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## Evolution of Copyright Law: The Indian Journey

Justice Prathiba M. Singh

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# EVOLUTION OF COPYRIGHT LAW – THE INDIAN JOURNEY

*Justice Prathiba M. Singh\**

I. Fundamental Principles.....	38	IV. Fair Use/Fair Dealing .....	52
II. Originality.....	39	V. Conclusion.....	62
III. Remedies for Copyright Violations.	46		

Out of all the forms of protection given to innovation and creation, copyright law is the most versatile. This law encompasses recognition, protection and enforcement of rights for a very large variety of creative works including traditional forms of works such as books, articles, poetry, lyrics of songs, paintings, musical compositions, sculpture, architecture, script in a drama or a film, to modern forms of copyrighted works such as computer software, databases, compilations, broadcasts etc. Protection for copyright finds its justification in fair play<sup>1</sup>. The law strikes a fine balance between the rights and interests of authors/owners of copyright and the right of the public to access public domain material. The three most important areas that determine this balance are:

1. The Test of Originality;
2. Remedies for Copyright Violations, and;
3. Fair Use/Fair Dealing provisions

The manner in which judicial precedents have evolved on these core are as shows that India has actually curated copyright law to suit its social, economic and cultural context.

## I. FUNDAMENTAL PRINCIPLES

No discussion on Indian copyright law can begin without reference to the seminal decision of the Supreme Court in *R.G. Anand v Delux Films*<sup>2</sup>. This

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<sup>1</sup> *Eastern Book Co. v D.B. Modak* (2008) 1 SCC 1 : AIR 2008 SC 809.

<sup>2</sup> *R.G. Anand v Delux Films* (1978) 4 SCC 118.

case lays down the basic principles of the idea-expression dichotomy – that copyright exists not in an idea but only its expression. While dealing with an adaptation of the play ‘Hum Hindustani’ the Supreme Court held that there cannot be copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work. The Court was interpreting the Copyright, Patents and Designs Act of 1911. The Court also observed on the test for infringement –

*“One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.”*

Thus, the Supreme Court paved the way for development of copyright law, by laying down fundamental principles in clear terms.

The law of copyright has evolved over the years to extend to not only original works but also to derivative works such as cinematograph films and sound recordings that are recognized for their commercial value. These are works which are an amalgam of various original works. The classification under the Copyright Act, between original works and derivative works, is of significance as the copyright industry expands into unknown terrain.

## II. ORIGINALITY

There are two categories of works that qualify for copyright protection – Original works and Derivative works. For the former category of works, copyright protection is not in doubt. In the latter category, since derivative works such as databases, compilations etc., are based on primary works the question of originality is trickier. Case law on copyright recognizes the rights of compilers who use mental labour and capital to modify an existing work or create a new compilation. In *Gopal Das v Jagannath*<sup>3</sup>, the Allahabad High Court considered two books written on the same theme and held that a compiler of a work which does not have absolute originality would be entitled to use the works forming part of the compilation, if he expends sufficient labour and subjects the same to revision and correction, so as to produce

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<sup>3</sup> *Gopal Das v Jagannath Prasad* 1938 SCC OnLine All 287 : AIR 1938 All 266.

an original result. Similarly, in *V. Govindan*<sup>4</sup>, the Madras High Court held that the amount of originality required in case of a compilation is not very high and even a 'small' amount of originality is entitled to protection. If sufficient skill, labour and brain has been expended, the test of originality would be satisfied.<sup>5</sup> In *Cunniah v Balraj*<sup>6</sup>, which dealt with a painting, the Court held that the changes introduced by the Defendant did not satisfy the test of originality to render the Defendant's work an independent work, thus the Plaintiff's prayer for injunction was granted.

In *Agarwala Publishing House*<sup>7</sup>, the Allahabad High Court held that examination papers are original literary works as the preparation of such papers required selection, judgment and experience, and the author was expected to employ sufficient labour and skill. In *Rupendra Kashyap*<sup>8</sup>, the Delhi High Court took a similar view and held that question papers would constitute original literary works being the product of the labour and skill of the author.

The test of originality that was followed in the above cases was in line with the English judgments of *Ladbroke v Hill*<sup>9</sup> and *University of London Press*<sup>10</sup>, which laid down the 'sweat of the brow' doctrine as the standard for originality. In *Rai Toys Industries*<sup>11</sup> like in *Ladbroke v Hill*<sup>12</sup>, the High Court of Delhi recognized the skill and labour employed in creation of a Tambola ticket compilation. The Court held that a compilation of Tambola tickets was original enough for being protected as an original literary work. In the Court's opinion, the arrangement of numbers in tickets is the individual work of the person who prepares it, it bears his individuality and long hours of labour.

In *Burlington Home Shopping*<sup>13</sup>, which was one of the first cases on database protection in India, the Plaintiff who was running a home shopping

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<sup>4</sup> *V. Govindan v E.M. Gopalakrishna Kone* 1954 SCC OnLine Mad 368 : AIR 1955 Mad 391.

<sup>5</sup> *ibid* [8].

<sup>6</sup> *C. Cunniah and Co. v Balraj and Co.* 1959 SCC OnLine Mad 15 : AIR 1961 Mad 111.

<sup>7</sup> *Agarwala Publishing House v Board of High School and Intermediate Education U.P.* 1966 SCC OnLine ALL 124 : AIR 1967 All 91.

<sup>8</sup> *Rupendra Kashyap v Jiwan Publishing House* 1996 SCC OnLine Del 466 : (1996) 16 PTC 439.

<sup>9</sup> *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.* (1964) 1 WLR 273 : (1964) 1 All ER 465.

<sup>10</sup> *University of London Press Ltd. v University Tutorial Press Ltd.* [1916] 2 Ch 601.

<sup>11</sup> *Rai Toys Industries v Munir Printing Press* 1982 PTC 85.

<sup>12</sup> *Ladbroke* (n 9).

<sup>13</sup> *Burlington Home Shopping (P) Ltd. v Rajnish Chibber* 1995 SCC OnLine Del 746 : (1995) 15 PTC 278.

catalogue business, claimed rights in the database of its customers. An ex-employee who had copied the database was sued for infringement of copyright and the defence taken was that the compilation of addresses did not have sufficient originality to be protected under copyright law as a literary work. The Court however applied the '*sweat of the brow*' doctrine and held that a compilation of addresses, which was developed by devoting sufficient time, labour and skill would be an original literary work, even though it may have been derived from common sources such as telephone directories and other public sources.

