

Dealing Fair with the Doctrine of Fair Use – A Comparative Study of the Doctrine between the US and India

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Introduction

With the increasing development in the economy, the IPR regime has also marked its importance. The excessive competition in the market has paved way for IPR infringements. Therefore, in this digital world, many entities consider Intellectual property as a pivotal one. The doctrine of fair use is an integral part of the copyright law. Section 52 of the Indian Copyright Act, 1957 deals with the fair use. However, this doctrine owes its genesis towards the American Jurisprudence. The Americans have refined this doctrine from time to time but in India, there are still unexplored areas. The American courts mainly rely upon the factor based approach while applying this doctrine. The Indian Judiciary have admitted to the fact that there is a dearth of jurisprudence on the matters of copyright law. This paper will try to ponder upon the Doctrine of fair use with a comparative study of the India and United States of America. This paper is an attempt to bring out the differences in how both the countries treat this doctrine and lessons that India can learn from the USA

The global market has witnessed a tremendous change in the recent times. With the plethora of corporate houses stepping in, the scope of dissemination of knowledge has also widened. IPR regime is too affected by it. The objective of the copyright law is to protect the interests of the author/creator of the work. But unlike the patent law, copyright law does not provide an absolute right. Imagine a situation, wherein you being a law student start reviewing the legal resources like Manupatra, Lexis-Nexis, SCC online, Hein Online and Westlaw. You note down their content and conduct a poll as to which of the following is the best legal resource, and one day either of the above serves you with a legal notice stating that you have infringed their copyright. In 2015, a tech blogger from Hyderabad was served a legal notice by Flipkart.com contending that he violated Flipkart's copyright by using the domain name "www.amazonvsflipkart.com". The blogger compared Flipkart and Amazon India on a number of parameters such as service, interface, discounts, deals, returns and replacement policy[1].

So whether the copyright law protects you in the above situation? Does the Indian Copyright Act 1957 contain any provision? The answer to these questions lies in the doctrine, the "Doctrine of Fair Use". This doctrine has been extensively debated and discussed by the Courts, Academicians, and Research scholars all over the globe on its jurisprudential aspect and its application. The "Doctrine of Fair Use" states that a work shall not amount to copyright infringement if there is an element of "fair use" involved in it. This brings us to another question:-What does the word "Fair use" mean? Since there is no absolute meaning attached to this doctrine, therefore, it was left upon the Judiciary to interpret. The word "Fair use" is coined as "Fair dealing" in the Indian and English law, while the American law uses the word "Fair use". However, one of the notable features of the UK Copyright law is that the fair dealing is only permitted for the purposes specifically listed in the Copyright, Designs and Patents Act, 1988. The provisions under abovementioned Act points out that the dealing must be fair when it is used for the

purpose of research or private study, criticism or review or the reporting of current events.[2] Section 52[3] of “The Copyright Act, 1957” largely draws its inspiration from the English Law. In contrast to the English and Indian law, the American law on Fair use seems to have a more liberal approach, which in turn gives the judiciary, a wider scope to interpret. Section 107[4] of the “US Copyright Act, 1976” lays down certain factors to determine fair use. The Indian courts now are relying upon the factor based approach developed by the USA. Furthermore, the TRIPS Agreement has also incorporated the principle of fair use under Article 13[5]. This paper shall try to discuss the concept of “Fair use” and draw a comparative analysis between the United States of America & India.

Decoding Fair Use through the American Perspective

Before understanding the concept of fair use, we should first delve into the meaning of copyright. The concept of copyright derives its root from the “Positive law” theory. It consists of limited rights[6]. Crews[7] pointed out that “The fair use doctrine helps to prevent the copyright owner’s exclusive rights from interfering with the framer’s stated purpose of the promotion of learning”. The doctrine of fair use is based on a fundamental belief that not all copying should be banned, particularly in the domain of criticism, news reporting, teaching, and research[8]. Even the congress has termed fair use as an “equitable rule of reason”[9]. Before the codification of copyright law in the US, fair use doctrine was a judge made right[10] which was developed to preserve and maintain the constitutionality. The same is reflected under Section 107[11] of the US Copyright Act, 1976. On reading the first paragraph, it mainly consists of two things: -

Fair use of a copyright is not an infringement;

Copying can constitute fair use.

