

## Indian Perspective of Fair Dealing under Copyright Law: *Lex Lata* or *Lex Ferenda*?

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Fair dealing is an important concept in Indian copyright law. However, despite its importance in the copyright regime and the importance of the copyright regime to advancement of technology, the concept remains relatively unexplored in India. The Americans, on the other hand, have been rapidly refining their concept of fair use over the past decades. Has the Indian Judiciary benefited from the American experience? This article attempts to explore the historical roots of copyright law and fair dealing in India, its *raison d'être*, the statutory and primarily the judicial treatment of the concept. It also discusses the attitude of the Indian judiciary to the defence of fair dealing, in the light of American jurisprudence.

The article concludes to say that though the Indian courts have borrowed the factor analysis method in the assessment of fair dealing from US and have also adopted a disciplined approach in dealing with this defence, Indian copyright jurisprudence is still awaiting its watershed equivalent of *Folsom v Marsh* to address fundamental issues about the purpose, meaning and application of the Indian law on fair dealing. The role of fair dealing in the overall scheme of Indian copyright law regime remains to be defined.

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The doctrine of fair use or fair dealing is an integral part of copyright law.<sup>1</sup> It permits reproduction of the copyrighted work or use in a manner, which, but for the exception carved out would have amounted to infringement of copyright. It has thus, been kept out of the mischief of the copyright law.<sup>2</sup>

The defence of fair dealing originated as an equitable doctrine allowing certain uses of literary works that copyright law would otherwise have prohibited, if prohibiting such uses 'would stifle the very creativity which that law is designed to foster'.<sup>3</sup> Fair dealing also serves as an answer to those 'fair' copyright proponents who actively argue that copyright, not being a patent, is not an absolute right and should therefore be balanced against user rights.<sup>4</sup> Indeed, the fair dealing doctrine is

'a key part of the social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture ...'<sup>5</sup>

India's fair dealing doctrine, along with that of other former UK colonies, has been perceived as having the weak imperial import. Fair dealing, as found in the United Kingdom's copyright framework,

has been widely characterized as restrictive, featuring an exhaustive list of defined exceptions.<sup>6</sup> Its US 'cousin', fair use, has been seen as a more robust vehicle for users.<sup>7</sup> In contrast to the Indian and the UK provisions, which are traditionally applied only to a work used for one of a closed list of enumerated purposes, fair use in the US allows any use of a work to be 'fair' pursuant to a set of factors that aid in the decision-making process. Apart from this, the US Copyright Code offers an open list of permissible purposes.<sup>8</sup> The US fair use defence is said to offer flexibility at the expense of certainty, fair dealing, on the other hand, is said to offer certainty but is very rigid.<sup>9</sup>

Members of WTO are obligated to conform with the essential factors of exceptions to copyright as provided by the Berne Convention and Article 13 of TRIPS Agreement which lay down a 'three-step test'<sup>10</sup>, i.e., exception must be 'special'; it must not conflict with normal exploitation; and it must not unreasonably prejudice the legitimate interests of rights holders. It is to be noted that even the TRIPS equation of fair dealing has been considered to be closely aligned with the US doctrine of fair use.<sup>11</sup> Therefore, the US fair use provision has been construed as the 'fairest' of all.<sup>12</sup>

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Fair dealing and fair use began as judge-made exceptions to the mechanism and are now statutorily entrenched in their respective jurisdiction. But what is the role of these exceptions and what scopes are they intended to encompass? With the advancement of technology, the Americans have had the occasion, rather, a need, to address these issues in some detail. India has in recent years witnessed tremendous technological advancement but nevertheless a limited exposure to the concept of fair dealing. But can the US initiatives in this area serve as fruitful sources of inspiration for the development of Indian fair dealing doctrine?

