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## CHAPTER - 4

# FAIR USE VS FAIR DEALING: A COMPARATIVE STUDY IN THE DIGITAL ERA

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### 1. Introduction

Copyright law seeks to strike a balance between two competing interests: the rights of creators to control and profit from their works, and the public's interest in accessing knowledge, information, and culture. To achieve this balance, legal systems across the world incorporate exceptions and limitations. Among the most significant of these are the doctrines of fair use and fair dealing (Bently et al., 2022).

These doctrines allow limited use of copyrighted material without the authorization of the copyright owner. However, while they share a common objective, their scope, structure, and application differ significantly across jurisdictions. The distinction is particularly evident between the United States, which follows the doctrine of fair use, and countries like India, the United Kingdom, Canada, and Australia, which follow fair dealing (Goldstein & Hugenholtz, 2019).

In the digital era—characterized by the internet, social media, artificial intelligence, and mass content sharing—the relevance of these doctrines has increased exponentially. This chapter critically examines the concepts of fair use and fair dealing, compares their legal frameworks, and evaluates their effectiveness in addressing contemporary challenges.

### 2. Conceptual Foundation of Copyright Exceptions

The rationale behind copyright exceptions lies in the broader goal of promoting knowledge dissemination. Copyright law is not merely a system of protection but also a system of access (Netanel, 2008).

Limitations such as fair use and fair dealing are essential mechanisms that ensure a balance between the interests of rights holders and the public (Singh, 2011). These exceptions:

- Promote education and research
- Enable criticism and commentary
- Facilitate innovation and creativity
- Prevent monopolization of information

Thus, fair use and fair dealing function as **safety valves** within copyright law (Ghosh, 2012).

### 3. Understanding Fair Use

#### 3.1 Legal Framework

Fair use is codified under Section 107 of the U.S. Copyright Act (17 U.S.C. § 107, 1976). It provides that certain uses of copyrighted works—such as criticism, comment, news reporting, teaching, scholarship, and research—may not constitute infringement.

Importantly, this list is illustrative, not exhaustive, meaning courts have the flexibility to recognize new forms of fair use (Samuelson, 2017).

The four part test from 17 United States Code § 107 is as follows:17 ... the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be

**considered shall include -**

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

#### 3.2 The Four-Factor Test

The determination of fair use is guided by a four-factor test:

1. Purpose and character of the use
2. Nature of the copyrighted work
3. Amount and substantiality used
4. Effect on the market value

These factors are applied holistically rather than mechanically (Goldstein & Hugenholtz, 2019).

#### 3.3 Transformative Use Doctrine

One of the most important developments in fair use jurisprudence is the concept of transformative use, where the new work adds new meaning, message, or purpose (Balganesh, 2014).

This doctrine has allowed courts to adapt copyright law to modern technologies, including:

- Search engines
- Digital archives
- Parody and memes
- AI-generated content

#### 3.4 Nature of Fair Use

The US “fair use” doctrine a flexible four-factor balancing test that American courts apply case by case, does not exist in India. Indian copyright law contains “fair dealing,” a fundamentally different and significantly more restrictive concept. The categories are specific and closed. If your use is not expressly listed in Section 52 of the Copyright Act, 1957, it is not protected regardless of how reasonable or non-commercial it appears. This is the single most important distinction in Indian copyright law that content creators, educators, businesses, bloggers, YouTubers, and journalists consistently get wrong. The governing provision: All copyright exceptions in India flow from Section 52 of the Copyright Act, 1957. Unlike the United States, which applies a flexible four-factor fair use analysis under 17 USC §107, India operates a closed list system only the specific categories enumerated in Section 52(1)(a) through (q) and the sub-clauses that follow are protected from infringement claims. No amount of reasonableness, non-commercial intent, or attribution creates protection outside these categories.

Fair use is:

- Flexible
- Case-specific
- Judicially interpreted

It allows courts to evolve the law according to technological and social changes (Nimmer, 2015).

## 4. Understanding Fair Dealing

### 4.1 Legal Framework in India

In India, fair dealing is governed by Section 52 of the Copyright Act, 1957 (Copyright Act, 1957, § 52). Unlike fair use, fair dealing provides a specific list of permitted purposes, such as:

- Private or personal use
- Research and study
- Criticism or review
- Reporting of current events

Any use outside these categories does not qualify as fair dealing (Narayanan, 2017).

### 4.2 Nature of Fair Dealing

Fair dealing is:

- Restrictive and specific
- Based on enumerated categories
- Less flexible than fair use

However, even within these categories, the use must still be “fair,” which is determined by courts.

### 4.3 Judicial Interpretation in India

Indian courts have interpreted fairness using factors similar to the U.S. test, including:

- Purpose of use
- Nature of work
- Amount used
- Market impact

This indicates a gradual convergence with the fair use doctrine (Ghosh, 2012).

## 1. Key Differences Between Fair Use and Fair Dealing

“Fair use” and “fair dealing” are two different legal doctrines that happen to serve a similar purpose, allowing limited use of copyrighted material without permission but they work in fundamentally different ways.

**US Fair Use (17 USC §107)** is an open-ended, flexible doctrine. American courts assess any use against four non-exhaustive factors: the purpose and character of the use (including whether it is commercial or transformative), the nature of the copyrighted work, the amount used in relation to the whole, and the effect on the market for the original. Courts weigh these factors holistically. No single factor is determinative. A use can qualify as fair use even if it does not fit a pre-defined category, provided the overall balancing exercise favours it.

