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Concept of fair dealing – A co-relative analysis

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ABSTRACT

In this research article, the researcher makes a comparative analysis between India's Doctrine of "Fair Dealings" and the US's Doctrine of "Fair Use". And the outcome of this research article would be, to analyze which law stands in a better position to protect the rights of the creator and the Consumer. And whether the Provisions in India and the United States relating to Fair use is in like nature to the International frameworks or not?

Keywords— Fair dealing, Fair draft, Right holder, Unfair, Infringement

1. INTRODUCTION

The rationale behind acceptance of the Fair Dealing principle is that in certain matters or Circumstances the Copyright infringing work may bring greater good to the Society and on such occasions it is better to allow such infringement rather than denying it.

And it's important to make note of the case "Hubbard v. Vosper"[1] whenever we attempt to define the term "Fair Dealing" And Lord Denning in this judgement had specifically pointed out that;

"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 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".[2]

The above words of Lord Denning clearly portray that it is impossible to determine or propose the definition of Fair Dealing / Fair Use, cause, the term changes from time to time with the improvement in technology.

Any unauthorized use of copyright works amounts to the infringement of the copyright, however, there are certain exceptions provided by the law where some unauthorized use of the copyright is not considered as an infringement. In Indian law, the exceptions for such unauthorized use are provided under Sec. 52 under the ambit of "Fair-dealings" which was borrowed from UK's CDP Act, 1988 where there are certain exceptions such as (a) "research or private study", (b) "reporting current events" and (c) "criticism or review" are provided by law. Whereas, the US law stipulates that "Fair Use of copyright work" for certain purpose such as "research, news reporting, comment, etc.," as explained under Sec. 107 of USCA, cannot be considered an infringement. Although the US law has the same exceptions as stipulated in India and UK but it takes a turn when it comes to Judicial Interpretations. As far as India and UK is concerned the law remains the same but the US laws provides certain factors and lays a platform for Judiciary to determine the case of infringement because India and UK's provisions relating to Fair Use is traditional and has a closed list which makes Judiciary stick with the provided list and it does not provide flexibility to Judiciary to interpret but whereas the US is concerned the United States fair use doctrine is wider which allows judiciary to have a wider interpretation.[3] And the WTO members have a duty to follow the exceptions provided under "Berne Convention" and Art.13 of the "TRIPS Agreement" which insists a "Three-step "process to determine [4] that is., "It should be special, It should not without any reason cause harm or injury to the upright interest of the owner or the Right Holder and it should not conflict with normal exploitation". And also it is to be noted that even, the TRIPS application of "Fair Dealing" is closely aligned with the "Doctrine of Fair Use" of the United States.[5]

2. FAIR DEALING IN INDIA

2.1 Legislative and Jurisprudential context of fair dealing in India

2.1.1 Legislative context: The First Statutory introduction for the ideology of "Fair Dealing" was done in 1914, through "The Copyright Act, 1914", but it was a mere resemblance of the Sec. 2(1) i of the "UK copyright Act 1911," which stated that certain acts would not amount to copyright infringement if it is fairly dealt for certain purposes such as "Research, Review or Newspaper

summary, Private study and Criticism.”[6] Then came to the Independent and self-contained Indian Copyright Act, 1957, although it borrowed most of the Substantial and basic principles from that of the “United Kingdom’s Copyright Act, 1956,” the scope of the “Fair Dealing” concept under the sec. 52 of the act was different and wide.[7] which included Radio summary and Judicial Proceedings to the term. And after that, section 52 was amended four times which also includes the concept of “Fair Dealings” to it. The 1883 amendment did not have any impact on the definition of the concept of “Fair Dealing” but the Copyright Amendment Act, 1994 was a major one, which included private study, computer programs (Computer programs and its copying in a lawful processor) and sound recordings of Dramatic, musical and literary works in a certain manner has been added to the definition and the 1999 amendment also dealt with the same computer programs whereas the 2012 amendment had added a clause (zb) to the section 52(1) to the fair dealing provision in order to include use of copyright matters by the disabled persons under the purview of “Fair Dealing”. [3]

