

## Fair Dealing - An Important Aspect of Copyright Law

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*Copyright is an important aspect of the Intellectual Property Law and is a mechanism which can lead to protection and security of the author's right, which is much needed in today's world. There are lots of hue and cry regarding the exploitation of exclusive right of the author, and thus various legislations which were enacted with the view to provide protection to the owners of the original work. Fair dealing is a user's right in Copyright Law permitting use of, or "dealing" with, a Copyright protected work without permission or payment of Copyright royalties. The fair dealing exception in the Copyright Act allows you to use other people's Copyright protected material for the purpose of research, private study, education, satire, parody, criticism, review or news reporting, provided that what you do with the work is 'fair'. Though the Indian law has emerged with the concept of fair dealing but that has not been strengthening as much as that of US provisions. There is a lot that we need to work upon. With the hope that we would be making the provision more enabling in near future the various aspects, hurdles and scopes of fair dealing is discussed in this article.*

### Introduction to the Concept of Property:

Before defining Copyright, it is essential that we define "property" first. Property, as per jurisprudence, is nothing but the bundle of rights or interest. For e.g., in the case of a book as a subject, book is the property it is the ownership in the book i.e., the property. Again if we take the example of a building which was taken on rent by a coaching institute, here in the case "Right to use" and the "building" both are the property. Property has the dual meaning attached to it, one being the interest of right vested

with that property and other is the material thing on which the interest or right is exercised is also the property.

### Basically, property is of two kinds:

**Tangible property:** The physical existence of a material thing. The material on which the right is exercised is called the tangible property.

**Intangible property:** When property is defined in terms of rights and interest it is called the intangible property.

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**Meaning of Intellectual Property Rights:**

Intellectual Property refers to creation of human mind for which exclusive rights are guaranteed. As the name suggests, it is the right vested by virtue of creations developed out of the intellect of a person. Article 27 of UDHR<sup>1</sup> which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions has incorporated the concept of IPR within itself. Intellectual Property Right is further categorized into Industrial property which inscribed

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within itself Patents, Trade marks, Industrial Designs and Geographical Indications and Copyrights which basically covers literary works, cinematography, artistic work, films music etc. of phonograms in their recordings, and broadcasters in their radio and television programs.

**Meaning of Copyright:**

Copyright is a kind of protection that the State affords to the authors and creators of 'original works'. The 'original work' may take literary, dramatic, musical, artistic or any other form of similar nature. In India, the Indian Copyright Act, 1957 addresses the regime of Copyright and prescribes rules that afford protection to authors and creators of original work. What Copyright Laws intend to protect is the 'expression of the idea' and not the

idea itself, that is to say, there can be no Copyright on an idea.<sup>2</sup> Howsoever, like all other rights even the 'Copyright' does not confer upon the author an absolute right over their works and the same is subjected to certain limitation which is *sine qua non* to strike a balance between the interest of the author or creator, as the case may be, and the interest of public at large. These limitations allow the public at large to use the protected work, for certain prescribed purposes, without the approval of the Copyright owner. One such limitation is known as 'fair dealing', the related provisions of which has been enshrined u/s 52 of the Copyright Act, 1957.

The author through this research paper intends to discuss the important aspect related to Copyright i.e., fair dealing.

As per *Chancellors, Masters & Scholars of Oxford University v. Narendera Publishing House*<sup>3</sup>, 'Copyright is premised on the promotion of creativity through sufficient protection.' The Copyright Act confers upon authors certain enumerated exclusive rights over their works during the term of the Copyright, including the rights to reproduce the Copyrighted work and to distribute those copies to the public.

**Purpose of Copyright law:**

The 'primary objective of Copyright is as set forth in the Constitution, is to promote the Progress of Science and useful Arts'. The purpose is central to the fair use enquiry. The ultimate test is whether the challenged use advances the human knowledge. All Copyright system allow some unauthorized uses, but the important point is that the 'limitations and exceptions' rhetoric attempts to restricts such uses to the minimum and to place a heavy burden on the passage of new ones.

1 Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris, France.

2 *R.G. Anand v. M/s/ Delux Films & Ors.*, AIR 1978 SC 613

3 2008 (106) D.R.J. 482

Copyright and related rights protection is an essential component in fostering human creativity and innovation. The activity of authors can be increased and so would also be their efficiency and outcome thereby increasing the result if the artist creators and artists are provided with the incentives in the form recognition and fair economic reward. If the authors or creators are ensured their rights are in existence and they are enforceable, individuals and companies would tend to invest more in the creation, development and global dissemination of their works. This, in turn, helps to increase access to and enhance the enjoyment of culture, knowledge and entertainment the world over and also stimulates economic and social development.

#### **Exception to the exclusive right granted by Copyright Law:**

The idea behind sanctioning the proprietary rights in any Intellectual Property is the promotion of public interest. Protection and enforcement of Intellectual Property Rights must:

1. be conducive to social and economic welfare;
2. safeguard an individual's fundamental rights; and
3. promote commerce, competition and innovation.

