

“FAIR DEALING: LIMITATION TO COPYRIGHT?”**Prashant Rahangdale**

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Abstract: Copyright grants protection to the creators of original works. It protects expressions of ideas rather than the ideas themselves. A copyright owner cannot enjoy his rights unless infringement of the same is stringently dealt with by the Courts. Copyright grants exclusive ownership to the owner for his mental labor. However, Fair dealing is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. It permits reproduction or use of copyrighted work in a manner, which, but for the exception carved out would have amounted to infringement of copyright. It has thus been kept out of the mischief of copyright law. In this research paper author would like discuss the provision relating to fair dealings under Indian Copyright Law.

Keywords: Copyright, Ownership, Fair dealing, Limitation

Introduction

Copyright law is that branch of Intellectual Property Law which provides protection to the originator of innovative works. The works which are protected under copyright are such as literary works - including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium, dramatic, musical and artistic works, cinematographic films and sound recordings (Section - 13 of Copyright Act 1957). Copyright confers verity of rights to its owner. These rights include the right of adaptation, right of reproduction, right of publication, right to make translations, communication to public etc.

However, when a person intentionally or unintentionally copies or uses the work of another creator, without his prior consent or permission, or any contract or license or assignment with the author as covered by the copyright law, it amounts to

infringement. Infringement can be broadly classified into two¹:-

1. Primary infringement;
2. Secondary infringement.

Primary infringement deals with the real act of copying, while secondary infringement deals with other kinds of dealing like selling the pirated books, importing etc.

I. Fair dealing

The doctrine of fair use or fair dealing is an integral part of copyright law². Fair dealing permits reproduction of the copyrighted work or use in a way, which but for the exception carved out would have amounted to infringement of copyright. It has, thus, kept out the mischief of the copyright law.³ The defence of fair dealing originated as an equitable doctrine allowing certain uses of

¹ <http://lawmantra.co.in/infringement-of-copyright/>

² The Chancellors Masters and Scholars of the University of Oxford V. Narendra Publishing House and Ors. 2008(38) PTC 385(Del) at para 2

³ S.K. Dutt V. Law Book Company & Ors., AIR 1954 All 570 at Para 12

literary works that copyright would otherwise have prohibited, if prohibiting such uses would stifle the very creativity which that law is designated to foster.⁴ Fair dealing also serves as an answer to those “fair” copyright proponents who actively argue that copyright, not being a patent, is not an absolute right and should therefore be balance against user rights⁵.Therefore, the doctrine of fair dealing is “a key part of the social bargain at the heart of the copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture”.⁶

As the term Fair dealing is not defined under Copyright Act, the Court often get confused to call What if covers under purview of Fair dealing and what ought? Usually Court relies on the case of Hubbard vs Vosper⁷ which held 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. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next,

you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may also come to mind. But, after all, whatever said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal decides on facts of the case. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.

II. Differences between Fair dealing and Fair use

"Fair dealing" and "fair use" are related concepts pertaining to user's rights under copyright law. It is nevertheless important to understand that fair dealing and fair use are not synonymous terms since their meaning and scope are defined by different legal systems. It is challenging to adequately summarize the shared and divergent underpinnings of fair dealing and fair use succinctly, given their highly complex and contested nature. Fair dealing is an exception to copyright infringement laid out in the copyright statutes of common law jurisdictions such as Great Britain, Canada, Australia and New Zealand. The copyright acts of these jurisdictions provide that fair dealing with a copyrighted work is not infringing if the dealing is for a fair dealing purpose specifically stated in the act. This means, for example, that if a work is copied for a purpose other than one or more of the statutory fair dealing purposes, the copying cannot be a fair dealing regardless of the copier's possibly beneficial or meritorious goal.

Fair use is a limitation on exclusive rights in works of authorship granted under U.S. copyright law. Like the Canadian Copyright

⁴ Harper and Row Publishers V Nation Enterprises, 471 US 539 at 550

⁵ A.Giuseppina D’Agostino, Healing for Fair Dealing? A comparative copyright analysis of Canada’s fair dealing to UK fair dealing and US fair use, McGill law Journal 53 (2008) 309-363

⁶ Association of video and filmmakers, documentary filmmaker’s statement of best practices in fair use (18 november 2005) at 1-2.

