

How Fair is 'Fair Use' of Copyrighted Resources?

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0 THE POSER

The doctrine of fair use or fair dealing is an integral part of the copyright law of almost every country of the world. "It permits reproduction of the copyrighted work or use in a manner, which, but for the exception carved out, would have amounted to infringement of copyright" [14]. The doctrine allows making copies of the original for purposes such as criticism, comment, news reporting, teaching or research [17]. Fair use doctrine provides a set of guidelines pursuant to which researchers, educators, scholars, and others may use copyrighted works without seeking permission or paying royalties. [21] Thus in the context of fair use, two aspects of using a resource are considered, viz., making single or multiple copies of the resource – partly or fully – and making use of the resource – partly or fully – for some definite purpose. Copyright laws try to specify the extent to which these aspects of use can be allowed. Since the author or creator of an intellectual product is naturally and legally the owner of his creation, it is a question – certainly a very apt one – as to how fair it will be to allow others to copy or use that product and, if so, to what extent?

1 THE LEX LATA

But before trying to answer this question, it is perhaps pertinent to have a glimpse of the existing provisions and practices of fair use. The fair use provision often covertly exists in the exception clauses in a legal instrument on copyright. Generally such an instrument enumerates what are infringements of copyright and what are not. [2] Use of small portion of copyrighted material for education and research is considered non-infringement of copyright. As United Kingdom's Statute of Anne of 1709, the first statute to provide for copyright regulated by the government and the courts, had no provision for authorized reproduction of copyrighted content, the courts gradually created a doctrine of "fair abridgement", which later became "fair dealing", that recognized the utility of such actions [6]. It was the British Copyright Act of 1911, which perhaps for the first time incorporated the idea of fair use for private study, research, etc.

1.1 The Acquiescence

Fair use or fair dealing of copyrighted documents of a country is governed by the

copyright law of the country concerned. However, this facility, along with copyright protection, is also provided for foreign works as reciprocal measure on the basis of international treaties and conventions on copyright. The declarations made at international conventions on copyright held at Bern (1886) and on protection of industrial property held in Paris (1883) have endorsed the concept of fair use. Most of the countries are signatories of those declarations. Article 9(2) of the declaration of Berne Convention authorizes national legislation to permit the reproduction of protected works 'in certain special cases' provided two conditions are fulfilled: (a) the 'reproduction does not conflict with a normal exploitation of the work'; and (b) such reproduction 'does not unreasonably affect the legitimate interest of the author'. Article IV bis, paragraph 2 of the Universal Copyright Convention held in 1952 in Geneva, as revised in Paris in 1971, permits the member states to make exceptions to three basic rights of the creator of a work (the reproduction right, the public performance right and the broadcasting right) provided that: (a) they 'do not conflict with the spirit and provisions of the convention', and (b) provided they 'accord a reasonable degree of effective protection to each of the rights'. [6, 16] Rome Convention on the protection of the rights of performers, producers of phonograms and broadcasting organizations (1961) also allowed exceptions in national laws to the above-mentioned rights as regards private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases — except for compulsory licenses that would be incompatible with the Berne Convention — where the national law provides exceptions to copyright in literary and artistic works [21]. World Intellectual Property Organization (WIPO) sponsored copyright treaty signed in Geneva in December 1996, permits contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. "Similarly, these provisions should be understood to permit contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment", it says. [21].

1.2 The Contrast

Thus the fair use provision, which was incorporated in the Bern Convention document, has been dittoed or supported by subsequent international conventions and treaties. However, there are wide variations in the provisions relating to fair use in the copyright laws of different countries. "On one extreme is the US, which allows even the multiple copying of a copyright-protected work for classroom use as well as specific exceptions for libraries and archives, the other extreme is in the EU countries, which do not allow any free use of copyright-protected materials" [1]. Nevertheless, the Copyright, Designs and Patents Act, 1988 (CDPA) of UK permits individuals to make a single copy of a "reasonable proportion" of literary, dramatic, musical and artistic works for "research and private study" and "criticism, review and news reporting" [4]. "Canada follows the golden mean where there is limited 'fair use' provision that generally does not permit multiple copying and some very limited exceptions for libraries and archives. Australia has provisions in the Act

that allows reviewers and students to use copyrighted material without permission provided their use is fair. There are also special provisions for copying by libraries, educational institutions and government bodies. In some cases, certain procedures must be followed and in some cases fees must be paid. Japan copyright law very specifically iterates the exceptions wherein permission is not required to reproduce the work based upon the purpose and amount of reproduction required" [1].