### Legislative Context of Fair Dealing in India

Before analysing the jurisprudence of fair dealing as developed by the Indian Courts, it will be useful to outline briefly the Indian legislative fair dealing context. In India, the doctrine of fair dealing is statutorily entrenched under Section 52 of the Indian Copyright Act, 1957. The English Copyright Act, 1842 was held to be applicable in India by the Bombay High Court in *McMillan v Khan Bahadur Shamsul Ulama Zaka*, even when the Act was not made expressly applicable to India.<sup>13</sup> In 1914, the Indian legislature passed the Copyright Act, 1914 so that thenceforth the law of copyright was governed by the Imperial Copyright Act of 1911 which was essentially the extension of the British Copyright Act, 1911. The Indian legislature; however had a very limited power of modification and addition.<sup>14</sup> Fair dealing was first statutorily introduced in 1914 as a mere duplication of Section 2(1)(i) of the UK Copyright Act, 1911, providing that copyright would not be infringed by 'any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary'.<sup>15</sup> The current Indian copyright statute i.e., the Indian Copyright Act was passed in 1957 as an 'independent and a self-contained law'.<sup>16</sup> Even the new legislation had extensively borrowed, both textually and in basic principles, from the new UK Copyright Act, 1956.<sup>17</sup> However, the scope of fair dealing was increased in the statute of 1957 and 'a fair dealing with any work for the purposes of radio summary or judicial proceeding' was hereafter proclaimed not to constitute an infringement of copyright.<sup>17</sup> Since 1957, Section 52, which constitutes fair dealing, has been amended thrice.<sup>18</sup> The first minor amendment brought to Section 52 was by the Copyright Amendment Act,

1983 (23 of 1983) whereby an explanation below sub-clause (ii) of clause (b) has been inserted.<sup>19</sup> The Section was, however, comprehensively amended by the Copyright Amendment Act, 1994. Activities like private research and dealing with computer programmes and their copying by a lawful possessor were incorporated into the provision and making sound recordings of any literary, dramatic and musical works in certain circumstances were declared to constitute fair dealing. The latest amendment brought to Section 52 was in the year 1999, which again sought to address issues relating to computer programmes.

### Raison D'etre

The Indian Copyright Act, 1957 amended the law prevailing before its enforcement and consolidates the law relating to copyrights. The statement of objects and reasons of the Indian Copyright Act reflects the recognition that the new copyright regime in India was to be built on the bedrock of growing public consciousness of the rights and obligations of authors. The new statute also sought to acclimatize the legislation to advances in technology and make the domestic copyright law consonant with India's international obligations.<sup>17</sup>

The various amendments to the Copyright Act also have an obvious implication as to the reasoning behind fair dealing defense under the Indian Act. The new exceptions to copyright infringements introduced via the amendments brought to Section 52 in 1995 have also endeavored to strike a balance with the emerging technical challenges.

In *Eastern Book Company v DB Modak* the question before the Court was that whether the copying of copy-edited judgments as published in the plaintiff's law report by the defendant amounted to copyright infringement and whether the copying constituted fair dealing under Section 52(1)(q) Sub-clause (iv) of the Act, which excludes the reproduction or publication of any judgment or order of a court, tribunal or other judicial authority from the scope copyright infringement. The Indian Supreme Court following the approach laid down by the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*,<sup>20</sup> rejected the 'sweat of the brow' doctrine, (which conferred copyright on works merely because time, energy, skill and labour was expended, that is, originality of skill and labour), and held that the work must be original 'in the sense

that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author'. It is noteworthy that the Court noticed that the two positions i.e. the 'sweat of the brow' on one hand, and 'modicum of creativity' were extreme positions; it preferred a higher threshold than the doctrine of 'sweat of the brow' but not as high as 'modicum of creativity'.<sup>21</sup> Thus, Indian law too mandates that not every effort or industry, or expending of skill, results in copyrightable work, but only those which create works that are somewhat different in character, involve some intellectual effort, and involve a certain degree of creativity.

Recently, the Delhi High Court, in the case of *Chancellor Masters*, has aptly summed up the policy behind the defence of fair dealing. The Court held that fair dealing '...legitimizes the reproduction of a copyrightable work. Coupled with a limited copyright term, it guarantees not only a public pool of ideas and information, but also a vibrant public domain in expression, from which an individual can draw as well as replenish. 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....'<sup>22</sup>

In *Wiley Eastern Ltd and Ors v Indian Institute of Management*; the Court clearly traced the purpose of the defence of fair dealing to the Indian Constitution:

'The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India- so that research, private study, criticism or review or reporting of current events could be protected. Section 52 is not intended by Parliament to negatively prescribe what infringement is.'<sup>23</sup>

