

EVOLUTION OF LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND RELATED RIGHT

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ABSTRACT

The two terms 'limitations' and 'exceptions' are often used simultaneously and interchangeably in the copyright discourse as it is not possible or feasible to draw a clear demarcation between the two. They both refer to the permitted free uses of copyrighted works and non-voluntary licensing of rights over such works which are stipulated by copyright legislations in view of overriding public interest or other relevant justifications. There are many limitations on copyright protection such as limitations regarding subject-matter, duration, criteria of originality, requirement of fixation, and the like; however, these limitations, although they delineate scope of copyright protection, do not come within the ambit of the connotation acquired by the term 'limitations and exceptions' in copyright discourse. The limitations and exceptions to copyright and related rights function to strike a balance between the conflicting interests of owners and users of copyrighted works. National copyright laws have framed their respective limitations and exceptions according to the peculiar socio-economic and historical influences requiring the fashioning of such exceptions. It is often debated whether limitations and exceptions serve as defences for users or their right to make certain usages of copyrighted works. According to Andrew F. Christie, the fine line of distinction between exceptions and limitations is that exceptions are more specific than limitations. Exceptions are specifically carved out by the legislature to expunge liability of copyright infringement in the permitted acts so excepted from copyright owners' exclusivity; exceptions may either be complete where the permitted actions are specifically enumerated, or partial where the permissibility of each action is to be decided as per laid down criteria.

KEYWORDS: Copyright, Evolutions Etc

INTRODUCTION

The Copyright Act 1957 (India) provides for limitations and exceptions to copyright, primarily vide Section 52 of the said Act, which lists the exceptions to infringement of copyright, or the permitted fair dealing of copyrighted works, and Sections 31, 31A, 31B which stipulate for grant of compulsory licenses under specified circumstances identified by the legislature as involving an overriding public interest. The system of 'fair dealing' enumerates a list of exceptional circumstances permitting free use of copyright-protected works without prior knowledge or consent of the copyright owner. The judiciary in India, while deciding questions regarding the scope and interpretation of exceptions to copyright, has always sought to balance the

competing interests of the owners of copyright and the users of the copyrighted works. For instance, in *Blackwood and Sons Ltd. v. A.N. Parasuraman*, the High Court of Madras noted that the private use of a copyright-protected work would be fair dealing if the purpose of such dealing is enumerated in the statute, thus giving the exception of 'private use' a restricted interpretation. Then, in *Syndicate Press of University of Cambridge v. Kasturi Lal*, the Delhi High Court held that the dealing of a copyright-protected work by the defendant, a local publisher, was not fair as he had published guides for students by reproducing the content of the books published by the plaintiff, a reputed publisher, as Section 52(1)(h) of the Copyright Act 1957 allowed reproduction only for the purpose of answering questions in an examination. Thereafter, in *Entertainment Network Limited v. Super Cassettes Industries*, the Supreme Court of India construed Section 31 of the Copyright Act 1957 purposively while holding that compulsory license could be granted to not just one, but any number of applicants in public interest. However, in 2016, in *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopying Services*, 6 the Delhi High Court held that it was fair dealing to prepare 'course packs' which were compilations of existing publications, and thereafter to distribute them among students commercially, as it was within the statutory exception enumerated for the purpose of education.

JUSTIFICATIONS FOR COPYRIGHT LIMITATIONS AND EXCEPTIONS

Since the establishment of the Berne Union, the need for exemption of certain acts or uses from copyright protection has been recognised. This is reflected in the statement made by Swiss delegate, Numa Droz during the negotiations at Berne in 1884: "Limits to absolute protection are rightly set by the public interest." Public interest is the underlying rationale for abridging private interests of copyright owners in certain cases by stipulating limitations and exceptions to their exclusive rights. The limitations and exceptions to copyright that are provided for by international conventions, and consequently, by national copyright legislations may be classified into the following categories: One, where the specified subject-matter is excluded from copyright protection or exempted from exclusivity, such as, official texts of judicial, administrative or legal proceedings, or speeches made during a legal proceeding. These subject-matters limit the scope of copyright exclusivity, and hence, act as 'limitations' to copyright; Two, where certain acts or uses are permitted, even when they are unauthorised, effectively absolving liability of the actor or user from copyright infringement, such as reproducing copyright-protected works for educational purpose, or for reporting of current events. These permitted acts are 'exceptions' to copyright exclusivity; Three, where certain use(s) of copyright-

protected work are permitted upon payment of compensation to the owner by way of compulsory licenses.¹

