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THE INDIAN DOCTRINE OF FAIR DEALING FAIR: ANALYSING THE NEED FOR REFORM

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ABSTRACT

The present paper attempts, at first hand, a general study of the Fair Dealing Doctrine as it operates in India. India provides the area for fair dealing in Section 52 of the Copyright act, 1957. The section encloses a list of instances which allow fair use of copyrighted work. The focus of the paper remains on the scope of its operation. It is analysed as to what and why the doctrine evolved and more importantly whether Section 52, which operates exclusively, fully justifies and gives adequate scope for operation of a fair area to the maximum possible and lawful extent which at the same time is balanced by the need to protect IPR's. The paper contends for reform in the fair usage doctrine in India because currently, it is rigid and unfair in the wake of the exclusiveness of Section 52 of the Copyrights Act. The paper targets to delve into an understanding as to why an expansion is invited on the copyright law in India and how the contours of the doctrine are presently insufficient to balance the right of creators in contradistinction to fair usage by non-creators as such. At last, the endeavour of pointing towards the inadequacy of the present law of fair dealing in India is intended to lead to certain specific issues faced.

INTRODUCTION TO FAIR USAGE DOCTRINE

A very perspicacious remark pronounces that protection and enforcement of IPRs must be advantageous to social and economic welfare, should protect the individual's fundamental rights and should encourage commerce, competition and innovation. In an ideal world, Intellectual Property Rights (IPR) do not only protect the creator from infringement of his intellectual property but also pave the way to healthy future developments over the already

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existing work.[3] In pursuance of that ideal world, the law in almost all jurisdictions of the world provides for a fair area was developing, building, copying etc. on/of someone else's work does not attract an infringement claim. The present paper focuses on the provision of this fair area in the copyright regime.

Fair dealing has its grounds rooted in the doctrine of equity and has found a significant expression in the discussions over copyright law. India provides the area for fair dealing in Section 52 of the Copyright Act, 1957. The section encloses a list of instances which allow fair use of copyrighted work. Apart from the fact that the contours of the section are fairly limited, questions as to the exclusivity of the section have often arisen. The paper tends to answer this very question to facilitate further discussion over the sufficiency of the section. Having understood the operation of Section 52, it is only natural to tend to shift to the question whether such a straight-jacket formula is enough to justify copyright law in the country. The standard for sufficiency has to be the effectiveness of the provision to achieve its underlying objective. Now, the objective of the law of fair dealing, worldwide, remains to achieve a balance in protecting the "rights over creations of creators" as opposed to the "allowance of the use of creations within lawful limits". In that light, one may rightly infer that the line between fair dealing and infringement is but a thin one.

A comprehensive copyright law accompanied by an effective and efficient enforcement mechanism can have a significant and measurable impact on Gross Domestic Product[4] and so it becomes indispensable for a discussion on copyright law to understand and appreciate the impending changes in one of the most crucial aspects of the law, namely, the Fair Dealing Doctrine.

DEFINITION OF FAIR DEALING

The doctrine of fair dealing initially emerged as a doctrine of equity and soon then became the basis of discussion at an international scale. Light may be put on Article 13 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) which says:

"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably

[3] Dushyant Sharma, Intellectual Property and The Need to Protect It, 9 IJSR 84-87 (2014).
[4] Professor David Vaver, *Principles of Copyright: Cases and Materials*, WORLD INTELLECTUAL PROPERTY ORGANISATION, available at: https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf (last accessed on Apr. 20th 2020).

prejudice the legitimate interests of the right holder"

The case of Sk Dutt v. Law Book Co. & Ors.[5] *simply and very aptly describes the doctrine as "it* permits reproduction or use of copyrighted work in a manner, which, but for the exception carved out would have amounted to an infringement of copyright. It has thus been kept out of the mischief of copyright law". It may, well, be considered to be exceptions to the Intellectual Property Right. The Berne Convention for the Protection of Literary and Artistic Works provides a three-step test which runs by providing an exception to the copyright only if allowed as[6]:

a. when it covers some distinct cases,

b. the work does not conflict with the normal infringement or exploitation, and

c. when the legitimate interests of the author are not at stake unreasonably or prejudicially.

