



## **FAIR DEALING AS A DEFENCE TO AN ACTION OF COPYRIGHT**

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### **ABSTRACT**

The goal of laws governing copyright is to achieve a delicate balance between safeguarding the legal rights of authors and expanding people's access to information and opportunities for creative expression. The "fair dealing" concept is an important component of this equilibrium since it may be used as a defence against allegations of copyright infringement. Others are permitted to use copyrighted content for some purposes without first obtaining express permission via the use of fair dealing, which offers a narrow exemption to the exclusive rights held by copyright holders. This article examines the notion of fair dealing as a defence in copyright law, focusing on its relevance, breadth, and the elements that are taken into consideration when assessing whether a specific use qualifies as fair dealing or not. It also explores the changing landscape of fair dealing in light of the improvements in technology, as well as the issues that it brings in this day and age of digital technology. In the end, fair dealing is an essential precaution that enables the peaceful coexistence of the protection of intellectual property and the unrestricted flow of ideas and information. Fair dealing is a term that originated in the United Kingdom.

**Keywords:** Copyright, Fair Use, Fair Dealing, WIPO etc.

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### **INTRODUCTION**

Copyright is a specific part of intellectual property law that grants legal protection to the creations of individuals, such as authors, musicians, artists, and innovators. It bestows upon them exclusive rights to perform certain actions or authorize others to do so regarding their original works in the fields of literature, drama, music, art, cinematography, sound recordings, and computer programs.

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This exclusive right includes the ability to control the “reproduction of their works, such as books, music, paintings, songs, and movies, for a specific duration of time”, chosen by the copyright holder. The primary goal of intellectual property law is to safeguard the rights of creators, ensuring that their original works are not illicitly replicated or commercially exploited by others. Copyright establishes both the exclusive rights of creators over their work and certain limitations on the exercise of those rights. When an owner's rights over a copyrighted work are limited without the creator's consent, it is referred to as fair dealing. “Fair dealing allows for the legitimate use of a literary, dramatic, musical, or artistic work for purposes such as research, private study, critique, or review, regardless of whether it pertains to the original work or another. Although copyright law does not explicitly define the term fair dealing”, courts have repeatedly sought to clarify its meaning by interpreting different works and determining their scope.

### **LEGAL PROVISIONS FOR FAIR DEALING**

“Article 13 of the TRIPS (Trade related aspects of Intellectual property Rights) explicitly provides, Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the Right holder.”<sup>1</sup>

“Article 9(2) of the Berne Convention also states that it shall be a matter for legislation or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the Right holder. This idea has been codified in significant territorial copyright legislations since all WTO members are required to abide by the TRIPS articles and the Berne Convention on Copyright. Each nation has its own rules that govern how the exception of fair dealing is applied and interpreted. In India, Section 52 of the Copyright Act, 1957 lists common exceptions or defences to copyright infringement.”

### **ORIGIN AND DEVELOPMENT OF FAIR DEALING**

The concept of fair dealing is a crucial element in the regulations concerning intellectual property and reproduction. It serves to prevent any infringement on intellectual property rights associated with a particular work by allowing its usage. The "Fair Dealing" defence originated as a Doctrine of Equity, permitting the use of certain copyrightable works that would otherwise be prohibited and considered copyright infringement if done differently. The primary purpose of this theory was

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<sup>1</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual property rights, April 15, 1994.

to safeguard creative and intellectual development, which is a fundamental objective of the legal system. Within copyright law, this doctrine holds significant importance as it distinguishes between legitimate fair use of a work and deliberate, blatant copying. It achieves this by establishing a boundary between these two types of uses.

The legal notion of fair dealing allows for the use of content that is protected by intellectual property rights without the authorization of the owner of such rights. Its goal is to strike a balance between the rights of those who own copyrights and the public interest in having access to and making use of creative works. The terms "fair dealing" and "dealing fairly" are sometimes used interchangeably in contexts such as "criticism," "review," "news reporting," "research," "education," and "parody."

