

HOW FAIR IS FAIR USE? UNDERSTANDING THE NUANCES

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Abstract

"Each new Fair Use case increases our awareness and our knowledge"

- J.J. Eysenck

Fair use is one of the exceptions to the exclusive right of Copyright, as it allows the use of the copyrighted material without the owner's prior approval. However, this doctrine is applicable only in cases in which certain conditions are fulfilled. The essence of this doctrine is the sharing of information, and knowledge creation, thereby allowing the public to use the copyrighted works, thus limiting the owner's monopoly. Having initially originated in the USA, this doctrine is now a part of multiple statutes across the world, and has also been incorporated into Article 13 of the TRIPS Agreement. In the Indian context, this defense is available under § 52 of Indian Copyright Act, 1957 which provides for certain acts which will not constitute infringement of copyright. The acts include fair dealing with a literary, dramatic, musical or artistic work for private use, criticism, educational and judicial proceedings, among others. While the provision appears straight-forward at first, the meaning and interpretation of what is 'Fair Use' depends on the facts of each case and thus can present many problems. Through this paper, the authors will trace the development of the doctrine over the course of years, and will determine what the term 'Fair Use' entails. Further, the authors aim to analyze the recent trends of the doctrine's usage as a defence through various judicial pronouncements. Moreover, this paper will highlight the interpretation of the 'Three Step Test' as laid down in the Berne Convention and the TRIPS Agreement. Lastly, the authors will delve into any possible loopholes and suggest some changes in the law that would make the doctrine more comprehensive.

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Introduction

Intellectual Property Rights (IPRs) confer an exclusive right to the creator or his assignee to fully utilize his invention or creation for a given period of time.¹ This in turn fosters creativity, innovation, and competition, and acts as an incentive for coming up with new inventions or creations, and thus leads to significant technological and economic growth.

The concept of IPRs was first recognized in the year 500 BCE by the Greek city of Sybaris, where a rudimentary system granted patents for a year to citizens who made 'any new refinement in luxury.'² However, the modern system of Intellectual Property Rights first originated in Medieval Europe, where the Government granted certain companies monopolies in order to regulate and censor literary works.³ Due to rising discontent, this system was replaced by the first modern legislation on Intellectual Property Rights, the Copyright Act of 1710, popularly known as the Statute of Anne.⁴

¹ Chandra Nath Saha & Sanjib Bhattacharya, *Intellectual property rights: An overview and implications in pharmaceutical industry*, 2 ADV. PHARM. TECH. RES. 88, 89-91 (2011).

² *The Evolution of Intellectual Property*, LAW OFFICE OF JEFF WILLIAMS PLLC (Nov. 11, 2015), <https://www.txpatentattorney.com/blog/the-history-of-intellectual-property/>.

³ *History and Sources of Intellectual Property Law*, LAW SHELF, <https://lawshelf.com/courseware/entry/history-and-sources-of-intellectual-property-law>.

⁴ Jeremy Norman, *The Statute of Anne: The First Copyright Statute*, HISTORY OF INFORMATION, [http://](http://www.historyofinformation.com/expanded.php?id=3389)

Intellectual Property Rights usually include Patents, Trademarks, Copyright, Industrial Designs, and Geographical Indications, among others. Copyright is a concept related to rights offered to the creators of original literary, artistic work or music. The original expressions of an idea, like drama, music, movies, software, art, paintings, sculptures, designs, photographs, sound recordings and any literature are covered under the copyright protection.

Doctrine of Fair Use

Copyright law provides some exclusive rights to the creator of an original work. These exclusive rights are negative in character, since the holder of the copyright can prevent others from reproducing the work, from making any adaptation, or from carrying on any such act that can solely be performed by the copyright owner. The rationale behind these exclusive rights is that they enable the copyright owner to exploit the work protected by copyright, and to derive financial benefit from it.

As a result, if any other person, without prior authorization, uses the works that are protected by Copyright law, then that person is considered to have infringed the exclusive rights that were granted to the creator of that work. In case an

www.historyofinformation.com/expanded.php?id=3389.

infringement takes place, the owner of the Copyright can file a suit to recover damages.