The judgment of the Supreme Court in *Eastern Book Co. v D.B. Modak*<sup>14</sup> (hereinafter, 'EBC'), however marked a pivotal moment in the course of Indian copyright law. The Court was considering the question as to whether law journals which published the judgments of the Supreme Court with some copy-editing inputs were original literary works, entitled to copyright protection. The Court first upheld the finding of the High Court that publishers of 'Supreme Court Cases (SCC)' are not the authors of judgments of the Supreme Court. It held that judgments are works in public domain in view of Section 2(k). The Court highlighted the distinction between original works also termed as primary works and derivative works also termed as secondary works. It reviewed the test of originality as applicable to derivative works, as laid down in *Ladbroke v Hill*<sup>15</sup> and *University of London Press*<sup>16</sup> judgments, and contrasted the same with the position in the U.S., as laid down in *Feist Publications*<sup>17</sup> and *Matthew Bender*<sup>18</sup>. In the former, the test was one of capital and labour i.e. the '*sweat of the brow*' and in the latter, the U.S. courts had laid down the test of '*modicum of creativity*' as being an essential condition for originality. The Supreme Court, after reviewing the varied approaches in different jurisdictions, finally followed the approach of the Supreme Court of Canada in *CCH Canadian Ltd.*<sup>19</sup>. The Court held:

“38. It is the admitted position that the reports in the Supreme Court Cases (SCC) of the judgments of the Supreme Court is a derivative work in public domain. *By virtue of Section 52(1) of the Act, it is expressly provided that certain acts enumerated therein shall not constitute an infringement of copyright. Sub-clause (iv) of Clause (q) of*

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<sup>14</sup> (2008) 1 SCC 1 : AIR 2008 SC 809.

<sup>15</sup> *Ladbroke* (n 9).

<sup>16</sup> *University of London* (n 10).

<sup>17</sup> *Feist Publications Inc. v Rural Telephone Service Co.* 1991 SCC OnLine US SC 46 : 113 L Ed 2d 358 : 499 US 340 (1991).

<sup>18</sup> *Matthew Bender & Co. v West Publishing Co.* 158 F 3d 674 (2nd Cir 1998).

<sup>19</sup> *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 : 2004 SCC OnLine Can SC 13 : (2004) 1 SCR 339 (Canada).

*Section 52(1) excludes the reproduction or publication of any judgment or order of a Court, Tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the Court, the Tribunal or other judicial authority from copyright.* The judicial pronouncements of the Supreme Court would be in the public domain and its reproduction or publication would not infringe the copyright. *That being the position, the copy-edited judgments would not satisfy the copyright merely by establishing amount of skill, labour and capital put in the inputs of the copy-edited judgments and the original or innovative thoughts for the creativity are completely excluded.* Accordingly, original or innovative thoughts are necessary to establish copyright in the author's work. *The principle where there is common source the person relying on it must prove that he actually went to the common source from where he borrowed the material, employing his own skill, labour and brain and he did not copy, would not apply to the judgments of the courts because there is no copyright in the judgments of the court, unless so made by the court itself.* To secure a copyright for the judgments delivered by the court, it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment printed in SCC some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one. *The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Indian Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Supreme Court.* We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation

or inputs put in the judgment would not satisfy the test of copyright of an author”

In the context of copy-edited judgments, the Court held that since judgments were themselves in public domain, the reproduction or publication of the same would not infringe copyright. To claim protection as a derivative work, the variation made by law journals had to be substantive, which would not be permissible, as editing of judgments is not allowed. The Court held that the copy-edited text of the judgments would not be original works as there was no substantive difference between the raw text and the copy-edited text of the judgments. The clear finding was that mere ‘*sweat of the brow*’ i.e. capital and labour would not be sufficient for claiming copyright in derivative works. Exercise of skill and judgment was needed for gaining protection which the copy-edited text did not satisfy. The various inputs which may have been provided by the law journal were merely of labour and capital and not exercise of skill and judgment. The Court did not disturb the position that head notes and short notes would be original literary works. In the copy-edited text, some inputs such as para-numbering, comments such as ‘concurring’ etc. were protected. Thus, with the *EBC*<sup>20</sup> judgment, India changed the course of the test for originality required for claiming copyright in derivative works. A mere machine created compilation would thus not be entitled to copyright under Indian law.

The post *EBC*<sup>21</sup> era, saw several judgments emanating from various High Courts. In *Reckeweg v Adven*<sup>22</sup> the question before the Delhi High Court was whether the sequencing of medicines, description, formulation and literature of the Plaintiff’s homeopathic medicines qualified for copyright protection. The Court applied the *EBC*<sup>23</sup> standard and held that mere skill, effort or industry does not result in a copyrightable work. There ought to be some intellectual effort to create a work of a different character. Thus, the Court held that the sequencing of medicines would not be copyrightable. Even the literature consisting of the series and curative elements would not be copyrightable. It held that the findings in *Reckeweg v Sharma*<sup>24</sup> being of an interim nature would not be binding. In *Mattel v Jayant Agarwalla*<sup>25</sup>,

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<sup>20</sup> *Eastern* (n 14).

<sup>21</sup> *ibid.*

<sup>22</sup> *Reckeweg and Co. Gmbh v Adven Biotech (P) Ltd.* (2008) 38 PTC 308.

<sup>23</sup> *Eastern* (n 14).

<sup>24</sup> *Dr. Reckeweg & Co. Gmbh v S.M. Sharma* 2006 SCC OnLine Del 436 : (2006) 130 DLT 16.

<sup>25</sup> *Mattel Inc. v Jayant Agarwalla* 2008 SCC OnLine Del 1059 : (2008) 38 PTC 416.

the Delhi High Court held that the Scrabble game did not measure up to the originality standard required by *EBC*<sup>26</sup>.

In *University of Oxford v Narendra Publishing House*<sup>27</sup> and *University of Cambridge v B.D. Bhandari*<sup>28</sup>, the question was whether the questions at the end of each chapter, in Mathematics and English textbooks, were original enough to entitle them for copyright protection. The Single Judge in the *Oxford v Narendra Publishing House*<sup>29</sup> case held that questions in Mathematics did not meet the originality standard of *EBC*<sup>30</sup>. However, the Division Bench reversed the said finding and held that the required skill, judgment and labour test was satisfied for framing of Mathematics questions. This judgment is also significant in the context of fair use/fair dealing, which would be discussed later.

In *Servewell Products*<sup>31</sup> the Court held that the tray-designs of the Plaintiff did not result in a copyrightable artistic work.

DNA sequences in hybrid seeds, did not qualify as original literary works as per *Emergent Genetics*.<sup>32</sup> According to the Court, since the DNA sequence in a seed was merely extrapolated from nature, there was no creativity and hence the sequence did not have originality to attract copyright protection.<sup>33</sup>

In *Akuate Internet Services*<sup>34</sup>, the Delhi High Court was dealing with information/facts from cricket matches, for example, cricket scores etc, which the Court held to be ‘public domain information’, lacking originality. In *Tech Plus Media*<sup>35</sup>, *Navigators Logistics*<sup>36</sup> and *Satish Kumar*<sup>37</sup>, customer databases were held by the Delhi High Court to not satisfy the originality standard of *EBC*<sup>38</sup> and hence not entitled to protection. In *Dart Industries*<sup>39</sup>,

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<sup>26</sup> *Eastern* (n 14).

<sup>27</sup> *University of Oxford v Narendra Publishing House* 2008 SCC OnLine Del 1058 : (2008) 38 PTC 385.

<sup>28</sup> *University of Cambridge v B.D. Bhandari* 2011 SCC OnLine Del 3215 : (2011) 47 PTC 244.

<sup>29</sup> *Oxford* (n 27).

<sup>30</sup> *Eastern* (n 14).

<sup>31</sup> *Servewell Products (P) Ltd. v Dolphin* 2010 SCC OnLine 1456 : (2010) 43 PTC 507.

<sup>32</sup> *Emergent Genetics India (P) Ltd. v Shailendra Shivam* 2011 SCC OnLine Del 3188 : (2011) 47 PTC 494.

