

CONTOURS OF FAIR DEALING IN INDIA: AN ANALYSIS ON JUDICIAL INTERPRETATIONS & DISTINCTIONS

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ABSTRACT

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Fair dealing is the main internal limitation on copyright in India and it works through a list of exceptions laid down in the Copyright Act, 1957 under section 52. Whereas, in the USA it is an open-ended "fair use" standard, Indian law has a closed, purpose-denominated model of exception under which a use must first fit into one of the statutorily recognised purposes before fairness can be investigated. This article examines the doctrinal and analytical evolution of Indian courts in their concordant, extensible and at times constricted application of this doctrine. The genesis of fair dealing as a doctrine rather the constitutional evolution it has undergone from its common-law inheritance through R.G. Anand's landmark idea-expression articulation, Civic Chandran's parody-and-criticism reasoning, Hamar Television and India TV's transformative-use turn to an expansive reading of Section 52(1)(i) for educational ends in the DU Photocopy litigation. It contends that Indian fair dealing jurisprudence has gradually internalized a number of American fairness factors, all while maintaining the appearance of a closed-category doctrine yielding a hybrid doctrine combining substantial flexibility with uncertain predictability. It argues that while courts have made substantial gains in public access, especially as to education and free speech the doctrine remains plagued by analytical inconsistency and an indeterminate relationship between statutory categories and judicially imposed fairness tests. The paper finds inadequacies in Indian copyright jurisprudence and questions the normative justification of the existing equilibrium between rights of creators and public interest.

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1. Introduction

Copyright provides a bundle of exclusive economic rights for a limited time to promote creativity, but these are not absolute. Every established copyright regime includes constraints in its very design that effectively allow for unauthorized uses in specific and important contexts, recognising that an overly protectionist regime would have the

perverse outcome of impoverishing the public discourse copyright seeks to enrich. The doctrine of fair dealing, which is mainly exercised through Section 52 of the Copyright Act, 1957 serves this balancing function in India.¹ The provision identifies permissible uses (e.g. comment, research, news reporting, criticism and judicial or legislative reproduction) that would not be deemed infringement. The term "fair dealing" is not defined anywhere in the Act.² This silence with respect to definition has rendered the doctrine an almost entirely judicial make. Indian courts have provided the analytic substance missing from this statute, tapping both English authority and, increasingly, American jurisprudence. The result is a comparatively rich and yet doctrinally uneven body of case law that swings between a formalistic reading grounded in enumerated headings and a purposive reading steeped with imported "fairness" factors. This paper examines that interpretative trajectory and whether the courts have reached a proper balance between creators' proprietary interests with public access interests.

Section 52 contains a watertight list of exceptions, the phrase that governs their application "fair dealing" remains undefined and unstructured. This leads to a kind of structural tention, the statute is literally categorical but operates in a way that resembles standards. The fact that the Indian provision is structurally inapt has not dissuaded courts from importing tests created for the wide-open fair use defence as found by US law. The question this paper addresses is whether such doctrinal copying has produced sensible and predictable law, or instead rendered the concepts of fair dealing and fair use interchangeable, with little stable analytical framework to guide litigants and lower courts. This study aims to: (i) explore the theory and structure of fair dealing as it exists under the Copyright Act, 1957; (ii) address how Indian courts have construed Section 52 and the criteria they have developed; (iii) articulate how an Indian model of fair dealing differs from the American fair use doctrine; and finally, (iv) expose gaps, inconsistencies with judicial rationales, emerging issues in copyright law and assess if this balance between rights holders' interests and public access is adequately crafted

2. Research Methodology

This paper uses the doctrinal method. Aggarwal uses the statute itself in particular, the Copyright Act of 1957 and the Constitution of India, and case law from various Supreme Court and High Court judgments as well as secondary sources such as leading treatises and academic commentary for art to built this up. The analysis of the historical development is qualitative and interpretive, through case analysis and comparative logic. There is no empirical or quantitative method; the investigation focuses on substance and consistency and direction of legal norms.

3. Concept and Evolution of Fair Dealing under Indian Copyright Law

Fair dealing was introduced into Indian law as a common-law legacy through examples like the Imperial Copyright Act, 1911, which then had to be interpreted through the lens of English jurisprudence. That represents a basic conceptual foundation in the common law tradition, captured by Lord Denning's comment in *Hubbard v Vosper* that fair dealing "is a question of degree" incapable of precise definition but to be determined by reference to the number and length of extracts and what is done with them.³ This is counter-intuitive, because fairness resists a stringent

¹ Copyright Act 1957, s 52 (India).

² The Act enumerates permitted acts but supplies no definition of "fair dealing"; the term's content is wholly judge-made. See *Civic Chandran v Ammini Amma* 1996 PTC (16) 329 (Ker).