However, there are certain exceptions to this principle of law. According to the doctrine of Fair Use, if the use of copyrighted content is determined to be fair, or falls under an enumerated set of exceptions and limitations, then it does not constitute an infringement,⁵ even if they are done without the prior permission of the owner of the copyright. For instance, acts of parody, satire, critical commentary,⁶ dissemination of information on matters of public concern,⁷ private use, and performance of artistic works for the purpose of education are generally considered to be exceptions to the principle of infringement. Thus, the doctrine of Fair Use is a defence against copyright infringement, and allows people to copy a copyrighted material for a limited and 'transformative purpose'.⁸ This in turns enables people to gain access to work protected by copyright, which they would not have been able to access otherwise. For instance, the doctrine of Fair Use allows the

use of copyrighted material to a certain extent for activities which are in the general interest of the public, such as non-profit and educational purposes.⁹

The origins of Fair Use lie in the doctrine of 'Fair Abridgment', which was established by the Court of Chancery in the case of *Gyles v. Wilcox, Barrow, and Nutt*.¹⁰ Here, it was held that where an abridgment of another work was created merely by shortening the original work, and without any proper application of skill or labour by the Editor, then the abridged work would not be considered as a true abridgment, and thus would be an infringement of the copyright.

¹¹ Over the course of decades, the scope of this doctrine was expanded by various judgments to bring about the doctrine of Fair Use.

It is a common misconception that the Fair Use doctrine was first recognized in the landmark case of *Folsom v. Marsh*.¹² In fact, the Court in *Folsom* had attempted to enlarge the rights of the copyright holder by redefining what constituted infringement. At the same time, however, the Court also acknowledged that some acts could be fair, and while doing so, put forth certain factors

⁵The Three-Step Test, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/files/filenode/three-step_test_fnl.pdf.

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, L 167/10 O.J. 22.6.2001, Arts. 5(3)(d), (i), (k).

⁷ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 10bis.

⁸ Rich Stim, *What Is Fair Use?*, STANFORD UNIVERSITY LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>.

⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁰ (1740) 3 Atk 143; 26 ER 489.

¹¹ Matthew Sag, *The Pre-History of Fair Use*, 76(4) BROOK. L. REV. 17, 1-42 (2010).

¹² 9 F.Cas. 342 (C.C.D. Mass. 1841).

to be considered while determining whether an act falls under the Fair Use doctrine or not: ¹³ "We must often... 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." These factors were later codified under the Copyright Act of 1976, ¹⁴ and have gone on to become the foundation of the modern Fair Use doctrine.

The statutory definition of what actions constitute Fair Use has deliberately been made and left as fairly vague and ambiguous, in order to expand the ambit of the doctrine by way of interpretation. Hence, this matter has been brought up before the Courts in multiple cases, in which some general guidelines have been laid, as dealt with below.

Fair Use in India

In India, fair dealing has been mentioned in § Section 52 ¹⁵ of the Indian Copyright Act, 1957 (hereinafter, "The Act"). While the phase 'fair dealing' has not been expressly defined anywhere in the Act, there are a number of judicial pronouncements, both Indian and foreign, that talk about the same.

¹³ L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5(2) J. INTEL. PROP. L. 431, 431-452 (1998).

¹⁴ 17 U.S.C. § 107.

¹⁵ § 52, Indian Copyright Act, 1957, No. 14 of 1957.

In the landmark case of *Hubbard v. Vosper*, ¹⁶ Lord Denning held –

"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 a fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next, you must consider the proportions."

Broadly, fair dealing as laid down in § 52 covers the following heads in reference to a literary, dramatic, musical or artistic work for the purposes of - private use, ¹⁷ criticism or review, ¹⁸ Reporting current events, ¹⁹ judicial proceedings, ²⁰ work prepared by the Secretariat of a Legislature, ²¹ reproduction of any work in a certified copy made or supplied in accordance with any law in force, ²² reading or recitation in public,

¹⁶ [1972] 2 Q.B. 84.

¹⁷ § 52(1)(a)(i), Indian Copyright Act, 1957, No. 14 of 1957.

¹⁸ § 52(1)(a)(ii), Indian Copyright Act, 1957, No. 14 of 1957.

¹⁹ § 52(1)(a)(iii), Indian Copyright Act, 1957, No. 14 of 1957.

²⁰ § 52(1)(d), Indian Copyright Act, 1957, No. 14 of 1957.

²¹ § 52(1)(e), Indian Copyright Act, 1957, No. 14 of 1957.

²² § 52(1)(f), Indian Copyright Act, 1957, No. 14 of 1957.

²³publication in a collection, composed for bona fide reasons, ²⁴ bona fide use by teacher in the course of instruction. ²⁵ Using of recordings in public in an enclosed room in a residential building, ²⁶ or as part of activities of a club. ²⁷

Additionally, the section also covers - the performance of a literary, dramatic or musical work by an amateur club or society for a non-paying audience or for the benefit of a religious institution, ²⁸ bona fide reproduction in a newspaper or magazine, ²⁹ reproduction of any matter published in the Official Gazette, any act of a legislature, report of any committee, and any judgement or order of the Court, ³⁰ making or publishing of a painting, drawing, engraving or photograph of a sculpture or any other artistic work which is permanently situated in public, ³¹ certain allowed inclusions in a cinematograph film which includes artistic work permanently situated in public, etc. ³²

²³§ 52(1)(g), Indian Copyright Act, 1957, No. 14 of 1957.