Copying per se is not an infringement, but it is the use of that work which amounts to copyright infringement. As we further go down to Section 107, there are four factors which determine the “fair use”. In other words, these factors are considered as a litmus test for determining fair use. These four factors are: -

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit or educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- The effect of the use upon the potential market for or value of the copyrighted work.

These factors draw its genesis from the landmark case of Folsom v. Marsh[12] wherein the defendant used plaintiff’s 12 volume work on George Washington’s Biography in his own work which consisted of 2 volume. The plaintiff sued the defendant under the Copyright Revision Act of 1831[13]. The defendant came up with the defense that it is

“Abridgement of work” and shall not amount to infringement of copyright. The abridgment doctrine was based on positive law theory derived from an English precedent which was not appreciated by the American Courts. The Judges while deciding such cases during this period had a notion that it was unjust on part of later author to take a free ride on the original author’s work. Justice story while applying the natural law principles in this case held defendant as liable. He stated fair use doctrine in this case:-

“In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work”[14]

The three Folsom factors were based on the: -(1) Nature of the work, (2) Amount of the work used, (3) Effect on the use of work’s economic value. However, this case was under the scanner of criticism. L Ray Patterson called this case as one of the bad copyright decisions ever. According to him, the case was based on sheer poor reasoning and non-application of law[15].

In *Campbell v. Acuff-Rose Music*[16], the Supreme Court addressed the defense of fair use to copyright infringement in parody. The majority opinion found parody rap version of the original song “Oh pretty woman” as a fair use within the meaning of Section 107 of the Copyright Act, 1976. The fair use defense is an inconsistent and confusing area that has been called “the most troublesome issue in the whole law of copyright[17]. The Supreme Court granted Certiorari and handed down a unanimous opinion holding that 2 Live Crew’s version of “Oh, Pretty Woman” was a parody and could be a fair use. “Because we hold that a parody’s commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand. Justice Souter delivered the opinion of the Court[18].

The US doctrine is mainly known for its liberal approach. Therefore, it gives liberty to the Judges to extend the meaning and scope of this doctrine. Therefore, because of the extreme liberal approach, the rights of the copyright holder gets affected which in turn then defeats the entire purpose and objective of the copyright law. We should always know that “Fair use” is only a defense but affirmative right.

Four Factors Test: - A Litmus Test for Determining Fair Use

Initially, we discussed a hypothetical situation where a student was served a legal notice from one of the online legal resources entity, In order to claim the defense of fair use in this case, we should scrutinize this problem under the Four Factor test.

The First – factor test

The first test is to examine the nature and purpose of the use. We have to check whether the use is for commercial purpose or for non-commercial purpose. We have to see in the

above- mentioned case wherein a student is taking the content of the online legal resources, comparing them and conducting a poll. We have to see the nature and purpose of the use. Whether he is doing it for some commercial activity or the purpose is to create awareness amongst the people? The US Supreme court has observed that “the purpose should involve the non-commercial use of work.

The Commercial purpose would be presumptively unfair whereas purpose for non-commercial use would raise a presumption of fairness[19]”. Subsequently, it has been observed that “the crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but we need to figure out that whether the user is making a profit by exploiting the copyrighted material without paying any customary price[20]”. In the instant case, the purpose is to create awareness amongst the masses as to which online legal database they should prefer. There is no purpose to gain commercial benefit by exploiting the copyrighted material.

The Second – factor test

The second factor in the fair use deals with the nature of the copyrighted work, which is potentially infringed[21]. Here a distinction has to be made out between the factual work and creative work. While reviewing the online legal resources, you are not using the content of the copyrighted material for your own benefit but to create awareness amongst people so as to make a proper choice while choosing a particular online legal database. Therefore irrespective of the nature of the work it is, it doesn’t make any difference so long as the copyrighted material is not used to the economic detriment of the copyright holder.

In fact, on the other hand, it is certainly giving a scope of improvement for the online legal database companies to improve their content.

The Third – factor test

The third factor is based on both quantitative and qualitative test which connects itself with the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Here in our case, we need to figure out the amount of substantiality of work involved both from the perspective of quality and quantity.

The Fourth – factor test

The fourth factor deals with the effect of the use upon the potential market for or value of the copyrighted work. Here, in this case we need to determine whether the alleged work causes any potential threat of loss of market for the copyright holder.

