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CONSERVING FAIR USE IN ACADEMIA: A LEGAL PERSPECTIVE

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Abstract

The fair use clause within copyright law provides individuals with the freedom to make unauthorized secondary uses of copyright protected materials. This article discusses the concept of fair use from an educational perspective by analysing the factors which determine whether a particular use is fair or an infringement, as well as by showing the criteria for fairly using copyrighted work in education with some cases. A comparative analysis is drawn out to demonstrate how the interpretation varies by countries like India where the courts take a stricter approach compared to the USA where it is more open-ended. Moreover, while it is true that stricter copyright laws would promote more original work and foster creativity, the article also recommends that expanding the scope of fair use would have beneficial effects by allowing the general public to have more access to copyrighted educational materials.

Keywords: Copyright, fair use, educational purpose, technology, infringement.

INTRODUCTION

Copyright is an essential legal concept for professionals in academia which protects their intellectual property from being used without their authorization. Through copyright laws, not only are creativity and formation of original ideas encouraged, but original authorship is also protected from being replicated.² Fair use is an exception to copyright law which remains as “one of the most unsettled areas of copyright law.”³ This allows individuals to use copyright

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² Crews, Kenneth D. "The Law of Fair Use and the Illusion of Fair-Use Guidelines." *Ohio State Law Journal* 62 (2001): 599-702.

³ *Princeton Univ. Press v. Mich. Document Servs. Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996).

protected material without the permission of the copyright owner. For instance, when a teacher uses an excerpt from a book for teaching purposes, then the concept of fair use takes effect. Therefore, students and educators are able to depend on it for their academic works. While educators often use portions of newspaper articles, books and journals to complement their teaching, students also refer to these texts to aid their research and scholarship.

THE CONCEPT OF FAIR USE IN COPYRIGHT LAW

The basic idea of fair use is that individuals can use copyright protected materials for reasons such as education, commentary, criticism, review, parodies and so on. As long as the use does not replace the need for purchasing the work, then it is considered as a fair use.⁴

Fair use is defined as the "privilege in others than the owner of a copyright to use the copyright protected material in a reasonable manner without his consent, privilege in others than the owner notwithstanding the monopoly granted to the owner".⁵ Because of fair use, authors, teachers and artists are encouraged to portray their creativity as they have been guaranteed the right to produce and gain from their original work.

HISTORICAL DEVELOPMENT OF COPYRIGHT AND FAIR USE

Copyright laws were first enacted in England when The English Crown granted a monopoly to the Stationer's Company in order to regulate the spread of negative information concerning the Crown.⁶ Afterwards, Parliament enacted the Statute of Anne, which enabled publishers of books to have legal protection for 14 years, during which time, reproduction of their work without authorization was not legally permissible.⁷

In the United States, the Constitution incorporated copyright in the American law to protect original authorship.⁸ It was modelled after the Statute of Anne and provided the same incentives for individuals to create original work by ensuring copyright protection. It was during the case

⁴ Crews, Kenneth D. *'Copyright Essentials for Librarians and Educators'*. Chicago: American Library Association, 2000.

⁵ *Basic Books v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), which dealt with the question of whether photocopy stores may sell copied excerpts of books to college students without authorization from the books' publishers. The decision in the case ultimately affected the price that the public must pay for access to copyrighted information.

⁶ William F. Party, *'Copyright Law and Practice'* 10 (1994).

⁷ Marshall A. Leaffer, *'Understanding Copyright Law'* 1-2 (2d ed. 1995).

⁸ The Constitution states that Congress shall have the power "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." U.S. CONST. art I, Sec 8, cl. 8.

of *Lawrence v Dana* (1869), when the term “fair use” was first introduced in the American court system, where Lawrence had sued Dana for unfairly using his notes on Wheaton’s “Elements of International Law.” Lawrence had previously edited and commented on two editions of the book for the benefit of the late author’s family; however, after the death of Mrs. Wheaton, Dana proceeded to publish another edition with no credits given to Lawrence. While Dana argued that he had abridged and “fairly used” Lawrence’s notes, the court eventually ruled that Lawrence’s notes “involved great research and labour” and that their use by Dana was not fair – rather it was a reprint.