⁷ [1972] 2 Q.B. 84

Act's fair dealing provision, Title 17 of the United States Code states that fair use of a copyrighted work is not an infringement of copyright. But unlike the Canadian statute, Title 17 provides an open-ended list of purposes that may be fair use - "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use)..." - instead of listing a finite list of purposes defining the bounds of acts that may be fair dealing.

Another point of difference is the availability of statutory guidance on how the fairness of a dealing or use should be evaluated. Since fair dealing provisions generally lack statutory definitions or regulations specifying how fairness is to be determined, the appropriate approach to assessing the fairness of actual dealings with protected works is a matter for the Courts to decide. In CCH, the Supreme Court of Canada set out a two-step analytical framework to assess fair dealing in which the second step identifies six fairness factors. The Court said the extent to which the factors are relevant may vary from case to case and noted some cases may require consideration of factors beyond the six identified in the framework.

In contrast, the fair use provision in U.S. copyright law prescribes four factors that must be included in a fairness determination: the 1) purpose and character of the use, 2) nature of the copyrighted work, 3) amount and substantiality of the portion of the work used and 4) effect of the use on the potential market or value of the work. These fair use factors are similar to the six CCH fair dealing factors (purpose, character, amount, and effect of the dealing, nature of the work, and alternatives to the dealing) but U.S. and

Canadian case law have applied the fairness factors in different ways.⁸

III. Fair dealing - A limitation to Copyright in India?

Fair dealing is a limitation and an exception to the exclusive right granted by copyright law to the author of a creative work. Doctrine of Fair dealing draws a line between a legitimate, bonafide fair uses of a work from a malafide blatant copy of the work.

Article 13 of the TRIPS (Trade Related Aspects of Intellectual Property Rights) 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".

The Berne Convention also allows certain limitations and exceptions on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10bis (reproduction of newspaper or similar articles and use of works for the purpose of reporting current

⁸ D'Agostino, G. (2008). 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, 309-363.

events) and 11bis(3) (ephemeral recordings for broadcasting purposes)⁹.

The laws relating to fair dealing in India is provided under Section 52 of The Copyrights Act, 1957.¹⁰ The term "fair

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http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

¹⁰ 52. Certain acts not to be infringement of copyright.—

(1) The following acts shall not constitute an infringement of copyright, namely:—

(a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of—
1[(i) Private use including research;]

(ii) criticism or review, whether of that work or of any other work; 2[(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy— 1[(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy—"

(i) in order to utilise the computer programme for the purpose for which it was supplied; or

(ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied;] 3[(ab) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available; 3[(ab) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme

provided that such information is not otherwise readily available;"

(ac) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied;

(ad) the making of copies or adaption of the computer programme from a personally legally obtained copy for non-commercial personal use;]

(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events—

(i) in a newspaper, magazine or similar periodical; or

(ii) by 4[broadcast] or in a cinematograph film or by means of photographs. 4[broadcast] or in a cinematograph film or by means of photographs." 5[Explanation.—

The publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of this clause;]

(c) the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;

(d) the 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;

(e) 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;

(f) the reading or recitation in public of any reasonable extract from a published literary or dramatic work;

(g) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title

and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists: Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years. Explanation.—In the case of a work of joint authorship, references in this clause to passage from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person;

(h) the reproduction of a literary, dramatic, musical or artistic work—

(i) by a teacher or a pupil in the course of instruction; or

(ii) as part of the questions to be answered in an examination; or

(iii) in answers, to such questions;

(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and student of the institution, or of a cinematograph film or a 6[sound recording], if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution 7[or the communication to such an audience of a cinematograph film or sound recording]; 8(j) the making of sound recordings in respect of any literary, dramatic or musical work, if—

(i) sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work;