2.1.2 Judicial context: There are many important cases where the Judiciary has explained the purpose, necessity, and indefinite character of the “Fair dealing” provisions under the Indian Copyright Act. And one such case is “Wiley eastern Ltd & others v. Indian Institute of management [8]”, the court, in this case, held that the basic and main purpose of such exceptions provided under sec. 52 was to preserve the “Freedom of Expression” which is stipulated by Art 19(1) of our Constitution so, that the copyrighted work can be used for fair works like Research, review, Private study, Criticism or reporting of current events and through this case the court had explained the purpose of section 52. Later in another DB. Modak’s case [9] the question raised before the court was, whether the copying of the copied and edited judgments which was produced in the law report of the plaintiff, by the opposite party was an infringement or not, the court, by rejecting the existing Canadian doctrines “Sweat of the Brow and Modicum of Creativity” [10], created a new regime, in which the court held that not every work or industry or expending work amounts to copyright rather the work created must be different in characterisation and should involve some “intellectual effort” in it and should possess some creativity in it. Although the court had possibly explained the purpose and necessity of the Fair Dealing as an exception to the copyright infringement, the court could not possibly give a definition to the term Fair Dealing and whenever the question arises about the Definition part the Indian courts are relying on the judgment proposed by “Lord Denning” in which he stated that it is impossible to express the term “Fair Dealing” and in determining the fair usage we must see the quantity of the contents extracted and used and then the proportions should be considered and many others may come to mind but after everything’s done its only the matter of impression. And even after this the court tried to give a definitive interpretation to the term but after everything in the “ESPN Star Sports v. Global Broadcast news Ltd and others” [11] case, the court held that it is impossible to develop a “Rule of Thumb” in the “Fair Dealing” cases because it depends upon the Circumstances and facts and both Facts and Circumstances differ from case to case basis. The Indian courts which primarily relied on the UK and US courts applied three following factors for determining the Fair Dealing cases: [12] And the following factors are 1) “Amount and Substantiality of the dealing” 2) “Purpose, Character (and Commercial Nature) of the dealing” and 3) “Effect on the potential market: Likelihood of Competition”.

2.2 Amount and Substantiality of the Dealing

This principle was first used in the case of “RG Anand v. Deluxe films and others”, In this case the Supreme court of India held that Copyright cannot be given for an Idea, Subject-matter, plots, Historical events etc., and in such cases the expression of the idea, the manner and arrangements of the plots etc should be reviewed will determining cases with such issues. And it was, in this case, the principle of Idea-Expression Dichotomy was first used. Further, the court held that, whereas if the idea being developed is the same, then it is obsolete that the resemblance is bound to occur, then the court has to decide based on the resemblance occurred. Firstly, it should determine whether the similarities occurred are “Fundamental” or “Substantial” aspects that have been used in the expression of the copyrighted work. [13] The question of fair dealing arises only when the expression is copied because the idea itself is not copyrightable and once the question of fair dealing comes into the place then the question of substantiality arises and the issue of substantiality is the matter two different equations, at first the court has to check whether the substantial part has been taken or not because if there is no substantial part then there would be no infringement at all, secondly, if there is a prima facie Copyright infringement then the amount of fairness of Substantial part taken should be determined. There should be a substantial amount should be used for the Doctrine to apply but for such use to be fair it should not be too substantial. However, the Indian courts could not separate the two different inquires of quantitative and qualitative instead the court held that the quantitative and qualitative quotations depend upon the case to case basis. Then in Blackwood case, the court interpreted the term “Fair” in the “Fair Dealing” concept and gave two important points:

- (a) The word Fair in the “Fair dealing” means that, the intention of using the exception “Fair Dealing” should not be unfair, which means there should be no “Commercial motive” behind such infringement of copyrighted work.
- (b) And if the intention of the infringer is not unfair, in the means of improper then obviously the dealing would be fair.

So, in order to be an infringement, the Right holder must prove either that the infringer has taken fundamental or major Substantial part of his expression work or the intention of the infringer is Unfair, and if not it cannot be considered as an infringement. [14]

2.3 Purpose, character and commercial nature of the dealings

Sec. 52 of the Indian copyright act, has given a list of purposes that comes under the purview of the term “Fair Dealing” and if the purpose of a reproduction is not the enumerated under the list then there would be no question of “Fair Dealing”, the major purposes enumerated where, review, Criticism, private study, research etc., As per the Indian Courts a review may summarize a whole big article and will be useful for a better and quick understanding and a Criticism may help a person to know the Merits and Demerits of any article or book etc., and a guide may help a student for his educational purpose for a better understanding but an exact copying of the copyrighted work cannot be protected under the regime. [15] Then the American court had developed the Concept of “Transformative Character of the use” [16] and this principle had emerged in the Chancellor masters case, which means that the mere involvement of the mechanical work cannot be considered as the original work and there should be a transformative element and the court further held that there must be a Substantial change in the work and the purpose of the present work should Substantially vary from the purpose of the previous work along with transformation of the Character and in some means or circumstances

both may be or may look same. Then in case of “Rupendra Kashyap vs. Jiwan publishing house [17], the court explicitly pronounced that the “Public Interest is not one of the exceptions that’s provided by the legislature under the provisions of Indian copyright law and so an infringement cannot qualify to be an exception because it is claimed to be in Interest of the Public. And also such purpose of the reproduction cannot be commercial in nature which carries a commercial benefit along with it.

2.4 Effect on the potential market: Livelihood of competition

This principle is unlikely on the part of the Indian judiciary but in “Blackwood case [18] the court ruled that the “likelihood of competition” is all that is needed for determining the Infringement. And even in the ESPN star sport case [19], the Court addressed the principle of “Likelihood of Competition” where the court held that if the reproductive work is used to propose the same meaning of the original work for the rivalry purpose then it amounts to infringement because the Indian courts also consider the effect or impact, that the reproduced work creates on the original work. [20]

From the above mentioned cases it can be clearly noticed that although the Indian courts have made a root into the United States “Four Factor Analyse Method” but the Indian courts instead of applying the whole test instead sticks with a single test as per the “Circumstances and facts” of the case and the Indian courts are giving “Strict Interpretation” to the cases by applying the law as it is so it makes the Exceptions rigid in character.

