



Copyright, Culture and Contemporary Debates: A Jurisprudential Analysis of Fair Dealing in India

Chelsea Sawlani[†]

National Law University Delhi, Sector 14, Dwarka, New Delhi – 110 078, India

Received: 30th June 2022; accepted: 22nd March 2023

As technological developments continue to disrupt creative industries, they put to test our copyright doctrine. The recent litigation initiated against Sci-Hub and LibGen by three publishers raises complex questions permeating the Indian copyright regime. In this context, it is important to determine the values our copyright system serves and the standards of 'fairness' it demands to exempt certain infringements. This paper studies the Indian fair dealing jurisprudence from a theoretical standpoint to argue that it lacks a robust normative foundation. It first maps the prevalent theories of copyright and suggests that the cultural theory not only exposes gaps in the dominant incentive theory but also offers a more comprehensive understanding of copyright. It then analyses Indian fair dealing cases from this viewpoint. While the jurisprudence is largely inconsistent, analysis of two important cases reveals that while their outcome was desirable from a cultural theory perspective, their doctrine is insufficient to excuse certain socially-valuable infringements. Their emphasis on transformativeness coupled with an implicit bar on verbatim reproductions is critical. It is suggested that the Indian fair dealing jurisprudence is unfit to foster a just and attractive culture; one that strives to attain pluralistic values essential for the 'good life'.

Keywords: Copyright, Fair Dealing, India, Sci-Hub, Cultural Theory, Section 52

More than a decade ago, Aaron Swartz, famous 'hactivist' and the Internet's Own Boy, in a landmark move of civil disobedience, opened up the door to knowledge stored behind pay walls of a for-profit database by 'hard-wiring' into MIT's networks and bulk downloading academic publications available on the database. Famously, Swartz thought it a moral duty of those privileged enough to have access to the world's 'banquet of knowledge' to open its doors to those locked out. Emphatically, he said that "*sharing isn't immoral — it's a moral imperative. Only those blinded by greed would refuse to let a friend make a copy*"; and called on the world's researchers to

*take information, wherever it is stored, make our copies and share them with the world. We need to take stuff that's out of copyright and add it to the archive. We need to buy secret databases and put them on the Web. We need to download scientific journals and upload them to file sharing networks. We need to fight for Guerilla Open Access.*¹

Around the same time, Swartz's counsel and renowned intellectual property scholar Lawrence

Lessig expressed a similar idea when he said that copyright regulations render our free culture proprietary.² The ever-expanding reach of copyright and the strict regulation of digital technology, together, he argued, result in a "truly profound change"; one that allows proprietary control over culture to travel unprecedented extents.² While Swartz had to pay an enormous price for a move he regarded as a moral crusade against private theft of our public culture, he inspired many others like him, 'hactivists' and researchers, to innovate technological solutions that enable equitable access to knowledge and culture across nations.³ Although developments in information technology and widespread access to the internet continue to offer more opportunities for wider dissemination of knowledge and culture⁴, these efforts have been met with fierce opposition.⁵ For instance, while the peer-to-peer sharing service Napster brought to fore the egalitarian effects of digital distribution of the music industry, it eventually had to shut down due to a range of copyright infringement lawsuits.⁶

One such innovation in the past decade has been the emergence of digital libraries providing unrestricted and free access to all scientific knowledge. However, much like previous attempts at

[†]Email: chelseasawlani005@gmail.com

wider dissemination of proprietary knowledge, these initiatives have not been able to escape opposition.⁷ These wars waged by oligopolistic publishers⁸ against digital libraries raise fundamental issues at the intersection of law, technology and society – with copyright as their battleground. These issues raise certain fundamental questions about the values our copyright system seeks to serve. Recently, this debate has reached Indian Courts and our copyright regime is on trial.⁹ In December 2020, three global publishing houses- Elsevier Ltd, Wiley India Pvt Ltd and American Chemical Society, filed a copyright infringement suit in the Delhi High Court against online repositories LibGen and SciHub seeking, *inter alia*, a dynamic injunction against these ‘rogue’ websites.¹⁰ While a Single-Judge Bench of the Delhi High Court refused to grant any interim relief to the publishers¹¹, the matter raises certain important questions regarding the Indian Copyright regime. The matter not only requires the Court to balance two competing interests- safeguarding exclusive rights of the publishers while ensuring access to knowledge- it also asks what values our copyright regime seeks to serve. What is the underlying purpose of granting limited monopoly rights over cultural and knowledge goods? What standards of ‘fair dealing’ pardon infringement of copyright? Scholars have been grappling with these issues for decades and writings debating and employing various ‘theories of intellectual property’ continue to increase. Factors like digital technologies, identity politics and ever-increasing scope of copyright protection have prompted severe theoretical and empirical critique of the traditional incentive theory of intellectual property. These ideas and practices are not sporadic events; rather, they form part of a larger movement challenging theoretical and normative underpinnings of copyright law at the legal level, and unequal social structures at the political and philosophical level.¹² The recent litigation against Sci-Hub and LibGen in the Delhi High Court only brings forward inherent tensions and conflicts in Indian copyright law and fair dealing jurisprudence.

