

## Fair Dealing in India: An Analysis *vis-à-vis* Fair Use in the United States

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One form of intellectual property that has seen tremendous growth in recent times is copyright. The main objective of copyright protection is to encourage authors to create and give them the opportunity to profit from their hard work. However, since the ultimate aim of the copyright law is to promote, advance and disseminate knowledge in the public interest, copyright exceptions and limitations are the main mechanisms for ensuring a fair balance between the competing interests of copyright owners on one side and the public on the other. The most important and significant restriction on the exclusive rights of holder of a copyright is the exception of 'fair dealing'. Section 52 of the Indian Copyright Act, 1957 contains the provisions relating to 'fair dealing'. It is a list of potential defences against a claim that an exclusive copyright has been violated. As opposed to the equivalent American concept of 'fair use', any act that does not fit into one of the specified categories is not subject to 'fair dealing'. This paper aims to draw points of differences between 'Fair Dealing' in India and 'Fair Use' in the USA. The objective of the paper is to analyse both doctrines and their scope and lacunae if any, in respective countries.

**Keywords:** Fair Dealing, Fair use, Fairness Factor, Copyright, Infringement, Research, Criticism, Creativity, Exceptions, Nature of Copyrighted work, *De Minimis* Rule

The doctrine of "Fair Dealing" is an important component of copyright law. It legitimizes the copyrighted work's reproduction, which would have otherwise been considered a copyright infringement. It authorizes a person other than the owner of the copyright to use the work reasonably without the consent of the copyright holder. The phrase 'fair dealing' has not been defined in the Indian Copyright Act, 1957. Section 52(1)(a) provides that "a fair dealing with any work, not being a computer program, for private or personal use, including research, criticism or review, whether of that work or of any other work, the reporting of current events including the reporting of a lecture delivered in public shall not constitute an infringement of copyright".<sup>1</sup> 'Fair dealing' which is a British concept is more rigid unlike 'fair use', which is derived from American law and is more flexible. The doctrine of 'Fair Use' originated in the landmark case of *Folsom v. Marsh*, in which Justice Story put out a four-factor test and formulated as follows:

*"Look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits or supersede the objects, of the original work."*<sup>2</sup>

The 'fair use' restriction is covered under Section 107 of the US Copyright Act.<sup>3</sup> It specifically mentions the words "purposes such as", which shows that the list is not exhaustive but inclusive. It also states the 'four factors' that must be taken into account when deciding whether or not the exception would apply as:

- (i) "Purpose and character of the use.
- (ii) Nature of the work.
- (iii) Amount or substantiality of the portion used concerning the copyrighted work as a whole.
- (iv) Effect of the use upon the potential market for or the value of the work."<sup>4</sup>

Instead of the 'fair use' method, the 'fair dealing' approach is used in India. The specific applications of the 'fair dealing' exception are listed in Section 52(1)(a). As a result, Indian law does not grant judges a lot of latitude in this regard. The Indian Act relies on judicial decisions to determine what criteria need to be taken into account when assessing whether 'fair dealing' has occurred. It does not specify these factors. The law on "fair dealing" in India is rigid as it provides an exhaustive list, any act that does not come within that list is seen as an infringement. In contrast, the US idea of "fair use" is based on a 'Four-factor test' that allows everything to be fair that meet the requirements of a legitimate use of a copyrighted work.

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## Comparison of Indian Fair Dealing with the USA Fair Use

### Legislative Intention

The United States Constitution expressly addresses the purpose of copyright: The Congress is empowered “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>5</sup> This provision, which forms the foundation of how ‘fair use’ is interpreted, may also be the reason why American copyright laws frequently tilt the scales in favour consumers instead of authors and other copyright holders. ‘Fair use’ is an affirmative right, not a justification for infringement. It should be seen as a restriction on the monopoly in the public interest.<sup>6</sup> But in India, the intention of the legislature was indicating towards the importance of rights of authors as it can be gathered from the statement of purposes and reasons of the Indian Copyright Act. It reflected that, in India, the new copyright regime was to be established on the foundation of increasing public awareness of the authors’ rights and obligations. The Indian legislature focused more on the rights of the authors. Additionally, the new Indian statute aimed to align the copyright law with its international obligations under TRIPs and adapt the law to technological advancements.<sup>7</sup> Thus the legislative intent of both countries is different with different approaches to the doctrine. In India importance was given to the rights of the author whereas in the USA it was to strike a balance between the right of the author and the interest of the public.

