

LL.M IInd Semester

LM-102

Law Relating to Intellectual Property Rights

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Topic No.6: DOCTRINE OF FAIR USE UNDER THE COPYRIGHT LAW

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Introduction

The aim of copyright law is to maintain a balance between the diverging interests of the society and the author of a creative work. It tries to maintain this balance by providing to the author adequate compensation for his labor and to the society the liberty to use his work thereby ensuring the free flow of information .Copyright is a bundle of rights, which confers a negative right on the part of the registered owner to exclude all the others from using and exploiting his work. Copyright confers exclusive right to use and exploit the copyrighted work devoid of others. Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, *inter alia*, rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work. Copyright is the legal protection given to the creator of an original literary or artistic work. It is the exclusive right granted by the law to creator of such original work, to do, authorize, or prohibit certain acts in relation to such work, thereby protecting and rewarding creativity.

Copyright Law in India

In India, the Copyright Act 1957, was passed on 4th June, 1957, and came into force on 21st January, 1958. Drastic Amendment in the Act was brought about by the Copyright (Amendment)

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Act, 1983. Soon after, was introduced another major amendment, in 1984. Then came into force the Copyright (Amendment) Act, 1992, thereafter the Act was again thoroughly amended by the Copyright (Amendment) Act, 1994, which came into force w.e.f. 10.5.1995. The setting of Copyright Office and Copyright Board assures full protection of all rights in relation to a work in which Copyright subsists, whether of user or of licensee or of publishers. In 1999 an important amendment is made and now the Indian Copyright law is equal to international standard.

Infringement of Copyright

Copyright infringement (or Copyright violation) is the unauthorized or prohibited use of works covered by Copyright law, in a way that violates one of the Copyright owner's exclusive rights, such as the right to reproduce or perform the Copyrighted work, or to make derivative works.¹

According to Section 51 of Copyright Act 1957, Copyright in any work is deemed to be infringed:

- (a) When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any conditions imposed by a competent authority under this Act-
 - (i) Does anything, the exclusive right to do which is by this Act conferred upon the owner of the Copyright, or
 - (ii) [(Note: Subs. by Act 38 of 1994, S.16 (1) (w.e.f. a date to be notified)) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of Copyright, or]

(b) When any person -

¹ Available at <http://www.legalserviceindia.com/article/1195-Copyright-Law-inIndia.html>. (as accessed on 05/04/2020)

- (i) Make for sale on hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
- (ii) Distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, or
- (iii) By way of trade exhibits in public, or
- (iv) Imports into India, any infringing copies of the work:

The reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film will be deemed to be an infringing copy.² In general it is the commercial exploitation of the work in any form by any person without authority that constitutes infringement.³

Fair Use Doctrine: An Exception to Infringement

The right to control access to one's own expressions before publication does not engender free speech concerns, but publishers' control of access after publication does. This explains why historically Copyright was deemed a monopoly to be strictly construed and to be shaped to serve the public interest over that of the Copyright owner. The public interest to be served was reasonable access to the Copyrighted work. In order to solve this quandary, countries, like United Kingdom, the United States or other countries where authors enjoy Copyright protection, tried to create a balance between the authors' sole right of copying on the one hand and public interest in using the authors' work on the other. Even when the author enjoys Copyright, his protection is often subject to many limits. An example of these limits is the *doctrine of Fair use*.

Position in US

'Fair use' is a doctrine in United States Copyright law that allows limited use of Copyrighted material without requiring permission from the rights holders, such as use for scholarship or review. It provides for the legal, non-licensed citation or incorporation of Copyrighted material in another author's work under a four-factor balancing test. The term "fair use" originated in the

² Narayanan, P. , 'Intellectual Property Law,' 3rd edition, 2009, Eastern Law House, p-319.

³ *Ibid*

United States, but has been added to Israeli law as well; a similar principle, fair dealing, exists in some other Common Law jurisdictions. Civil law jurisdictions have other limitations and exceptions to Copyright. One of the rights accorded to the owner of Copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in Sections 107 through 118 of the Copyright law (title 17, U. S. Code). One of the more important limitations is the doctrine of “fair use.”⁴ The doctrine of ‘fair use’ has developed through a substantial number of court decisions over the years and has been codified in section 107 of the Copyright law. Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research .The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁵ ‘Fair use’, typically involve, according to the Copyright Act of 1976, the reproduction of authored works for the purpose of "criticism, comment, news reporting, teaching ..., scholarship, or research" (17 U.S.C.A. § 107). It is usually considered fair use of an authored work to take small quotations or excerpts and to include them in another work, as when quotations are taken from a book and inserted into a book review. However, courts have found that such quotation is not ‘fair use’ when material is taken from unpublished sources.⁶

