

Theoretical understanding of fair use under copyright law

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Abstract

Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of protected works, however, these rights are never unrestricted. Restrictions are imposed in various ways, one such way is, copyright exceptions or fair use provisions. It permits the use of copyrighted works for certain specified purposes without the consent of the creator. The doctrine of fair use originated as an equitable doctrine permitting the use of certain works that copyright law would otherwise have prohibited, prohibiting such uses would stifle the creativity that the law is designed to promote. These permitted acts are carved out to prevent the conflict between the creators, disseminators and society. The researcher intends to highlight the development of the concept of fair use and its rationale.

Keywords: fair use, copyright exceptions, education, dissemination of knowledge

Introduction

The concept of property has undergone many changes over a period of time, initially, humans were unfamiliar with it, but with progress, movables, chattels and land came to be recognized as property and with technological advancements, scientific knowledge also came to be recognized as a property^[1]. One of the most precious forms of property at present known is intellectual property (IP). It is now globally acknowledged that the economic development of a nation depends upon its IP. Intellectual property rights (IPRs) are property rights granting a limited monopoly over innovations or creations fulfilling minimum requirements as prescribed in the law. IP refers to creations of the mind- inventions; literary and artistic works; and symbols, names and images used in commerce^[2]. IPRs are the exclusive rights conferred on the owners or creators of the work to allow them to benefit from their own creations by using the same and by excluding others from using the same. Black's Law Dictionary defines IP as, "A category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright and patent rights, but also includes trade secret rights, publicity rights, moral rights, and rights against unfair competition^[3]." The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) does not define the term IPR but classifies IPR under seven heads, namely, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and protection of undisclosed information including trade secrets.

Copyright is one of the IPRs. It refers to a bundle of exclusive rights conferred by law on creators of original works for commercially exploiting the copyrighted work. It gives the holder some exclusive rights to control the reproduction of original work of authorship for a certain period of time. The protection is conferred upon original literary, dramatic, musical and artistic works; cinematograph films and sound recordings. The copyright also protects neighbouring rights *i.e.* the rights of performers and the rights of the broadcasting organisations.

Copyright law confers exclusive economic rights on the creators, like the right to reproduce, distribute, make derivative works and publicly display or perform the work. However, these rights are never absolute and there are restrictions imposed on these rights. Firstly, the rights conferred under copyright law are limited in time, it does not exist for an indefinite period and the law provides a duration for which the rights of the copyright owner exist and after that, the work falls in the public domain. Secondly, in some cases, creators are deprived of their rights but are given equitable remuneration through compulsory licensing and statutory licensing. Thirdly, in some cases, creators are neither left with exclusive rights nor with a right to equitable remuneration and copyrighted works are permitted to be used even without the consent of the creators and it is come to be known as 'copyright exceptions' or 'fair use'. Fair use permits certain uses of copyrighted works to secure a balance between the interests of owners and the interests of the public^[4]. It exists to encourage creativity and promote the use of existing works.

Understanding Fair Use

Copyright law allows certain limitations and exceptions on economic rights. One such limitation is 'fair use' where the copyrighted works can be used by anyone for certain purposes without the authorization of the copyright owner and without any equitable remuneration. It is hailed as a "powerful check on the limited monopoly that a copyright grants^[5]." Such free uses of the copyrighted works are permitted to balance the tension between the copyright owner's desire to restrict access to works and the public's interest in freely using such works. Sections 52 and 39 of the Indian Copyright Act, 1957 specifically mention such activities which can be done without authorization and without paying any remuneration to the owner of the works. In *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd*^[6], the Supreme Court held that the Copyright Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have

access to the works on the other hand and the two are competing rights between which a balance has to be struck^[7]. Lord Mansfield has rightly observed that “We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded^[8].”

Fair use was traditionally defined as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent [9].” The Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law defines it as “...a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner’s market for his work^[10].”

