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Fair Use vs Fair Dealing: Key Differences in Copyright Law

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Copyright law seeks to strike a balance between protecting creators' rights and ensuring public access to knowledge and creativity. Two important doctrines that reflect this balance are Fair Use and Fair Dealing.

Introduction

Copyright law grants creators exclusive rights over their original works, promoting creativity by allowing authors to control how their expressions are used. However, these exclusive rights are not absolute.

To balance the interests of creators with the public interest in accessing and using information, Indian copyright law incorporates doctrines that permit limited use of copyrighted material without the permission of the copyright holder.

The most prominent of these is "Fair Dealing," as provided under the Copyright Act, 1957. Understanding this concept is fundamental for comprehending the practical application and limitations of copyright in India.

The Purpose of Copyright Limitations

Copyright protection is designed to incentivise the creation and dissemination of new works. However, an overly strict application of exclusive rights could stifle creativity, research, education, and public discourse, all of which often rely on building upon or referencing existing works. Limitations and exceptions to copyright, such as Fair Dealing, serve to:

- Promote freedom of expression and speech.
- Facilitate education, research, and scholarship.
- Enable criticism, commentary, and news reporting.

- Allow for transformative uses that create new works (though this is more explicitly a feature of US Fair Use, the concept can be relevant in assessing fairness).
- Prevent copyright from becoming a barrier to legitimate activities.

These doctrines are essential mechanisms for ensuring that copyright law serves its ultimate purpose: promoting the progress of science and useful arts for the benefit of society.

Fair Dealing Under Copyright Law

Fair Dealing is a specific defence to copyright infringement found in **Section 52** of the Copyright Act, 1957 in India. It permits the use of copyrighted material for certain specific purposes, provided the dealing is considered "fair."

Unlike the broad, flexible Fair Use doctrine in the United States, Indian law enumerates specific acts that do not constitute copyright infringement, many of which fall under the umbrella of Fair Dealing.

Permitted Purposes for Fair Dealing under Section 52:

Section 52 lists various acts that do not infringe copyright. Those commonly considered under Fair Dealing include:

- Private Use, Including Research: This allows individuals to make copies of copyrighted works for their personal use or for research purposes.
- Criticism or Review: Using a copyrighted work for the purpose of criticism or review, whether of that work or of any other work. This often requires sufficient acknowledgment of the original source.
- Reporting of Current Events and of Current Affairs: Using copyrighted material in connection with the reporting of current events or current affairs, including the reporting of a lecture delivered in public. Acknowledgment is usually required.
- Reproduction or Adaptation of a Literary, Dramatic, Musical or Artistic Work:
  - For the purpose of teaching in a class, or as part of the questions to be answered in an examination, or in answers to such questions.
  - As part of a collection for the use of educational institutions, if certain conditions are met (e.g., the collection is mainly composed of non-copyright matter and the extent of

copyrighted material is justified by the purpose).

- Making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy—
  - in order to utilise the computer programme for the purpose for which it was supplied; or
  - to make back-up copies purely as a temporary protection against loss, destruction or damage in order to utilise the computer programme for the purpose for which it was supplied.
- The performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of bona fide teaching or religious instruction.

Determining “Fairness”

Even when a use falls within one of the purposes listed in Section 52, it must still be “fair.” The Copyright Act, 1957 itself does not explicitly define “fairness,” leaving it to judicial interpretation. Indian courts, while not strictly bound by the U.S. four-factor test, often consider similar principles when assessing whether a dealing is fair. These considerations typically include:

- The purpose and character of the use: Is the use genuinely for the permitted purpose (e.g., research, criticism, teaching)? Is it for commercial gain or non-profit?
- The nature of the copyrighted work: Is the work published or unpublished? Is it factual or highly creative?
- The amount and substantiality of the portion used: How much of the original work was used? Was the portion used significant or the “heart” of the work? Using a small, insubstantial part is more likely to be fair.
- The effect of the use upon the potential market for or value of the copyrighted work: Does the use compete with the original work or substitute for its purchase? If it harms the market, it is less likely to be fair.

Indian courts have also looked at whether the use is proportionate to the purpose and whether it is accompanied by proper attribution where required.

Key Aspects of Indian Fair Dealing

- Specific Enumeration: Unlike U.S. Fair Use, Indian law provides a list of specific exceptions, including those considered fair dealing. This offers more clarity but can be less adaptable to entirely new forms of use not contemplated by the statute.
- Judicial Interpretation: While the statute lists purposes, the determination of whether a "dealing" is "fair" in a given case is left to the courts, allowing for some flexibility based on the specific facts.
- No Explicit "Transformative Use" Doctrine: While the concept of using a work to create something new is relevant in assessing fairness, Indian law does not have a standalone "transformative use" doctrine as central as in the U.S.

Comparison with US' Fair Use Doctrine

While both doctrines aim to balance copyright protection with public interest, the Indian approach through Fair Dealing differs from US Fair Use:

- Statutory Basis: Indian Fair Dealing is based on specific exceptions listed in the Copyright Act, 1957. US' Fair Use is a broader doctrine codified in Section 107, providing a flexible test.
- Scope: Indian Fair Dealing is generally limited to the enumerated purposes in Section 52. U.S. Fair Use, being open-ended, can potentially apply to a wider range of uses.
- Flexibility vs. Certainty: U.S. Fair Use offers greater flexibility but can lead to uncertainty. Indian Fair Dealing provides more certainty through its list of exceptions, though the assessment of "fairness" still requires judicial interpretation.

Despite these differences, the underlying principles considered when assessing fairness – purpose, nature of the work, amount used, and market impact – are similar in both jurisdictions.

The Global Landscape

India's approach to copyright exceptions, including Fair Dealing, aligns with the framework found in many Commonwealth countries.

These national laws are also influenced by international treaties like the Berne Convention and the TRIPS Agreement, which require member states to provide limitations and exceptions to copyright, often guided by the "three-step test" (that limitations should be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably

prejudice the legitimate interests of the right holder). India's Fair Dealing provisions are generally considered consistent with this international standard.

Conclusion

Fair Dealing is a crucial limitation on copyright in India, ensuring that copyrighted material can be used for legitimate purposes such as research, criticism, news reporting, and education without infringing the rights of the copyright holder.

While based on a list of specific exceptions in the Copyright Act, 1957, the determination of whether a particular dealing is "fair" involves judicial consideration of factors similar to those found in the US' Fair Use doctrine. Understanding the scope of Section 52 and the principles guiding the assessment of fairness is essential for navigating copyright issues in India.