Position in UK

When the printing press was developed in the fifteenth century, rights for the reproduction of written works extended to printers rather than to authors. In England, a printers' guild, the Stationers Company, claimed for itself the exclusive right—in effect, a monopoly—on written works. It was not until 1710 that Parliament passed a statute relating to Copyright. That law, called the Statute of Anne, established authors' rights to control the reproduction of their work after it was published. It also created a term of protection of 28 years from the date of publication. After that time, an author's work entered the public domain, meaning that anyone could print or distribute it without obtaining the author's permission or paying a royalty, or fee,

⁴Available at <http://www.worldlawdirect.com/forum/law-wiki/30666-copyright-fair-use-law.html> (accessed on 05/04/2020)

⁵ *Supra* note 1

⁶ *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 85 L. (1985)

to the author. Other European countries developed similar laws in the late eighteenth and early nineteenth centuries.⁷

Under the British system, the author retained a common-law right to ownership of his or her work until publication. After publication, Copyright was established as a statutory right, protected by the Statute of Anne. Under the Copyright, Designs and Patents Act 1988 (CDPA), fair dealing is limited to the following purposes: research and private study (both non-commercial), criticism, review, and news reporting (s. 29, 30, 178). Although not actually defined as a fair dealing, incidental inclusion of a Copyrighted work in an artistic work, sound recording, film, broadcast or cable programme doesn't infringe Copyright. Contrary to the often stated view, the provisions of section 29 of the CDPA do *not* restrict the amount of a literary, dramatic, musical or artistic work that may be copied for the purposes of non-commercial research or private study to a "reasonable proportion" of the work or to single copies of the work, where the copies are made by the researcher or student himself. Such restrictions only apply to copies made by or on behalf of a librarian (by virtue of s. 40), or by a person, other than the researcher or student himself, who knows or has reason to believe that "it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose" (by virtue of parag. s. 29(3) (b)).⁸For copying beyond the boundaries of fair dealing, universities and schools in the UK obtain licences from a national copyright collective, the UK Copyright Licensing Agency (CLA). Under these licences, multiple copies of portions of Copyrighted works can be made for educational purposes.⁹

Position in Australia

In providing for a doctrine of 'fair use' the Australian *Copyright Act 1968* would establish a charter for access and user that would fuel and recognize creative innovation as an integral part of human existence in Australia's knowledge based society.

In Australia, the grounds for fair dealing are:

⁷ Available at <http://www.umuc.edu/library/copy.shtml> (accessed on 05/04/2020)

⁸ Available at http://en.wikipedia.org/wiki/Fair_dealing (accessed on 05/04/2020)

⁹ *Ibid*

- Research and study (Section 40)
- Review and criticism (Section 41)
- Reporting the news" (Section 42)
- Legal advice (although the federal Crown is deemed to own Copyright in federal statutes, and the Crown in each State in state statutes). (Section 43)
- Parody and Satire (with some exceptions) (Section 41-A).¹⁰

Australia has a deeming position which guarantees that 'fair dealing' applies if you photocopy either "not more than one chapter", or "less than 9.99%" of a book or journal (this was a result of a successful lawsuit brought against a university library for "authorization" of patrons' copyright infringement).

Indian Perspective of Fair Dealing

Fair dealing is an important concept in Indian Copyright law. However, despite its importance in the Copyright regime and the importance of the Copyright regime to advancement of technology, the concept remains relatively unexplored in India.. The doctrine of 'fair use' or 'fair dealing' is an integral part of Copyright law. It permits reproduction of the Copyrighted work or use 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 the Copyright law.¹¹ The Copyright Act provides for "fair dealing" or "statutory licensing". Sections 31, 32-A and 52 provide for compulsory or statutory licensing of certain literary, scientific or artistic works for instructional and certain other activities subject to reporting and royalty payment requirements. Section 52 of The Copyright Act contains 'fair use' provisions for a statutory license to a person desirous of making a sound recording of an existing work by engaging independent artist to create the same music and use identical lyrics provided that "version recording" is made after two years of the original sound recording subject to certain conditions. The section also provides for 'fair use' of making copies or adaptation of computer programmes, for non-commercial use, from a personal,

¹⁰ Available at http://en.wikipedia.org/wiki/Fair_dealing (accessed on 06/04/2020)

