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FAIR DEALING OF COMPUTER PROGRAMS IN INDIA*Rahul Matthan* & Nikhil Narendran*****ABSTRACT**

This essay analyses the amendments to the Copyright Act introduced in 1994 that dealt with fair dealing provisions for computer programs. The authors identify fair dealing as a user right rather than a defense right on the basis of judicial decisions on the point. They discuss the statutory exceptions to copyright for the purposes for which the program was supplied and to achieve inter-operability of a program. The authors also discuss the restrictions upon such fair dealing provisions, such as their accrual only to the lawful possessor of the program and their use solely for the purpose of achieving the purpose of supplying the program. The exceptions provided for research purposes and for making copies for non-commercial use fulfil the need for greater public access to programs and dissemination of such programs to achieve the utilitarian aim of public benefit, rather than merely seeking to vest rights in the copyright holder, despite the resistance of the industry to such methods. The authors conclude that any attempts by a company to enforce its rights to the program by creating stricter license terms to exclude the statutory exceptions for fair dealing ought to be punished under the Act.

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The utilitarian or public benefit rationale of copyright law suggests that copyright is a legal concept that, contrary to appearances, was not designed to grant unlimited rights to the authors, but rather to limit the monopoly an author has over the author's works.¹ The earliest copyright law - the Statute of Anne of 1709 in England - aimed at restricting the rights of the author by limiting the author's rights to a fixed period, after which they expired. Thus, while copyright entitles an author to certain rights, it also restricts the author's rights on the grounds of principles of public policy, access to information and restraint of monopoly. Copyright is a form of intellectual property right that protects a variety of literary, artistic, musical and dramatic endeavors as well as sound recordings and films. These rights take the form of negative rights using which owner of a copyright can prevent others from copying, reproducing, etc., the work, without obtaining permission.

¹ Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. R. 365 (2004).

I. FAIR DEALING

The fair dealing provisions under the Copyright Act, 1957 (“Copyright Act”) state that certain acts will not amount to an infringement of copyright. Under the Copyright Amendment Act, 1994, additional fair dealing provisions with regard to computer programs were introduced. The amendment introduced the triple test laid down in the TRIPS² into the provisions relating to fair dealing of computer programs.

Before proceeding to analyse these provisions, it will be useful to examine the fair dealing provisions as a whole. Various questions arise in this connection. For instance, can the fair dealing provisions be excluded by way of a contract? Do fair dealing provisions grant users specific rights or are they mere exceptions/defenses available to users?

II. FAIR DEALING AND CONTRACTUAL RESTRICTIONS

While it could be argued that an individual can waive a private right by contract,³ a contract waiving the right to fair dealing may be viewed as being contrary to Indian public policy. Copyright is a right guaranteed under statute. The natural rights theory attached to copyrights has already been put to rest through a plethora of judicial decisions.⁴ Copyright as a right is granted to an author under the Copyright Act and derives its basis from Article 19(1)(g)⁵ and Article 300A⁶ of the Constitution of India. Any restrictions, limitations or exceptions to a person’s right to the enjoyment of copyright cannot be anything more than a reasonable restriction on the negative rights available to the copyright owner. Such restrictions manifest themselves in the Copyright Act through provisions relating to compulsory licensing and fair dealing. These reasonable restrictions are imposed in keeping with the utilitarian public benefit

² Article 13: “Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right-holder”.

³ India Financial Assn., Seventh Day Adventists v. M.A. Unneerikutty. (2006) 6 S.C.C. 351.

⁴ Donaldson v. Beckett, 1 Eng. Rep. 837.

⁵ Freedom to practice any profession, or to carry on any occupation, trade or business.

⁶ No person shall be deprived of his property save by authority of law.

theory of copyright law so that public access to content and its necessary dissemination is not curtailed by the rights granted to the author.

While considering the question of compulsory licensing under the Copyright Act, the honorable Supreme Court in the case of *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*⁷ held:

...the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right...is not absolute. It is subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.⁸

Further, the court went on to say that:

...In our constitutional scheme of statute, monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available, subject of course to reasonable terms and grant of reasonable compensation to the public at large.⁹

Copyright law promotes creativity by offering creators legal protection. However, the various exemptions and doctrines implicit in copyright law, whether statutorily embedded or judicially innovated, recognize the equally compelling need to promote creative activity and ensure that the privileges granted by copyright do not stifle dissemination of information.¹⁰ India's ratification of the Berne Convention and TRIPS further supports the argument that fair dealing is a part of public policy of India. Any contract excluding the fair dealing provisions would likely be held to be void under section 23 of the Indian Contracts Act, 1872.

