Inefficacy of Fair Use

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Abstract.

The concept of Fair use in the U.S.A. vis-a-vis the concept of Fair Dealing in India has a massive difference in its implementation. In this article, the author will analyze that the defence of fair use is subjective. Since it is not well defined in the law's language, there remains a space for ambiguity and vagueness, as fair use concerns "the purpose" for which a substantial part of the copyrighted work is reproduced and not in "the manner" of use about that purpose. After the brief discussion of "Fair use," the author aims to show how its cousin "Fair Dealing", even after its rigidity, is fairer than the principle of fair use itself. The fair dealing principle provides "the purpose" and "the manner" in which a substantial part is reproduced. This article will not only help to differentiate between Fair Use and Fair Dealing but will also enable to understand the reasons as to why, although Fair dealing is a subset of Fair use, common law countries are reluctant to apply it.

"We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men."

-Immanuel Kant.

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I. Introduction

Copyright provides a stack of restrictive rights to the maker of a copyrighted work concerning the reproduction of the work, and other decided acts, to engage the creator to get monetary advantages by practising such rights and subsequently stimulate improvement. If a man without due consent infringes any of the rights inside this bundle, then such a showing is an infringement upon creator's copyright in his work. Copyright infringement is statutorily stated in both India[2] and the U.S[3]. Like other legitimate rights, copyright is not added up to yet is obligated to purposes of limitation and exceptions. One of such particular case is the tenet of "Fair Use"[4] and "Fair Dealing"[5]. To be clear, any unapproved use of a copyrighted work is regularly an infringement, and reasonable use goes about as protection thereof — the defence of fair use does not command a non-infringing activity. The unlicensed user accepts that he has used the work, which would regularly constitute copyright infringement, yet legitimizes his use as secured inside the particular case of "Fair Use".[6]

It has been decided that a fair and legal infringement of original work, is not piracy of the author's copyright.[7] Nevertheless, what constitutes a fair and b̂ona-fide infringement, in the proper legal sense, is a standout amongst the most challenging points, under some peculiar circumstances, which can well arise for judicial discussion. The preliminary debate on fair dealing can be drawn from "**Gyles v.Wilcox**"[8], a decision from the Court of Chancery in England in which Lord Chancellor Hardwicke introduced the notion of "Fair Use" ***Folsom v. Marsh***[9] is a 19th-century U.S. copyright case, widely regarded as the first "Fair Use" case in the United States. The judgment was given by Judge Joseph Story, who set forth four principles that are in use today, and was ultimately encoded in the "Copyright Act of 1976 as 17 U.S.C. § 107"[10]. Fair use doctrine has

[2] INDIAN COPYRIGHT ACT, 1957
[3] 17 U.S.C. § 101-810 (1982)
[4] The term fair use is undefined under US, but it has its spirit occupied in legislation, with the judicially derived principle being enlisted under 17 USC § 107,
[5] The term fair dealing , although undefined under Indian copyright law, has also rendered its spirit in legislation, § 52 of the Copyright Act of 1957, rendering "[c]ertain acts not amounting to infringement."
[6] Rathod Sandeep, "*Comparing US and Indian Copyright Law*, JURIST" – Last retrieved, October 28, 2016, http://jurist.org/dateline/2012/05/sandeep-kanak-rathod-copyright.php.
[7] See Dodsley v. Kinnersley, 1 Amb. 403; Whittingham v. Wooler, 2 Swanst. 428, 430, 431, note; Tonson v. Walker, 3 Swanst. 672-679, 681.
[8] Gyles v. Wilcox, 2 Atk. 141, 26 Eng. Rep. 489 (I740).
[9] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841)
[10] 17 U.S.C. § 107

evolved in series of judgment, beginning in the mid-nineteenth century, in which federal courts held that conduct seemingly prohibited by the copyright statute in force at the time did not give rise to liability.[11]In the early cases, the question of whether the defendant's conduct constituted a "Fair Use" was not always clearly differentiated from the question of whether it infringed the plaintiff's copyright.[12] One of the earliest Indian cases to discuss "Fair Use" within the copyright domain was "Macmillan and Company v. K. and J. Cooper"[13], which was adjudged based on India's earlier Copyright Act of 1914.