Copyright law gives the original author a limited monopoly to encourage their intellectual creativity; but the monopoly is restricted by the first sale doctrine,⁹ the fair use doctrine¹⁰ and the concept of copyright privilege which only provides for a limited duration of copyright protection.¹¹

THE PRESENT ADMINISTRATION OF FAIR USE IN THE UNITED STATES

The common law doctrine was legislatively recognized as Section 107 of the Copyright Act of 1976.¹² The bill lists four non exhaustive factors to analyse fair use: (1) the purpose and character of the secondary use, (2) the nature of the copyrighted work, (3) the amount or substantiality of the portion used, and (4) the effect of the use on the copyright owner’s potential market. Since fair use is interpreted as “an equitable rule of reason”¹³ the list of exceptions under Section 107 was neither viewed as an extension to the common law doctrine of fair use, nor were the listed factors intended to be the sole determiners of fair use.

The Copyright Act does not state the importance or considerations given to each factor. The Supreme Court disapproves a strict interpretation of the statute and has expressed that fair use permits and requires “courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designated to foster.”¹⁴ On that account, the four factors within Section 107 should be regarded as general guidelines rather

⁹ The first sale doctrine allows a person who has legally acquired a copyrighted work to use that work so long as that person does not violate any exclusive rights of the copyright holder. This doctrine allows individuals to share or resell novels and enables libraries to loan books to the public. Title 17 U.S.C. Sec 109 (1994)

¹⁰ Title 17 United States Copyright Law, Sec 107 (1994).

¹¹ The exclusive rights of copyright holders are limited to reproduction, distribution, preparation of derivative works, public performance, public displays, and public performance of audio works. Title 17 U.S.C. Sec 106 (1994 & Supp. IV 1999)

¹² Title 17 United States Copyright Law, Sec 107 (1994).

¹³ *Sony Corp. of Am. v. Universal Studios Corp.*, 464 U.S. 417, 448 (1984); And *Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994).

¹⁴ Title 17 United States Copyright Law, Sec 107 (1994).

than clearly defined rules. The aforementioned factors for examining fair use are considered in the following points in more detail.

1. Factor One: The Purpose and Nature of the Use

First, courts must assess the nature of the use by determining whether it is for commercial purposes. The 1976 Copyright Act House Report stated that “the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in a fair use decision.” The inspection of the secondary use focuses on the type of use being made rather than the type of entity making it. Furthermore, fair use also cannot be ruled out solely based on the factor of commercial gain.

A commercial use can be modified by a transformative use. Transformation implies that the new work has a non-identical purpose from the original work and makes some new “contribution of ... intellectual value.” The prelude to Section 107 of the Copyright Act of 1976 states that plausible purposes of fair use include “criticism, comment, news reporting, teaching, scholarship or research.” In general, the greater the transformation, the less any commercial purpose influences the analysis of fair use. When producing a scholarly paper, for instance, it is considered acceptable to quote other researchers’ writings for reference.

2. Factor Two: The Nature of the Copyrighted Work

The second factor considers whether the original work is informational or creative in nature and whether it was published. As copyright protects expressive materials such as fiction more than facts or particulars, creative works receive more substantial copyright protection.¹⁵ Facts receive less copyright protection because rewarding the mere acquisition of facts would frustrate the intent of a copyright monopoly to distribute ideas by retarding the disclosure of facts and thoughts.¹⁶

3. Factor Three: The Amount and the Substantiality of the Portion Used

In each case, the court will examine the quality and proportion of the original work which has been taken for secondary use. If the copied amount is large enough to replace the need for purchasing the original work then the use is to be judged as not fair. While copying a small percentage would generally be regarded as fair use, using a majority of the work would point towards copyright infringement. However, in rare cases, copying a mere 5 second clip from an

¹⁵ Melville B. Nimmer & David Nimmer, Nimmer on Copyright, Sec 13. 5(A) (2) (a), at 13-170 (49th ed. 1999).

¹⁶ Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539, 563-64 (1985).

entire movie may be determined as an infringement if the court deems those 5 seconds to be highly “substantial.”

