

A CRITICAL APPRAISAL OF THE 'FAIR DEALING' DOCTRINE UNDER COPYRIGHT LAW IN INDIA: HIGHLIGHTING THE IMPERATIVE NEED FOR REFORM

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ABSTRACT

Fair dealing is an integral part of copyright law. In the global context, the fair dealing doctrine has been a point of constant discussion for a long time now. However, the issue of fair dealing is one of the least explored areas of Intellectual Property Law in India.

The fair dealing exceptions provided in the Indian Copyright Act are very limited and inadequate in comparison to international copyright practice. Moreover, the Indian Courts have viewed the purposes enumerated in the Indian Copyright Act as exhaustive and prefer to strictly adhere to the purposes enumerated in the Act. The author points out that the fixed and rigid approach taken by the Indian Courts has failed to introduce the much required element of flexibility.

It is pointed out by the author that such a rigid approach to fair dealing should not be followed in India keeping in mind the technological and societal progress. It is further argued that confining fair dealing doctrine to such strict interpretation of statutes leaves absolutely no room for judicial creativity. It is in view of this that an imperative need for reform in the fair dealing provision in India is felt.

This paper will further argue that in view of the public interest, current fair dealing exceptions in Indian Copyright Act must be reformed in order to allow a mutually beneficial stability between creators and consumers.

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I. AN INTRODUCTORY OVERVIEW OF THE CONCEPT OF 'FAIR DEALING'

The main purpose why a copyright is granted is to offer the creator or the maker of a creative and original work an exclusive right over its subsequent use and distribution.¹ In order to balance the competing interests of the society and that of the copyright holders, certain exceptions are provided in the Copyright Act in favour of the society in general.² The Copyright Act³ of India also clearly provides for exceptions⁴ to this exclusive right to balance the two competing interests.

The concept of fair dealing was brought about to function as one of the defences to this exclusive right granted through a copyright to the author of a creative work.⁵ The concept of fair dealing has also been recognised in the Berne Convention⁶ as well as the TRIPS Agreement.⁷ The rationale or justification for allowing the exception of fair dealing is that on certain specific occasions an infringing use of the copyrighted work may bring about greater public good than its absolute denial.⁸

While attempting to look at the definition of fair dealing, it is pertinent to make reference to the famous case of *Hubbard v. Vosper*⁹ where Lord Denning specifically pointed out:

“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. Are they altogether too many and too long to be fair? Then

¹ *Miller v. Taylor*, (1769) 4 Burr 2303 (2335).

² Luis C Schmidt, *The Changing Face of Copyright*, 34 COPYRIGHT WORLD 190 (2009).

³ The Indian Copyright (Amendment) Act, 2012.

⁴ The Copyright Act, 1957, § 52.

⁵ Stephen M. Mcjohn, *Fair dealing and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61 (1998).

⁶ The Berne Convention for the Protection of Literary and Artistic Works, 1886.

⁷ TRIPS Agreement, art. 13.

⁸ B.J. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 12 YALE LAW JOURNAL 1179 (2003).

⁹ CA 1971 [1972] 2 WLR 389.

*you must consider the use made of them...Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.”*¹⁰

As per the principle of fair dealing, the reproduction or use of a copyrighted work is permitted by law, which would otherwise have amounted to an infringement of copyright of the content owner.¹¹ The concept of fair dealing finds its roots in the doctrine of equity¹² and thereby allows the use of certain copyrightable works, the usage of which would otherwise have been illegal and would have amounted to a clear breach of the copyright of the owner. The prior permission of the author of the content is also not required.¹³ The fair dealing concept functions as a limitation and exception to the exclusive and in a way monopolistic right granted by copyright law¹⁴ and thus it happens to be an integral part of the copyright law.¹⁵

In the case of *Pro Sieben Media AG v. Carlton UK Television Ltd*¹⁶, it was pointed out by the court that English fair dealing provisions “*define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection.*” It makes clear that as per the law in place in the UK, for a fair dealing defence to be successful there is a two-step test: the purpose must, to begin with, be enumerated in statute, and then, if it is enumerated in the statute, it must be shown to be fair – if either of the two condition is not met or complied with, the defence falls flat. It can be noticed from a bare reading of the relevant provisions that copyright infringements are only exculpated for very specific and clear uses. There is absolutely no room provided for judicial discretion at all for situations when use of a work may otherwise give the impression of being reasonable.¹⁷

¹⁰ *Id.*

¹¹ S.K. Dutt v. Law Book Co and Ors., AIR 1954 All 570.