It must be remembered that member states of WTO are obligated to obey both with the articles of TRIPS and as well as the Berne Convention on Copyright. Owing to that most of the countries have provided space for fair dealing to operate in their localised areas in a localised fashion. A great difference, however, lies in the application and scope of operation of this doctrine in different countries.

To put forward the doctrine at once, the words of Lord Denning in *Hubbard v. Vosper*[7] *must be referred to as has been done by the courts in India several times:*

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them...Next, you must consider the proportions...other considerations may come into mind also. But, after all, is said and done, it is a matter of impression."

[5] *AIR 1954 ALL 750.*
[6] Centre for Copyright Studies Ltd, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* (December, 2002) available at http://static-copyright-com-au.s3.amazonaws.com/uploads/2015/08/CCS0202-Ricketson.pdf (last accessed on May 14th 2020).
[7] *(1972) 1 All ER 1023 p. 1027.*

DEVELOPMENT OF THE DOCTRINE

The development, in the rising understanding of the importance of the need to have exceptions, may be understood now. Fair dealing or fair use trace their origin as judge-made exceptions which later came to be statutorily entrenched. It initially emerged as a doctrine of equity. The doctrine of fair dealing owes its origin to English Courts and then codification by the English legislature in 1911. In the UK legislation, the reproduction of a work for "private study, research, criticism, review, or newspaper summary" was entrenched as an exception to infringement.[8] Almost all commonwealth countries absorbed the fair use doctrine from the British Reign.

After their independence and more specifically in recent decades these commonwealth countries led to bettering the doctrine with the introduction of developments in its usage. Not to hide the fact that in some countries the fair dealing remains, as in the UK, restricted to the original purposes of the 1911 Act. However, many others like the Bahamas have developed a non-exclusive list of examples which is more advanced and modern. In still other countries, a different approach has been taken like in Australia legislatures have added factors that a court must consider in determining fair dealing. Countries that are not former British colonies have also adopted fair use or fair dealing, some good examples being Taiwan and Korea. Then we have colonies like Botswana, Ghana, Lesotho, and Malawi which very wisely have incorporated other exceptions. Interestingly, some countries have replaced the term "fair dealing" with "fair use" like the USA or our neighbour Bangladesh.

There also seems to be a trend whereby many of the countries have tried to evolve their law on fair use on similar lines as that present in the US which is considered very wide. For instance, we may take Canada where judicial interpretations of fair dealing are very similar to that in the United States.[9]

We may now trace the journey of the doctrine in India. Kind reference may be made to *McMillan* v. *Khan Bahadur Shamsul Ulama Zaka*,[10] whereby the Bombay High Court applied the English Copyright Act, 1842 to India although it was not specifically intended to be applicable in India. The statutory implementation for India came in 1914 which may but

[8] ARIEL KATZ, FAIR USE 2.0: THE REBIRTH OF FAIR DEALING IN CANADA 93 (Ottawa University Press, Ottawa, 2013).

[9] Jonathan Band and Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook*, INFO JUSTICE (2015), available at: http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf (last accessed on May 17th 2020).

[10] (1895) I.L.R. Bom. 557, 567.

be described as a mere replication of the United Kingdom laws.[11] Obviously, after independence, we have a new law which again is not free from the vice as it is extensively borrowed from the new law enacted by the United Kingdom that is UK Copyright Act, 1956. Though, the amendments thereafter have widened the scope of fair dealing in India.

II. LAW IN INDIA

The complete law in India relating to Copyright is all but one section which is Section 52 of the Copyrights Act. Copyright is what is defined as a copyright in the Indian Copyrights Act, 1957, whereby it refers "to a bundle of exclusive rights vested in the owner of copyright under Section 14 of the Act". Under section 13 of the Copyright Act 1957, copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording.

Section 52, on the other hand, provides a long list of acts which shall not be counted as an infringement. This means that a list is given whereby certain things if copied, used, reproduced etc. to the extent provided in that list, the act will not come in the ambit of being called an infringement. In short, it provides a fair area to operate. Private study, research, criticism, review etc are the general purposes for which it came into existence.

