



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **COPYRIGHT INFRINGEMENT IN CONTEMPORARY ART: FAIR USE OR THEFT**

AUTHORED BY - AJAY SHARMA<sup>1</sup>

## **1. Introduction to Copyright Law in Art**

Contemporary art often blurs the boundaries between originality, replication, and reinterpretation. In this landscape, copyright law plays a crucial role in determining whether artistic expression is protected or infringes upon it. Copyright in the visual arts protects original works of authorship that are fixed in a tangible medium of expression. These include paintings, drawings, sculptures, installations, and digital creations. Under Section 13 of the Indian Copyright Act, 1957,<sup>2</sup> and 17 U.S.C. § 102 in the United States,<sup>3</sup> the law grants authors exclusive rights over their works, including the right to reproduce, distribute, and publicly display them. Importantly, these rights are limited to the *expression* of ideas and do not extend to the underlying concepts, techniques, or styles.

In contemporary art, however, the boundaries of expression and idea are frequently challenged. Artists often draw inspiration from existing works through sampling, referencing, or direct appropriation to create new meaning or critique cultural norms. This raises pressing legal questions: Where does creative freedom end and copyright infringement begin? How should courts assess whether a contemporary artwork merely “copies” or meaningfully transforms the original? Moreover, the issue becomes more complex in the digital age, where works are easily replicated and disseminated globally. The advent of appropriation art and remix culture complicates traditional doctrines of originality and infringement. Consequently, modern legal systems must grapple with evolving standards of authorship, originality, and transformative use. In India, the protection is governed by both economic rights (under Sections 14–22 of the Copyright Act, 1957) and moral rights (under Section 57). In contrast, the U.S. places greater emphasis on economic rights, with limited but significant recognition of fair use as a defence to infringement under 17 U.S.C. § 107.

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<sup>2</sup> Indian Copyright Act, 1957 § 13.

<sup>3</sup> 17 U.S.C. § 102 United States.

## 2. Understanding Fair Use / Fair Dealing

The doctrines of fair use (in the U.S.) and fair dealing (in India, the UK, and other Commonwealth jurisdictions) provide crucial defenses for artists who use copyrighted works in their own creations. These doctrines aim to balance the copyright holder's rights with freedom of expression and the promotion of knowledge and creativity.

### A. The U.S. Fair Use Doctrine

Under 17 U.S.C. § 107,<sup>4</sup> the fair use doctrine permits limited use of copyrighted works without permission, provided the use meets certain criteria. Courts in the U.S. apply a four-factor test to assess whether a particular use is “fair”:

1. Purpose and character of the use: Is the new work *transformative*? Does it add new expression or meaning?
2. Nature of the copyrighted work: Is the original creative or factual?
3. Amount and substantiality of the portion used: How much of the original was copied?
4. Effect on the potential market: Does the use affect the market value of the original work?

The landmark case *Campbell v. Acuff-Rose Music, Inc.*<sup>5</sup> held that even commercial use can be fair if it is transformative. More recently, in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,<sup>6</sup> the U.S. Supreme Court ruled that Warhol's transformative portrait of Prince did not qualify as fair use when licensed for commercial publication.<sup>2</sup> This case has sparked intense debate within the art community regarding the scope of fair use in visual art.

### B. Fair Dealing in India

India follows the fair-dealing principle under Section 52 of the Copyright Act, 1957.<sup>7</sup> The scope of fair dealing is narrower than U.S. fair use and typically covers:

- Private or personal use (including research and education),
- Criticism or review,
- Reporting of current events.

Unlike the U.S. test, Indian law does not permit a broad, flexible interpretation. Courts tend to interpret the provision strictly, often siding with original copyright holders.

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<sup>4</sup> 17 U.S.C. § 107 United States.

<sup>5</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>6</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. (2023).

<sup>7</sup> Indian Copyright Act, 1957 § 52.

However, in *India TV Independent News Service Pvt. Ltd. v. Yashraj Films Pvt. Ltd.*,<sup>8</sup> the Delhi High Court recognised that “transformative use” could fall within the ambit of fair dealing if it meets the necessary tests of public interest and critique. Still, Indian jurisprudence lacks consistent case law on visual arts, particularly about appropriation and collage, making the application of fair dealing to contemporary art somewhat ambiguous.