This paper delves into the debate on social implications of the Indian copyright regime from a jurisprudential perspective. It builds on Fisher’s argument that underlying theories of intellectual property are of extreme importance to lawmakers and judges, especially in a contested arena like ‘fair dealing’.¹³ Much like information goods, this paper stands on the shoulder of giants – scholars who have

exposed gaps in dominant justifications for protection of intellectual property through limited exclusive rights – and builds on their work to argue that Indian fair dealing jurisprudence lacks a uniform and robust theoretical foundation; one that is prepared to address challenges raised by the networked information economy. It further argues that the cultural theory of intellectual property offers a more comprehensive and nuanced understanding in this regard and lends a framework to think about difficult questions like the ones raised by the Sci-Hub litigation. The second part of this paper lays its theoretical groundwork by explaining the traditional incentive theory of copyright and outlining a ‘crisis of theory’ in intellectual property. Building on the critique of the incentive theory, it then chalks out a cultural theory of intellectual property and argues that it offers a more robust foundation for addressing complex questions arising at the intersection of monopoly rights and access to knowledge. The third part then analyzes the Indian fair dealing jurisprudence from a cultural theory perspective. It argues that not only does the Indian fair dealing jurisprudence lack a uniform theoretical foundation, it is insufficient to excuse certain socially-valuable infringements. It studies in detail two illustrative cases that have been considered as fair use ‘wins’ to argue that the Courts’ emphasis on transformativeness coupled with an implicit bar on verbatim reproduction renders our fair dealing doctrine inadequate. The fourth part argues that the reluctance of Indian courts to analyze, holistically, the various theoretical foundations of copyright law in the context of fair dealing is a critical omission- one that Courts must address in forthcoming litigations; and argues that the cultural theory of copyright offers certain important insights in this regard.

Copyright and the Crisis of Theory

Theory assumes great importance in copyright law and practice, especially in cases involving difficult socio-legal questions.¹⁴ This Part discusses four major theories of copyright law. However, for the purpose of its central arguments, it shall focus on the dominant incentive theory and its various gaps and ambiguities. It then outlines a cluster of theories, collectively referred to as the ‘cultural theory’ of intellectual property and argues that it offers a better framework within which judges and legislators can understand complex questions at the intersection of copyright, culture and society.

Mapping Diverse Theories of IP

A series of changes in technologies and society have drastically changed the way we make and exchange information, knowledge, and culture.¹⁵ The emergence of what Benkler has termed the ‘networked information economy’ has challenged the way liberal democracies and markets function.¹⁶ These changes have not overlooked the way intellectual property systems currently function. In contemporary debate, scholars like Fisher have identified four different clusters of theories justifying intellectual property.¹³ While a detailed analysis of these theories is beyond the scope of this paper, a brief overview may be helpful.

First of the two theories, popularly called the ‘labor theory’, is based on the works of prominent political philosopher John Locke. Locke argued that labor gives rise to ownership of property.¹⁷ Extended to intellectual property, this theory argues that any person who creates an intangible work by mixing their labor with ideas and other resources in the public domain acquires an ownership right over such work,¹⁸ as long as the public does not suffer any net harm.¹⁹ The second conception, popularly termed as the ‘personhood theory’, identifies the intimate, sacred bond between authors and their works as a source of copyright.²⁰ Rooted in the works of philosophers like Emmanuel Kant and Hegel, the personhood theory argues that property rights exist not by virtue of labor, rather through an exercise of human will because humans can become their true selves only by engaging in ownership relations.²¹

The dominant justification underlying intellectual property, however, is the ‘incentive theory’, which finds its philosophical roots in utilitarian thought.²² Utilitarians argue that intellectual property, like any branch of law, must structure property relations in a way that promotes maximum net social welfare. Copyright does so by balancing exclusive rights required to spur creative production against the public interest in widespread availability of such works.²³ In order to justify the existence of limited monopoly rights over creative and intellectual production, welfare economists employ the popular “public goods problem”. Since intellectual and creative goods are both non-excludable and non-rivalrous, in the absence of exclusive rights they would be under-produced. Therefore, in order to incentivize creative protection, certain exclusive rights must necessarily be granted to creators and innovators in the form of patents, copyright, etc.²⁴

However, as Benkler explains, this model of promoting creative production through exclusive rights is inherently inefficient. Since welfare economics defines production of a good as ‘efficient’ only when it is priced at its marginal cost, goods like information, culture and knowledge can never be ‘efficiently’ sold at a positive price (the marginal cost of producing the same good being zero). Therefore, such exclusive rights involve a trade-off between static and dynamic efficiency.²⁵ Simply put, intellectual property law allows some inefficient lack of access to creative goods every day in exchange for an increase in long-term creative production.

Narrow Economic Justifications: Towards a Cultural Theory of IP

Critiques of the dominant incentive theory of intellectual property have gained momentum as developments in information technology and the internet continue to disrupt industries, giving birth to more copyright wars on the one hand and fuelling demands for freeing our common culture of proprietary control on the other. While some scholars like Benkler argue that the traditional incentive theory is insufficient in explaining *why* exclusive rights are necessary for creativity and progress, others like Sunder argue the intellectual property regime protects rights *unequally*.²⁶ Largely, however, these scholars target the same foundational assumptions of the incentive theory and arrive at the same conclusion, that our current intellectual property regime fails to incentivize creativity in a manner that fosters a just and attractive culture.¹³ They also agree that intellectual property structures social relations and has social effects beyond incentivizing creativity.²⁶

Before chalking out fundamental principles of a cultural theory of intellectual property, it is prudent to explain its critique of the incentive theory. It must be kept in mind, however, that copyright law and theory also import the foundational assumptions of liberal political theory- along with its gaps and limitations.²⁷ From an economic perspective, scholars like Benkler and Elkin-Koren challenge the fundamental assumptions of the incentive theory that incentives in the form of limited monopoly rights are necessary to spur creativity. In the absence of such incentives, proponents of the theory argue, informational goods would be under-produced and maximization of wealth would not be possible. This assumption has two fundamental flaws. *Firstly*, it fails to justify existence of creative industries without

economic incentive in the form of exclusive rights. Indeed, researchers have studied and presented evidence supporting the existence of a creative and innovative culture even in the absence of copyright protection.²⁸ These so-called ‘negative spaces’ of intellectual property- like the fashion industry, for instance- are testament to the fact that limited monopoly rights are *not* a sine qua non for creative production. *Secondly*, it fails to account for information producers that do not get economic benefits. The recent enormous success of Free and Open Source Software is only one example in this regard.²⁹ Further, there exists remarkably little backing, in theory as well as empirics, for the claim that strong intellectual property rights are necessary for creative production.³⁰ These arguments gain further support in the networked digital economy, where peer-production of information goods has proved to be not only socially successful but also economically efficient. Scholars have examined various cases- like peer production of academic and scholarly works- where non-market production of informational goods has been extremely successful.³¹

From a theoretical perspective, while the incentive theory claims to spur creativity, it lacks a deep understanding of what creativity is and how creative processes function. Cohen has previously highlighted this critical omission in economic justifications of copyright.³² She argues that a critical understanding of creative processes and user behavior is crucial to any justification of copyright law, especially in the digital age- where users of information goods are also potential creators.³³ Therefore, while market failure in the production of public goods may be the starting point, incentive theory fails to explain *why* and *how* intellectual property rights are the best way to address it.