4. Factor Four: The Effect on the Plaintiff’s Potential Market

The fourth factor considers the probable harm to a copyright holder’s potential market.¹⁷ It evaluates whether the copied work would result in the devaluation of the copyrighted material and whether it would lead to lost income for the original creator. Furthermore, copyright infringement must directly cause the alleged market harm. The Copyright Act does not provide protection against harms caused by criticism or reviews of the original work.¹⁸ Instead, other areas of law such as slander and defamation deal with such issues.

CASE ANALYSIS ON MULTIPLE COPYING FOR THE PURPOSE OF EDUCATION AND RESEARCH

Fair use has been tested in court as an affirmative defence only on rare occasions when it comes to educational settings. The following cases apply the fair use factors in academic contexts, where the court’s decisions demonstrate a pattern of increased protection for copyright holders and reduced lawful fair use.

1. Williams & Wilkins Co. v. United States

In 1974, the National Institute of Health and the National Library of Medicine were charged with copyright infringement¹⁹ for distributing unauthorized photocopies of articles taken from medical books and journals published by the copyright owner Williams & Wilkins.²⁰ The defendants would make these photocopies available upon request to their medical researchers who were engaged in scientific studies. However, the court found that the defendant’s use of the articles constituted fair use due to the non-profit nature of both the institutes, which signified that there was no intent to make economic gain from the distribution. Furthermore, not only did the plaintiffs fail to prove that the defendant’s practices could cause them substantial harm, but the court also had strong concerns that holding defendants’ practices to be copyright infringement would harm future medical research.

¹⁷ Rubin v. Brooks/Cole Publ’g Co., 836 F. Supp. 909, 920 (D. Mass. 1993) (holding that plaintiff’s work had been published previously numerous times without any harm to the market and therefore a similar use would have little effect on the market).

¹⁸ Campbell, 510 U.S. at 591-93. A court must distinguish between those harms caused by the defendant’s product becoming a substitute in the same or derivative market for the original work and those harms that result from criticisms of the original work.

¹⁹ Williams & Wilkins Co., 487 F.2d at 1346. Although the case was decided under the 1909 Copyright Act, the court applied the same factors later prescribed by the 1976 Copyright Act.

²⁰ 172 U.S.P.Q. (BNA) 670 (1972), rev’d, 487 F.2d 1345 (Ct. Cl. 1973), aff’d, 420 U.S. 376 (1975)

2. American Geophysical Union v. Texaco Inc.

The American Geophysical Union v. Texaco Inc.²¹ case involved Texaco scientists photocopying articles from various journals for research purposes. Although the journals were used for research, Texaco's objective was to use the research to develop profitable products; therefore, the court concluded that Texaco's use was commercial. Texaco's use was not transformative either, as complete texts from the articles were photocopied verbatim. Thus, this factor also worked in the copyright holder's favour. Moreover, it was found that Texaco could have purchased a license for photocopying the articles through the Centre for Copyright Clearances, but by not doing so, they had deprived the copyright holder from potential economic gain in the form of licensing fees. On these accounts, the court ultimately judged Texaco's use to be not fair and the defendant was accordingly fined.

3. Princeton University Press v. Michigan Document Services

Princeton University Press v. Michigan Document Services²² addresses multiple duplication for educational use where Michigan Document Services (MDS) photocopied packets of course materials and offered them for sale to students without obtaining the necessary copyright permissions.

The court held that the copies made by MDS were not fair use based on several indicators. Firstly, MDS replicated entire chapters or articles without any alteration, which made the use non-transformative; some excerpts were greater than ninety-five pages in length,²³ thus exceeding the limits prescribed in the Educational Guidelines. Moreover, it was a profit-oriented photocopy shop, which meant that they operated for profit and therefore the use was commercial. Some of the excerpts taken for duplication also contained creative material which are considered to have substantial value, thus making the duplication of these materials to not be a representation of fair use. Lastly, the court found the existence of a market where the copyright owners licensed their books and articles for legal replication. This meant allowing photocopy shops such as MDS to continue duplicating without authorization could potentially diminish the revenue earned by the copyright owners through licensing.