Amendments to the Act relating to fair dealing have been done four times. First among which came in 1983 with which an explanation below sub-section (b) (ii) was inserted. The second amendment was done in 1994 which served a great purpose. With that certain activities were included in the fair dealing doctrine like private study and research work, dealing with computer software, making its copy by a lawman, creation of sound recordings of any existing literary work, dramatic and musical works in some circumstances. The third amendment came in the year 1999 which focused its attention on computer programmes. Then comes in 2012 amendment which served a general extension of doctrine in India. Cinematograph and musical works were included, sub-section (1) (w) was brought which made the making of a 3D object from a 2D layout fair dealing, clause (zc) was added which brought the importation of literary or artistic works incidental to products or goods being imported under the umbrella of exceptions, clauses (zb) and (zc) were also added which

[11] Section 2(1)(i) of the UK Copyright Act, 1911.

provides for fair dealing in the use of disabled persons.

In dealing with cases relating fair dealing, the courts have time and again reiterated that it is impossible to give a straight jacket formula for cases of fair dealing as each case depends upon in its facts and circumstances. The courts in India, however, while dealing with fair dealing have made use of some traditional theories like:

a. the amount and substantiality of the dealing;

b. purpose, character (and commercial nature) of the dealing;

c. effect on the potential market: the likelihood of competition.

However, the fact remains that once not found in Section 52, there is little that the court can do.

SECTION 52: EXCLUSIVITY

Section 52 may thus be taken to be carving out an affirmative defence. The burden of proving this defence is placed on the party which is alleged to have committed the infringing act. It must be noted, however, that the other party needs to first establish prima facie infringement.

The court bringing out the significance of the section in *The Chancellor, Masters and Scholars of the University of Oxford and Ors* v. *Rameshwari Photocopy Services & Ors.*[12] said that "Section 52, therefore, cannot be interpreted to stifle creativity, and the same time must discourage blatant plagiarism. It, therefore, must receive a liberal construction in harmony with the objectives of copyright law. Section 52 of the Act only details the broadheads, use under which would not amount to infringement".

It has been several times argued that the decision in *Syndicate of the Press of the University* of *Cambridge* v. *B. D. Bhandari*,[13] is path-breaking for in that case the purposes mentioned in Section 52, specifically Section 52(1)(h), was declared to be merely illustrative by the Delhi High Court and it went ahead to broaden the contours of such purposes. A similar view has been indicated in a publication[14] by National Law University, Delhi whereby it states that "in absence of exhaustiveness, Section 52 leaves enough space for judicial creativity

[12] (2016) 160 DRJ (SN) 678.

[13] 2011 (47) P.T.C. 244 (Del).

[14] Dr. Priya Rai, Transforming Dimension of IPR: Challenges for New Age Libraries, National Law University, Delhi, availabe at http://nludelhi.ac.in/download/publication/2015/Transforming%20Dimension%20of%20IPR%20-%20Challenges%20for%20New%20Age%20Libraries.pdf. (last accessed on Jul. 7th 2020).

…..”

The question which this paper treats as having great relevance is whether Section 52 is exclusive or merely illustrative. The paper contends for modification in the fair usage doctrine in India because currently, it is rigid and unfair in the wake of the exclusiveness of the section.

Courts in many cases have observed the object enumerated in the Indian Copyright Act as exhaustive and wide.[15] Consideration for several other factors like a necessity, public good etc has also not had popular support in India.[16] The enumerated purposes under Section 52 are interpreted as exhaustive, inflexible and certain since any use not falling strictly within an enumerated ground is considered infringement.[17] We thus see that Indian courts have analysed and used the American factor of purpose and transformative character, however, they have not abandoned their loyalty to the language of the statute and have firmly adhered to object enumerated as a consequence of which the provision has received a restricted interpretation.

The learned author Ananth Padmanabhan has in his book[18] addressed this issue and observed: “the general principles should apply only while gauging the second leg of the fair use requirement i.e. the manner of use. When Parliament has chosen to specifically enumerate the different heads of fair use, as opposed to the fair use mechanism in the United States, for instance, we have to strictly comply with that for purposes of certainty as well as copyright integrity. At the same time, once the purpose requirement is met, it is excusable to permit some deviation from the manner of use which may be strictly outlined in the provision, by examining the general principles.”