<sup>33</sup> *ibid* [28].

<sup>34</sup> *Akuate Internet Services (P) Ltd. v Star India (P) Ltd.* 2013 SCC OnLine Del 3344.

<sup>35</sup> *Tech Plus Media (P) Ltd. v Jyoti Janda* 2014 SCC OnLine Del 1819 : (2014) 60 PTC 121.

<sup>36</sup> *Navigators Logistics Ltd. v Kashif Qureshi* 2018 SCC OnLine 11321 : (2018) 76 PTC 564.

<sup>37</sup> *Satish Kumar v Khushboo Singh* 2019 SCC OnLine US SC 10671.

<sup>38</sup> *Eastern* (n 14).

<sup>39</sup> *DART Industries Inc. v Techno Plast* 2016 SCC OnLine US SC 4016 : 2016 (67) PTC 457 (Del).



the drawings of Tupperware products were again held to be not entitled to copyright protection. In *Ravinder Singh v Evergreen*<sup>40</sup> however, where the Defendant's guidebooks were a mere reproduction of the question papers, the Delhi High Court upheld the claim for copyright.

Works which are capable of protection under copyright include both Original works *per se* and Derivative works. A review of case law in India shows that in the case of derivative works in view of the principles laid down in *EBC*<sup>41</sup>, some amount of skill and judgment is required to satisfy the test of originality. Mere compilations have been refused protection. The amount and value of corrections and improvements as also independent skill and labour have to be judged – so as to make the creator of the derivative work the author of it. In the U.S., exercise of more skill and judgement is needed. However, as per Indian law, little bit of skill, labour and capital is sufficient for a copyright in a derivative work. Though the literary merit need not be gone into, the exercise of skill and judgment ought not to be trivial. The quality and character of the derivative work ought to be distinct from the original work. The selection, co-ordination or arrangement of pre-existing data also ought to have a different character.

This discussion is of great importance currently in the context of the value that is being attached to data, and innovation based on data. In the near future, substantial creativity and innovation will be based upon data analysis and application. Whether such compilations of data *per se* would be entitled to copyright protection is a significant issue. Aggregation of data with employment of skill and judgment in a manner so as to make the data useful and implementable in varying applications and industries would involve enormous effort. A combination of such skill, effort and labour with an exercise of judgment to utilise the data for practical application in specific industries ought to satisfy the test of derivative works as laid down in *EBC*<sup>42</sup>. Any reports, analysis based on such data would be treated as original works.

In so far as completely original works are concerned, since they are *per se* original, the question of testing them on any such parameters would not arise. It is only in the context of 'derivative works' or 'transformed works' such as compilations, databases etc., which are derived from common sources, that the question of originality as laid down in *EBC*<sup>43</sup> needs to be applied. If an author creates a completely new work, irrespective of how impressive,

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<sup>40</sup> *Ravinder Singh & Sons v Evergreen Publications (India) Ltd.* FAO 235 of 2017, decided on 10<sup>th</sup> January, 2018.

<sup>41</sup> *Eastern* (n 14).

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

aesthetic or creative it may or may not be, such a work is entitled to copyright protection. Thus, the drawing of a simple cartoon or a painting or a simple amalgam of colours, a small poem irrespective of the quality and creativity is entitled to copyright protection.

### III. REMEDIES FOR COPYRIGHT VIOLATIONS

The Copyright Act, 1957 confers exclusive rights to copyright owners under Section 14 of the Act. Broadly, in case of original works, the exclusive rights which a copyright owner enjoys includes the right to reproduce the work, issue copies of the work, perform the work in public, communicate the work to the public, make translations or adaptations of the work etc. There are some specific rights given in the case of computer programmes, such as rental rights. In the case of artistic works, copyright owners have the right to convert two-dimensional works into three-dimensional works and *vice versa*. In the case of other works, such as cinematograph films and sound recordings, the storing of these works is the exclusive right of the owner. In the case of a cinematograph film, even the right to make a photograph of any image of the film vests with the owner. Rental rights of these works also vest with the owner. Though the statute was enacted in 1957, it has thereafter been amended substantially in 1983, 1984, 1994 and 2012.

The definition of “*communication to the public*” under Section 2(ff) is wide. It includes any means, other than by issuing physical copies, by which the copyrighted work is made available for being seen, heard or otherwise enjoyed by the public. If any person does anything, the exclusive right for which vests with the owner, or permits any place to be used for communication of the work for profit, the same would constitute infringement of copyright under Section 51. This would include making for sale, hiring, selling, displaying, giving out on rental, distributing for commercial purposes, exhibiting for commercial purposes or importing for commercial purposes any infringing copy of the work. “Infringing copy” is defined in Section 2(m) and would include any unauthorized copy of the work. Thus, copyright owners’ rights are broad and all encompassing.

The beauty of the Copyright statute lies in the fact that the terminology used is so wide so as to include all forms of dissemination. The term “*communication to the public*” is so wide that it, in fact, covers every form of dissemination or making of a copy, whether it be a hard copy on paper or soft copy on a USB stick/computer/hard drive/phone etc. Growth in digital technology has led to newer methods of infringing copyright but the statute

covers all such modes and methods. While not many amendments have been required in the statute, innovative remedies have been conceived by Courts to ensure that the exclusive rights vested in copyright owners are adequately protected.

It is a matter of common knowledge that digital technology has made dissemination very easy and on most occasions, untraceable. Initially, when a film used to be released, producers and owners had to file civil and criminal complaints for seizure of pirated VCDs and DVDs from notorious *bazaars* in various cities. Even with the advent of computer software, companies used to conduct periodic raids in known markets where CDs containing pirated software were regularly sold. In recent years, however, the modes of infringement have changed considerably. Apart from the infringement taking place in physical markets and shops selling pirated books, pirated CDs, pirated DVDs etc., the predominant form of infringement now takes place on the internet. In respect of real-world infringement, remedies of injunctions, appointment of Local Commissioners etc. are quite prevalent and well settled. In most copyright infringement matters in the last several years, injunctions have been granted directing cable operators and multi-system operators not to disseminate unlicensed content. It has been quite usual for producers to approach the court at least one week before the release of their film seeking such injunctions and appointment of Local Commissioners. There have also been cases where, in order to protect rights in a literary work, a suit for injunction has been filed seeking directions to be issued to the police to monitor and ensure that pirated copies are not sold openly, for example at traffic signals etc. Though these orders were passed in civil suits, Courts had created a blend of civil and criminal enforcement mechanisms by directing the local SHO to enforce the injunction order. This by itself was an innovative method of ensuring that copyright offences do not go unchecked, as the same may not be a priority for the police.

In the last decade or so, the prevalence of the internet has required Courts to couch remedies for copyright infringement in a manner that the infringer is unable to escape with the infringement. One of the first cases which dealt with this issue was *Star India v Haneeth*<sup>44</sup>, where Star India Pvt. Ltd. approached the Delhi High Court for an injunction blocking entire websites which had infringing content. The practice until then was to merely block the URL<sup>45</sup> i.e., the specific web-page containing the infringing content and not the entire website. However, owing to the prolific nature of infringement on

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<sup>44</sup> *Star India (P) Ltd. v Haneeth Ujwal* (2014) 7 HCC (Del) 333 : (2014) 60 PTC 504.