### C. Comparative Insight

While both doctrines aim to prevent the overreach of copyright monopolies, U.S. law offers greater leeway to artists under the transformative use standard. Indian law, being more rigid, may inhibit some forms of artistic experimentation unless explicit permission is obtained

## 3. Appropriation Art: Case Studies

Appropriation art is a form of contemporary art in which artists deliberately use pre-existing images or objects with minimal transformation to create new works. This artistic technique raises significant legal and ethical questions surrounding originality, transformative use, and copyright infringement.

### A. Richard Prince and Patrick Cariou: The “Canal Zone” Controversy

One of the most prominent examples of legal challenges in appropriation art is *Cariou v. Prince*.<sup>9</sup> In this case, Richard Prince, known for his appropriation works, used photographs from Patrick Cariou’s book *Yes Rasta* without permission to create a series titled Canal Zone. The district court initially ruled in favour of Cariou, stating that Prince’s works did not sufficiently transform the originals. However, the Second Circuit reversed this finding in part, holding that 25 of the 30 works were indeed transformative as they altered the meaning and aesthetic of the originals. The court emphasised that a new message or expression could constitute fair use even without a satirical or critical intent. This ruling greatly expanded the scope of fair use in visual art but was also criticised for giving too much interpretive freedom to courts.<sup>10</sup>

### B. Jeff Koons: A Repeat Defendant

Jeff Koons, another highly celebrated yet controversial appropriation artist, has faced multiple

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<sup>8</sup> *India TV Indep. News Serv. Pvt. Ltd. v. Yashraj Films Pvt. Ltd.*, 2009 SCC OnLine Del 3219.

<sup>9</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>10</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

copyright infringement lawsuits. In *Rogers v. Koons*,<sup>11</sup> Koons copied a photograph of a couple holding puppies and turned it into a sculpture titled String of Puppies. The court held that this did not constitute fair use as the copied elements were too substantial and the purpose was not sufficiently transformative. However, in *Blanch v. Koons*,<sup>12</sup> the Second Circuit ruled in Koons' favour. The artist used part of a fashion photograph in a painting that critiqued consumerism. The court found the use transformative and not detrimental to the market of the original work. This shift reflects the evolving interpretation of "transformativeness" in fair use.

### C. The Indian Context

India has yet to witness high-profile litigation involving appropriation art, but parallels can be drawn from controversies surrounding artists like Subodh Gupta, known for using everyday Indian objects in new contexts. While not direct appropriation, such works raise questions about conceptual ownership, cultural expression, and implicit copying, all of which fall into grey areas under Indian copyright jurisprudence.

## 4. Legal Tests and Judicial Interpretation

In disputes concerning copyright infringement in contemporary art, courts apply a range of legal tests to determine whether the use of a copyrighted work is unlawful or falls under a legally permitted exception such as fair use or fair dealing. These tests are rooted in statutory provisions but heavily shaped by case law and judicial discretion.

### A. The Transformative Use Test

The transformative use doctrine, primarily developed in the United States, examines whether the secondary work adds "something new, with a further purpose or different character," thereby altering the original with new expression, meaning, or message.<sup>13</sup> This test has become central in fair use analysis since the U.S. Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.*<sup>14</sup>

In *Blanch v. Koons*,<sup>15</sup> the Second Circuit applied the transformative test in favour of Jeff Koons, finding that his use of a fashion photograph in a painting was not merely repurposed, but *commented upon and critically engaged with* the source material.<sup>3</sup> However, in *Andy Warhol*

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<sup>11</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

<sup>12</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

<sup>13</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

<sup>14</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>15</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

*Foundation v. Goldsmith*,<sup>16</sup> the U.S. Supreme Court clarified that even if a work is transformative, the commercial nature and market substitution effect can tilt the balance against fair use. The Court's emphasis on purpose and context signalled a shift back to a more structured application of the four-factor test under 17 U.S.C. § 107.<sup>17</sup>

## **B. Substantiality Test: Quality vs Quantity**

Both Indian and American courts consider not just how much of the original work is taken (quantitative) but what is taken (qualitative). In *Harper & Row v. Nation Enterprises*,<sup>18</sup> the Court found infringement even though only a small excerpt was copied, because it constituted the "heart" of the work. This principle becomes especially significant in art, where even minor visual elements like colour schemes or compositional arrangements may carry expressive significance.

