

## CONCEPT OF FAIR USE IN INDIA AND ABROAD: A COMPARATIVE AND ANALYTICAL STUDY OF AN EXCLUSIVE DEFENSE IN LAW OF COPYRIGHT

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### Abstract

The Notion of “**Fair Use**” serves as a core value for any **Copyright Regime**. Basically, this doctrine aims to strike a harmonious balance between the creator of an original work and interests of public at large by permitting a narrow or restricted usage of an original copyrighted work without needing to seek the prior permission from the holder of copyright. **Indian Copyright Act of 1957** in its **Section 52** talks about the Doctrine of “**Fair Dealing**” and this doctrine is also an embodiment of “Fair Use”. Key motives behind the adoption of this doctrine are utility of a copyrighted work for the socially significant pursuits and also to be used for the purpose of criticism, private study, review, reporting of news and for research purposes. Section 52 of Copyright Act 1957 plays a role like a fundamental pillar of copyright regime in India, this section classifies the acts, which cannot be treated an infringement of copyright, which also includes the fair dealing with creative works such as artistic, dramatic, literary and musical works. But it is pertinent to note that these do not include a computer program. This research paper explores into a brief examination of **Section 52 of Principle Act (referred to as Copyright Act, 1957)**, elements to prove a fair use of original work without owner's prior approval, relevancy of this doctrine and notable judicial pronouncements highlighting the significance of “Fair Use” Doctrine.

**Key Words.** The Copyright Act of 1957, Fair Use, Fair Dealing and Copyright Regime.

I. **Introduction:** As we have discussed above in the abstract that the **Doctrine of “Fair Use”** is included as the **Doctrine of “Fair Dealing”** in the Indian Copyright Regime, which continues to be governed by the **Indian Copyright Act, 1957**. These two doctrines do act as a foundational pillar, which helps in keeping a bridge between the popular interests and rights of an original work creator. Hon'ble Courts of India have multiple times in their landmark rulings recognized this doctrine as a cornerstone of Copyright Laws and as a result of these judicial decisions, this doctrine has over the time evolved as an exclusive exception to the infringement of Copyright. Apart from our nation, there are many countries in the world with an adoption of Doctrine of Fair Use Exception or any other defense that is closely

resemble to the Fair Use Doctrine and these includes **United States, United Kingdom, Malaysia, South Korea, Singapore, Israel, Poland and Australia**. This research paper is also a depiction of Global Aspects of Doctrine of Fair Use and How the Courts of these nations have interpreted this doctrine in their respective jurisdictions? There are two important in which firstly, **Gylex vs. Wilcox**,<sup>237</sup> which laid down the establishment of the notion of the “**Fair Abridgement**” and secondly, **Folsom vs. Marsh**,<sup>238</sup> which established that what the meaning of “**Fair Dealing**” is? Both of these cases served the role of precedents in cases pertaining to the India.

<sup>237</sup> (1740) 26 ER 489

<sup>238</sup> 9 F. Cas. 342, 1841 U.S. App. LEXIS 468

## II. Notion of “Fair Use” Doctrine

However, this doctrine cannot be set in a specific set of definitions but Doctrine of “**Fair Use**” refers to a common defense to the copyright infringement, which allows the limited usage of a copyrighted work without obtaining a prior explicit consent from the owner of copyright, but this usage of copyrighted work is restricted to some specific circumstances or purposes. Such as review, commentary, research, criticism and for the purpose of parody. It is pertinent to highlight that the any work which is adaptive or derivative of a copyrighted work will not fall under the purview of Fair Use Exception. There are certain essentials to satisfy the hon’ble courts to attract an exception of Fair Use Doctrine such as **Purpose and Character of Use, Nature of Copyrighted Work, Portion or Amount of Work Used and The Potential Effect of Use on Market Value and Original Work**. A detailed analysis of these elements has been provided later in this research paper.