However, lawmakers in the United States and India have purposefully left the meaning of ‘fair dealing’ and ‘fair use’ up to the discretion of the judiciary, depending on the particulars of each case. As a result of this, ‘fair use’ and ‘fair dealing’ are imprecise and vague, making it difficult to determine what exactly qualifies as ‘fair use’ or ‘fair dealing’ without resorting to court. Furthermore, there are many different interpretations and perceptions about ‘fair dealing’ and ‘fair use’ which leads to confusion.<sup>8</sup>

### Purpose

A very significant difference between the two legislations is the generality of US ‘fair use’ over the specificity of Indian ‘fair dealing’. The courts in India have examined and uncovered various aspects of ‘fair dealing’, through different cases and they have stated that its very difficult to interpret what comes under

the scope of ‘fair dealing’, however, it all depends on the facts of each case. ‘Fair dealing’ is the important exception which restricts the copyright holder’s exclusive right. At many times, courts have interpreted the doctrine on the basis of economic impact it has on the work of the copyright holder. The use might qualify as ‘fair dealing’ in situations where the economic impact is minimal.

Unlike Indian law, which lists specific acts that would be declared ‘fair dealing’, US law provides a ‘four-factor test’ that must be taken into account in order to determine whether an individual’s act comes within the purview of ‘fair use’ or not. “Although fair dealing is quite rigid but offers certainty, the US fair use protection is believed to provide flexibility at the price of certainty”.<sup>9</sup> ‘Fair use’ is an adaptive instrument that fits in the changing world of new technologies.

Provisions for the ‘fair use’ of copyrighted material can be found in Section 107 of the US Copyright Act. When the use of the copyrighted work is “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research it is not copyright infringement”.<sup>10</sup> For determining whether the use is fair, Section 107 lays down that a court must take into consideration the following four factors:

- (i) “the purpose and character of the use, including whether such use is commercial or is for non-profit educational purposes;
- (ii) the nature of the copyrighted work;
- (iii) the amount and substantiality of the portion used concerning the copyrighted work as a whole; and
- (iv) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>11</sup>

Courts must always take into account these four elements, but they may also consider other elements that are relevant and important to the specific case. There is difference in the language used in Sections 107 of US Copyright Act and 52 of Indian Copyright Act. The American ‘fair use’ provisions are merely illustrative as they do not constitute an exhaustive or closed-ended list. They may be “for purposes *such as* criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship, or research”. The open-ended list in ‘fair use’ includes other purposes also which are consistent with the promotion of the progress of science and arts. The doctrine of ‘fair use’ advances these purposes and promote learning and culture which is also the true intent of the legislature.<sup>12</sup>

In India, Section 52(1)(a) stipulates that only those purposes which are set out in the provision will constitute 'fair dealing'. For any work to fall under this exception, it must be for research, news reporting, private study, review and criticism. If the use is not for any stated purposes, then it is not protected under the doctrine of 'Fair dealing'. 'Fair dealing' provisions do not extend to unpublished works whereas in the US "if fair use is determined after taking into account the four factors, the fact that a work is unpublished will not itself preclude that finding. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of four factors test."<sup>13</sup>

#### Research or Private Use

In India, after the 1994 amendment, 'fair dealing' is permitted for private use, which also includes research. "Private study covers the case of a student copying out a book for his use, but not the circulation of copies among other students."<sup>14</sup> The guide cannot be said to be a work of research.<sup>15</sup> Whereas in the USA, Section 107 does not specifically address the private use of copyrighted work. If the work is for private use it has to satisfy the four factors test. In the case of commercial use, although it has higher probability to be found to be violative of copyright, this element is not always determining one, but has to be decided on the basis of facts of the cases. In India, for research to qualify under the exception, it is required to be private research and not commercial one. If a copyright owner suffers economic loss, courts in India are likely to conclude the use as an infringement. Non-commercial use is generally considered as 'fair use' because of the reason that the user does not intend to make profits by use of work.<sup>16</sup>

#### Criticism or Review

Section 52 (1) (a) ii of the Copyright Act, 1957 states that 'fair dealing' for criticism and review will not infringe copyright provided it is accompanied by sufficient acknowledgment. A dealing must be fair, have adequate acknowledgment, and have been previously made available to the public in order to fall under this category.<sup>17</sup> The defence of 'fair dealing' with a work for criticism or review is available not only for that work but also for some other work. Consequently, it is acceptable to use quotes from other similar works to illustrate criticism of one work when making a critique of another. The source of the work and the author's name (if provided in the source) must be cited for criticism,

reviews, and news reporting under 'fair dealing'. However, it is not mandatory to acknowledge the source under 'fair use'. In the United States citation is not required for 'fair use'. As a result, even if authors and sources are not given credit, using a copyrighted work may still qualify for exemption as 'fair use'.<sup>18</sup>

