

Doctrine of Fair Dealing in Copyright and Intellectual Property Jurisprudence - By Raj K Suwal

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Introduction

There are various philosophical and consequential theories which justify for copyright law as it provides benefits to intellectuals and warrant to crook. Along with these, the vital aspect of copyright is that, it secures individual creator as well as whole public, the user, by keeping balance between the encountering interests of these couple of parties. In general view the whole copyright law crafts the system which creates and protects rights and provides remedies for infringement to the owner and author of copyrighted work. But in wide sense it secures the basic human entitlements and fundamental rights for the sake of being capable to reach to the stage on which person can develop his/ her both inner and external attitude and personalities as a whole. The basic requirements of human social life mainly for the personality development is made possible by reasonable free use of copyright work which is provided as special category of permitted act which do not make an act infringement and piracy.

Copyright law confers upon the owner of the work a bundle of exclusive right in respect of the reproduction of the work and other acts which enables the owner to get financial benefits by exercising such rights. The copyright is not an inevitable, divine or natural right that confers on author the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. This utilitarian goal achieved by permitting authors to reap the rewards of their creative efforts. Rights depend on nature of work. The type of act, which will constitute infringement, will also depend on the nature of the work. The mere use of a copyright work was not to be equated with "infringement" of that work. A copyright was infringed only if the use to which the copyrighted material was put falls within the "rights" that were made "exclusive" to the holder of the copyright by the term of the statuette. All intellectual creativity activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on building block fashioned by prior thinkers. "The world goes ahead because each of us builds on the work of our predecessors. Dwarf standing on the shoulders of giant can see further than the giant himself."

Permitted Act, Fair Dealing and Fair Use

As per the legal provision in copyright, the fair dealing comes under the category of permitted act, which does not constitute and infringement of copyright. Two broad categories of act can be traced out that have been permitted under the Indian Copyright Act 1957. Permitted act in general form which includes reproduction, public show, assess or performance, publication, translation, adaption, copying, etc as provided in the Act. And permitted act in specific form, which is known as fair dealing. Fair dealing is one of the major categories of permitted act, which always comes with particular precondition provided by law. It is selected permitted act which has the particular purpose prescribed by law. The term 'Fair dealing' have been using in connection with the permitted use of copyright work in common law jurisdiction like in India and United Kingdom and the term 'Fair use' have been using in connection with the permitted use of copyright work in other jurisdiction. Fair use was traditionally defined as a privilege, in other than owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the monopoly granted to the owner.

The notion of permitting some use of a copyright work which is considered to be fair is common in many jurisdictions. Long after the creation of the copyright by Statute of Anne of 1709, courts recognized that certain instances of unauthorized reproduction of copyrighted material are possible. The concept of fair dealing was, before 1911, a common law defense and the Act do not say whether the statutory fair dealing provisions an intended to supersede the old common law or to apply in addition to it. It has been suggested judicially that there might be fair dealing defense on the case of public safety. The UK Copyright, Design and Patent Act 1988, section 29 and 30 provided the provision of fair dealing as a sort of permitted act and defense for infringement of copyright. The Indian copyright Act 1957 provides fair dealing in its S. 52(1) (a) & (b) correspondently in s-39 as a sort of permitted act and defense for infringement of copyright in broadcasting and performance work. The copyright (Amendment) Act 1994, provided fair for the purpose of "private use, including research" instead of previous provision "research or private study." It also provided genuine provision in respect of computer program for fair dealing provision through newly added subsection (aa), (ab), (ac)&(ad).

The term fair dealing is not defined in the Act, it is only by reference to case law that the factors that might be considered by a court can determined. It is in practice the most general and perhaps the most important defense of permitted act in relation to copyright. It is statutory defense limited to infringement of copyright. Public interest is outside and independent of statutes and is limited to copyright cases and is based on a general principle of common law. Although the courts have considered and ruled upon the doctrine over and over again, no real definition of the concept has ever emerged. Indeed since the doctrine is an equitable rule of reasons, no generally applicable

definition is possible, and each case raising the question must be decided on its own facts. It is highly dependent on the factual circumstances of each case. Neither the decisions that have applied it for nearly 300 years, nor its eventually statutory formulation, undertook to define or explain its contours or objectives. The use of such material is considered 'fair' when it is reasonable.

