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# Legal Regulation of Fair Dealing and Fair Use in India, Australia and the United States

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AISHWARYA. V<sup>1</sup>

## ABSTRACT

*Every man who puts in his effort, skill, labour, and capital would want to protect it as its own contribution, and sometimes an author of the work would also like to be known for his work. especially, in case of literary, dramatic, musical, artistic work including cinematograph film and sound recording. The author is given protection for his work under the Copyright Act but is subject to an exception called "Fair dealing". the main objective behind this exception called "Fair dealing "is for the public benefit. Fair dealing ensures that the copyrighted work is protected, and at the same time, the public gets benefit by providing the new upgraded talent and information to the researchers, students, etc. However, this exception is called Fair dealing in India and Australia, whereas in the united states, it is known as Fair use. This article focuses on the exceptions to copyright infringement in India, Australia, and the United States. The article mainly highlights the factors that need to be considered while determining the use to be fair. This paper also deals with the provisions of the doctrine of fair use and fair dealing in the Indian, Australian and united states copyright act.*

**Keywords:** Fair, Infringement, Copyright, Factors

## I. INTRODUCTION

Copyright sets out a bunch of exclusive rights to the author of a copyrighted work concerning the reproduction of the work and other specified acts to promote and encourage the author's financial benefits and enable them to innovate and create more innovative work. If without due permission, any person exercises any of the rights within this bundle, such an act would infringe upon the author's copyrighted work. In India, the U.S., and Australia, copyright is not an absolute right but is put through few exceptions. The Copyright Act does not restrict the usage of a copyrighted work. It permits an individual to use a copyrighted work under certain limitations. One such exception is "fair use." The term fair use, though not defined under the U.S., Indian copyright law, and the Australian copyright law, its judicially derived factors being listed under of the Copyright Act of 1957, providing individual acts not

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<sup>1</sup> Author is a LLM student at School of Law, Christ (Deemed to be University), Bangalore, India.

amounting to infringement.

The terminology concerning the concept of the doctrine of fair use in the U.S. and fair dealing in India and Australia differs. In U.S. law, it is known as "fair use," whereas in U.K. and India, it is known as "fair dealing." The concept of fair dealing was discovered in the case *Gyles v. Wilcox*, in which the notion of "fair abridgment" was introduced by Lord Chancellor Hardwicke.<sup>2</sup> *Folsom v. Marsh* was another case in which Justice Joseph Story laid down the notion of fair use and abridgment with a four factor test, which is very popular to date. However, the doctrine of Fair dealing and Fair use is dealt with differently in different countries.

## II. THE CONCEPT OF FAIR DEALING IN AUSTRALIA

According to the Australian Copyright Act 1968, there is an exception regarding the copyrighted work in Australia relating to fair dealing. Provisions or sections like 40, 41, 43, 43A, 44, 49 deal with the exceptions to the copyright owner's exclusive right.<sup>3</sup>

- Section 40 of the Australian Copyright Act 1968 clearly describes that work copied for the purpose of study, research, and adaptation falls within the purview of Fair dealing.
- Section 40(1) of the Australian Copyright Act specifically states that using a copyrighted work for the purpose of study and research does not result in infringement of copyright concerning literary, dramatic, musical, or artistic work or adaptation of the same but excludes lecture notes from the literary work.

The expression lecture notes for the purpose of this section means any work written by the researcher or lecturer for the purpose of teaching in relation to course.

- Factors to be considered for the purpose of determining fair dealing in relation to the Australian Copyright Act:
  1. The primary objective behind the use of the copyrighted work
  2. The impact of possessing the work or adaptation on the market.
  3. The nature and character of the dealing
  4. In the case of reproduction of any literary, dramatic, musical or artistic work, the amount or substantial amount of work copied from the original copyrighted work must be considered.

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<sup>2</sup> V.K AHUJA, LAW OF COPYRIGHT AND NEIGHBOURING RIGHTS 1-5 (2<sup>d</sup> ed. 2015).

<sup>3</sup> Copyright Act, 1968, No. 63, Acts of Parliament, 1968 (Australia).