Fair Use is also defined as a use that is “legally permissible, either because of the scope of a copyright, the nature of a work, or by reason of the application of known commercial, social or professional usages, having the effect of custom, insofar as these do not expressly run contrary to the plain language of copyright legislation^[11].” Another author, defined fair use as “a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have foreseen it and tacitly consented to it^[12].” The most precise definition of fair use is that it is “an exemption from copyright for uses that are fair^[13].”

The defence of fair use originated as an equitable doctrine allowing certain uses of literary works that copyright law would otherwise have prohibited, if prohibiting such uses “would stifle the very creativity which that law is designed to foster^[14].” In *Williams & Wilkins v. United States*^[15], it was observed that, “the development of fair use has been influenced by...tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection to promote progress of science and the useful arts.” Others have argued that after the enactment of the Statute of Anne in the year 1709, the courts started recognising instances of unauthorized reproduction of copyrighted work and described them as fair abridgement^[16] which was later developed into fair use doctrine^[17]. Therefore, it is claimed that the fair use doctrine originated as a judicially crafted exception to the exclusive rights of the creators of copyright^[18].

It has been acknowledged that the grant of copyright without any limitations or exceptions impacts public access and impedes development priorities but also has implications on free expression, creativity and innovation^[19]. William Fisher has pointed out that fair use can be used to “advance substantive conception of a just and attractive intellectual culture^[20].” The limitations and exceptions to copyright vary from country to country as largely such limitations and exceptions are dependent upon the social, economic and historical conditions of a particular country.

The copyright statutes recognise fair use doctrine but the statutes do not define or explain the contours or objectives of the doctrine. The doctrine of fair use is not simple to understand. Due to the very nature of the doctrine of fair use, the term is devoid of precision in definition and the courts have time and again confronted this problem. The end of this problem is that fair use has been regarded as

peculiarly situation-specific and case-specific^[21]. Story, J. wrote in *Folsom v. Marsh*^[22], that, “It is not easy to lay down any general principles applicable to all cases.”

Rationale behind Fair Use

Limitations and exceptions on copyright are designed either to resolve the potential conflict of interests between rights owners and users from within the copyright system or to implement a particular aspect of public policy. The copyright limitations and exceptions reflect the legislator’s assessment of the need and desirability for society to use work against the impact of such a measure on the economic interests of the rights holders.

There is a tendency that conflict can arise between the exclusive rights granted under copyright law and the fundamental rights of users in several circumstances. One such circumstance is freedom of expression. Freedom of expression can be broadly defined as the freedom to communicate. It also includes the freedom to gather and impart information which is required for shaping one’s opinions and beliefs. Copyright provides the reward for the creation of new forms of expression and hence promotes freedom of expression. The purpose of copyright is to promote the creation and publication of free expression^[23]. However, the exercise of exclusive rights by authors can impose a burden on freedom of expression of those who wish to use copyrighted material to convey their own message^[24]. Thus, certain limitations and exceptions have been recognised in copyright law to allow users to make use of copyrighted material in furtherance of their own freedom of expression. The defence of fair use has been able to accommodate freedom of expression within the ambit of copyright law by virtue of free use of copyrighted works for non-commercial research and private study, criticism or review and reporting of current events. This also promotes ongoing authorship^[25]. Fair use is said to have a “constitutional significance as a guarantor to access and use^[26]” for freedom of expression. Even the courts in India have traced the purpose of defence of fair dealing to the Indian Constitution under article 19 (1) (a) *i.e.* freedom of speech and expression. In *Wiley Eastern Ltd. v. Indian Institute of Management*^[27], the court observed that “The basic purpose of section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India-so that research, private study, criticism or review or reporting of current events could be protected.” It is established that copyright exceptions are essential to fully realise the freedom of expression.

With the advent of new technologies, the relationship between copyright and the right to privacy came to the forefront as the technologies allowed creators to control the use of their copyrighted works in each individual’s home and creators were able to restrict the use of the work through the technological protection measures. The copyright exceptions permitting the use of copyrighted works for private or personal use without the authorisation of the creator enable individuals to participate in the intellectual life and also protect their right to privacy.