## III. Notion of “Fair Dealing” Doctrine

Indian Copyright Act of 1957 under its Section 52 talks about the concept of “**Fair Dealing**” but this provision embodies in itself “Fair Use”. Basically, Doctrine of Fair Dealing is another exception to the copyright infringement. This principle is also prevalent in nations like **Canada, Great Britain, Australia and New Zealand**. The Copyright Acts of these Countries include the legal provisions for activities that are not considered as an infringement of copyright if such activities or dealing is mentioned under their acts. In other language, we can say that if there is an act of copying of an original copyrighted work but it does not fall under the scope of fair dealing purpose of statutes then, regardless of intention of a person who copied, it will not be considered as an act of fair dealing.

## IV. Comparative Examples of “Fair Use” and “Copyright Infringement”

With the help of following two examples, we can understand a difference between a fair use and a copyright infringement are as follows:

- If someone quotes a line of an original song for the song review then it is a fair use but remixing the same without prior explicit permission from the real owner constitutes the copyright infringement.

- If any person cites an excerpt from a book of an original author for the purpose of publishing a research paper or another related works then. It is fair use but, an act of paraphrasing someone’s book or any research paper constitutes the infringement of copyright.

## V. Doctrine of “Fair Use” in India in the light of Section 52 of Copyright Act of 1957

As we have discussed above Indian Copyright Act, 1957 allows a reproduction of certain copyrighted work without seeking a prior consent from the copyright owner. Section 52 of the Copyright Act of 1957 outlines certain general defenses or exemptions from the infringement of copyright, where a copyright is not deemed to be infringed. These defenses/exemptions are as follows:

A. **Fair Use:** This permits the usage of an original copyrighted work for the pursuits such as research work, criticism, reporting, commentary, teaching, scholarship, to create parody and news reporting. If an original work did use for any of these activities then, it is generally exempted from the infringement of copyright.

B. **Reproduction for Personal Use:** If someone makes a single copy of an original musical, dramatical, literary and artistic works for his personal use (excluding a computer program) then it is not considered as an infringement of copyright.

C. **Performance of a Work by Amateurs:** If a musical, dramatic and literary work is performed by Amateurs then, it is not deemed to be an infringement of copyright only in a situation where such performances are dedicated to the non-paying audiences and where such proceeds are applied to the pursuits of education and charity.

D. **Reproduction/Publication of Certain Works:** If there is a reproduction or publication of certain works to meet the pursuits of legal or

judicial proceedings or for the purpose of reporting of current events is not deemed to be a copyright infringement.

E. **Broadcasts Recording:** If someone makes a sound recording of a broadcast for the purpose of domestic/private use then such an act is generally exempted from the infringement of copyright.

#### VI. The Conditions of Fair use

Like the United States, India too, relies on same four factors to consider that whether a particular act qualifies to be a fair dealing/fair use or not? These four factors are as follows:

A. **Purpose and Character of the Use:** In order to qualify an act to be a fair dealing/fair use, purpose of the use of such work and the character of the use of same will be a subject to the evaluation. Whether such purpose is commercial/non commercial and for the transformative purposes, comes under the purview of defense of fair dealing or not.

B. **Nature of the Copyrighted Work:** This is another factor to check a work whether qualified to be a fair dealing or not. Nature of an original copyrighted work will also be examined. There are certain factors to be taken into account such as the examination of the creative or artistic nature of a work, its factual nature/informational nature and its status whether such a work is published or unpublished.

C. **Volume and Substantiality of the portion of the work used:** At the point of this factor the amount and significance of portion of the used work shall be a subject of an assessment. In this way, if there is even a small/insignificant portion of a copyrighted work is used, then there is a probability of qualifying it to be a fair dealing.

D. **Effect on the Potential Market Value:** At this factor, potential market effect of the used copyrighted work shall be examined. In this way if use of a copyrighted work encroaches upon the market value of such work in a significant amount or such use rides upon the creator's ability to exploit the work used, then in these

situations, defense of fair use may not be applicable.