For the courts to establish whether or not a specific usage constitutes fair dealing, they evaluate several elements, which may differ from country to jurisdiction. In general, these considerations include the intention and nature of the use, the kind of work that is protected by intellectual property rights, the quantity and significance of the piece that is utilised, and the impact of the use on the market for the original work. The evaluation is very dependent on the surrounding circumstances, and the courts consider each of these aspects on an individual basis.

The United Kingdom Copyright Act of 1911 was the first imperial copyright law to explicitly acknowledge fair dealing. "This marked its inaugural recognition. The fair dealing provisions encompass three notable exceptions to the rights of the copyright owner. These exceptions are fair dealing for non-commercial research or private study, fair dealing for criticism or review purposes, and fair dealing for news reporting."

"In India, fair dealing is addressed in Section 52 of the Indian Copyright Act of 1957<sup>2</sup>, which draws heavily from the copyright legislation of the United Kingdom. This provision mirrors similar language used in the UK's copyright law. The defence of fair dealing is specifically included in Section 52 of the Act, although the term is not defined elsewhere in the legislation. Making fair use of a literary, dramatic, musical, or artistic work for research or private study, criticism or review (of that work or any other), and reporting current events is not considered a copyright violation. The Copyright Amendment Act of 2012 broadened the scope of works that can be used for private and personal use by including the phrase any work." This expansion was achieved by widening the

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<sup>2</sup> Copyright Act of 1957, § 52.

range of applicable works. Additionally, the amendment extended the provision for fair use of cinematograph films and musical compositions.

The use of fair dealing in the context of education and research is one of the most significant applications of fair dealing. Students, instructors, researchers, and scholars are all able to use copyrighted content for educational purposes, such as criticism, review, or study thanks to this provision. While doing so does not infringe on the rights of those who have copyrights, it does contribute to the diffusion of ideas and the growth of knowledge. Fair dealing also assists in the production of works that are transformative, such as parodies, commentaries, and satires, which often depend on the integration of material that is protected by copyright. Fair dealing supports cultural analysis, creative expression, and social commentary by enabling innovators and artists to build upon previously published works.

The proliferation of digital technology and the internet has had a considerable effect on fair dealing, resulting in the emergence of brand-new difficulties and complications. The simplicity of copying and sharing content protected by intellectual property rights have weakened conventional boundaries, necessitating a re-evaluation of the rules governing fair dealing. Issues such as transformative usage, user-generated material, user-generated platforms for online sharing, and the effect on the economic interests of copyright holders are being grappled with by courts and legislatures all over the globe.

## **DOCTRINE OF FAIR DEALING**

The Act does not define the term "fair dealing." However, there is a legal concept known as fair use that allows individuals to use copyrighted works without obtaining permission from the owner under certain circumstances.

Determining whether a person's use of copyrighted material is considered "fair" depends on the specific facts and conditions of each case. The line between fair dealing and infringing on someone's intellectual property is subtle. In India, there are no predetermined criteria for the maximum amount of words or sections that can be used from another source without permission. The court can only resolve this issue by applying common sense.

On the other hand, some argue that any portion taken from a work should be structured in a way that doesn't harm the author's significant interests. Fair dealing has been recognized by the courts as a substantial limitation on the exclusive rights of copyright owners. It has been interpreted

multiple times, primarily focusing on its economic impact on the copyright owner. If the usage has a minimal effect on the economy, it may be considered fair dealing.

A pivotal case in English copyright law regarding fair dealing is *Hubbard v. Vosper*.<sup>3</sup> The Church of Scientology sued Cyril Vosper, a former member, for copyright infringement due to negative comments he made about Scientology in his book, "The Mind Benders." The Church alleged that Vosper's book contained content taken from L. Ron Hubbard's writings and revealed private information about Scientology classes. Vosper successfully defended himself using the fair dealing defence, and the Court of Appeal unanimously ruled in his favour. Lord Denning's judgment, in this case, clarified the parameters and elements of the fair dealing defence.

