

INDIA'S FAIR USE EXCEPTION: WHERE DID IT GO WRONG?

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John Locke, one of the world's best philosophers, in his Labour theory propounded that an individual shall have the right to control the fruits of his labour. One of the justification of Copyright law stems from this Lockean theory¹. An artistic, literary or musical work is the brainchild of its author, the fruit of his labour, and so, considered to be his property². So highly is it prized by all civilized nations that it is thought worthy of protection by national laws and international conventions relating to copyright³. However in order to be copyrightable, the work must emanate from the author, the work must be in a tangible medium (i.e. not temporary) and there must be human authorship.

Copyright is defined as the exclusive right given by law for a certain term of years to an author, composer etc. (or his assignee) to print, publish and sell copies of his original work⁴. The Indian Copyright Act, 1957 defines copyright exhaustively as the exclusive right to do or authorize others to do certain acts in relation to⁵:

- i. Literary, dramatic or musical works, not being a computer programme,
- ii. Computer programme,
- iii. Artistic work,
- iv. Cinematograph film and
- v. Sound recording.

Thus it is only the author's right to do those acts enshrined under Section 14 but it is albeit subject to the other provisions of the Act. If any of these acts relating to the work is carried out

¹ Hughes, Justin. "The Philosophy Of Intellectual Property". *Georgetown Law Journal* 77 (1988): 287

² Verkey Elizabeth, *IPR Law and Practice* (First edn, Eastern Book Company, Lucknow 2015) 18

³ *Gramophone Co. Of India Ltd. V. Birendra Bahadur Pandey*. 2 SCC 534. 1984

⁴ *Copyright* as defined in Oxford English Dictionary

⁵ The Copyright Act 1957, s 14

by a person other than the owner without a license from the owner or a competent authority under the Act, it constitutes infringement of copyright in the work⁶. Section 51 defines infringement of copyright generally⁷. However there are certain exceptions to such infringement of copyright.

Exceptions to infringement of Copyright:

Rights provided to a copyright owner are not absolute as in the case of patent holder and has few exceptions. These exceptions are few circumstances in which even if there is unauthorized violation of rights such as reproduction of the copyrighted work copyright infringement will not take place. These exceptions are carved out in copyright acts of almost all jurisdictions since the main idea behind this doctrine is to prevent the stagnation of the growth of creativity and innovation in various fields for whose progress the law has been designed. Exemptions in a copyright law serve as a basic goal to put copyrighted work for the use or reference for new generation of authors to build on the works of authors who preceded them.

Berne convention provides exemptions from the infringement of the rights of the copyright owner. Article 9(2) added in Stockholm in 1976 provides *“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.”*⁸

Article 13 of the TRIPS Agreement⁹ also applies the three step test for the exceptions to the reproduction rights to all the other rights in the copyrighted work whether it be literary, artistic or cinematographic works given under Article 9(2) of the Berne Convention.

In India, Section 52 provides for certain exceptions by which even a person other than the proprietor may do certain acts which would, but for the said provision, amount to infringement. It envisages in itself the concept of fair dealing and an exhaustive list which if fulfilled would constitute no infringement.

In contrast, **Section 107** of the US Copyright law also provides for certain exceptions but it does not provide for an exhaustive list or circumstances. Contrarily it provides four factors

⁶ The Copyright Act, 1957, s 51

⁷ Narayanan P., *Law of Copyright and Industrial Design*, (Fourth edn, Eastern Law House, Kolkata, 2007) 172

⁸ Berne Convention 1886, s 9(2)

⁹ TRIPS Agreement 1995, Article 13

which have to be applied from case to case basis and conclude whether the act falls under the exception or not. This is also known as the *fair use exception*¹⁰. Thus it can be said that the Indian law recognizes ‘fair dealing exception for certain purposes’ whereas the US law recognizes the ‘fair use exception’.

Owing to the distinction, two issues regarding the fair use exception in Indian Copyright Law maybe highlighted:

- i. Whether the fair dealing requirement must be read into all the provisions of Section 52 even if there is no such express mention of such requirement¹¹?
- ii. Can a use, not falling under Section 52, still be said to be not infringing the copyright if it fulfills the four general factors of the fair use exception recognized globally in most of the jurisdictions?

The fair dealing or fair use requirement in all the provisions of Section 52:

¹⁰ 17 U.S. Code s 107 - Limitations on exclusive rights: Fair use:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

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.