On the other hand, scholars like Sunder and Bartow have argued that the current intellectual property regime fails to address both the intellectual contributions as well the distributive needs of the poor and the marginalized. Through examples like Solomon Linda, an African artist who died destitute of a curable disease despite his composition ‘Mbube’ having made record labels millions of dollars, Sunder explains that it is not sufficient for copyright to foster a ‘free culture’. According to the cultural theory, our intellectual property regime must strive to promote a ‘fair culture’- one that allows everyone the *capabilities to participate* in cultural processes.³⁴ The

incentive theory’s reliance on market forces for distribution and its assumption of equal, rational, wealth-maximizing actors prevents its proponents from furthering a theory of copyright that promotes these objectives. Similarly, Bartow attacks the dominant justifications of copyright from a feminist perspective to argue that copyright law unequally allocates control over creative works in a manner that disadvantages women.³⁵

These stresses and strains in copyright emerging from the shaky grounds of the incentive theory have prompted scholarship exploring ‘alternative’ theories of intellectual property. These ideas, having roots in the works of Sen³⁶ and Nussbaum,³⁷ offer a different perspective for evaluating creativity, culture and copyright. They reject the narrow, welfare-maximizing goal of utilitarianism and argue that copyright, much like other fields of law, must foster a just and attractive culture.³⁸ The various strands of jurisprudential thought falling under this broad category accept some or the other vision of the ‘good life’ and certain values that enable individuals to lead lives that is culturally fulfilling. The conditions that facilitate a ‘good life’ generally include life, health, autonomy (i.e. a substantial degree of self-determination), engagement, self-expression, competence, connection and privacy.³⁹ The role of law is to ensure wide availability of these ‘goods’.

Proponents of the cultural theory argue that in order to attain wider availability of these ‘goods’, our collective culture and its regulation in the form of copyright law must be altered along at least four aspects-

- (i) Diversity- a rich and diverse culture increases autonomy, engagement and self-expression. Mill recognized this when he said that the diversity of culture allows each individual to do more for themselves, thereby developing their mental and moral capacities and rendering our collective culture even richer.²³
- (ii) Art- art represents the language of our shared culture. The richer this shared language is, the more opportunities for creativity and communication it offers. Therefore, copyright law must recognize interdependence and interconnectedness of creative production and strive to structure cultural production in a way that allows inter and intra cultural sharing in a socially just manner.⁴⁰

- (iii) Education- education is, perhaps, the lynchpin of the good life. Universal availability of quality education supports the attainment of all the ‘goods’ necessary to lead a fulfilling life.⁴¹ Reform of copyright law in the context of education is, therefore, necessary to support learning, creativity and competence.
- (iv) Democracy- a robust, participatory and pluralistic society is necessary for the ‘good life’.⁴² With the emergence of digital technologies, individuals have more opportunities to participate in forms of meaning-making, leading to a ‘semiotic democracy’.⁴³ Our copyright law can foster these values by- a) by providing an incentive for creative production; and b) by supporting creative and communicative activities that are free from reliance on the State/elite patronage.

These theories accept the important role played by copyright law in structuring social relations; a role that extends beyond maximizing creative production. They recognize the plurality of values that intellectual property must promote, and in doing so allows us to design our social and legal architecture in accordance with these pluralistic values. The ‘cultural theory’ of copyright therefore offers a more comprehensive and nuanced understanding of how copyright law alters and structures our shared culture.

Cultural Theory and Fair Dealing: A Case for Access to Knowledge

Application of cultural theory to copyright demands certain key changes to important doctrines like fair dealing. This approach recognizes that copyright is capable of distributive justice,⁴⁴ and wider dissemination of certain ‘goods’ must assume priority over protection of limited monopoly rights. From the standpoint of equitable distribution of essential ‘goods’, exceptions to copyright like fair dealing represent a choice in favor of ‘socially-valuable infringements’.⁴⁵ The doctrine of fair dealing, by allowing certain infringing activities, offers a way for legislators and judges to facilitate wider dissemination of ‘goods’ by viewing the ‘public goods’ nature of information as an asset. From a practical perspective, it offers a way for countries to shape their copyright doctrine in a manner that suits their local contexts without violating their international obligations. Since Article 9 of the Berne Convention and TRIPS Agreement provide sufficient flexibility to Members States to prescribe exceptions to copyright infringement, broad fair dealing

exceptions are likely to be TRIPS-compliant. Therefore, it becomes important to study fair dealing from the perspective of cultural theory.

Scholars have previously highlighted the importance of access to knowledge and education, and the far-reaching social benefits of fair use in such cases.⁴⁶ Given technology’s immense potential to leverage information for development, non-textbook and non-institution based access to knowledge is important.⁴⁷ In countries like India where access to knowledge remains limited,⁴⁸ certain infringements of copyright, that enable wider access to knowledge and information goods, may be regarded as socially-valuable.⁴⁹ Since fair dealing in the context of academic publishing is capable of actualizing the distributive potential of copyright, the cultural theory offers a more holistic framework within which complex questions of copyright law, like the ones raised by the Sci-Hub litigation, can be understood and addressed. The next part shall analyze Indian fair dealing jurisprudence from a theoretical standpoint to argue that not only does Indian the Indian fair dealing jurisprudence lack a uniform theoretical foundation; it is largely insufficient in excusing such socially-valuable infringements.