Despite subsection (2), even for the purposes of the study, research work copied should not exceed the reasonable portion mentioned.

- Reasonable portion:

A reasonable portion is defined in section 10(2)

1. In case of literary, dramatic, musical and artistic work except for computer programme if consisting of 10 pages, 10 percent of the number of pages from the published pages of the edition
2. If the research or copyrighted material is in the form of chapters and then the reasonable portion would be just one chapter.

In case of literary, dramatic, musical, and artistic work except a computer programme recorded in electronic form, then ten percent of the number of words in the copyrighted work or adaptation if the work is in the form of chapters then a reasonable portion would be that of a single chapter.

- Section 41 of the Australian Copyright Act 1968 deals with fair dealing of copyrighted work concerning criticism and review. It is considered to be fair dealing when the literary, dramatic, musical or artistic work or adaption of the same is reproduced or reasonable portion is extracted for the purpose of criticism and review of the same work or another work.

Provided there is acknowledgment given.

- Section 43 of the Australian Copyright Act deals with the reproduction of the copyrighted work for the judicial proceeding or professional advice:

It is well known that legal practitioners, judges, researchers always rely on the judicial precedents for the purpose of verifying particular reasoning. Henceforth the work reproduced for the purpose of judicial proceeding or review is not an infringement of copyright in literary, dramatic, musical work and artistic work.

Also, fair dealing for the purpose of giving professional advice:

1. Legal practitioner
2. Latent attorney
3. Trademark attorney

Provided the above professionals registered under the concerned acts.

- Section 43 A of the Australian Copyright Act 1968 deals with the temporary reproduction made in the course of communication:

The adaptation of a copyrighted work when used for the purpose or as apart of technical process for communication does not constitute infringement.

- Section 44 of the Australian Copyright Act 1968

States that is not an infringement of the copyright if there has been a short amount of passage, extract that is taken from a published literary, dramatic, musical artistic work cinematograph and sound recording with the intention to use in places of education.

Provided if it is enumerated in a proper place in the book.

The collection has principally the matters in which copyright subsists.

- Section 49 of the Australian Copyright Act deals with the exception for the exclusive right for the libraries and archives. This section aims to preserve adequate protection to copyright owners, meanwhile serving the purpose of providing access for libraries and archives.<sup>4</sup>

### **III. THE CONCEPT OF FAIR DEALING IN INDIA**

Fair dealing in India is something that an unauthorized person can use from the copyrighted material and it is not considered an infringement of copyright. Such uses are criticism, review, research, study, news, reporting, teaching etc.

In *Civic Chandra v. Ammini Amma*<sup>5</sup> it was laid down that "the fair dealing" is not defined anywhere but after the analysis of certain case laws it was held that the standard to find out if the unauthorized use is likely to harm the potential market.

In *Blackwood and sons ltd and ors v. A.N Parasuraman and ors*<sup>6</sup>, the court laid down two things to be examined regarding "fair "in "fair dealing," which means to what extent the fair dealing is fair.

They are as follows:

1. The unauthorized use is made with an intention of competition and to make profits
  2. The unauthorized use is improper and oblique
- Section 52 (1)(a) deals with the works which shall not constitute infringement if the purpose is for the following:

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<sup>4</sup> Copyright Act, 1968, No. 63, Acts of Parliament, 1968 (Australia).

<sup>5</sup> *Civic Chandra v Ammini Amma*, (1996) AIR 329 (India).

<sup>6</sup> *Blackhood and sons ltd and ors v A N Parasuraman and ors*, (1958) AIR 410 (India).