### Judicial Treatment of Fair Dealing

The Indian Copyright Act under Section 52 carves out fair dealing from copyright infringement as affirmative defences, which places the onus of proving the defences onto the user once the copyright

owner establishes *prima facie* infringement by substantial copying of expression. However, the fair dealing cases in India do not always establish *prima facie* infringement before considering the application of fair dealing.<sup>24</sup>

The first issue in these cases, following the text of the Copyright Act, is the definition of fair dealing. As the Act does not define fair dealing, the Indian courts have heavily referred to the English authority of *Hubbard v Vosper* which contained the oft-quoted definition of fair dealing by Lord Denning:

'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.....Then you must consider the use made of them.....Next, you must consider the proportions.....Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.'<sup>25</sup>

Also, the enumerated purposes under Section 52 have been typically interpreted as exhaustive, inflexible and certain, since any use not falling strictly within an enumerated ground is considered an infringement.<sup>26</sup> The courts have time and again reiterated that it is impossible to develop a 'rule of thumb' for cases of fair dealing as each case depends upon in its own facts and circumstances.<sup>27</sup>

As the courts in India have analysed the doctrine of fair dealing, in which they drew primarily from UK and US approaches, they endorsed certain factors that may be more or less relevant in fair dealing cases and which are not provided by the Indian copyright statute. The Courts have traditionally articulated and applied the following three factors in deciding the cases:<sup>28</sup>

#### The Amount and Substantiality of the Dealing

The first factor is the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>29</sup> In order to be an infringement of a man's copyright there must be a 'substantial infringement' of the work.<sup>30</sup> Its logic is plain: the larger the taking, the less fair the dealing.

In *RG Anand v Delux Films and Ors*, the Indian Supreme Court while recognizing the idea-expression dichotomy held that there can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author

of the copyrighted work. The Court further held that where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur and therefore in such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work.<sup>31</sup> In other words, in order to be actionable the copy must be a substantial and material reproduction of expression and not merely of an idea. Therefore, the question of fair dealing defense does not arise in case a copying is made of an idea as that would not, at all, constitute a copyright infringement.

However, the issue of substantiality is the subject of two different concerns. First, there is no copyright infringement unless there is substantial taking. Second, once there is *prima facie* copyright infringement, whether a use is fair is partly determined by the substantiality of the taking as one of the factors.<sup>32</sup> Therefore, for fair dealing to apply, the use must be substantial enough to render an infringement, and for the use to be fair, it must not be too substantial. However, in Indian jurisprudence, the courts have been unable to separate the two very different inquiries. In either case, however, generally, Indian courts have applied both quantitative and qualitative test of substantiality and the literal number of words copied has not been held to be a determinative factor.<sup>33</sup> The courts have recognized that the permissible quantum of extracts or quotations will depend upon the facts of each case.<sup>34</sup>

In *Blackwood* case, which involved the reproduction of the work in the form of guides, the court rightfully held that the alleged infringer's intention is an important but not a decisive factor in determining whether the work in question was copied so substantially that the copying would amount to negative 'fairness'.<sup>35</sup> The Court took a peculiar stand in *SK Dutt v Law Book Co and Ors*, where the dispute was based on the use of certain quotations from a work. The Court interpreted the fact of acknowledgement by the authors of the plaintiff's material to mean that had the authors made any other use of the plaintiff's book in compiling their own book, they would have acknowledged it; thus, the copying was held not to be a substantial taking.<sup>36</sup>

#### **Purpose, Character (and Commercial Nature) of the Dealing**

The next consideration relates to the purpose and character of the use.<sup>37</sup> Section 52 of the Indian Copyright Act also sets out in an exhaustive list

various purposes that fall under the domain of fair dealing. If the purpose of the reproduction is not one of those enumerated in the statute the question of fair dealing would not arise.<sup>38</sup> The major purposes which the act enumerates are: private study, research, criticism, review.<sup>35</sup>

When a fair dealing is made, *inter alia*, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, there can be no claim as to copyright infringement. Thus, if some performance or dance is carried out within the purview of the said clause, the mischief of copyright cannot be claimed. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the purview of amateur club or society, the same would not constitute any violation.<sup>39</sup>

