

HOW FAIR ARE THE FAIR DEALING EXCEPTIONS UNDER INDIAN COPYRIGHT LAW?

Latha R. Nair*

These detailed and pedantic exceptions to copyright protection, and their predecessors in the 1956 Act, are not only difficult to understand in some cases, but they also reinforce the perception that virtually all reproductions of copyright works, no matter how innocuous, are infringements. Is it surprising then, that when, for the purposes of advertising the film “Carry on Cleo”, a poster was created which was a harmless but humorous spoof of a similar poster for the Elizabeth Taylor/Richard Burton film “Cleopatra”, it was held to infringe copyright. It would be possible to go on criticising the width of our copyright laws, but perhaps I have said enough. It might be more useful to inquire why our law has developed as it has. I have mentioned already the value and size of the industries which now believe they need extensive copyright protection to safeguard their income stream. They, quite properly, lobby for their interests. But who lobbies against them? There is no trade union of copyright infringers. Support for any limitation on copyright is easily portrayed as support for pirates - the usual pejorative global expression for infringers. It is depicted as support for the parasites of industry. Is it surprising, then, that the scope of protection gets ever wider? I suggest that the drafting of the legislation bears all the hallmarks of a complacent certainty that wider copyright protection is morally and economically justified. But is it?¹

I. INTRODUCTION

The above quote speaks the mind of late Sir Hugh Laddie, a judge of the High Court of United Kingdom, on the issue of ‘fair use’ of copyrighted works. Known for his audacious opinions on issues of intellectual property rights which often departed from the usual and conventional, his rather daring views above on ‘fair use’ could annoy those who view copyright only from the protectionist angle.

* The author is a partner with K&S Partners, a full service Intellectual Property law firm based in Gurgaon. The views are personal.

1. Sir Hugh Laddie, Judge of the High Court of Justice, England, Copyright: Over-Strength, Over-Regulated, Over-Rated, Stephen Stewart Lecture Before the IP Institute, (1995), 18 EUROPEAN INTELLECTUAL PROPERTY REVIEW 253 – 60 (1996).

What is 'fair use' or 'fair dealing'? While copyright is granted to authors of various works as an exclusive right, public interest in accessing such protected works is achieved by providing for certain fair use exceptions to copyright protection. Use of a work by third parties that falls under these exceptions could be categorized as fair dealing with such work.

This article makes a case for review of the existing provisions on fair dealing and fair use under the Indian Copyright Act, 1957 after reviewing the scope and extent of fair use therein from a practitioner's point of view, comparing these provisions with the copyright practice of other jurisdictions.

II. FAIR USE EXCEPTIONS UNDER INDIAN LAW

There are three separate rights granted under the Indian Copyright Act, 1957 (hereinafter, 'the Act'), being 'copyright' under Section 14, 'broadcast reproduction right' under section 37 and 'performer's right' under section 38. This position finds partial support in *ESPN Star Sports v. Global Broadcast News Limited*², a recent judgment of a Division Bench of the High Court of Delhi filed by a broadcaster against certain television channels wherein copyright and broadcast reproduction right were held to be two distinct rights under the Act. The third right, being performer's right, was not discussed in the judgment.

Fair use exceptions to these rights are given under sections 39 and 52 of the Act. While section 39 deals with acts not infringing broadcast reproduction rights and performer's rights, section 52 lists the acts that do not constitute infringement of copyright. Section 39, besides providing for two exceptions to broadcast reproduction rights and performer's rights under sub clauses (a) and (b) thereof, extends the exceptions to the protection of these two rights to those provided in respect of copyright infringement under section 52 of the Act 'with any necessary adaptations and modifications' under sub clause (c). The said sub clause has not specified as to which provisions of section 52 will apply to these two rights and has, therefore, left ample scope for the judiciary to interpret the same. There has not been any occasion for the courts so far to interpret section 39(c) of the Act.

There are several fair use exceptions under the Act that are common to the copyright law of the United Kingdom, based on which the Act was enacted. These provisions relate to criticism, review and news reporting, research and private study, use of works for educational purposes, parliamentary and judicial proceedings, version recordings or sound alike

2. *ESPN Star Sports v. Global Broadcast News Limited & Ors.*, 2008 (2) CTMR 494 (Delhi) (DB).

recordings, use with regard to pictorial, graphic and sculptural works and use with regard to architectural works. However, unlike the law in the United Kingdom, the Indian law has not even provided for these exceptions to all categories of work. In order to understand the limitations of the exceptions provided under the Act, it would be necessary to review sections 39 and 52 in detail.