## **C. Indian Jurisprudence**

India lacks a strong precedent base in visual art copyright cases. However, in *Amarnath Sehgal v. Union of India*,<sup>19</sup> the Delhi High Court upheld the moral rights of an artist under Section 57 of the Indian Copyright Act.<sup>20</sup> The court emphasised that mutilation or destruction of an artist's work, even by the commissioning body (the Indian Government), infringes upon the personal connection between the creator and the creation. Though this case did not involve traditional "copying," it demonstrated that courts are willing to consider artistic integrity and expression in interpreting copyright protections.

## **5. Gallery, Museum, and Collector Liability**

In the ecosystem of contemporary art, galleries, museums, and private collectors play a pivotal role not just in curating and showcasing art but also in navigating its legal landscape. When infringing artworks are displayed, bought, or sold, these intermediaries may be held liable under doctrines of secondary or contributory infringement.

### **A. Secondary Liability in Copyright Law**

Under U.S. law, a party may be held liable for secondary infringement if they knowingly

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<sup>16</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S.(2023).

<sup>17</sup> 17 U.S.C. § 107 United States.

<sup>18</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>19</sup> *Amarnath Sehgal v. Union of India*, 117 (2005) DLT 717.

<sup>20</sup> Indian Copyright Act, 1957 §57.

facilitate or contribute to the unauthorised use of copyrighted works. In *Fonovisa, Inc. v. Cherry Auction, Inc.*,<sup>21</sup> a swap meet operator was held liable for allowing vendors to sell pirated CDs on their premises. This principle has been extended to art galleries and auction houses that exhibit infringing works.

In the art context, if a gallery knowingly exhibits a work that substantially copies another artist's original creation without authorisation, it can be sued for contributory infringement. Due diligence, provenance checks, and warranties of originality become crucial risk-mitigation strategies.

### **B. Museum Responsibility and Deaccessioning**

Museums are generally perceived as non-commercial cultural institutions. However, their legal exposure increases when:

- They exhibit works of questionable ownership or authenticity.
- They engage in commercial exploitation through merchandising.
- They sell artworks without proper provenance verification.

The Sackler Gallery and the Metropolitan Museum of Art have faced controversies involving artworks with unclear or stolen origins, triggering calls for stronger ethical and legal compliance frameworks within institutional settings. While museums in India are largely government-operated and governed by the Antiquities and Art Treasures Act, 1972, there is currently no clear civil liability framework for exhibiting infringing contemporary artworks. However, moral and reputational risks are high, particularly when dealing with indigenous, religious, or community-based art.

### **C. Art Collectors and Private Sales**

In secondary markets, collectors must rely on representations and warranties from sellers or galleries regarding the authenticity and lawful origin of a work. Buyers may face legal issues if a work turns out to be infringing, even if purchased in good faith. In the absence of a central registry or due diligence mandate in India, this area remains opaque. Contractual mechanisms like indemnity clauses, title guarantees, and disclaimers are used to navigate potential disputes, but legal recourse remains underdeveloped compared to Western jurisdictions.

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<sup>21</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

## 6. Moral Rights vs Economic Rights

In copyright jurisprudence, the rights granted to authors can be broadly categorised into economic rights (rights to derive financial benefit) and moral rights (rights to protect personal connection and integrity about the work). While economic rights are more widely discussed in infringement cases, moral rights are particularly significant in the realm of visual and contemporary art, where the integrity of the artwork and attribution to the artist are deeply tied to their artistic reputation.

### A. Legal Framework in India

The Indian Copyright Act, 1957, explicitly recognises moral rights under Section 57,<sup>22</sup>, allowing authors:

1. The right to claim authorship of the work (right of attribution),
2. The right to restrain or claim damages in respect of any distortion, mutilation, or other modification of the work that would be prejudicial to their honour or reputation (right of integrity).

These rights are independent of the author's ownership of the copyright and continue even after the transfer of economic rights.

The landmark case of *Amarnath Sehgal v. Union of India*<sup>23</sup> illustrates the power of moral rights. The Delhi High Court upheld the artist's right to claim damages when his mural, commissioned by the Government of India, was mutilated and improperly stored. The court recognised the personal dignity of the artist and reinforced the moral rights provision as an essential safeguard for artistic integrity in India.

