

Fair Dealing Vs. Fair Use Doctrine

*Dr Pramod Kumar, Assistant Professor, Department of Legal Studies, Chhatrapati Shahu Ji Maharaj University, Kanpur

Introduction

Fair dealing and fair use are legal concepts that provide exceptions to copyright laws, allowing certain limited uses of copyrighted material without the permission of the copyright owner. While they are similar in purpose, they differ in their scope and application.

Fair dealing is a legal concept primarily used in Commonwealth countries, such as India, Canada, Australia, and the UK. It allows for the use of copyrighted material for specific purposes such as research, private study, criticism, review, news reporting, education, satire, and parody. The use must be fair, meaning it should not adversely affect the market for the original work, and should not use more of the original work than necessary. Fair dealing is generally more restrictive than fair use and requires a case-by-case analysis to determine whether a particular use falls within the exception.

Fair use, on the other hand, is a legal concept used in the United States that allows for a broader range of uses of copyrighted material, including for purposes such as commentary, news reporting, teaching, scholarship, research, and parody. The use must be transformative, meaning it adds something new or alters the original work in some way, and should not substitute for the market of the original work. The four factors considered in determining fair use are: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the whole work, and the effect of the use on the potential market for or value of the original work.

Fair Dealing Doctrine

In India, fair dealing is referred to as "fair use" and is governed by Section 52 of the Indian Copyright Act, 1957. Here is some notable UK, Canadian and Indian cases related to fair dealing:

Hubbard v Vosper¹: In this case, the defendant used portions of the plaintiff's book in his own work without permission, arguing that his use was covered by the fair dealing exception for criticism and review. The court held that the use of the plaintiff's work was not fair dealing because the defendant's work was not a critique or review of the plaintiff's work, but rather a wholesale copying of parts of it. The case established the principle that the purpose and character of the use of copyrighted material must be considered in determining whether it constitutes fair dealing.

Ashdown v Telegraph Group Ltd²: This is the case in which the plaintiff, a former politician, brought a defamation suit against a newspaper for publishing articles that he claimed contained false and damaging statements about him. The newspaper argued that their use of the information was covered by the fair dealing exception for reporting current events. The court held that the fair dealing exception did not apply in this case, as the newspaper had used far more of the plaintiff's memoirs than was necessary for reporting the current events in question. The case established that the amount of copyrighted material used must be proportionate to the purpose of the use in order to qualify for the fair dealing exception.

R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills³: In this case, the UK High Court considered a challenge to regulations that introduced an exception to copyright law for the purpose of private copying. The claimants, a group of music industry organizations, argued that the regulations were unlawful because they did not provide for compensation to be paid to copyright owners for the use of their works. The court held that the regulations were indeed unlawful, as they failed to provide for a mechanism for compensating copyright owners for the harm caused by private copying. The case established the principle that any exception to copyright law must be accompanied by a mechanism for compensating copyright owners for any loss they may suffer as a result of the exception.

¹ [1972] 2 QB 84.

² [2002] EMLR 22.

³ [2015] EWHC 1723

ITV Broadcasting Ltd v TVCatchup Ltd⁴: In this case the UK Court of Appeal considered whether the TVCatchup service, which retransmitted live television broadcasts over the internet without the consent of the broadcasters, was covered by the exception for temporary copies made for the purpose of lawful use under UK copyright law. The court held that the exception did not apply, as the TVCatchup service was not a lawful use of the copyrighted material. The court also held that the retransmission of the broadcasts constituted an act of communication to the public, which required the consent of the copyright holders. The case established that the exception for temporary copies under UK copyright law is narrow in scope and does not apply to activities that infringe on the exclusive rights of copyright holders.

CCH Canadian Ltd. v. Law Society of Upper Canada⁵: was a landmark fair dealing case in Canada. The case dealt with the use of copyrighted materials in a law library database. The Law Society of Upper Canada had compiled a database of legal texts and made them available to its members for research and reference purposes. CCH Canadian Ltd., a legal publisher, sued the Law Society for copyright infringement, arguing that the use of its works in the database was not a fair dealing exception. The Supreme Court of Canada, in a unanimous decision, held that the use of copyrighted materials for research and private study purposes was a valid fair dealing exception. The court stated that fair dealing was a user's right that should not be interpreted restrictively, and that the purpose of the dealing should be considered when determining whether a particular use is fair. The court also emphasized the importance of balancing the rights of copyright owners with the public interest in accessing and using creative works.

The court established a two-step test to determine whether a particular use is fair dealing:

- (1) Determine the purpose of the dealing, and
- (2) Assess whether the dealing is fair by considering the six factors set out in the Copyright Act, including the purpose of the dealing, the character of the dealing, the amount of the dealing, and the effect of the dealing on the market for the original work.