¹¹ Some of the provisions which do not mention the requirement of fair dealing are as follows:

- i. **Section 52(c)** permits reproduction in a judicial proceeding,
- ii. **Section 52(d)** permits reproduction or publication for Legislative purposes,
- iii. **Section 52(e)** permits reproduction for the purposes of a certified copy,
- iv. **Section 52(f)** permits only reading and recitation of a reasonable extract,
- v. **Section 52(g)** permits publication in a collection of essentially non-copyright matter for use in “educational institutions”
- vi. **Section 52(h)** permits reproduction during the course of instruction or in examinations
- vii. **Section 52(i)** permits performance in the activities of an educational institution
- viii. **Section 52(j)** permits making sound recording of the work with the license or consent of the owner of the work
- ix. **Section 52(l)** permits performance in an amateur club to a non-paying audience, or in a religious institution
- x. **Section 52(o)** permits making of three copies for a library if the book is not sold in India

Recently, the division bench of Delhi High Court in *The Chancellor Masters and Scholars of University of Oxford & Ors v Rameshwari Photocopy Services & Ors*¹² held that a fair dealing standard has only been provided in clause (a) of sub-Section (1) and not in the other clauses of sub-Section (1) of Section 52, and therefore, cannot be read into the other clauses.

Since the Indian law provides for an exhaustive list which decide whether an act falls under the exception or not, there is no flexibility which exists with the court to decide infringement on a case to case basis. Only flexibility which the courts have exercised in various cases are in cases mentioning the requirement of fair dealing. The Act however is silent in determining as to what amounts to a *fair dealing*. However the courts have on various occasions referred to the authority English case *Hubbard v Vosper*¹³ on the subject matter. J. Lord Denning provided the outline of fair dealing as follows:

“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.”

In the *Blackwood's case*¹⁴ court has provided the purpose of section 52 and have maintained that it is typically interpreted as inflexible, exhaustive and with specificity since if use of copyrighted work does not fall in any of the mentioned categories then benefit of the exception will not be provided. Courts have time and again reiterated that no “thumb rule” can be developed for cases dealing with fair dealing. Therefore the courts have very discretely used certain factors in determining whether there exists a fair use or not in different cases. They have indirectly resorted to the factors of *fair use* exception as given under the US copyright law¹⁵.

Apart from the provisions that mention *fair dealing* as a requirement, there are certain other provisions which strictly provide for situations and acts which would fall under the exception if those acts are done. However, the author suggests that such a strict provision determining

¹² Also known as the DU Photocopy Case

¹³ *Hubbard v Vosper* 2 Q.B. 84, 1972

¹⁴ *Blackwood and sons Ltd. v A N Parasuraman and Ors*, AIR 1959 Mad 410 Para 84

¹⁵ In *Harper & Row v Nation Enterprises* 471 US 539 1985, the court had noted 4 factors to be used to determine whether the use was a fair one (the same factors are given under Section 107 of the US Code):

- i. The purpose and character of the use;
- ii. The nature of the copyrighted work;
- iii. The substantiality of the portion used in relation to the copyrighted work as a whole;
- iv. The effect on the potential market form or value of, the copyrighted work.

whether a particular act of infringement falls within the exception or not has some of its shortcomings. Such provision outcasts the courts discretion and may also, in some cases, lead to absurd results. For example, if under *Section 52(1)(i)*¹⁶ it is shown that the reproduction of any work is done by a teacher in the course of instruction, the same would not amount to infringement owing to the said provision. It ignores other factors. Suppose if the teacher reproduces the work and charges money for reproducing it to the students and earn profit. Even such an act by the teacher would be justified and it would be falling under the exception. However such a result would be unjust to the proprietor of the work which is being reproduced. It is well established that there has to be a balance between the interest of the proprietor as well as the public at large and such reading of the requirement in whole Section 52 would lead to more just and proper balance between the two. Thus it would be more just if the factors of fair dealing, if not fair use are read into all the sub-sections of Section 52 as held in the *University of Cambridge v. B.D. Bhandari Case*¹⁷.

Is Section 52 Complete in itself?

Section 52 provides for certain specific situations under which the use would fall under it, i.e. *the fair use exception*. However, can the general principles of fair use can be used to exempt a new purpose altogether which is not provided under Section 52 and hence be held to be a fair use and amount to no infringement. There are two cases which are worth mentioning here to address the issue, however the issue still remains to be put to rest. In *Blackwood and Sons Ltd v A.N. Parasuraman*¹⁸, the court said that the fair use exception deals with two things: (i) the purposes for which the copyrighted work is used, and (ii) the manner of use pertaining to such purpose. If the defendant's activity does not fit into any of the purposes mentioned in the relevant statutory provision, there is no need to look any further.

However, it is to be noted that the purpose and character of the use is one of the factors in determining fair use. Can the defendant still argue that even if the purpose of his use does not

¹⁶ Section 52(1)(i) of the copyright act provides that: The following acts shall not constitute an infringement of copyright, namely:— (i) the reproduction of any 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;

¹⁷ *University of Cambridge v. B.D. Bhandari Case*, 185 DLT 346 (2011)

¹⁸ *Blackwood and Sons Ltd v A.N. Parasuraman*, AIR 1959 Mad 410

fall under the list of Section 52, it can still be a case of fair dealing or fair use on the basis of other three factors?