The concept of "Fair use" in the U.S.A. vis-a-vis the concept of "Fair Dealing" in India has a massive difference in how it is implemented. In this article, the author will try to analyze that the defence of fair use is subjective. Since it is not well defined in the language of the law, there remains a space for ambiguity and vagueness, as fair use is concerning "the purpose" for which a considerable part of the copyrighted work is reproduced and not in "the manner" of use about that purpose. The author, after the brief discussion of "Fair use", aims to show that how its counter-part "Fair Dealing", even after its rigidity, is fairer then principle of "Fair Use" itself. The fair dealing principle provides "the purpose" and "the manner" in which a substantial part must be reproduced. This article will not only help to differentiate between Fair Use and Fair Dealing but will also enable to understand the reasons as to why, although Fair dealing is a subset of Fair use, common law countries are reluctant to apply it.

This paper is organized as follows: In Section II, we introduce the Fair Dealing provision in the Indian context. The author will then differentiate between fair use and fair dealing in the following manner; Difference of views between Fair use and Fair Dealing in Section III, Difference of flexibility in Section IV, Difference of Simplicityin Section V Difference of Compliance in Section VI respectively. Concluding observation would be provided in Section VII of this article.

[11] During development of this doctrine, the courts had rely on a substantial body of English cases, initiated by the judgment of Chancellor Hardwicke in Gyles v. Wilcox, 2 Atk. 141, 26 Eng. Rep. 489 (I740). For a thorough review of these precedents, see W. PATRY, "THE FAIR USE PRIVILEGE IN COPYRIGHT LAW" 6-17 (I985).

[12] See Folsom v. Marsh, 9 F. Cas. 342, 345, 348-49 (C.C.D. Mass. 1841) (No. 4901) ("where it was held that some activities inconsistent with the terms of the copyright statute nevertheless constitute "fair and bona fide abridgement[s]" or "justifiable use[s]" and therefore do not give rise to liability"); Lawrence v. Dana, I5 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136); Nichols v. Universal Pictures Corp., 45 F.2d 19, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (I931); Sheldon v. Metro-Goldwyn Pictures Corp., 8i F.2d 49, 54 (2d Cir.), cert. denied, 298 U.S. 669 (1936); Twentieth Century Fox-Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. I944).

[13] Macmillan and Company v. K. and J. Cooper AIR 1924 PC 75.

II. Fair dealing in India

To answer, Whether a copyrighted use is fair, Indian and U.S. law bear similarities. As stipulated in Section 107 USCA , the four factors guideline resemble the elements produced by the English courts.[14] Typically, any unauthorized use of copyright in a work amount to infringement of the copyright in that work. However, some unauthorized uses of copyright work for particular specific reason are allowed by law, and they are not considered an infringement of that work. The basis of law for this unauthorized use for research, private study, criticism, news reporting etc. is termed as fair dealing in India. In "Blackwoods and Sons ltd. And others v. A.N. Parasuraman and others"[15], the court in differentiating between "Fair use" and "Fair dealing", stated that the first is concerning "the purpose" for which a considerable part of copyright work is replicated, the second is concerning the manner of use for that purpose in order to receive the protection it must be fair dealing. If the purpose of reproduction is not one of those enumerated in the statue, the question of "fair use" would not arise.

Before breaking down the law of fair dealing as created by the Indian Courts, it will be useful to plot the Indian legislative setting of "Fair Dealing quickly". In India, the doctrine of fair dealing is statutorily settled in under Section 52 of the "Indian Copyright Act, 1957" [16]. The English

Copyright Act, 1842 was thought to be pertinent in India by the Bombay High Court in "McMillan v Khan Bahadur Shamsul Ulama Zaka"[17] , despite the Act being not made expressly applicable to India. In 1914, the Indian committee passed the Copyright Act, 1914 so that the law of copyright was spoken to by the Imperial Copyright Act of 1911 which was essentially the expansion of the English Copyright Act, 1911. The Indian legislature body; however, had a to a great degree of

[14] Infra note 38

[15] AIR 1959 Mad 410.