²¹ 60 F.3d 913 (2d Cir. 1994).

²² 99 F.3d 1381 (6th Cir. 1996).

²³ The court did not distinguish between a 95-page excerpt representing 30% of a work and a 17-page excerpt representing 5% of the work. The court ended its analysis after deciding the use did not fit within the Educational Guidelines.

FAIR USE IN THE FIELD OF EDUCATION

Due to the equitable nature of fair use, the controversies surrounding it seem particularly profound in the area of education. Fair use promotes the goals of copyright by encouraging the spread of information for the enrichment of society while education promotes the cultivation of society, provides access to information, and encourages creativity. Having said that, eliminating copyright protections throughout education would hinder monetary incentives for creation of original work. Although educational fair use should not be viewed as a complete protection to use copyright protected materials, the elimination of educational fair use would be similarly harmful.

EDUCATIONAL BENEFITS DERIVED FROM FAIR USE

Education provides the foundation of an informed populace by teaching reading, critical, analytical and problem-solving skills. All citizens, not just scholars, benefit from openly available information. It is evident that education creates social welfare by broadly disseminating ideas and exposing many people to new concepts.²⁴

Educational fair use has beneficial effects upon further creative constructions, teaching expertise and student flexibility. In academia, students and instructors must constantly create new and original materials. Without the protection of fair use, the costs of producing secondary works would increase. This is because many students are restricted to limited educational budgets, which would prevent them from bearing the cost of licensing. As a result, students may be discouraged from enrolling in classes which require expensive reading materials.

Fair use allows instructors to provide the most appropriate and cultivated education possible. Instructors are able to utilize newly discovered materials that expose students to a more comprehensive understanding. This also enables instructors to keep classes up-to-date, especially in rapidly changing fields.

LIMITATIONS IN THE ECONOMIC MODEL OF FAIR USE

From an educational perspective, there are various flaws in the economic model of fair use despite there being high external benefits of distribution of information. For instance, although students are the primary consumers of copyrighted materials such as books and articles, the entities making the purchasing decisions are the educators or the school authority. Instructors making decisions usually focus on the higher objective of intellectual development rather than

²⁴ A complete exemption for education would be over-expansive. This Note does not seek a broad right of fair use in education, but seeks to preserve a reasonable right of fair use in the educational realm.

economic efficiency, which is why in the educational setting, it is less appropriate to use an economic model to explain efficient resource allocation.²⁵

Instructors primarily focus on the academic benefits of obtaining a published work rather than its economic benefits. When presented with an option to choose from a number of articles with similar viewpoints, instructors would often determine their choice of article based on the content and academic satisfaction instead of economic factors such as the price. Moreover, finding alternative articles in search of a lower price may be more difficult and could raise the transactional costs to the instructor.

The absence of a central system for acquiring copyright permissions may further give rise to transactional costs. While large universities often use such systems to control future liability, smaller institutions may not have sufficient funds to arrange similar services which can help obtain copyright permissions. As a result, instructors often have to bear the cost of obtaining the licenses themselves when the institution does not have an available budget and it is not possible to spread the cost among students.

EDUCATIONAL GUIDELINES ACCORDING TO THE U.S. COPYRIGHT ACT OF 1976

Although the factors and circumstances explained above apply to all cases involving fair use, educational uses of copyrighted materials pose special challenges to courts and thus have received particular attention from the legislature. Sections of the House Reports from the Copyright Act of 1976 specifically laid out guidelines for educational uses.²⁶ The Committee on the Judiciary concluded that broad copyright exceptions need not be granted to non-profit educational institutions but nevertheless included explicit guidelines to provide educators with some predictability. Thus, the Educational Guidelines were designed to provide a safety net for educational uses of copyrighted materials.²⁷

GUIDELINES FOR CLASSROOM USE OF BOOKS AND PERIODICALS

The Educational Guidelines show specific instances when educators may reproduce copyrighted works without permission for research or classroom use. However, the preamble to the guidelines states that some reproductions not mentioned in the guidelines may still be

²⁵ Buranen, Lise and Alice M. Roy, eds. *Perspectives on Plagiarism and Intellectual Property in a Postmodern World.* Albany: State University of New York Press, c1999.