1. Private or personal use
2. Research
3. Current events and current affairs update
4. Criticism and review

It also includes storing the same in electronic form for these purposes also storing of any computer programme which is not an infringing copy for the said purpose shall not constitute an infringement of copyright<sup>7</sup>

- Unauthorized uses permitted in relation to computer programme (52) (1)(aa,ab,ac,ad)(b)
  - It shall not constitute an infringement of copyright when the computer programme is utilized for the purpose for which it was supplied.
  - It shall not constitute an infringement of copyright when the temporary copies are made as backups to merely for securing in case of losing the same.
  - It shall not constitute infringement when there is any act done to obtain information regarding the operating inter-operability of a self-supporting established computer programme for the purpose with other programme by the lawful possessor of a computer programme only if information is not available
- Judicial proceeding:
  - section 52 (1)(d) deals with judicial proceeding for the purpose of reporting or reference and makes clear that it does not constitute infringement if copyright and falls within the purview of fair dealing.<sup>8</sup>

section 52 (1)(e) says that any work reproduced for the purpose of use of the members of legislature does not constitute an infringement

- Reading or recitation in public 52(1)(g)
  - The reading or recitation of the copyrighted material does not constitute infringement provided the amount copied is reasonable and sufficient acknowledgment has been made
- Use of copyrighted material in the course of education 52 (1)(i)

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<sup>7</sup> The Copyright Act 1957, No. 14, Acts of Parliament, 1957 (India).

<sup>8</sup> URJITAH SRIKANTH AND RAHUL AGARWAL, INTELLECTUAL PROPERTY LAW 151-154 (2011).

- The reproduction of any copyrighted material for the purpose of education such as instruction by a lecturer or student as a part of questions that need to be answered in the examination does not constitute an infringement of copyright
- Performance of a work in the course of activities of educational institutions 52(1)(j)
- The performance of any copyrighted literary, dramatic, musical, artistic including sound recording and cinematograph for the purpose of educational activities by the students and staff of that particular institution does not constitute infringement.

Provided the audience is limited to the staff, students, parents, and guardians of the students and people connected to the institution.

- Causing a recording to be heard in public 52(1)(k)
- According to the Indian copyright act 1957

Copyright is not infringed if the sound recording or musical work is made or cause to be heard in public with limited audience in a closed room or hall meant for the recreation purpose of residence.

- Reproduction for the purpose of libraries section 52(1)(o)
- The reproduction of copies of books does not constitute infringement produced.

Provided it done under the direction of a person who is authorized to deal with non-commercial public library.

Books for the purpose of this section include pamphlet, a sheet of music, map, chart or plan.

- Making or publishing of a painting, photograph etc. of a work or architecture or sculpture or other artistic work section (1)(s)(t)
- For the purpose of this section copyright is not infringed by, making or publishing of a painting or drawing or engraving or photograph of a work architecture for the purpose of display

The making or publishing of a painting, drawing, engraving, photograph to permanently situate a public place or any premises to which the public has access

- Use of artistic work by the author himself in certain circumstances (52)(1)(v)
- The person being an author by profession has for the purpose of cast, sketch, plan, model or study is not an infringement of copyright. Even if the author is not owner of that particular work which he intends to modify, cast, sketch or plan.

- Translations and adaptations 52(2)
- The provisions of section 52(1) applies to the doing of any act related to the translation of literary, dramatic, musical work or adaptation of literary, musical dramatic, musical or artistic work.

#### IV. CONCEPT OF FAIR DEALING IN UNITED STATES

- Section 107 of the U.S. Copyright Act 1796<sup>9</sup>

Copyright Act deals with the doctrine of fair use it lays down the standards to identify if the use made by the unauthorized owner is fair and meets the requirement of fair use provided such uses are:

1. Criticism
  1. Comment
  2. News
  3. Reporting
  4. Teaching
  5. Scholarship
  6. Research
- Factors to be considered to determine if it is "fair" in "fair use"

##### 1. The purpose and character:

The U.S. copyright law focuses if the claim is by the non-profit organization or by an organization for commercial purposes. It is generally seen that non-profit organization are more likely to be fair than that of the organization that makes profit-making organization

However, it shall not be assumed that all the non-profit organizations do constitute fair use. court will also consider the others factors to determine the fair use in copyrighted work. similarly, transformative works are considered to be transformative.

For the purpose of this section, transformative works means addition, modification, alteration to the already existing copyrighted work.

