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Revisiting Fair Dealing and Copyright Infringement in India vis-à-vis Research and Education

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ABSTRACT

Copyright law grants authors and creators an "exclusive right" to their original works while allowing certain exceptions that enable individuals to use these works in ways that would typically infringe copyright. This exception is known as the "doctrine of fair use" in the United States and the "doctrine of fair dealing" in India. These doctrines encompass the 'permitted acts' or 'defences' recognised by copyright laws across various jurisdictions. 'Fair dealing' and copyright are intrinsically linked and cannot exist in isolation. In India, Section 52 of the Copyright Act of 1957 outlines the provisions associated with "fair dealing" and enumerates possible defences against copyright infringement claims. The primary objective of 'fair dealing' is to foster research and education; however, its overly restrictive nature has hindered the achievement of this goal. The limited scope of 'fair dealing' provision and judgments, which lack clarity and certainty, fail to address the challenges faced by developing nations like India, where access to information remains a significant barrier to progress. This paper intends to thoroughly examine the existing legal principles and jurisprudence surrounding this doctrine in the context of research and education in India, highlighting the challenges it faces and proposing potential reforms to revise copyright law to enhance both its flexibility and predictability within the context of India's socio-economic landscape and to foster research and education.

Keywords: Copyright; Fair dealing; Fair use; Right to research; Right to life; Section 52 of the copyright act; UDHR; TRIPS; Pirate

1. INTRODUCTION

The inception of copyright law, signified by its establishment in the Statute of Anne in 1710, marks a crucial turning point in the worldwide acknowledgement of intellectual property rights. Copyright constitutes a form of intellectual property that provides its owner with "an exclusive right to copy, reproduce, distribute, adapt, perform or display his works of creative expression[1]." Although the core principles of copyright jurisprudence are based on several intellectual property theories, such as incentive and reward theories, there is an increasing demand from different parts of society, especially students and researchers, for improved access to creative works. These works, which are often excessively priced and tightly controlled by copyright protections, underscore the necessity for a balance between the rights of authors and public access.

Thus, a crucial inquiry concerning copyright as a legal entitlement is whether it mainly caters to the personal and financial interests of creators or acts as a public right intended to enhance access to creative works for society. For instance, the U.S. Copyright Law, particularly noted in the Copyright Clause, clearly states that its objective is utilitarian; it aims to benefit the public, while the economic motivations and rights of authors are considered secondary factors. This claim has also been backed by the U.S. Supreme Court[2].

It's also crucial to keep in mind that copyright was initially established as legislation intended to enhance public access. The original statute, the Statute of Anne, was named "a law for the advancement of learning." Hence, creative works must be available to the public, as they are crucial components of creativity and knowledge. The court has also underscored that "the Act's fair dealing provisions must receive a liberal construction in harmony with the objectives of copyright law[3]."

There has been an established demand among users of copyrighted materials to comprehend their rights related to the use of such content, especially in cases where they may do so without facing costs or seeking authorisation from the creator or publisher. This concept is legally known as the "doctrine of fair dealing/use." Now, a major issue that comes up is the understanding of the "fair dealing/use doctrine," which seeks to find a middle ground between the public good and the individual rights of creators of artistic works. Although the doctrine permits individuals to access copyrighted works that

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are typically shielded by paywalls concerning academic publications, its interpretation lacks clear boundaries. In this regard, Justice Story correctly described copyright as "metaphysics of the law-where the distinctions are, or at least may be, very subtle and refined, and sometimes almost evanescent[4]." In ICC Development (International) Ltd v. New Delhi Television Ltd., *the court also remarked that* "it is both inadvisable and impossible to define the precise limits of fair dealing[5]."