In *Super Cassette Industries* v. *Hamar Television Network Pvt. Ltd*,[19] the Court highlighted that both tests namely quantitative and qualitative tests are to be considered while determining fair dealing issue. It also went on to discuss the lay listener test. However, the court categorically held that “the applicability of Section 52 is to be restricted to the purposes stated therein”. The court, however, in this case, did not find the infringing act to be falling

[15] Supercassette Industries v. Nirulas Corner House Pvt Ltd, 148 (2008) DLT 487.
[16] Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?, 14 JIPR 523-531 (2009).
[17] Blackwood and Sons Ltd and Others v. AN Parasuraman and Ors, AIR 1959 Mad 410 Para 84, See also Civic Chandran v. Ammini Amma,1996 PTC 16 670.
[18] ANANTH PADMANABHAN , INTELLECTUAL PROPERTY RIGHTS-INFRINGEMENT AND REMEDIES (1st ed., LexisNexis, 2012).
[19] 2011 (45) PTC 70.

under the fair dealing defence. *The Chancellor, Masters Scholars case*[20] is again referred to where the court recognized that:

"Copyright is not a common law right but a statutory right and only the rights arising from the copyright act would be provided to the copyright owner. Therefore, according to the provisions of the copyright act, photocopying original copyrighted work is an exclusive right of the owner of the copyright and that the making of photocopies by the defendant in the case would constitute infringement under Section 51 unless such act is listed under Section 52 of the Copyright Act thereby which it falls under the fair use exception.

Consequently, as per the opinion, the courts have abortive to acquaint with the element of flexibility which has become the reason for the medieval nature of the doctrine.

INADEQUACY OF THE FAIR USE DOCTRINE

A. THE NEED FOR WIDER FAIR USAGE DOCTRINE

In a study conducted in Singapore, the effect of intellectual property in increasing economic activity was discussed and analysed. It was analysed that fair use aims to balance user and right-holder interests in copyright which only provides an encouraging environment for further developments. Copyrighted works are outputs of great labour and inspired ideas but they also serve another equally important purpose and that of acting as input for subsequent works which we may fancy as raw materials for further developments. It is not illogical to articulate that an increase in the number of works available for reference only helps encourage building up for better work. Fair use solves double purpose; one by enabling the creation of new work and other allowing public use of those works. So, exceptions to copyright law have a direct/ indirect impact on the rate of innovation in modern economies.

Another factor requiring equal consideration is that copyright work is almost always expected to yield monetary benefit which implies that expected revenues must exceed the cost of development. It remains the incentive of creations most of the times. In *Eastern Book Co*. v. *DB Modak*[21] the apex court acknowledged that "in the field of knowledge and information the reproduction of some portion of the copyrighted work is necessary for research, private study, criticism, news reporting, teaching, review, etc. The fair dealing doctrine is a key part of the

[20] (2016) 160 DRJ (SN) 678.

[21] (2008) 1 SCC 1.

social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture ..."[22]

The purpose of the fair use doctrine has been very aptly been put in *Wiley Eastern Ltd and Ors* v. *Indian Institute of Management*[23] as follows, "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." The case of *Hubbard* v. *Vosper*[24] maybe again referred which probably for the first time elucidated the objective of fair dealing provision which was described as "to shield or protect a reviewer who wants to put forward his opinion or views or comments on a particular copyrighted work by using certain relevant extracts from that work".

Fair use even if perceived in its narrowest sense acts as a balancing approach, it promotes the dissemination of information without removal of incentives of creation. It is a popular approach to view free usage as a free license to use one's work. However, this is in stark contrast to another popular view which articulates that every property developed intellectually is a result of the perception that individual forms from among his or her surroundings or society and as a result the piece of work belongs to the society at large and not individually to a person. In the day to day practice of law, however, these are taken to mean simply certain exceptions to the rights of a copyright holder. As a result of the debate over ownership of these rights an uncertainty regarding the scope of uses that fair use is meant to protect in practice emerges.