### B. Position Under U.S. Law

In contrast, the United States provides limited moral rights protection, primarily through the Visual Artists Rights Act (VARA), 1990, codified in 17 U.S.C. § 106A.<sup>24</sup> VARA applies only to works of visual art and offers similar protections:

- Right of attribution,
- Right to prevent intentional distortion, mutilation, or destruction of the work.

In *Carter v. Helmsley-Spear, Inc.*,<sup>25</sup> a group of artists sued when their commissioned sculpture

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<sup>22</sup> Indian Copyright Act, 1957 §57.

<sup>23</sup> *Amarnath Sehgal v. Union of India*, 117 (2005) DLT 717.

<sup>24</sup> 17 U.S.C. § 106A United States.

<sup>25</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

was removed by the building owners. The court held that VARA protected the artists' rights against destruction and emphasised that even site-specific art is entitled to integrity protection. However, VARA's scope is limited: it applies only to a narrow category of artworks, does not cover applied arts or digital art, and does not apply to works created for hire.

### **C. Conflicts Between Moral and Economic Rights**

In practice, moral and economic rights can come into conflict, especially when:

- Artworks are modified for commercial use,
- Derivative works are created from the original,
- Public display alters the context or presentation.

Indian courts have occasionally prioritised moral rights in such situations. In *Moral Rights of Authors v. Commercial Interests*,<sup>26</sup> the Bombay High Court stressed that even the economic transfer of a painting does not give the buyer unlimited control over its use or presentation. For contemporary artists, especially those whose works are displayed in public spaces, this interplay is critical. It ensures that the authenticity and reputation of the artist are not compromised even when the work changes hands or format.

## **7. The Role of the Internet and Digital Reproduction**

The internet has transformed the way art is created, shared, and consumed. While it provides unprecedented visibility and reach for contemporary artists, it also exposes them to rampant unauthorised reproduction, plagiarism, and loss of control over their intellectual property. In this context, copyright law often struggles to keep pace with the digital reality.

### **A. Challenges of Online Sharing and Reproduction**

With platforms like Instagram, DeviantArt, Behance, Pinterest, and Tumblr, visual content is constantly reposted without attribution or permission. These platforms blur the line between promotion and unauthorised distribution.

Unlike traditional reproduction, digital sharing:

- Occurs instantly,
- Leaves little trace of original ownership,
- Can be copied infinitely without loss of quality.

This results in widespread infringement-by-reposting, which is difficult to monitor or enforce.

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<sup>26</sup> *Moral Rights of Authors v. Commercial Interests*, 2008 SCC OnLine Bom 775.

Artists may find their work used in blog posts, advertisements, or even merchandise, often without their knowledge or consent. In India, the lack of a specific legal provision addressing digital copying of visual artworks under fair dealing adds to the uncertainty. Although Section 52<sup>27</sup> lists certain exceptions, online sharing does not explicitly fall within its protective umbrella unless it serves a research, review, or reporting function.

### **B. Safe Harbour and Platform Liability**

Under Section 79 of the Indian Information Technology Act, 2000,<sup>28</sup> and 17 U.S.C. § 512 (Digital Millennium Copyright Act DMCA) in the U.S.,<sup>29</sup> intermediaries (such as social media platforms) enjoy “safe harbour” protection from liability, provided they act upon receiving takedown notices. However, the effectiveness of this mechanism is often questioned. Small creators face procedural burdens in filing complaints, while infringing content frequently resurfaces through mirror accounts or bots. In *Super Cassettes Industries v. MySpace Inc.*,<sup>30</sup> the Delhi High Court limited the intermediary’s liability but emphasised a need for proactive filtering once notified.

### **C. Rise of Memes, GIFs, and Digital Remix Art**

Internet culture has given rise to meme art, GIF loops, and filter-based art, which often involve copyrighted visuals. These forms usually rely on minimal editing or juxtaposition to produce humour, irony, or social commentary, raising questions of whether they qualify as parody or infringing reproduction.

The U.S. courts have at times recognised parody as fair use. In *Campbell v. Acuff-Rose*,<sup>31</sup> parody was considered transformative. But such protections are still undefined in the Indian context. As a result, digital artists in India operate in a legally ambiguous space with few precedents to rely upon.