<sup>45</sup> Uniform Resource Locator.

certain websites, broadcasters sought a blocking order against the websites as a whole. Such websites which had predominantly infringing content were called ‘*rogue websites*’. In view of the various submissions made by the parties, including that ‘*rogue websites*’ blatantly infringe copyrighted material and pose a security risk to unsuspecting users, an *ex parte ad interim* injunction was passed blocking the rogue websites. The question as to whether entire websites ought to be blocked or not then arose in *Department of Electronics & IT*<sup>46</sup> before the Division Bench. The Delhi High Court heard a challenge by the government against a blocking order *qua* entire websites. The government took the position that only the URLs ought to be blocked. However, the Division Bench held that in the case of rogue websites, blocking of URLs is not sufficient and the entire website ought to be blocked. The reasoning given by the Court is as under:

“14. The respondent has placed enough material in the suit to show that the rogue websites are indulging in rank piracy and thus *prima-facie* the stringent measure to block the website as a whole is justified because blocking a URL may not suffice due to the ease with which a URL can be changed, and as noted above, the number of URLs of the rogue websites range between 2 to 2026 and cumulatively would be approximately 20,000. It would be a gargantuan task for the respondent to keep on identifying each offending URL and especially keeping in view that as and when the respondent identifies the URL and it is blocked by the ISP, the rogue website, within seconds can change the URL thereby frustrating the very act of blocking the URL.”

After this judgment of the Delhi High Court, it became common practice to grant injunction orders blocking entire websites which had predominantly infringing content. Courts also passed orders directing the Department of Communications and MEITY to block access to rogue websites. The Bombay High Court, however, in *Balaji Motion Pictures*<sup>47</sup> favored blocking of only infringing URLs and not the entire website.

It was then realized that blocking of entire websites was also not sufficient as a ‘redirect website’ or a ‘mirror website’ was being created by these website owners to escape the injunction order. For example, if the original website was *abc.com*, the mirror or the redirect website was called *abc1.com* and the entire data which was available on *abc.com* could now be found on *abc1.com*. This practice, which was rampant, required the copyright owner

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<sup>46</sup> *Department of Electronics and Information Technology v Star India (P) Ltd.* 2016 SCC OnLine Del 4160.

<sup>47</sup> *Balaji Motion Picture Ltd. v Bharat Sanchar Nigam Ltd.* 2016 SCC OnLine Bom 6607.

to file a fresh suit seeking an injunction against the mirror/redirect website. Thus, enforcement of rights became more onerous for the copyright owner, also leading to higher costs and multiplicity of litigation. The real speed with which rogue websites were creating mirror/redirect websites made the implementation of the injunction extremely difficult. In *UTV Software Communication*<sup>48</sup>, the Delhi High Court considered the judgment of the Singapore High Court in *Disney Enterprises*<sup>49</sup>, to hold that a solution needed to be found to stop the proliferation of websites with infringing content. After considering the judgment of the Singapore High Court and various provisions of Indian law, the Delhi High Court implemented the concept of a 'dynamic injunction', in order to prevent copyright infringement by mirror/redirect websites. A 'dynamic injunction' refers to an injunction order which is not static but dynamic. Though the first injunction order may be applicable only to one website, if mirror websites are created, the injunction would dynamically apply to the said mirror websites as well. The copyright owner is merely required to bring the factum of creation of a mirror website to the notice of the Registrar by way of an affidavit/application and the injunction would then automatically extend to the mirror/redirect website.

One of the biggest challenges copyright owners continue to face is on digital and online platforms selling infringing works and also e-commerce marketplaces. Digital platforms and online marketplaces usually seek protection under Section 79 of the Information Technology Act, 2000 and argue that they do not monitor the products being sold as they are merely intermediaries and hence, they are not liable for violation of any copyright. This issue has been considered in the context of the Copyright Act in *Myspace v Super Cassettes*<sup>50</sup>, wherein the Division Bench of the Delhi High Court has interpreted the judgment of the Supreme Court in *Shreya Singhal*<sup>51</sup>, and laid down the manner in which it has to be applied for copyright infringement. The Division Bench has held that intermediaries can claim the defence of 'safe harbour' and the 'place' as referred to in Section 51(a)(ii) could be a digital platform. However, if the intermediary satisfies the conditions under Section 79, no liability can be imposed on it but if any of the provisions of Section 79 are found to have been violated by the intermediary i.e., by exercising control over the content or aiding/abetting the violation, then the safe harbour defence would not be available. The Division Bench finally ruled that intermediaries would have an obligation to take down the infringing content upon receiving notice i.e., a court order, within the time limit provided

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<sup>48</sup> *UTV Software Communication Ltd. v 1337X.TO* 2019 SCC OnLine Del 8002.

<sup>49</sup> *Disney Enterprises, Inc. v M1 Ltd.* [2018] SGHC 206.

<sup>50</sup> *Myspace Inc. v Super Cassettes Industries Ltd.* 2016 SCC OnLine 6382.

<sup>51</sup> *Shreya Singhal v Union of India* (2015) 5 SCC 1 : AIR 2015 SC 1523.

under the Act and the Rules. Thus, the distinction between active and passive intermediaries is maintained even in the case of copyright infringement. If the intermediary is an active one, it cannot claim safe harbor, however, if it is a passive intermediary, it has to comply with the take down conditions laid down in *Shreya Singhal*<sup>52</sup> and in *Myspace v Super Cassettes*<sup>53</sup> In several cases, such as *Rakesh Kumar Mehta*<sup>54</sup>, intermediaries have also been directed to reveal the identity of the person uploading the infringing content.

Recent challenges that have arisen in the case of intellectual property rights violations explore whether intermediaries and search engines such as Google or Facebook can be directed to remove infringing or illegal content on a global scale. The conflict between injunctions that operate on a national level and those that operate on a global level has been highlighted in *Google v Equustek Solutions*<sup>55</sup>, where the Supreme Court of Canada had granted an injunction against Google directing it to take down counterfeit products from its global website. This order of the Supreme Court was challenged by Google in the District Court in California, wherein a stay was obtained against the operation of the said injunction. In India, this issue was decided in *Swami Ramdev v Facebook*<sup>56</sup>, wherein it was held by the Delhi High Court that if the initial cause of action i.e., the initial uploading of the illegal infringing content takes place from India, then Indian courts would be fully empowered to direct global takedown. Although the said order is under appeal, it continues to be in operation. The observations of the Court are as under:

“74. The question that has arisen in the present case is what would constitute removal or disabling access within the meaning of Section 79. Can removal or disabling access be geographically limited or should it be global?

...

76. All the platforms i.e. Facebook, Google, YouTube and Twitter argue in one voice that they are intermediaries under Section 79. A perusal of their written statements shows that they claim that they do not either initiate, select or modify the transmission, and that they observe due diligence. Thus, sub-sections (1) and (2) of Section 79 are relied upon by the platforms. However, in order to avail of the exemptions provided under Sections 79(1) and (2), the intermediaries

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<sup>52</sup> *ibid.*

<sup>53</sup> *Myspace* (n 50).

<sup>54</sup> *Rakesh Kumar Mehta v Dushyant Kumar* 2018 SCC OnLine 7817 : (2018) 74 PTC 391.