A reading of these provisions reveals that our legislators have overlooked the other side of copyright protection, namely public interest in accessing information contained in protected works while granting rights under the Act to authors and owners. Despite the lengthy provisions, these exceptions are so scant in comparison to international copyright practice that if anyone were to complain about the scope and breadth of protection available under the Act, it would be those at the receiving end for violation of copyright in situations which they believed to be genuine fair use³. A feeble attempt to limit the scope of such broad protection by bringing in certain reasonable exceptions can be seen in the amendments proposed to the Act in 2006⁴ which are still pending.

III. BROADEST PROTECTION TO CINEMATOGRAPH FILMS

Mysteriously, the broadest protection is offered under the Act to the category of ‘cinematograph films’ by excluding these from many of the exceptions to protection. The only permitted act in respect of the copyright in cinematograph films that would not amount to infringement under the Act is as provided under sub-section (i) of section 52.

The subsection refers to ‘performance’ and ‘communication to the public’ of the cinematograph film. Under sub section (q) of section 2 of the Act, ‘performance’ has been defined only in respect of performer’s right and means ‘any visual or acoustic presentation made live by one or more performers’. Further, under subsection (d) of section 14, the exclusive rights granted in respect of a cinematograph film are: (i) to make a copy of the film including a photograph or any image forming part thereof; (ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether

3. Take the case of a twelve year old girl who started a music band for raising funds for helping underprivileged children. Although she did not receive any monetary benefits from her music shows, her activities were not technically permitted under section 52 of the Act irrespective of the cause she wished to work for and the fact that money for charity was raised from sponsors rather than the audience. Eventually, she decided to seek a license from the relevant copyright society.

4. Proposed Amendment to the Copyright Act, (2006), <http://copyright.gov.in/View%20Comments.pdf>.

such copy has been sold or given on hire on earlier occasions; and (iii) to communicate the film to the public. Notably, there is no right granted in respect of ‘performance’ of a cinematograph film. ‘Communication to the public’ is defined under sub-section (ff) of section 2 to mean ‘making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available’. The right of performance of a work is granted to the owner of copyright under sub-section (a) of section 14 of the Act only in respect of literary, dramatic or musical works.

It also significant to note that the UK copyright law has clearly reserved rights of “performance” only in respect of literary dramatic and musical works and rights of “playing or showing of the work” (akin to the right of ‘communication to the public’ under the Indian Act) in respect of sound recordings, films, broadcasts and cable programs⁵.

Considered in that light, it is trite to state that an exception from protection could be given only to a right that is provided for under the Act. While there does not appear to be any exclusive right of performance granted to the owner of a cinematograph film, an exception granted to the right to perform a cinematograph film in certain circumstances is rather out of place. Further, the words, ‘*or the communication to such an audience of a cinematograph film or sound recording*’ inserted by the 1994 Amendment seems almost an afterthought and a clumsy attempt to rectify the situation.

IV. WHAT IS NOT PERMITTED UNDER THE ACT IN RESPECT OF A CINEMATOGRAPH FILM?

Barring the exception provided under sub-section (i) of section 52, no other use may be made of a cinematograph film under the Act. While the Hindi film industry, indeed has something to cheer about, there certainly are serious implications for such an omission, whether an oversight or otherwise.

With a booming Hindi film industry in Mumbai and various regional film industries catering to the vernacular language films, cinematography and film-making are much sought after careers in India today. Films being an integral part of teaching the art of cinematography and film making, the absence of provisions making exceptions by way of research, teaching and

5. See UK Copyright, Designs and Patents Act § 19, (1988).

private study in respect of cinematograph films appear to make our film institutes and film schools guilty of continuous infringement of copyright in cinematograph films. Further films, effectively used to teach languages, often pose a challenge in terms of advice to a client by a copyright practitioner as to their use.