¹² Harper & Row Publishers v. Nation Enterprises, 471 US 539.

¹³ **Giuseppina D" Agostino**, *Healing Fair Dealing? A Comparative Copyright Analysis Of Canada's Fair Dealing To UK Fair Dealing And Fair Use*, 53 MCGILL LAW JOURNAL 309 (2008).

¹⁴ Kartar Singh v. Ladha Singh, AIR 1934 Lah 777.

¹⁵ The Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors, 2008 (38) PTC 385 (Del).

¹⁶ [1997] E.M.L.R. 509, 516.

¹⁷ *Id.*

In various jurisdictions, the courts have attempted to set out the test to check for the fairness in fair dealings.¹⁸ One very famous case which finds relevance here with regards to our present discussion is the Canadian case of *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁹ where the court set out the test involving two steps. The first step of the process is to establish whether the dealing was for the permissible purpose of “research or private study” under Section 29 of the Copyright Act of Canada, “criticism or review” under Section. 29.1 or “news reporting” under Section 29.2 of the same Act. The second step of the process is for assessing whether or not the dealing is “fair.”²⁰

However, it is pertinent to note that the most commonly known and generally used test is known as the four-factor test, which was laid down by the Courts in the USA. The courts of USA pointed out that the four steps involved in this test are basically: the reason and nature of use; the quantity and substantiality of the fraction taken; the nature of copyrighted work; and the effect of the use upon the prospective market. ²¹ The Apex Court of USA gives foremost emphasis to the first factor of the four, which is - the purpose and character of use, which is also popularly known as the transformative test.

The concept of fair dealing, as instituted in the copyright framework of the United Kingdom is very restrictive in nature and contains an exhaustive list of exceptions²² which have been defined in the CDPA, 1988.²³ In practise, this exhaustive list of exceptions in the UK legislation for fair dealing is very rigid in nature and is disproportionately inflexible. ²⁴ It is necessary to be noted here that the Indian Copyright Act, 1957 which has been widely borrowed from the UK Copyright Law presents the same sort of inflexibility in the matters of fair

¹⁸ T.G. Newby, *What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?* 51 STANFORD LAW REVIEW 1633 (1999).

¹⁹ (2004) 1 SCR 339.

²⁰ *Id.*

²¹ Rich Stim, 'Measuring Fair Use: the Four Factors' COPYRIGHT & FAIR USE, STANFORD UNIVERSITY LIBRARIES (2010), available at: <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (Visited on May 22, 2016).

²² Singh Jayakumar, Hansard Parliamentary Debates 78 (2004) 10.

²³ [Copyright, Designs and Patents Act, 1988.](#)

²⁴ Justice Laddie, *Copyright: Over-strength, over-regulated, over-rated*, 18 (5) EUROPEAN INTELLECTUAL PROPERTY REVIEW 253-260 (1996).

dealing.²⁵ The second part of this piece elaborately discusses the position of fair dealing in the Indian Context.

Before we move to discussing the scheme in which this paper would proceed, it is relevant to look at one of the earliest copyright cases to come before the courts, *Sayre v. Moore*, in which Mansfield C.J. pointed out:

*“We must take care to guard against two extremes equally prejudicial: the one, that men of ability...may not be deprived of their just merits, and the rewards of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”*²⁶

A. SCHEME OF THE PAPER:

To begin with, in part II of this paper, the doctrine of fair dealing was explained in greater detail and the place of fair dealing in the copyright framework was highlighted. Further, part III of the piece deals with the doctrine of fair dealing with respect to India. Subsequently, various relevant case laws where fair dealing doctrine has been discussed will be covered in part III of the paper to further understand the position of the Indian judiciary in this matter. Part IV discusses the legislation present in the US in this regard which is also popularly known as fair use. Moreover, in part V of the piece, it is pointed out that the exhaustive list of exceptions provided under the Indian Copyright Act, which is largely based upon similar provisions of the English law, is outdated, inadequate and unnecessarily restrictive in nature causing severe problems in view of the present day requirements. To that effect, this paper will argue that in view of the public interest, current fair dealing exceptions in Indian Copyright Act must be reformed in order to allow a mutually beneficial stability between creators and consumers. Part VI finally concludes the paper.