The Indian courts have started understanding and appreciating the importance of the need to have sufficient discretion in addressing as to whether an act would constitute an infringement and providing a prior list will not help the cause. In the case of *Kartar Singh Giani* v. *Ladha Singh*,[25] the High court delved into an understanding of the law as it is, instead of mathematically applying Section 52 for it must have been considered important that new dimensions need to be analysed. It was held as follows:

"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

[22] Association of Independent Video and Filmmakers, *Documentary Filmmakers' Statement of Best Practices in Fair Use*, CENTRE FOR SOCIAL MEDIA, available at: http://centerforsocialmedia.org/files/pdf/fair_use_final.pdf (last accessed on Apr. 17th 2020).
[23] 1995 PTC (15) (Del).
[24] [1972] 2 Q.B. 84.
[25] (1935) ILR 16 LAH 103.

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."

B. OBSOLETE CHARACTER OF DOCTRINE

Moving back to our history, it was in due time that our colonisers realised that situations in India are unique and so must be the law, no legal principle can be embedded into the Indian soil without there being a proper adjustment of the sun and temperature otherwise the seed will not be able to break off its stagnancy and grow to give desired fruits. So must be considered with a doctrine like fair usage. At the time when we need to compete at an international level, our laws must be just the right amount of giving protection and allowing competition. For that copy-pasting, a law from a different country with a different set of competition, values and economic status will help a little. We need an indigenous doctrine which recognises the situations in India concerning competition, practicalities, IT development, infringement rate, working of courts, the efficiency of legal mechanisms to catch lawbreakers, development of creative industry, economic interests in copyright work, regulation of IP rights, ease of selling, creation costs, state's rights etc.
The need for widening the ambit is now being felt in the country because of two very simple, common-sensical but important reasons, both owing their origin to the obsolete character of the doctrine.

The first, that certain acts which may be done mala fide and affect to a great extent commercial interests vested therein may not be adjudged to be infringements as they may be protected by the list given in section 52. To bring out the gravity reference may be had to decision of the Delhi High Court in *Chancellor, Masters & Scholars of the University of Oxford & Ors*. v. *Rameshwari Photocopy Services & Ors*.[26] A suit was filed by three renowned publishing houses of books and scholarly material which is used in disciplines of the academic world namely Cambridge University Press, Oxford University Press and the Taylor & Francis group. They asked the hon'ble court to pass a permanent injunction against infringement of copyright by the respondents that were the University of Delhi and Rameshwari Photocopy Service shop which used to photocopy their protected work and circulate it in lower cost for their gain. The court in light of section 52 held that the preparation of 'course packs' and its circulation by an educational institution to their students will not create any kind of IPR infringement under the provision. However, this will only be

[26] (2016) 160-DRJ (SN) 678.

justified as long as the inclusion of the works photocopied was used for educational instruction, also, this act does not need a license or permission from the authors or publishing houses. The court believed that such act of photocopying qualifies as a mere reproduction of work by a professional teacher in its course of instruction which does not amount in any way a copyright infringement under the law that is Section 52(1)(i) of the Act.

The second scenario is where a certain act, not mala fide, giving sufficient citation, non-commercial, or sometimes justified by natural law or logic may be categorised as an infringement. As an example, the case of *(India Tv) Independent News Services Pvt. Ltd* v. *Yashraj Films Private Limited*[27] and *Super Cassettes Ltd*[28] must be studied. A documentary was shown in a live show on "India TV" on the life of singers. Video of some scenes from the movies was shown as and when the singer was singing the song. The Delhi High Court in its judgement tried to look at the case from a slightly changed viewpoint as follows:

"There are certain questions which remain unanswered. In my opinion the argument of the counsel for defendant stating that the singer who has recorded a song which has gone on to become a hit has a sense of ownership over such a song and that it would be very unreasonable-to the point of being unfair and cruel to the said singer, to say that he/she cannot sing the said song in a TV or other interactive program in front of an audience, only because the copyright in the underlying literary and musical works resides in some other person(s) also withholds a valid point. But since such use does not come within the exhaustive list provided under section 52 of the act, they were deprived of any remedy in the fair dealing laws."

