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FAIR USE DOCTRINE: STRIKING A BALANCE BETWEEN COPYRIGHT AND CREATIVITY

- Devika G Thampi[1]

Abstract

Copyright is a type of intellectual property that grants creators a bundle of exclusive rights. A Copyright holder may grant permission to others to use their work.If anyone uses copyrighted work without the permission of the Copyright holder, they may subject to copyright infringement. However, there are circumstances in which using a work without the permission of copyright holder does not amount to infringement. Under such circumstances, you can someone else's work without their permission or without the fear of copyright infringement. These situations come under the Doctrine of Fair use. This paper discusses the Doctrine of Fair use.This paper gives an overall idea about the doctrine,its acceptance in the international regime etc.After giving a brief introduction,this paper discusses how the Doctrine of Fair use differs from Doctrine of Fair dealing and the evolution of the doctrine.Later, the paper discusses the Indian scenario in applying this doctrine.The paper thus concluded after putting forth the concluding observation followed by some suggestion and recommendation.

Key words: - Fair use, Fair dealing,Copyright infringement exception,

Introduction

Copyright is a type of Intellectual property that grants creator a bundle of exclusive rights. These rights include right to reproduce, adapt, transalate and communicate their work to public. A Copyright holder may grant permission to others to use their work. Ifanyone uses copyrighted work without the permission of Copyright holder, they may subject to copyright infringement.

[1] Student at Govt. Law College, Ernakulam

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However, there are circumstances in which using a work without the permission of copyright holder does not amount to infringement. Under such circumstances, you can use the someone else's work without their permission or without the fear of copyright infringement. These situations come under the Doctrine of Fair use. In short, we can say Doctrine of fair use is an exception to copyright infringement, allowing limited use of copyrighted material without needing to obtain permission.

Under the Doctrine of fair use, you can use the copyrighted material without the permission of the copyright holder but only to a limited extent.This doctrine emerged as to strike a balance between the rights of copyright owners and the public's interest in permitting copying in restricted circumstances. Example of fair use purposes are News reporting, Research and educational purposes, Paradoy etc.

In order to consider an use as Fair use the court as to consider three things, firstly what is the nature of the work copied, secondly how much amount of work is copied and what is the substantial connection between the two and lastly what impact it gives in the potential market.In the first instance the nature of the work is concerned i.e., assessing what kind of work is it, what is the importance of copyrighted work on the later work such things.Next what is the amount of work copied ,if the majority portion of the work is copied from another we can't say there is fair use and also we need to assess what is the substantial connection between this to work.As we all know in order to succeed in an action for copyright infringement the author has to prove that there is a substantial connection between two works. Last one is regarding the impact on potential market, specifically whether both the works are rivalries in market and whether use of copyrighted work diminishes the market value of the same.

Article 13 of TRIPS Agreement and Article 992) of Berne Convention deals with the concept of Fair use.

Article 13 of TRIPS agreement it states that "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"[2]

[2] Agreement on Trade Related Aspects of Intellectual Property Rights,1994,art.13

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Article 9(2) of Berne convention read as follows "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author"[3]

Doctrine of Fair use and Doctrine of Fair dealing

Doctrine of Fair use and Fair dealing are two similar concepts. Doctrine of fair dealing is an English concept where as Doctrine of Fair use originated in US. Now let's discuss about the origin of these concepts and what are their resemblances and differences.

As mentioned earlier Doctrine of fair Dealing is an Englishdoctrine.This doctrine was emerged after the enactment of "statute of Anne" in 1710,which is the first copyright statute in the world.Under this statute certain activities were considered as Fair and English Courts developed the concept of Fair dealing in response to this statute.Later this doctrine was incorporated in the Copyright Act and UK Copyright Act ,1911 became the first statute that in cooperate the concept of fair dealing.[4]After the development of the doctrine the next issue ariseswas,what can be considered as a Fair dealing or what are the circumstances can be counted as a fair dealing.Thisquestion is resolved in the land mark case *Hubbard V. Vosper* in this case Lord Denning held that, "It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them.... Next, you must consider the proportions...other considerations may come into mind also. But, after all is said and done, it is a matter of impression"[5]

The terminology Fair use originated in US around 19thcentury. Before that in the case of Gyles V. Willcox doctrine of "Fairness Abridgment" was established[6], later this terminology was altered to Fair use in the landmark case Folsom V. Marsh.In this case Court establishes four factor test in

[3] The Berne Convention for the protection of Literary and Artistic works,1886,art.9(2)
[4] Abhishek Yadav, "Fair Dealing Unveiled In India: Evolution And Challenges",9 *International Journal of Novel Research and Development* 723 (2024) available at: https://www.ijnrd.org/papers/IJNRD2403289.pdf(last visited April 1,2025)
[5] Revant Ranjan, "THE 'FAIR DEALING' EXCEPTIONS UNDER INDIAN COPYRIGHT LAW: A CRITICAL APPRAISAL", 5 South Asian Law Review Journal 3 (2019) available at: https://thelawbrigade.com/wp-content/uploads/2019/06/Revant-Ranjan.pdf (last visited April 1,2025)
[6] Supra note 3

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determining fair use.Under this test four factors are considered ,firstly what is the purpose and character of use.which means for what purpose the work is copied,whether it is commercial or educational or for any other purpose. Second factor is the nature of the work copied and third one is the amount of work copied. Here court examine amount of work copied, whether the work copied major part of the work or a smaller portion. In Harper & Row V. National Enterprises the US Supreme court held that even use of a small portion will be excessive if it touches "heart of the work"[7]. Last factor is the potential impact on the market, here court examine impact created on the market of the original work in response to this copying. Here consider the expected competition between the two works in market and what will be the substantial harm caused to the original work in the market.If such copying created any adverse effect on the market of the original work then it can't be considered as a fair use.US copyright office fair use index define this factor as, "Here, courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread".[8]Doctrine of Fair use and these four factors are incorporated under Section 107 of The US Copyright Act ,1976.