²⁶ 1976 HOUSE REPORT, The “Educational Guidelines” are formally titled The Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals.

²⁷ Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, March 1976. (U.S. Congress. House. Copyright Law Revision, 94th Cong., and 2d sesss. [1976]. H. Doc. 1476: 68-70.)

considered as fair use. Although the Educational Guidelines clearly allow educators to make single copies of portions of books for research or class preparation,²⁸ the real issues arise when multiple copies are created in order to distribute in a class. In this case, the guidelines provide for the reproduction of multiple copies as long as the use is brief, spontaneous, not cumulative, and includes appropriate copyright notices.²⁹

Even if an educator fulfils those initial requirements for creating multiple copies, the Educational Guidelines present further limitations: educators may not make multiple copies to create or replace an anthology, materials may not be photocopied from term to term, no charge may be made to students in excess of the copying costs, and finally, the Educational Guidelines do not apply to consumables.

CRITICISMS OF THE EDUCATIONAL GUIDELINES

The Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, members of the Authors League of America, Inc., along with the Association of American Publishers, Inc., who proposed the Book Guidelines, represented the interests of authors and publishers. However, educators disagreed with the committee's findings.³⁰

The American Association of University Professors and the Association of American Law Schools wrote the Judicial Committee and criticized the Educational Guidelines on the basis of its standards for multiple copying.

Critics proclaimed that the Guidelines create additional confusion over legally permissible secondary uses. Although the prelude to the Educational Guidelines states that the guidelines represent the minimum permissible uses and that other uses could still be considered fair, academic institutions are relatively conventional and would adopt the Guidelines to avoid litigation expenses.³¹ Consequently, adopting the guidelines would inadvertently narrow the

²⁸ The Educational Guidelines indicate that for research or preparation, a teacher may make a single copy of (a) a chapter of a book; (b) an article from a periodical or newspaper; (c) a short story, essay, or poem; or (d) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

²⁹ The brevity factor limits the amount that an educator can reproduce to a maximum amount of 1,000 words or 10% of a work or 250 words of a poem. *Id.* The spontaneity factor requires that only educators who are unable to obtain the appropriate approvals due to time constraints may make multiple copies. This factor states that teachers must need the work at that time for the "maximum teaching effectiveness," and that therefore, it "would be unreasonable to expect a timely reply to a request for permission."

³⁰ The three individuals who endorsed the Educational Guidelines represented the Authors League of America, the Association of American Publishers, Inc., and the House of Representatives Copyright Committee. Notably absent were the representatives from educational institutions.

³¹ Gregory Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101, 108 (1999).

acceptable applications of fair use in education.³² The courts have adopted the same conventional view by looking at the permissible uses as requirements instead of guidelines.

Moreover, it is argued that the requirements of being spontaneous, brief and non-cumulative are excessively limiting. In the case of spontaneity, the Educational Guidelines suggest that educators can meet this criterion if they had insufficient time to obtain a license for using a particular work; it further requires educators to know about this service, be able to obtain necessary funding for copyright fees, and receive approval from an authorized representative of the educational body. However, critics argue that this requirement provides very minimal guidance for educators.

A different issue arises when educators lack the monetary resources needed to obtain a copyrighted material from the publisher, even though the work is essential for educational purpose. Publishers often claim that not paying fees such as royalties would signify that their work is not being appropriately valued at their economic rate. However, this argument would be valid if it was the case that educational institutions possess unlimited resources for obtaining copyright materials and their licenses for teaching purposes. The amount that an educator is willing and able to pay would correlate with the value and importance that is placed on the material only when it is true that resources of an institution are unlimited.

There is further confusion about the extent to which the Educational Guidelines are legally persuasive as they are not included in the Copyright Act of 1976.³³ As they were originally drafted after negotiations by concerned parties such as educators and publishers, the involvement of congressional committee members during the drafting of the Guidelines is not clear. As a result, they do not extensively reveal congressional intent despite being accepted by the judicial committee. Moreover, the Guidelines particularly being excluded from Section 107 of the Copyright Act by Congress further weakens the importance of this proposal.

