

FAIR USE MIGHT BE UNFAIR

Pamoda Jayasekera

Magistrate of Nuwaraeliya

Introduction

Fair use is a legal doctrine that promotes freedom of expression by permitting the unauthorised use of copyright protected materials in certain circumstances. Fair use has a special place in copyright law. Otherwise stated fair use may be considered a defense, but not a right. Fair use is the most frequently used of exception for copyrighted work. This article intends to examine the scope of fair use and further **to explain how four factors balancing test is evaluated in a question of fair use.**

Section 11 [1] of the Intellectual Property Act No 36 of 2003 (IP Act)¹ provides in respect of fair use as;

Notwithstanding the provisions of sub-section (1) of Section 9 the fair use of a work, including such use by reproduction in copies or by any other means specified by that section for purposes such as criticism comment news reporting teaching (including multiple copies for classroom use) Scholarship or research shall not be an infringement of Copyright.

It is important to note that Section 11 of IP Act is identical and a verbatim recreation of section 107 of the **United States Copyright Act of 1976**²: however, neither the Sri Lankan IP Act nor the US Copyright Act defines the term “fair use”.

Black’s Law Dictionary defines word fair use as;

¹Intellectual Property Act No 36 of 2003(as amended)

²United States Copyright Act of 1976

'A reasonable and limited use of a copyrighted work without the author's permission, such as quoting from a book in a book review or using parts of it in a parody. Fair use is a defence to an infringement claim, depending on the following statutory factors 1. The purpose and character of the use 2. The nature of the copyright work 3. The amount of the work used and 4. The economic impact of the use'

The English Law ³ and Indian Law ⁴ use the term "fair dealing" instead of fair use. In the English case of Hubbard and Another V Vosper and Another⁵, Lord Denning defines the doctrine of fair dealing⁶ as follows,

"It is impossible to define what is 'Fair dealing' it must be a question of degree. You must consider first the number and extent of the quotation and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author for a rival purpose that may be unfair. Next, you must consider the proportion to take long extracts and attach short comments may be unfair, but short extracts and attach short comments may be fair. Other considerations may come to mind also. But after all, is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of Copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing."

Based on the above, it can be determined that there is no exact statutory definition to fair use, and it will always be a matter of fact, degree and impression varying from case to case. In many countries the legislative arm relinquished the right to courts in deciding what fair use is.

³Copyright, Design and Patent Act 1988(as amended)

⁴The Copyright Act 1957 (as amended)

⁵[1972] 2 QB, [1972] 1 ALL ER 1023

⁶Section 6 (2) of the Copyright Act 1956

History and development of fair use

Under the Licensing of the Press Act of 1662 (Licensing Act), the Royal Company of Stationers had the monopoly of publishing books. In addition to this absolute authority, they had the right to seize and burn books published by any other publisher. When the Licensing Act lapsed for the final time in 1694, the Royal Company of Stationers continued to publish books based on perpetual copyrights⁷. In this era there was no practice of fair use whatsoever. In 1710 British parliament enacted the Statute of Anne⁸ (Copyright Act of 1710) which justified certain types of fair use in copyrighted work⁹.

Contemporaneously the US enacted the Copyright Act of 1776 the provision of which envisage rights to reproduce, adapt, publicly distribute, and publicly perform and publicly display the copyrighted work.¹⁰

With this background, the origin of the fair use doctrine made its first appearance in the United States in the case of *Folsom V Mash*¹¹, by way of an opinion written by Justice Story while sitting as a circuit judge. Justice Story laid down the rule for fair use which was adopted by the US Congress¹².

England recognised the doctrine of fair dealing (as an alternative to fair use) in the Imperial Copyright Act of 1911. British Colonies such as Australia, New Zealand, and South Africa, soon adopted the provisions of the English Imperial Copyright Act. Subsequently, this Act was repealed in the UK by the **Copyright Act of 1956** which was in force until 1988 and was replaced by the **Copyright, Designs, and Patent Act of 1988**¹³.

⁷ Copyright without a finite term

⁸The Statute of Anne granted publishers of books legal protection for 14 years with the commencement of the statute

⁹Section IX & XI of Statute of Anne.