'Fair dealing' and copyright are intrinsically linked and cannot exist in isolation. Therefore, in India Section 52 of the Copyright Act of 1957 outlines the provisions associated with "fair dealing" and enumerates possible defences against copyright infringement claims. It strives to achieve an equilibrium between public interests and the accessibility of educational resources, encouraging creativity while also offering incentives to the creators of works. Although, the Copyright Amendment Act of 2012 broadened the types of works that can be utilised for personal and private purposes by embodying the term "any work", thereby addressing the current gaps between the Act and its intended goals, yet it still falls significantly short of expectations. The primary aim of 'fair dealing' is to promote knowledge sharing, but due to its overly restrictive nature, it has not fully achieved its intended purpose.

The unclear nature of copyright and fair dealing has resulted in a surge of legal disputes, with the most recent case being that of Sci-hub[6]. Furthermore, though precedents can typically help clarify the extent of a statutory exception, it's essential to recognise that case law interpreting the fair dealing exception specified in Section 52 is sparse and frequently inconsistent. Courts have been noted to use "fair use" and "fair dealing" interchangeably, even though they have distinctly different meanings as defined by various national legislations. Furthermore, Indian courts have been known to employ the "four-factor test" standard in the USA, which lacks a basis in the Indian legislative framework.

In light of the aforementioned issues, this paper aims to underscore the deficiencies in the existing legal framework and address the errors made by the courts in interpreting the law. Consequently, the paper will propose modifications to enhance the framework, ensuring it is more robust and better serves the interests of the general public.

2. THE CONCEPT OF FAIR DEALING IN INDIA: APPLICABLE LAW AND ITS DEFICIENCIES

The law governing copyright in India, the Copyright Act of 1957, being influenced by British legislation and follows the "doctrine of fair dealing," unlike the "doctrine of fair use" that is prevalent in the United States. Also importantly, during the case of McMillan v. Khan Bahadur Shamsul Ulama Zaka in 1842, the Bombay High Court referred to British laws, stating that "the English Law on Copyright would be applicable in India[7]." Presently, the Indian Copyright Act of 1957 details a set of thirty three exceptions in Section 52 that specify circumstances under which copyright infringement is not considered to have occurred as long as the action fulfils one of the specified purposes[8]. Notably, the expression "fair dealing" does not appear in the Act itself; instead, Section 52 is labelled "Certain acts not to be an infringement of copyright[9]."

What is fair for purposes of fair dealing- In a notable early case focused on reproducing content for academic guidebooks, Blackwood v. Parasuraman, the Madras High Court acknowledged that "for a dealing to be considered unfair, one has to have regard to the substantiality of the quantity and the quality of the matter reproduced[10-11]." Additionally, in Civic Chandran v. Ammini Amma, the Kerala High Court referred to the "doctrine of fair dealing" and quoted Lord Denning's perspective from Hubbard v. Vosper, asserting that "fair dealing as a matter of impression that is impossible to define[12-13]".

2.1 Fair Dealing v. Fair Use: Inadequacy in Fair Dealing

Fair use is a provision included in domestic copyright legislation, as allowed by Article 13 of the TRIPS Agreement. As per Article 13, nations are permitted to create exceptions for copyright violation, provided they fulfil three criteria: "(a) the exception confines only to special cases; (b) does not conflict with the normal exploitation of the work; and (c) does not unjustly prejudice the rights holder's interests." The concept of "fair use" is outlined in Section 52 of the Copyright Act, covering educational uses, government publications, and resources aimed at those with visual impairments, along with various other categories[14].

In the United States, the expression "fair use" is not clearly defined in the Copyright Act, and its meaning is primarily determined by the courts on a case-by-case basis. Because there is no legal definition, fair use is evaluated using the four-factor test established by Justice Story in the Folsom v. Marsh case:

"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."[15]

Judges have historically relied on these yardsticks to evaluate fair use cases until Congress formally established the essential elements of Justice Story's test in Section 107[16]. This section outlines the relevant factors concerning fair use. Specifically, the aforementioned section clarifies that "fair use" differs from copyright infringement and may occur when a work is utilised for purposes such as "criticism, commentary, news reporting, teaching, scholarship, or research". Furthermore, Section 107 presents a set of four important but non-exclusive factors that must be considered to assess whether the use of a work qualifies as fair: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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."