[16] The legitimate structure for fair dealing in India follows after the common law and, as noted prior, does not characterize fair dealing fundamentally. The legal provision for fair dealing provides that:

"The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with a literary, dramatic, musical or artistic work for the purposes of —

(i) research or private study;

(ii) criticism or review, whether of that work or of any other work;

(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events —

(i) in a newspaper, magazine or similar periodical or

(ii) by broadcast or in a cinematograph film or by means of photographs."

[17] Lal, *The Copyright Act*, 3rd edn (Law Publishers India, Allahabad), 1995, p.6.also see (1895) ILR Bom 557

limitation to change. [18] Fair Dealing was first statutorily displayed in 1914 as an exact duplication of Section 2(1)(i) of the "U.K. Copyright Act, 1911," giving that copyright would not be infringed by "any Fair dealing with any work for private study, research, criticism, review or newspaper summary ".[19] The present Indian copyright statute, i.e., the Indian Copyright Act was passed in 1957 as a "free and an autonomous law".[20] To be sure, even the new institution had generally obtained, both abstract and in an essential guideline, from the new U.K. Copyright Act, 1956.[21]

III. Difference of views between Fair use and Fair Dealing

The concept of public policy varies from place to place and may change time and again, according to a particular society's social needs. It is because these reasons that the "doctrine of public interest"[22] has never remained static. Both India and the U.S.A. being a common law country, there is a minor difference in terminology concerning the concept of fair use in the U.S. and India. U.S. law uses the term "fair use," while British and Indian law uses the term "fair dealing".[23]

What kind of social order would it be a good idea for us to endeavour to accomplish? Many scholars who lately have tended to this age-old question can be categorized as one of two camps "Utilitarian" and "Kantinian Liberal". We assert that defence of "fair use" assert Utilitarian views while "fair dealing" which can be called as the subset of Fair use holds

Kantian view. Utilitarian scholars contend that our aim should be to distinguish and initiate the framework that would amplify "general happiness", measured by "the sum of the pleasure" minus "the sum of the pains" experienced by the people of the society, assessing the intensity- however no record of the character - of the desire whose fulfilment or dissatisfaction offers ascend to those

[18] Ibid at 7-8.
[19] UK, 1 & 2 Geo V, Clause 46, Section 2(1)(i), Burrell Robert, Reining in copyright law: Is fair use the answer? *Intellectual Property Quarterly*, 4 (2001) 361-388.
[20] Statement of Objects and Reasons, Indian Copyright Act, 1957.
[21] Narayanan P, *Copyright and Industrial Designs*, 3rd edn (Eastern Law House, Kolkata), 2002, p. 8.
[22] See "Beloff v. Pressdram Ltd" (1973) 1 All ER 241; "discussed the scope of the defense of public interest. It stated that a scope of this defense was to permit disclosure of misdeeds of serious nature, such as breaches of the national security or of law, fraud or matters destructive of the country or its people including matters medically dangerous to the public. Thus, the courts may refuse to enforce copyright on the grounds of public interest, even though there is a reference to that defense in the Indian Copyright Act."
[23] Supra Note 6.

pleasures and pain. [24] The people of the other group - may be best portrayed as "Kantian liberals"[25] - dismiss the utilitarians aggregative measure for settling clashes between people's inclinations on the ground that it regularly counsel subordinating the interests of a few people to the interests of others, and outcome hostile to our concept of justice and equity. [26] The Kantian scholars desire to formulate rules for the design of the social and political framework that do not involve judgments concerning option yearnings or methods for living however instead accord all people the regard they are expected as self-sufficient right specialists.[27] This conveys us to our first difference in flexibility.

