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## *Abstract*

This paper compares the dealing of the fair use exception in India to fair use in the US. Current law in India limits fair dealing to specific uses, unlike the US's flexible fair use doctrine. This creates problems as technology advances. The paper argues that India should adopt a more flexible approach based on US fair use. This would allow judges to decide each case based on its facts, balancing the rights of creators and consumers. This would promote creativity and knowledge sharing in the digital age.

The initial part of the paper discusses a comparison between Indian law and US law while giving some modifications to Indian Law. The second part of this paper takes the economic approach and discusses the position of various markets and the economic implications of this principle.

## *I. Comparison Between Indian Law and US Law*

### **a. Introduction**

The overlaps of the 'fair use' exception in copyright law, specifically in the context of Indian and U.S. legislation, is a significant matter in the present world where everything is digital. The fair use principle has a universal acknowledgment, but its interpretation and application vary significantly. The Indian Copyright Act, of 1957, tries to create a balanced approach where creators' rights are protected and public interest is served, but still, it has some limitations which require certain changes. Whereas the U.S. fair use principle is driven by a flexible four-factor test that offers a more adaptable structure. This part critically examines the fair use principle in Indian law, examining its inflexibility and the related need for modification, while doing a comparison with the more flexible U.S. approach to implement this principle.

## **b. Fair Use vs. Fair Dealing: Why India Should Embrace a More User-Centric Approach?**

Fair dealing is an important aspect of copyright law, with universal discussions on the fair use principle as an exception to protect copyrighted material. In the Indian Copyright Act, of 1957, fair dealing is a delicate balance between legitimate use and blatant copying. However, the Act lacks a clear definition of 'fair dealing,' and Section 52<sup>1</sup> provides limited and possibly insufficient fair dealing exceptions by outlining specific purposes. Despite three amendments<sup>2</sup> to Section 52, there's a need for reform, and this paper aims to bring out the insufficiency of the fair dealing provision while highlighting its potential mutual benefits for creators and consumers.

The concept of fair dealing is driven by the concept of equity and justifies unauthorized use based on specific facts and circumstances of a case. The lack of a clear rule in India regarding the amount of work permissible under fair dealing makes it the court's responsibility to decide on such matters, considering factors like public interest. However, the courts often restrict themselves to the exhaustive list in Section 52, reflecting a strict and limited understanding of fair dealing. In the case of *Civic Chandran v. Ammini Amma*<sup>3</sup> Kerala high court held that even substantive duplication of copyrighted work is allowed under the reasonable fair dealing exception if the duplicating is public.

A comparison with the United States' fair use doctrine shows a more flexible approach. Justice Joseph Story laid the foundation for this idea of fair use and short test in *Folsom v. Marsh*<sup>4</sup> with a four-factor test. It considers the purpose and character of use, the nature of the copyrighted work, the amount used, and the impact on the market value. The *Lenz v. Universal*<sup>5</sup> Music Corporation case shows the debate over users' rights and creators' rights, emphasizing the need for a delicate balance. In this case, the court encourages copyright holders to stay ignorant of noninfringement when issuing takedown notices.<sup>6</sup>

While the U.S. law provides an open-ended and flexible framework for fair use, the Indian law, despite amendments, lacks clarity and flexibility. This paper will conclude while suggesting the need for reforms in India's fair dealing provision to adapt to the evolving technological environment and to better serve the interests of both creators and consumers.

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<sup>1</sup>The Indian Copyright Act 1957, S. 52

<sup>2</sup>Zarkin Thomas, Overview of changes to the Indian Copyright Law (Journal of Intellectual Property right, Vol 17, 2012) 329

<sup>3</sup>Civic Chandran v/s C. Ammini Amma (1996) 16 PTC 329 (Ker.) (India)

<sup>4</sup>Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) Year. 184

<sup>5</sup>Lenz v. Universal No. 13-16106, 2016 WL 1056082 (9th Cir. Mar. 17, 2016)

<sup>6</sup>Lenz v. Universal Music Corp, (Harvard Law Review, Vol 129 Harv. L. Rev. 2289, 2016)

### **c. Criticism and the Need for Modification in India's Fair Dealing Exception**

The rigid structure of India's fair dealing exception restricts its applicability, whereas the laws of the UK and the US provide this exception across all categories of copyrightable works. A comparison between two landmark judgments, the *Blackwood v. Parasuraman*<sup>7</sup> case and the *University of Oxford v. Rameshwari Photocopy Services*<sup>8</sup> (RPS) case, shows the evolving interpretation of fair dealing in India.