#### VII. Relevance of "Fair Use" Doctrine

A. This doctrine becomes relevant in many contemporary activities, which can be associated with number of creative industries. We can understand this relevance through some significant examples. For instance, **Makers of Documentary Film** do solely rely on the original copyrighted works and "Fair Use" Doctrine and they use to incorporate someone's original work for the pursuits of commentary, criticism and for the purpose of historical documentation. Similar to this instance, in the arena of literature, visual arts and music, the pursuits of **transformative works and parodies** do rely on this doctrine to create contents, which are new and having a social relevance.

B. **Advertisements** often take into its use the artworks, copyrighted music and clips of films to support a desired effect. The practical application of Principle of "Fair Use" permits the advertisers to use these ingredients but such use must be within the limits of transformative use and related boundaries.

#### VIII. Judicial Aspects for Doctrine of "Fair Use" or "Fair Dealing" in India

Indian Judiciary has over the periods of time emphasized upon the significance of "Fair Use" and its applications in different scenarios through its verdicts in many notable cases and some of these landmark rulings are as follows:

A. **Civic Chandran vs. Ammini Amma**,<sup>239</sup> this case was one of the most notable verdicts concerning the doctrine of "Fair Use" in India, which was delivered by the Hon'ble High Court of Karnataka. In this case there was an issue related to the parody, where court ruled that if a parody is not in the abusive and in the form of misappropriation, then it does not constitute the copyright violation. As per court's ruling in this case only extracts from a work may constitute a "Fair Dealing" within the meaning of **Section 52 of Copyright Act of 1957**. In this case Hon'ble Court further ruled that even if an original work

<sup>239</sup> (1996) 1 KLJ 454.

is substantially copied then it may fall under the “Fair Dealing” exception if such an act of Copying is in the interest of Public at large.

**B. *Wiley Eastern Ltd. vs. Indian Institute of Management*,** <sup>240</sup>this was the notable case where Hon’ble Delhi High Court construed the main motive behind the **Section 52 of the Copyright Act of 1957**. Hon’ble Court here stated that the vision of Section 52 is to fulfill the objectives outlined as Fundamental Right to the Freedom of Speech and Expression under the **Article 19(1) of the Indian Constitution** through the pursuits like criticism, review, private study, research and act of reporting current events etc. It may be stated that both key **articles 19 and 21** of Indian Constitution collectively recognize the Right to Research. Copyright Law considers this recognition as an essential ingredient of **Freedom of Speech** and in the view of Constitution it is a vital element, which is supportive in maintaining **“Human Dignity”**.

**C. *The Chancellor Masters & Scholars of University of Oxford vs. Narendra Publishing House and Ors.*,** <sup>241</sup>in this landmark ruling Hon’ble Delhi High Court declared that the Doctrine of “Fair Dealing” forms an indispensable part of Copyright Regime or Copyright Laws. Basically, this is a notable ruling, where hon’ble court stipulated a stringent standard for the purpose of originality of a work and at the same time, court widened the purview of Principle of “Fair Use” in the arena of education. This landmark judgment highlights that the educational processes are free from the stifles of copyright law as well as it also restrains anyone from monopolizing basic academic contents. Court in this case emphasized upon the significance of unambiguous and clear guidelines provided by the legislative organ through which uncertainty and ambiguity resulting from the provisions relating to the “Fair Dealing” can be appropriately addressed.

**D. *Masters and Scholars of University of Oxford vs. Rameshwari Photocopy Services*,** <sup>242</sup>this is another landmark ruling where Hon’ble High Court of Delhi reiterated the same verdict as it pronounced in landmark case of ***The Chancellor Masters & Scholars of University of Oxford vs. Narendra Publishing House***. In this case too, hon’ble court ruled that the usage of an original copyrighted work/material for the educational pursuits does not constitute a violation of copyright. Hon’ble Court further held that that there is no requirement to seek prior consent from the publisher for the purpose of distribution if someone did an act of reproducing an original copyrighted material from coursebooks to achieve the academic pursuits.