The words 'research or private study' were replaced by the words 'private use including research' by the Copyright (Amendment) Act, 1994 (Act 38 of 1994). What is contemplated by this amendment is a defence to the person conducting research or private study who while doing so, if dealing fairly with a literary work, may not incur wrath of the copyright having been infringed. But, if a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defence under Section 52(1)(a)(i) would not be available to such a publisher though the book published by him may be used or be meant for use in research or private study.<sup>40</sup> Dealing with a work for private study must not involve any publication. Private study covers the case of a student copying out a book for his own use and not the circulation of copies among other students.<sup>47</sup>

The Act being silent on the meaning of research, the Court in *Blackwood* case while determining its meaning accepted the meaning of research as provided in 'The Shorter Oxford Dictionary' as 'an investigation directed to the discovery of some fact by careful study of a subject; investigation, inquiry into things'. In the light of this meaning, the Court held that chapter summaries of the plaintiff's work, made by the defendant, cannot be said to comprise quotations for the purposes of 'research'.<sup>41</sup>

According to the Indian courts, while a review may summarize the original work and present it for perusal to a third person so that such person may get an idea about the work; a criticism may discuss the merits and demerits of the work and a guide may seek to enable

students of the original work to better understand it from the point of view of examinations but, on the other hand verbatim copying cannot be provided any shield under the copyright regime.<sup>42</sup> A commentary has been held to be an expression of opinion or a set of explanatory notes on a text.<sup>43</sup>

American courts have further developed the factor of purpose and character by adding to the facet of 'transformative character of the use'.<sup>44</sup> This means that a mere reproduction from the original in a mechanical manner lacks the necessary element of being transformative.<sup>45</sup> Remarkably, the Indian Supreme Court, presciently in its judgment in *Anand's* case pronounced a principle resembling the 'transformative work' doctrine which was developed in the United States much later.<sup>46</sup> It held that:

'Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises'.

Again in *V Ramaiah v K Lakshmaiah*, where the question that whether the Act of the respondent in writing the guide is an infringement of the copyright, the courts were cautioned to keep in mind that defendants pleading fair dealing should not have used the work without making any independent contribution, in other words, the work must have been transformative.<sup>47</sup>

The Court in *Chancellor masters*, which again concerned copying for the purpose of guide books, had laid down that while dealing with the issue of fair dealing, a Court should ask whether the purpose served by the subsequent (or infringing) work is substantially different (or is the same) from the purpose served by the prior work. To be called transformative, the subsequent work must be different in character; it must not be a mere substitute, in that, it not sufficient that only superficial changes are made, the basic character remaining the same.<sup>48</sup> This determination, according to the Court, is closely knit with the other three factors, and therefore, central to the determination of fair use, i.e., if the work is transformative, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work.<sup>49</sup>

In *Chancellor Masters*, the Court also held that the purpose and manner of use by the defendants of the questions found in the plaintiff's textbooks were not

only different but, additionally, the defendants' works can be said to be 'transformative', amounting to 'review' under Section 52(1)(a)(ii) of the Act.<sup>50</sup> Here, the term 'review' was interpreted in a contextual background. The plaintiff's claim to copyright was premised on the work being a 'literary' one. The review or commentary, of a part of such mathematical work too was seen in the background of this claim. In the context of a mathematical work, a review was interpreted to be a re-examination or a treatise on the subject.

The courts have generally taken a mild stand on guides so far as the purpose of the guide is only to help the students to understand the meaning, significance and answers that have to be written for the questions therein. Thus, it falls four squarely under fair dealing with a literary work for purpose of private study *bonafide* intended for the use of educational institutions.<sup>51</sup> But the Court in *Blackwood* case declined to hold that guides constitute a 'criticism' of the copyright works.<sup>52</sup>

In *Syndicate of the Press of the University of Cambridge and Anr v B D Bhandari and Anr*, the Court while holding the work of the defendants to be transformative and not merely a substitute for the book of the plaintiff was reluctant to issue an injunction order because of the large scale use of such guide books and dependence thereon by students.<sup>53</sup>

On the other hand, in *Syndicate press of University of Cambridge v Kasturilal and Sons*, the Court went ahead to hold that even if it is assumed that the defendant's work could have enabled students to give effective answers in examinations, such a situation cannot permit purloining verbatim texts of the original work.<sup>54</sup>