##### 2. Nature of the copyrighted work:

Another factor to determine if the use is fair is to check the nature of copyrighted work. the extent to which work that was used is regarding the copyright's purpose of creative expression. So the real work is more likely to support the claim of the copyrighted work than

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<sup>9</sup> US Copyright Act 1976, 17 U.S.C, § 107 (1976).



the creative or imaginative work.

Furthermore, the use of an unpublished work is fair use.

### 3. Amount and substantiality:

This is an extraordinary factor that the U.S has adopted in order to determine fair use. Under this factor the court takes into consideration both the quantity and the quality of the work. If there is less amount of work copied then it is likely to be a fair use. But in case the amount of copied work is less but the copied work is the crucial part which would enhance the identity of the original copyright work. In such case one cannot take the defense of copyrighted work.

### 4. Effect of the use upon the potential market for (or) of the copyrighted work:

Under this factor, the court reviews if the use of a copyrighted owner by an unauthorised user causes harm to the present or future market by replacing the original market for the original copyrighted work.

### **Leibowitz v. Paramount Pictures Corp**<sup>10</sup>

In this case a famous professional photographer named Annie Leibovitz had photographed a famous celebrity Demi Moore who was seven months pregnant and had published on the cover of the magazine Vanity Fair in August 1991 titled More Demi Moore which received a huge response and appraisal.

In the year 1993, the Paramount Pictures for the purpose of promotions chose to play with the photograph captured and published by Annie Leibovitz on the Vanity Fair in August in the year 1991 for the film Naked Gun 33 1/3 the final insult.

The Paramount Pictures was spotted firing Leslie Nielsen's face with the body of a pregnant woman shot digitally and exploited in such a manner that was very similar to that of Annie Leibovitz photograph of Demi Moore. The Paramount Pictures advertisement became popular and then Leibovitz sued for copyright infringement.

1. Whether the copyright was infringed by Paramount Pictures?
2. Whether there was any harm caused on the potential market?
3. Whether the Paramount Pictures can take the defense of fair use?

From the facts of the case it is quite evident that the Paramount Pictures had almost copied everything from the photograph published in the Vanity Fair magazine. But the court in this case after analyzing the issues according to the four factor test. The court held that since there

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<sup>10</sup> Leibowitz v. Paramount Pictures Corp, 137 F.3d 109 (2d Cir. 1998).

is not no harmful effect on market by the use of the photograph the court held it to be a fair use.

Annie Lebivoitz being aggrieved by the decision of the court argued, saying that she was entitled to licensing revenue from the photograph. The court in turn held the revenue that photograph generated was very less or no revenue at all. the court also took into consideration various other factors which were very close to the original photograph such as posing, lighting, the size of the ring and expression

The court analysed each of the above-mentioned similarities:

The lighting in each photo is different as in the paramount photo the lighting is garnish and highly contrasting whereas in the Leibovitz photo the lighting is warmer.

Secondly, the ring on the paramount pictures model is much larger than that of the Leibovitz photo model.

Thirdly, the expression in both of the model's faces was also different. in this case the court has compared the expression of the original Leibovitz model to the ancient classic "Venus Pudica" pose whereas the paramount model's expression is more of a serious one.

Further, the court highlighted major constrat saying that the difference is of a healthy pregnant women's body and other is that of an older man's face superimposed into women's body.

The court in this case clearly from the beginning of the trail held the use to be fair. At, the trial southern court of New York held the use to be fair. when the aggrieved party appealed to the United States the court of appeals for the second circuit the court again affirmed the paramount pictures' use to be a fair use.

The doctrine of fair use or fair dealing is a terminology used in different countries depending upon the usage. the concept of fair use and fair dealing acts as an exception to copyrighted work. However, different factors in different countries determine if the use is fair and the particular use has the met the requirements of law. As there is no specific meaning or formula that gives us a clear cut idea about the doctrine it is implied that courts depend on the circumstances and other factors to into consideration.

However, there are certain provisions though not adequate in the Indian, Australian, and United states which specifies the factors and tests to determine and identify fair use.

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