Society of Composers, Authors and Music Publishers of Canada v. Bell Canada⁶: This case dealt with the use of copyrighted music in ringtones. The court held that the use of copyrighted music for private purposes was a valid fair dealing exception. was a case that dealt with the use of copyrighted music in ringtones offered by Bell Canada, a telecommunications company in Canada. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) sued Bell Canada for copyright infringement, arguing that the use of copyrighted music in ringtones was not covered by the fair dealing exception.

The Federal Court of Appeal held that the use of copyrighted music in ringtones was not fair dealing, as it did not fall within any of the enumerated purposes of fair dealing, such as research or private study. The court also rejected Bell Canada's argument that the use of ringtones was covered by the "private copying" exception, which allows individuals to make copies of copyrighted material for their own use. The Supreme Court of Canada, in a unanimous decision, overturned the lower court's decision and held that the use of copyrighted music in ringtones was covered by the fair dealing exception for private purposes. The court emphasized that the purpose of the dealing, rather than the nature of the dealing or the amount of the dealing, was the most important factor in determining whether a particular use was fair dealing. The court also noted that the private purpose exception should be interpreted broadly to allow for the use of copyrighted material in new and innovative ways.

Access Copyright v. York University case⁷: This is a recent case in Canada that dealt with fair dealing and copyright infringement in the context of educational institutions. The case involved Access Copyright, a collective society that represents copyright holders, and York University, a public research university in Ontario. Access Copyright sued York University for copyright infringement, alleging that York University's "fair dealing guidelines" for the use of copyrighted material in course materials were too broad and exceeded the scope of fair dealing.

⁴ [2011] EWHC 1874 (Pat).

⁵ 2004 SCC 13, [2004] 1 SCR 339.

⁶ 2012 SCC 36, [2012] 2 SCR 326.

⁷ 2021 FC 1146

York University argued that its guidelines were fair dealing and that the use of copyrighted material was necessary for educational purposes. The Federal Court of Canada held that York University's guidelines were not fair dealing, as they were not based on a proper assessment of whether the use of copyrighted material was necessary for educational purposes. The court found that the guidelines allowed for the copying of entire works, rather than small excerpts, and that they did not require a consideration of alternatives to the use of copyrighted material. The court also held that York University's use of copyrighted material was not covered by the "educational exception" in the Copyright Act, which allows for the use of copyrighted material in educational settings under certain conditions. The court found that York University's use of copyrighted material did not meet the criteria of the educational exception, as it was not "fair" and did not have a proper educational purpose.

Canadian Broadcasting Corp. v. SODRAC 2003 Inc.⁸: was a case in Canada that dealt with the use of copyrighted music in television broadcasts. SODRAC 2003 Inc. is a collective society that represents copyright holders, while the Canadian Broadcasting Corporation (CBC) is a public broadcaster. The case involved the "retransmission" of copyrighted music in CBC's television broadcasts. SODRAC claimed that CBC had to obtain a license for this use of copyrighted music and sued CBC for copyright infringement. CBC argued that the use of copyrighted music fell within the fair dealing exception for news reporting, criticism, and review.

The Supreme Court of Canada, in a unanimous decision, held that CBC's use of copyrighted music was not covered by the fair dealing exception. The court held that the use of copyrighted music in television broadcasts did not constitute "news reporting, criticism, or review" because it did not involve the creation of new content or the expression of a viewpoint. The court also noted that the use of copyrighted music was an integral part of the broadcast, rather than a subsidiary or incidental use.

The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services⁹: This case was heard by the Delhi High Court in India. The case was brought by several publishers against a photocopy shop, Rameshwari Photocopy Services, for making and selling course packs containing excerpts from copyrighted books to students of Delhi University. The court had to determine whether the making of these course packs constituted copyright infringement, or whether they were protected by the fair dealing exception under Section 52 of the Indian Copyright Act, which permits the use of copyrighted material for the purpose of education. The court ultimately ruled in favour of Rameshwari Photocopy Services, holding that the making of course packs for the students was covered by the educational exception under Section 52 of the Copyright Act, and therefore did not infringe the copyright of the publishers. The court also held that the copying was a permissible fair use, as it was for educational purposes and did not have an adverse effect on the market for the original works.

Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd¹⁰: In this case, is a case that was heard by the Bombay High Court in India. The case involved a dispute between two media companies, Entertainment Network (India) Ltd. (ENIL) and Super Cassette Industries Ltd. (SCIL), over the use of copyrighted musical works. ENIL operated several FM radio stations and had been playing copyrighted songs without obtaining a license from the copyright owners. SCIL, a music company, filed a lawsuit against ENIL, alleging copyright infringement and seeking damages for the unauthorized use of its musical works. The court held that ENIL had indeed infringed on SCIL's copyright by playing its musical works without a license. The court also rejected ENIL's defense that its use of the musical works constituted fair dealing under Section 52 of the Indian Copyright Act, as it was for the purpose of news reporting and criticism.