II. FAIR DEALING IN INDIAN COPYRIGHT LAW

Even before the English Act was expressly made applicable in India, the Bombay High Court had pronounced the Copyright Act of the United Kingdom to be applicable in India in the case of *McMillan v. Khan Babadur Shamsul Ulama Zaka*.²⁷ The concept of fair dealing was first

²⁵ Blackwood and Sons Ltd and Others v. A.N. Parasuraman and Others, AIR 1959 Mad 410.

²⁶ Sayre v. Moore, (1785) 1 East. 361n, 102 E.R.139.

²⁷ (1895) ILR Bom 557.

brought about in India in a statute in the year 1914. That statutory provision of fair dealing was but a mere copy of the similar provision of the statute present in the United Kingdom. The said statutory provision provided 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*'.²⁸ The present Copyright Statute of India which was passed way back in 1957 also had extensively borrowed from the new Copyright Act of UK of the year 1956.²⁹

The concept of fair dealing is primarily dealt with in Section 52 of the Copyright Act, 1957.³⁰ This section has been subjected to amendments many times since 1957. This section was first amended by the Copyright (Amendment) Act of the year 1983³¹, and subsequently by the Copyright (Amendment) Act of the year 1994³² and of the year 1999³³ and finally by the most recent Copyright (Amendment) Act of 2012³⁴.

The provision under section 52 makes it clear that for the „dealing“ to be “fair,” the purposes have to fall within the statutorily established purposes of private use, research, criticism and review as categorically provided under Section 52 of the Copyright Act of India. Even though this section of the Copyright Act **primarily deals with the doctrine of „fair dealing“ and** provides for when the dealing is considered to be fair; still, the term „fair dealing“ has not been defined anywhere in the Copyright Act, 1957.³⁵ The said section does the job of specifying what shall not amount to a violation of copyright.

The 2012 amendment to the Copyright Act was brought in order to generally extend these provisions. This amendment has, inter alia, extended the fair dealing provision to cinematograph and musical works. The provision under Section 52 (1)(a) has been subjected to amendment in order to provide fair dealing with any work for the purposes of private and

²⁸ Burrell Robert, *Reining in copyright law: Is fair use the answer?* 4 INTELLECTUAL PROPERTY QUARTERLY 361-388 (2001).

²⁹ NARAYAN P, COPYRIGHT AND INDUSTRIAL DESIGNS 8 (3rd ed. Eastern Law House, Calcutta 2002).

³⁰ *Supra* note 4.

³¹ The Copyright (Amendment) Act, 1983 (Act 23 of 1983).

³² The Copyright (Amendment) Act, 1994 (Act 38 of 1994).

³³ The Copyright (Amendment) Act, 1999 (Act 49 of 1999).

³⁴ *Supra* note 3.

³⁵ *Id.*

personal use with the exception of it being a computer programme.³⁶ Another new clause under Section 52(1) (w) brought through the 2012 amendment provides that the making of 3D object from a 2D layout shall not constitute infringement of the copyright.³⁷ Further, clause (zc) of Section 52 added by the 2012 amendment has been introduced to provide that importation of literary or artistic works such as labels, company logos or promotional or explanatory material that is incidental to products or goods being imported is to be under the umbrella of exceptions.³⁸ Moreover, this clause supports the parallel import provision which is present in the Trade Marks Act, 1999. Apart from the above additions, clauses (zb) and (zc) under Section 52 added by the 2012 amendment provides for fair dealing in the use of disabled persons.³⁹ It provides for the fair use of the work for the advantage of the disabled, facilitates adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, for persons with disability to access works for educational purposes or research including the freedom of sharing with any person with disability for private or personal use.

The catalogued purposes made clear under Section 52 have been characteristically interpreted as exhaustive, inflexible and definite since any use or dealing which finds itself not falling firmly within the enumerated grounds as specified in section 52 is considered to be an infringement of the copyright.⁴⁰

It is important to note that the Indian Copyright Act under the provisions of Section 52 slices out fair dealing from copyright as one of the affirmative defences which places the burden of proving the defences upon the user once the copyright owner establishes *prima facie* infringement by showing extensive breach of copyright of expression. However, as it is clear from the case of *Civic Chandran v. Ammini Amma*⁴¹ the fair dealing cases in India do not at all times establish *prima facie* infringement before taking into consideration an application of fair dealing.