**E. *Rupendra Kashyap vs. Jiwan Publishing House*,** <sup>243</sup>this case dealt with an issue concerned with the **“Commercial Exploitation”** of an original copyrighted work in reference to the Doctrine of “Fair Dealing”. In this landmark ruling Hon’ble High Court of Delhi held that the Principle of **“Fair Dealing”** is not available to get availed by a publisher, who makes a commercial exploitation of an original protected work and in furtherance of it, he violates upon someone’s copyright, despite of if such an act of publication was attempted for the pursuits of private study or research. Hon’ble Court further ruled that an exception under the Section **52(1)(a)(i) of Copyright Act, 1957** is not available to a publisher, who published a book for the purpose of commercial gain and as a consequence thereof, he encroached upon an original work, even if such a publication was made to achieve the pursuits such as private study or research. An important thing which was established in this case that the Defense of **“Fair Dealing”** is applicable only to an extent to which it does not attract the **“Commercial Exploitation”** of an original work.

**F. *Saregama India Ltd. & Ors. vs. Alkesh Gupta & Ors. (2013)*,** this landmark case concerns **“Fair Dealing”** was entertained by the

<sup>240</sup> 61 (1996) DLT 281

<sup>241</sup> 2008 (38) PTC 385

<sup>242</sup> 235 (2016) DLT 409

<sup>243</sup> (1996) 38 DRJ 1

**Hon'ble High Court of Calcutta.** In this case Hon'ble Court ruled that if a party allows an act of filtering or streaming another party's original copyrighted sound recording on a website, then it attracts an infringement of copyright and same is not permissible. Hon'ble Court further stated that if there is an activity of downloading a copyrighted content by another website, then it constitutes the copyright violation and such an act is illegal and unethical under the scope of "Fair Use" if concerned website generates a revenue from its sponsors. Ultimately, Hon'ble Court emphasized that such an activity or use leads to a "**Commercial Exploitation**" of a copyrighted content and cannot fall under the personal use.

**G. Shemaroo Entertainment Limited vs. News Nation Network Private Limited (2022),** this was a case where verdict was given by the Hon'ble Bombay High Court. In this case **Shemaroo Entertainment** was the plaintiff and "**News Nation**" was the defendant, where Hon'ble High Court of Bombay had put a restriction on the defendant and stated that "News Nation" will not publish, disseminate, telecast, record, broadcast, distribute, incorporate and record etc. from the catalogue of plaintiff Shemaroo Entertainment. In the background of this case plaintiff instituted a lawsuit against the defendant and alleged that defendant using plaintiff's content, despite of an agreement between them was made but later it was terminated. In reply to plaintiff, defendant took a defense, contended that he used to utilize the content in an issue at the time of reporting of news, which is just taking into consideration the principle of "**Fair Use**" and principle of "**de minimis**". Defendant further argued that this act was not done for the purpose of "**Commercial Exploitation**" or to exploit same thing individually but same was done only for the pursuit of news reporting. The defendant further resorted to the "**de minimis**" use, which here implies that the clip which was in issue was less than even a minute. Ultimately, in this notable case Hon'ble Court judged in favor of plaintiff and stated that after an

agreement between plaintiff and defendant being terminated, there was non-association of any right with defendant to use plaintiff's content. Court further said that if there is a mere quantitative analysis of the duration of content, then such an analysis is not enough to establish a huge difference and if there is only an use of less than a minute, then it does not establish that defendant is not a guilty of copyright violation.