(a) Encouragement of Learning

Limitations and exceptions to copyright are critical for ensuring access to knowledge and encouragement of learning, which is the sine qua non for growth and development in the global information society and economy. Access to knowledge is pivotal, especially for developing economies and weaker intellectual property regimes for fostering cultural, social, educational, and economic activity within and across territorial borders; for alleviating their institutional weaknesses by strengthening intellectual property enforcement; and, for creating a level-playing field for such economies at the world trade negotiating tables. Therefore, every copyright regime provides for educational exceptions which permit usage of copyright-protected works to be freely used for teaching, learning, and research purposes. The past decades have witnessed a trend of expansion of copyright to include a wider range of owners' rights, thereby monopolising more acts concerning exploitation of such works by users. This trend has also been accompanied by invasion of technology in imparting education which has persisted since the onset of distance learning courses; e-lectures and panel discussions; digital storage and dissemination of teaching and reading materials; access to digital libraries, etc. In this scenario, a finite list of exceptions to copyright interpreted strictly may lead to every single act of viewing, downloading, listening or sharing via digital technologies, becoming infringement of the owners' rights. Therefore, educational institutions are faced with several questions regarding permissibility of digital exploitation of copyright protected works. Can teachers make compilations of extracts from various copyrighted textbooks and digitally distribute among students as reading materials? If yes, can students download and store such material on their personal devices? Can such material be forwarded by students to other users? Is the right of communication to public breached by such forwarding of material originally distributed for educational purpose? These questions impel the reconsideration of justification of copyright in the digital age².

(b) Encouragement of Creativity

It is hackneyed to say that all new creators stand on the shoulders of giants, but the truism is not devoid of support from empirical evidence. Evidence has showcased that developed countries where knowledge or know-how is disseminated rather freely have witnessed heightened growth in technology and innovation, whereas countries which have legally restricted the flow of knowledge have witnessed lesser levels of technological development and innovation. Makers of creative content cannot be

¹ Annabelle lever (ed.), new frontiers in the philosophy of intellectual property, 1st ed. 2012, p.19

² supra n.17.

produced in a vacuum where they do not receive exposure to and inspiration from the creative works of their predecessors and contemporaries. Therefore, if all creative work is copyright-protected and curtailed from dissemination, creativity is bound to be discouraged. If aspiring literary authors are curbed from writing fan fiction or blogs by quoting extracts from works that inspires, or amateur music composers are disallowed from sampling from music that enthuses, they may get discouraged from pursuing their calling. Copyright limitations and exceptions are necessary and justified for the purpose of encouraging creativity, perpetuating authorship and consequently, encouraging economic, social and cultural progress of a society³.

(c) Protection of Users' Interests

Limitations and exceptions to copyright have assumed centre-stage in the copyright discourse in the wake of emergence of the internet and the digital era because of the transformation of the relationship between users or consumers of copyrighted works, and producers or creators of copyrighted works. New technologies have blurred the line between creator and consumer by enabling any person with access to the appropriate technological equipment and formats, such as CD, VCR, VHS, DVD, etc. to adapt, copy, blend, or perform images, sounds, motion pictures. This has led to significant reduction in the cost of creation, and increase in speed of creation of new works, thereby tweaking the balance of copyright in favour of creators. Therefore, in order to rebalance copyright, it is essential to protect the interests of users by incorporating new and expanded forms of limitations and exceptions to copyright in the copyright regime. Further, incidental uses of copyright protected works which do not jeopardise the legitimate commercial interests of the owner are saved out by copyright legislations by way of limitations and exceptions, such as broadcasters making ephemeral recordings of recordings in anticipation of broadcasting in future, and computer programme owners making ephemeral copies of other computer programmes essential for the utilisation of the first programme.