¹¹ *SK Dutt v. Law Book Co and Ors* , AIR 1954 All 570 at Para12 and *Kartar Singh v Ladha Singh* , AIR 1934 Lah 777.

legal copy, air use of literary and certain other works allows broadcasting in a newspaper, magazine, or periodical by broadcast, or in a film for reporting current events. But certain forms of data compilation are exempt from this 'fair use'.¹²

In India, the doctrine of fair dealing is statutorily entrenched under Section 52 of the Indian Copyright Act, 1957. The English Copyright Act, 1842 was held to be applicable in India by the Bombay High Court in *McMillan v Khan Bahadur Shamsul ulma Zaka*, even when the Act was not made expressly applicable to India.¹³ Fair dealing was first statutorily introduced in 1914 as a mere duplication of Section 2(1)(i) of the UK Copyright Act, 1911, providing that Copyright would not be infringed by 'any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary'.¹⁴ The current Indian Copyright statute i.e., the Indian Copyright Act was passed in 1957 as an 'independent and a self contained law'.¹⁵ Even the new legislation had extensively borrowed, both textually and in basic principles, from the new UK Copyright Act, 1956. However, the scope of fair dealing was increased in the statute of 1957 and 'a fair dealing with any work for the purposes of radio summary or judicial proceeding' was hereafter proclaimed not to constitute an infringement of Copyright. Since 1957, Section 52, which constitutes fair dealing, has been amended thrice.¹⁶ The first minor amendment brought to Section 52 was by the Copyright Amendment Act, 1983 (23 of 1983) whereby an explanation below sub-clause (ii) of clause (b) has been inserted. The Section was, however, comprehensively amended by the Copyright Amendment Act, 1994. Activities like private research and dealing with computer programmes and their copying by a lawful possessor were incorporated into the provision and making sound recordings of any literary, dramatic and musical works in certain circumstances were declared to constitute fair dealing. The latest amendment brought to Section 52 was in the year 1999, which again sought to address issues relating to computer

¹² Poorvi Chotani, 'Copyright and Emerging Technology' *MIPR* VOL.1, 2007, A-149.

¹³ (1895) ILR Bom 557 in Lal, *The Copyright Act*, 3rd edn (Law Publishers India, Allahabad), 1995, p.6.

¹⁴ Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law, *Journal of Intellectual Property Rights*, Vol. 14 (November 2009), pp 523-531

¹⁵ Statement of objects and Reasons, Indian Copyright Act 1957

¹⁶ The three amendments brought to Section 52 have been via, Copyright (Amendment) Act, 1983 (Act 23 of 1983), entered into force 9 August 1984, Copyright (Amendment) Act, 1994 (Act 38 of 1994), entered into force 10 May 1995 and 1999 (Act 49 of 1999), entered into force 15 January 2000.

programmes.¹⁷ The Indian Copyright Act, 1957 amended the law prevailing before its enforcement and consolidates the law relating to Copyrights. The statement of objects and reasons of the Indian Copyright Act reflects the recognition that the new copyright regime in India to be built on the bedrock of growing public consciousness of the rights and obligations of authors. The new statute also sought to acclimatize the legislation to advances in technology and make the domestic Copyright Law consonant with India's international obligations.¹⁸

In *Eastern Book Company v DB Modak*,¹⁹ the question before the Court was that whether the copying of copy-edited judgments as published in the law report by the defendant amounted to Copyright infringement and whether the copying constituted fair dealing under Section 52(1)(q) Sub-clause (iv) of the Act, which excludes the reproduction or publication of any judgment or order of a court, tribunal or other judicial authority from the scope Copyright infringement. The Indian Supreme Court following the approach laid down by the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*,²⁰ rejected the 'sweat of the brow' doctrine, (which conferred Copyright on works merely because time, energy, skill and labour was expended, that is, originality of skill and labour), held that the work must be original 'in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author'. It is noteworthy that the Court noticed that the two positions i.e. the 'sweat of the brow' on one hand, and 'modicum of creativity' were extreme positions; it preferred a higher threshold than the doctrine of 'sweat of the brow' but not as high as 'modicum of creativity'.

The Delhi High Court in *The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors*,²¹ has aptly summed up the policy behind the defence of fair dealing. The Court held that fair dealing '....legitimizes the reproduction of a Copyrightable work. Coupled with a limited Copyright term, it guarantees not only a public pool

¹⁷ *supra* 15

¹⁸ *Ibid*

¹⁹ AIR 2008 SC 809 Para 38.