The court has, in *Folsom v. Marsh*, 1841, however, developed some criteria for determining what a reasonable use of copyright material is. It is cited as "The short we must oftenlook to the nature object of the selection made, the quantity and value of the materials used and degree in which the use may prejudice the sole or diminish the profits, or suppressed the objects of the original work."

In practice there are four basic features, which should be considered as conditions for treating an act as fair dealing.

I. The purpose and character of the secondary use

II. Nature of copyright work

III. Amount and Substantiality

IV. Effects on the Market

I. The purpose and character of the secondary use

The secondary use adds value to the original if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings. This is the essence of the concept that the fair doctrine intends to protect for the enrichment of society. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general. Mere dealing with the work for the purpose is not enough. It must also be dealing which is fair for that purpose whose fairness must be judged in relation to that purpose. The work and dealing must fulfill and meet both expressed and implied condition under the fair dealing provision of law. When someone who is approved by law deals the work for the purpose of private study, use and research, criticism, review and reporting current events, the reasonable use of the copyright work is considered as fair dealing. It is utilization of the work, for approved purposes with approved condition. The question of fair dealing would not arise if the purpose of the dealing is not one of those enumerated in the statute. The enumerated purposes are:

A. Private use and study including research

Fair dealing with a literary work, other than a database, or a dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work. The making of any second recording of visual recording for private use of the person making such recording or society for the purpose of bona fide teaching or research is considered to be a fair dealing. The use, consistent with fair dealing of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide research is considered to be a fair. The private use provision of the Indian law is one of the best examples of liberal provision for the fair dealing, which has reached one step ahead than in the UK law for 'private study' in respect of public welfare, culture and educational and other development.

B. Criticism and review

Every man can take what is useful from the original work, improve, add and give to the public the whole, comprising the original work with the additions and improvement, and in such a case there is no invasion of any right. Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement. The use, consistent with fair dealing of excerpts of a performance or of a broadcast for bona fide review, teaching is considered to be a fair. The amount that can be legitimately reproduced is not susceptible to hard and fast rules, although it is probably true to say that extracts permissible under this exception will generally tend to be shorter than those permitted under research or private study since the copies are being published rather than being used by one individual.

C. Reporting of current events or Newspaper summary

A fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events in a newspaper, magazine or in a similar periodicals or by broadcast or in a cinematography film or by means of photography are justifiable. But the publication of a compilation of address or speeches delivered in public is not a fair dealing of such work.

II. Nature of copyright work

The nature of the copyright work is a factor that has been only superficially discussed and little understood. It implies that certain types of copyrighted material are more amendable to fair use than others. Unpublished matter is off-limits to the secondary user, regardless of justification, unpublished work normally enjoy complete protection against copying any protect expression. The unpublished status of a copyrighted work is a critical element of its nature and a "factor tending to negate the defense of fair use. The scope of fair use is narrower with respect to unpublished work." An author who prefers not to publish a work or wishes to make aesthetic choices about its first public revelation will generally have the legal right to enforce these wishes. Inquiry into the nature or value of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author's entitlements. Notwithstanding that nearly all writing may benefit from copyright, its central concern is for the protection of material conceived with a view to publication, not of private memos and confidential communications that its authors do not intend to share with the public. It is held that the purpose was to expose and criticize the plaintiff's unsavory business methods but it was held not to be fair dealing to publish a previously unpublished work. But this factor is not a sufficient basis for ruling out fair use. There is no logical basis for making it determinative. On the other hand, if a sufficient justification exists, and the quotations do not cause significant injury to the author's entitlements, it may allow even quotation from unpublished drafts of a Novel specially if an author is not still alive and reasonable dealing is necessary for social enhancement.