1.3 The Law of the Land

Fair use or fair dealing was first statutorily introduced in the Copyright Act passed by Indian Legislature in 1914 as a mere duplication of Section 2(1)(i) of the UK Copyright Act, 1911, providing that copyright would not be infringed by 'any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary' [13]. In the subsequent Indian legislation on copyright, the Copyright Act of 1957, the scope of fair dealing was widened. It may be pointed out here that the statutory framework for fair dealing in India follows the common law and does not define fair use or fair dealing *per se* [12]. The legal provisions for fair dealing are available in Section 52 of Indian Copyright Act listing the actions not to be treated as infringement of copyright. The major provisions related to fair use are [3]:

- Fair dealing with a literary, dramatic, musical or artistic work for the purposes of :
 - (i) research or private study;
 - (ii) criticism or review, whether of that work or of any other work.
- Fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events:
 - (i) in a newspaper, magazine or similar periodical, or
 - (ii) by broadcast or in a cinematograph film, or by means of photographs.
- The reproduction of a literary, dramatic, musical or artistic work:
 - (i) by a teacher or a pupil in the course of instruction; or
 - (ii) as part of the question to be answered in an examination; or in answers to such question
- The making of not more than three copies of a book (including pamphlet, sheet of music, map, chart, or plan) by or under the direction of the person in-charge of a public library for the use of the library, if such book is not available for sale in India.
- The reproduction for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in library, museum or other institution to which public has access.

2 THE CEILING

Though the copyright laws do not often have clear provision relating to the exact proportion that can be copied from a document for fair use, the associations of people connected with creation of literary learned works, such as writers, composers, publishers, etc. have sometimes put forward their views in this regard. In Britain, for example, according to the views of Society of Authors, Writers Guild and Publishers Association, in general

making one copy of a maximum of a complete chapter in a book, or 5 per cent of a literary work by an individual for research or private study may be considered as fair dealing. According to the Library Association (now CILIP) Guide, in case of short books, reports, standards, and pamphlets up to 10 per cent, if more than 20 pages or 2 pages if brief, may be copied for fair use. The Association of Learned and Professional Society Publishers of UK regards copying of a single article from an issue of a periodical as fair use. [10]

3 THE RATIONALE

The rationale for exception to copyright law for fair use is that while the owner of any intellectual asset has absolute right over this asset like any other personal asset, he also has the responsibility to allow selective use of that asset for the benefit of the society. [2] If the former is the moral right, the latter is the moral responsibility of the author. Fair use thus ensures limited utilization of copyrighted resources for research, development and welfare of the masses. "The idea behind this is that if copyright laws are too restrictive, it may stifle free speech, news reporting, or result in disproportionate penalties for inconsequential or accidental inclusion" [18]. It has also been argued that "if copyright protection is applied rigidly, it can hamper progress of the society" [8]. Favouring fair use, IFLA also maintains that "overprotection of copyright could threaten democratic traditions and impact on social justice principles by unreasonably restricting access to information and knowledge. If copyright protection is too strong, competition and innovation are restricted and creativity is stifled". It has also adopted the principle that "national copyright laws should aim for a balance between the rights of copyright owners to protect their interests through technical means and the rights of users to circumvent such measures for legitimate, non-infringing purposes" [7]. Thus there is strong reason for allowing fair use of copyrighted materials, but certainly with restrictions.

4 THE CONCEPT

Even if it is admitted that exceptions to copyright is 'fair' for the benefit and progress of the society, two major questions still remain to be answered: what is actually 'fair use' and how much use of copyrighted resources can be considered as fair use? To find answers to these questions is really difficult. To quote Lord Denning, a British legal luminary, "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. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression" [15]. Thus decision as to the fairness of use of copyrighted resources will differ from case to case. The courts have also time and again reiterated that it is impossible to develop a 'rule of thumb' for cases of fair dealing as each case depends upon its own facts and circumstances" [14].

5 THE DILEMMA

Possibly this is the reason that copyright law of no country clearly defines the concept of 'fair use'. Laws of some of the countries have only mentioned the purposes of use that may be considered as 'fair'. In fact use of same material may be fair in some case, but not so in another case, e.g. use of a portion of a document for study and research will be considered as fair use, but copying of the same material for commercial purposes will not be considered as fair use. Similarly, the copyright law of no country has prescribed definite quantitative limit on the portion that can be used without infringing copyright for different types of works, except in case of copies that can be made in a public library. In most cases "copyright in a work is considered as infringed only if a substantial part is made use of unauthorisedly. What is 'substantial' varies from case to case. More often than not, it is a matter of quality rather than quantity. For example, if a lyricist copies a very catching phrase from another lyricist's song, there is likely to be infringement even if that phrase is very short" [8]. These create dilemma for the authors, who quote others to prove or explain their points; scholars, who copy others' works for study and research; and librarians, who provide reprographic services. For the same reasons, the courts need to take help of their own reasoning and interpretation and sometimes discretion in deciding the cases relating to alleged infringement of copyright, thus leaving scope for varying judgements in similar cases. It may be mentioned that in some countries, including India, the copyright law enumerates some conditions or instances where use of copyrighted materials will not be considered infringement of the law, while in USA some factors are considered for assessing whether an instance of use of a copyright protected material is fair use or infringement of copyright. These factors are:

- *Motive of Use*: Whether the motive of use is making profit i.e. for commercial purpose or using for non-profit purposes, such as education, research, criticism, review, etc.;
- *Nature of Work Used*: Whether the work being used is a fiction or non-fiction, published or unpublished;
- *Substantiality of Use*: How much of the work has been used – small portion or large portion; whether the portion used is significant or main area of the work; whether the prescribed limit of portion that can be copied, has been adhered to;
- *Effect on Potential Market or Value of Protected Work*: Whether the use will have any adverse effect on the commercial prospect or value of the protected work.