³⁶ The Copyright Act, 1957, § 52 (1)(A).

³⁷ The Copyright Act, 1957, § 52 (1)(w).

³⁸ The Copyright Act, 1957, § 52 (1)(zc).

³⁹ *Id.*

⁴⁰ *Supra* note 25.

⁴¹ 1996 PTC 16 670.

It is clear from the above understanding that fair dealing forms an essential and integral part of the copyright law.⁴² It is also clear that this concept of „fair dealing“ is not reasonably developed in India and finds itself at a very nascent stage. The law in this regard is still at its formative stage and this can be noticed from the fact that „fair dealing“ has not even been defined in the Act. A greater need is felt for an analysis on the approach, be it strict or liberal towards the whole situation surrounding the doctrine of fair dealing. The difficulty that exists and causes hindrance with respect to this defence is the fact that the Indian courts and legislature are yet to fully explore the scope of fair dealing which is a very necessary exception in the copyright regime.

III. THE POSITION OF INDIAN JUDICIARY WITH REGARDS TO THE DOCTRINE OF FAIR DEALING

Cases dealing with this doctrine have been rare in India until the recent decades. Even in the present day, only a mere handful of cases dealing with this issue arrive to the courts. This part of the piece takes a look at the cases where the concept of 'fair dealing' has been talked about and discussed in the Indian courts. The Courts have on various occasions made it clear that it is absolutely impossible to come up with a certain „rule of thumb“ which would find its application in all the cases of fair dealing as each and every case depends upon its own varied facts and circumstances.⁴³ However, the courts consider the interest of the public to be paramount consideration.⁴⁴

In the case of *Wiley Eastern Ltd and Ors v. IIM*⁴⁵ the court noted and drew a connection of the purpose of the defence of fair dealing with the Constitution of India. The court pointed out that the basic purpose of Section 52 of the Copyright Act is to protect the freedom of expression prevalent under Article 19 (1) of the Constitution of India - so that purposes like research, private study, criticism or review or reporting of current events could be protected.⁴⁶

⁴² Sony Corporation v. Universal Studios, 464 US 417, 479-480 (1984).

⁴³ ESPN Star Sports v. Global Broadcast News Ltd and Ors., 2008 (36) PTC 492 (Del).

⁴⁴ Ashdown v. Telegraph Group Ltd, (2001) EWCA Civ 1142.

⁴⁵ 61 (1996) DLT 281 Para 19.

⁴⁶ INDIA CONST. art. 19.

The court further noted that Section 52 is hardly intended by Parliament to unconstructively stipulate what an act of infringement is.⁴⁷

Another famous case law where fair dealing doctrine was discussed and principles for determining what makes up "private use" were laid down was the case of *Blackwood v. Parasuraman*⁴⁸ In this particular case, fair dealing defence was claimed for the purpose which was stated to be of private study. In this case, the defendant took the liberty of publishing guides of the plaintiff's books but the Court in this particular case rejected it. The court subsequently went on to hold that the purview of private study covers the student copying the book for his own personal use, and that it certainly does not include circulation of copies among other students. Clearly, the court in this case had given a very restricted meaning to the fairness of the dealing. It was in this very case that the Court stated that in order to receive protection the use must be one enumerated in the statute under „fair dealing“.⁴⁹

In *Blackwood* case the court gave two points with regards to the meaning of the expression „fair“ in the term „fair dealing“:

- 1) In order to constitute unfairness there must be an intention to compete and to obtain profit from such competition, and;
- 2) Unless the intention of the infringer were unfair, in the sense of being improper or oblique, the dealing would be fair.

Basically, the test given in the *Blackwood* case serves to find whether the use is likely to damage the potential market or the value of the copyrighted work.⁵⁰ If substantial and important works are duplicated then the intention of the infringer to use the effort and labour of the copyright owner for his own profit can be noticed apparently.

Another relevant case which had pretty similarity facts to that of the *Blackwood* case, is the case of *Syndicate of Press University of Cambridge v. Kasturi Lal*,⁵¹ in this case, the Court in its

⁴⁷ Wiley Eastern Ltd and Ors v. Indian Institute of Management, 61 (1996) DLT 281 Para 19.