<sup>55</sup> *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34 : (2017) 1 SCR 824.

<sup>56</sup> *Swami Ramdev v Facebook* 2019 SCC OnLine Del 10701 : AIR 2020 (NOC 529) 173.

have a duty to “expeditiously remove or disable access”. The intermediaries have to remove or disable access to “that material”. The said material would be the information or data “residing in or connected to a computer resource”. What would be the material to which access is to be disabled or expeditiously removed? The answer to this is in the 2011 Rules. Under Rule 3(2), the information or data which constitutes “that material” would be ‘the material or information that is grossly harmful, harassing, blasphemous, defamatory.... or otherwise unlawful in any manner whatsoever’. Thus, the access would have to be disabled to any material or information which falls in any of these categories from (a) to (i). If a material or information falls in this category, upon receiving a Court order, the intermediary has to remove expeditiously or disable access to the same.

77. From which locations is the removal or disabling to take place? The answer to this is again in Section 79(3)(b). The removal or disablement to the offending material has to take place “on that resource”. What constitutes “that resource”? It is a computer resource in which the “information, data or communication link” is “residing in” or is “connected to”.

78. Computer resource is defined as a computer, a computer system or a computer network. It is not merely a single computer. It encompasses within itself a computer network, which would include a maze or a network of computers. Such a computer network could be a global computer network. Thus, a proper reading of Section 79(3)(b) would mean that if any information, data is residing in or connected to a computer network, i.e. a computer resource, the intermediary has to remove or disable access to the said information or data on that resource. The use of the words “that material” and “that resource” shows that the same is intricately connected to the initial part of the provision which deals with “any information, data or communication link” and “a computer resource.” Thus, if any information or data has been uploaded or is residing in a computer resource i.e. a computer network, the information or data which has to be removed or disabled from that very computer resource or network. The computer resource in the initial part of the Section is the same computer resource as used in the later part of the Section. The latter resource cannot be a sub-set or a species of the former. It has to be the entire computer resource which was initially connected when the uploading of the information or data took place. Thus, if an information or data has been uploaded on a computer network, the platforms would be bound to remove it and disable it from that computer network completely. Any other

interpretation of Section 79(3)(b) would not give proper meaning to the use of the words “that material” and “that resource”.

*79. Thus, the removal and disablement is intricately connected to the information that is uploaded and the system upon which it is uploaded, where it resides.*

*80. There is no doubt that when the uploading of information or data takes place by a user upon any computer resource of these platforms, the same is made available on a global basis by the platforms.*

*81. The act of uploading vests jurisdiction in the Courts where the uploading takes place. If any information or data has been uploaded from India on to a computer resource which has resulted in residing of the data on the network and global dissemination of the said information or data, then the platforms are liable to remove or disable access to the said information and data from that very computer resource. The removal or disabling cannot be restricted to a part of that resource, serving a geographical location.”<sup>57</sup>*

Though the Google judgment extracted above was in the context of a defamation action, the principles laid down therein ought to be equally applicable to infringing content.

The above discussion highlights the manner in which remedies for copyright infringement are being moulded to keep pace with technological developments. The ultimate object and intent of Courts is always to protect the copyright owner. However, the fact that technology is developing at such a fast pace has thrown various challenges on the court system, requiring a recalibration of not merely the remedies, but maybe even the law itself. The Copyright Act has, however, stood the test of time owing to the drafting of the definitions and the various provisions, which have withstood the fast pace of technology.

#### IV. FAIR USE/FAIR DEALING

After tracing the evolution of the test of originality and the innovative remedies that Courts have devised to protect copyright, we now come to one of the most vibrant aspects of copyright i.e., ‘fair use’ and ‘fair dealing’. The concept of ‘fair use’ and ‘fair dealing’ is as important as the exercise and the protection of the right itself. While providing remedies for infringement

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<sup>57</sup> *ibid* [74], [76]-[81].



protects the rights of owners, 'fair dealing' protects the rights of the public. 'Fair dealing' also indirectly permits wider dissemination of a work which authors, lyricists, composers and artists crave for as it not only spreads their work to a larger segment but also gives them name and fame. It is through 'fair dealing' and fair dissemination that members of the public get to know about the work which in turn helps artists in earning their living.

The manner in which the copyright industry functions today is that after the initial assignment/licensing of the work by the artists/authors, it is the publishing company that earns the monetary revenues. Amendments made in 2012 to the Copyright Act, 1957 were actually a result of this dynamic in the industry. The 2012 Amendments made it compulsory to share a part of the royalties with the authors on a continuing basis.<sup>58</sup> However, it is due to 'fair dealing' on mainstream media and online platforms that the public usually becomes aware of the author and the talent of the author, resulting in invitations for artists, singers, performers etc. to give live performances. These live performances in fact form the main basis of the livelihood of authors and artists. Thus, 'fair dealing' is not unidimensional but multidimensional in that it is to be viewed from the point of view of all three stakeholders viz., the authors, the public and the owners.

The terms 'fair use' and 'fair dealing', though having a nuanced distinction, are used almost synonymously. While the jurisprudence in the United Kingdom is built on 'fair dealing', in the United States of America, it is known as 'fair use'.

The US Supreme Court in 1985 declared in *Harper Row*<sup>59</sup> "*take not from others to such an extent and in such a manner that you would be resentful if they so took from you.*" In the US, as per the settled legal position, the question of 'fair use' is adjudged on the following four factors:

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

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<sup>58</sup> See provisos of Section 18, clauses 19(8)-(10) of Section 19 and proviso to Section 38A, as inserted by Act 27 of 2012.

<sup>59</sup> *Harper Row Publisher Inc. v Nation Enterprises* 1985 SCC OnLine US SC 129 : 85 L Ed 2d 588 : 471 US 539 (1985).

Along with these factors, the doctrine of ‘fair use’ has also been merged with the legal maxim ‘*de minimis non curat lex*’ meaning that if the usage is *de minimis*, no legal right would be violated. According to Prof. David Nimmer, the above four ‘fair use’ factors are extremely malleable and there is no discernible trend in the judicial decisions which he analysed in his article - ‘*Fairest of Them All and Other Fairy Tales of Fair Use*’<sup>60</sup>.

*Thus, in the US the above factors which form part of Section 107 of Title 17 of the United States Code are the basis on which ‘fair use’ is tested. Though these look like objective tests, they are actually extremely subjective and the decision as to whether a particular use is fair or not depends largely on facts.*

In the United Kingdom, the Copyright Act, 1988 uses the term ‘fair dealing’ and not ‘fair use’. It is perceived that the doctrine of fair dealing is narrower than that of ‘fair use’. It is dealt with under Chapter 3 of the Copyright Act, 1988 and various exceptions for the purposes of private study, research, educational purposes, use in libraries and archives etc. are provided for. The fundamental pre-condition to invoke the concept of ‘fair dealing’ is that the use has to be non-commercial in nature. *Hubbard v Vosper*<sup>61</sup> was a celebrated judgment of the Court of Appeal, wherein Lord Denning speaking for the Bench, observed that it is impossible to define ‘fair dealing’ and that it is a question of degree. It was held that criticism and review are to be interpreted broadly. Thus the expressions used in Section 52, i.e. criticism, review, current events etc. are to be liberally construed under UK law.