Therefore, in order to claim the defence of fair use, all the four factors must be satisfied. Whereas, unlike the US law, Section 52 of “The copyright act, 1957” of India does not

have provision of factors testing it. We shall now look into the Indian stand on fair use in the following section.

India's Stand on the Fair Use

Under the Indian law, the word "Fair dealing" is used instead of "Fair use". Unlike the Section 107 of the US Copyright Act, 1976, which is based on the factor approach, the Indian concept of fair dealing which is largely inspired by the English law is more restrictive in nature. The current Indian Copyright Act, 1957 contains section 52 on fair dealing. The various amendments to the Copyright Act also have obvious implication as to the reasoning behind the fair dealing defense under the Indian Act[22]

In *The Chancellor Masters and Scholars of the University of Oxford Vs. Narendera Publishing House and Ors.*[23] Justice S Ravindra Bhatt opined that "The doctrine of fair dealing or fair use is an integral part of the copyright law". The court in this case further held that the fair use provisions must be interpreted in the manner so as to strike out a balance between the rights of the copyright holder and the often enriching interest of the public domain. The Single bench emphasized on the liberal interpretation of section 52 of The Copyright Act, 1957 so as to achieve harmony with the objective of the copyright law. Justice Bhatt further emphasized that courts must not merely rely on the heads mentioned under section 52, rather they should further also rely upon the principles enunciated to identify fair use.

Further in *Supper Cassettes Industries Ltd. V Mr. Chintamani Rao and Ors. And India TV Private Ltd. V. Yashraj Films and Anr*[24]., the core issue before the Delhi High Court was – "Whether Sound recordings and Cinematograph film can be a subject matter of fair dealing under Section 52(1) of The Copyrights Act, 1957? The counsel in this case appearing from the side of India TV contended before the Honourable High Court that Copyright Act provides a limited monopoly. The copyright law all over the world balances the rights of the authors/creators and casts a duty upon them to share the rights they reserve to use of their works – especially for the purpose of news reporting; for reporting of current events; for educational purposes; for private use, etc., subject to Fair dealing provisions of each country. Delhi High court in this case did not appreciate the argument of the India TV's counsel and held that Sound recordings and Cinematograph film cannot be a subject matter of fair dealing.

Now going back into 1959 where the Madras High Court in *Blackwood and Sons Ltd. and others v. A.N. Parasuraman and Others*[25], while dealing with the question of "Fair dealing" held that there are certain factors to look upon while dealing with "Fair use". First, you need to refer the "purpose" for which a substantial part of copyright work is reproduced. The second was with respect to the manner of use pertaining to that purpose in order to receive protection. However, these factors were restricted to the categories mentioned in the copyright statute which were mainly for the purpose of Private Study, Research, Criticism, and Review. The main issue while dealing with the "Fair Use" is that there is no clear cut definition of word Fair dealing or Fair use. Many Courts across the globe have developed the meaning of this word. Therefore it's easy to

conclude that the Doctrine of Fair use owes its genesis towards the Judiciary. Even in *Civic Chandran V. AmminiAmma*[26]. The Court observed that the term “Fair use” or “Fair dealing” have nowhere be defined. The courts find it difficult to lay down precise standards. The courts after examining the case laws have laid down some important tests to find out whether the use is likely to harm the potential market or the value of the copyrighted work.

It is not possible to provide definite guidelines for fair use. Whether a dealing is fair is the question of degree and impression. It should be noted that the relative importance of each of these factors will vary according to the case in hand and the type of dealing in question[27].

Further in *Ashdown v. Telegraph Group Ltd.*[28], the court in order to ascertain the fair use laid down the following tests

- Whether the alleged fair dealing is in a commercial battle with the owner’s work?
- Whether the work has already been published or exposed in the public domain?
- The amount and importance of the work which has been taken.

The courts have further retreated that fair dealing under Section 52 of the Copyright Act, 1957 is at all justified in protecting the Right of freedom of speech and expression guaranteed under Article 19(1) of the Indian Constitution. In *WhileyEastern Ltd and Ors v. Indian Institute of Management*[29], the court linked section 52(1) with Article 19(1) of the Indian Constitution and observed that:- “The prime purpose of section 52 is to protect the freedom of speech and expression enshrined under Article 19(1) of the Indian Constitution so as to protect the research, review, criticism or reporting of the current events”. While inserting Section 52, Parliament had no intention to negatively prescribe what infringement is.

