.2 No.2, Indian Journal of Integrated Research in Law, Pp. (1-8).
2. Caroline Hewitt Fischer, It's De Minimis, but Wait! It's Also Fair Use: Faulkner v. Sony Pictures and Why Courts Should Focus on Developing the De Minimis Doctrine to

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<https://www.ijalr.in/>

Streamline Copyright Infringement Analysis, Vol. 16, Tulane Journal of Technology and Intellectual Property, Pp. 301-312 (2013).

3. Rich Stim, Measuring Fair Use: The Four Factors, Stanford Libraries, 2019.
4. RG Anand v. Delux Films, (1978), SC 1613.
5. Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013).
6. Solomon R. Guggenheim Foundation v. Lubell, 569 N.E.2d 426 (N.Y. Ct. App. 1991).
7. Super Cassettes Industries Ltd. Vs Myspace Inc. & Another 29 July, 2011.
8. Wis. Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992).
9. Gonzales v. Raich, 125 S. Ct. 2195, 2206 (2005).
10. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994).
11. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
12. India TV Independent News Services Pvt. Ltd. v. Yashraj Films Pvt. Ltd. (21st August 2012).
13. Sony Corporation of America v. Universal City Studios Inc., 78 L Ed 2d 417 (1984).

STATUTES, AGREEMENTS AND CONVENTIONS

1. The Berne Convention of 1886.
2. The Buenos Aires Convention of 1910.
3. The WIPO Copyright Treaty of 1996.
4. The U.S Copyright Act of 1976.
5. The Copyright Act of 1957.

ONLINE WEBSITES

1. [https://Articles.Manupatra.Com/Article-Details/Fair-Dealings-And-Fair-Use-Critically-Analysing-The-Copyright-Exemption-Doctrines-In-Place-In-India-And-The-United-States,\(Last Visited on Oct 17, 2023\).](https://Articles.Manupatra.Com/Article-Details/Fair-Dealings-And-Fair-Use-Critically-Analysing-The-Copyright-Exemption-Doctrines-In-Place-In-India-And-The-United-States,(Last%20Visited%20on%20Oct%2017,%202023).)
2. <http://www.penacclaims.com/wp-content/uploads/2019/03/Rajmani-Mohanty.pdf>.