Evaluating the Indian Fair Dealing Jurisprudence

Much like copyright in India, the doctrine of fair dealing is a creation of the statute⁵⁰, provided under Section 52(1)(a) of the Copyright Act, 1957 (‘Act’). Section 52 of the Act enumerates certain instances that may impinge upon the copyright of the author, yet do not constitute infringement. Section 52(1)(a) of the Act exempts ‘fair dealing’ with literary, dramatic or artistic works for certain purposes enumerated therein. Namely-

- (i) ‘private or personal use, including research;
- (ii) criticism or review, whether of that work or of any other work;
- (iii) the reporting of current events and current affairs, including the reporting of a lecture delivered in public.’

While the exceptions enumerated under other sub-sections of Section 52 have a standard of fairness imbibed within them, Section 52(1)(a) requires courts to undergo a ‘fairness’ analysis, i.e., determine whether the use constitutes a ‘fair dealing’ with the work in question.⁵¹ While 52(1)(a) is relatively more open-ended in its wording as well as interpretation⁵² compared to the other sub-sections, it is also more

ambiguous. Scholars have previously discussed the serious dearth of judicial scrutiny of this important exemption and its various gaps and ambiguities.⁵³ However, this part shall focus on how Courts have understood the underlying justifications of copyright law in fair dealing cases.

The fundamental factor underscoring the importance of Section 52(1)(a) of the Act is its open-ended usage of the term 'fair dealing'. While the statute nowhere defines 'fair dealing', various Courts have attempted to construct a doctrine of fair dealing in an attempt to balance the interests of authors in their exclusive rights versus the interest of the general public in access to copyrighted works. However, various Courts have understood the provision differently- especially in the light of no authoritative decision of the Supreme Court in this regard. In its only fair dealing judgment, the Supreme Court simply restated the wording of the statute without examining the contours of 'fairness'.⁵⁴ Therefore, it becomes imperative to analyze how various High Court decisions have understood 'fair dealing' and its purpose in copyright law. The discussion must be preceded with the caveat that there is, unfortunately, limited jurisprudence on fair dealing in India.

Firstly, the jurisprudence is theoretically ambiguous. Courts have either imputed the 4-part 'fair use' test prevalent in the United States⁵⁵ together with its theoretical inconsistencies or have been influenced by the dominant incentive theory of copyright. Secondly, and importantly, a close reading of two judgments regarded as fair dealing 'wins' also reveals that their construction of a doctrine is largely inadequate. The Delhi Court's decision in *Narendara Publishing*⁵⁶ and the Kerala High Court's judgment in *Civic Chandran*⁵⁷ have been chosen for the analysis in this regard, keeping in mind some important factors- in both cases, an interim injunction for infringement of copyright was vacated by the High Court's on the grounds of exceptions to copyright infringement under Section 52(1)(a), making them fair dealing 'wins'. Both cases deal with issues arising outside the plain meaning of subsections to Section 52(1)(a) [While *Narendara Publishing* dealt with whether 'guide books' providing step-by-step solutions to questions of a mathematical textbook constitute 'review' under Section 52(1)(a)(ii), *Civic Chandran* dealt with whether a counter-drama based on a play constituted its 'criticism' under Section 52(1)(a)(ii)] and the High Courts in both cases have expanded the contours of the plain language of Section 52(1)(a). From this

angle, fair dealing arguments prevailed in both cases. Yet, as it will be argued, both cases failed to construct a doctrine adequate to foster a just and attractive culture.

Theoretical Ambiguities in Indian Fair Dealing Jurisprudence

The Indian fair dealing jurisprudence can be characterized by important trends- importation of the 4-part 'fair use' doctrine and influence of the incentive theory. Despite the legal differences between exceptions in Indian and US Copyright Law, Indian Courts have often imputed the United States' 4-part test into their fair dealing analysis. The leading decision in this regard came from a Division Bench of the Delhi High Court in *India Tv Independent News Service Pvt. Ltd. v Yashraj Films Pvt. Ltd.*, wherein the Court concluded, albeit without much analysis, that the four factors for determining 'fair use' in the United States.⁵⁸ After holding that the 4-part test as applicable in India, the Court then proceeded to discuss how the *de minimis* doctrine is imputed within the fourth factor.⁵⁹ The Court's blanket approval of the 4-part test, without much deliberation over its effects and theoretical underpinnings, has immense significance and goes on to show the theoretical ambiguities of Indian fair dealing jurisprudence.

Professor Fisher has previously argued that the 4-part test, as laid down by the Supreme Court of the United States is an array of decisions, is not only theoretically incoherent, but also fails to construct a doctrine of fair use that promotes a just and attractive culture.⁶⁰ The issue with the 4-part test, he explains, is that each of its factors is derived from a different philosophical tradition- causing fragmentation of its normative bases. For instance, while the 'purpose of use' and 'nature of use' factors are rooted in the utilitarian tradition – enabling the Court to exempt infringing uses that do not affect authors' incentives – the 'market impact' factor focuses on giving a 'fair return' to creators of their labor.⁶⁰ The theories underlying these factors – as discussed previously – employ very distinct conceptions of what copyright law seeks to achieve. Not only does this lead to policy uncertainty, it also prevents authors from ascertaining their rights precisely.⁶⁰ The ruling is surprising since the Delhi Court has categorically held that copyright in India is a creation of the statute, and not a common law/natural right.⁴⁹ Therefore, its adoption of a 4-part test, each of whose prongs is rooted in a different philosophical tradition, is unfortunate.