Major difference between these two doctrines is that Doctrine of Fair dealing is more rigid and strict compare to Doctrine of Fair use.US doctrine of Fair use is based on four- factor test, it considers everything to be fair if it meets the required criteria under four factor tests.

Doctrine of Fair use and India

India follows the strict Fair dealing doctrine of UK.In India this doctrine was first incorporated in the Indian Copyright Act,1914.According to the Section 2(1)(i) of the Act, an act can't be considered ascopyright infringement if "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary."[9]Now Section 52 of Indian Copyright Act,1957 deals with the Doctrine of Fair dealing.Under this provision fair dealing of

[7] Nejat Utku Inaltong, Notion Of Fair Use: An Exclusive Exception In Copyright Law available at: https://ssrn.com/abstract=4170017 (last visited April 2,2025)

[8] US Copyright office Fair use index, available at: https://www.copyright.gov/fair-use/index.html#:~:text=About%20Fair%20Use&text=Section%20107%20of%20the%20Copyright,may%20qualify%20as%20fair%20use. (last visited April 2 2025)

[9] The Indian Copyright Ct,1914(Act 3 of 1914), S. 2(1)(i)

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any literary ,dramatic,musical or artistic work ,for the purpose private or personal use in research, criticism or review shall not be amount to Copyright Infringement. This provision of Copyright act doesn't cover infringement of computer programme or Doctrine of fair dealing can't be claim as a defense in the unauthorized use of computer programme in India.[10]In order to get protection under this provision the use or the purpose use must be statutorily permitted otherwise it may amount to copyright infringement. The use must be for private or personal is any one use a work for economical or commercial purpose it can't be considered as a Fair dealing.

"In *The Chancellor Masters & Scholars of the University of Oxford v Narendra Publishing House*, The Delhi High Court reiterated that the Fair use provisions must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the valid competing interest of enriching the public domain. The Court borrowed four factor tests from American Pretty Woman case33 to determine whether a particular use of a work is fair, and thus entitled to protection under the fair dealing exception even if the use of the work doesn't really fall under any of the categories mentioned in Section 52. These four factors are: (i) The purpose and character of the use (educational purposes or critique etc.); (ii) The nature of the copyrighted work – whether the work is eligible for copyright protection in the first place; (iii) The substantiality of the portion used in relation to the copyrighted work - the extent and nature of copying done with respect to a work; (iv) The effect on the potential market for, or value of, the copyrighted work - whether the new work would adversely affect the market value of the original work."[11]

Another major case in India That discuss Doctrine of Fair dealing is *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors. (DU Photocopying Case)*. In this case Delhi High Court held that distributing course packages to students that contain photocopy of relevant portions of books mentioned in their syllabus were not Copyright infringement. Court held that this comes under the Doctrine of Fair dealing because educational institutions are not required to obtain licenses or permission from publishers to create and

[10] The Indian Copyright Act,1957 (Act 14 of 1957), S.52
[11] Supra note 4

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distribute course packs to students, provided that the copyrighted materials included are essential for instructional purposes by the teacher for the class.[12]

In *Devendrakumar Ramchandra Dwivedi v. State of Gujarat and Ors*,Gujarat High Court held that playing songs in navrathri,Dandiya is a fair use,here it used for religious purposes not for economical or commercial gain.

Blackwood v. Parasuraman is another well-known case where the fair dealing doctrine was examined providing guidelines for defining what constitutes "private use. The court also ruled that copying a book for one's own personal use falls under the definition of private study, but sharing copies with other students is undoubtedly not included. It is obvious that the court in this decision gave the term "fairness of the dealing" a restrictive definition. In this landmark case, the court ruled that the usage must fall inside the definition of "fair dealing" in the Act in order to be protected.[13]

Fair Use Doctrine plays a vital role in balancing copyright and creativity. The Doctrine protects copyright and also addresses the public needs. Doctrine of Fair use has a wide impact on the International regime as TRIPS Agreement and Berne Convention recognize it. In India the Copyright Act incorporates Doctrine of fair dealing under section 52 ,but India follows strict Doctrine of Fair dealing like UK. Additionaly, Indian Law is silent regarding the amount of work that can be considered as a fair dealing. It is important to make the Doctrine of Fair dealing flexible in this technologically advanced world ,and it is also it is necessary to clarify the confusions regarding it. Therefore, Indian Law still has room to develop in the concept of Fair use or Fair dealing.

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[12] Supra note 3 at 727

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