#### Parody

A parody is a piece of art that ridicules and critiques an existing work in order to highlight its shortcomings. Sometime it becomes difficult to decide to what extent parody is acceptable. They often adapt copyright-protected works that already exist. But they also have a significant impact on modern media and cultural practises, and to some extent, they foster social and political objectives also. Countries all over the world have tried to address this issue by allowing parodists to use copyrighted works within specific limits.<sup>1</sup> *Campbell v Acuff-Rose Music, Inc.* provides the most thorough judicial analysis of the four factors of 'fair use' in relation to parodies. In the instant case, the Court gave the following definition of the parody, "the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work."<sup>20</sup> The court held that the question that matters is the extent to which the new work changes the original by offering it a 'new expression', 'meaning', or 'message'; the more transformative the work is, the more the parodist will benefit from it.

'Fair dealing' in parodies is vague in terms of Indian copyright law, and judging whether a particular parody falls under the exception has to be decided on certain factors. Under the Copyright Act, parodies are neither expressly prohibited nor allowed. The High Court of Kerela in the matter of "*Civic Chandran*", had held that a 'counter drama' of a play did not infringe the copyright in the play.<sup>21</sup> Parodies of any kind are not permitted in India, each parody would need to be evaluated independently, and not all parodies would be deemed to be in violation of copyright.<sup>22</sup> As such, it would be incorrect to say categorically that "Parody is allowed under Indian copyright law". In *M/s. Blackwood & Sons Ltd. v A.N. Parasuraman*, it was established that for invoking the defence of fair dealing, the alleged infringer must not intend to compete with the owner of the copyrighted work with the goal of making money from that competition. It can be said that motive and intention do play an important role in determining whether the work falls under the exception of fair dealing or not.<sup>23</sup>

Therefore, if a parodist wants to invoke the 'fair dealing' defence in India, he must meet two requirements: first, he must not seek to compete with the owner of the copyright, and second, he must not improperly utilise the original work without adding anything new. Since most parodies only aim to highlight the flaws in the original rather than try to outdo it, they usually serve to highlight the original's deficiencies, making the first condition—basically the market replacement test—easily proven. It's unclear what defines improper use and whether a parody falls within this category in relation to the second condition. Consequently, a parody is deemed 'fair dealing' by the Kerala High Court as long as it does not infringe against the rights of use of the original work and makes use of copies from the original to critique it.

The aforementioned discourse clearly indicates that parody has been granted substantial protection by the government and courts under the 'fair use' defence. Since U.S. courts have typically established too low a standard for parodies to qualify for the fair use defence, such extensive protection for parodies has come under heavy criticism.<sup>24</sup> However, in India, the law needs to be clearer in case of parody.

#### **Reporting of Current Events**

Copyright material can be used to report current events provided the use of material is fair. It is important to satisfy the specified criteria to avail the defense of 'fair dealing' in reporting current events. Firstly, the use of copyrighted work should not be in competition with the copyright owner's commercial exploitation of the work. In *Swatch Grp. Mgmt. Servs. Ltd. v Bloomberg*, a news organization (Bloomberg) tapped into an earnings report phone call made by executives of a foreign corporation (Swatch) to 132 analysts and posted a recording and transcript of the phone call. Court held that "Bloomberg's publication of the call was analogous to news reporting so it was not necessary to have a transformative use". Furthermore, in order to achieve the objective of reporting, the complete recording had to be posted online. According to the Second Circuit, "Bloomberg's primary goal in this case was to provide newsworthy financial information to American investors and analysts, not to scoop or supplant the copyright holder's commercially valuable right of first publication."<sup>25</sup> Copyrighted material should be used to report on current events and not in furtherance of another purpose. If the work significantly diminishes the value of the original work or serves as a replacement in

the market for sale of authorized copies of the original material, then it would be unjust.

Secondly, before reporting, the content of the work should be verified, including whether it has already been published or made public. Reporting on unpublished or confidential work could be challenging unless there is a valid public interest. Thirdly, how much copyrighted content is used and how important is it? As long as only what is required to report the current event is used and no more than a significant portion of the material is used, then it can be used. Lastly, an acknowledgment naming the author and the material's title should be included.