²⁰ 2004)1S.C.R.339.2004SCC13

²¹ 2008 (38) PTC 385(Del) Para 33.

of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. 'Fair use' provisions, then must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain. Section 52 therefore cannot be interpreted to stifle creativity, and the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of Copyright law. Section 52 of the Act only details the broad heads, use under which would not amount to infringement. Resort, must, therefore be made to the principles enunciated by the courts'.

In *Wiley Eastern Ltd and Ors v Indian Institute of Management*²²; the Court clearly traced the purpose of the defense of fair dealing to the Indian Constitution: 'The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India- so that research, private study, criticism or review or reporting of current events could be protected. Section 52 is not intended by Parliament to negatively prescribe what infringement is.'

In *Civic Chandran v Ammini Amma*,²³ the Court observed, The Indian Copyright Act under Section 52 carves out fair dealing from Copyright infringement as affirmative defenses, which places the onus of proving the defenses onto the user once the copyright owner establishes *prima facie* infringement by substantial copying of expression. However, the fair dealing cases in India do not always establish *prima facie* infringement before considering the application of fair dealing.

In *Blackwood and Sons Ltd and Others v. AN Parasuraman and Ors*,²⁴ the Court held that, 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. The courts have time and again reiterated that it is impossible to develop a 'rule of thumb' for cases of fair dealing as each case depends upon in its own facts and circumstance.

²² 61 (1996) DLT 281 Para 19.

³⁴ 1996 PTC 16 670

²⁴ AIR 1959 Mad 410 Para 84

In *SK Dutt v Law Book Co and Ors*,²⁵ where the dispute was based on the use of certain quotations from a work. The Court interpreted the fact of acknowledgement by the authors of the plaintiff's material to mean that had the authors made any other use of the plaintiff's book in compiling their own book, they would have acknowledged it; thus, the copying was held not to be a substantial taking.

In *Academy of General Edu, Manipal and Anr v. B Malini Mallya*,²⁶ the Court held, When a fair dealing is made, *inter alia*, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, there can be no claim as to Copyright infringement. Thus, if some performance or dance is carried out within the purview of the said clause, the mischief of Copyright cannot be claimed. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the amateur club or society, the same would not constitute any violation.

In, *The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors*,²⁷ the court laid down that while dealing with the issue of fair dealing, a Court should ask whether the purpose served by the subsequent (or infringing) work is substantially different (or is the same) from the purpose served by the prior work. To be called transformative, the subsequent work must be different in character; it must not be a mere substitute, in that, it not sufficient that only superficial changes are made, the basic character remaining the same. This determination, according to the Court, is closely knit with the other three factors, and therefore, central to the determination of 'fair use', i.e., if the work is transformative, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work. the Court also held that the purpose and manner of use by the defendants of the questions found in the plaintiff's textbooks were not only different but, additionally, the defendants' works can be said to be 'transformative', amounting to 'review' under Section 52(1)(a)(ii) of the Act. Here, term

²⁵ AIR 1954 All 570 Para 45

²⁶ 2009(2) SCALE 310 Para 20.

²⁷ 2008 (38) PTC 385 (Del).

'review' was interpreted in a contextual background. The plaintiff's claim to Copyright was premised on the work being a 'literary' one. Review or commentary, of a part of such mathematical work too was seen in the background of this claim. In context of a mathematical work, a review was interpreted to be a re-examination or a treatise on the subject.

In *Super cassette Industries v Nirulas Corner House (P) Ltd*,²⁸ where the plaintiff alleged Copyright infringement on the ground that few audio clippings of songs in which they owned Copyright were played on the television in an enclosed room of the defendant's hotel, the Court, while rejecting the defence of fair dealing in terms of Section 52(1)(k) held that the two categories 'hotels' and 'similar commercial establishment' gives a clue to Parliamentary intention to exclude the operation of such categories of establishments from the benefit of what are obviously deemed not infringements and that such provisions should receive a restricted interpretation, having regard to the nature of the expressions used. These provisions were held to be pointers to the legislative intent of treating use of televisions and sound recordings, in hotels as communications to the public as opposed to a private purpose, even if played in an enclosed hotel room. Therefore, the Court declined to extend the law beyond its meaning to take care of any perceived broader legislative purpose.