⁴⁸ *Supra* note 25.

⁴⁹ *Id.*

⁵⁰ Civic Chandran v. Ammini Amma, I.L.R 1996 Ker 670; *Supra* note 9; *Supra* note 42.

⁵¹ 2006 (32) PTC 487 (Del.).

holdings pointed out that there indeed was infringement, not falling within the purview of fair dealing for the reason that Section 52(1) (h) allows reproduction for the purpose of answering questions in an examination and not questions and answers as a whole. The court moreover noted that even if it is believed that the defendant's work could have facilitated students to give effective answers in examinations, such a situation cannot permit purloining word for word texts of the original work.

The Courts in India have also held that an infringement of Copyright cannot be permitted merely on the ground that it has been claimed in the interest of the public. It has been noted by the courts that the law as to copyright in India is governed by a statute which provides no relief whatsoever for considerations of the use being in public interest.⁵²

Moreover, as it is clear from provisions of Section 52, it is to be noted that the defence of fair dealing is also available for instances of criticism or review. However, the defence of fair dealing is available for criticism or review only when the act goes along with an acknowledgement as obligated under the provision of Section 52 (1).

The principle concerning this was most likely first laid down in the famous case of *Hubbard v. Vosper*.⁵³ The basic objective of this provision of law is to shield or protect a reviewer who wants to put forward his opinion or views or comments on a particular copyrighted work by using certain relevant extracts from that work.

The above laid down principle was subsequently followed in the case of *Associated Newspapers Group v. News Group Newspapers Ltd.*⁵⁴ where, inter alia, it was pointed out by the court that it is not fair or just to allow a trade rival or a competitor to take copyrighted material and use it for their own benefit. Moreover, the court added that the motive for which the copy is made is the pertinent question to be answered. So, it is clear thus that for the dealing to be fair in criticism, the use ought to be made just for the purpose of criticism or review and not for any

⁵² Rupendra Kashyap v. Jiwan Publishing House, 1996 (38) DRJ 81 Para 24.

⁵³ [1972] 2 Q.B. 84.

⁵⁴ R.P.C. (1986) 103 (19) p. 515-520.

other purposes. It is permissible, however, to quote from other similar works for the purpose of exemplifying the criticism.⁵⁵

Another relevant case in this regard is the case of *Civic Chandran v. Ammini Amma*,⁵⁶ in this case, it was held that even if the copying of a work is substantial it would not be infringement if it is for the purpose of criticism.

Further, parodies are considered as a satirical form of commentary on a work and thereby they also fall within the purview of criticism.⁵⁷ They are a comical or satirical form of social observations, and at the time of deciding whether a particular work constitutes a valid parody, it must be shown that work being copied is only that much as would be necessary to jog the memory of the reader, listener or viewer with regards to the original work.⁵⁸ Under the English legal regime, this issue is yet to be addressed directly by the Courts where, however, it has been acknowledged as a prospect.⁵⁹ If the copyright regime present in U.S.A. is considered, it can markedly be noticed that it without a doubt falls within the ambit of fair use.⁶⁰ But, in the Indian context, the legal standing is not clear as such cases have not arisen hitherto.

Moreover, as it was held in the case of *Reliance Petrochemicals v. Indian Express Newspapers*, fair dealing material for the purpose of coverage of current events in print mode or broadcast media is also an exception under Section 52 (1) (b) of the Copyright Act because a person has the right to know (right to freedom of speech and expression).⁶¹

Clearly, the Indian Courts have viewed the purposes enumerated in the Indian Copyright Act as exhaustive.⁶² Even though only a mere handful of cases dealing with this issue arrive to the courts the above case laws make it clear that the courts in India prefer to strictly adhere to the purposes enumerated in the act and they give the provision a restricted interpretation.

⁵⁵ *Supra* note 42.

⁵⁶ *Supra* note 50.

⁵⁷ *Campbell v. Acuff-Rose Music*, 114 S. Ct. (SC) 1164.

⁵⁸ *Woody Allen v. National Video*, (1985) 610 F Supp. 1612.

⁵⁹ *Williamson Music v. The Pearson Partnership Ltd*, (1987) F.S.R. 97.