The court emphasized that the purpose of news reporting and criticism must be genuine, and not merely a pretext for using copyrighted material without permission. The court held that the

⁸ 2015 SCC 57, [2015] 3 SCR 615.

⁹ (2016) 242 DLT 429.

¹⁰ 2008 (37) PTC 193 Bom.

use of copyrighted material in the context of a radio program was not justified as fair dealing for news reporting or criticism, and therefore constituted copyright infringement.

ICC Development (International) Ltd. v. Arvee Enterprises¹¹: In this case, is a case that was heard by the Supreme Court of India. The case involved a dispute between two companies, ICC Development (International) Ltd. (ICC) and Arvee Enterprises, over the use of copyrighted materials. ICC had licensed the broadcast rights for cricket matches to Prasar Bharati, a government-owned broadcasting corporation. Arvee Enterprises, a cable TV operator, had been broadcasting the cricket matches without obtaining a license from ICC, arguing that it constituted fair dealing under Section 52 of the Indian Copyright Act.

The Supreme Court held that the use of copyrighted material by Arvee Enterprises was not covered by the fair dealing exception as it was being used for commercial purposes and not for any of the specific purposes listed under Section 52, such as criticism, review, or news reporting. The court emphasized that the fair dealing exception is a limited exception that must be interpreted narrowly and cannot be used as a defense for commercial exploitation of copyrighted works.

Fair Use Doctrine

Fair use is a legal doctrine that allows limited use of copyrighted material without the permission of the copyright owner. It is a common defense against claims of copyright infringement. Here are some notable cases that have addressed the concept of fair use:

Campbell v. Acuff-Rose Music, Inc.¹²: This case was a landmark case in copyright law that addressed the issue of fair use. The case involved the use of a four-note guitar riff and a bass line from the song "Oh, Pretty Woman" by Roy Orbison in a parody rap song called "Pretty Woman" by the rap group 2 Live Crew. Acuff-Rose Music, which owned the copyright to "Oh, Pretty Woman," sued 2 Live Crew for copyright infringement. The Supreme Court held that 2 Live Crew's use of the copyrighted material was a fair use. The court rejected Acuff-Rose Music's argument that any commercial use of a copyrighted work is presumptively unfair, and instead held that the purpose and character of the use must be considered. The court found that 2 Live Crew's use of the sample was transformative, in that it used the original work to create a new and different work with a different meaning and purpose. The court also considered the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market for or value of the original work, and found that the use was not excessive or harmful to the copyright owner.

The Campbell decision is significant because it established the importance of transformative use in the fair use analysis and clarified that commercial use of a copyrighted work is not necessarily unfair. It has been cited in numerous subsequent fair use cases and has had a significant impact on the development of copyright law.

Authors Guild, Inc. v. Google Inc.¹³: This case was also a landmark case that addressed the issue of fair use in the context of Google's digitization of millions of books for its online library. The case was brought by the Authors Guild and several individual authors who claimed that Google's scanning and display of copyrighted works constituted copyright infringement. The case was heard in the United States District Court for the Southern District of New York, and the court issued a summary judgment in favour of Google, holding that its use of the copyrighted works was a fair use. The court found that Google's use of the copyrighted works was transformative, in that it provided a new and valuable public service by allowing users to search for and view snippets of books online. The court also found that the use of the works was not excessive or harmful to the copyright owners' interests, as it did not replace or diminish the market for the original works.

The Authors Guild appealed the decision to the United States Court of Appeals for the Second Circuit, which affirmed the district court's ruling in favour of Google in a 2015 decision. The court held that Google's use of the copyrighted works was a fair use because it was transformative and served a different purpose than the original works. The court also found that

¹¹ (2003) 4 SCC 699.

¹² 510 U.S. 569 (1994).

¹³ 804 F.3d 202 (2d Cir. 2015).

Google's display of snippets of the copyrighted works was a reasonable and limited use that did not harm the market for the original works. The Authors Guild petitioned the Supreme Court to review the decision, but the Court declined to do so, leaving the Second Circuit's ruling in place.

Cariou v. Prince¹⁴ : This is a case that addressed the issue of fair use in the context of an artist's use of copyrighted photographs in his own artwork. The case involved the appropriation artist Richard Prince, who used a series of photographs taken by the photographer Patrick Cariou in his own artwork. Cariou sued Prince for copyright infringement, arguing that Prince's use of his photographs did not constitute fair use. The United States District Court for the Southern District of New York held that Prince's use of the photographs was not a fair use and granted Cariou's motion for summary judgment. The court found that Prince's use of the photographs did not sufficiently transform them into a new work, and that his use was not sufficiently transformative to qualify as fair use. Prince appealed the decision to the United States Court of Appeals for the Second Circuit, which reversed the district court's ruling in favour of Cariou in a 2013 decision. The court held that Prince's use of the photographs was a fair use because it transformed the original works by adding new meaning and context to them. The court also found that the transformative nature of Prince's use outweighed the commercial nature of his artwork. The Second Circuit's decision in Cariou v. Prince has been controversial, with some commentators criticizing the court's broad interpretation of fair use and others applauding its recognition of the transformative nature of appropriation art.