The second important trend visible in Indian fair dealing jurisprudence is the influence of the dominant incentive theory of copyright. Various Courts not only lay emphasis on the (non) commercial nature of the work seeking fair dealing exemption, but also adopt the narrow utilitarian goals of copyright law- i.e. maximization of welfare through incentivizing creative production. Observations such as, *'if a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defense under Section 52(1)(a)(i) would not be available to such a publisher though the book published by him may be used or be meant for use in research or private study'* are not uncommon.⁶¹ While certain decisions have categorically stated that every commercial exploitation of a work is not *ipso facto* unfair dealing⁶², the general trend suggests that Courts lean in favour of the utilitarian incentive theory of copyright.

Courts have been influenced by the (non)commercial nature of the allegedly infringing work even in the context of broadcast cricket matches,⁶³ sound recordings⁶⁴ as well as past year CBSE examination papers.⁶¹ In all these cases, Courts readily held that commercial uses of copyrighted works are inherently impermissible. For instance, the Calcutta High Court in *Saregama India Ltd Ors v Alkesh Gupta*, in the absence of any statutory provision to that effect, held that fair dealing protects only private and personal uses of copyrighted works. It does not permit any 'commercial exploitation' of the work.⁶⁵ This trend suggests an underlying assumption in Indian fair dealing jurisprudence that the sole purpose of copyright law is to provide economic incentives for production of creative works and penalize acts that potentially impinge upon those incentives. The purpose of this argument is neither to suggest that Indian Courts *only* consider economic incentive-based arguments nor to contend that such arguments are wholly inappropriate. It is only to show that ideas associated with the incentive theory are dominantly prevalent in the Indian fair dealing jurisprudence and continue to guide Courts in cases arising under Section 52(1)(a) of the Act.

Fair Dealing 'Wins': Transformativeness and Implicit Bar on Verbatim Reproduction

This section analyses two illustrative cases- Delhi Court's decision in *Narendara Publishing*⁶⁶ and the Kerala High Court's judgment in *Civic Chandran*⁶⁷ from a cultural theory perspective to argue that their

interpretation of Section 52(1)(a) suffers from key limitations. These two cases have been chosen for analysis keeping in mind various factors, especially the limited jurisprudence on this point in India. As highlighted previously, the only Supreme Court decision on fair dealing merely reiterated the wordings of the section without elaborating on its interpretation.⁵⁴ The two Division Bench decisions of the Delhi High Court discussing fair dealing were ultimately decided on different legal principles. While the decision in *India TV* turned on the Court's interpretation of the *de minimis* doctrine, the ruling in *Rameshwari* was limited to the educational use exceptions. Various Single Bench decisions of different High Courts have interpreted fair dealing in less detail. Therefore, given their deeper engagement with the doctrine, both cases form important precedents for the Courts in upcoming fair dealing cases. The analysis of rulings in *Narendra Publishing* and *Civic Chandran* reveals interesting observations as both have expanded the boundaries of fair dealing. While both cases pertain to completely different kinds of subject matter, they raise similar questions of interpretation and deal with certain socially-valuable infringements- namely, parodies and guide books.⁶⁸ Therefore, while their outcomes may be desirable, when the decisions are closely read from a cultural theory lens, certain key limitations can be observed.

In the case of *Narendra Publishing*, the Delhi High Court was called upon to decide whether guide book providing step-by-step analysis of questions of a mathematical textbook constituted 'fair dealing'.⁶⁹ The Court had granted an *ex parte* interim injunction solely on the ground that certain questions and answers had been copied verbatim⁷⁰; however, the order was later overturned upon a finding of fair dealing. While the Court found that the guide books constituted a 'review' of the original, it did so only upon finding that the work was rendered 'transformative' on account of addition of step-by-step solutions; something missing from the original textbook.⁷¹ Throughout its judgment the Court can be seen placing great importance on transformativeness⁷² and expressing outright disapproval of 'blatant plagiarism',⁷³ 'mere replication',⁷⁴ or 'colorable imitations'.⁷⁵

After discussing the landmark US case of *Campbell*⁷⁶- which championed the transformative use doctrine- at length, the Court found transformativeness to be a most crucial factor in determining fair use. It observed-

*The Courts should in cases like the present ask whether the purpose served by the subsequent (or infringing) work is substantially different (or is the same) from the purpose served by the prior work. The subsequent work must be different in character; it must not be a mere substitute, in that, it not sufficient that only superficial changes are made, the basic character remaining the same, to be called transformative.*⁷⁷

Indeed, it was the ‘transformative’ character of the Respondent’s work that tipped the scales in its favor.⁷⁸ At this point, it is important to note that while the influence of this factor is rising in US courts, it is still far from necessary for a finding of fair use.⁷⁹ Further, the other three factors which assume importance in cases of access to education by balancing non-transformative copying were surprisingly left untouched. Despite recognizing the importance of access to knowledge and the importance of fair dealing in achieving the objects of copyright law,⁸⁰ the Court’s omission in constructing a robust yet flexible fair dealing doctrine to resolve later cases is disheartening.

In the case of *Civic Chandran*, the Kerala High Court can similarly be seen rooting its fair dealing finding largely in the dramatic and artistic differences between the plays.⁸¹ While the Court referred to various factors like potential competition between the works, it justified the dealing largely on the grounds of amount and purpose of copying. Upon conducting a scene-by-scene comparison of the two plays, it found the copying to be for the purpose of criticism and not reproduction. It also found the themes, ideologies and dialogues of the two plays to be different.⁸² Importantly, however, the Court imputed a high threshold for the permissive amount of copying by observing-

*The term ‘fair dealing’ has not been defined as such in the Act. But Section 52(1)(a) and (b) specifically refers to ‘fair dealing’ of the work and not to reproduction of the work. Accordingly, it may be reasonable to hold that the reproduction of the whole work or a substantial portion of it as such will not normally be permitted and only extracts or quotations from the copyrighted work.*⁸³

[Emphasis supplied.]