As there is always an exception attached to the general principle so is the case here. Copyright Law also provides certain exceptions and limitation which are in larger interest of the society wherein use of Copyrighted work is permitted without the authorization or license from its owner.

Generally, exceptions and limitations to Copyright are subject to a three-step test set out in the Berne Convention for the Protection of Literary and Artistic Works. Briefly stated, the Berne Convention provides that an exception or limitation to Copyright is permissible only if:

1. it covers special cases

2. it does not conflict with the normal exploitation of the work; and
3. it does not unreasonably prejudice the legitimate interests of the author.

In India the provisions of Section 52 of the Copyright Act, 1957 provide for certain acts, which would not constitute an infringement of Copyright namely fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of-

- private use, including research;
- criticism or review ,
- reporting current events in any print media or
- by broadcast or in a cinematographic film or by means of photographs,
- reproduction for the purpose of a judicial proceeding or of a report of a judicial proceeding;
- reproduction or publication of a literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature;
- the reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force;
- the reading or recitation in public of any reasonable extract from a published literary or dramatic work;
- the publication in a collection, mainly composed of non-Copyright matter, bona fide intended for the use of educational institutions,
- the making of sound if made by or with the license or consent of the owner of the right in the work.

#### **The doctrine of Fair Dealing**

Fair dealing is a concept which has gradually developed with time and

through cases. The term has nowhere been defined in the Act. It is a legal doctrine, which is an exception to the exclusive right of the author wherein a person can make limited use of Copyrighted work without the permission of the owner.

It depends on the facts and circumstances of each case as to whether a person's use of Copyright material is "fair" or not. The line between "fair dealing" and infringement is a thin one. If we talk about the prevalent use in India, there is no such limitation to words or paragraphs which has been prescribed to be used for copying or reproducing without the permission from the author of the original work. It depends upon the application of judicial mind of the Court which would determine how much content can be copied. But obviously the rule set forth is that the reproduction of the work should not be prejudicial to the interest of the author. This concept of fair dealing can be termed as an exception to the exclusive right of the owner on his work. With the progression of time the Court has, on several occasions interpreted the concept of fair dealing by judging mostly the economic impact it has caused to the Copyright owner. If the economic impact is not significant it may constitute fair dealing and vice versa.

In order to determine whether the use of Copyrighted work is a fair dealing or not, the following four factors need to be considered:

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

In the case of *Kartar Singh Giani v. Ladha Singh*<sup>4</sup>, the High court held that:

*"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 the dealing would be fair."*

As per Section 52 of the Indian Copyright act, fair dealing is one such exception granted against the exclusive right of the creators of the original work. It is through this doctrine that one is enabled to use or reproduce the Copyrighted work in the manner, which, but for the exception carved out would have amounted to infringement of Copyright. Doctrine of equity is the mother of defense of fair dealing which allows the use of Copyrightable work without the permission of the author which would have been otherwise amounted to infringement of Copyright. Logic behind such a doctrine is to explore the creativity to its full extent and should not let the creativity be stagnated.

Now the first analytical factor, the purpose and character of the use, is the heart of the fair use inquiry. Evidently while considering this factor, it must be examined, whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; to say it in other words, whether and to what extent the new work is 'transformative'. Regards must also be given to the fact of nature of use i.e., 'whether the use is of a commercial nature' or 'whether it is for non-profit educational purposes.' It is proved that the reproduction, distribution and display of millions of in-Copyright works do not constitute transformative uses. In *Campbell*<sup>5</sup>, the U.S. Supreme Court stated that a use is transformative when it "adds something new, with a further purpose or different

<sup>4</sup> AIR 1934 Lahore 777

<sup>5</sup> 510 U.S. at 579 (1994)

character, altering the first with new expression, meaning, or message".

Evidently, the requirement that the use have 'a further purpose or different character' does not stand alone, but instead modifies the ultimate requirement that the secondary use "adds something new." As a result, merely articulating a new purpose for a use of a Copyrighted work, without changing or adding anything new, is not enough to render the work transformative.

In *Associated Press v. Meltwater U.S. Holdings Inc.*<sup>6</sup>, it was held that %

*"the fact that Defendant also offer a number of analysis tools does not render its copying and redistribution of article excerpts transformative."*

The second analytical factor while making 'fair use' analysis calls for recognition that some works are closer to the core of intended Copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.

The third analytical factor for the purpose of 'fair use' analysis, considers 'the amount and substantiality of the portion used in relation to the Copyrighted work as a whole'. That is to say, 'whether the quantity and value of the materials used are reasonable in relation to the purpose of the copying'. Evidently, this factor 'recognizes that the more of a Copyrighted work that is taken, the less likely the use is to be fair, and that even a less substantial taking may be unfair if it captures the essence of the Copyrighted work'.

#### **Fair Dealing: Is the Indian Law competent enough to meet the challenges?**

Fair dealing is one of the most emerging aspects of the Indian Copyright Act

which distinguishes a legitimate, bonafide fair use of a work with that of malafide blatant copy of work. And so the fair dealing has been incorporated in Article 13 of the TRIPS<sup>7</sup> 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".