In *Hyde Park Residence*<sup>62</sup>, which involved the use of two photographs of Lady Diana, the Court rejected the ‘fair dealing’ defence and held that the publication of some photographs by a tabloid would constitute giving honour to dishonour and that the use was excessive on the basis of whether a ‘fair-minded person’ would have dealt with the said work as such. Later on, in *Fraser-Woodward*<sup>63</sup>, which concerned photographs of the Beckham family, the Court held that ‘fair dealing’ was a matter of impression.

The Indian statute embodies the doctrine of ‘fair dealing’ under Section 52. The said section contains numerous provisions from 52(1)(a) to (1)(zc) which itself shows the significance and importance attached to fair dealing in India. The concept of fair dealing has been dealt with in various case laws

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<sup>60</sup> David Nimmer, ‘“Fairest of Them All” and other Fairy Tales of Fair Use’ (2003) 66 (1) Law and Contemporary Problems 263.

<sup>61</sup> (1972) 2 QB 84 : (1972) 2 WLR 389.

<sup>62</sup> *Hyde Park Residence Ltd. v Yelland* (2001) Ch 143; (2000) 3 WLR 215 : [2000] RPC 604.

<sup>63</sup> *Fraser-Woodward Ltd v British Broadcasting Corpn.* [2005] EWHC 472 (Ch).

in respect to literary works, artistic works, computer programmes, musical works and sound recordings etc. The jurisprudence of fair dealing in India has developed over the years, keeping in mind the social and cultural character of the society. The various provisions also reflect this feature, where for example, it permits playing of copyrighted works in religious and community functions and ceremonies or for the benefit of religious institutions<sup>64</sup>.

If a copyrighted work is used for private or personal use, including research, it is fair dealing.<sup>65</sup> Criticism of the work, review of the work<sup>66</sup> or use for the purpose of reporting current affairs/current events etc.<sup>67</sup>, is also protected. It is also permissible to use parts of a work to criticize or review some other work. Transient or incidental storage would not be infringement.<sup>68</sup> If a work is used for the purpose of judicial proceedings, it is exempt.<sup>69</sup> Reproduction of public works, such as works of any legislature or a judgment of a court or a tribunal, reports of committees, councils, boards which are public bodies etc – being works in the public domain, reproduction of the same would not be infringement.<sup>70</sup> Use for the purposes of giving instructions or in the course of teaching or for the purpose of answering questions in an examination or in the activities of an educational institution would also be fair dealing.<sup>71</sup> Playing of a sound recording within a residential complex or a club or similar organization is permissible, so long as it is non-commercial in nature.<sup>72</sup> Reproduction of a part of a work as part of reporting in a newspaper, magazine etc. on any current issue is completely permissible.<sup>73</sup> Storing of a work by a non-commercial library is not an infringement if the library has a hard copy of the work and the same is converted into an electronic copy.<sup>74</sup> Libraries are also permitted to make three copies of a book which is part of their collection, if the book is otherwise not available for sale.<sup>75</sup> There are several such provisions in Section 52, which permit ‘fair dealing’. Specific provisions have been made to permit use by persons with disabilities<sup>76</sup> and performance of works in official ceremonies<sup>77</sup> is also not infringement.

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<sup>64</sup> Copyright Act 1957, ss 52(1)(l) and 52(1)(za).

<sup>65</sup> Copyright Act 1957, s 52(1)(a)(i).

<sup>66</sup> Copyright Act 1957, s 52(1)(a)(ii).

<sup>67</sup> Copyright Act 1957, s 52(1)(a)(iii).

<sup>68</sup> Copyright Act 1957, ss 52(1)(b) and 52(1)(c).

<sup>69</sup> Copyright Act 1957, s 52(1)(d).

<sup>70</sup> Copyright Act 1957, s 52(1)(q).

<sup>71</sup> Copyright Act 1957, s 52(1)(i).

<sup>72</sup> Copyright Act 1957, s 52(1)(k).

<sup>73</sup> Copyright Act 1957, s 52(1)(m).

<sup>74</sup> Copyright Act 1957, s 52(1)(n).

<sup>75</sup> Copyright Act 1957, s 52(1)(o).

<sup>76</sup> Copyright Act 1957, s 52(1)(zb).

<sup>77</sup> Copyright Act 1957, s 52(1)(za).

While the provision itself is quite extensive, cases which have dealt with ‘fair use’ and ‘fair dealing’ and the tests evolved therein are even more vibrant. One of the earliest judgments of the Lahore High Court in 1934 was *Kartar Singh*<sup>78</sup>, wherein the Defendant, who was a Granthi at the Golden Temple in Amritsar had written a live sketch on the tenth guru of the Sikhs, Shri. Guru Gobind Singh and given it the name ‘Dashmesh Parkash’. The copyright in the book, which was in Punjabi poetry, was transferred to the Plaintiff and one of the clauses in the said contract was that the author and his legal heirs would have no right to get the book printed in any language or alter its subject matter or change its name. The assignment took place in 1915, and in 1917, the author started writing a series of books called Akali Jot on various Sikh gurus. The same was published in 1920. One of the books in the series of Akali Jot was ‘Dashmesh Partap’. The argument of the Plaintiff was that Dashmesh Parkash and Dashmesh Partap were one and the same book and the Defendant ought not to be allowed to publish the same. The case of the Defendant was that Akali Jot was completely different from the book for which copyright was assigned to the Plaintiffs and that it was an outcome of independent research and labour. The Trial Court had decreed the suit, which then came in appeal before the Lahore High Court. The Court held that under the guise of copyright, the frontiers of human knowledge cannot be curtailed. Avenues for research and scholarship ought to be permitted. The Defendant/author agreed to change the name of the book and the Court accordingly allowed him to publish the book with the changed name.

In *Blackwood & Sons*<sup>79</sup>, the Court was dealing with the Imperial Copyright Act of 1911. The Plaintiffs - Macmillan & Co. claimed copyright in two works, one authored by Thomas Hardy and the second by Rabindranath Tagore. Defendants were publishers in Madras. The work of the Plaintiff - ‘Stories from Tagore’ was published as a textbook for the intermediate examination (pre-university exam) and the Defendant published a guide to the said textbook. In the process of publishing the guide, the Defendants had used substantial parts of the original work. The case of the Defendants was that the use of the copyrighted work – ‘Stories from Tagore’ for the purpose of the guidebook constituted ‘fair dealing’. The court firstly held that the Imperial Copyright Act, 1911 as modified by the 1949 Act would govern the rights of parties. On ‘fair dealing’ the Court summarized the questions as under:

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<sup>78</sup> *Kartar Singh Giani v Ladha Singh* 1934 SCC OnLine Lah 277 : AIR 1934 Lah 777.

<sup>79</sup> *Blackwood and Sons Ltd. v A.N. Parasuraman* 1958 SCC OnLine Mad 62 : AIR 1959 Mad 410.

*“The questions to be considered are: (1) is there a reproduction of a substantial part of the copyright work” quantitatively and (2) what is the quality of the work abstracted and does it constitute a valuable portion of the copyright work.”*

The Court then embarked on a calculation of the words which showed that out of 1,64,000 words in the original work, 4000 words were copied insofar as the Thomas Hardy work was concerned. In respect of the contention that the Defendant’s work did not compete with the Plaintiff’s work, the Court held that whether the work is in competition or not is only one of the factors that is to be considered. Though there may be no intention to compete, but the Defendant’s intention is not relevant and thus in respect of Thomas Hardy’s work, the Court held that there is infringement of copyright.