American fair use can apply to a broad array of purposes, as the examples listed in Section 107 of the US Copyright Act are intended to be illustrative, indicated by the specific phrase "such as". The model, celebrated for its adaptability and openness to diverse perspectives, has garnered acceptance from numerous nations due to its practical and effective protective strategy. Furthermore, the Doctrine is comprehensive and flexible, allowing for its application to new and varied situations that may arise as countries evolve over time.

Conversely, the Indian Copyright Act, much like various successors of the UK Copyright Act of 1911, does not contain the phrase "such as". Consequently, the list of specified purposes which includes "research, private study, criticism, review, or newspaper summaries", and has since been expanded to encompass "research, private study, education, parody, satire, criticism, review, or news reporting" is considered exhaustive and suggests that "dealings for purposes beyond this scope are not included in the exception, even if they could be deemed fair[17]."

2.2 Judicial Interpretation Beyond the Parameters of the Indian Legal Framework

2.2.1 The Complexities Surrounding the Distinction Between Fair Use and Fair Dealing as Demonstrated by Indian Courts

The Indian judiciary has frequently exhibited varying stances in handling cases related to permissible actions under copyright law and have applied both the concepts of fair use and fair dealing, depending on specific situations. For example, in the cases of the University of Oxford v. Narendra, the University of Cambridge v. Bhandari and India T.V. Independent News Service Pvt. Ltd. v. Yashraj Films Pvt. Ltd., the Delhi High Court and the parties involved repeatedly cited these doctrines interchangeably. In the first case, the court analysed "whether the defendants sufficiently made out a 'fair dealing' or a 'fair use' defence", a reasoning that was also utilised in the subsequent case[18-20]. It wasn't just a matter of wording; the court analysed US "fair use" rulings while assessing the Indian fair dealing defense and made the following comment:

"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 to identify fair use[21]."

2.2.2 Indian Courts Frequently Reference the Four-Factor Test in Their Rulings

Indian courts have also referred to the four-factor test established in the United States when resolving cases. For example, in the ICC Development case, the court stated that "the four-factor test enshrined in Section 107 of the American Copyright Act helps determine fair dealing within Section 52(1)(a) of the Indian Copyright Act[22]." This concept was further explained in the significant DU/Rameshwari Photocopy case, where the court emphasised that "the four-factor test is essential for the import of Section 52(1)(a), *i.e.* the fair dealing assessment is concerned. However, the rest of the provision, which enumerates other permitted acts, cannot be held to the strict standard of the four-factor test and are only subject to a general idea of fairness[23]."

2.2.3 Court's Argument Regarding End-users and "Fundamental Right to Research"

In the DU/Rameshwari Photocopy case, the Delhi High Court presented a distinctive viewpoint by stating that the production of 'course packs' which entails assembling photocopies of pertinent sections from various textbooks required in the syllabus and distributing them to students, the end-users, through educational institutions does not amount to copyright violation under the Copyright Act of 1957[24]. This exemption is based on Section 52(1)(i) of the Act and is maintained as long as the photocopied materials are intended for educational instructional purposes, regardless of the extent of usage. In effect, the court ruled that this type of photocopying is considered a reproduction of the work by an educator within the instructional context, thereby not breaching copyright laws. Consequently, educational institutions are not obligated to obtain licenses or permission from publishers when compiling and distributing course packs, as long as the copyrighted content included is critical for educational purposes. The Court took a practical stance that aligns with the objectives of the legislation, highlighting the importance of taking into account the end-uses and end-users.