It is important to note that the courts may also rely on public-interest purposes for allowing an otherwise infringing activity, but this common law power has been rarely exercised in India or in the UK, where it was invented.<sup>55</sup> In *Rupendra Kashyap v Jivan Publishing House*, where the defendant was involved in publishing question papers of the CBSE's examinations, to which, the plaintiff contended to hold an exclusive license, the Court has very explicitly held that 'the law as to copyright in India is governed by a statute which does not provide for defence in the name of public interest. An infringement of copyright cannot be permitted merely because it is claimed to be in public interest to infringe a copyright.'<sup>56</sup>

#### **Effect on the Potential Market: Likelihood of Competition**

This factor seems to have been a weaker consideration in India. However, in *Blackwood* case, the Court held that the possibility of competition is all that is necessary for determining infringement of a copyright.<sup>57</sup> In *ESPN Stars Sports* the Court endorsed the 'likelihood of competition' and held that if the work is being used to convey the same information as the author, for a rival purpose, it may be unfair.<sup>58</sup> Effect of the publication as a competitor with the plaintiff's copyright work is also one of the aspects sometimes taken into account by the Indian courts for ascertaining whether the reproduction is substantial.<sup>59</sup>

An important aspect under this factor is the 'impression of the work' alleged to be an infringement. In *ESPN Stars Sports v Global Broadcast News Ltd and Ors*, the plaintiffs had contended that they held sole and exclusive rights/license from various sports bodies including but not limited to 'Cricket Australia' to televise sporting events including the India i Australia cricket match and the defendants in broadcasting those matches had violated their copyright. The Court again while referring to *Vosper* held that 'After all is said and done, it must be a matter of impression'.<sup>60</sup>

#### **Importing Fair Use: In Which Direction are the Courts Heading?**

In *Blackwood* case, which was based on Imperial Copy Right Act, 1911, the Court had impliedly cautioned against the application of American law in India. There the Court was unable to derive much assistance from the American authorities as the Court found the provisions of the two statutes governing copyright law in the two jurisdictions to be different.<sup>61</sup>

Fair dealing cases have been rare in India until the recent decades which, even then, generated only a mere handful of cases. One must again be mindful that the Indian Copyright Act does not contain any list of factors to consider in determining fair dealing. Nonetheless, given the limited Indian decisions, navigating these decisions using the American system of factor analysis provides at least some framework of orientation.<sup>62</sup>

In the United States, the four statutory factors have been interpreted to be 'illustrative' not definitive, the factors are not to be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.<sup>63</sup> Also, the factors have often been perceived as non-exhaustive.<sup>64</sup>

However, Indian courts have, at times, adopted a piecemeal approach in the application of these factors, thus applying a particular factor in isolation with other factors.

As for the first American factor, i.e., the purpose of dealing (and its commercial nature) is the most pronounced factor in India and it tops the hierarchy of factors. However, as mentioned before, the Indian courts have viewed the purposes enumerated in the act as exhaustive. For instance, in *Supercassette Industries v Nirulas Corner House (P) Ltd*, where the plaintiff alleged copyright infringement on the ground that few audio clippings of songs in which they owned copyright were played on the television in an enclosed room of the defendant's hotel, the Court, while rejecting the defence of fair dealing in terms of Section 52(1)(k) held that the two categories 'hotels' and 'similar commercial establishment' gives a clue to Parliamentary intention to exclude the operation of such categories of establishments from the benefit of what are obviously deemed not infringements and that such provisions should receive a restricted interpretation, having regard to the nature of the expressions used. These provisions were held to be pointers to the legislative intent of treating use of televisions and sound recordings, in hotels as communications to the public as opposed to a private purpose, even if played in an enclosed hotel room.<sup>65</sup> Therefore, the Court declined to extend the law beyond its meaning to take care of any perceived broader legislative purpose.

It can be inferred from this that though the courts have utilized the American factor of purpose and transformative character but in spite of that, the courts have also remained faithful to the language used in the statute, by strictly adhering to purposes enumerated in the act and giving the provision a restricted interpretation. Also, the Indian courts have not taken consideration for other factors such as necessity. Thus, such a rigid approach by the courts has failed to introduce the element of flexibility contemplated under the American fair use doctrine.

