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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided 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

DOCTRINE OF FAIR USE AND ITS CHALLENGES **IN DIGITAL AGE**

AUTHORED BY - NITHYA RANI S

Abstract

Knowing the legal limits and rules for content usage is essential as the internet develops into a constantly growing center of creativity and knowledge and the concept of "Fair use" is one of the most crucial concepts in this field. The concept of fair use has served as a fundamental element of copyright law for many years, providing a versatile framework that permits limited use of copyrighted works without authorization. However, with the advancement of digital technologies and the internet, new challenges regarding the implementation of fair use have arisen. In today's digital landscape, rapid technological progress, easy access to copyrighted materials, and the emergence of platforms that support user-generated content have increasingly tested the limits of this doctrine. This article examines the challenges faced by fair use in the digital era, particularly its role in areas such as social media, online education, and content creation, while also assessing possible solutions to these issues. The historical aspect of fair use, the relationship between the fair use and copyright, the existing legal framework in India regarding the doctrine of fair use will be also covered touching upon the case studies in relation to the doctrine of fair use.

Key Words: Fair Use, Copyright Infringement, Digital Rights Management, Public Access

INTRODUCTION

The advent of the digital age has transformed how people generate, share, and engage with content. The emergence of online platforms like YouTube, TikTok, Instagram, and blogs has moved content creation away from conventional media sources to a more decentralized, user-led approach. These platforms allow creators to develop and distribute a wide range of materials, including informative videos, commentary, fan fiction, remixes, and memes. Nevertheless, this democratization of content production also brings notable legal hurdles, especially concerning copyright law and fair use.

Fair use is a doctrine that permits restricted use of copyrighted content without needing the rights holder's consent, making it a fundamental aspect of copyright law. It acts as a legal protection that enables people to participate in activities like criticism, commentary, research, parody, and news reporting without the risk of legal consequences. Ultimately, fair use helps to balance the rights of creators with the promotion of free expression, creativity, and access to information for the public. In the digital age, fair use presents both new opportunities and challenges. With ongoing concerns about intellectual property and the protection of free speech, a thorough understanding of fair use is vital for balancing the rights of copyright owners with the promotion of a creative and vibrant environment.

DOCTRINE OF FAIR USE - ITS APPLICABILITY AND RELATIONSHIP WITH COPYRIGHT

The "Doctrine of Fair Use" originated as courts attempted to find a middle ground between the rights of copyright holders and the public's interest in allowing copying under certain conditions. Fair use cannot be strictly defined by a specific set of criteria. Instead, it is a more subjective idea that varies for each individual case. A key reason for this doctrine is the recognition that not all copying should be banned, particularly when it serves an important social purpose or qualifies as "transformative use," such as in criticism, news reporting, education, research, or parody creation¹. Fair use serving as an exception within copyright law, permits specific uses of copyrighted material without needing permission from the copyright owner. It serves as a defense against copyright infringement claims, placing the burden of proof on the individual asserting fair use. The doctrine aims to avoid a strict enforcement of copyright law that could hinder creativity and the free exchange of information.

The doctrine of 'Fair Use' originated in the landmark case of **Folsom v. Marsh**², in which Justice Story put out a four-factor test and formulated as follows. Determining whether a particular use of copyrighted material falls under fair use can be complex, as courts analyze the following four factors on a case-by-case basis:

- a. Purpose and character of the use:** The judiciary evaluates if the new creation is transformative and contributes additional meaning or value to the original content. In this context, the court primarily examines whether the individual is enhancing the

¹ Saikia N, Indian copyright: The legality of parodies under Indian Law, <http://www.copyright.lawmatters.in/2013/01/the-legality-of-parodies-under-indian-law.html>

² 9 F. Cas. 342, 1841 U.S. App. LEXIS 468

original work with fresh expression and meaning or simply reproducing it as is. The new creation should contribute additional value by incorporating the person's unique insights, research, or understanding.