This exception applies to a broad range of current events, regardless to which categories it relates. It may pertain to politics, culture, sports, natural phenomena, or other categories of events. There is no strict definition of what counts as a current event. It comprises current events that have actually caught the public's attention in the recent past.<sup>26</sup> Additionally, it encompasses the past if it continues to be a subject of legitimate ongoing for its use to be fair, the use must be for reporting the events and not for editorial or other purposes.<sup>27</sup>

There is as such no difference between American 'fair use' and Indian 'fair dealing' related to this provision. In America, there are many cases related to reporting current events where this defence has been taken, but the Indian judiciary has not got many cases on this, due to which this purpose remained unexplored.

#### **Fairness Factor**

If the copying serves the intended goals, as defined by sections 107 and 52, the court will have to determine whether the copying is "fair." The four considerations the court must make when evaluating whether the copying was fair, are outlined in Section 107. On this subject, Section 52 is silent. In the case of "*Kartar Singh Giani v Lodha Singh*", the High Court held that:

*"Two points have been urged in connection with the meaning of the expression fair, in fair dealing (1) that to constitute unfairness there must be an intention to compete and to derive profit from such competition and (2) that unless the motive of the infringer were unfair in the sense of being improper the dealing would be fair."*<sup>28</sup>

In contrast to the four American 'fair use' factors that the US Copyright Act of 1976 codified, India does not have a statutory fairness factor. Indian statute

does not specify the elements that must be taken into account in order to determine whether or not fair dealing has occurred. They were first set out in *Civic Chandran v Ammini Amma*. In this case, the Court cited the three factors necessary to determine whether there is 'fair dealing' or not. These factors are: (i) Quantum and value of the matter taken; (ii) The purpose for which it was taken; and (iii) The likelihood of competition between the two.<sup>29</sup> The two sets of factors can be fairly mapped onto each other, despite the difference in their number.

### **Purpose and Character of the Use**

The purpose and the nature or the character of use is the first factor and is often said to be "the heart of the 'fair use' doctrine". It tackles the question of whether the use is appropriate given that it encourages artistic innovation. The primary component of the first factor of fair use—the purpose and character—is transformative. Due to the fact that it creates something more than just a duplicate of the original work, it is also occasionally referred to as a "productive use".<sup>30</sup> The remaining factors become less significant where use is thought to be more transforming or productive, at the very least. This fact reduces the significance of the other elements (apart from market effect) or necessitates a more narrow interpretation of them, even in cases in which the use is non-transformative.<sup>30</sup> In *American Geophysical Union v Texaco Inc. (Texaco)* the Court connected the idea of transformative to the "value of the user's contribution to the advancement of the arts and sciences in creating the copy".<sup>32</sup> According to the Court, making an untransformed duplicate does not contribute in any way, making it less likely to be regarded as 'fair use'. In *Warner Bros. Entertainment, Inc. v RDR Books*, this transformative quality alone was insufficient to support a 'fair use' defence, even though the production of a Harry Potter encyclopaedia was found to be "slightly transformative" because it brought the lexicons and terms together in a single volume. The Court was of the opinion that there was the exact copy of the text from the Harry Potter books and this played a significant role in the ruling of the Court.<sup>33</sup>

In India also the element of transformative is considered important as in America. The main issue in *University of Oxford v Narendera Publishing House and Ors.* was "whether the work was transformative and whether the other factors were not given equal weight?"<sup>34</sup> The aforementioned case also

demonstrates how the judiciary in India has incorporated the US transformation criterion. So far, the courts in India have held that if the secondary work is transformative, regard to the other factors need not be given in determining 'fair dealing'. In '*Campbell*' the Court found that as long as the work remained transformative, the significance of the other factors, such as commercialization was not to count against the verdict of fair use.<sup>35</sup> In *R.G. Anand v Deluxe Films*, it was held that if the work was transformative, then the degree or substantiality of the copying might not matter, and further, as the secondary work could not act as a substitute for the original work, the market of the latter would remain unaffected.<sup>36</sup> So the first factor has an important place in both jurisdictions. In American fair use "purpose and character" is one of the important factors which has been entrenched in the statute and strongly contested in the courts. In India, although it's not a part of the statute it has been recognized by the judiciary and it is an important element for the defense of 'fair dealing'.