III. Amount and Substantiality

The third factor instructs use to assess the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The amount of work also play the role for validity for considering fair dealing to the act which is secondarily created but it is not a static one. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. This factor has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factors (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market). As to first factor, an important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification. A solid transformative justification may not for taking a few sentences that could not, however, justify a taking of large quantities of material. In its relation to the market impact factor the qualitative expect of the third test "substantiality" may be more important than the quantitative. However the amount that can be legitimately reproduced is not susceptible to hard and fast rules.

IV. Effects on the Market

The fourth factor addresses "the effect upon the potential market for the copyrighted work. When the secondary use does substantially interfere with the market for the copyright work this factor powerfully opposes. The secondary user should not harm market for the original one. Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not over shadow the requirement of justification under the factor, without which there can be fair use. Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belong to the owner of the copyright use should become wide spread. Not every type of market impairment opposes fair use. And adverse criticism impairs a book's market. A biography may impair the market for book by the subject if it exposes him as fraud, or satisfies the public's interest in that person such market impairment is not relevant to the fair use determination. The fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, or in story's words supersedes the use of the original.

Considerable factors for Fair dealing

I. Subject of Dealing

Subject matter of fair dealing in relation to private use and research is provided limited as it included only literary, dramatic, musical and artistic work.

II. Motive of Dealing

The financial motive behind making a copy of a work or part of a work for research or private study surely must be considered in determining whether or not it falls within the scope of fair dealing. To this can be other factors, such as the nature of the research or study and the funds available to the researcher or student. Questions such as whether the person concerned is copying simply to save himself the expense of buying a copy of the work, or whether it is reasonable to expect a copy to be purchased, are important.

III. Aspect of work

The aspect behind the purpose of making criticism or review of the work is another important condition for considering fair dealing. Among other defined condition or purpose, the economic aspect of dealing with work is very important concern in the field. This can be of two kinds.

A. Aspect of economic gain

Making economic benefit, commercial use of work through dealing is the aspect of economic gain, which should not come in dealing. The motive of the person relying on fair dealing as an exception is relevant. If the principal motive for the use of the work is for the profit to be derived from the sale of the work rather than the sale of, for example, the criticism it would not constitute fair dealing. It is held that every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.

B. Aspect for economic defect

Making or providing wrong and negative information to the public or market and effecting in honor and reputation in public, is aspect for economic defect. Creating the cause of economic defect to the copyright owner through several acts in the course of dealing the work will not consider fair such as making direct competition in market with the primary work.

IV. Acknowledgement

The acknowledgement or source indication is one of major and important supplementary aspect of fair dealing provision which provides various norms in the field for both copyright owner and the user of the work as he has expressed his gratitude to the owner it is also a sign of the labor made by the dealer of the work. Acknowledgement of the work in relation to fair dealing is another crucial factor in copyright field. Fair dealing for criticism or review can only be relied on if it is accompanied by a sufficient acknowledgement which identifies the work being copied and its author. Sufficient acknowledgement means an acknowledgement means acknowledge, which identifies the work by title or other description; unless in the case of a published work it is published anonymously or in the case of an unpublished work it is not possible for a person to ascertain the identity of the author by reasonable inquiry. It will not be satisfied merely by stating the author and title but requires some acknowledgement in the sense of recognition of the position and claims of the author.

Conclusion

The concept of fair dealing is a pivotal conception in the copyright law in intellectual property jurisprudence without which all the attempts made in the field of copyright will not leave any trace for reaching its goal. Fair dealing is a question of fact and of impression. Fair dealing is public defense in general sense and safeguard of basic human right and human entitlement in wide sense and it is the vital policy of copyright law. Even if fair dealing directly concern with some specific acts which does not create infringement; there is no meaning at all the acts which does not infringe copyright are fair dealing. The concept applied in the provision and term inserted in law is almost always limited. The term fair dealing has been used in law as it relates only to limited work and specific nature of work. It applies for the means of using it as the basis of creating secondary work. When copyrighted work used as basis for approved purposed then the use of the work will be the fair dealing, if the outcome or last expression and existence of the work come under the provided limits or conditions.