²⁴ § 52(1)(h), Indian Copyright Act, 1957, No. 14 of 1957.

²⁵§ 52(1)(i), Indian Copyright Act, 1957, No. 14 of 1957.

²⁶§ 52(1)(k)(i), Indian Copyright Act, 1957, No. 14 of 1957.

²⁷§ 52(1)(k)(ii), Indian Copyright Act, 1957, No. 14 of 1957.

²⁸§ 52(1)(l), Indian Copyright Act, 1957, No. 14 of 1957.

²⁹§ 52(1)(m), Indian Copyright Act, 1957, No. 14 of 1957.

³⁰§ 52(1)(q), Indian Copyright Act, 1957, No. 14 of 1957.

³¹§ 52(1)(t), Indian Copyright Act, 1957, No. 14 of 1957.

³²§ 52(1)(u), Indian Copyright Act, 1957, No. 14 of 1957.

and the performance of a literary, dramatic or musical work, or a bona fide communication to the public, or any sound recording in the course of any religious ceremony, or any other official ceremony held by the Government. ³³

The list has been held to be exhaustive and restrictive and is limited to the points mentioned in the Section. ³⁴ That means that any use not included in § 52 will be considered an infringement, depending on the facts and circumstances of the case. Hence, India takes a more narrow approach in comparison to countries like USA which provides for inclusion of any act that comprises of bona fide use of work under the doctrine of fair use. Even in the presence of an exhaustive list, the decision of an act being an infringement or fair dealing depends on certain factors. These elements include –

1. Amount and Sustainability of the dealing

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This principle basically means that infringement requires ‘substantial’ copying of the work or ‘substantial’ infringement. So, for the use to be fair, it must not be too substantial so as to render it an infringement. While what is ‘substantive’ depends on circumstances of the case, the

³³§ 52(1)(za), Indian Copyright Act, 1957, No. 14 of 1957.

³⁴ Super Cassette Industries v. Nirulas Corner House Pvt. Ltd., 148 (2008) DLT 487.

Indian Courts have held in a number of pronouncements that both the 'qualitative' and 'quantitative' aspects matter.³⁵ In *Blackwood and Sons Ltd and Ors. v. A.N. Parasuraman and Ors.*,³⁶ the Court held: "In ascertaining as to whether a substantial part of the work has been reproduced it cannot be dependent solely on the 'bulk' or 'length of the extract'. Not only quantity but also the value is required to be looked at."

2. Purpose and Character of the act –

The section provides many circumstances when the act won't amount to an infringement because of the purpose of the act. For example, if a student copies certain things from a copyrighted book for private study and does not circulate it or publish it, it won't be an infringement on account of § 52(1)(a)(i).³⁷ On the other hand, if the same things are copied and reproduced for commercial exploitation, the same will prima facie be an infringement. Moreover, the Act does not mention any set of people specifically permitted to copy work, and anyone can copy if it is for private study.

One of the recent landmark cases is the *DU Photocopy Case*,³⁸ wherein eminent international publishers filed a case against Rameshwari Photocopy Services, a small shop functioning in the vicinity of the Delhi School of Economics for copyright infringement. The plaintiffs alleged that the preparation of course packs by the Defendant including photocopy of books and no additional material amounted to violation of copyright.³⁹ The plaintiffs further alleged that the course pack was competing with the actual publications and the photocopy shop was commercially exploiting the same by selling the course pack at 50p per page.⁴⁰

The Defendant on the other hand claimed the defence of fair dealing under § 52(1)(a) and (h) of the Copyright Act. DU, on the other hand, claimed defence under § 52(1)(i) as the material was provided in the course of providing education and the Act provided no limit on copying for the purpose of 52(1)(i). The Court, refusing to pass any action against the defendants, held that § 52(1)(i) was wide enough to include the act of photocopying by the shop.⁴¹ The Court further held that the phrase 'course of education' was not limited to classrooms.⁴²

³⁵Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd. and Anr., 2011 (45) PTC 70(Del); Hawkes & Son (London) Ltd. v. Paramount Film Service Ltd., [1934] 1 Ch. 593 (C.A.); Ladbroke (Football) Ltd. v. William Hill (Football) Ltd, [1964] 1 All ER 465.

³⁶ AIR 1959 Mad 410.

³⁷ V Ramaiah v. K Lakshmaiah, 1989 (9) PTC 137.

³⁸ The Chancellor, Masters & Scholars of University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors., 233 (2016) DLT 279.

³⁹*Id.* at ¶ 1.

⁴⁰*Supra* note 38 at ¶ 14.