The outcome of both these cases has been desirable from a cultural theory perspective- while access to

guide-books enhances access to knowledge and education, counter dramas (comparable to parodies) enrich our art and culture by adding diverse perspectives. However, their reasoning and their construction of a fair dealing doctrine is inadequate. *Firstly*, neither decision attempted to chalk out principles of fair dealing that may guide subsequent Courts in addressing difficult issues. *Secondly*, the theoretical underpinnings of fair dealing in both decisions remain ambiguous. While it is unclear from the decisions *why* the Courts found purpose and amount of copying to be important, in the American context Fisher has argued that the factor it seeks to serve the goal of social utility.⁸⁴ As discussed previously, such understanding of the purpose of copyright is narrow and fails to foster a just and attractive culture. It fails to recognize the social impact of copyright law and the plural values it serves. Lastly, and most importantly, both Courts place greater importance on ‘transformativeness’ and implicitly disallow verbatim reproduction, making it difficult for various cases of non-transformative copying, albeit socially-desirable ones, to satisfy the standard of fair dealing.

In the US context, scholars have criticized Courts’ condemnation of what they term ‘pure copying’, by selective reliance on transformativeness; even though the aim of copying was to further education or research.⁸⁵ The Courts in these two instances have fallen down the same path by rooting their fair use findings in transformativeness and disapproving verbatim reproductions. It must be remembered that a fair dealing analysis from a cultural perspective requires no such bar on verbatim reproduction. Rather, the starting point of any inquiry must be furtherance of plural values the copyright system strives to serve. From this viewpoint, ‘pure-copying’ may hold great value for the speakers and audience alike,⁸⁶ and transformativeness must not act as a gatekeeper, excluding such copying from scope of fair dealing - especially in the Indian context where such copying can further wider access to knowledge and culture.

Courts’ present approach makes the challenge before the Delhi High Court in the *Sci-Hub* case a difficult one. Despite the infringement being socially-valuable, it would be difficult for the Defendants pass this standard of purpose and amount of copying. While it remains to be seen how the Court will deal with these issues, it must accrue relative weight to

various factors in striking a balance between rights of users and rights of copyright holders. Nonetheless, a *prima facie* presumption against reproduction would be dangerous. Cultural theory of copyright warrants exemption of certain kinds of non-transformative copying⁸⁷, especially where the copying furthers wider dissemination of knowledge and information goods. Even in the US, where the transformative use factor is regaining importance, at least 19 cases of verbatim reproduction have satisfied ‘fair use’.⁸⁸ Therefore, if India is to avail the egalitarian benefits of emerging technologies, the Courts’ emphasis on transformativeness and their disapproval of verbatim reproduction must be dealt with.

Contemporary Debates and the Value of Theory: Some Conclusions

As advancements in digital technology and structural changes in society demand legitimation of new forms of ‘socially-acceptable infringement’, Courts will continue to be faced with complex questions of copyright law; often testing their standards of ‘fairness’. The Sci-Hub litigation is one such example that raises important issues pertaining to the Indian fair dealing jurisprudence. The previous Part analyzed the Indian fair dealing jurisprudence from a theoretical perspective and found that the limited jurisprudence in this regard too suffers from certain gaps and limitations. It found that while some Courts imported the 4 part test of ‘fair use’ prevalent in the US, each factor of which derives itself from a distinct philosophical tradition, generally the incentive theory is dominant in Indian fair dealing jurisprudence. Even cases regarded as fair dealing ‘wins’ place unreasonable importance on transformativeness and purpose of copying in their construction of a fair dealing doctrine, without any discussion on other balancing factors. In light of the mounting criticism of the incentive theory discussed previously, a theoretical ambiguity coupled with a disapproval of verbatim copying displays how Indian fair dealing jurisprudence lacks a comprehensive theoretical foundation; one that allows Courts the flexibility to excuse socially-valuable infringements. Fair dealing interpretation is far from a mechanical exercise – and in hard cases, principles assume prime importance in guiding legislators and judges.⁸⁹ Therefore, this lack of robust jurisprudential foundation underscoring copyright law is a critical omission.

The cultural theory of copyright law outlined previously offers a more nuanced and holistic understanding of various factors influencing copyright law and practice and offers judges and lawmakers a better framework within which such complex socio-legal questions can be understood and addressed. This is especially useful in the context of Section 52(1)(a) as it would allow judges to balance the plural values sought to be served by the copyright regime in determining what constitutes ‘fair’ dealing under the law. While Courts have so far failed to undertake a holistic fairness analysis in Section 52(1)(a) cases, the Sci-Hub litigation offers a landmark opportunity to rectify the same. A weighing of competing interests in determining the appropriate standard of fairness, keeping in mind the impact of the copyright regime on society and culture, would further the ends of a fair and attractive copyright law.

The purpose of this paper was not to substitute one meta-narrative for the other. Rather, it has shown that certain gaps exist in the dominant understanding of copyright law and the cultural theory presents an account that can add immense value to our jurisprudence. The first step in this direction would be acceptance of the fact that copyright law has enormous social implications, beyond incentivizing creativity. This would allow legislators and judges to recognize the ability of copyright law to structure social relations and foster a just and attractive culture by making a choice in favor of socially-valuable infringements. Indeed, application of cultural theory to Indian fair dealing jurisprudence not only supports a legislative Amendment of Section 52(1)(a), rendering it more open-ended, it also requires Courts to keep in mind the broader social implications of copyright law when deciding fair dealing cases. Ultimately, the copyright regime is not a neutral economic tool spurring creative production. It serves human values. It is upto the legislators and judges to determine *what* values it must serve.

References

- 1 Swartz A, Guerilla Open Access Manifesto, (*Internet Archive*, July 2008) https://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008_djvu.txt (accessed on 17 April 2022).
- 2 Lessig L, The People own Ideas! *MIT Technology Review*, 1 June 2005, <https://www.technologyreview.com/2005/06/01/230913/the-people-own-ideas/> (accessed on 17 April 2022).
- 3 Menell P S, Envisioning Copyright Law’s digital future, *NY L Sch L Rev*, 46 (2002) 63.