THE CONFERENCE ON FAIR USE (CONFU), 1994

Due to rapidly advancing technology, a Conference on Fair Use (CONFU) was held in September 1994 to examine the effects of digitalization on fair use provisions of the Copyright Act and to develop new guidelines which were more suitable. The conference involved representatives from various interest groups including educators, publishers, Congress and the

³² Stephana I. Cobert & Oren R. Griffin, *The Impact of Fair Use in Higher Education: A Necessary Exception?* 62 ALB. L. REV. 437, 440 (1998).

³³ MDS, 99 F.3d at 1390. Justice Scalia would agree that the meaning of the statute can only be determined by the words comprising the statute itself.

White House who were present to discuss issues regarding fair use in the digital world.³⁴ The White House Administration Task Force on Information Infrastructure, along with publishers, intended to narrow down the scope of fair use of copyrighted works in digital platforms.³⁵ Conversely, educators argued that the guidelines should provide counsel and recommendations rather than act as a strict set of rules. Due to a large number of divergent views and opinions, the conference failed to develop guidelines for fair use in a digital learning environment even though there is a greater requirement for legislative solutions.³⁶

ADVANCING TECHNOLOGY

The historical, economic, and legal backgrounds as well as the educational controversies surrounding fair use in copyright law highlight the conflict between maintaining creative incentives and promoting public accessibility. Technological advances further enhance this conflict as new technology lowers transaction costs and allows for greater ease of infringement. With advancing technology, copyright holders are advocate for expanding copyright protection, which is for the purpose of reducing public access to information for individual and educational use. Much of the debate concerning educational fair use centres on these technological advances and their effects on intellectual property rights.

A. Development of copyrights due to technology

Changes in copyright law emerged as new inventions appeared during the past fifty years. To counteract the increased threat of infringement caused by technological advances such as the copy machine, the Copyright Act of 1976 and the legislation that followed it provided copyright holders with additional intellectual property.

The Copyright Act of 1976 significantly increased the rights of copyright holders to include all fixed, original works. This new protection was automatic, as neither a copyright notice nor registration was necessary for protection. It extended the duration of copyright protection from a maximum of fifty-six years to fifty years after the death of the creator. Thus, new technologies

³⁴ The Copyright Act of 1976 also granted limited reproduction rights to libraries and archives. Section 108 allows libraries and archives to create at least one copy of a work if it is done without the intent of direct or indirect commercial advantage, the library is open to the public, and the reproduction includes the appropriate copyright notice.

³⁵ Conference on fair use: Final report to the Commissioner on the conclusion of the conference on fair use, available at <http://www.uspto.gov/web/offices/dcom/olia/confu/> (last modified Nov. 24, 1998)

³⁶ For responses to the CONFU Final Report, see NINCH, Fair Use in Education: Responses to “Final” CONFU Meeting, http://www-ninch.cni.org/ISSUES/COPYRIGHT/FAIR_USE_ (May 19, 1997).

forced copyright law to adapt in order to provide adequate protections and incentives to produce.³⁷

The anticipation of threat from copy machines was eventually replaced by concerns regarding digital technology. The Clinton Administration envisioned the Internet as a channel for increased distribution and communications, both nationally and internationally. The White House Administration created the Information Infrastructure Task Force (IITF) to research implementation of digital networks, such as the Internet, and the effects of those structures on intellectual property rights. The IITF created the Working Group on Intellectual Property Rights to investigate the feasibility of a global communications network.

The Digital Millennium Copyright Act (DMCA)³⁸ is the latest amendment to American copyright law which does not clearly address fair use but still has an impact on the fair use doctrine. It has provisions for criminal penalties to prevent people from making unauthorized use of copyright protected material in digital platforms. This also provides publishers and their works with additional copyright protections in the form of encryption or similar software. Furthermore, it enables them to monitor and keep track of the use of their works through Copyright Management Information systems, which allows them more extensive control of their digital materials along with enforcing copyright protections.

Although providing additional copyright protections increases the profit of the copyright holders, it is at the expense of public access as it raises costs to individuals and educational institutions and decreases the number of expressive works in the public domain.