#### **IX. Global Applicability of Principle of "Fair Use"**

Each nation across world embodies with its unique system of "Fair Use". The principle of fair use has influenced the practices, laws and regulations of copyright in many countries throughout the world. However, in different nations there may be varied standards and terminology to be used in respect of fair use doctrine, but the core idea behind using this principle is to strike a balance between the rights of copyright owner and larger public interest remains intact. Following is a brief examination of different nations with their own standard and terminology in respect of fair use:

**A. Fair Use in the United States:** Under the law of United States, subjects protected are **Satire, News Broadcasting, Critiques, Research and Pursuits of Education**. The principle of fair use in the copyright laws of US came into play in **19<sup>th</sup> Century**, when a suit for the violation of copyright was instituted by **Charles Folsom**, who originally published **George Washington's biography** and respondent here used to reproduce from this original work of Charles Folsom around **353 pages**. In this issue, the decision was turned in plaintiff's favor, where Justice Joseph Story outlined for important pillars/elements to establish whether a particular act fall under the fair use exception and these four elements are continued to be used across the globe. These four elements are **(i) The Purpose and Character of the use (ii) The Nature of the copyrighted work (iii) The Amount of copyrighted work used (iv) The effect of the use on potential market value**.

**B. Fair Use in the United Kingdom:** In the United Kingdom, **Section 29 and Section 30 of the Copyright, Designs and Patents Act 1988** are dealt with the concept of “Fair Dealing”. In the United Kingdom, there are three pre-requisites have to be fulfilled that validate the fair dealing defense and these three elements are **(i) Where the original copyrighted material/work is used for the pursuits like private study or research (ii) where a copyrighted material/work is utilized for the purpose of review or criticism (iii) where there is a copying of an original copyrighted work with an intent to the reporting of current events.** After a brief analysis of the fair dealing policy in United Kingdom, we can say that it is contrasted with that of United States, where is a rigid policy with the four factors/pillars to consider fair use.

**C. Fair Use in Malaysia:** In the Malaysia, **Section 13(2)(a) of the Copyright Act of 1987 was amended in year 2012.** Even in Malaysia, likely to the United States same four factors have to be taken into account to check whether an act fall under the category of the Fair Use.

**D. Fair Use in South Korea:** In the South Korea, an amendment was made in the **Korean Copyright Act in the year 2012** and via this amendment, alterations were made in **Article 35-3.** This act of South Korea, too, relies on the four pillars/factors test as prevalent in the United States.

**E. Fair Use in Singapore:** In Singapore, there is a system of fair dealing in country, after an amendment in 2004, provisions for the matters related to the fair dealing were incorporated in the **Section 35 of the Copyright Act of 1987.**

**F. Fair Use in Israel:** Israel works in respect of fair use with its new Laws of Copyright in a similar way to that of the United States. In Israel the fair use is allowed for the pursuits are **(i) Research (ii) Criticism (iii) Journalistic Reporting (iv) Private Study (v) Review.**

**G. Fair Use in Poland: Article 23 to Article 35 of the Polish Copyright Law** dealt with the principle of fair use in Poland and under the

Polish Law there is a clear distinction between the Public Use and Private Use. In Poland, there is a provision that if usage of an original copyrighted work is associated with the commercial purpose, then there is a system of the imposition of fine. In order to attract the fair use, the defendant has to prove that the plaintiff's claim of use of a copyrighted work for the public use by the defendant is false and he/she (defendant) has used the copyrighted work the private purposes.

**H. Fair Use in Australia:** Since 1998, the implementation of fair use system in the Australia has been a subject of debate and discussion of whether this principle should or should not be adopted within the country. Almost of the inquiries, the Government of Australia was in the support of incorporating a “flexible and open” policy of fair use. **In the year 2012,** there were the instructions from the **Australian Law Reform Commission (ALRC)** that a survey should be carried out to explore whether the provisions of statutory licenses and exceptions enshrined in the **Copyright Act of 1968** were appropriate in the digitally created environment. Further in **year 2013,** the Australian Law Reform Commission (ALRC) had made recommendations that there should be a framework on fair use, that is based on or similar to that of the United States Fair Use Policy and **ALRC** recommended the same through the release of Copyright and Digital Economy. In this furtherance, in **year 2015,** the Productivity Commission was directed to conduct a public inquiry into the **Intellectual Property (IP) System of Australia** and in this way, in **year 2016,** there was an issue of a report, which was titled “Intellectual Property Arrangements” along with recommendations were made to the “Fair Dealing” with “Fair Use”. In this way the Government of Australia became hesitant and responded with a statement that this would “publicly consult on more flexible copyright exceptions”. Furthermore, **in year 2018,** there was a conference and sought the suggestions from the public to make their submissions in response to its **“Copyright**