³ *Hubbard v Vosper* [1972] 2 QB 84, 94 (CA) (Lord Denning MR).

formulation and was reflected in the nature of Indian adjudication which explained why courts had treated Section 52 as broadly a statutory framework even as committed to contextual evaluation over mechanical application.

The earliest Indian pronouncement is in *Blackwood & Sons Ltd v A.N. Parasuraman*, where the Madras High Court formulated that a dealing is fair only if the use must be bona fide for the permitted purpose and must not involve actual or effective commercial competition between the original and new work so as to amount to a competing/substituting appropriation of the original.⁴ The bona fides of the user and lack of intent to use for competing commercially with the copyright owner were underscored by the court, two themes that would later reverberate throughout subsequent jurisprudence. In the decades that followed, these common-law roots were gradually supplemented by factor-based reasoning imported from the United States, yielding a hybrid doctrine that has remained intact to this day.

4. Statutory Framework under the Copyright Act, 1957

A. Section 52 of the Copyright Act serves as a series of statutory exceptions to copyright law: anything that falls within one of its sub-clauses "shall not be infringement of copyright."⁵ The feature of architectural significance is the list and closure of permissible uses. Fairness alone won't save a use that doesn't fall in an enumerated category. The most legally contested among heads include Section 52(1)(a), dealing with fair dealing in respect of work other than a computer programme for private or personal use including research, criticism or review, and the reporting of current events; and Section 52(1)(i), reproducing by a teacher or pupil in the course of instruction.⁶

The 2012 Copyright (Amendment) Act expanded the scheme considerably. It broadened the fair dealing defence to all classes of works and importantly, made provisions for its applicability in respect of cinematograph films and sound recordings, which were not expressly covered therein earlier.⁷ That expansion of regulation was already the direction in which courts were headed and key to describing post-2012 case law. Section 52 also needs to be analysed within the context of international obligations that India is a party to. These exceptions have to be interpreted in line with the "three-step test" the limitations limited to certain special cases and do not conflict with normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of author stipulated by Article 9(2) of The Berne Convention and Article 13 of TRIPS Agreement.⁸ This test serves as an external check on the potential broad interpretation of Section 52.

5. Judicial Interpretation of Fair Dealing in India

The first step in the interpretive journey exists within the conceptual border of copyright itself. The Supreme Court considered and held in *R.G. Anand v Delux Films* that copyright does not subsist in the ideas, themes, plots or historical facts but copyright does exist only if their particular expression; if the same idea is developed differently then no infringement occurs.⁹ Although *R.G. Anand* was decided in the context of an infringement case rather than a pure fair dealing case, it is foundational for that it ascertains the outer limits within which any fairness inquiry

⁴ *Blackwood & Sons Ltd v A.N. Parasuraman* AIR 1959 Mad 410.

⁵ Copyright Act 1957, s 52(1) (India).

⁶ Copyright Act 1957, ss 52(1)(a), 52(1)(i) (India).

⁷ Copyright (Amendment) Act 2012 (India), amending s 52 of the Copyright Act 1957 with effect from 21 June 2012.

⁸ Berne Convention for the Protection of Literary and Artistic Works 1886 (as revised), art 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, art 13.

⁹ *R.G. Anand v Delux Films* AIR 1978 SC 1613, (1978) 4 SCC 118.

operates only appropriations of protected expression can infringe and indeed, the idea-expression dichotomy itself serves a public-interest screening role mirroring that performed by fair use. *Civic Chandran v Ammini Amma* provided tangible contours to the standard for evaluating fairness in the ambit of criticism. The Kerala High Court, confronted with a "counter-drama" scripted to critique an acclaimed play, ruled that even extensive copying may be justifiable as fair dealing where it is in the public interest for bona fide criticism.¹⁰ Three governing considerations which the court identified were as follows: the quantum and value of what was taken in relation to the criticism offered, purpose for which it was taken, likelihood of competition between works. Of great importance, the court did not deem substantiality as per se fatal, recognizing that legitimate criticism of a dramatic work may necessitate recourse to the actual elements of that work.

We went back to the doctrine in *Academy of General Education, Manipal v B. Malini Mallya*, which had trespassing in an instrumental form of ballet. The Court explained fair dealing as a defence to copyright infringement for any acts outside of the statutory exceptions, and stated that performances or other uses not covered by those exception are still actionable; it also recognized the doctrine protects derivative and adapted works within the statutory framework.¹¹ The ruling is important for confirming, at the highest level of authority, that Section 52 delineates the boundaries of fair dealing and not any free-ranging equitable concept (the notion of fairness). Another thread of interpretation is the doctrinal basis in the Constitution. The Delhi High Court in the case of *Wiley Eastern Ltd v Indian Institute of Management* (2009) 4 SCC 209 has held that, The basic object of Section 52 is to safeguard Article 19(1)(a), which guarantees right to freedom of speech and expression and further limiting copyright so that it cannot be used as an instrument for preventing research, criticism and dissemination of knowledge.¹² This rational connects fair dealing with the Charter rights and provides a purposive justification for broad interpretation.