- b. Nature of the copyrighted work:** Uses that are non-commercial, educational, or critical tend to be more readily classified as fair use. Fair use is more often determined when the original work is factual or non-fiction, rather than creative or fictional. When a work is factual, such as a biography, it is often deemed fair use by the court since it generally serves the public interest. In contrast, fictional works like novels and plays are typically afforded greater protection due to their creative aspects. Additionally, if a work has already been published, the potential for fair use is broader than for unpublished works, as the court recognizes the original author's right to manage the initial public release of their work.
- c. Amount and substantiality of the portion used:** The courts also assess both the amount and significance of the copyrighted material utilized. Typically, smaller and less vital portions are more likely to fall under fair use. In the case of **Harper and Row v. Nation Enterprises**³, the court deemed the 300 words that were copied to be significant within the context of the 200,000-word manuscript, viewing it as the essential part of the book.
- d. Effect of the use upon the potential market:** If the new work adversely affects the market for the original or its potential derivatives, it is less likely to be deemed fair use. If utilizing a small amount could harm the work's market value, it falls outside the boundaries of fair use. In this context, the market refers to both the current and future sales potential of the work.

Fair use which permits the limited use of copyrighted material without requiring permission from the copyright owner, copyright on the other hand provides creators with exclusive rights to their original works, including literary, artistic, musical, and dramatic creations, as well as sound recordings and films. These rights encompass the ability to reproduce the work, distribute copies, publicly perform or display the work, and create derivative works based on the original.

The relationship between fair use and copyright reflects the delicate balance between protecting creators' rights and serving the public interest. While copyright encourages the creation and

³ 471 U.S. 539 (1985)

distribution of original works, fair use ensures that the law does not restrict free speech, creativity, or innovation. By permitting certain limited uses of copyrighted material, particularly for non-commercial purposes, fair use supports a dynamic public domain and fosters cultural and intellectual exchange. However, it is important to carefully maintain this balance to prevent fair use from overly infringing on creators' rights or undermining the economic incentives that copyright protection offers.

FAIR DEALING - POSITION IN INDIA

The Copyright Act⁴ offers extensive protection for various types of creative works, such as literature, drama, music, art, films, and sound recordings. Its purpose is to strike a balance between the rights of creators and the public interest by granting creators exclusive rights to their works, while also permitting certain exceptions and limitations that encourage creativity, education, and access to information.

In India, although the term "fair use" is not specifically stated in the Copyright Act, the idea is acknowledged through the doctrine of "fair dealing." This principle permits the limited use of copyrighted content for activities like research, criticism, reviews, news reporting, education, and personal study, as long as the usage is fair and does not violate the rights of the copyright owner. Nonetheless, what qualifies as fair dealing is subjective and influenced by factors such as the intended purpose of the use, the character of the work, and its impact on the market for the original work.⁵

The Act⁶ contains several key provisions that govern the protection and enforcement of copyright in India, like, Section 13 which deals with the outlines the categories of works eligible for copyright protection, Section 14 enumerates the exclusive rights granted to copyright holders, Section 51 defines acts that constitute copyright infringement and Section 52 provides certain exceptions to copyright infringement, including fair dealing provisions.

In India, Section 52(1)(a) of the Copyright Act, 1957, specifies that only the purposes outlined in the provision qualify as 'fair dealing.' To be exempt under this provision, a work must serve purposes such as research, news reporting, personal study, review, or criticism. If the usage

⁴ The Copyright Act, 1957

⁵ Sharma A, Indian perspective of fair dealing under Copyright Law: Lex Lata or Lex Ferenda, Journal of Intellectual

Property Rights, 14 (2009) 523.

⁶ The Copyright Act, 1957

does not align with these specified purposes, it does not receive protection under the 'Fair dealing' doctrine. Furthermore, the 'Fair dealing' provisions do not apply to unpublished works, unlike in USA.⁷

In the case of **Rupendra Kashyap v. Jiwan Publishing House**⁸, the Delhi High Court examined the relevance of the "commercial exploitation" test concerning the fair dealing defense. The court concluded that a publisher who commercially exploits an original work and infringes copyright would not be able to claim fair dealing, regardless of whether the publication is intended for research or private study. It determined that the statutory defense under section 52(1)(a)(i) does not apply to publishers who release a book for commercial gain while violating copyright, even if the book is designed for research or private study use. The ruling clarified that fair dealing for facilitation is permissible as long as it does not constitute "commercial exploitation."