### **Nature of the Copyrighted Work**

This factor is the least important out of all four factors. The factual or fictional nature of a work, as well as its publication status, are factors that courts take into account. It depends on how much the work has been taken from a copyrighted work. More the creativity more it favours the owner as the work is deemed to be the original work of the owner.<sup>37</sup> The Supreme Court of America ruled in *Sony Computer Entertainment America, Inc. v BLEEM LLC* that this factor is the least significant of the four and that it should be disregarded.<sup>38</sup> In the *Triangle Publications, Inc. v Knight-Rider Newspapers, Inc.*, the Court observed that this element neither supported nor refuted the fair use defence.

*Harper & Row Publishers, Inc v Nation Enterprises* appears to have established a presumption against fair use for unpublished works, which subordinate courts have also upheld.<sup>39</sup> However, Congress disregarded this presumption in response to the publishing industry's concerns. Now the fair use defence extends to unpublished work also if it satisfies the four-factor test.<sup>40</sup> However Indian Law does not have this provision, but dealing with unpublished work generally is unfair.

### **Amount and Substantiality of the Portion Used**

The value of the copied materials is taken into account, both in terms of quantity and quality.

Sometime copying whole content does not amount to copyright infringement if the work is totally transformative like in the form of parody. This factor depends on the nature of copy which if productive then it may fall within 'fair use' exception. Likewise, if the portion which have been copied is less but is substantial to the work, it may amount to copyright infringement. Taking heart of the work is not covered under 'fair use', so it can be said that there is no hard and fast rule to decide that how much of the material can be copied.<sup>41</sup> In India also the amount of words or passages that can be used without the author's consent is not explicitly given in the Copyright Act. This has been left on the court to decide what is fair and what is not. Nevertheless, the portion that has been taken must not impede the author's substantial interest in any way. Thus, in both jurisdictions, this factor is essentially the same.

#### **De Minimis Rule**

'*De minimis*', a latin phrase, refers to the bare necessities. In intellectual property, the idea of *de minimis* emerges as a defence against copyright infringement. When a photograph, a musical sample, a literary work excerpt, or any other creative work protected by copyright is used without permission but in a way that is so tiny or insignificant as to be unlikely to cause the copyright holder serious harm, then the idea of *de minimis* applies.<sup>42</sup> Recently, the *de minimis* defence has been accepted by Indian courts as a legitimate means of refuting claims of infringement. According to the '*de minimis* principle', some issues are so miniscule that the courts would not even classify them as contentious. In *India TV Independent News Service Pvt. Ltd. & Ors. v Yashraj Films Pvt. Ltd* two suits were initiated against India TV by Yashraj Films Pvt. Ltd. The first suit was related to the use of a line from a well-known Hindi song in an advertisement by India TV, and the second was for a programme in which renowned playback singer Vasundhara Das performed nine stanzas from songs that had made her famous. Considering the 5 factors of *de minimis*:

- (i) "the size and type of the harm
- (ii) the cost of adjudication
- (iii) The purpose of the violated legal obligation
- (iv) The effect on the legal rights of third parties
- (v) The intent of the wrongdoer".<sup>43</sup>

The Court held that the damage done is trivial and there is no copyright infringement.

In the United States, the *de minimis* theory is actively employed as a defence against infringement of copyright and trademark, in contrast to the legal system in India, where it only applies to copyright law. The quantum of material used or copied in some cases is so miniscule (or '*de minimis*') that the courts without even applying 'fair use' analysis allow the use of copyrighted material. In *Sandoval v New Line Cinema Corp*, many copyrighted photos were included in the movie "Seven," which led the owners of the photos to file a lawsuit against the film's producer. The Court held that the photos "appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable."<sup>44</sup> The rule of '*de minimis*' was applied by the Court in this case and hence no 'fair use' analysis was done.

In contrast, it was ruled in *Ringgold v Black Entertainment Television, Inc.* that it's not *de minimis* to use a copyrighted poster in the background of the TV show Roc for a total of 27 seconds.<sup>45</sup> The use of the poster in present case is distinguished from the use of photographs in 'Seven's case'. According to the Court "the poster was visible and recognizable with sufficient observable detail for the 'average lay observer' to view the artist's imagery and colorful style."

Hence, there is no well-defined parameter for determining a *de minimis* use. The use of this rule in the defence of 'fair use' is common in America whereas in India *de minimis* principle has been applied as a defence recently. Several copyright infringement suits have recently reached the courts in India where this rule was applied.