In the Blackwood case, the court strictly interpreted 'private study,' limiting it to a student copying a book for personal use. The court insisted on using explicitly mentioned in the fair dealing clause to qualify for protection. On the other hand, the RPS case demonstrated a wider understanding of fair dealing. The court interpreted 'instruction' broadly, including copying for making and issuing course packs, departing from strict adherence to statutory language.

The RPS case considered India's economic circumstances, acknowledged limited resources for students, and emphasized the overarching goal of fair dealing to benefit the public against intellectual enrichment. This broader interpretation instead of a literal interpretation showcases the judiciary's willingness to adapt to the needs of a developing nation.

While India's judiciary has broadened its interpretation of fair dealing, the initial traditional approach to the laws raises questions about their relevance and effectiveness. Section 52 of the Act, despite its seemingly lengthy list, is, in practice, quite limited. Similar to the US approach, the need for more openness becomes evident to allow judges to decide on a case-by-case basis, considering critical factors.<sup>9</sup>

A unique perspective, suggested by L. Ray Patterson, suggested a shift in applying fair use to the copyright owner rather than the users. Patterson argues against limiting personal use, highlighting the balance between creators' rights and the cultural contributions they draw inspiration from.<sup>10</sup>

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<sup>7</sup>Blackwood v. Parasuraman AIR 1959 Mad 410

<sup>8</sup>University of Oxford v. Rameshwari Photocopy Services (2016) 16 DRJ (SN) 678

<sup>9</sup> Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law: Lex Lata Or Lex Ferenda? (Journal of Intellectual Property Rights Vol 14, November 2009)

<sup>10</sup> Patterson, L. Ray. "Free Speech, Copyright, and Fair Use." Vanderbilt Law Review 40, no. 1 (1987)

In conclusion, the call for moving away from India's rigid understanding of fair dealing toward a more flexible US-inspired fair use doctrine is evident. While recognizing the grey areas in the US framework, India should adopt an approach that allows for judicial discretion and modification of the fair dealing provision to remain relevant and efficient.

## ***II. Economic Analysis of the Fair Dealing Principle***

### **a. Overview of The Market Model:**

This part of the article explores the market model regarding the context of fair use in copyright law. It starts by defining markets as systems for the mutual exchange of owned goods, acknowledging that private ownership is just one approach among many for resource control. The paper argues that fair use should be interpreted as a judicial response to market failure in copyright, using the presence or absence of market failure indicators to predict fair use outcomes.

Economists, following Adam Smith's tradition, defend society's dependence on markets, stating that individual transactions serve both social and individual needs.<sup>11</sup> However, this paper points out that perfect competition conditions, such as perfect knowledge and the absence of transaction costs, are very rare to meet. Imperfect markets may lead to market failures, pushing the legal system to step in.

Additionally, public goods, like books and inventions, cannot be limited once produced and can be accessed without paying for them, leading to possible underproduction in a private market. Copyright law creates property rights, lowers transaction costs, provides information, and facilitates enforcement, allowing the market to function.

Despite the existence of various mechanisms within copyright markets, they may not always be efficient. Recognizing flaws in these markets can help provide a clearer framework for fair

use doctrine. Conditions of perfect competition are significant, as they are important factors that put reliance on fair use when market failures occur.

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<sup>11</sup>Kurz, Heinz D. "Adam Smith on Markets, Competition and Violations of Natural Liberty." *Cambridge Journal of Economics* 40, no. 2 (2016): 615–38. <http://www.jstor.org/stable/24695923>

## **b. The Three-Part Test for Determining Fair Use: Unveiling A Structured Approach**

Fair use is a legal principle that gives defendants protection from infringement claims under specific conditions. This protection is contingent upon the fulfillment of a three-part test designed to carefully balance the interests of copyright holders and promote social benefits. The purpose of this test is to grant protection against market failure exploitation, ensure social value through unauthorized use, and avoid substantial injury to the copyright owner's incentives. The three-part test consists of<sup>12</sup>:

### **i. Market Failure**

The first element inspects market failure, focusing that fair use should not be invoked without valid cause. In the copyright world, where reliance on the market is typically assumed to serve society, a mere economic judgment that transferring use to the defendant would give a net social benefit is insufficient to justify fair use. The argument against this approval is based on that if a work is socially more valuable in the hands of a buyer, market mechanisms should allow for the purchase of permission from the owner. A copyright owner can only be deprived of his work in instances where consensual bargains are unattainable due to market failure. Thus, market failure is essential for justifying fair use based on economic grounds.<sup>13</sup>

### **ii. Balancing Injury and Benefit**

In cases where market failure is identified, the second element involves a careful evaluation of whether the use is more valuable in the defendant's hands than in the copyright owner's possession. Simulating a market inquiry, the court considers whether, when market failure is rectified, the price demanded by the owner is lower than the price the user would offer. Courts may face difficulty when fair use is claimed for non-commercial purposes bringing uncompensated societal benefits. Despite these challenges, the court's assessment mirrors the

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comparison made in market transactions, implying that fair use is akin to the copyright owner's consent under ideal market conditions.