In 2011, the Honourable Delhi High Court in “*Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd &Anr*”[30]laid down thirteen (13) broad guidelines on fair dealing.

It is neither possible nor advisable to determine the exact meaning of the word “Fair dealing” ;

Fair dealing is not a question of law but question of fact;

In determining whether extracts taken from the copyrighted work have been put to fair use, it depends upon the length of the extracts and comments. Long extracts followed by short comments may in certain circumstances may be unfair, while the short extracts followed by long comments may attract fair use;

The Right to fair use includes Right to criticize. But the criticism is not only restricted to the style but also underlying doctrine or philosophy of the copyrighted work;

The court should adopt a liberal approach while construing the meaning of words such as Current events, Criticism, and review mentioned under section 52(1);

In discerning as to whether a person has made fair use of copyrighted work, the standard employed ought to be that of a “fair minded” and “honest person”. When it comes to musical work, the test would be that of a “lay hearer”;

The Court while examining the defense of fair dealing, the length and the extent of the copyrighted work which is made use of, is pertinent. You cannot merely rely upon the quantitative test without considering the qualitative aspect. The court has to make out whether the impugned extract forms an essential part of the work of the person in whom inheres the copyright. This situation may be seen in case of musical work where the few notes makes all the difference;

There is copyrighted work which may contain confidential information, the courts would refrain from injunctioning the use of such work it is in public weal. Though there is a difference between a breach of confidence as against infringement of copyright, the court would not grant an injunction in favour of the person in whom inheres the copyright if it is contrary to public policy, i.e. if it is (a) immoral; (b) scandalous; (c) contrary to family life; (d) injurious to public life, public health, public safety or is inimical to administration of justice; and (e) incites an action which endangers (c) and (d) above;

The principle of freedom of expression will protect both information and ideas. Freedom of expression would include the right to publish and receive information. Public interest in certain circumstances is so overwhelming that courts would not refrain from the injunctioning use of even “leaked information”. While the courts may desist from granting injunction based on the principle of freedom of expression, this would, however, not necessarily protect the infringer in an action instituted on behalf of the person in whom the copyright vests for damages and claim for an account of profit;

(10) There is difference between public interest and what interests public;

(11) The motive of the user shall play an important role in assessing as to whether injunction ought to be granted;

(12) Commercial use of copyrighted work cannot simply make it unfair;

(13) “Transformative work” in certain situation shall be considered as a fair use of copyrighted work;

One shall appreciate Justice Rajiv Shakhder for laying down certain guidelines in understanding the “Doctrine of Fair use” He did not base his reasoning merely within the boundaries of Section 52 of The Copyright Act, 1957 but also gave due emphasis to the principles which laid down the concept of fair use. His guidelines were also somehow in line with the factor based analysis.

Results And Scope for Improvement

On comparing both the US and Indian perspective on “Fair dealing”, we can very well conclude that there is a scope of improvement for Indian “Fair dealing” concept. The

courts now are adopting the factor based approach while dealing with the cases on fair use. The courts further admit that the Indian IPR regime is rapidly changing because of its relation to the technology. The language contained under section 52 of the Indian Copyright Act, 1957 is restrictive in nature. While the congress in the US adopted a general provision under section 107 of The Copyright Act, 1976.

The Indian parliament has amended section 52 three times. Surely, there is a room for another amendment whereby the Indian parliament should adopt the factor based approach from the USA. Now while comparing both the legislation, one may definitely argue that the US law gives judges more room and space to interpret “fair use”, the judges may extend the meaning of fair use to many new avenues of the technology and copyright content. On the other hand, the Indian approach seems to be more static in nature. Having said that, one major implication for the US that the test under section 107 may tend to ignore the commercial implications that fair dealing might have upon such use of a work.

The doctrine of fair use or fair dealing has traversed a path of transformation. But the underlining problem that still lies is “How to strike out a balance while applying this doctrine”? The problem with this doctrine is that too much of liberal approach of this doctrine might hamper the rights of the copyright holder. So it is important to strike out a balance while applying this doctrine.

The Indian concept of fair dealing has a scope for improvement. It is high time we should do away with the restrictive approach and adopt a factor based approach from the US.

We saw Berne Convention setting up an example by universalizing the concept of copyright law. The developing jurisprudence behind the fair use is taking a stance so that all the WTO countries should have a uniformity. This doctrine should be developed in such a manner that though the jurisdiction may differ but the principle shall remain the same[31].

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