IV. Difference of Flexibility

The *Gowers Review*[28] (2006) regards the U.S. "Fair Use" defence as more flexible than any other common law country because it offers an instrument that can be adapted by the courts as new events unfold. One of the vital peripherals of a general fair use principle is its breadth. It is extensively apt to various sorts of uses of copyrighted work. In this way, the doctrine can apply to a continuous assortment of cases, and the courts can adjust it to new circumstances through a case-by-case basis if the conditions so demand. A Fair use test offers much more noteworthy adaptability than the Fair dealing protections in the Copyright Act which are constrained to a particular arrangement of motivations behind the utilization.[29] Through its flexibility, a fair use

[24] See "Reconstructing the Fair Use Doctrine," 101 Harv. L. Rev. 1659 (1988) J. BENTHAM, "AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION"; J. BENTHAM, "FRAGMENT ON GOVERNMENT"; H. SIDGWICK, "METHODS OF ETHICS" 411-509 (7th ed. 1907)., also see R. BRANDT, "A THEORY OF THE GOOD AND THE RIGHT" 306-26 (1979), and R. HARE, "MORAL THINKING" 164-67 (1981).

[25] Id. The title "Kantian liberal" in this paragraph is taken from M. SANDEL, "LIBERALISM AND ITS CRITICS" 1-7 (1984). "The notable differences in the views of the members of this group preclude referring to them as a "school," but their common need to the hypothesis set forth in the text warrants bumping them together for present purposes." Their major works include B. ACKERMAN, "SOCIAL JUSTICE IN THE LIBERAL STATE" (1980); R. DWORKIN; "What Is Equality?", 10 PHIL. & PUB. AFF. 185, 283 (1981); C. FRIED, "RIGHT AND WRONG" (1978); J. RAWLS, supra note 192; D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); and E. Rakowski, Equal Justice (forthcoming 1989) (draft of August 7, 1987 on file with Harvard Law School library). For helpful debate and opinion of the themes common to their arguments, see Hart, "Between Utility and Rights", 79 COLUM. L. REV. 828 (1979); and Shiffrin; "Liberalism, Radicalism, and Legal Scholarship", 30 UCLA L. REV. 1103, 1119-74 (1983).

[26] See, e.g., R. DWORKIN, supra note 26, at vii; D. RICHARDS, "A THEORY OF REASONS" 87 (1971).

[27] See, e.g., B. ACKERMAN, supra note 26, at 11, 57-58, 327-78; C. FRIED, supra note 26, at 9, 20, 24, 28-29; J. RAWLS, "A THEORY OF JUSTICE" , at 395-452 (insisting that "persons in the original position be ignorant of their own conceptions of the good"); id. at 325-32, 442 (arguing that "government, once established, should remain neutral as to alternative ways of life").

[28] Gowers review of Intellectual Property;December 2006; last visited (8th October,2016) and retrived from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

[29] Martin brenncke " Is fair use an option for U.K copyright Legislation?" last retrived on (24 november 2016) http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft71.pdf also see *Copinger*, para. 9-07;

test can easily entertain the challenges posed by expeditious technological developments[30] because then the judges can determine the other presences of additional purposes to which fair use can be applied. They are not attached to a statutory language that may get out of date as innovation changes. The cap for such a dynamic doctrine to hold its pertinence notwithstanding for new requests made by the advanced environment is demonstrated by the U.S. "Fair Use" arrangement under s.107 USCA which does not require a steady amendment to keep up with technological advancement made forward, for example, the P.C. and the web.[31]

Since a straightforward, fair use test is not confined to a comprehensive arrangement of purposes and includes a wide range of work, its application on a case-by-case basis. Because of this open-ended approach, the fair use doctrine structure stays unclear, vague, and the outcome to fair use cases is said to be scarcely predictable.[32] The susceptibility of the doctrine in how a court will finally choose is a part of what has prompted its infamy for being the most troublesome doctrine in U.S. copyright law.[33]

Therefore, it is comprehensible that this doctrine often fails to provide concrete guidance for the parties[34]and fosters litigation[35] if the interpretation of the "Fair Use" defence depends considerably on the judge's perspective.[36] The harmonizing processes between the copyright holder's "rights" and the public interest in the "dissemination" of the work are likely to be influenced by the relative copyright expertise of the court and the personal value system of individual judges[37]. Albeit this harmonizing process partly requires the choice among competing

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Laddie, EIPR (1996), 253 (258); cf. *Gervais*, The reverse three-step test, 27; *Weatherall*, Fair use, fair dealing, 8 (for Australian law).