*Modernization Consultation Paper*” and all of that was started by the Department of the Communications and the Arts. **There was a total of 89 submissions and out 89 submissions, 39 favored the fair use and 39 submissions were made against fair use and remaining 11 submissions could not make a decision on this principle** and that’s why, there is no release of final report yet. Under the ongoing law of Australia, the pursuits do not attract fair use are (i) **An access by a person with disabilities** (ii) **Judicial Proceeding/professional advice** (iii) **Study/Personal Research** (iv) **Criticism/review** (v) **Reporting of News** (vi) **Parody/satire.**

#### X. Judicial Approach on “Fair Use” in the United States

A. **Sony Corporation of America vs. Universal City Studios, Inc (popularly known as Betamax Case)**,<sup>244</sup>this was the landmark case concerning the principle of fair use in the United States to be decided by the **U.S. Supreme Court**. In this notable case, Supreme Court of US held that if there is an act of personal recording of an entire television programs for the purposes of time shifting, then such an act does not constitute an act of copyright violation but it comes under the concept of fair use. In this case Supreme Court of U.S. further established that the producers of the equipment of the home movie recording such as VCR and Betamax do not constitute the violation of copyright. In this case U.S. SC further stated that the copying a broadcast of news may be a better contention in respect of fair use rather than an act of copying a movie. Reasoning for this statement is that because an act of copying from scientific, scholarly and journals of news is very crucial to help in the free expression of ideas and also for the newly created scientific and educational works and same is very excellent for public.

B. **Google LLC vs. Oracle America**,<sup>245</sup>this was also a landmark judicial pronouncement on fair use to be decided by the U.S. Supreme

Court. In this case SC of U.S. cleared that the in order to develop the Android Operating System, an usage of Java API (Application Programming Interface) by the Google was an act of fair use. In this case, U.S. SC observed that such an act of Google was for the transformative purposes and it served the different pursuits from an original work. Ultimately, U.S. Supreme Court held that such use by the Google did not cause harm to the potential market value for the original work.

#### XI. Conclusion:

In last, when we summed up this research paper into a conclusion, then we can say that the concept “Fair Use” and it’s resemble/equivalent concept of “Fair Dealing” have played a vital role in managing the regime of copyright laws globally. As we have discussed earlier sections of this research paper that in India, the Copyright Act of 1957 talks about the concept of “Fair Dealing”, which is an embodiment of “Fair Use”. This principle in India paves a way to ensure that the free expression and creativity shall not be a subject to the undue stifles by the restrictions of copyright. A global applicability of the principle of fair use acts as an aid in enabling the usages for the transformative purposes and also in promoting innovations and it also helps in safeguarding the rights of public to ensure an uninterrupted access and engagement with the realm of creativity/creative works. In this digital age, where every day new challenges along with opportunities are arriving and at the same time fair use keeps a harmonious balance like a bridge between the rights of copyright owners and the broader interests of public at large. Section 52 in Indian Copyright Act, 1957 clearly talks about the common exceptions to the violation of copyright and in India clause of fair dealing sets up the criteria for an act or activity to be established as “fair” and same must be fit into the legally recognized pursuits such as Private Study, Criticism, Research, Commentary, News Reporting and Review etc.

Apart from India, this research paper also describes the application of fair use in other

<sup>244</sup> 464 US 417 (1984)

<sup>245</sup> 141 S. Ct. 1183



countries like the United States, Australia and others. After observing the applications of fair use in these countries, we come to a conclusion that the standard and terminology for this concept across the nations may be varied but the core objective is same that to strike a balance between rights of copyright of holders and public interests.