<sup>12</sup> Gordon, Wendy J., Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors (1982). Columbia Law Review, Vol. 82, No. 1600, 1982

<sup>13</sup> Government of India, Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, A Handbook of Copyright Law

In analyzing market failures, hypothetical scenarios based on perfect market principles are considered. Courts should determine what copyright owners would consent to if a functioning market existed. This approach parallels implied consent in intentional torts, assuming optimal market conditions. It protects both social welfare and copyright owner interests, safeguarding incentives against substantial harm.

### **iii. The Substantial Injury Hurdle**

As per the third element fair use should be denied when substantial injury is anticipated, as it would undermine the overarching incentive system. Differentiating between complete market failure and intermediate cases, the third part addresses situations where no incentive purpose would be served by protecting the plaintiff or where a potential plaintiff's protection would create a disincentive for the defendant. In cases of complete market failure, fair use is justified if the first two elements of the test are satisfied, affirming the presence of market failure and identifying a net social benefit from the defendant's use.

Fair use gets tricky when the market for ideas isn't completely broken. If someone could buy permission (but maybe it's expensive or inconvenient), using fair use might hurt the creator's income. To avoid this, courts consider whether the creator would be seriously harmed if someone used their work for free. This protects creators' incentive to create.

It also considers the future. Maybe a new market for using the idea will develop. Courts don't want to give someone free use if the market could fix things later. This makes sure fair use doesn't create problems that could be solved with a proper marketplace for ideas.

### **c. Alternatives to fair use and burden of proof**

Copyright law is like a marketplace for ideas. The usual approach is a three-step test to balance the rights of creators and users. There are other ideas, though. One option is for courts to order payment instead of blocking someone from using an idea. This can help creators financially without shutting down new uses. However, courts shouldn't try to act like market managers and set prices for ideas.

Another key question is who must prove what in court. Normally, the person using the idea (the defendant) must show why the market isn't working and why their use is important. But if the market is broken, the burden shifts to the creator (the plaintiff) to show they're being hurt. This reflects the idea that copyright is supposed to encourage creativity, and sometimes letting people use ideas for free can be good for society.

Overall, the three-step test offers a good way to weigh the different interests in copyright. It considers market problems, the value of using ideas, and how much creators might be hurt. Other approaches exist, but courts should be careful not to mess up the market for ideas. Finally, the burden of proof is placed on the right person depending on the situation, ensuring a fair balance.

#### **d. Case Study**

In the Williams & Wilkins<sup>14</sup> case study, the Supreme Court upheld a Court of Claims decision recognizing extensive library photocopying as potentially fair use. This decision aligned with the Court of Claims' three-part test, akin to the approach proposed in the article. The dispute involved publisher Williams & Wilkins and government libraries NIH and NLM over copyright infringement from photocopying.

The Court of Claims centered its assessment on market failure, emphasizing noncommercial use and the challenge of monetizing values like human health. It posited that ceasing photocopying could hinder the formation of a satisfactory market for vital medical uses. The court assumed high transaction costs might impede conventional bargaining methods.

However, questions arose regarding the majority's assumption of photocopying cessation, with dissent suggesting alternatives like licensing or a clearinghouse system to address transaction

costs. Criticism of the majority's decision focused on its lack of coherent rationale and failure to consider potential photocopy royalty income harm to the plaintiff.

While Williams & Wilkins tackled pivotal issues like market failure and substantial injury, the article advocates for a more structured fair use analysis. A detailed examination of these issues could mitigate potential pitfalls and offer a clearer rationale for fair use determinations in copyright law, especially concerning advancing technologies.

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<sup>14</sup> Williams & Wilkins Co. v. United States (1973) 487 F.2d 1345 (Ct. Cl.)

### ***III. Conclusion:***

In navigating the nuanced landscape of fair dealing, this paper has unraveled the intricacies within the Indian Copyright Act and the U.S. fair use doctrine. The comparative analysis underscores the need for reform in India's fair dealing provisions to adapt to evolving technological landscapes, fostering a more equitable balance between creators and consumers. As the global legal community grapples with the challenges of safeguarding intellectual property while promoting societal interests, India's fair dealing paradigm presents an opportunity for pragmatic enhancement. By embracing the flexibility inherent in the U.S. fair use doctrine, India can pave the way for a more dynamic and responsive copyright framework, fostering creativity, innovation, and the dissemination of knowledge in the digital age.



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