Sony Corp. of America v. Universal City Studios, Inc.¹⁵: This case is also known as the "Betamax case," was a landmark case in copyright law that addressed the legality of home recording of copyrighted television programs using video cassette recorders (VCRs). The case involved Universal City Studios, which sued Sony Corp. of America for copyright infringement for manufacturing and selling VCRs. The case was heard in the United States Supreme Court, which issued a decision in favour of Sony in 1984. The Court held that the manufacture and sale of VCRs did not constitute contributory infringement, because the VCRs had substantial non-infringing uses, such as time-shifting and space-shifting of television programs. The Court also found that the practice of home recording of television programs was a fair use, because it was a non-commercial use that did not replace or diminish the market for the original works. The Sony decision has been significant in shaping the development of copyright law and the balance between the rights of copyright owners and the interests of users. It has been cited in numerous subsequent fair use cases and has had a significant impact on the development of technologies for copying and distributing copyrighted works.

Leibovitz v. Paramount Pictures Corp.¹⁶: It was a case that involved the use of a copyrighted photograph in a movie poster without the photographer's permission. The case was brought by the photographer Annie Leibovitz, who claimed that Paramount Pictures had infringed her copyright by using a photograph of the actress Meryl Streep that Leibovitz had taken for a magazine cover in a movie poster for the film "Prime." The case was heard in the United States District Court for the Southern District of New York, which issued a summary judgment in favour of Leibovitz in 2006. The court found that Paramount had infringed Leibovitz's copyright by using the photograph without her permission and without a license. The court also rejected Paramount's fair use defense, finding that the use of the photograph in the movie poster did not constitute a transformative use that would qualify as fair use. The district court's ruling was upheld on appeal to the United States Court of Appeals for the Second Circuit in 2008. The Second Circuit agreed with the district court that Paramount's use of the photograph was not a fair use, because it did not sufficiently transform the original work and did not add new meaning or expression to it. The Leibovitz decision has been significant in shaping the legal framework for copyright infringement claims involving the use of photographs in commercial contexts. It has also been cited in numerous subsequent cases involving fair use and transformative use of copyrighted works.

¹⁴ 714 F.3d 694 (2d Cir. 2013).

¹⁵ 464 U.S. 417 (1984).

¹⁶ 137 F.3d 109 (2d Cir. 1998).

Difference between Fair Use Doctrine and Fair dealing Doctrine

Fair use and fair dealing are legal doctrines that allow for the use of copyrighted material without obtaining permission from the copyright owner. However, they differ in their scope, purpose, and application.

Fair use is a doctrine in United States copyright law that permits limited use of copyrighted material without obtaining permission from the copyright owner. Fair use is based on a balancing test that considers the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market or value of the copyrighted work. On the other hand, fair dealing is a legal doctrine that exists in some other countries, including Canada, the United Kingdom, and India. Fair dealing allows for limited use of copyrighted material without obtaining permission from the copyright owner for specific purposes such as criticism, review, news reporting, teaching, scholarship, and research. The scope of fair dealing is narrower than that of fair use and is more limited to specific contexts and purposes.

Another difference between fair use and fair dealing is their application. In the United States, fair use is a flexible doctrine that is applied on a case-by-case basis, with no specific guidelines or rules. In other countries, fair dealing is a more rigid doctrine with specific criteria for what constitutes fair dealing in different contexts and purposes.

Fair use and fair dealing are important doctrines in copyright law that allow for the use of copyrighted works for certain purposes without permission from the copyright owner. While the specific criteria for fair use and fair dealing may vary by jurisdiction, they generally balance the interests of copyright owners with the interests of users in accessing and using copyrighted works.

Conclusion

Fair use and fair dealing are essential to the promotion of creativity, education, and free expression. They enable creators to build upon existing works, promote innovation, and allow for important uses of copyrighted works, such as for criticism, commentary, and research. However, determining whether a particular use of a copyrighted work constitutes fair use or fair dealing can be a complex and fact-specific inquiry. Courts and lawmakers must balance the interests of both copyright owners and users, taking into account the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the market for the original work.

In conclusion, fair use and fair dealing play a crucial role in maintaining a balance between the interests of copyright owners and the public interest. They allow for important uses of copyrighted works, promote creativity and innovation, and support the free flow of ideas and expression.