The learned author Ananth Padmanabhan, in his book has addressed the issue and observed¹⁹: “the general principles should apply only while gauging the second leg of the fair use requirement i.e. the manner of use. When Parliament has chosen to specifically enumerate the different heads of fair use, as opposed to the fair use mechanism in United States for instance, we have to strictly comply with that for purposes of certainty as well as copyright integrity. At the same time, once the purpose requirement is met, it is excusable to permit some deviation from the manner of use which may be strictly outlined in the provision, by examining the general principles.”

However in Single Judge bench decision of *Syndicate of the Press of the University of Cambridge v B. D. Bhandari*²⁰, the court was deciding infringement by the defendant publishing guides containing extracts from the plaintiff's textbooks. On comparison, the High Court concluded that the defendant's guide books, kunjies and dukkies are basically tools not for study or understanding but for undertaking an examination at a short notice. The market/patronage for the two are also entirely different. The purchasers of such guide books may also possess the textbook but would not have normally even opened the same. The Court concluded that once the book of the plaintiff was prescribed by the University, the questions given in the exercises became questions to be answered in an examination and thus fell within the purview of Section 52(1)(i)²¹. The decision is path breaking as the High Court has treated the purposes mentioned in Section 52, specifically Section 52(1)(h), as merely illustrative and gone ahead to broaden the contours of such purpose²². Also, while the court did not specifically articulated so, all the four factors in the U.S. standard of fair use were taken into account²³.

Thus it is submitted that the law regarding fair use exception in India must be shifted from being strict to a bit liberal and allow a use to fall under fair use even if it does not categorically fall under the purposes mentioned under Section 52 and is a different purpose altogether.

¹⁹ Padmanabhan Ananth, *Intellectual property rights infringement and remedies*, (first edition, Lexis Nexis Butterworths Nagpur, 2012) 334

²⁰ *Syndicate of the Press of the University of Cambridge v B. D. Bhandari*, (39) PTC 642 (Del) 2009

²¹ Corresponding Section 52(1)(h) before 2012 Amendment

²² Padmanabhan Ananth, *Intellectual property rights infringement and remedies*, (first edition, Lexis Nexis Butterworths Nagpur, 2012) 340

²³ *Ibid.*

DU Case vis-à-vis the fair use exception:

The requirement of the general factors of fair use for the interpretation under the Indian context can be better understood by the analyzing those principles under the light of recent judgment of Delhi HC in 2016.

In 2012, the publishers filed a suit for infringement of copyright against Rameshwari Photocopy Services and the University of Delhi as they were providing compiled and photocopied study materials from certain books to the students, without taking any authorization from the publishers the books concerned.

The High Court of Delhi granted interim injunction in the case due to which the defendant was restrained from making and selling the study material and also reproducing the plaintiff publications by compiling the same either in the book form or course packs. During the proceedings Society for the Promotion of Educational Access and Knowledge (ASEAK) and Association of Students for Equitable Access to Knowledge (ASEAK) were impleaded as Defendants. The primary issue in this case was that whether compiling and reproducing of course material without authorization of the copyright owner amounted to infringement of copyright of the plaintiffs.

The court recognized that copyright is not a common law right but a statutory right and only the rights arising from the copyright act would be provided to the copyright owner. Therefore according to the provisions of the copyright act, photocopying original copyrighted work is an exclusive right of the owner of the copyright and that the making of photocopies by defendant in the case would constitute infringement under Section 51 unless such act is listed under Section 52 of the Copyright Act thereby which it falls under the fair use exception. Court also pointed out the difference between issuing of books and reproduction of the copyrighted work. In the former exhaustion of rights will be applied after sale of the book and is not liable for infringement while in the latter “issuing of books” under section 14 cannot be read as reproduction of the work without the owner’s consent.

The court then moved to Section 52 of the copyright act which contains a specific list of acts which are not considered violation of copyright act. It pondered upon various sub provisions of Section 52 and concluded that the act of compiling and reproduction of course material

would be tested and decided that under *Section 52(1)(i)*²⁴. It is to be noted here only that under the Indian Copyright Act, there are only three sections dealing with ‘*fair dealing*’ in an educational context i.e. 52(1)(a), 52(1)(g) and 52(1)(h) and no such mention is found in Section 52(1)(i).