Insofar as ‘Stories from Tagore’ was concerned, the Court held that even the translated works enjoyed copyright protection except one story. The court after examining the quantum of content copied i.e., 6543 words out of 42264 words (about 15%), held that the defendant would still violate the Plaintiff’s rights. The two points urged by the Defendant that there has to be an intention to compete and that the motive of the infringer should be unfair, were rejected. On the quantum that can be used for the purpose of ‘fair dealing’, the Court holds that the user must use its ‘best judgment’. The mere fact that the Defendant’s book does not compete with the Plaintiff’s does not put to rest questions as to ‘fair dealing’. Accordingly, permanent injunction was granted against the infringement of copyright.

The Madras High Court judgment was rendered by a Single Judge – Justice Rajagopala Ayyangar, who thereafter authored the Ayyangar Committee Report, which reformed Indian Patent Law. Unlike the view of Justice N. Rajagopala Ayyangar, later courts including the Division Bench of Jammu & Kashmir and Justice K. Ramaswamy in the Madras High Court itself, took a different view in the context of guidebooks. In *Romesh Chowdhry*<sup>80</sup>, the Jammu & Kashmir High Court quashed a criminal complaint at the instance of a proprietor of a press who had published notes on textbooks which were prescribed by the University. Reliance was placed on the decisions of the Madras High Court in *E.M. Forster*<sup>81</sup> and Lahore High Court in *Kartar Singh*<sup>82</sup>, as also of the Allahabad High Court in *S.K. Dutt*<sup>83</sup> and

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<sup>80</sup> *Romesh Chowdhry v Ali Mohamad Nowsheri* 1965 SCC OnLine J&K 1 : AIR 1965 J&K 101.

<sup>81</sup> *E.M. Forster v A.N. Parasuram* 1964 SCC OnLine Mad 23 : AIR 1964 Mad 331.

<sup>82</sup> *Kartar Singh* (n 78).

<sup>83</sup> *S.K. Dutt v Law Book Co.* 1953 SCC OnLine All 286 : AIR 1954 All 570.

Privy Council in *Macmillan*<sup>84</sup> to hold that the notes which were published by the press explain the significance and meaning of the quotations in the textbooks of the complainant. Once a book is published by a University, in the strict sense, there cannot be copyright and any member of the public could publish a review, or a criticism of guidebooks. The court goes to the extent to hold that if a book becomes a textbook it becomes public property.

The judgment in *Blackwood & Sons*,<sup>85</sup> can also be clearly contrasted with two judgments of the Delhi High Court in *University of Oxford v Narendra Publishing House*<sup>86</sup> and *University of Cambridge v B.D. Bhandari*<sup>87</sup>. In both these judgments, in the context of guidebooks being published for Maths and English textbooks, the Court held that the use by the Defendants was 'transformative' in nature and thus amounted to 'review' under Section 52.

The Delhi High Court's view was taken by a Division Bench headed by Justice A.K. Sikri, who unlike Justice Ayyangar, rejected the test of US law on 'fair use' as being not very useful, and borrowed the concept of 'transformative use' from American jurisprudence to recognize originality even in a guidebook and hence holding it to be non-infringing. The Division Bench of the Delhi High Court interestingly, reversed the Single Judge's view on 'originality' in *University of Oxford v Narendra Publishing House*<sup>88</sup> and held that the questions contained in the textbooks at the end of each chapter were original and qualified for copyright protection. However, the Court permitted the publication of the guidebooks on the ground that they constitute 'transformative use'.

In the context of education, the next judgment that is of significance is *University of Oxford v Rameshwari Photocopy Services*<sup>89</sup>- wherein the Division Bench of the Delhi High Court held that the publication of course packs, which were compilations of different books prescribed in the syllabus, constituted 'fair dealing' under Section 52(1)(i) of the Copyright Act.

A review of all these judgments shows that in the context of education, in recent times, Courts tend to tilt in favour of allowing publication of guides, photocopying etc. as the Courts' approach is driven from the point of view of the students and not the owners. The judgments also have an underlying

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<sup>84</sup> *Macmillan and Co. Ltd. v K. and J. Cooper* 1923 SCC OnLine PC 59 : AIR 1924 PC 75.

<sup>85</sup> 1958 SCC OnLine Mad 62 : AIR 1959 Mad 410.

<sup>86</sup> 2008 SCC OnLine Del 1058 : (2008) 38 PTC 385.

<sup>87</sup> 2011 SCC OnLine Del 3215 : (2011) 47 PTC 244.

<sup>88</sup> 2008 SCC OnLine Del 1058 : (2008) 38 PTC 385.

<sup>89</sup> *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386.

philosophy that for the purpose of education, access is crucial and if textbooks are over-priced, publication of guidebooks and course packs ought to be permitted. Thus, the effort of copyright owners ought to be to make copyrighted books reasonably priced and made accessible for the larger mass of students, in order to avoid violations, such as photocopying and other publications using parts of copyrighted works.

Apart from literary works, the concept of fair dealing and fair use has been severely debated in the context of the broadcasting industry as well. In *Super Cassette v Bathla Cassette*<sup>90</sup>, the Plaintiff who had made a version recording of an original sound recording, could not obtain an injunction against another company publishing a version recording of the Plaintiff's version recording. Section 52(1)(j) as it then existed under the Copyright Act was interpreted. The said provision now stands repealed with the 2012 Amendment in the Act.

The question of ephemeral recordings was considered in *Video Master*<sup>91</sup>, by the Bombay High Court which held that the preparation of Betachem cassettes for the purposes of broadcasting on satellites would not be infringement under Section 52(z) of the Act.

In *ESPN v. Global Broadcast*<sup>92</sup>, ESPN had objected to use of footage from cricket matches for the purpose of news broadcast. While balancing the rights of the original broadcaster who had invested huge sums of money in obtaining the right and the right of the news channel to broadcast news, the Division Bench of the Delhi High Court laid down clear tests as to what constitutes 'fair dealing' in the context of broadcasting. The Court approved the test laid down by the High Court of New Zealand in *Media Works NZ Ltd.*<sup>93</sup> that in order for usage in news to be 'fair dealing', the extract must be brief, and had to be used within 24 hours for it to constitute a current event. It would not be permissible to broadcast full-fledged sponsored programs with advertising under the garb of 'fair dealing'. While reporting of news is protected by Article 19(1)(a) of the Constitution of India, commercial exploitation with sponsored programmes and advertising is not permissible. Repeated use of the broadcast footage would not be 'fair dealing'. The Court finally held that although 'fair dealing' cannot be defined, extensive use in

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<sup>90</sup> *Super Cassette Industries Ltd. v Bathla Cassette Industries (P) Ltd.* 2003 SCC OnLine Del 843 : (2003) 27 PTC 280.

<sup>91</sup> *Video Master v Nishi Productions* 1997 SCC OnLine Bom 454 : (1998) 18 PTC 117.

<sup>92</sup> *ESPN Star Sports v Global Broadcast News Ltd.* 2008 SCC OnLine Del 1385 : (2008) 38 PTC 477.