3. UNITED STATES DOCTRINE OF FAIR USE

This Doctrine had its origin the famous case of “Gyles vs. Wilcox [21],” which emerged as the “Doctrine of Fair Use” in modern times. Although the Doctrine had its origin in the Gyles case the famous Four Factor test was laid down by “J. Joseph Story” in the case of “Folsom v. Marsh” [22], which was later incorporated as Sec. 107 of the United States Copyright Act, 1976. And this test is the only factor that decides the fate of a particular use whether it comes under the ambit of “Doctrine of Fair Use” and there are no exceptions explicitly provided under the Act.

The Four Factors provided under the S. 107 of the “US Copyright Act”, 1976 as follows;

- (a) “Purpose and Character of the Use - Nonprofit Educational purpose or Commercial Nature”,
- (b) “The nature of the copyrighted work - whether Fundamental or Substantive”
- (c) “The amount and Substantial of the portion Extracted or Used”
- (d) “The effect of such use upon the potential market value of the infringed work”.

And all the above factors will be considered to determine the Fair use of the work. And the provisions of Berne and TRIPS were likely to be the near resemblance of the US Fair Use doctrine because the Fair use in Berne and TRIPS is provided under Article 9(2) and 13 respectively, which lays down a three-step test and those conditions are; 1) “Certain Special cases” 2) “Should not be unreasonably prejudiced to the original work” and 3) “should not conflict with the normal exploitation of the work”. And these conditions are resembling the United States Doctrine of Fair Use and even the international standards are supportive to the US model and it also makes a Flexible way to determine the factors.

4. CONCLUSION

From the above-discussed points, it can be clearly said that the Indian law is more rigid and non-flexible when compared to both the US and UK. Although the UK’s law is the same as the Indian it has included the clause of Public Interest to its exception which makes more room for Judiciary to interpret on and decide. Even though Indian law has a clear exception that has been sharply stipulated without any doubts, it does not provide any flexibility to the Judiciary. Because if we notice the decided Indian cases we can see that Judiciary has taken every necessary step to serve the purpose by making reference to the United States and UK’s Judiciary to determine in difficult situations but still the Judiciary had to stick with the provisions of the Indian Copyright Act and they could not interpret anything outside the exceptions. Because, they could not apply the Four factor test as a whole instead they applied the test in a case by case basis and when it came to the matter of public interest the Indian courts had to directly go with the provision and the court held that since the Public Interest was not provided as an exception it cannot be considered as one because the court had to give a Strict interpretation to the exception clauses.

Even though the provisions of US regarding the Doctrine of “Fair Use” is wider it gives Judiciary a better room for interpretation to address all the issues whereas, although the Indian laws are precise and clearly given, their brief explanation doesn’t express the meaning or purpose of the application or defence and its rigid and non-flexible character of excluding other matters such as Public Interest makes it age-old and there a need for the Reformation of Indian provisions in order to cope up with the rapidly increasing technology and other issues. And even the International standards stipulate the broader interpretations without limiting the scope of the Judiciary. And so the Indian legislations should broaden the provisions of the Fair Dealing doctrine.

5. REFERENCES

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- [2] Id
- [3] Craig J Carys, The Changing Face of Fair dealing in Canadian Copyright law, Irwin Law, Toronto, 2005, p. 437”.
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- [5] Gervais J Daniel, Post CCH-Canadian Copyright Law, Intellectual Property Journal, 18(2004), 131-167”.
- [6] Ayush Sharma, Indian perspective of fair dealing under copyright law: Lex Lata or Lex Ferenda?, Journal of IPR, Vol 14, Nov 2009, pg. 523-531”.
- [7] Pragalbh Bharadwaj, A critical appraisal of Fair Dealing doctrine under Indian Copyright Law, HNLU Student Bar Journal, Vol-II, 2016, pg. 39-54.

- [8] 61 (1996) DLT 281 para 19.
- [9] Eastern Book Company v. DB Modak, CA No. 6472 of 2004.
- [10] 2004 SCC 13.
- [11] 2008 (36) PTC 492 (Del) Para 34.
- [12] Civic Chandran, 1996 PTC 16 670. It can be noted that the three corresponding factors that the Indian court follows have its exact resemblance with the US factors that have statutory recognition under S. 107 of US copyright code.
- [13] Supra Ayush-6.
- [14] S.K. Dutta v. Lawbook co & others, AIR 1954 All 570 para45.
- [15] Ramesh Choudhary and others v. Ali Mohd AIR 1965 J&K 101.
- [16] 2008(38) PTC 385(Del) Para 28.
- [17] 1996 (38) DRJ 81 para 24.
- [18] AIR 1959 Mad 410 para 85.
- [19] Supra 12 ESPN case.
- [20] Held in Blackwood case, AIR 1959 Mad 410 para74.
- [21] 1740 (26) ER 489.
- [22] 9 F. Cas. 342 (C.C.D. Mass. 1841).