6. Analysis of Major Indian Case Laws

American fairness criteria moving into Indian reasoning is the most consequential recent development. *Super Cassettes Industries Ltd v Hamar Television Network Pvt Ltd*. In this case the Delhi High Court did a comprehensive consolidation of fair dealing principles and distilled the four well-recognised statutory factors under US fair use defences purpose and character of use; nature of copyrighted work; amount and substantiality of portion used in relation to copyright work as a whole and effect on market (statutory standard defined in Section 107, Title 17 US Code) as appropriate indicia for an Indian fairness analysis.¹³ The decision clarifies that public interest and the presence of a commercial substitution strongly favour a positive finding of fair dealing.

The first half of the concept of transformative-use was doctrinally grounded in *The Chancellor, Masters & Scholars of the University of Oxford v Narendera Publishing House*, wherein the Delhi High Court applied a "transformative work" test to determine whether an use has been or not on copyright material.¹⁴ This exemplifies a straightforward transplantation of *Campbell v Acuff-Rose Music*'s analytical framework into the Indian legal landscape. The genesis of the principle of fair dealing and trifling use was devised in *India TV Independent News Service Pvt. Ltd. v Yashraj Films Pvt. Ltd.* The Delhi High Court there pondered the question of embedding very short samples from songs into

¹⁰ *Civic Chandran v Ammini Amma* 1996 PTC (16) 329 (Ker).

¹¹ *Academy of General Education, Manipal v B. Malini Mallya* (2009) 4 SCC 256, AIR 2009 SC 1982.

¹² *Wiley Eastern Ltd v Indian Institute of Management* 1995 PTC (15) 247 (Del).

¹³ *Super Cassettes Industries Ltd v Hamar Television Network Pvt Ltd* 2011 (45) PTC 70 (Del) (Rajiv Shakhder J).

¹⁴ *The Chancellor, Masters & Scholars of the University of Oxford v Narendera Publishing House* (2008) 38 PTC 385 (Del).

a TV programme, and found that various judicial "paths" on fair dealing were "quite confusing"; it thus preferred de minimis for trivial takings as more straightforward and faster than a full fairness-criteria analysis.¹⁵ The judgment itself notes that post the 2012 Amendment, the fair dealing defense applies even in respect to derivative copyrightable works like film and sound recordings.¹⁶

The *DU Photocopy* litigation represents the high-water line of public-access reasoning. In the first instance decision in *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services*, Endlaw J held that where copying was biennially covered by Section 52(1)(i) as "in the course of instruction" no infringement followed regardless Quality of copies.¹⁷ In appeal, the Division Bench quashed the blanket conclusion of the single judge, yet reaffirmed the legal principle that such reproduction would only be admissible to "the extent justified by purpose" and remanded for trial as to whether reproduction of specific works meets that standard.¹⁸ The Division Bench therefore moderated the absolutism of the first instance ruling whilst retaining its access-protective essence.

7. Distinction between Fair Dealing and Fair Use Principles

The structural distinction between these two doctrines is essential. The American fair use defence, which is contained in 17 U.S.C. § 107, is an open-ended standard, every copyright-infringing use could be a potential special case, depending on the holistic weighing of four non-exhaustive factors.¹⁹ Its attribution to Justice Story in formulation in *Folsom v Marsh* built the inquiry by questioning the character, purpose and amount of the use as it relates to the original.²⁰ The Indian doctrine is a more rigid, closed system a use must be of an enumerated purpose in Section 52 before fairness can even enter the analysis. A use that is socially useful but cannot be described in statutory pigeonhole simply has nowhere to go regardless how much "fairness" it might, in the abstract, seem to embody. This creates a paradox in the present state of Indian law. Statutory form is keeping its doors firmly closed and reinforced categorical boundaries, while the judicial method has opened up considerably, becoming more factor-based, increasingly based on the transformative-use concept of *Campbell v Acuff-Rose*²¹ and building off Judge Leval's seminal argument that transformative uses are at the core of fair use.²² Indian courts therefore utilize an essentially American analytical framework, but within a frame of essentially British statutory law. The result is a mixed doctrine, predictable at the first stage categorization but unpredictable at the second-stage evaluation, where results turn on elements the statute never specifies.