Is it fair to make a film school or a language school obtain a license from the film producers? If so, what is the process for the same as there are no copyright societies in India that can grant such collective licenses on behalf of film producers? Would this mean that the concerned institute should approach each individual producer for a license? In the absence of an exception to this effect and in order to dodge copyright infringement suits, this would seem to be the most appropriate solution, yet the most impractical one.

The Indian courts have also these days frequently been called upon to examine issues relating to violation of copyright in films and sound recordings. Unfortunately, the Act exempts only the reproduction in the course of a judicial proceeding of literary, dramatic, musical and artistic works from infringement⁶. Hence, strictly speaking, viewing and comparing such works in the course of a judicial proceeding to determine infringement and other legal issues could fall foul of the copyright protection provisions under the Act.

Lastly, the issue of use of a cinematograph film for reporting current events arises more in today's context with the highly pervading electronic media. In the case of *ESPN Star Sports v. Global Broadcast News Limited and Others*⁷, although a specific argument that no fair dealing provisions existed in respect of cinematograph films for reporting of current events and that the reporting of a sports event by the news channels, therefore amounting to violation of the copyright in the cinematograph film was raised by the appellant-broadcaster, the High Court of Delhi did not address that same.

Yet another act of infringement in the context of reporting current events is the unauthorized use by newspapers and magazines of photographs of images forming part of a cinematograph film while publishing reviews in the print media. As per sub-section (i) of section 14(d), the producer of the film has the exclusive right to make a copy of the film including a photograph of any image forming part thereof. The photographs of images from films that usually accompany the film reviews in newspapers and magazines would,

6. Indian Copyright Act § 52 (c).

7. ESPN, *Supra* note 2.

therefore, amount to violation of the said right unless expressly permitted by the owner of the cinematograph film.

V. OTHER SIGNIFICANT FAIR USE EXCEPTIONS NOT PROVIDED UNDER THE ACT

Sound recordings

A significant exception to infringement of sound recordings is the provision for making “version recordings” or “sound-alike recordings”⁸. Barring this exception, sound recordings also face an almost similar yet marginally superior treatment under the Act and, almost all the concerns raised in respect of cinematograph films above apply equally to sound recordings.

Literary, dramatic, musical and artistic works

Although a majority of the exceptions provided under section 52 pertain to literary, dramatic, musical and artistic works, the Section has not provided for some important exceptions to acts that constitute infringement of works falling in these categories. One of these exceptions is the archival use of literary, dramatic and musical works by a librarian or archivist. As things stand today, copies of any work in these categories for the purpose of preserving a permanent copy as archive (a common practice by some libraries around the world) would amount to copyright infringement. The laws of the United States of America, the United Kingdom, Australia and New Zealand do have provisions permitting the making of copies for archival purposes. Indian literary culture is rich with works being published in multiple languages. Further, there are numerous works in the category of literary, musical, dramatic and artistic works as well as cinematograph films and sound recordings which are adapted from Indian epics and ancient literature pertaining to various disciplines. Ideally, India should take advantage of its edge in information technology to preserve these works by permitting libraries to create digital archives. An exception ought to be provided under the Act for the unfettered facilitation of the same.

Another exception not provided for under the Act is use of literary, dramatic, musical or artistic works for charitable purposes. The Act does exempt the use by way of performance of a literary, dramatic or musical works by an amateur club or society to a non-paying audience or for the benefit of a religious institution⁹. However, there are certain limitations to

8. Indian Copyright Act, § 52 (j).

9. Indian Copyright Act, § 52 (l).

this exception. First, it has to be by an ‘amateur club’ to a ‘non-paying audience’. So if funds are to be raised for a good cause by performing a work, then use of professionals to perform such work and the collection of fees from the audience would constitute a violation of the copyright in the work. Secondly, such acts are limited to the benefit of only religious institutions, thereby excluding charitable institutions which do not have any religious leanings. Further, why artistic works (and also cinematograph films and sound recordings) are left out of the purview of this section is also something to be inquired into. What about an art collector who wants to hold an exhibition of his art collection consisting of copyrighted artistic works to raise charity money for a good cause?

Lastly and most importantly, the Act overlooks the needs of the visually challenged section of society. There are no exceptions provided under the Act for the reproduction of any of the categories of protected works in Braille format or other kinds of format that would suit the visually challenged. Such a provision can be found in the laws of other jurisdictions such as the United Kingdom, Australia and New Zealand.