(d) Effective Functioning of Public Institutions

Copyright protection is extended to creators automatically, without requiring the fulfilment of registration or other like formality. Thus, all documents, including letters, plans, outlines, minutes of meeting, memoranda, and photographs and other works are copyrightprotected, even if their creation was not motivated by copyright incentives. However, the reproduction and distribution of copies of some of these documents may be required in course of functioning of public institutions, such as for the purpose of: production of evidence in judicial, quasi-judicial, and administrative

³ Arthur r emmett, "roman law, private property and the public domain: lessons for copyright policy", brian fitzerland and john gilchrist (eds.), copyright perspectives- past, present and prospect, 1st ed. 2015, pp.24-25.

proceedings; criminal investigations; legislative deliberations, and so on. Limitations and exceptions to copyright operate to obviate the liability for copyright infringement in such cases, thereby enabling public institutions to function effectively.

DIFFERENT APPROACHES TO LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND RELATED RIGHTS

There is consensus regarding the proposition that limitations and exceptions are at the core of the copyright policy equation, and not merely an afterthought. Irrespective of the perspective adopted to view the said equation, whether utilitarian, economic incentive or creative incentive, it is well-settled that copyright policy cannot be reduced to equation, where is a blank space left for any number and kind of limitations and exceptions to be inserted arbitrarily. There is a definite policy and legal framework at the international level to facilitate countries in crafting well-balanced limitations and exceptions to copyright. The significance of devising such well-balanced limitations and exceptions has only increased since the copyright discourse has enveloped within its ambit interfacing of copyright with other rights, such as human rights, right to free expression, right to education, right to information, right to privacy, right to preservation of cultural expressions, and the right to economic development. Therefore, copyright exclusivity has been consciously cabined to allow interfacing rights to be guaranteed, along with catering to the safeguarding of users' interests.

APPROACHES ADOPTED BY DIFFERENT JURISDICTIONS

(a) United States

The US copyright legislation has incorporated the fair use approach, along with specifying certain permitted uses of copyrighted works; for example: Section 108 provides for limitations for reproduction by libraries and archives; Section 109 provides for limitations for transfer of particular copy or phonorecord; Section 110 provides for exemption of certain performances and displays; Section 111 provides for limitations for secondary transmissions of broadcast programming by cable; Section 112 provides for limitations on exclusive rights: Ephemeral recordings; Section 113 provides for scope of exclusive rights in pictorial, graphic, and sculptural works), etc. Users of copyrighted works coming within the scope of the enumerated exceptions in Section 108 and 118 are also subject to the fair use doctrine, like any other user of copyrighted work. Section 107 of the US Copyright Act enumerates the standard for limitations and exceptions to copyright by providing for four factors; these four factors form the criteria for determination of the fairness of a particular use in question. The four factors are: the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, the effect of the use upon the

potential market for or value of the copyrighted work. The determination whether the use in question is fair is undoubtedly complex and difficult, depending on the peculiar circumstances of each case. There is no statutory definition of 'fair use', thereby making the standard accommodative of all possible factual circumstances which are justifiable as being fair. The aforesaid four factors are guiding principles in the analysis made for determination of questions of fair use. The four factors are discretionary and non-exhaustive in application, i.e., in a given case, one factor may matter more than another, and factors other than the listed four may also be considered depending on the factual matrix of that case. Therefore, US copyright law follows the fair use approach, along with the enumerated exceptions, with two enumerated exceptions being subjected to fair use⁴.