In the case of **New Delhi Television Limited v. ICC Development (International) Limited**⁹, the Court addressed the issue of using ticker advertisements. It decided that displaying an advertisement on a ticker overlaying copyrighted footage used in a news bulletin does not inherently constitute a violation of fair dealing rights. Consequently, the ruling permitted the defendant to showcase advertisements on tickers during routine newscasts, whether they featured new or archival footage, provided that these ads weren't exclusively scheduled for the ICC Twenty 20 World Sri Lanka 2012 coverage.

Recently, in the case of **Shemaroo Entertainment Limited v. News Nation Network Private Limited, 2022**¹⁰, the Bombay High Court restricted the news channel titled "News Nation" from incorporating, recording, distributing, broadcasting, telecasting, disseminating, or publishing any work from the catalogue of the plaintiff i.e., Shemaroo Entertainment. The High Court have dismissed the principle of de minimis non curat lex mentioning that mere quantitative analysis will not justify the fair use contention.¹¹

⁷ Section 107 of U.S Copyright Code 1976

⁸ (1996) 38 DRJ 1

⁹ (2012) 195 DLT 61 (DB)

¹⁰ <https://indiankanoon.org/doc/128671960/>

¹¹ <https://iprmentlaw.com/2022/05/01/shemaroo-vs-news-nation>

CHALLENGES IN THE DIGITAL AGE

With the digitalization continuously evolving into a vast source of creativity and information, it is essential to grasp the legal limits and regulations regarding content usage. Though the doctrine of fair use permits restricted, unlicensed access to copyrighted content for reasons such as criticism, commentary, news reporting, teaching, scholarship, and research, it encounters difficulties in the digital era because of the simplicity of copying and sharing, which complicates its definition and enforcement. The digital era has significantly changed the way content is created and consumed. With social media platforms, video-sharing websites, and digital editing tools, countless individuals are now able to produce and share content online, often using existing materials to inspire their creativity. Consequently, the lines separating original works from derivative ones have become more ambiguous. A major challenge of the digital age is how easily users can copy, alter, and share copyrighted content. Previously, reproducing copyrighted works demanded considerable resources and effort, like printing books or making physical copies. Now, however, users can instantly share high-quality versions of songs, videos, images, and texts with just a click, allowing them to reach a worldwide audience. This simplicity in access and distribution has raised significant worries about copyright violations and has sparked legal disputes over the definition of fair use in the realm of digital media.

Technology has had a mixed impact on the enforcement of copyright law and fair use. On one side, digital platform have developed advanced content identification tools to combat copyright violations. For instance, YouTube's Content ID and Facebook's Rights Manager automatically examine uploaded content for copyrighted material, either removing it or allowing it to be monetized for the rights holder.¹² These tools assist rights holders in safeguarding their intellectual property in a landscape where infringement is widespread.

Conversely, these automated systems have their shortcomings. They frequently overlook the subtleties of fair use, particularly in cases where content is utilized for criticism, commentary, or parody. Consequently, numerous creators have experienced the removal or demonetization of their content, even when their use of copyrighted materials would probably be deemed fair use by conventional legal standards. This excessive dependence on automated systems has ignited discussions about the necessity for human oversight and more defined guidelines for

¹² Sood, Pushpanjali, "Fair Dealing in India: An Analysis vis-à-vis Fair Use in the United States" *Journal of Intellectual Property Rights* Vol 28, November 2024, pp 560-568

fair use in the digital era.

The following are the major challenges which makes the application of doctrine of fair use difficult in this digital age.

a. Ease of Copying and Difficulty in Determining the Originality

A major challenge is the ease with which digital content can be duplicated and shared with audiences worldwide. This complicates the management of work distribution and the safeguarding of intellectual property rights. The digital landscape facilitates the copying and sharing of content, often blurring the boundaries between fair use and copyright violation. The distinction between fair use—such as for commentary or educational purposes—and infringement can often be vague, resulting in confusion and possible legal conflicts regarding what is considered permissible use.

Establishing originality, particularly regarding AI-generated content, poses a considerable challenge when evaluating fair use. It remains uncertain whether the training datasets or outputs of AI can be deemed transformative, which could allow them to qualify for fair use. Additionally, identifying the ownership of digital content is complicated. The simplicity of copying and sharing digital files makes it hard to verify the original creator or the party entitled to distribute the work. Within the digital realm, defining fair use becomes more problematic, particularly on platforms abundant with user-generated content. While these platforms encourage creativity, they simultaneously complicate copyright ownership issues.

