

Copyright and Related Rights Law

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WEEK - 11

LECTURE – 52

Fair Dealing and Permitted Acts

Welcome back to this course on copyright and related rights law. In the previous session, we discussed fair use as an exception to copyright. We discussed the four factors that are used in categorizing an exception as fair use. In today's discussion, we are going to see how fair dealing and permitted acts are considered exceptions to copyright. We will take the help of a Delhi High Court decision in *Super Cassette Industries versus Hamar Television Network*. This case involved the use of copyrighted material, the ownership of which rests with Supercassette Industries, by the channel Hamar TV.

Such broadcasting of works that was made by this channel was claimed by them to be of short duration, only encompassing 10 to 40 seconds. But more importantly, their contention revolved around the purpose of use. You would recall that when we discussed fair use, the first factor, which spoke about the purpose and character of use, was a dominant consideration. On whether the parody in that specific instance in *Campbell v. Acuff-Rose* could be considered fair use or not. The defense is thus claiming refuge under section 52(1), subclause a. Let us see what this provision is saying: it states that certain acts are not to be considered infringement of copyright. The following acts shall not constitute an infringement of copyright, namely, fair dealing with any work that is not a computer program for the purposes of private or personal use, including research. Criticism or review, whether of that work or of any other work, includes the reporting of current events and current affairs, including the reporting of a lecture delivered in public.

You can see, just like the preamble to Section 107 of the US Copyright Act, that there are certain illustrative examples provided under Section 52. Indicating the purpose of usage, which can be considered an exception to copyright. But the terminology used under 52(1) subclause A is fair dealing. How then are we to consider whether the research mentioned in 52(1) subclause a is to be considered fair? Do we employ the four factors that we discussed under fair use? One thing, though, seems to be clear: in terms of terminological reference, both fair use and fair dealing are different. In this particular case, the Delhi

High Court, in consideration of the many cases foreign in nature that were brought before it, in which fair dealing has been considered in jurisdictions such as the UK, some of the important considerations in the determination of whether an exception is in fact fair or not have been summarized.

Bear in mind that this is an explanation of what fair dealing is. The first of such considerations is that it is neither possible nor advisable to define the exact contours of fair dealing. Therefore, just like the US four-factor test, as explained by the US Supreme Court, it is not an objective test. It is supposed to be applied on a case-by-case basis, and any rigid application of what an exception should be could have the effect of limiting creativity in other spheres. Therefore, in fair dealing as well, the court is saying that a consideration that must be brought in is that such objectivity is not possible.

Second, the court says it is a consideration because of the subjective basis of whether a use is fair or not. That is the overall impression left on the court on account of: The degree of usage, the fact or the purpose of usage—all of these factors will play a role in determining their own persuasive value on whether a particular use can be considered fair or not. The third consideration according to the court is the extent of the expression that has been taken. We have understood that quantitatively taking a portion from a particular work can, in fact, show that such use is in line with the purpose of superseding the object of the original work. Quantity can, therefore, be a serious consideration in determining whether such use is fair or not.

Fourth, the court is saying that the question of whether something like criticism can be considered fair or not. It must be considered that criticism can be strong. According to the court, criticism can be unbalanced. But these are not considerations that will play in the mind of the court in the copyright context. There could be a case that is filed within the ambit of defamation, for example.

But specifically in relation to copyright, as we had discussed and as explained by the US Supreme Court as well, Criticism, particularly of itself, would not lead to any kind of non-consideration of the fairness of such use. The next consideration the court looks at is that any approach to determine whether a certain usage is subject to criticism or review must be a balanced approach. The court says that the courts should adopt a liberal approach, which in effect means that: The private right of copyright and the copyright holder's perspective should not be given unbalanced favor; rather, there should be a balanced approach in determining whether the purpose is satisfied. The next consideration is that in discerning whether a person has made fair use of the copyrighted work, the standard employed ought to be that of a fair-minded and honest person. In the case of musical works, the test would be that of a lay listener.

To an ordinary person, when such a use is compared to the original work, does it appear to be fair use? The next consideration, according to the court, is in relation to factor 3, which was already discussed regarding what kind of consideration for fairness would arise based on quantitative taking. According to the court, it is not just the quantitative considerations that must play on the mind of the court in determining fairness, but qualitative aspects must also be considered. It's possible that what has been used by a person is, in fact, the essence of the work for the copyright holder. An example that the court gives is with respect to musical works. If the original work is immoral, scandalous, contrary to family life, and such other considerations, then the kind of usage would probably be considered fair.

After all, the criticism is purposefully aimed at targeting this very nature of the original work, which is that it is contrary to public policy. Still again, the court says that there might be certain interests of the public that are of such a nature that, despite the usage of leaked material, imagine an unpublished work that has been brought out by, say, a certain use; then that use can also satisfy the purpose of fairness in certain contexts. Furthermore, the Court says the motive of the user shall play an important role in determining whether an injunction ought to be granted. Commercial use of copyright work simpliciter makes it unfair. And lastly, transformative use may be deemed fair use of copyrighted work in certain situations.