### **FAIR DEALING VS FAIR USE**

The terms "fair use" and "fair dealing" are often used interchangeably, but there are slight linguistic differences between them. "In the United States, the term Fair Use is utilized in the legal system, while Fair Dealing is used in England and India. Both terms rely on interpretation by courts on a case-by-case basis. In the United States, fair use is not explicitly defined in the Copyright Act, so it is evaluated based on Justice Story's four-factor test established in the *Folsom v. Marsh* case.<sup>4</sup> This test considers factors such as the nature and purpose of the use, the quantity and value of the materials used, and the potential impact on the original work's market."

Common law countries like Great Britain, Canada, Australia, India, and New Zealand have copyright legislation that includes a provision called "fair dealing," which acts as a defence against allegations of intellectual property infringement. According to these laws, if a copyrighted work is used for purposes explicitly mentioned in the Act, it will not be considered an act of infringement. However, if the copying is done for a purpose not specified in the statutory list of fair dealing purposes, it cannot be deemed fair dealing, regardless of the copier's original intent.

Another contentious issue in this area is the lack of regulatory guidance on how to evaluate the fairness of a transaction or usage. Fair dealing laws generally do not provide legislative definitions or regulations that clarify how fairness should be determined. As a result, it is left to the courts to decide the methodology for assessing whether real transactions involving protected works are fair.

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<sup>3</sup> *Hubbard v. Vosper*, [1972] 2 Q.B. 84.

<sup>4</sup> *Folsom vs. Marsh* 9. F.Cas. 342.

## **FAIR DEALING UNDER INDIAN COPYRIGHT LAW**

“The concept of fair dealing is implemented and interpreted differently in each country due to their diverse laws. In India, Section 52 of the Copyright Act of 1957 provides a list of typical exceptions and defences against copyright infringement allegations.” Fair dealing ensures that a transaction is considered "fair" if it falls within designated categories such as private use, study, criticism, and review, as specified by law. This provision was established to protect intellectual property rights.

“The fair dealing exemption is not explicitly defined in the Act but has its basis in the principle of equity.” Simply put, it justifies the unauthorized use of a copyrighted work based on the specific facts and circumstances of each case. It distinguishes between authorized and reasonable use of work versus unauthorized, dishonest, and blatant copying. In the *Wiley Eastern Ltd. v. IIM* case, the court upheld Section 52, stating that it preserves the freedom of speech guaranteed by Article 19 (1) of the Indian Constitution. “This freedom of expression can include research, private study, criticism or review, and reporting on current events.”

In the *Hubbard v. Vosper* case, Lord Denning attempted to define "fair dealing." He noted that it is difficult to provide a precise description and that it depends on various factors. These factors include the number and extent of quotes and excerpts used and the purpose of their use. Ultimately, it boils down to an overall impression.

Currently, India does not have specific rules or regulations defining the quantity of a work that can be used without the author's consent for it to qualify as fair dealing. The court's discretion plays a significant role in making judgments on this matter. However, certain principles guide the court's decision-making process, and among them, the consideration of the public interest is deemed crucial.

## **CONCLUSION**

In summary, the preceding discussion demonstrates that fair dealing is a crucial and substantial aspect of copyright law. The concept of fair dealing is not extensively developed in India, but through legislative changes and court rulings, it has gained a strong presence in our country's copyright legislation. Moreover, fair dealing is evolving and expanding its application through judicial decisions. The Doctrine of Fair Dealing is essential for striking a balance between the monopolistic rights of authors and the creative interests of the broader community. Without it, numerous innovative and remarkable works would likely not have been created. The doctrine

fosters innovation in society, resulting in a diverse range of creative and exceptional works. As a consequence, the Doctrine of Fair Dealing plays a pivotal role in promoting creativity and advancing copyright legislation at both the domestic and international levels, by safeguarding and encouraging creative works.

When it comes to gaining access to and making use of creative works, "fair dealing" plays an essential part in striking a balance between the competing interests of those who own the copyright and the general public. It makes possible critical interaction, educational opportunities, and innovative endeavours, all of which contribute to the growth of a thriving cultural and intellectual environment. However, due to the ever-changing nature of technology and the terrain of the digital world, the principles of fair dealing need to be evaluated and refined continually. Finding the optimal compromise between the protection of intellectual property and the public's access to works of creative expression is an ongoing problem that calls for continuing conversation, legal research, and public participation.