[30] Ibid. *AU Copyright Law Review Committee*, "Simplification of the Copyright Act 1968", para. 6.08; *Car- roll*, "Fixing Fair Use", 64 et seq.; *Macmillan*, Dig. Tech. L.J. (1999), 13.

[31] "*Tasini v New York Times Co.",* 972 F. Supp. 804 (816) (S.D.N.Y. 1997); *Ayers*, U. Pitt. L. Rev. 62 (2000-01), 49 (76).

[32] Supra note 30. *Leaffer*, Ohio St. L.J. 62 (2001), 849 (852, 855); *Leval*, Harv. L. Rev. 103 (1990), 1105 (1106 etseq.); *Okediji*, Colum. J. Transnat 39 (2000), 75 (118); cf. *Burrell/Coleman*, Copyright Excep- tions, 250 et seq.; *Carroll*, Fixing Fair Use, 20; *Weatherall*, Fair use, fair dealing, 8 et seq.

[33] "*Universal City Studios v Sony Corp. of America",* 659 F.2d 963 (969) (9th Cir. 1981); "*Dellar v Samuel Goldwyn", Inc.*, 104 F.2d 661 (662) (2nd Cir. 1939); cf. *de Zwart*, IPQ (2007), 60 (87 et seq.).

[34] *Bently*, Dig. Tech. L.J. (1999), 2; *Carroll*, Fixing Fair Use, 13 et seq., 36; *Leaffer*, Ohio St. L.J. 62 (2001), 849 (855).

[35] *Ibid*.

[36] Supra note 30. *Ayers*, U. Pitt. L. Rev. 62 (2000-2001), 49 (76); *Dratler*, U. Miami L. Rev. 43 (1988), 233 (255 etseq.); *Laddie*, EIPR (1996), 253 (258); cf. *Leval*, Harv. L. Rev. 103 (1990), 1105 (1106 et seq.).

[37] Supra note 30 *Dratler*, U. Miami L. Rev. 43 (1988), 233 (255 et seq.); *Okediji*, Colum. J. Transnat 39 (2000), 75 (119).

values by judges especially when a judge needs to determine the fairness of use – while construing the whole doctrine of fair use on judicial wisdom explains why scholars censure the doctrine for its absence of a steady and principled application.[38]

Secondly, even though new purposes can come quite close to the fair use doctrine before the forms of another particular case are unmistakably worked out by the courts, delay and expenses in courts are apparent to occur.[39] This postponement and extra expenses for "test cases" are discarded by the fair dealing framework in India, which requires legislative movement keeping in mind the end goal to add new "Purposes" to it. Legislative action also has the preferred standpoint that it is most appropriate to manage political issues, and that is what deciding fair use is all about.[40]

For instance, if the technological advance makes new uses or purposes, it should be illuminated where the line is to be drawn between the exclusive rights of copyright proprietors and people in general's requirement for access. This procedure often includes the rights of a large group, and it is the pre-legislative stage that guarantees that advocates of every side can clarify and safeguard their interests. Like this, the Fair Dealing arrangements in India accommodate lawful assurance through an inventory of defined exception that Parliament can only enlarge. It has advanced the preferred standpoint in that each of the legal exceptions mirrors an authoritative compromise between important industry group.[41]

V. Difference in Simplicity

Another practical standpoint of a "Fair use" test is its simplicity. It combines all conceivable Fair dealing exceptions into one single and short arrangement; along these lines diminishes its wording and structure, making the law easy to read and more comfortable to understand for users.[42]

The Indian Copyright Act under Section 52 shapes the fair dealing exception from copyright infringement as affirmative defences, which places the burden of proving the defences onto the infringer once the copyright owner provides "*prima facie"* evidence of infringement by showing substantial copying of his/her expression. Nonetheless, the "Fair Dealing" cases in India do not