#### **Effect of the Use upon the Potential Market**

This factor is the most important factor for deciding whether the work falls under the 'fair use' doctrine or not. If using a work that is protected by copyright, divest the owner of the copyright from financial gains or jeopardises his work in any way then the court shall consider this factor while applying the doctrine of 'fair use'. It is very likely that depriving a copyright owner of any financial benefit will result in legal action. This holds true even in cases where the new work does not directly compete with the original. The "market effect" factor is the sole component of 'fair use', according to the court's ruling in *Harper & Row*.<sup>46</sup> In *Basic Books*<sup>47</sup> the idea was reiterated, and in the *Princeton*<sup>48</sup> court described it as "first among equals." However, the Court in *Georgia State* rejected the notion that the "market

effect” is the most significant because the copying was done for not-for-profit education. The court observed that "It is hornbook law that there is no across-the-board rule for what weight should be given to each factor or how the factors should be applied."<sup>49</sup> In the *Hathi Trust* case, the court did not discuss the fourth factor's relative importance.<sup>50</sup>

The "market harm test" is part of the US fair use analysis. If the use is for commercial purpose, then it will definitely violate the economic rights of copyright holder but for non-commercial purpose, the copyright holder needs to just prove that a widespread use would negatively impact the market or the potential market.<sup>51</sup> In India, in *Ramaiah v Lakshmaiah*, where publishing guide books, even for a profit-making purpose have been held to be falling within the 'fair dealing' exception, this factor holds less importance.<sup>52</sup> This case is not correctly decided because the element of 'fairness' as described above has not been paid due consideration, since these guides hamper the sale of the original works and compete with them, despite their educational motive.

### Flexibility

The element of flexibility in 'fair use' allows the doctrine to adapt to new situations and technological advancements. It is important to mention the famous case of 'Google' which was applauded for expanding the scope of 'fair use' in software and a significant win for developers as well as consumers.<sup>53</sup> "This case's holding will provide breathing room to software developers employing similar strategies to create their products".<sup>54</sup> On the other side 'fair dealing' is rigid in its application as its scope is limited under Section 52(1)(a) of the Indian Copyright Act, 1957. This indicates that if the work is copied besides the specified reasons, then it cannot be said to be 'fair dealing'. However, lack of clarity on the interpretation and application of the four factors of 'fair use' cannot be ignored. It can be said that the application of 'fair use' can lead to unpredictable and sometime erroneous results.<sup>55</sup> However the significant advantage of 'fair use' in terms of flexibility overshadows the element of uncertainty about its implementation.

### Conclusion

Although, the 2012 amendment to the Indian Copyright Act, 1957 aims to rectify the existing disparity between the Act and its objectives, it falls well short of expectations. 'Fair dealing' and copyright are two sides of a coin that cannot exist without each

other. The objective of 'fair dealing' is the dissemination of knowledge but because the doctrine is too restrictive, it has not been successful in serving its purpose to the fullest. The limited application of 'fair dealing' does not address the issue for developing nations such as India, where the problem of information access is a major obstacle in developmental process. The doctrine has not been explored in India. There is ambiguity to its meaning and application, as the Act does not define 'fair dealing' of any work, neither has it given any factor analysis like US, to determine what is fair and what is not. Provisions related to the 'fair dealing' are not sufficient. Though, the Indian courts have borrowed the concepts from various jurisdictions around the world in the assessment of 'fair dealing', they have only considered the issues in a limited context. The goal, interpretation, and scope of doctrine of 'fair dealing' are central questions that the copyright jurisprudence in India is still waiting on precedents to address. Whereas its counterpart 'fair use' in America has been successful in achieving the purpose of copyright which is not only about the incentives to the copyright holder but also the dissemination of knowledge and serving public interest. The courts in America have utilized the doctrine and explored all its aspects even the technological ones. The same was done in *Author's Guild*<sup>56</sup> case. The Court in this case has established that Google book project falls under the purview of fair use and does not violate copyright on the basis of public interest. In the era of technological advancement like artificial intelligence the doctrine of fair dealing has to keep pace just like fair use. It cannot remain restrictive in fast growing world with so many creativities and inventions.

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- 1 Section 52 of Indian Copyright Act, 1956: Certain acts not to be infringement of copyright. — (1) The following acts shall not constitute an infringement of copyright, namely, — [(a) a fair dealing with any work, not being a computer programme, for the purposes of—  
(i) private or personal use, including research;  
(ii) criticism or review, whether of that work or of any other work;  
(iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public. Explanation. — The storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.]
- 2 *Folsom v Marsh*, 9 F. Cas. 342, (C.C.D. Mass. 1841) (No. 4, 901).

- 3 Section 107 of the US Copyright Act: Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.  
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