## **8. AI-Generated & Conceptual Art**

The emergence of artificial intelligence (AI) as a tool and sometimes even as a creator in the art world has disrupted conventional notions of authorship, originality, and copyright. AI-

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<sup>27</sup> Indian Copyright Act, 1957 §52.

<sup>28</sup> Indian Information Technology Act, 2000, §79.

<sup>29</sup> 17 U.S.C. § 512 United States.

<sup>30</sup> *Super Cassettes Indus. Ltd. v. MySpace Inc.*, 2011 SCC OnLine Del 4528.

<sup>31</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

generated art involves software often trained on massive datasets of existing artworks, creating new visual content that may closely resemble the style or substance of human artists.

### **A. Authorship and Originality in AI Art**

Under the Indian Copyright Act, copyright subsists in original works authored by a human. The law does not currently recognise non-human creators such as machines or software. Similarly, U.S. copyright law requires human authorship as a threshold requirement. In *Naruto v. Slater*,<sup>32</sup> the court held that animals (a monkey in that case) cannot hold copyright. This principle has been extended to AI, meaning that purely AI-generated works are not eligible for copyright protection unless there is meaningful human intervention.

In 2022, the U.S. Copyright Office rejected a registration for an AI-generated work (Zarya of the Dawn) where the author claimed the AI was responsible for visual components. The Office reiterated that human authorship is essential, even if AI tools are involved in the process. In the Indian context, although Section 2(d)(vi)<sup>33</sup> allows the “person causing the work to be created” to be deemed the author in the case of computer-generated works,<sup>4</sup> the application to autonomous AI (like GANs or neural networks) remains legally unsettled.

### **B. Infringement by Training and Output**

A major concern in AI art creation is the training data. AI tools often train on existing copyrighted artworks without obtaining licenses. If the training set includes protected images and the AI outputs work stylistically similar to an original artist’s work, does this constitute infringement? Courts have not yet ruled decisively on this question, but artists such as Karla Ortiz and Greg Rutkowski have publicly alleged that their styles were mimicked by generative AI tools without consent. The U.S. Copyright Office is currently reviewing such complaints, signalling a growing need for regulation.

The challenge is to balance:

- Artists' rights to control how their work is used,
- Developers' and the public interest in using large datasets for innovation.

### **C. Conceptual Art and the Idea-Expression Dichotomy**

Conceptual art, which prioritises the idea over the form or execution, further complicates

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<sup>32</sup> *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

<sup>33</sup> Indian Copyright Act, 1957 § 2(d)(vi).

infringement analysis. Since copyright protects expression and not ideas, conceptual artists often find it difficult to claim infringement unless a specific execution is copied.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*,<sup>34</sup> the U.S. Supreme Court held that ideas and facts are not protected even if they form the core of a conceptual or performance piece.<sup>6</sup> Thus, unless the specific visual manifestation is copied, the concept alone cannot form the basis for an infringement claim. In India, no prominent case has directly addressed infringement in conceptual art, but the principle under Section 13<sup>35</sup> and Section 14<sup>36</sup> of the Copyright Act continues to reflect the idea-expression divide.

## 9. Conclusion

The intersection of copyright law and contemporary art presents a dynamic and often contentious space where legal doctrine must engage with evolving creative practices. As artists increasingly draw upon existing materials, whether through appropriation, collage, remix, or digital reproduction, the challenge lies in distinguishing between unlawful copying and permissible reuse. Courts and lawmakers are thus faced with the delicate task of maintaining the integrity of copyright protection while fostering the kind of artistic innovation and critical expression that enriches culture and public discourse. In the United States, the doctrine of fair use has evolved significantly to accommodate new forms of visual expression. The transformative use test, particularly since *Campbell v. Acuff-Rose* and *Blanch v. Koons*, has provided artists with a degree of latitude in reworking existing material to create new meanings. However, the recent *Andy Warhol Foundation v. Goldsmith* decision has highlighted the limitations of this approach, especially where commercial motives are involved. In India, the fair-dealing exception remains comparatively narrow, and jurisprudence in visual art remains underdeveloped, often failing to provide artists with adequate interpretive flexibility.