Few copyright exceptions have been adopted to regulate industry practice *i.e.* either to facilitate trade for certain users of copyrighted material or to regulate competition within a specific copyright sector. For instance, for public exhibitions, it is important to permit reproduction of artistic works inside the catalogues. Similarly, the media sector

indulges in the making of press reviews of copyrighted works. It is important to have copyright exceptions permitting such uses so as to promote competition in these sectors.

Similarly, few uses share the common objective of encouraging the dissemination of knowledge and information among the members of society at large. This happens in the case of the exceptions provided in favour of educational institutions and public libraries and archives. For the purpose of education, heavy reliance is placed on copyrighted works and specifically on photocopies of copyrighted works and for this special copyright exceptions are required for educational establishments. The libraries work towards the dissemination of information by lending of copyrighted works and allowing people to reproduce the works for their personal uses and therefore exceptions for libraries encourage the dissemination of knowledge for the common good of the members of the society. The exception enabling the creation of a special format for persons with disability promotes greater access to the copyrighted works. Further, the right to education has been recognised as a human right at the international level under article 26(1) of the UDHR and incorporated thereafter under various other international instruments on human rights. Copyright law guarantees reward for authors ensuring creation of diverse range of works thereby protecting right to education. However, copyright comes in conflict with the right to education as copyright law made it difficult for students and educators to gain access to copyrighted works. Therefore, the international instruments on copyright permit states to have specific exceptions for educational purposes. In *Kartar Singh Giani v. Ladha Singh* ^[28], the court observed that “All laws which put a restraint upon human activity and enterprise must be construed in a reasonable and generous spirit. Under the guise of the copyright, a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge ^[29].”

The commentators have argued that there are high transaction costs that are associated with the negotiation of licenses between rights owners and users and with the enforcement of one's copyright. High transaction costs are one form of market failure that needs to be addressed under the copyright system, and therefore it justifies the adoption of limitations on copyright ^[30]. Goldstein explained that “Fair use operates on the pragmatic notion that half a loaf is better than none; without it, the copyright owner would get no revenues because costs of negotiating a license are insuperably high, while the prospective user would for the same reason get no copy; with it, the copyright owner still gets nothing, but the user at least gets to make a copy ^[31].”

Therefore, limitations or exceptions are generally adopted on the basis of one or more of the rationales mentioned above. Copyright exceptions or fair use provisions under the copyright law may or may not be a constitutional requirement, but it is a necessity to protect the interest of the public at large and various sectors which are dependent upon the use of the copyrighted works.

Conclusion

IPRs are property rights granting a limited monopoly on the creations of the mind which fulfill minimum requirements set by law. Copyright is one of the listed intellectual property rights which confers a bundle of rights on creators of original work of authorship for a certain period of time. It

is intended to “increase the harvest of knowledge” and its primary objective is not to reward the labour of authors, but to promote the progress of useful arts. To fulfill this basic objective of copyright, the copyright system gives certain exclusive rights to the creators but at the same time, these rights are not absolute and are made subject to certain limitations. The basic foundation of providing such limitations is to balance the conflicting interest of the creator of the work and the society at large. Fair use permits the use of copyrighted works by anyone for certain purposes without the authorization of the copyright owner and without any equitable remuneration. Fair use provisions under copyright law are required to protect freedom of expression, right to education and the right to privacy, safeguard free competition, promote the dissemination of knowledge and respond to symptoms of market failure. Fair use and copyright are, therefore two sides of a coin that cannot exist without each other. If the regime of a country is structured to treat copyright with no fair use or without adequate fair use, everything can be appropriated in the name of copyright, thereby creating a monopolistic regime in favour of owners of copyrighted works. Copyright law plays an important part in balancing the interests of those creating, curating and disseminating learning materials with those requiring access to them and that is possible only through the doctrine of fair use.

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