¹⁰17 USC § 106 (1988)

¹¹9F.Cas 342 US Circuit Court judge for the District of Massachusetts (1841)

¹²The United States Congress is the bicameral legislature of the federal government of the United States

¹³Section 29 & 30

Copyright Ordinance No 02 of 1908 was the first Sri Lankan legislation pertaining to copyright law that made a reference to fair dealing¹⁴. Later-on the British introduced their Copyright Act of 1911 to Ceylon which then came in to force as an Ordinance to amend the law relating to copyright. However, the Copyright Act of 1956 was not introduced to Sri Lanka (Ceylon at that time) because Ceylon became an independent nation in 1948. The British concept of fair dealing was embedded in the Sri Lankan legal system until it was replaced in 1979. The concept of fair use was first introduced to Sri Lanka by Act No 52 of 1979 Code of Intellectual Property ¹⁵ (IP Act of 1979) and the same is reflected in the existing **Intellectual Property Act No. 36 of 2003** (IP Act of 2003) as well. The relevant sections for fair use in the IP Act of 1979 as well as the prevailing IP Act of 2003 are almost identical to the US Copyright Act.

Four Factors Balancing Test of Fair Use

As the Section 11 (1) of the Sri Lankan IP Act provides the provision for fair use, which allows criticism, comments, news reporting, teachings (which includes the use of multiple copies for classroom/academic purposes) scholarships or research. Though this is intended to be descriptive it is not prescriptive in nature. Moreover, Section 12 of the Sri Lankan IP Act sets out a list of conducts which are permitted within the ambit of fair use. The intention of the above-mentioned legislation is not to narrow it down for purposes of Section 11 (1); where section 11 (3) clearly extends the applicability of fair use doctrine to act of fair use in section 12. This situation is very similar to that of Sections 108 and 109 of the US Copyrights Act.

Fair use is a flexible copyright exception, based on the idea that the “use” compromise of an act that has to be fair to escape being an infringement. Defenses for fair use are most likely to succeed in areas such as education, criticism, literature, parody and news reporting. When applying the fair use doctrine, courts balance several factors in reaching their decision; which is often called a “Balancing Test”. It was challenging to specify at which point does fair use cease

¹⁴Section 23 of Copyright Ordinance no 02 of 1908.

¹⁵Section 13 of Code of Intellectual Property Act No 52 of 1979

and where does infringement starts. In many jurisdictions four aspects are considered when determining fair use.

Purpose of use - most common test for look why the wrongdoer used copyrighted work. Whether such use is of a commercial nature or is for non-profit educational or charity purpose.

Nature of copyright work - some works are better protected than others. For example facts, and data in a physics book are not protected by copyrights, whereas creative expressions of the movie Harry Porter is well protected.

The proportion that has been used - The amount and substantiality of the portion used in relation to copyrighted work. The amount and substantiality can have not only a meaning of qualitative value but also a meaning of quantitative value.

Economic impact - The effect of the use upon the potential market for or value of the copyrighted work.

These four factors are used as a balancing test. It is a test that is very attentive to the specific circumstances of the particular use. However, one factor being S positive or negative would not decide whether or not it is fair use. A court determining will always walk through all four factors and decide whether the inculcation of facts is fair use or not.

Since provisions for fair use in Sri Lankan IP Act has considerable similarities with the US Copyrights Act, the below-mentioned US judgment would provide better understanding of the said four factors.

Sony Corporation V Universal City Studios ¹⁶ (Betamax case) is a classic example of applying the fair use doctrine. Sony was being sued by Universal pictures for creating the Video Cassette Recorder (VCR). Universal studios argued that recording of something in a TV show is a violation of their copyrights because the universal studios did not permit to copy their TV shows which were protected under copyright law. In this landmark case, Universal Studios argued the point

¹⁶Sony Corp. of America V Universal City Studios, Ins 464 United State Reports 417 (1984)

that by creating the VCR device, Sony cooperation was vicariously liable for copyright infringement in allowing the general public to record TV shows.

Court went through each factor of the balancing test and decided the matter in favour of Sony Corporation. In considering the first factor, Purpose of use, Court held that with the argument advanced by the Sony Corporation that there is no strict copyright infringement as the device was used only to shift the time of the program. Viewers who were unable to watch the original program may record and watch it later; and this is merely shifting time. The economic impact factor too favoured Sony. The Court held if the device was used to make copies for a commercial or profit-making purpose, such use would presumptuously be unfair. However, the Court's findings established that time-shifting for private home use must be characterized as a non-commercial or a non-profitable activity.”

Other two factors were weighed against Sony Corporation. Nature of the works such as movies and fictions well protected in copyright law, are well within the subject matter of this case. The proportion of the usage is either 100% or the entire TV show.