In *E M Forster and Anr v A N Parasuram*²⁹ which involved alleged violation of plaintiff's Copyright by reproduction of his book in a guide, that the Court explicitly divided its decision between the determination of infringement (that copying must be substantial enough to render an infringement), and the determination of fair dealing (that the copying must not be too substantial) and refused to deal with the issue of fair dealing until infringement was found. This structured approach in analyzing the issue of substantiality is rare among Indian cases of fair dealing.

Use of Copyrighted material in educational institutions

Educational institutions are one of the major user of Copyrighted materials. They do so by using almost all methods of exploitation of a work, i.e., by reproduction, communication to public, adaptation, abridgement, translation and also as publication in school magazines. The students

²⁸ 148(2008) DLT 487 Para 20.

²⁹ AIR 1964 Mad 331 Para 14.

always need study materials so as to get knowledge, information and to excel in the field of competition. The Copyright law provides exclusive rights to the holder of Copyright owner, but at the same time also sets forth several exceptions to these rights. In India, Section 52(1) (g)³⁰ and section 52(1)(h)³¹ deals with fair dealing in an educational institutions which will not amount to an infringement in Copyright. the section 52(1) (g) provides that the bonafide publication of a non Copyright matter in a collection intended for the use of educational institutions will not amount to an infringement in Copyright, section 52(1) (h) of the Copyright Act further provides that any reproduction of a literary, musical or artistic work by a teacher or a pupil in the course of instruction or in answer to the questions asked in examinations will not amount to an infringement of Copyright. The statutory provisions in India do not provide expressly with the issue of photocopying of Copyrighted works for educational purpose. According to the statutory provisions in Australia, the inclusion of works in a collection to be used by places of educations shall not be regarded as acts constituting infringement of Copyright. In Canada, educational institutions and persons acting under there authority may make copies and give performances of works for educational purposes, with restrictions where such work are commercially available. It is not infringement of Copyright to publish in a collection , mainly composed of non-Copyrighted matter, intended for the use of schools, if not more than two passages from works of the same author are published by the same publisher within five years, and the source from which the passages had been taken is acknowledged.³²In the USA, the ‘fair use’ doctrine allows a person to use Copyrighted material in a reasonable manner without the Copyright owners consent and irrespective of the monopoly granted to the owner.³³

In USA, Educational institutions and governmental agencies are also authorized by a separate Copyright statute to publicly display and perform others' works in the course of face-to-face teaching activities, and to a lesser degree, in digital distance education. These rights are

³⁰ Indian Copyright Act 1957.

³¹ *Ibid*

³² Dharamveer Singh & Pankaj Kumar ‘ photocopying of copyrighted works for educational purpose:does it constitute fair us’ “Journal of Intellectual Property Rights” vol.10 jan 2005 p-21

³³ Ieuan G Mahony, Copyright infringement in the USA, in Copyright infringement , 437(dennis Campbell & Susan cotter ,eds Kluwer Law International 1997)

described in Section 110 (1) and (2), respectively, of the Copyright Act. More information about the recent expansion of Section 110(2)'s rights for digital distance education may be found in 'The Teach Act'.³⁴

Conclusion

The Doctrine of Fair Use developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing copying in certain, limited circumstances. In the context of computer technologies, the '*Fair Use*' Doctrine is often used in the context of *Reverse Engineering*. Under Trade Secret Principles, it is generally accepted to "*Reverse Engineering*" a product to determine how the product works. Reverse Engineering may involve analyzing circuit board layouts, "peeling" back an integrated circuit chip, or decompiling computer software. It is impossible to decompile software and then analyze the results without making a copy (or a derivative work) of the software, the making of these copies in the context of reverse engineering is a '*Fair Use*' and is not Copyright infringement. It is without dispute that the Indian Copyright Act, purport to maximize the promotion of creativity and the dissemination of information at the same time, but it is different from US counterpart which traces ultimately in the policy pre-occupations of the Indian and US Courts. The provision for Fair Dealing in the Indian Act is brief and does not define the meaning or the application of the defence. The provision for the '*Fair Use*' in the American Act is more elaborate and extensive. The American Act is more flexible and open for further advancement and is so intended by its legislators. Indian legislators, desiring certainty, have chosen the conservative approach and the Indian judicial jurisprudence is reflective of this approach. Considering the global nature of the digital environment, it is in the interest of both right-holders and users that exceptions and limitation to the exclusive rights of reproduction and communication to the public and provisions on applicable laws be harmonized as much as possible. For an optimum development of the internet, harmonization should occur at international level, Specific situations in various countries to be taken into account.

³⁴ Available at <http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm> last accessed on 06/04/2020