(b) United Kingdom

The fair dealing approach was statutorily introduced by the UK Copyright Act 1911 and has since been followed by UK. The Copyright, Designs and Patents Act 1988 provides exemption for fair dealing for specified purposes. Section 29 provides for exception in favour of research and private study; Section 30 provides for exception in favour of criticism, review, quotation and news reporting; Section 30A provides for exception in favour of caricature, parody or pastiche; Section 32 provides for exception in favour of illustration for instruction of the said Act, along with enumerated exceptions under Sections 28A for making of temporary copies; under Section 28B for making personal copies for private use; under Section 29A for text and data analysis for non-commercial research; under Section 31 for incidental inclusion of copyright material; under Section 31A for copies of works made for personal use by disabled persons; under Section 31B for making, communicating, making available, distributing or lending of accessible copies by authorised bodies; under Section 31BA for making, communicating, making available, distributing or lending of intermediate copies by authorised bodies; under Section 33 for making anthologies for educational use; under Section 34 for performing, playing or showing work in course of activities of educational establishment; under Section 35 for recording by educational establishments of broadcasts; under Section 36 for copying and use of extracts of works by educational establishments; under Section 36A for lending of copies by educational establishments; under Section 37-44A for making copies by libraries and archives; under Section 44B which provides for permitted uses of orphan work; under Section 45 for parliamentary and judicial proceedings; under Section 46 for royal Commissions and statutory inquiries. Therefore, the UK copyright law follows the fair dealing approach, along with enumerated exceptions.

⁴ Suvrashis sarkar, "history and evolution of copyright in india", indian journal of research, vol.5 no.11, november 2016, p.274.

(c) Canada

In Canada, the Copyright Act 1985 provides for a combination of fair dealing provisions and enumerated exceptions. Fair dealing is provided for in Sections 29 for the purpose of research, private study, etc.; in Section 29.1 for the purpose of criticism or review; in Section 29.2 for the purpose of news reporting. Enumerated exceptions are provided in Section 29.21 for non-commercial user-generated content; in Section 29.22 for reproduction for private purposes; in Section 29.24 for making of back-up copies; in Sections 29.4-30.04 for use by educational institutions; in Sections 30.1-30.21 for use by libraries, archives and museums; in Section 30.7 for incidental inclusion of works; in Section 30.8 for ephemeral recordings, etc⁵.

(d) India

The fair dealing approach is followed by India, along with providing enumerated exceptions. Section 52 of the Copyright Act 1957 of India provides for both fair dealing, as well as the enumerated list of exceptions. Fair dealing is provided under Sections 52(1) (a) which provides for use of work for private use; research; criticism or review; back-up copies of computer programmes; 52(1) (b) which provides for use of work for reporting of current events; 52(1) (f) which provides for use of work for reading or recitation in public, etc. Enumerated exceptions are provided in Sections 52(1) (c) which provides for use of work for reproduction for purpose of judicial proceeding; 52(1) (d) which provides for use of work for reproduction or publication for purpose of legislative proceeding; 52(1) (h) which provides for use of work for educational purpose, etc. In *Blackwood and Sons Ltd. v. A.N. Parasuraman*, the High Court of Madras noted that the question of fair dealing would not arise, if the purpose of the reproduction is not from among those enumerated in the statute. The court further deliberated on the meaning of the expression 'fair' in fair dealing, and emphasised that there should not be an intention to compete and to derive profit from such dealing, nor should the motive of the infringer be improper or oblique.³⁷ In *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd.*,³⁸ the Delhi High Court noted that it is impossible to sketch out the boundaries of fair dealing, and its determination would remain a question of fact, degree and overall impression⁶.

REQUIREMENTS FOR COPYRIGHT PROTECTION

Legislations of copyright protection in common law countries generally consist of an express or implied specification or requirement that for an intellectual creation to be protectable under such legislation, it has to conform to a particular form. The general requirement of form is that the idea be manifested in some form of expression which

⁵ David saunders, authorship and copyright, 1 st ed. 1992, pp.149-150.