[38] By Martin Brenncke ;Is "fair use" an option for U.K. copyright legislation?; November 2007.
[39] *Carroll*, "Fixing Fair Use", 10, 36; cf. *Handa*, McGill L.J. 40 (1995), 621 (684); *Ricketson*, EIPR (1999), 537 (543).
[40] Supra note 36.
[41] Supra note 38.
[42] *Ricketson*, EIPR (1999), 537 (537, 549); cf. *AU Copyright Law Review Committee*, Simplification of the Copyright Act 1968, para. 6.02-6.08; *Weatherall*, Fair use, fair dealing, 8.

always establish *prima facie* evidence for infringement before considering the application of fair dealing.[43]

The preliminary issue in such cases, following the text of the Copyright Act, is the definition of "Fair Dealing". As the Act does not explain fair dealing, the Indian courts have heavily referred to the English authority of *Hubbard* v *Vosper*[44] which contained the oft-cited definition of fair dealing by Lord Denning:

> "It is impossible to define what is 'fair dealing.' It must be a question of degree. You must consider first the number and extent of the quotations and extracts…..Then you must consider the use made of them…….Next, you must consider the proportions…... Other considerations may come to mind also. But, after all, is said and done, it must be a matter of impression."[45]

Likewise, the number of purposes illustrated under Section 52 has been generally interpreted as "exhaustive, inflexible and certain" since any use not falling entirely inside any of the listed ground is viewed as an infringement. [46] On numerous occasions, the courts have emphasized that it is unreasonable to build up a "rule of thumb" for instances of "Fair Dealing" as every case relies upon its particular facts and circumstances. [47]

Nevertheless, the Indian courts have adopted the U.S. developed "factor analysis method" in assessing infringement and whether it fulfils the criteria of fair dealing. The Indian judiciary has just treated issues concerning fair dealing in an extremely restricted setting. [48] It is subsequently left without much opportunity to take an extensive perspective of how these issues may coordinate together or a point by point perspective of how these issues might be separated. [49] The courts have not possessed the capacity to investigate different components, for example, lacking honesty since they have not come at issue. [50] Even though such elements might not have

[43] *Civic Chandran v Ammini Amma*, 1996 PTC 16 670.
[44] *Hubbard* v *Vosper* (1972) 1 All ER 1023 p. 1027.
[45] Id.
[46] *Blackwood and Sons Ltd and Othrs* v *AN Parasuraman* and Ors, AIR 1959 Mad 410 Para 84 and *Civic Chandran* ,1996 PTC 16 670.
[47] *ESPN Stars Sports* v *Global Broadcast News Ltd and Ors*, 2008(36) PTC 492 (Del) Para 34.
[48] Ayush Sharma; "Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda?" Journal of Intellectual Property Rights Vol 14, November 2009, pp 523-531
[49] Ibid.
[50] Id.

been explicitly highlighted as a potential variable, this hush, in any case, does not imply that such calculates cannot include future cases. [51]

A specific level of multifaceted design in the law may be required when legislation deals with specialized subjects, for example, P.C. programming or telecommunications, because lay language might be inadequate to speak to the nuances of these issues. [52] Henceforth, even a fair use test would not be insusceptible to possible future corrections which may add intricacy to its language, if the technological development so requires. [53]

VI. Difference of Compliance

The fair use test provision is inconsistent with international treaty obligations. India and the U.S.A. are a member state of the Berne Convention and of the Agreement on "Trade-related aspects of intellectual property rights" (TRIPS), which both provide for limitations and exceptions to copyright infringement.[54]

Members of W.T.O. are duty-bound required to conform with the essential principles of exceptions to copyright as provided by the Berne Convention and Article 13 of TRIPS Agreement which lay down a "three-step test"[55], i.e., an exception must be "special, it must not conflict with normal exploitation', and it must not unreasonably prejudice the legitimate interests of rights holders". It is to be noted that even the "TRIPS" equation of "Fair Dealing" has been considered to be closely aligned with the U.S. doctrine of "Fair Use". [56] The essential inquisition in regards to the compliance of a fair use test with the "Berne Convention" and "TRIPS" is whether such a test are confined to "certain special cases". Whereas some scholars discuss and debate that the fair use provision in the U.S. (s. 107 USCA) meets the requirements of the three-step test,[57] while others argue that it is too broad to qualify in as a "certain special case". [58]