You would recall that when we discussed the four factors of fair use, we had discussed that in the first factor, Commercial usage by the person using the portions from the original work is only one element of consideration. The more important element is whether there is a new meaning and a new purpose that is being brought by the user. In other words, such work is transformative in nature. What does this remind us of, then? What is fair dealing? Fair dealing, it would seem, incorporates the essence of the four-factor fair use test. No matter which factor you take from these four factors, they seem to be encapsulated within fair dealing as well.

We can thus say that, though fair dealing and fair use are terminologically different, the effect is much the same. Let us then consider how the court determined whether this particular usage was fair or not. The court found that despite there being small usage as claimed by the defendant, it was in fact substantial. This is something that we will take a look at in more detail when we examine infringements. And second, that the purpose of usage was not reflective of criticism or review, as was claimed by the defendant, and therefore this was not fair dealing under section 52(1), subclause a.

Having understood the fair deal, now let's look at the permitted act; for this purpose, let us consider a case that was also decided by the Delhi High Court. This is the Chancellor, Masters and Scholars of the University of Oxford, and others versus Rameshwari Photocopy Services. This case revolved around the issue of making course packs. These

course packs use extracts from textbooks that are copyright protected. Students would purchase these course packs at an economical rate.

You would note that the purpose of these course packs is the furtherance of education, and this is particularly so because it is the professors themselves who are authorizing the use of these extracts. Would the amount and substantiality of such usage of extracts from a copyrighted work be infringing, or would it be fair use? This is the consideration that is before the Delhi High Court in this particular case. The specific provision that is there for our consideration is section 52, clause 1, subclause i. What does this say? Certain acts are not to be considered infringement of copyright. The following acts shall not constitute an infringement of copyright, namely the reproduction of any work by a teacher or a pupil in the course of instruction, or as part of the questions to be answered in an examination or in the answers to such questions. What is the first thing you've noted? In the distinction between section 52, clause 1, subclause a, and section 52, clause 1, subclause i, you would note that there is no mention of fair dealing. The way this provision would read then is that where the purpose is a course of instruction, then reproduction would not amount to infringement of copyright. Such a statement would not include the consideration of the amount and substantiality. Is that, in fact, the difference between what we are calling a permitted act and fair dealing? Let us see.

The court is framing two questions. The first question is whether the right of reproduction of any work by a teacher or a pupil in the course of instruction is absolute and not hedged with the condition of it being a fair use. The second question is subsumed within the first. What is the span of the phrase "by a teacher or a pupil in the course of instruction" in section 52(1)(i)? Let us see here that fair use is a term that is used in a limiting sense. To the purpose that has been identified under section 52, clause 1, subclause i, which is the course of instruction, in other words, education.

The court cautions that it is the context of India that must be considered, along with the requirements in India regarding access to information and the purpose of education. Fair use, as it has been developed in its four-factor test, or fair dealing for that matter, which, as we have understood, can be correlated to fair use. These considerations must be kept in a persuasive lens. What the court says is that whilst it is true that winds from across the border should be welcome in a country, care has to be taken to retain the fragrance thereof and filter out the remainder. Reference to foreign case law while interpreting a municipal statute has to be made with care and caution.

It is the India-specific context, the specific terminology that is used in 52(1)(i) by the legislature that must be considered, and simply because foreign case law seems to be suggesting something, That should not be considered the basis for interpretation of 52(1)(i). What the court then explains is that fair use can be considered in a general sense. In a general sense, there should be fairness in every action. But this doesn't mean that fair

use is the four-factor test under the US copyright statute. which is, in effect, a limiting effect on usage by individuals.

According to the court, a plain reading of Clause i would show that the legislature has not expressly made fair use a limiting factor while permitting reproduction by a teacher or a pupil during the course of instruction. Therefore, the general principle of fair use should be read into the clause, and not the four principles on which fair use is determined in jurisdictions abroad, especially in the United States of America. What is the one factor that can play a major role in limiting the extent of reproduction when the purpose is the purpose of education? It would be the factors of amount and substantiality of the work. According to the court, this particular application of amount and substantiality would not limit the purpose as identified under 52(1)(i). The court explains, if in fact we must see a general application of fair use, then what would fair use be? It would be for the purpose of use.

It is only the purpose of use that is the first factor in fair use that will be determinative of whether a particular usage falls under 52(1)(i) or any other provision we can consider under section 52, which does not particularly use the term "fair dealing" or similar terms such as "reasonable usage," for example. The court says that in the context of teaching and the use of copyrighted material, the fairness of the use can be determined by the extent justified by the purpose. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for the purpose of education. We then understand that as long as the purpose of education is something that underlies the use of a particular work under clause 52, subclause 1(i), then the four factors, specifically the factor of amount and substantiality, are not something that needs to be considered, the legislature has expressly not included such a fair dealing consideration as it included under 52(1)(a). Therefore, as the court explains, the only thing that needs to be considered is fair use as a general conception and not the four factors that are considered with respect to fair use.

Let us quickly summarize what we have understood. Fair dealing and fair use substantially serve the same effect. Whereas the permitted act is a wider scope exception in which the extent justified by purpose is the major consideration, any hedging of this with considerations of amount and substantiality would not be permissible. In the next session, we are going to take a look at compulsory licensing as provided for under the Indian Copyright Act.

Thank you for joining me. See you all in the next session. Thank you.