The American copyright law, however, does not provide express instructions for weighing each of the elements, but rather relies on courts to develop further the substance of the doctrine. [5] These factors, fully or partly, are also considered by the courts in other countries for judging fair use cases. Nevertheless, "it is important to keep in mind that these factors are simply guidelines and that they may be more or less important in different situations. For example, just because your use is for educational and non-profit purposes, this does not automatically make it fair use. Similarly, it is also possible for a use to be fair

without necessarily fulfilling each of these criteria. Even though it is commercial, other factors like whether a work is being reproduced or transformed can make a big impact on whether or not fair use applies" [20].

6 THE LEX FERENDA

The vagueness in the copyright laws with regard to the definition of fair use as well as absence of prescription for any limit to the number of copies that can be made of a resource and the quantitative extent of a work that can be allowed for fair use purposes not only "provides tremendous flexibility, but also leads to much uncertainty. Applying the statute to a particular proposed project can result in multiple, quite reasonable interpretations" [9]. It may be pointed out that due to this vagueness in copyright laws "applying the doctrine of fair use has proven to be difficult throughout its history, making it the most complex and difficult concept in copyright law – and the basis for many misconceptions" [11]. To combat this uncertainty and make fair use more predictable, there seems to be an urgent need to seriously consider the ways to remove the vagueness relating to fair use to the extent possible in copyright laws, though it is really a difficult task, specially to fix quantitative limit of works for deciding or assessing fair use. Besides, there is need to frame guidelines or compile a handbook for the benefit of authors, researchers and libraries and their users, who seek copies of copyrighted materials. Such guidelines (sometimes in tabular form called fair use charts or fair use worksheets) have been compiled by various institutions for their patrons in some countries. [2] In USA. "the most well known of these guidelines are the CONTU Guidelines on Photocopying Under Inter-library Loan Arrangements, adopted in 1978, and the Agreement on Guidelines for Classroom Copying in Not-for-profit Educational Institutions with Respect to Books and Periodicals (often referred to as the 'Classroom Guidelines'), adopted in 1976 [9]. Another such important 'guidelines' or handbook is *Code of best practices in fair use for academic and research libraries*, prepared by Association of Research Libraries (USA).

6.1 The Vad'e-mecum

In India there are no such guidelines or handbook for the guidance with regard to fair use, but a *Handbook of Copyright Law*, has been brought out by the Ministry of Human Resource Development, Government of India, which does not provide any definition of fair use but briefly mentions the exceptions provided in the law for fair dealing [8]. This is because the law itself does not provide any definition, nor does it prescribe any definite limit with regard to number of copies or portions of a book that can be copied for fair use except in case of public libraries, where making of three copies are allowed with certain conditions. There is, therefore, a need for amendment of Indian copyright law, to include a definition of 'fair dealing' or 'fair use', as clearly as possible, and also copyright rules to indicate the number of copies and/or the proportion of a work that can be treated as fair dealing or at least to mention definite conditions or factors to be considered for deciding about the extent of a work that can be copied for 'fair use' for each type of work. This will help the users of copyrighted resources as well as the courts in assessing the extent of copyright violation. The amendment of the law and the rules may be taken up in

consultation with the representatives of copyright holders on the one hand and the users on the other and also considering the verdicts of different courts of the country in cases relating to copyright dispute. The above handbook may also be revised accordingly for the guidance of the users and libraries. Different organizations may also compile their own guidelines for fair use for their members, which may include, besides an overview of the copyright law and the exceptions granted under the law, the following [19]:

- Limitations relating to time, portion, copying and distribution
- Provision for seeking permission and payment of fee
- Attribution and acknowledgement
- Use restrictions
- Protection of integrity of copyrighted digital works, etc.

7 THE EPILOGUE

While recognizing the intellectual property rights of the writers and innovators, the importance of fair use or fair dealing i.e. restrictive use of copyrighted resources for the advancement of research and development has been realized internationally, which is evident from the fair dealing clauses of copyright laws and treaties. But there are still vagueness and differences of opinion as to the number of copies and the extent of copyrighted resources that should be permitted for fair use. In today's world when open access has taken the shape of a movement, and scholars are voluntarily coming forward to place their writings on open access, fair use should be encouraged more and more for the furtherance of research, of course with necessary precautions. The copyright laws should make clear provisions for fair use and fair use guidelines or handbooks may be compiled for proper management of this provision. Awareness should also be developed about the provisions of fair use among the scholars and public in general. The libraries can play a vital role in this regard [2]. ●

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