(ii) the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him,

at the rate fixed by the Copyright Board in this behalf: Provided that—

(i) no alterations shall be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings;

(ii) the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity;

(iii) no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first recording of the work was made; and

(iv) the person making such sound recordings shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording: Provided further that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this clause, the Copyright Board is, prima facie satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty;

(k) the causing of a recording to be heard in public by utilising it,—

(i) in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or

(ii) as part of the activities of a club or similar organisation which is not established or conducted for profit;]

(l) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a

non-paying audience, or for the benefit of a religious institution;

(m) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction;

(n) the publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public;

(o) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India;

(p) the reproduction, for the purpose of research or private study, or with a view to publication, of an unpublished literary, dramatic or musical works kept in a library, museum or other institution to which the public has access: Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than 9[sixty years] from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who died last;

(q) the reproduction or publication of—

(i) any matter which has been published in any Official Gazette except an Act of a Legislature;

(ii) any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter;

(iii) the report of any committee, commission, council, board or other like body appointed by the Legislature, unless

the reproduction or publication of such report is prohibited by the Government;

(iv) any judgment or order of a court, Tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the Tribunal or other judicial authority, as the case may be;

(r) the production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder—

(i) if no translation of such Act or rules or orders in that language has previously been produced or published by the Government; or

(ii) where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public: Provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government; 10[(s) the making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture;]

(t) the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of section 2, if such work is permanently situate in a public place or any premises to which the public has access;

(u) the inclusion in a cinematograph film of—

(i) any artistic work permanently situate in a public place or any premises to which the public has access; or

(ii) any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film;

(v) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any would, cast, sketch, plan, model or study

made by him for the purpose of the work: Provided that he does not thereby repeat or imitate the main design of the work; 11[***] (x) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed: Provided that the original construction was made with the consent or licence of the owner of the copyright in such drawings and plans;

(y) in relation to a literary, dramatic or musical work recorded or reproduced in any cinematograph film, the exhibition of such film after the expiration of the term of copyright therein: Provided that the provisions of sub-clause (ii) of clause (a), sub-clause (i) of clause (b) and clauses (d), (f), (g), (m) and (p) shall not apply as respects any act unless that act is accompanied by an acknowledgement—

(i) identifying the work by its title or other description; and

(ii) unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgement of his name should be made, also identifying the author; 12[(z) the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival purposes on the ground of its exceptional documentary character;

(za) the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority. Explanation.—For the purpose of this clause, religious ceremony including a marriage procession and other social festivities associated with a marriage.]

(2) The provisions of sub-section (1) shall apply to the doing of any act in relation to the translation of a literary, dramatic or

dealing" is not defined under the Indian Copyright Act therefore Court took reference of English case *Hubbard v Vosper*¹¹. Lord Denning in this case opines 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."

The laws relating to "fair dealing" is rigid in comparison to US doctrine of "fair use". Indian law provides for an exhaustive list and any use falling out of the statutory list is considered as an act of infringement. However, US law is flexible to accept any new exceptions which fall in the ambit of fair and genuine use of a copyright work. Moreover, Indian courts depends themselves upon the facts and circumstances of each case to judge the scope of fair dealing.

In *(India Tv) Independent News Services Pvt. Ltd Vs Yashraj Films Private Limited & Super Cassettes Ltd Vs*¹², defendants took defense of fair dealing within the meanings of section 52 of The Copyrights Act. The Single Judge of Delhi High Court 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. But, an appeal from the above order, the

musical work or the adaptation of a literary, dramatic, musical or artistic work as they apply in relation to the work itself.

¹¹ (1972) 1 All ER 1023 p. 1027.

¹² FAO (OS) 583/2011

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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.

Conclusion

Scope of limitation to copyright is quite flexible under US copyright law. However,

same is not in case of Indian copyright Act. Limiting section 52 of copyright act, made it more rigid. Being India a developing nation the more flexible approach should have been adopted to make Fair dealing provisions Open ended. Still lot of labour is required by Indian legislature come out from conservative views on Fair dealing and to enhance purview of limitations of copyright in India.