<sup>93</sup> *Media Works NZ Ltd. v Sky Television Network Ltd.* [2016] NZHC 1883.

direct competition with the copyright owner's broadcast would not be protected by 'fair dealing'.

In *Super Cassettes v Hamar Television*<sup>94</sup> sound recordings of the Plaintiff were being telecasted on a Bhojpuri channel, wherein the channel pleaded 'fair dealing' on the ground that the usage was of a maximum of 10-30 seconds, that too not in a single stretch and thus would constitute 'fair dealing'. The court followed the judgment in *ESPN v Global Broadcast*<sup>95</sup>, and after reviewing a large number of judgments from the UK on 'fair dealing', held that the exact contours of 'fair dealing' cannot be drawn. Some tests were laid down by the Court, for example 'short extracts with long comments' may be 'fair dealing'; that Courts ought to take a liberal approach as to what constitutes criticism or review; in the context of sound recordings, the standard would be that of a fair minded and honest person, from the viewpoint of a 'lay hearer'; the length and extent of the use would be crucial; public interest and the interest of public is not the same.

After reviewing the amount of usage by the Defendant, the Court held that in order to assess as to what constitutes 'substantial taking' of a work, it is the quality of the work that is important and not the quantity. The court held that even the taking of a single note which forms an essential part of the work could be substantial. Since the Defendant was using the same for running a TV Channel, which constituted commercial purpose, without taking the permission of the Plaintiff, and not for reporting any current events, the 'fair dealing' defence was not recognized by the Court.

This case would be in sharp contrast with the judgment of the Division Bench in *India TV v Yashraj*<sup>96</sup>, wherein the Court was considering use of very small portions of a famous song 'Kajra Re' and certain other songs during an interview with the singer. The Court applied the 'de minimis test' and held as under:

*"55. In our opinion, the use of de minimis, as applied in other areas of the law, without any modification or without having any marriage of convenience, has three significant advantages in the field of Copyright Law. Firstly, the Fair Use concept would be a bad theoretical fit for trivial violations. Secondly, de minimis analysis is much easier. Thirdly, a de minimis determination, is the least time consuming, and*

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<sup>94</sup> *Super Cassettes Industries Ltd. v Hamar Television Network (P) Ltd.* 2010 SCC OnLine Del 2086 : (2011) 45 PTC 70.

<sup>95</sup> *ESPN* (n 92).

<sup>96</sup> *India TV Independent News Service (P) Ltd. v Yashraj Films (P) Ltd.* (2013) 53 PTC 586.



*needless to state it is in the interest of the parties as also the society that litigation reaches its destination in the shortest possible time.*

*56. After all, the factors commonly considered by Courts in applying de minimis are well listed. They are five in number: (i) the size and type of the harm, (ii) the cost of adjudication, (iii) the purpose of the violated legal obligation, (iv) the effect on the legal rights of third parties, and (v) the intent of the wrongdoer.”<sup>97</sup>*

By applying the tests as laid down above, the Court held that use of a part of a song in a consumer awareness advertisement, was ‘*de minimis*’ usage and the infraction was trivial. In the third usage, the performer who had originally lent her voice to the song was being interviewed on a TV channel, and as part of the interview, she sang portions of the song. The Court held that simply because, she had assigned her rights to the sound recording company, the performer cannot be denuded from using her own excerpts of her performance. In an interview it was common for a celebrity to be asked questions about her well-known works and her singing would be perfectly justified in that context. In the 45 minute program, the total singing was less than 10 minutes and the court held that the same would constitute ‘fair use’ by applying the doctrine of ‘*de minimis*’.

The Bombay High Court in *Tips Industries Ltd.*<sup>98</sup> rejected the defence of ‘fair dealing’, as the Defendants’ use was commercial and for the purpose of renting the sound recordings. Such use would not constitute private use or research.

A significant judgment rejecting the defense of ‘fair dealing’ and ‘fair use’ in the context of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 is the *Union of India v BCCI*<sup>99</sup> judgment, wherein the Supreme Court narrowly construed the provisions of the said Act as permitting Prasar Bharti to use the live feed received by it only on its own terrestrial and DTH networks and not to Cable Operators. Although this judgment did not deal with the provisions of the Copyright Act specifically, the Mandatory Sharing Act was itself meant to permit use of copyrighted broadcasts in larger public interest to make cricket matches available on Prasar Bharti’s wide network. The Supreme Court narrowly construed the

<sup>97</sup> *ibid* [55] –[56].

<sup>98</sup> *Tips Industries Ltd. v Wynk Music Ltd.* Comm. Suit IP (L) NO. 114/2018, decided on 23rd April, 2019.

<sup>99</sup> *Union of India v Board of Control for Cricket in India* (2018) 11 SCC 700 : (2018) 73 PTC 31.

Act so as to safeguard the rights of broadcasters and the investment made by them in acquiring broadcasting rights.

In *Malini Mallya*<sup>100</sup>, the Supreme Court recognized the defence of ‘fair dealing’ in the performance of Yakshagana ballet dance in an educational institution. The Supreme Court held that Yakshagana ballet, a dance form developed by Dr. Kota Shivarama Karanth, when performed in an educational institute for non-commercial purposes, would not constitute infringement of an order of injunction.

*Civic Chandran*<sup>101</sup> was also an interesting case where an original drama was criticized by performing a counter drama. The Id. Single Judge of the Kerala High Court held that the counter drama, being for the purpose of criticism, the defence of ‘fair dealing’ would be applicable.

A review of the case law on ‘fair use’ and ‘fair dealing’ shows that though there are some broad principles, decisions are very case-specific. The experiences of judges and their own personal philosophies have had an impact on the judgments, especially in the context of education. However, broadly, Courts have upheld the defence of ‘fair use’ and ‘fair dealing’, with some exceptions. Clear commercial use is not protected, transformative use is recognized, and fair dealing cannot be unshackled and uncontrolled, as it has to be within the four corners of reasonableness, bona fide use, non-commercial use and *de minimis* use.

For any use to constitute fair use, only that quantum of the work as is needed must be used. ‘Fair use’ and ‘fair dealing’ are exceptions to the rule and hence they have to be construed narrowly and not broadly. The statute itself permits a large variety of ‘fair use’ and ‘fair dealing’ measures. Criticism, review, etc. has to be genuine and not merely a charade. The depth/strength of criticism is not a measure, so long as it constitutes criticism.

## V. CONCLUSION

The evolution of case law in the realm of copyright on the principles of originality, innovative remedies and ‘fair dealing’ shows that they have been moulded to the needs of Indian society, including India’s social and cultural context. Indian Courts have maintained the balance between protection afforded to copyrighted works and permitting ‘fair dealing’ in the larger

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<sup>100</sup> *Academy of General Education v B. Malini Mallya* (2009) 4 SCC 256 : AIR 2009 SC 1982.

<sup>101</sup> *Civic Chandran v C. Ammini Amma* 1996 SCC OnLine Ker 63 : (1996) 16 PTC 670.

interest of the public. The remedies that have been ingeniously crafted to protect copyright owners also show that Courts have risen to the challenges thrown up by technology. The law on copyrights, as multi-faceted as it is, would continue to grow with the advent of digital technologies that have enabled further dissemination of copyrighted works.