Section 52(1)(i) states that the reproduction of a work by a “teacher or pupil in the course of instruction” would not constitute infringement. It was argued by the plaintiff that instruction should only confine itself to lectures and tutorials but the court refused this argument, stating that the legislature intended to expand the exception by deliberately choosing the expression ‘instruction’ instead of ‘lecture’. So by using the abovementioned provision and interpreting copyright as a welfare legislation as it intends to promote “access to education” it was held that compilation and reproduction of the course is within the confines of the exception of copyright act and it will not amount to copyright infringement.

The court while deciding the case mentioned that the fair dealing requirement is expressly mentioned in Section 52(1)(a) whereas Section 52(1)(i) does not have such a mention. Therefore it held that the fair dealing standard cannot be read into the said provision. The author has hereinabove submitted that the fair use requirement must be read into all the provisions of Section 52. In furtherance of the said submission the author has attempted to analyse the DU copyright case in the light of the fair dealing requirement.

The *purpose of* compiling and photocopying the portion out of the copyrighted material by the defendant who was photocopy shop owner under a contract with the university for the purpose of selling the study material at a fixed rate which included his profit margin clearly shows that along with educational purposes for the students he was reaping commercial gains out of the exercise. If the university could have provided the course packs freely or just at the cost of compiling and photocopying with no profits whatsoever then it could be contended that it was only for educational purposes. Education purpose could also have been sufficed if the university installed photocopy machines for the use of students according to their own requirement.

²⁴ The Copyright Act 1957, s 52(1)(i) states that 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;

Another factor which could have been looked by the court in the case is that of the *nature of the work* which was used to make the course material for the students. Since these copyrighted works are extensively researched and thoroughly revised by the author and writing a good literary piece is a work of utmost care, sustained efforts and sheer dedication to both the subject and the student community. The author's labour surely deserves recognition and reward. Moreover target audience for these course books is really small so if the DU judgment is too applied *in toto* than it would mean the small market for these books further reduces to libraries of the colleges only. This factor also goes against fair dealing.

Amount and substantiality of work as a factor could also have been considered by the high court. Courts in India have time and again maintained that quality of the work copied will always be preferred over the quantity in its various judgments and the literal number of words is not held to be a determinative factor²⁵ and have maintained that quantum of extracts depends upon case to case basis.²⁶ So since these course packs have been compiled from the most lucid portions of various copyrighted books of renowned authors we can assume that this factor would also have gone against the contention of fair dealing.

Conclusively author submits that if these factors would have been taken into consideration by the hon'ble court in the case decision might have tilted in the favour of plaintiffs i.e. the copyright owners. Therefore the general factors regarding fair dealing must be read into all the provisions of section 52 so that it can actually fulfil the purpose of balancing the interest of copyright proprietor and doesn't stifle the creativity for which the law is designed.

Concluding Remarks:

Copyright encourages creativity and knowledge. However it is not an absolute right. When a work is created, it surely has to be protected and certain rights to the proprietor may as well be given. However those rights must not be at the cost of the public in general. It is true that an individual's right should be protected for his own creation as he toils hard and works with sheer dedication to contribute to genre in which he is dealing with but creator never creates anything from the void and he learns and encapsulates that creativity from the culture that surrounds him. Hence, if the people other than the proprietor are barred from using the work then it would

²⁵ *Civic Chandran v Ammini Amma* (16), PTC 670 (1996)

²⁶ *ESPN Star Sports v Global broadcaster news Ltd. and Ors.* (36) PTC 492 (Del) Para 34 (2008)

stifle the creativity among the budding scholars on the subject. It will be detrimental to the development of the area under consideration. Therefore there has to be a balance between the right of the owner of a work on one hand and the right of the public to exploit that work on the other. This has been achieved by introduction of the fair use exception in various jurisdictions. Section 107 of the US Copyright law provides with the general principle of the fair use exception which has to be decided on case to case basis by applying the four factors, namely the purpose of the work, the nature of the work, the amount of substantiality and the effect on the potential market form or value of the copyrighted work.

However in India, Section 52 of the Copyright Act envisages the fair use exception in which it provides with certain purposes for which if the work is used it would not amount to infringement, in other words it would fall under the fair use exception. However, since fair use involves balancing of rights of the proprietor and the world at large, such objective provision may sometimes lead to unjust results. Also, there may be situations in which the work is exploited for a purpose which is not provided in the provision but on taking all things into consideration it would be a fair use. In such cases, denying him the fair use exemption only because the purpose of exploitation is not one which is mentioned in the provision would lead to injustice.

In conclusion, it is submitted that in order to do away with such issues, the general test of the fair use exception must be incorporated in the Indian law as well. If not that, then at least the Parliament should amend Section 52 of the Indian Copyright Act, 1957 and incorporate the requirement of fair dealing under all the purposes provided in the said provision so that there comes some subjectivity in deciding the fair use on case to case basis.