⁶⁰ *Supra* note 18.

⁶¹ *Reliance Petrochemicals v. Indian Express Newspapers*, (1988) 4 SCC 592.

⁶² *Supercassette Industries v. Nirulas Corner House Pvt Ltd*, 148 (2008) DLT 487.

IV. FAIR USE DOCTRINE

The term "fair use" finds its origins in the United States.⁶³ The courts created a doctrine of "Fairness Abridgement" in the famous case of *Gyles v Wilcox*⁶⁴, which eventually evolved into the modern concept of "fair use" in the US. The fair use of a copyrighted material is the extra-legal use which is usual, reasonable and customary.⁶⁵

The doctrine of fair use functions as a limitation to the exclusive right which is granted by copyright law to the author of a creative work. In the US, Justice Joseph Story is credited with the laying down of the foundation for the fair use doctrine in the famous case of *Folsom v. Marsh* with a four-factor test.⁶⁶ US law does not specify acts which would be considered fair use; rather it gives a four factor test that must be considered to assess whether an action of exploitation by the person falls within the ambit of fair use.

The "four factor test" is used for assessing whether a particular use lies in the ambit of fair use, as against an exhaustive list of activities that constitute exceptions to copyright. The test appears to be applicable across the board, irrespective of the nature of the work protected by copyright.

So, the four factors for determining fair use as given under section 107 of the US Copyright Act, 1976 are⁶⁷:

- a) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- b) the nature of the copyrighted work;
- c) the amount and substantiality of the portion used; and
- d) the effect of the use upon the potential market value of the copyrighted work.

⁶³ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁶⁴ (1740) 26 ER 489.

⁶⁵ T.R.S. IYENGAR, *THE COPYRIGHT ACT, 1957* 52 (Universal Law Publishing Co., New Delhi, 2001).

⁶⁶ *Supra* note 63.

⁶⁷ Copyright Act, 17 U.S.C. § 107.

It is further pointed out in the provision that the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Clearly, the Copyright Act of 1976 of USA is very flexible and open-ended for further development and that is believed to be the intention of its legislators.⁶⁸ The fair use doctrine is now being imported by many countries around the world because of its innate logical reasoning and better protection ambit. Unlike fair dealing, fair use is a more flexible model.⁶⁹ It allows the exceptions provided to be expanded in order to cater to the requirements of the ever growing technological and economic practices in the general society.⁷⁰

V. THE IMPERATIVE NEED FOR REFORMS IN THE INDIAN COPYRIGHT LAW AND THE QUEST FOR THE FAIREST APPROACH SUITING THE CONTEMPORARY NEEDS

So, it is clear that the Indian Copyright Act also provides for several exceptions for fair usage which are incidentally common to the exceptions provided under the Copyright law of the UK. These provisions basically extend to criticism, review and news reporting, research and private study, use of works for educational purposes, parliamentary and judicial proceedings, version recordings or sound alike recordings, use with regard to pictorial, graphic and sculptural works and use with regard to architectural works. However, it is important to review section 52 of the Indian Copyright Act in greater detail because in contrast to the provisions of United Kingdom in this regard the provisions under the Indian Copyright law do not provide even exceptions to all categories of work.⁷¹

A plain and simple reading of these provisions makes it amply clear that our legislators have ignored taking into account public interest in accessing information contained in those protected works while granting absolute rights under the Indian Copyright Act to authors and

⁶⁸ Hyde Park Residence Ltd. v. Yelland, (2001) Ch. 143 (1999) R.P.C. 655.

⁶⁹ Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARVARD LAW REVIEW 1137 (1990).

⁷⁰ Newspaper Licensing Agency Ltd. v. Marks and Spencer plc, (2001) Ch. 257 R.P.C. 76.

⁷¹ V.K. AHUJA, INTELLECTUAL PROPERTY RIGHTS IN INDIA 257 (LexisNexis Butterworths Wadhwa, New Delhi, 2012).

owners. Despite the presence of lengthy provisions in the Indian Copyright Act, these exceptions are very limited and inadequate in comparison to international copyright practice.

It is easily noticeable that the courts in India prefer to stay faithful to the language used in the statute and thereby strictly adhere to the purposes enumerated in the act and consequently end up giving the provision a restricted interpretation. Moreover, it is to be noted that the courts have failed to take into account the other important factors such as need and necessity.