It must be noted that an appeal was filed and the Hon'ble bench of the Delhi High Court took the decision to set aside the single bench order and therefore restrictions were removed however the appealing party were still restricted from displaying the video clip without consent of the owner of cinematographic film. This case very rightly and precisely brings home the point that we need an expansive law whereby Section 52 is not exclusive so that breathing space is given to judiciary to deal with such cases based on unique facts of different cases. Giving such exclusivity to the section only makes its purpose static. It may not be able to meet the just requirements of natural law by tying the hands of the judge to not deviate from the list given. It is also difficult to comprehend that such a static law will be enough to meet the dynamic requirements of today and tomorrow.

[27] 2013 (53) PTC 586 (Del) (DB).
[28] *(2012) 49 PTC 1 (DEL).*

In the case of *Supercassette Industries* v. *Nirulas Corner House (P) Ltd.*,[29] a suit was filed contending that clipping of songs was played in an enclosed room on television in defendant's hotel. The judge rejecting the plea of defence of fair dealing under section 52(1)(k) said that the legislature intended to exclude the two categories which are a hotel and such similar commercial establishment from the operation of establishment from the advantages point of view, which is not considered a violation or breach which should be seen from a perspective of restricted interpretation, in respect of the nature of the expression used. The intention of the parliament in including these provisions in the law is clear that use of audio or video recording and playing it on a television in a hotel as communication to the public is opposed to what is done for an earning purpose, even in play by a hotel. Thus, the court rejecting the suit and held that it cannot extend the law outside its meaning to include any hypothetical wider legislative purpose.

Justice Pierre N Leval A judge of Court of Appeal, United States formulated the fair use doctrine as follows[30]:

"The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law... Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."

We may discuss certain specific issues to have an idea of the inflexibility and rigidity of the fair dealing doctrine in India.

C. MORE SPECIFIC ISSUES

The adequacy of the fair dealing doctrine in India is seriously questionable when we consider the development of Information Technology. An individual via online media can

[29] 2008 (37) PTC 237 (Del).

[30] United States. Congress. House. Committee on the Judiciary. Subcommittee on Intellectual Property and Judicial Administration , (U.S. Government Printing Office, 1991).

communicate through the internet and he/she can have the work of thousands of users scattered over the entire world capable of downloading information from privacies of their homes.[31] Not only is that, in certain cases, getting away with certain acts in cyberspace is way easier than doing the same in the physical world. For instance, in the case of *Sagarika Music Pvt. Ltd. & Ors*. v. *Dishnet Wireless Ltd. & Ors*.,[32] the High Court passed interim orders in the matter giving direction to block the website. All ISPs were directed to block the access to the website through methods feasible to them. However, courts direction for the website handlers lasted barely for forty days and they re-launched the same website with a similar name by some other domain owner name. Which highlights the issue that online distribution of anything has a serious challenge for the protection of the work and implementation of the copyright law of such content.[33]

We also see the potential of building up of a parallel market in the online world. This directs reason to believe that the cyberspace is far more powerful than is perceived. Looking at its potential, it can be either condemned for infringement issues or can be converted into a constructive breakthrough to nurture and develop in the virtual world and among people that may out of reach in the physical space.[34] Absence of any provision in Section 52 dealing with copying over the internet, its contours, limitations, etc is a major fall out of the Section.

Issues may also be analysed about non-inclusion of certain acts in fair dealing provision. For example, except for the exception provided in section 52 (i), no other use is allowed of a cinematograph film. There has been a lingering debate over the use of films in teaching film making. Films have to be an intrinsic part of teaching the art of cinematography and film making. The absence of provisions only makes their use in fine institutes a matter of infringement unless specific permissions are taken and royalties paid. But then, is it fair to make them obtain a license from the film producers for hefty amounts of money?[35] This particular issue has been raised in the case of *ESPN Star Sports* v. *Global Broadcast News Limited and Others*[36] the High Court of Delhi did not address this issue in their judgement.

Questions have often arisen as to use of celebrity images in newspapers, books, magazines

[31] T C James, Indian Copyright Law and Digital Technologies, 7 JIPR 423-435, at p.433 (2002).

[32] Sagarika Music Pvt. Ltd. & Ors. v. Dishnet Wireless Ltd. & Ors., 2012 SCC Online Cal 5276.