8. Limitations and Emerging Challenges

Several challenges confront the doctrine. The closed-list architecture is inherently ill-suited to new types of use text and data mining, machine learning, user-generated content and digital aggregation, which do not conform to categories drafted in 1957 or amended in 2012. Secondly, while the judicial borrowing of fairness criteria is especially

¹⁵ *India TV Independent News Service Pvt. Ltd. v Yashraj Films Pvt. Ltd.* 2013 (53) PTC 586 (Del).

¹⁶ *ibid* (noting that, post the 2012 Amendment effective 7 June 2012, the fair dealing defence extends to derivative copyrightable works).

¹⁷ *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 5128 (single judge, Endlaw J, 16 September 2016).

¹⁸ *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229 (Division Bench, Nandrajog and Khanna JJ, 9 December 2016).

¹⁹ Copyright Act of 1976, 17 USC § 107 (United States).

²⁰ *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841) (Story J).

²¹ *Campbell v Acuff-Rose Music Inc* 510 US 569 (1994).

²² Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 Harvard Law Review 1105.

appealing because it breeches the broad conceptual providence inherent in the international three-step test (which requires that exceptions be limited to "certain special cases"), this approach presents fundamental incompatibilities.²³ A broader fair use conception threatens to stretch that confinement thin. Third, the density of access-protective interpretation around the educational exception in *DU Photocopy* nevertheless leaves unsettled this tipping point, where instructional reproduction gives way to market erosion for academic publishing at least a tension that was held in relief by the Division Bench but ultimately unresolved.²⁴

9. Critical Analysis

Indian jurisprudence on fair dealing is characterized by inconsistent analysis. Judicial interpretations have yet to resolve where the Section 52 categories operate like hard and firm gateways or as more colloquially illustrative purposes subject to liberal construction. The former is proposed by *Academy of General Education*, which treats the statutory exceptions as the sole indicia of allowable use,²⁵ while the latter (reflected in *Wiley Eastern* and a portion of the *DU Photocopy* reasoning)²⁶ reads categories purposively with constitutional free-speech values and educational access informing their interpretation. This unbridged methodological divide means that similar facts might generate alarmingly different results depending on the interpretive stance a court employs. The second criticism relates to the uncritical transfer of factors from the USA. The four fair use factors developed to structure an open-ended standard; using them in a closed-list context collapses two separate questions, whether a use is *categorised* and whether it is *fair* into one another, potentially rendering the classes meaningless. The connection between the statutory purpose-requirement and the fairness factors that have been imported would benefit from a more clear articulation confusion in Indian jurisprudence. As of now, the foremost treatises rightly note that the contours of this doctrine are still under-theorized and individual benches enjoy a wide berth.²⁷

That being said, the courts should be applauded for progress on public interest in two of the areas that matter most education and freedom of expression. *Civic Chandran* sheltered speech that was both critical and parodic *DU Photocopy* ensured access to learning materials at an affordable price *Hamar Television and s India TV* kept copyright from being used as a blunt weapon against trivial, but transformative uses. These seem to represent a sincere commitment to the access side of the copyright bargain.

10. Conclusion

Indian jurisprudence on fair dealing has come a long way from its common-law origins. In large part by interpretive construction, courts have devised a flexible doctrine that can defend criticism, parody, news reporting, research and education on the attack from an overreaching copyright. It leads to an outcome that strikes a largely justifiable balance between rewarding creators and rewarding the public creators have durable protection against substantial preparation for commercial use, while the public has significant room for transformative, critical and educational use. However, measured in terms of doctrinal coherence the balance is less certain. This means it is often unclear whether Section 52 is a closed door or purposefully opened window, that statutory categories and common law factors

²³ Berne Convention 1886, art 9(2); TRIPS 1994, art 13.

²⁴ *Rameshwari Photocopy Services* (DB) 2016 SCC OnLine Del 6229

²⁵ *Academy of General Education* (2009) 4 SCC 256.

²⁶ *Wiley Eastern Ltd* 1995 PTC (15) 247 (Del); *Rameshwari Photocopy Services* 2016 SCC OnLine Del 6229.

²⁷ VK Ahuja, *Law Relating to Intellectual Property Rights* (3rd edn, LexisNexis 2017); P Narayanan, *Law of Copyright and Industrial Designs* (4th edn, Eastern Law House 2007).

have yet to be reconciled and that the international three step test framework has continued to stand in tension with domestic jurisprudence; leaving the doctrine unpredictable where its margins meet most. As such Indian fair dealing has sought an appropriate balance of effects without yet attaining an appropriate balance of analysis. The immediate challenge facing both courts and legislatures is not to adjust results but to provide a rational and internally consistent framework for analysis one that reconciles the closed nature of the statute with the purposive tendencies of judges, and that can accommodate online uses never imagined in 1957. And until that reconciliation is achieved, fair dealing in India will continue to be, in Lord Denning's time-tested words, 'a question of degree which has to be settled from case to case rather than by the application of principles.

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