Furthermore, in the aforementioned case, there have been arguments suggesting that the copyright act ought to be regarded as a form of "welfare legislation" linked to the Fundamental Right to Education as interpreted under Article 21[25-26]. At this juncture, it is important to mention the Supreme Court's decision of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, in which Court expanded the understanding of this article to include "*the right to live with human dignity and all that goes along with it, including reading, writing, and self-expression*[27]." Furthermore, it has been posited that the Copyright Act should be connected to Articles 39(f) and 41 of the Indian Constitution, which are as follows:

"The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner[28]"

"The State shall, within the limits of its economic capacity and development, make effective provision for securing the right . . . to education[29]."

Although Fundamental Rights safeguard citizens' rights against violations by the State and others, allowing for their enforcement in courts, the Directive Principles of State Policy cannot be enforced through judicial means[30]. Nevertheless, the Supreme Court has often recognised that these principles carry "considerable moral force and authority", serving as "fundamental in the governance of the country"[31-32]. In this light, DU contended "both the Fundamental Rights and Directive Principles operate on a higher pedestal than any legislation."

The above discussion conclusively emphasises that the Copyright Act ought to be understood in a manner that supports user rights, especially concerning the constitutional assurance of the "right to research" as stated in the fair dealing provision found in Section 52(1)(a)(i) in India. Professor Satish Deshpande effectively points out in this regard that "quality higher education is not compatible with an overzealous copyright system[3].''

3. ELSEVIER LTD. V. ALEXANDRA ELBAKYAN: AN OPPORTUNITY

Sci-Hub is a popular platform that allows students and researchers to access copyrighted academic materials for free, as many cannot afford high subscription fees for journals and books. The site seeks to "eliminate all obstacles in the path of science" by providing free access to these works. However, a legal case has been filed against Sci-Hub in the Delhi High Court in India, receiving significant support from the academic community.

In December 2020, major publishers like the American Chemical Society, Wiley, and Elsevier filed a lawsuit in the Delhi High Court against Libgen and Sci-Hub. Libgen is one of many piracy websites that offer free access to numerous subscription-based research papers. The main accusation is copyright infringement, with publishers asking authorities to block access to these platforms. They argue that "pirate sites like Sci-Hub threaten the integrity of the scientific record, and the safety of university and personal data. They compromise the security of libraries and higher education institutions to gain unauthorised access to scientific databases and other proprietary intellectual property, and illegally harvest journal articles and e-books[34]."

The Sci Hub's defence is "rooted in principles of public interest and it should therefore, extend to facilitator of research websites such as Sci-Hub[35]."

From a legal standpoint, copyright infringement is clear, and such websites should be banned promptly. However, we support a more purposeful interpretation of copyright law that fosters scientific and social-scientific knowledge for communities focused on intellectual growth, including scientists, researchers, educators, and students. In order to support our case we put forth following arguments:

India's unique learning needs, combined with its status as a developing nation, highlight the urgent need for more accessible and affordable knowledge access.

India's developing status makes education a top priority. This focus, along with existing intellectual property regulations, supports the free use of copyrighted works for research and private study. In a report on the current situation by Prof. Subbiah Arunachalam Madhan Muthu, it has been found that:

"Only a handful of Indian universities and research institutions have access on par with their counterparts in the global. For a vast majority of universities, colleges, and research institutions these proprietary databases remain out of reach[36]."

Developing countries face significant challenges in accessing knowledge. While developed nations have strong intellectual property laws that favour authors and publishers-often disadvantaging users-countries like India need supportive frameworks for equitable access to scholarly materials. Without this support, their development could be stifled, limiting competitiveness in a globalised world.

India's responsibilities, national and international, in advancing scientific knowledge and ensuring access to educational materials.

Education and Knowledge are crucial measures of advancement in societies across developed, developing, and least developed countries. Article 26 of UDHR, adopted in 1948, states that "everyone has the right to education[37]." To facilitate education, access to information is crucial. Moreover, Article 27 of the UDHR reinforces that "everyone has the right to freely participate in the cultural life of the community and to enjoy arts and share scientific advancement and its benefits[38]."