[33] S.K VERMA AND R. MITTAL, INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION 263 (Indian Law Institute,
2004).

[34] Megha Nagpal, Copyright Protection through Digital Rights Management in India: A Non-Essential Imposition, 22 JIPR 224-237 (2017).

[35] Latha R. Nair, How Fair Are the Fair Dealing Exceptions Under Indian Copyright Law? 10 IJIPL 65 (2009).

[36] 2008 (38) PTC 477 (Del).

etc. Similar questions have arisen with respect to use of famous cartoons for purposes like education, for instance, their use in general knowledge books, however, as is established public welfare is not one of the exceptions engrained in Section 52 of the Copyrights Act. People who intend to use celebrity images have to get permission from and pay royalties to the owner of these images, and not the stars whose image it is. These images may not have any artistic or creative achievement but are to be paid for use only by way of being clicked by that certain other individuals if not even such acts would constitute infringement. There appears to be no logic as to why the use of a simple image of a well-known celebrity which has no creative value in it has to be licensed, that also from someone who has no ownership in the brand image of that particular star. Here another facet and that of celebrity rights may come into the picture and another question whether any other person by way of clicking an image must be given rights to disseminate and license the use of a picture of a celebrity. It may be worth quoting *Rajagopal* v. *State of Tamil Nadu*[37] *as follows:*

"The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."

This more or less relates to celebrity rights but raises a fair question why does a person need to pay money to "abc person/ firm" for a simple picture of Shah Rukh Khan, who receives no money from it? Why is the use of these pictures, not fair use? In *McFarland* v. *E & K Corp*.,[38] the court held that "a celebrity's identity, embodied in his name, likeness, and other personal characteristics, is the 'fruit of his labour' and becomes a type of property entitled to legal protection." In *Sonu Nigam* v. *Amrik Singh*, the Bombay High Court says that "no third person should make any commercial profits by using celebrity images unless they have consented to it". *ICC Development (International) Ltd.* v. *Arvee Enterprises,*[39] is another case, in which the High Court of Delhi acknowledged the right of publicity in India. It held that "such a right exists solely in an individual or it exists in any indicia of the individual's

[37] 1995 AIR SC 264, MANU/SC/0056/1995.
[38] 1991 WL 13728 (D. Minn. 1991).
[39] (26) PTC 245 Del; 2003 VIIAD Delhi 405, 2003.

personality which may be obtained via association with an event, sport, movie etc".

The further objection arises because the present law stands so rigid to not even provide space to the public interest. Take the example of *Rupendra Kashyap* v *Jiwan Publishing House* where the defendant published past year's question papers of CBSE's examinations. It was contended by the plaintiff that he had the sole license to do so. The court on public interest point held that "the law as to copyright in India is governed by a statute which does not provide for defence in the name of public interest. Infringement of copyright cannot be permitted merely because it is claimed to be in the public interest to infringe a copyright."[40]

Another issue raised time and again is that the act exempts the use by way of performance of literary, dramatic or musical works by an unprofessional or nubile club or society to a non-paying audience or for the help of a charitable purpose and religious institution. However, the limitation that exists is that the words in the provision are very stringently construed to analyse any defence raised under the provision due to which ancillary acts remain to come under the category of infringement. Then there are also no exceptions are given under the present law for the reproduction of any works done in braille format or such other format of works that would suit the differently-abled people challenged.

CONCLUSION

India has a very rich culture and tradition of art, music and literature. Development of all these forms can be traced to our ancient roots which evolved generation by generation with use of new means of technology. We passed and shared the abundance of knowledge not only with future generations but also the world. We thus represent an apt example of why a wide construction of fair use is important and what wonders it can do.

Currently, we have an insufficient law which when seen with the irregular application of the fair use doctrine leads us into an unhappy state of affairs. It seems that it is not performing the task to the optimal level. So to say this doctrine is fulfilling only one part of the twofold purposes of copyright protection which is recognizing intellect. Another part which is the protection of the public interest in accessing the information fails to be achieved by it to this day because of the inadequacy of the Indian doctrine.

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[40] 1996 (38) DRJ 81 Para 24.