- 4 The creative commons license, which offers a techno-legal tool enabling authors of literary works to licence their works in a simple and standardized manner. What We Do, Creative Commons, <https://creativecommons.org/about/> (accessed on 15 April 2022).
- 5 For a detailed examination of these “copyright wars”, Patry W, *Moral Panics and the Copyright Wars*, OUP, 2009.
- 6 *A&M Records, Inc v Napster, Inc*, 239 F.3d 1004. For a detailed analysis of the decision and its impact, Gartner G2 and the Berkman Center for Internet & Society, Copyright and Digital Media in a Post-Napster World, 2005, https://cyber.harvard.edu/wg_home/uploads/254/2003-05.pdf (accessed on 16 April 2022).
- 7 *Elsevier Inc et al v Sci-Hub et al.*, 15 Civ 4282(RWS).
- 8 Larivière V, Haustein S & Mongeon P, The oligopoly of academic publishers in the Digital Era, *PLoS ONE*, 10 (6) 2015 <https://doi.org/10.1371/journal.pone.0127502> (accessed on 16 April 2022).
- 9 Like-Minded IP Teachers, Working Group on Intellectual Property and Public Interest, Social Dimensions of Copyright Infringement and Enforcement: *A Quick Reflection in the context of Sci-Hub Litigation*, 2021, <https://osf.io/6yph7/> (accessed on 15 April 2022).
- 10 Aditi, Following piracy suit before Delhi High Court, Sci-Hub agrees to not upload new Elsevier, Wiley, American Chemical Society content, (Bar and Bench, 26 December 2020), <https://www.barandbench.com/news/litigation/piracy-suit-delhi-high-court-sci-hub-agrees-to-not-upload-content-elsevier> (accessed on 14 April 2022).
- 11 Agarwal S, Matter of public importance concerning entire scientific community: Delhi HC refuses to restrain LibGen Publications, *LiveLaw*, 6 January 2021, <http://www.livelaw.in.nludelhi.remotexs.in/news-updates/delhi-high-court-copyright-sci-hub-lib-gen-elsevier-168051> (accessed on 14 April 2022).
- 12 Julie Cohen *et al.*, *Copyright in a Global Information Economy* (4thedn, Aspen 2006).
- 13 Fisher W, Theories of intellectual property, 1987, <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> (accessed on 6 March 2022).
- 14 The amicus brief filed by 17 leading economists (including 5 Nobel laureates) in the *Eldred v Ashcroft* litigation before the Supreme Court of the United States wherein they make important theoretical arguments about the social effects of the Copyright Term Extension Act, 1998. <https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amic/economists.pdf> (accessed on 16 April 2022).
- 15 Elkin-Koren N & Salzberger E, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis* (1stedn, Routledge 2012).
- 16 Benkler Y, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, YUP, 2006, 2-3.
- 17 Locke L, *Two Treatises on Government*, Book II, Ch V (1690).
- 18 Gordon W, A property right in Self-Expression: Equality and individualism in the Natural Law of Intellectual Property, *Yale L J*, 102 (1993) 1533, 1545.
- 19 Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) 178-82.
- 20 Ginsburg J, A tale of two copyrights: Literary property in revolutionary France and America, *TI L Rev*, 64 (1990) 991, 992.
- 21 Radin M J, Property and personhood, *Stan L Rev*, 34 (1982) 957, 971-978.
- 22 *The Basic Writings of John Stuart Mill: On Liberty, The Subjection of Women and Utilitarianism*, Modern Library, 2002.
- 23 Besen S M & Raskind L J, An introduction to the law and economics of intellectual property, *J Econ Perspect*, 5(1) (1991) 3, 11.
- 24 Landes W & Posner R, An economic analysis of Copyright Law, *J Leg Stud*, 18 (1989) 325.
- 25 Benkler Y, The Economics of Information Production’ in Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, YUP, 2006.
- 26 Sunder M, *From Goods to a Good Life: Intellectual Property and Global Justice*, YUP, 2012, 82-94.
- 27 Amartya Sen’s critique of liberal conceptions of rationality, objectivity and neutrality, Amartya Sen, *The Idea of Justice* (Penguin Books 2010).
- 28 Raustiala K & Sprigman C J, When are IP rights necessary? Evidence from innovation in IP’s negative space in Ben Deporter, Peter Menell & David Schwartz (eds), *Research Handbook on the Economics of Intellectual Property Law* (Edward Elgar Publishing, 2019).
- 29 Gallaway T & Kinnear D, Open Source Software, the wrongs of copyright, and the rise of technology, *J of Econ Issues*, 38(2) (2004) 467.
- 30 Lerner J, 150 years of Patent Protection, 1999, <https://dx.doi.org/10.2139/ssrn.179188> (accessed on 14 April 2022).
- 31 Cohen *et al.*, Copyright in Context in Julie Cohen *et al.*, *Copyright in a Global Information Economy* (4thedn, Aspen 2006).
- 32 Cohen J, Copyright, Creativity and Cultural Progress in Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (2012) <https://juliecohen.com/configuring-the-networked-self/> (accessed on 13 April 2022).
- 33 Cohen J, Decentering Creativity in Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (2012) <https://juliecohen.com/configuring-the-networked-self/> (accessed on 13 April 2022).
- 34 Cohen J, Copyright, Creativity and Cultural Progress in Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (2012) <https://juliecohen.com/configuring-the-networked-self/> (accessed on 13 April 2022) 82-99.
- 35 Bartow A, Fair Use and the fairer sex: Gender, feminism, and Copyright Law, *Journal of Gender, Social Policy & the Law*, 14 (3) (2006) 551.
- 36 Sen A, *The Idea of Justice* (Penguin Books 2010) 225-235.
- 37 Nussbaum M, *Women and Human Development: The Capabilities Approach* (CUP 2000) 86-96.
- 38 Fisher W, Theories of intellectual property, 1987, <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>, 4-5, (accessed on 6 March 2022).
- 39 Nussbaum M, *Women and Human Development: The Capabilities Approach* (CUP 2000) 78-80.
- 40 Sunder M, IP³, *Stan L rev*, 59 (2) (2006) 257, 324.
- 41 Hart C S, The capability approach and education, *Cambridge J of Edu*, 2012, 275, <https://doi.org/10.1080/0305764X.2012.706393> (accessed on 13 April 2022).