The fixed and rigid approach taken by the Indian Courts has failed to introduce the element of flexibility which is provided in the Fair Use doctrine present in the United States legislation. It is to be noted that the fair use doctrine is based on utilitarian principles and fair dealing is based on the natural law theory where the author is of supreme consideration.⁷² It is rather unfortunate that the fair dealing provisions in the Indian Copyright laws are so restrictive in nature that they are asphyxiating the copyright system. Such constraining and restrictive provisions are calling into question both the credibility and effectiveness of the laws dealing with the same. A restrictive approach puts the credibility and efficiency of this exception into question. Therefore, there is a requirement of reform in the copyright provision in order to make it a more elaborate and wider scheme. It is proposed that the provisions should be moulded to be somewhat on the lines of the provisions present in the US, that is, the doctrine of fair use.

A more flexible approach allows the courts to develop the law on a case-by-case basis as new problems emerge and thus reliance on a flexible approach is better as compared to a codified system.⁷³ Flexibility is required to be brought in for the laws to be made more suited to the present day requirements. Therefore, it is to be realised that there is an imperative need of implementation of a more slender and open-ended fair dealing provision in the Copyright Act of India to ensure relevance of the Copyright laws and for the laws to meeting the needs and requirements of the modern day technological advancements.

In view of the scenario in India, the best possible discourse would be to attempt at bringing certain amendments and make the Indian fair dealing practise more in line with the „fair use“ doctrine present in the USA. However, since the fair use doctrine of USA is also not

⁷² Harry N. Rosenfield, *Customary use as "fair dealing" in copyright law*, 25 BUFF. L. REV. 119 (1975-1976).

⁷³ *Supra* note 69.

flawless and certainly has some grey areas, instead of adopting the „fair use doctrine“ in its entirety, an alternative „such as“ approach or the expansion of fair dealing should be adopted.

It has to be realised that there exists no thumb rule to deal with cases of these kinds, and each case depends upon the specific sets of facts and circumstances⁷⁴ and thus space should also be permitted for some judicial discretion to keep a check on the functioning and also to avoid any misuse of the flexibility provided by the laws.

India should thus look towards bringing an effective reform to the fair dealing law that ensures its flexibility and relevance in the digital age, while also not ignoring the interests of rights holders

VI. CONCLUSION

To conclude, it is clear that fair dealing is an integral part of the copyright law. It can be said without any doubt that "fair dealing" is an essential doctrine, not only with regards to the Copyright laws but also with regards to strengthening the protection guaranteed under Article 19 of the Constitution of India. However, the role of the fair dealing doctrine in the overall scheme of copyright law is still to be defined in India. Several elementary and fundamental issues such as its role, purpose, meaning and application are also yet to be addressed by the courts in India.

Although it cannot be denied that the purview of the Indian concept of fair dealing is large and the list of exceptions provided comprises of various activities still the exceptions provided are becoming redundant in the contemporary times due to the rapid technological and societal advancements.

As it was noted earlier in the paper, the Indian Courts have viewed the purposes enumerated in the Indian Copyright Act as exhaustive and prefer to strictly adhere to the purposes enumerated in the act and they give the provision a restricted interpretation. The fixed and rigid approach taken by the Indian Courts has failed to introduce the much required element of flexibility which is provided in the Fair Use doctrine present in the United States legislation. It is in view of this that an imperative need for reform in the fair dealing provision in India is felt.

⁷⁴ *Supra* note 43.

The fair use model prevalent in the US has been more effective and successful in balancing the interest of the user and the owner as compared to the present Indian model.

It is pointed out by the author that such a rigid approach to fair dealing should not be followed in India keeping in mind the technological and societal progress and confining fair dealing doctrine to such strict interpretation of statutes would leave no room for judicial creativity. Thus, to that effect, author proposes that a model similar to fair use model of US should be worked out. However, it is not in any way suggested that the fair dealing provisions be **completely done away with but simply that the flexibility of the „fair use doctrine“ should be** adopted into the Indian practice.

Finally, by bringing forth the reforms, and by making the fair dealing defence flexible and open-ended, but with guarantees for rights holders, a credible copyright system would be created and much needed legitimacy and balance can be brought back to the copyright regime.