⁶ Overview: the trips agreement, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (visited on may 19, 2020).

alone is protectable, as opposed to the idea itself. For instance, a literary work must be expressed in words, a dramatic work may be expressed in words or otherwise, and an artistic work may be expressed in numerous ways such as drawing, painting, sculpture, etc. The prerequisite of fixation of a creative works in some material form for the purpose of copyright protection has been expressly mentioned in the Berne Convention, vide Article 2(2). The same prerequisite has been adopted from the Berne Convention into the TRIPS Agreement, vide Article 9(2). The prerequisite of fixation of creative works has been, thereafter, also extended to copyright protection of works in cyberspace vide Article 2 of the WCT 1996. Member countries have the option of either making the requirement of fixation universally applicable to all works, or to restrict it to certain types of works. The underlying rationale of the requirement of fixation is that works which are fixed in a medium are susceptible to unauthorised reproductions, and therefore need protection of copyright. Copyright protection aims not only to incentivise creativity but also to boost production of creative works. The rationale or expected consideration for the grant of monopolistic rights to the author of creative works lies in enhanced creation and resultant dissemination of works among public, thereby promoting economic, cultural and social progress of a society. As only ideas expressed in a fixed tangible medium, like a writing, photograph, cinematograph film or a performance that are capable of being distributed to and consumed by the public, fixation assumes a pivotal role in securing the incentivising objective of copyright protection. The traditional forms of expression such as printed books, musical recordings, cinematograph film and photographs undisputedly comply with the pragmatic prerequisite of fixation in order to fulfil copyright's objectives. However, the appositeness of the fixation requirement is challenged in wake of evolution of newer modes of expression in the digital era which may be incentivised even without fixation. The Copyright Act of UK, in Section 3(2) requires the recording of a copyrightprotectable work, to be either in writing or in any other medium. The provision has no express application to artistic work in the UK Act; however, the criteria may have been extended to artistic works as well, by the courts. For instance, in *Creation Records Ltd. v. News Group Newspapers Ltd.*, an arrangement of objects was held not to come within the ambit of artistic work so as to merit copyright protection, but a photograph of such arrangement was held to be copyrightable. The issue whether the requirement of fixation is fulfilled in an electronic work when such work is recorded in the temporary memory of an electronic device may be answered in affirmative on the basis of the scope of 'copying' as provided under Section 17(6) of the UK Act wherein it is stipulated that making temporary copies of a copyrighted work or making copies of one work incidentally while creating another work would amount to copying of the first work for the purpose of copyright. Questions have also arisen regarding the copyrightability

of recording of speech. In *Walter v. Lane*, the writing of report of a speech delivered was held to be a subject-matter of separate copyright removed from the copyright subsisting in the speech itself. In *Football Datco Ltd v. Britten Pools Ltd.*, the issue was whether fixture lists of football matches fulfil the prerequisites for copyright protection. These fixture lists comprised of schedule of football matches to be played in a certain football league, including information regarding which team would face-off with which other team on what date. The preparation of these fixture lists entailed a careful consideration of many details, regarding which teams were participating, the rules that governed the manner of matching up of teams, and the pairing requests from football teams. The court held that although a computer assisted with the task of making such fixture lists, the task could not be accomplished without employment of labour, skill and a significant amount of human judgment and therefore, such lists constituted a database which was worthy of copyright protection as per Article 3(1) of the European Union Directive on the Legal Protection of Databases.⁷

CONCLUSION

Limitations and exceptions to copyright and related rights have evolved in different countries according to the social, economic and historical conditions circumstances in each country. While US follows the fair use approach, the UK, Canada and India follow the fair dealing approach along with enumerated exceptions. Singapore provides for two types of fair dealing- general and specific, along with enumerated exceptions. While US, Singapore and India provide for compulsory licencing of copyrighted works under the stipulated circumstances, UK provides for statutory licensing provisions while Canada does not currently provide for compulsory licensing of copyrighted works. A study of the evolution of limitations and exceptions to copyright and related rights in each jurisdiction is evidently reflective of the social, economic and historical conditions influences that contributed to shaping of the respective limitations and exceptions.

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