Ultimately, the digital era has significantly increased access to content, reshaping the creative environment. Nonetheless, this growth raises important questions about copyright standards and ownership, prompting a reevaluation of how we safeguard creative works in this swiftly changing landscape.

b. Enforcement Issues

Enforcing doctrine of fair usage is intricate because of varying legal systems, jurisdictional challenges, and differences in copyright laws, which complicate the global enforcement of copyright protection. Enforcing copyright and fair use in the digital landscape poses significant challenges, primarily due to the rapid and widespread dissemination of content online.¹³ One major obstacle in upholding copyright in today's digital world is the internet's global nature. Copyright laws

¹³ Raza, Aga (2021). Theoretical Underpinning of Copyright and Design Laws: decision of the Supreme Court of India. *Journal of Intellectual Rights*, 26, pp.220-234.

typically apply to specific countries or regions, but the internet facilitates the sharing and accessing of content from anywhere across the globe. This complicates the enforcement of rights, particularly when infringing material is hosted in countries with weak or minimal copyright enforcement. It is also difficult to determine which country's laws should govern cases of online copyright infringement. For example, a pirated film posted on a website in one nation can be viewed by users in various other countries. Taking legal action in such instances involves navigating the laws of multiple countries, which can be both expensive and time-consuming.

Content creators and media professionals face significant challenges with copyright enforcement mechanisms. The rise of decentralized file-sharing systems complicates the tracking and enforcement of copyright violations, posing a threat to copyright protection. Lack of international cooperation and coordination undermines effective cross-border enforcement of copyright laws, due to various inconsistencies and loopholes. In India, courts are increasingly dealing with cases related to digital piracy, online streaming, and violations of intellectual property rights. Legislative initiatives are underway to update copyright laws to tackle these new challenges while taking into account the interests of both creators and consumers. The development of copyright law in India highlights the necessity for flexibility and responsiveness to the changing dynamics of content creation and distribution in the digital age.

c. Evolving Technology Developments

Progress in machine learning and artificial intelligence has opened up fresh avenues for safeguarding intellectual property. These technologies can analyze large data sets to uncover possible infringement cases or pinpoint patterns that may reveal the sources of counterfeit products. However, they also pose new challenges for protecting intellectual property, particularly regarding the simplified reproduction and distribution of digital content.

The swift advancement of technology consistently introduces new challenges for copyright law and its interpretation, particularly regarding fair use. As technology progresses at a pace quicker than the legal systems meant to regulate it, innovations such as AI, blockchain, and non-fungible tokens (NFTs) complicate copyright enforcement since current laws struggle to address these developments. This technological evolution and the emergence of online content creation call for a reassessment of the fair use doctrine to maintain its relevance and effectiveness in the

digital landscape.¹⁴ It is essential for courts, lawmakers, and digital platforms to collaborate in establishing clearer guidelines that strike a balance between the rights of copyright owners and the artistic freedom of content creators. This could involve refining the four-factor test to better reflect the realities of digital content creation and tackling the shortcomings of automated enforcement systems. For instance, automated tools like YouTube's Content-ID have transferred the burden of fair use evaluation onto algorithms that may overlook the more intricate aspects of the law, raising concerns about potential overreach and the discouragement of legitimate uses.

d. Digital Rights Management

Digital Rights Management (DRM) systems, which aim to safeguard copyrighted digital materials, can present obstacles to the doctrine of fair use by imposing limitations on how individuals can access and utilize this content. Such restrictions may disrupt legitimate activities like education, research, and accessibility. Currently, more control is concentrated in the hands of the rights holders, who can grant or deny unrestricted access at their discretion. This has become increasingly significant given the current reliance on streaming and network access to content controlled by these rights holders.

DRM implementation limits users' ability to interact with creative works, depriving them of the chance to engage with these materials on their own terms. The principle of fair use is meant to facilitate access to copyrighted content and allows for certain types of use, but these restrictions risk creating a 'digital lockup' due to arbitrary choices made by rights holders and, in some cases, service providers. This undermines one of the fundamental tenets of copyright law, which promotes the advancement of knowledge and the creation of new works¹⁵. While copyright's exclusive rights incentivize creation, fair use enables individuals to engage with creative works, serving as a foundation for inspiration and new content creation. Consequently, it acknowledges the significance of existing works in producing new content.