B. The impact of new technology on copyright

Beyond new legislation, copyright holders are also able to restrict use of their works without relying on the law due to advancing technology.

1. Global Communications on the Internet

The Internet is a network of computer facilities expediting access to information. Not only does the Internet facilitate applications such as the World Wide Web, but e-mail, newsgroups, electronic bulletin boards, and Telnet are also included. The Internet creates an enormous resource centre by locating and distributing information or ideas in text, video, audio, or photographic format.

³⁷ Association for Computing Machinery (ACM). *Intellectual Property in the Age of Universal Access: A Collection of Articles from Leading Authorities Defines and Interprets the Emerging Technologies and the Laws They Instigate*. New York: ACM, 1999.

³⁸ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

Computers and the Internet provide individuals with greater duplicating abilities than the simple copy machine.³⁹ Advanced software, digital graphics, scanners, and other technology allow individuals to make copies of works in digital format and disseminate that information quickly, with minimal cost, and without any concern for geographical borders.

2. Technology hampering the spread of Information

The Internet allows for decreasing copying and distribution costs by enabling creators and copyright holders to better prepare and monitor the use of their works. For example, software programs such as Copyright Management Systems are embedded in other documents or programs allowing copyright holders to keep the accessibility and distribution of works under their surveillance.

In addition to preventing and deterring infringement, technology also increases the ability to prosecute infringement. Encryption,⁴⁰ digital watermarks,⁴¹ software metering,⁴² and cryptolopes⁴³ all enable copyright holders to exert greater control over their works.

FAIR DEALING FROM THE INDIAN PERSPECTIVE

In Indian copyright law, the importance of fair dealing is highlighted in the Copyright Act of 1957 which allows for exceptions for educational uses. Section 52 subsection (1) of the Act explicitly deals with certain circumstances which do not represent a copyright infringement. More specifically, sections 52(1) (g), (h) and (i) consider fair use in the area of education which is why Indian lawmakers who aim to ensure the maximum possible fair use provisions for educational purposes should examine whether these sections are appropriate for achieving the educational policy objectives of the nation.

Section 52(l) (g) further states that, as long as it is for the purpose of school use, it is legally permissible to include short passages from copyrighted published literary works in a different

³⁹ Vincent J. Roccia, Note, What's Fair Is (Not Always) Fair on the Internet, 29 RUTGERS L.J. 155, 161-62 (1997)

⁴⁰ Encryption encodes information so that only users with an authorized decoder can access the document, software, or information.

⁴¹ A digital watermark is an irremovable identifier embedded in a document. Although it does not alter the original document, if the user attempts to print or disseminate the document, a message will appear that conceals the original document and states that the use is unauthorized.

⁴² Software metering requires that hardware be attached to a computer system. The hardware records and charges for each download or program used.

⁴³ A cryptolope is a program that allows a user to search documents for key terms, but charges a user for the encryption key to open the document and view the actual content. Michael J. Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, 45 BUFF. L. REV. 845, 891 (1997).

collection which mainly consists of material which are not copyrighted. This exception is available subject to certain conditions, which are to be fulfilled in this regard.

The Copyright Act provides that the reproduction of a literary, dramatic, musical or artistic work or any translation or adaptation of such work:

- (i) by teacher or a pupil in the course of instruction; or
- (ii) as part of the questions to be answered in an examination; or
- (iii) in answers to such questions, shall not constitute infringement of copyright in the work.⁴⁴

Section 52(1)(i) provides that the performance of a literary, dramatic or musical work by the staff and students of the institution is not an infringement of the copyright if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution. The exception is wider in scope as the parents and guardians of the students also constitute part of the audience who are allowed.

In *Wiley Eastern Ltd. and Ors vs. Indian Institute of Management*,⁴⁵ the court clearly traced the purpose of the defence of fair dealing to the Indian Constitution: '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. Section 52 is not intended by Parliament to negatively prescribe what infringement is'.⁴⁶

The specified circumstances under which fair use is permissible, as per Section 52, has been said to be inflexible and exhaustive as any use not complying strictly with the mentioned purposes is deemed to constitute an infringement. Indian courts have repeatedly stated that it is not possible to formulate a strict principle to adhere to when dealing with cases of fair use as each case must be judged upon its own merits and context. The legal principles of fair dealing have been primarily drawn from approaches led by the United Kingdom and United States, but Indian courts have further included specific factors which are not provided by the Copyright law of India.