The second American factor of the nature of the copyrighted work, as in the US, has attracted little comment in Indian courts.<sup>66</sup> It received brief mention in *Civic Chandran*, which involved the publishing of a counter-drama in a way of critical analysis, where the Court had held that the nature of the work, i.e., to criticize the social structures in Kerala, by itself meant that certain sequences, events and incidents would be

common to both the prior and the subsequent work, and that the latter was not meant to imitate the former.<sup>67</sup> In this case, the Court had actually invoked the US 'scenes a faire' doctrine without its formal acknowledgment. The doctrine has been defined in US as 'incidents, characters or setting which are as a practical matter indispensable, or at least standard, in the treatment of a given topic,'<sup>68</sup> or 'scenes which necessarily result from identical situations.'<sup>69</sup>

The most extensive judicial discussion on the topic of fair dealing surrounds the third American factor of substantiality. According to some, this factor is the least significant in the United States.<sup>4</sup> This is somewhat also reflected in the American decision of *Williams & Wilkins Co v US*, where the US Supreme Court held that 'sometimes been suggested that the copying of an entire copyrighted work cannot ever be 'fair use,' but this is an overbroad generalization the extent of the copying is one important factor, but only one, to be taken into account, along with several others'

The more structured view of the issue of substantiality appeared first in India in the *Blackwood* case, where, as mentioned before, the Court in citing English authorities held 'that rather the intention it is important to see how substantially has the work in question been copied that such an amount of copying would negative 'fairness'.

It was in *E M Forster and Anr v A N Parasuram*, which involved alleged violation of plaintiff's copyright by reproduction of his book in a guide, that the Court explicitly divided its decision between the determination of infringement (that copying must be substantial enough to render an infringement), and the determination of fair dealing (that the copying must not be too substantial) and refused to deal with the issue of fair dealing until infringement was found.<sup>70</sup> As mentioned before, this structured approach in analysing the issue of substantiality is rare among Indian cases of fair dealing.

The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, is seen as the most important one in the United States. In *Harper & Row v Nation Enterprises*, the US Supreme Court applied much emphasis on the implication of the defendant's use on the potential market of the copyrighted work.<sup>71</sup> The Court held this fourth factor as the single most important factor while determining fair use. However, as mentioned earlier, this factor is little used in Indian cases on fair dealing.

Apart from the cases already considered under the previous discussion on this factor, the Court in *Chancellor Masters* case, mentions the factor while discussing the American authorities but there was no further discussion on the point.<sup>72</sup>

### Conclusion

Though, the Indian courts have borrowed the US born, 'factor analysis method' in the assessment of fair dealing, the Indian judiciary has only considered issues concerning fair dealing in each case in a limited context. It is therefore left without much opportunity to take a holistic view of how these issues may interact together or an analytical view of how these issues may be broken down. The courts have not been able to explore other factors, such as, bad faith because they have not come at issue. Though such factors may not have been expressly highlighted as a potential factor, this silence, however, does not mean that such factors cannot feature in future cases.

Rather than incorporating fair use by the introduction of factor analysis method in the Indian Copyright Act, Indian courts should rather seek to build on the distinctive features of its fair dealing regime, such as its policy preoccupations and other factors (in addition to those incorporated in the US code) for determining fair dealing that helps introduce the element of flexibility.

The doctrine of fair dealing is indisputably a necessity. However, its role in the overall scheme of copyright law remains to be defined. Precisely, Indian copyright jurisprudence is awaiting its watershed equivalent of *Folsom v Marsh*<sup>73</sup> to address fundamental issues about the purpose, meaning and application of the Indian law on fair dealing.

The Calcutta High court admitted the dearth of judicial jurisprudence on copyright matters, in *Barbara Taylor Bradford v Sahara Media Entertainment Ltd* in the following words:

'Our country is singularly devoid of reported decisions in copyright actions, at least up to the present day. We have had the case of R G Anand shown to us; but from that time until now there appears to have been no Indian authority which either side found worth citing before us. The statutory sections are therefore the first things to see'.<sup>74</sup>

Nonetheless, the approach of the Indian courts, even if sometimes too rigid or limited is a very cautious and disciplined one. The notion of exceptions to copyright infringement which had in the

past been largely premised on a narrow interpretation of its scope, the Indian courts have now broadened its scope. Indeed, in the recent fair dealing cases, the courts' approach generally has been to examine the cases by going through each of the factors in the backdrop of the enumerated purposes as a checklist, weighing each of them in favour of the copyright owner or the user and then tallying up the net score. This approach has in a way been effective to prevent the doctrine from freezing.