The enforcement of DRM can eliminate even the possibility of discussing copyright exceptions, which historically have helped balance the tension between copyright and emerging technologies¹⁶. Given the traditionally broad interpretation of fair use, there is little

¹⁴ <https://www.globalipconvention.com/blog/intellectual-property-challenges-in-the-digital-age>

¹⁵ As stated in Article 1, section 8 of the US Constitution: 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'

¹⁶ von Lohmann, F., 'Fair Use and Digital Rights Management: Preliminary Thoughts on

opportunity for legal challenges now, which may further enhance the monopolistic power of rights holders at the users' expense. Fair use serves as a check on this monopoly when the treatment of the work is considered 'fair.' However, the current reality seems to show that it is not the treatment of the content that is unjust, but rather the treatment of the user, resulting in an extension of the rights holders' monopoly to the networks.

SUGGESTIONS AND CONCLUSION

India's developing copyright system in the digital age reflects its dedication to staying current with technological advancements. Nevertheless, enforcing copyright in this era necessitates a careful balance between safeguarding intellectual property rights and nurturing a digital landscape that encourages creativity and accessibility to content. The difficulties of enforcing copyright have intensified in the digital realm, requiring flexible legal frameworks that reconcile the rights of creators with public access. Collaborating internationally, updating legislation, and educating users are essential for creating a digital environment that honors intellectual property while promoting innovation and creativity. Hence the following are the suggestions can be implemented for combating the above-mentioned challenges.

- a. Legislative Developments** - Examine and revise copyright legislation to reflect the realities of the digital environment, taking into account issues like digital distribution, and technological progress. Make sure that copyright laws adequately protect the rights of copyright holders while also permitting fair access and user rights. Encourage global cooperation and alignment of copyright laws to tackle cross-border violations and guarantee uniform standards for copyright protection worldwide.
- b. Robust Enforcement Measures** - Ensure that law enforcement agencies and specialized intellectual property units receive sufficient resources and support to successfully enforce copyright laws in the digital space. This involves training staff, investing in technology and tools, and creating effective processes for investigating and prosecuting copyright infringement cases. Encourage collaboration and information exchange among copyright holders, technology firms, internet service providers (ISPs), and law enforcement to identify and address online piracy. Set up systems for prompt reporting, takedown actions, and sharing of best practices.

- c. Improved Technology and Innovation** - Foster the creation of strong and intuitive DRM technologies that safeguard copyrighted material while not excessively limiting user rights. DRM systems ought to be compatible, versatile, and able to adjust to emerging technologies and changing consumer demands. Advocate for the implementation of watermarking and tracking technologies to recognize and monitor copyrighted content, aiding in the identification and enforcement against unauthorized use and distribution.
- d. Public Awareness on Copyright**- Enhance knowledge and comprehension of copyright laws, rights, and obligations among the general public, educators, creators, and businesses. Create educational initiatives and materials that encourage ethical use, respect for intellectual property, and an understanding of the consequences of piracy. Offer resources, advice, and assistance to creators, especially independent artists and small enterprises, to help them address copyright challenges, safeguard their works, and successfully profit from their creations.
- e. User Friendly Access** - Promote the accessibility and affordability of legal digital content by implementing various business models, including subscription services, ad-supported platforms, and flexible pricing strategies. This approach minimizes the temptation for consumers to turn to piracy and encourages the use of legitimate sources. Prioritize improving user experience, convenience, and value on legal content platforms, making sure they provide a broad selection of content, easy accessibility, and appealing features that either match or exceed those offered by pirate sites.

Understanding the concept of fair use is vital for online content creators, particularly on platforms like YouTube. By evaluating the four criteria of fair use and applying them to your work, you can more effectively navigate the intricate landscape of copyright law and steer clear of potential infringement problems, as we've explored in this article. As the internet continues to progress, it's essential to maintain the principles of fair use to encourage creativity, education, and the open exchange of ideas. After reviewing all the factors mentioned, it's evident that there is a need for legal reforms and clearer guidelines to more accurately define fair use in today's digital world, ensuring a balance between protecting intellectual property and nurturing innovation. These reforms, along with enhanced dispute resolution methods on digital platforms, are crucial for supporting content creators while maintaining copyright standards in the rapidly changing digital environment.