VI. AMENDMENTS PROPOSED IN 2006

In 2006, with a view to meet the challenges posed by the digital era, certain amendments were proposed to the Act¹⁰. While these amendments are still pending, the most significant of these proposed amendments relate to the fair dealing exceptions from a claim of infringement of copyrighted works.

These proposed exceptions to infringement are as follows:

- Non-commercial rental /lease or lending of cinematograph films and sound recordings by a non-profit library or educational institution.
- The making of three dimensional objects from two dimensional artistic works such as a technical drawing.
- The reproduction, issue of copies or communication to the public of any work specially designed for use of person suffering from a disability that prevents their enjoyment of such works in their normal format.
- In the case of “version recordings” or “sound alike recordings”.
- The two year wait period for making a version recording following the year in which the first sound recording of the work was made has been extended to five years.

10. *Supra* note 4.

- Requirement of payment of royalty for a minimum of 50,000 copies of each work during each calendar year.
- Upon complaint to the Copyright Board an ex-parte order may be granted to restrain the person making the sound recording from making further copies.¹¹

VII. UNFAIRNESS IN THE FAIR USE EXCEPTIONS?

There has not been any challenge to the Act before any judicial authority in India till date relating to the adequacy of the fair use provisions in view of the public interest in accessing the protected works. Most of the decided cases relating to fair use in India have raised the issue whether a particular use of a work amounts to fair use under the Act. Further, most of the users who use these works in fair use contexts not provided under the Act and the respective owners thereof are not aware of the implications of such use. While there have been decisions of Indian courts including the Supreme Court on what amounts to fair use, no court in India has had the occasion to address the issue of adequacy of the fair use provisions under the Act.

Fair use or fair dealing of works in which copyright exists assumes a significant role in copyright law as it blunts the monopolistic sting of copyright granted in favour of authors or owners. An unhappily worded legislation coupled with uneven application of the fair use doctrine in respect of the various categories of works results in unequal treatment of these works; thereby meeting only one part of the dual objectives of copyright protection, namely recognizing creativity. The other part, namely, protecting the public interest in accessing the information contained in these works cannot be achieved if fair use provisions are not adequate. While the proposed amendments in 2006 attempt to restore the current imbalance that exists in the Act vis-à-vis the said dual objectives, it is far from satisfactory.

India has a rich culture of art, music and literature. The film industry in India is the largest in the world and is versatile with multiple languages and cultures. The film industry has created an ancillary music industry which is equally large. In this *mélange* of culture and multiplicity of languages, the film and music industry churns out scores of copyrighted works every year. Adding to that is the literary, dramatic and artistic works created by Indians every year. With the recognition in the recent years of the creativity of Indian authors, musicians and film producers, it is opportune for India to

11. *Supra* note 4.

consider emulating the international copyright practice to accommodate certain widely recognized exceptions to enrich our copyright jurisprudence and keep it abreast with the international practice.

In conclusion, it is only apt to quote from an article by Pierre N Leval, a Judge of the United States Court of Appeal for the Second Circuit on the doctrine of fair use as follows:

The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.... Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.¹²

Fair use and copyright are, therefore, two sides of a coin that cannot exist without each other. If the regime of a country is structured to treat copyright with no fair use or without adequate fair use, everything can be appropriated in the name of copyright, thereby creating a monopolistic regime in favour of owners of protected works. The current lacunae in the Act regarding fair use of protected works are surely inadvertent errors that crept in at the time of drafting. However, there have been no subsequent efforts of rectification. The copyright law of a country has to keep pace with developments around the world and appropriate amendments must be made to maintain a balance between protecting creativity and preserving public interest. Copyright laws around the world recognize this aspect and undergo constant revision¹³. As the levels of creativity and creative works continue to mount in India, India needs to wake up to the urgent reforms required to the overall design of its copyright law to drain its monopolistic colour and restore a balance to reflect the current international practices on fair use.

12. Pierre Leval, *Toward a Fair Use Standard*, 103 HARVARD LAW REVIEW 1105, 1107 (1990).

13. For instance, see the Copyright (Visually Impaired Persons) Act, (2002) which brought about amendments to the UK law by adding provisions permitting reproduction of works for use by visually challenged persons.