It is without dispute that both the US and the Indian legislation purport to maximize the promotion of creativity and the dissemination of information at the same time. Fair dealing and fair use both appear as defences to the otherwise closed monopoly entrenched in the legislation. But the real differences between India and its US counterparts can be traced ultimately in the policy preoccupations of their respective courts. The provision for fair dealing in the Indian Act is brief and does not define the meaning or the application of the defence. The provision for fair use in the American Act, on the other hand, is more elaborate, culminated from extensive judicial reflection. The American Act is flexible and open for further advancement and is so intended by its legislators. Indian legislators, desiring certainty, have chosen the conservative approach and the Indian judicial jurisprudence is reflective of this approach.

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- 15 UK, 1 & 2 Geo V, Clause 46, Section 2(1)(i), Burrell Robert, Reining in copyright law: Is fair use the answer? *Intellectual Property Quarterly*, 4 (2001) 361-388.
- 16 Statement of Objects and Reasons, Indian Copyright Act, 1957.
- 17 Narayanan P, *Copyright and Industrial Designs*, 3rd edn (Eastern Law House, Kolkata), 2002, p. 8.
- 18 The three amendments brought to Section 52 have been via Copyright (Amendment) Act, 1983 (Act 23 of 1983), entered into force 9 August 1984, Copyright (Amendment) Act, 1994 (Act 38 of 1994), entered into force 10 May 1995 and 1999 (Act 49 of 1999), entered into force 15 January 2000.
- 19 The explanation clarifies that the publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of this clause.
- 20 (2004) SCC 13.
- 21 AIR 2008 SC 809 Para 38.
- 22 2008 (38) PTC 385(Del) Para 33.
- 23 61 (1996) DLT 281 Para 19.
- 24 *Civic Chandran v Ammini Amma*, 1996 PTC 16 670.
- 25 (1972) 1 All ER 1023 p. 1027.
- 26 *Blackwood and Sons Ltd and Othrs v AN Parasuraman and Ors*, AIR 1959 Mad 410 Para 84 and *Civic Chandran*, 1996 PTC 16 670.
- 27 *ESPN Stars Sports v Global Broadcast News Ltd and Ors*, 2008(36) PTC 492 (Del) Para 34.
- 28 *Civic Chandran*, 1996 PTC 16 670. It may be noted that these factors correspond with the fair use factors which find statutory recognition under section 107 of the US Copyright Code, 17 USC §107 as limitations on exclusive rights: Fair use.
- 29 Section 107(3) of the US Copyright Statute, 17 USC §107.
- 30 *SK Dutt v Law Book Co and Ors* AIR 1954 All 570 Para 12 and *ESPN Stars Sports v Global Broadcast News Ltd and Ors*, 2008 (36) PTC 492 (Del).
- 31 [1979] 1 SCR 218 Para 52. The expression-idea dichotomy has also been approved in *Academy of General Edu, Manipal and Anr v B Malini Mallya*, AIR 2009 SC1982 Para 19 and *Eastern Book Company and Ors v DB Modak and Anr*, AIR 2008 SC 809 at Para 38.
- 32 Lape L G, Transforming fair use: The productive use factor in Fair Use Doctrine, *Albany Law Review*, 58 (1995) 677-724.
- 33 *Blackwood Case*, AIR 1959 Mad 410 Para 71 and *Civic Chandran*, 1996 PTC 16 670. It may be noted that in *Harper & Row Publishers v Nation Enterprises*, 471 US 539, the US