Despite Two out of four factors being against Sony, US Supreme Court ruled that the making of individual copies of complete television shows for purposes of time-shifting does not constitute copyright infringement; and it qualified as fair use. This decision was a boom to the home video market as it created a legal, safe haven for the technology, which also significantly benefited the entertainment industry through the sale of per-recorded movies.

Cambell v Acuff rose Music ¹⁷ is another significant case where in addition to the four factors of fair use, the US Supreme Court considered a new legal concept known as 'Transformative fair use', a theory derived from a law article written by Judge Pierre N Laval in 1990. 'Oh Pretty Women' is a classic song by Roy Orbison's and whereas the Parody version of the same done by the rap group named '2 live crew' was found to be of fair use even though it uses a significant amount of the context of the original song and evidently used for commercial use.

¹⁷Campbell v. Acuff-Rose Music, Inc. 510 United State Reports 569 (1994)

In the said case, in justifying the purpose of use, the court found that the Parody version is clearly of transformative value despite its commercial nature linked to the illustrative purpose of criticism. When considering Nature of the work, Court asserted that the creative nature of the original song does assign it more protection, but that is not as important in the fair use analysis as 2 live crew's work is a parody. Court declared that the amount and substantiality of the permissible use of the original work depends upon the extent to which the overriding purpose and character of the new work is to parody than the original, rather than serve as a market substitute for the original; as such 2 live crew's copying of the original was not deemed excessive to its purpose. Weighing in on the Economic impact factor, Court was very comfortable that parodies are not substitutes for the original market and do not have an economic impact on the original version at all.

*Bill Graham Archive V. Dorling Kindersley*¹⁸ is another transformative fair use case where Bill Graham Archives, owned the copyright to seven images of event posters and the ticket images of S Grateful Dead (a rock band), and Dorling Kindersley Ltd in collaboration with Grateful Dead Productions, sought to reprint the images in reduced-size in a book titled Grateful Dead: The Illustrated Trip which was intended as a cultural history of the band. Illustrated Trip contains over 2000 images representing dates in the history of Grateful Dead in chronological order along with a time-line and explanatory text.

The Court upheld that Dorling Kindersley's copying of the images was fair use and further went on to mentioned that his use of the concert posters and tickets as historical artifacts of Grateful Dead performances is transformative and different from the original expressive purpose of copyrighted images. The Court held that the images copied in their entirety did not weigh against fair use because the reduced size of the images was consistent with transformative purpose. Additionally, the Court found that the Dorling Kindersley's use did not harm the market for Bill Graham Archive's sale of the copyrighted artwork.

¹⁸Bill Graham Archives v. Dorling Kindersley, Ltd. United States Court of Appeals for the Second Circuit 448 F.3d 605 (2006)

Prince V Cariou¹⁹ was a recent case on photography. Richard Prince is a transformative artist who takes other people's work and transforms them into new and different things. He had taken some photographs of Patrick Cariou who had spent time with Rastafarian and published a book Yes Rasta, a book of portraits and landscape photographs taken in Jamaica. Richard Prince altered and incorporated said photographs into a series of paintings and collages called 'Canal Zone' that was exhibited at a gallery as well as the gallery's exhibition catalogue. In this case, the US Appeal Court found that twenty-five out of the thirty works at issue constituted fair use because Prince's composition, presentation, scale, colour palette, and media are fundamentally different and new compared to the original photographs, as is the expressive nature of work. The Court also found no evidence that Prince's work usurped either the primary or derivative market for Cariou's photographs.

Although the four factor balancing test provides us with a roadmap for permissible use, a definitive determination can be made only by a Court depending on individual facts. However in the above mentioned judgments, Courts have recognized what does not constitute to be copyright infringement even though the copyrighted work are used for profit making purposes (Cambell v Acuff rose Music) or where the entirety of the work has been used (Betamax case) or where the nature of the work has been highly creative (Betamax case).

Conclusion

Fair use is one of the most complicated areas of the copyright law, and the same has been referred to as 'the most troublesome in the whole law of copyright'²⁰. In any fair use case, it is required to walk through all four factors and determine whether it is fair use or not. Finding an appropriate balance in copyright issues is not easy. But in one direction it is surely unfair to simply not compensate authors and publishers of copyrighted material that is used.

¹⁹Cariou v. Prince, United States Court of Appeals for the Second Circuit 714 F.3d 694 (2013)

²⁰Deller v Samuel Goldwyn United States Court of Appeals for the Second Circuit - 104 F.2d 661 (1939)