The ICESCR stresses that "there should be the progressive introduction of free education at the secondary and higher education level[39]." Article 15(1)(b) obligates State Parties to "recognise the right of everyone to enjoy the benefits of scientific progress and its applications[40]." Similarly, there are other international instruments which reinforce the same idea behind the right to education.

As regards constitutional mandates, Copyright Act ought to be regarded as a form of "welfare legislation" linked to the Fundamental Right to Education as interpreted under Article 21. In this light it is pertinent to mention the case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, in which Court expanded the understanding of this article specially assuring the "right to research"[32].

A purposive interpretation of the existing laws must be made. The purpose of the exceptions described in Section 52 is to promote scientific advancement and meet developmental requirements. This section should be understood as a manifestation of the national exceptions outlined in Article 8(1) of the TRIPS Agreement, which indicates that "member states may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development"[41]. Consequently, a purposive interpretation of Section 52 should be utilised to fully capitalize on the necessities

of science and development.

The interpretation of the "fair dealing/use exception" should consider both educational and commercial factors. However, commercial interests should not overshadow uses that qualify for the exception to avoid copyright infringement. A project can be profit-driven while still benefiting the public, especially by providing access to those in need, similar to the findings in the DU/ Rameshwari Photocopy case.

4. CONCLUSION

India's aim for social justice and reducing inequalities requires a balance with the copyright monopoly of owners. Copyright should ultimately benefit society. Although Indian law supports the right to education and the transmission of copyrighted works, this is not effectively applied. Therefore, allowing broader use of copyrighted materials is essential, especially in developing countries like India.

To enhance both flexibility and predictability within the context of India's socio-economic landscape and to foster innovation, we propose a three-pronged reform of the exceptions framework in Indian copyright law. *First*, we advocate for transforming the fair dealing exception into an "open-ended fair use exception". Nations such as Singapore and Israel, which had fair dealing provisions akin to that in India, have transitioned from fair dealing to fair use provisions to tackle the challenges[42]. In order to make the fair dealing exception more adaptable and open to new perspectives, taking a cue from Section 107 of the US Copyright Act, an amendment can be made in Section 52(1)(a) which could read "a fair use with any work, for purposes such as".

Second, we recommend incorporating "a three-factor test" into the fair use provision, providing courts with crucial guidelines while allowing for interpretative flexibility. It can be appended as an Explanation to Section 52(1)(a) and could read as:

"Explanation: In assessing whether a specific use of a work qualifies as fair use, several factors that the Court may consider include-

1. The characteristics of the protected material, such as the extent to which it is creative and the creator's desire to manage its first public disclosure;
2. The effect of the usage on the ability of the copyright holder to achieve a fair and adequate return; and
3. The purpose and nature of the usage, as well as how transformative the use is and the extent to which it serves the public good."

We recognise four interconnected benefits of integrating these factors into the explanation of the suggested fair use provision. Firstly, providing an explicit list of these factors will offer courts essential guidance in determining whether a use qualifies as fair use. Secondly, this list is comprehensive and non-hierarchical, enabling courts to weigh various factors based on the specific circumstances and to take additional factors into account if necessary. Thirdly, including these factors in the provision will improve the predictability of outcomes, as it is reasonable to anticipate that most courts will apply these factors during their fair use evaluations rather than searching aimlessly for suitable criteria. Lastly, when compared to the traditional four factors used in fair use analysis, we assert that these three factors promote increased objectivity in evaluation, thus enhancing outcome predictability for all parties involved.

Finally, we support "retaining the current enumerated exceptions" to ensure predictability in specific use cases and to facilitate the evolution of the framework by introducing additional targeted exceptions. These amendments will eliminate inconsistencies in court rulings and strengthen the legal framework by balancing the interests of copyright holders and the public, reinforcing the core principles of copyright law.

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