- 42 Netanel N, Copyright and a democratic civil society, *Yale L J*, 106 (2) (1996) 283, 341-346.
- 43 Balkin J M, Digital speech and democratic culture: A Theory of Freedom of Expression for the information society, *NYU L Rev*, 79 (2004) 1, 43.
- 44 Shaver L, Copyright and inequality, *Wash U L Rev*, 92 (2014) 117.
- 45 Tushnet R, Copy this essay: How Fair Use Doctrine harms free speech and how copying serves it, *Yale L J*, 114 (2004) 535, 565.
- 46 Goldstein P, Fair use in a changing world, *J Copyright Soc'y USA*, 50 (2002-03) 133, 139.
- 47 Chon M, Intellectual property from below: Copyright and capability for education, *UC Davis L Rev*, 40 (2007) 803, 839-40.
- 48 Talagala C, *Copyright Law and Translation: Access to Knowledge in Developing Economies*, Routledge, 2021, 8-9.
- 49 Decision of the Delhi High Court in *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services*, MANU/DE/2497/2016.
- 50 *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services*, MANU/DE/2497/2016 [28].
- 51 *The Chancellor, Masters & Scholars of the University of Oxford v Rameshwari Photocopy Services*, MANU/DE/3285/2016 [31].
- 52 *Civic Chandran and others v AmminiAmma and others* [1996] 16 PTC 329.
- 53 Priyadarshi G & Chandrashekhar A C, Fair Dealing under Indian Copyright Act: A defense against claim of infringement of literary works, *NUALS LJ*, 5 (2011) 71.
- 54 *Academy of General Edu, Manipal and Ors v B Malini Mallya*, MANU/SC/0146/2009 [20].
- 55 *Harper & Row Publishers v Nation Enterprises*, 47 U.S. 539 (1985), 588.
- 56 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008.
- 57 *Civic Chandran v C AmminiAmma*, MANU/KE/0675/1996.
- 58 *India T v Independent News Service Pvt Ltd v Yashraj Films Pvt Ltd*, MANU/DE/3928/2012 [39].
- 59 *India T v Independent News Service Pvt Ltd v Yashraj Films Pvt Ltd*, MANU/DE/3928/2012 [42]-[55].
- 60 Fisher W, Reconstructing the Fair Use Doctrine, *Harv L Rev*, 101 (8) (1988) 1659.
- 61 *Rupendra Kashyap v Jiwan Publishing House*, MANU/DE/0749/1996 [21].
- 62 *Super Cassettes Industries Ltd v Hamar Television Network Pvt Ltd and Ors*, MANU/DE/1128/2010 [9].
- 63 *ICC Development (International) Ltd v New Delhi Television Ltd*, MANU/DE/4483/2012 [11].
- 64 *Tips Industries Ltd v Wynk Ltd* [36].
- 65 Order dated 1 October 2013, <https://indiankanoon.org/doc/121369009/> (accessed on 16 April 2022).
- 66 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008.
- 67 *Civic Chandran v C AmminiAmma*, MANU/KE/0675/1996.
- 68 Jacques S, *The Parody Exception in Copyright Law* (OUP 2019), 138; *V Ramaiah v K Lakshmaiah*, MANU/AP/0292/1988 [3]-[4].
- 69 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [5], [15].
- 70 Order dated 5 December 2005 in CS(OS) No.1656/2005, http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=307882&yr=2005 (accessed on 5 June 2022).
- 71 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [37].
- 72 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [34].
- 73 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [33].
- 74 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [29].
- 75 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [30].
- 76 *Campbell v Acuff-Rose Music, Inc*, 510 US 569.
- 77 *Campbell v Acuff-Rose Music, Inc*, 510 US 569 [34].
- 78 *Campbell v Acuff-Rose Music, Inc*, 510 US 569 [35].
- 79 Beebe B, An empirical study of U.S. Copyright Fair Use Opinions updated, 1978-2019, *NYU J Intell Prop & Ent L*, 10 (1) (2020) 27.
- 80 *The Chancellor Masters and Scholars of The University of Oxford v Narendera Publishing House*, MANU/DE/1377/2008 [23], [32].
- 81 *Civic Chandran v C AmminiAmma*, MANU/KE/0675/1996 [16]-[19].
- 82 *Civic Chandran v C AmminiAmma*, MANU/KE/0675/1996 [20].
- 83 *Civic Chandran v C AmminiAmma*, MANU/KE/0675/1996 [8].
- 84 Fisher W, Reconstructing the Fair Use Doctrine, *Harv L Rev*, 101(8) (1988) 1659, 1687-88.
- 85 Tushnet R, Copy this essay: How Fair Use Doctrine harms free speech and how copying serves it, *Yale L J*, 2004, 114, 535, 559.
- 86 Tushnet R, Copy this essay: How Fair Use Doctrine harms free speech and how copying serves it, *Yale L J*, 2004, 114, 562-80.
- 87 Tushnet R, Copy this essay: How Fair Use Doctrine harms free speech and how copying serves it, *Yale L J*, 2004, 114 586.
- 88 Beebe B, An empirical study of U.S. Copyright Fair Use Opinions updated, 1978-2019, *NYU J Intell Prop & Ent L*, 10 (1) (2020) 27, 30.
- 89 Dworkin R, Hard cases, *Harv L Rev*, 88 (6) (1975) 1057.