- Supreme Court also focused on quantity and quality and though insubstantial in quantity, the copied extracts were held to constitute the 'heart of the book'.
- 34 *Civic Chandran*, 1996 PTC 16 670 and *ESPN Stars Sports v Global Broadcast News Ltd. and Ors*, 2008 (36) PTC 492 (Del) Para 34.
- 35 AIR 1959 Mad 410 Para 86.
- 36 AIR 1954 All 570 Para 45.
- 37 Section 107(1) of the US Copyright Statute, 17 USC §107.
- 38 *Blackwood Case*, AIR 1959 Mad 410 Para 84.
- 39 *Academy of General Edu, Manipal and Anr v B Malini Mallya*, 2009(2) SCALE 310 Para 20.
- 40 *Rupendra Kashyap v Jivan Publishing House*, 1996 (38) DRJ 81 Para 21.
- 41 AIR 1959 Mad 410 Para 84.
- 42 *Ramesh Chaudhary and Ors v Ali Mohd*, AIR 1965 J&K 101.
- 43 *Syndicate of the Press of the University of Cambridge on behalf of the Chancellor, Masters and Scholars of the University of Cambridge and Anr v B D Bhandari and Anr*, 2005(31)PTC58(Del) Para 7.
- 44 *Sony Corp of America v Universal City Studios*, 464 US 417, 104 S Ct 774 (1984) and *Campbell v Accuff- Rose Music*, 510 US 569 (1994).
- 45 *Syndicate press of University of Cambridge v Kasturilal and Sons*, 2006 (32) PTC 487 (Del) Para 7.
- 46 *Chancellor Masters Case*, 2008(38) PTC 385(Del) Para 28.
- 47 1989 (9) PTC 137.
- 48 2008(38) PTC 385 (Del) Para 34.
- 49 *Chancellor Masters Case*, 2008(38) PTC 385 (Del) Para 34.
- 50 2008 (38) PTC 385 (Del) Para 37.
- 51 *V Ramaiah v K Lakshmaiah*, 1989 PTC 137.
- 52 AIR 1959 Mad 410 Para 84.
- 53 MIPR 2009 (2) 60 Para 8.
- 54 2006 (32) PTC 487 (Del) Para 7.
- 55 David Vaver, Canada's intellectual property framework: A comparative overview, *Intellectual Property Journal*, 17 (2004) 125-149.
- 56 1996 (38) DRJ 81 Para 24.
- 57 AIR 1959 Mad 410 Para 85.
- 58 *ESPN Stars Sports v Global Broadcast News Ltd and Ors*, 2008 (36) PTC 492 (Del) Para 17.
- 59 *Blackwood Case*, AIR 1959 Mad 410 Para 74.
- 60 2008 (36) PTC 492(Del) Para 32, *Chancellor Masters Case*, 2008 (38) PTC 385 (Del) Para 27.
- 61 AIR 1959 Mad 410 Para 85.
- 62 Section 107 of the US Copyright Statute, 17 USC §107, lists four factors courts must consider in determining whether a particular use of a work is a fair use:
- (i) Purpose and character of the use,
  - (ii) Nature of the copyrighted work,
  - (iii) Amount and substantiality of the portion of the work used, and
  - (iv) Effect on the use of the new work on the potential market for the copyrighted work.
- 63 *Campbell v Accuff- Rose Music* 510 US 569 (1994) at 577-78.
- 64 Catherine Ng, When Imitation is not the sincerest form of flattery fair dealing and fair use for the purpose of criticism in Canada and the United States, *Intellectual Property Journal*, 12 (1997) 183-208. However, non-exhaustiveness of the list is sometimes overlooked. Patry W F and Perlmutter S, Fair use misconstrued: Profit, presumptions, and parody, *Cardozo Arts & Entertainment Law Journal*, 11 (1993) 667-709.
- 65 148 (2008) DLT 487 Para 20.
- 66 Section 107(2) of the US Copyright Statute, 17 USC §107.
- 67 1996 PTC 16 670.
- 68 *Atari Inc v N Am Philips Consumer Elecs Corp*, 672 F 2d 607, 616 (7th Cir 1982) [quoting *Alexander v Haley*, 460 F Supp 40, 45 (SDNY 1978)].
- 69 *Reyher v Children's Television Workshop*, 533 F 2d 87, 92 (2d Cir 1976).
- 70 AIR 1964 Mad 331 Para 14.
- 71 471 US 539 (1985).This factor constitutes the fourth factor under Section 107 of the US Copyright Statute, 17 USC §107.
- 72 2008 (38) PTC 385 (Del) Para 24.
- 73 9 F Cas 342.
- 74 2004 (28) PTC 474 (Cal) Para 56.