There is nothing speculative about the fact that piracy can have devastating consequences for the rights holders. Importantly, it is the Authors, who should be entitled to decide whether "to reproduce" and "to authorize" others "to reproduce" their works into digital format, and thereby subject their works to risks of piracy. By undermining Authors' rights to control whether, how and by whom their works are to be digitally exploited, Defendants has not only disempowered Authors, but at the same diminishes the value of their works.

Another issue arises out of the inherent features of digital works which Copyright Law across jurisdictions was not designed to deal with. Unlike their printed counterparts, digital works can be easily and more importantly, simultaneously reproduced, distributed, and accessed. Such works would be open to all users of libraries, who may freely access and download them, thereby obviating the need for individual purchases of the text from the author or publisher of the work.

It is very much clear that all the member countries of WTO are obliged to comply with the Berne Convention on Copyright as well as the Articles of TRIPS. Apparently, this doctrine was legislated

<sup>6</sup> 931 F. Supp. 2d 537, 557 (S.D.N.Y. Mar. 21, 2013)

<sup>7</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO).



in the domestic legislation of all the member countries. Apart from these there still exist wide differences if we compare the individual laws relating to fair dealing of various countries. On one hand some countries are keen to open their arms to include various acts which may be treated as fair dealing which other countries have adopted a rigid approach. If we talk about the approach of Indian laws towards fair dealing we can compare it to the UK laws which can be considered to be a little limited as they are exhaustive in their list. Conversely, if we talk about USA, the approach is more wide and open for the fair user of the Copyright.

#### **Fair dealing laws vis-à-vis India:**

Section 52 of the Indian Copyright Act, 1957 incorporates within itself the provision relating to the fair dealing. But when it comes to definition of fair dealing, it is very surprising to note that fair dealing has been nowhere defined in the Act.

The courts have on various occasions referred to the authority English case *Hubbard v. Vosper*<sup>8</sup> on the subject matter. 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.... 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.”

It is an open Indian belief that the law related to “fair dealing” is rigid, traditional and conventional as well as because it provides an exhaustive list and

any other use which is not covered in that list is considered to be an act of infringement. But on the other hand, as discussed above, US doctrine of “fair dealing” has kept its door open for addition of any new exception which might be considered as fair and bonafide use of Copyright. Gradually, Indian Courts have started taking a view that fair dealing cannot be circumscribed in an exhaustive list and it has to be decided basing upon the facts and circumstances of each case. Visually this approach also has more or less been derived from the UK or US laws than the Indian statutory laws.

Gradually with time the Indian Courts have started paying attention to the same. The best example of this development is the case of *India TV Independent News Services Pvt. Ltd v. Yashraj Films Private Limited & Super Cassettes Ltd.*<sup>9</sup>, where one of the various grounds of dispute was that the Defendants “India TV” broadcasted a TV show wherein a documentary is shown on the life of singers and they perform their own songs. While the singer sings, clips of scenes from the movies are shown in the background. The Plaintiffs claimed that such acts of the Defendants amounted to infringement of their Copyright. However, the Defendants claimed that such use of the Plaintiff’s Copyrighted material constituted fair dealing within the meanings of Section 52 of The Copyrights Act. The Delhi High Court in its judgment restrained the Defendants 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 Plaintiff.

However if we take the plotting of the present case in our consideration there still remains some questions which are unanswered. There was a very valid ground raised in the arguments of the

<sup>8</sup> [1972] 2 Q.B. 84

<sup>9</sup> (2011) 45 PTC 70

Defendant that he singer who has recorded that song and that song turned out to be a big hit has a sense of ownership on that song and it is very unreasonable to point that the said singer cannot sing that song in a TV or any other program because the Copyright in the underlying literary and musical works vests in some other person, holds a very valid point. But since that use is not covered in the detailed list provided under Section 52 of the Act and therefore the singer was deprived of any remedy in the fair dealing laws.

But, after a long litigation saga, in the appeal from the above order, the Hon'ble bench of the Delhi High Court also felt the need of a diversion from the conventional approach and thus the decision of the Single Judge was set aside and the restrictions thus imposed were accordingly removed. However, the Appellants were still prohibited from displaying any cinematographic films without permission.

The decision has proved that the courts

are keen towards taking a modern approach leaving behind the conventional one. Also the court has started thinking about the legislation incorporating within it the technological and scientific development that is going across the world.

#### Conclusion:

It is clear from the above discussion that fair dealing is the utmost important doctrine not only in Copyright law but also in strengthening the power of Article 19 of the Indian Constitution. However, the Indian law is very limited with respect to the concept of fair dealing. Courts have always been keen in adapting the US approach from time to time in its decision. Perhaps the Indian legislators wanted a more certain and focused approach and may be that is the reason behind the conservative approach of Section 52 of the Indian Copyright Act. But now with increasing insecurities it is the need of the hour that we should be more precise and concern about this aspect of Copyright law.