**Indian Fair Dealing (Section 52 Copyright Act, 1957)** is a closed, statutory list of specific exceptions. The Copyright Act enumerates the exact purposes and contexts in which using copyrighted material without permission does not constitute infringement. If your use falls within a listed category and satisfies the conditions attached to that category, it is protected. If it does not regardless of how non-commercial, reasonable, or well-intentioned it is it is not protected.

The practical consequence of this distinction is significant. Many content creators in India read American guides to copyright, conclude that their “transformative” or “educational” use is protected, and find themselves facing infringement claims when the Indian legal test is applied. The concept of “transformative use” central to US fair use analysis has no equivalent in Indian law. Indian courts do not conduct a transformation analysis. They ask whether the use falls within a specified Section 52 category.

**The “fair dealing” label itself:** Section 52 of the Copyright Act, 1957 does not actually use the words “fair dealing” anywhere in its text. The term is a common law concept used by lawyers and courts to describe the Section 52 exceptions collectively. The statute simply lists acts that “shall not constitute an infringement of copyright.” The label “fair dealing” is therefore a shorthand what matters legally is whether your specific use falls within the specific words of Section 52(1).

The fundamental distinction lies in **flexibility versus certainty**. Fair use offers adaptability but less predictability, whereas fair dealing provides clarity but limited scope (Bently et al., 2022).

## **6. Comparative Jurisprudence**

### **6.1 United States Approach**

The U.S. model emphasizes:

- Judicial creativity
- Case-by-case analysis
- Expansion through precedents

This enables adaptation to technological advancements without legislative amendment (Samuelson, 2017).

### **6.2 Indian Approach**

The Indian model emphasizes:

- Legislative clarity
- Defined boundaries
- Limited judicial expansion

However, courts have expanded the doctrine through interpretation (Narayanan, 2017).

### **6.3 Convergence Theory**

Despite formal differences, both systems show convergence in practice, as courts in fair dealing jurisdictions often apply fairness principles similar to fair use (Balganesh, 2014).

## **7. Fair Use vs Fair Dealing in the Digital Era**

### **7.1 Rise of Digital Technologies**

The digital revolution has transformed content creation and consumption through social media, streaming, and AI technologies (Lessig, 2004).

### **7.2 Social Media and User-Generated Content**

Platforms such as YouTube, Instagram, and TikTok rely on remix culture, reaction videos, and memes.

Under fair use:

- Many such uses may qualify as transformative

Under fair dealing:

- They must fall within statutory categories

This creates legal uncertainty (Senftleben, 2020).

### **7.3 Artificial Intelligence and Copyright**

- AI systems rely on large datasets, raising questions about whether training constitutes infringement.
- Some scholars argue that AI training is transformative and thus fair use, while others disagree (Samuelson, 2017).

### **7.4 Digital Piracy and Enforcement**

The digital era has increased unauthorized copying and piracy. Fair use provides broader defenses, whereas fair dealing imposes stricter limits (Goldstein & Hugenholtz, 2019).

### **7.5 Education and E-Learning**

Online education depends heavily on copyrighted material.

Fair use allows flexibility, while fair dealing restricts usage to statutory exceptions, impacting access in developing countries (Netanel, 2008).

## **8. Advantages and Disadvantages**

### **8.1 Fair Use**

Advantages:

- Flexible and adaptive
- Encourages innovation

Disadvantages:

- Legal uncertainty
- Inconsistent outcomes (Nimmer, 2015)

## 8.2 Fair Dealing

Advantages:

- Legal certainty
- Predictability

Disadvantages:

- Rigid structure
- Limited scope (Narayanan, 2017)

## 9. Case Law Analysis

### 9.1 United States

- *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
- *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015)

These cases emphasize transformative use and technological adaptation.

### 9.2 India

- *Civic Chandran v. Ammini Amma*, 1996 (16) PTC 329 (Ker)
- *University of Oxford v. Rameshwari Photocopy Services*, 2016 SCC OnLine Del 6229

These cases highlight educational and fairness considerations.

## 10. Challenges in the Digital Era

- Uncertainty in AI applications
- Cross-border legal inconsistencies
- Platform liability issues
- Over-enforcement through automated systems (Senftleben, 2020)

## 11. Need for Reform

### 11.1 Expanding Fair Dealing

India may introduce broader, flexible provisions (Narayanan, 2017).

### 11.2 Hybrid Approach

Combining statutory clarity with judicial flexibility is recommended (Bently et al., 2022).

### 11.3 Addressing AI

Legal frameworks must address AI training, data mining, and digital creativity (Samuelson, 2017).

## 12. Conclusion

Fair use and fair dealing represent two distinct approaches to balancing copyright protection with public access. While fair use offers flexibility and adaptability, fair dealing provides certainty and structure. In the digital era, rigid legal frameworks struggle to keep pace with technological advancements. The rise of AI, user-generated content, and global platforms highlights the limitations of traditional doctrines. A hybrid approach—combining the strengths of both systems—is essential to ensure that copyright law continues to promote creativity, innovation, and access to knowledge (Lessig, 2004).

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