⁴¹*Supra* note 38 at ¶ 97.

⁴²*Supra* note 38 at ¶ 72.

The Case was finally withdrawn by the publishers. However, this does not in any way mean that violation can be allowed only because it is good for public.⁴³

3. Likelihood of Competition –

Another factor that plays an important role is the likelihood of the work posing competition to the copyrighted work. The factor was highlighted in *ESPN Star Sports*,⁴⁴ wherein the Court held that if the work is conveying the same information in the same manner as the copyrighted work for a rival purpose, it won't be fair dealing. Finally, the impression that the work is creating is also of utmost important. In *Blackwood*,⁴⁵ the Court stated that the possibility of competition is all that is necessary for determining infringement of a copyright.

THE COPYRIGHT (AMENDMENT) ACT, 2012

The 2012 amendment made some much needed changes in the Copyright regime and specifically to § 52. Some of the changes made were –

1. With the amendment of § 52(1)(a), the fair dealing was extended to all works save for computer programmes. Hence, for the first time, the doctrine was

extended to musical and cinematograph works as well.

2. § 52(1)(w) which provides for “making of three dimensional object from a dimensional work” was introduced.
3. A new clause § 52(zc) was added to provide that importation of literary or artistic works that is incidental to products being imported will not constitute an infringement.

Further, a new provision was added that would facilitate access to people with disabilities.

International aspect of fair use

The now famous Three Step Test that regulates copyright limitations at the international level, was first laid down by Article 9(2)⁴⁶ of the Berne Convention for the Protection of Literary and Artistic Works in 1967. It authorizes Countries to permit the reproduction of such works in certain *special cases*, as long as the said reproduction *does not conflict with a normal exploitation* of the work, and does not *unreasonably prejudice the legitimate interests of the author*. This test is a clause that establishes three cumulative conditions to the limitations and exceptions of a copyright holder's rights, thus basically establishing the legal parameters for reproducing a work.

⁴³RupendraKashyap v. Jiwan Publishing House, 1996 (38) DRJ 81.

⁴⁴ESPN Stars Sports v. Global Broadcast News Ltd. and Ors., 2008 (36) PTC 492 (Del).

⁴⁵*Supra* note 36.

⁴⁶ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 9(2).

⁴⁷Since the test is fairly flexible, it allows countries to tailor their laws to their domestic economic, social, and cultural needs.⁴⁸

Over the course of years since the introduction of the Three Step Test, it has now been incorporated in various international agreements, such as The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁴⁹ the WIPO Copyright Treaty of 1996,⁵⁰ multiple EU Directives, and has further been included in the national legislatures of multiple countries, albeit with minor differences. For instance, the test laid down in the Berne Convention applies only to the Right of Reproduction, whereas the test laid down in the TRIPS Agreement applies to any of the exclusive rights that are associated with copyright.

Further, Article 10 of the Berne Convention deals with specific free uses of works for the purpose of quotations and teaching. It lays down that making quotations from a publicly available work is permissible as long

as it is compatible with fair practice,⁵¹ and authorizes Countries to allow the usage of literary or artistic works for educational purposes, as long as such usage is compatible with fair practice.⁵²

Conclusion

Even though the legal framework that regulates Fair Use in both USA and India are compliant with the Berne Convention and with the TRIPS Agreement, there still exist substantial differences between the two. For instance, USA with its four factor approach has a much wider ambit than India, which has an exhaustive list of actions that constitute fair use.

As a result, even if a certain usage of a copyrighted material is 'fair' in its basic sense, it would still not fall under the ambit of the doctrine if it is not mentioned in the statute. Further, since India is still a developing country, it has to ensure that the law caters to the aspirations and needs of its people. Even though a majority of the Indian society would benefit from the greater circulation of copyrighted material, such an action's impact on the commercial aspects of multiple industries cannot, and should not be ignored.

⁴⁷ Rachel Marusak Hermann, *IP Experts Focus On 3-Step Test In Copyright, Discuss Way Forward*, INTELLECTUAL PROPERTY WATCH (Dec. 21, 2011), <https://www.ip-watch.org/2011/12/21/ip-experts-focus-on-3-step-test-in-copyright-debate-way-forward/>.

⁴⁸ Martin Senftleben, *The International Three-Step Test. A Model Provision for EC Fair Use Legislation*, 1 JIPITEC 67, 67-82 (2010).

⁴⁹ The Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13 (entered into force Jan. 1, 1995).

⁵⁰ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996.

⁵¹ The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 10(1).

⁵² The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 10(2).

Thus, there is a need to widen the ambit of the Fair Use Doctrine in India by making it more inclusive, but at the same time it is necessary to ensure that the balance between

the rights of the copyright holder and the interests of the general public at large is maintained.