Moral rights, especially as protected under Section 57 of the Indian Copyright Act, offer an essential counterbalance to the dominance of economic rights by recognising the artist's bond with their creation. These rights become especially important in cases involving mutilation, distortion, or misattribution of visual art. However, enforcement remains inconsistent, and awareness among stakeholders—including artists, galleries, and collectors—is limited. The

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<sup>34</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

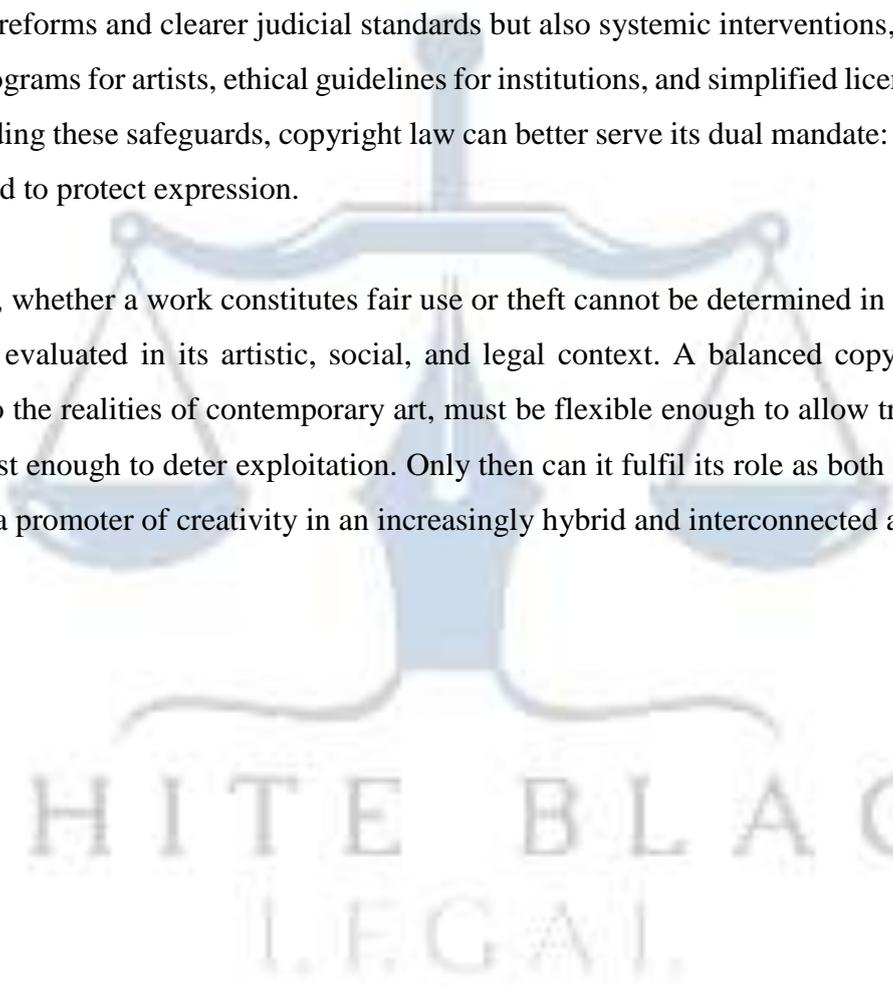
<sup>35</sup> Indian Copyright Act, 1957 §13.

<sup>36</sup> Indian Copyright Act, 1957 §14.

rise of digital art, AI-generated works, and internet-based sharing has further complicated the legal landscape. Issues of authorship, originality, and unauthorised reproduction in online spaces are increasingly difficult to govern using traditional copyright frameworks. Moreover, the absence of clear guidelines for the use of copyrighted material in algorithm training or digital remixing has created legal grey zones that are open to exploitation and abuse.

To address these challenges, the law must evolve to recognise and support legitimate creative appropriation without undermining the rights of original creators. This requires not only legislative reforms and clearer judicial standards but also systemic interventions, such as legal literacy programs for artists, ethical guidelines for institutions, and simplified licensing models. By embedding these safeguards, copyright law can better serve its dual mandate: to incentivise creation and to protect expression.

Ultimately, whether a work constitutes fair use or theft cannot be determined in abstraction—it must be evaluated in its artistic, social, and legal context. A balanced copyright regime, sensitive to the realities of contemporary art, must be flexible enough to allow transformation while robust enough to deter exploitation. Only then can it fulfil its role as both a protector of rights and a promoter of creativity in an increasingly hybrid and interconnected artistic world.



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