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[51] Id.
[52] *Ricketson*, EIPR (1999), 537 (537).
[53] Supra note 38.
[54] *Bainbridge*, Intellectual Property, 16 et seq.; *Bently/Sherman*, Intellectual Property Law, 37-41
[55] Ficsor M, How much of what? Three-step test and its application in recent WTO dispute settlement cases, *RIDA*, 192 (2002) 111-251.
[56] Gervais Daniel J, Canadian copyright law post-CCH, *Intellectual Property Journal*, 18 (2004) 131-167.
[57] *Geller*, Int'l Law. 29 (1995), 99 (112); cf. *AU Copyright Law Review Committee*, Simplification of the Copyright Act 1968, para. 6.14.
[58] *Okediji*, Colum. J. Transnat 39 (2000), 75 (126); *Ricketson*, "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment", 5 April 2003, WIPO doc. SCCR/9/7, 68 et seq., (Last

Instruction of how to interpret the phrase "certain special cases" was given by the W.T.O. Panel which ruled on Section 110(5) USCA with the TRIPS Agreement, among other things article 13 of TRIPS.[59] The Panel laid down that article 13 of TRIPS requires that national legislation exceptions should be clearly defined and narrow in scope.[60]

It was argued in the preceding paragraphs that "the application of the fair use test is a complete case-by-case basis and that the question of how a court will finally decide a fair use case is uncertain and hardly predictable. Moreover, the fair use test can potentially apply to all types of work and to any purposes of use which makes it capable of endless expansion by the courts"[61]. The legislature's breadth was already identified when the doctrine was incorporated into the statute since Congress noted in its House Report that "no generally applicable definition is possible" for fair use.[62] Therefore, considering the W.T.O. Panel's definition of specific exceptional cases, the doctrine cannot be said to be defined with clarity or limit in degree as a result of its uncertain and broad character. A fair use test is not limited to certain exceptional cases.[63]

Further, the Panel remarked that the probable scope of users who can rely on an exception is also essential for determining whether this exception is sufficiently defined to constitute a "certain special case".[64] The "Fair Use" doctrine can be depended on by any user who shields himself against a claim of copyright infringement and is unlimited in the extent of users. This situation additionally breeds the view that a "Fair Use" test is not restricted to "certain special cases".

VII. Conclusion

It is without contention that both the U.S. and the Indian legislation expects to expand the creativity of the creator and disseminate information for the general public in the meantime. "Fair dealing" and "Fair use" both show up as defences to generally shut monopoly business model made by copyright, settled in the enactment. In any case, India and its U.S. partners' genuine uniqueness can be attracted at last the approach distractions of their particular courts. The American Act is

visited on 3 November 2007); available on the internet: <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf>

[59] WTO, *United States –Section 110(5) of the US Copyright Act*, Report of the Panel on 15 June 2000, WT/DS160/R

[60] Ibid at ; 33, 34 (para. 6.112).

[61] Id.

[62] H.R. Rep. No. 1476, 94th Cong., 2nd Session, 65.

[63] Supra note 38.

[64] Supra note 55 at (para6. 127)

adaptable flexible and open for further advancement and is so proposed by its officials while despite what might be expected, Indian legislators, wanting certainty, have picked the moderate approach. The Indian legal law is intelligent of this approach.

On the one hand in this article, it was demonstrated that the elements of a “Fair use” tests are its flexibility and simplicity, and on the other hand, the “Fair Dealing” test is somewhat fixed and elaborate. It was then demonstrated that the advantages of a “Fair Use” doctrine specifically involve detriments, for example, its uncertainty and unpredictability. Also, it was shown that a straightforward “Fair Use” test is conflicting with article 9(2) Berne Conventions, Art. 13 TRIPS

In the light of these contentions, it is presented that the extensive disadvantages of a “Fair use” test are too high a cost to pay for its simplicity and flexibility. In this way, the protections to copyright infringement in the “Fair dealing” arrangements of the Copyright Act are much more pleasant than the teaching of reasonable use itself. Henceforth “Fair use” is not an attractive and needed alternative for any customary law copyright enactment.