Fair use and fair dealing both act as defences when it comes to making secondary uses of copyrighted materials but the legal nature of these concepts and the extent of their provisions vary greatly. In common law jurisdictions such as India, Great Britain and Canada, their copyright statute allows fair dealing by laying out a set of specific purposes under which using

⁴⁴ Copyright Act 1957. s 52(1)(h) and s 52(2)

⁴⁵ (1996) PTR 46 (Del).

⁴⁶ 61 (1996) DLT 281 Para 19.

a copyrighted work would be permissible. If the court finds that the use is for a commercial purpose then the use would not constitute to fair dealing. However, the United States copyright law takes a more flexible approach by avoiding a specific and restricted list; instead, it uses more versatile language and provides an open-ended list of purposes which may be a representation of fair use. Ultimately, the differences between the treatment of fair use and fair dealing in India vs its US counterparts depend upon the unique circumstances of each case and the policy preoccupations of the respective courts.

RECOMMENDATIONS

The fair use doctrine is an integral part of copyright law which allows for the legal reproduction of copyrighted work for certain situations. From the above discussion about educational fair use must be met for academic fair use are as follows:

1. The academic research paper must be original work of the author.

While this factor is open to interpretation, a paper which is supervised by a particular instructor for a course in a recognized educational institution will almost always qualify, as the reputation of the instructor and institution support the paper's "legitimacy." Conversely, individuals without formal academic connections who are writing on their own may need to establish the "legitimacy" of their work.

2. The material used must be directly relevant to the topic.

In the examples of the student papers cited below, the language and pictures of the cartoons were explicitly discussed in the explication of the papers. However, if a cartoon had not been explicitly discussed, but had been used as a decoration, illustration, or just to add color or style, this would not qualify.

3. The references must be provided for the original sources.

It must be clear from where the material was taken and, if possible, who created it. If the material was copied from a website or scanned from a print reference, this distinction should be clear. In all cases, a citation must be given for the original source.

4. The paper must be for non-profit educational purposes.

Academic fair use does not allow one to profit from the use of another person's copyrighted work. Typically, as in the case of papers written by Translation Department students which may be selected for the FAST website (or the Master's, Licentiate and Doctoral theses that are published in PDF format elsewhere in the university website), there is no question of profit or other financial benefit to the author of the paper, the website or the university, as all are non-profit educational instances. However, if the student were later to sell copies of his paper which

included copyrighted work that may have established or increased the market value of the paper, this would disqualify one from academic fair use. In this case the student would need to seek permission to use the copyrighted material and possibly arrange for royalties payments.

5. The amount of copyrighted material used must not be excessive, and must not affect the market value of the original work.

The amount of copyrighted material used must not infringe on the original authors' ability to make an economic gain from their own works. An individual cannot use such an amount of the author's material that the paper in which this material appeared could be considered an alternative to purchasing the original work of the author.

CONCLUSION

Intellectual property laws and principles, especially those related to copyright, are especially relevant for professionals who work in the field of education. A basic understanding of these laws is important for informed use as well as for the development of ethical students. It is only when these laws are understood and applied that scholars, teachers and professionals in higher education can derive the proper benefits from the rights given by this doctrine.⁴⁷

There is a very notable public interest in the controversies surrounding copyright and wider access to educational materials. It is evident that education has a special status as 'fair use' within the interests of the international copyright framework, and lawmakers should make the optimal use of the exception.⁴⁸ Considering that the nature of a country's copyright policy could have a significant impact on its ability to meet its developmental and educational goals, the most important objective for lawmakers in India is to reflect on the current fair use provisions for education in India not only for traditional education, but also for distance education and e-learning.

⁴⁷ Tom Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. REV. 557 (1998).

⁴⁸ Lape L G, Transforming fair use: The productive use factor in Fair Use Doctrine, Albany Law Review, 58 (1995) 677-724.