⁷ *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*, 2008 (9) S.C.A.L.E. 69 [hereinafter "Super Cassette"].

⁸ *Id.* ¶64.

⁹ *Super Cassette*, *supra* note 7, ¶84.

¹⁰ *The Chancellor Masters and Scholars of the University of Oxford v. Narendera Publishing House.*, 2008 (106) D.R.J. 482, ¶32.

III. THE NATURE OF FAIR DEALING PROVISIONS

In *Campbell v. Acuff-Rose Music*,¹¹ the United States Supreme Court held that fair dealing is a defense which can be successfully raised and proven by the defendant. The Canadian Supreme court in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹² held otherwise and classified it as a user right as opposed to a limitation or exception. There have been conflicting views as to whether fair dealing is a right or an exception.

In India, it is not clear whether fair dealing will be classified as a defense or a user right. Section 52 of the Indian Copyright Act uses the words: “The following acts shall not constitute an infringement of copyright, namely:...”

Based on this language, it could be argued that the fair dealing provisions under the Indian Copyright Act are not a right but a defense or an exception.

The Indian Supreme Court has held that a right is a legally accrued interest.¹³ Copyright is a negative right and any exception to copyright would therefore amount to a positive right available to the public at large. While fair dealing is generally seen to be an exception to copyright, it could also be argued on this basis that it is in effect a right made available to the public.

In India the burden of proof is always on the party who claims infringement to prove that the defendant has infringed upon claimant’s copyright.¹⁴ Thus, it can be argued that fair dealing is a right granted to public under the Copyright Act and essentially is a user right rather than a defense.

IV. MAKING COPIES/ADAPTATION (SECTION 52(AA))

Section 52(aa) of the Copyright Act, reads as follows:

The making of copies or adaptation of a computer program by the lawful possessor of a copy of such computer program, from such copy-

¹¹ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

¹² *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

¹³ *Mithilesh Kumari v. Prem Behari Khare*, 1989 2 S.C.C. 95.

¹⁴ *R.G. Anand v. Deluxe Films*, A.I.R. 1978 SC 1613.

- i) in order to utilise the computer program for the purposes for which it was supplied; or
- ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer program for the purpose for which it was supplied

Section 52(aa) of the Copyright Act permits copying or making backup copies or adaptation for the purposes for which the program was supplied. A user of a computer program is allowed to adapt the program or make copies in order to utilize it for the purposes for which the computer program was supplied. This seems to indicate that what is critical for the applicability of this provision is the purpose for which the program was supplied. In such case, any document that provides an indication as to the authorized use (such as the license under which the program was supplied) would be relevant. However, there is no clarity as to how to interpret the words “for the purposes for which the program was supplied”. A user is also allowed to make back-up copies as a temporary protection against loss, destruction or damage to use the program for the purposes for which the program was supplied.

The license terms under which any software is supplied usually lists all the actions that a licensee can perform with that computer program. This will constitute the purpose for which the program was supplied. The user has the right to adapt the program to use it for the purposes for which the program was supplied. The “purposes for which it is supplied” must be read in the context of the general purpose for which the software was supplied, as opposed to the restrictions on its use, of which reverse engineering and adaptation are examples.

Interpreting the term “purposes for which a program was supplied”, it can be argued that such purposes may include:

- a) use with a specific operating system;
- b) use with one specific computer or multiple computers (single user license or multi-user license);
- c) home use, personal use or use in an office;

- d) general uses of the software such as for use in legal profession, use in a video library etc.

Unfortunately, there are no judicial decisions that clarify this interpretation.

As discussed earlier, it could be argued that fair dealing provisions cannot be waived as doing so will be contrary to public policy. Any contractual provisions will, to that extent be held to be void. Since the fair dealing exceptions forms part of Indian public policy, any license term preventing the adaptation of a program may be held void.

However, if the license terms specifically lay down restrictions as to the purposes for which the software could be used, any right to copy or adapt the work should only be exercised for the limited purpose of utilizing the software. For example if the license sets out a restriction on the number of systems on which the software can be used, the right to copy or adapt cannot be validly exercised to make the program work on more systems than specified in the license. Similarly software licensed for use in a law firm cannot be modified or copied for use at home.

V. METHODS TO ACHIEVE INTER-OPERABILITY [SECTION 52(AB)]

Section 52(ab) of the Copyright Act reads as follows:

The doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer program with other program by a lawful possessor of a computer program provided that such information is not otherwise readily available;

Section 52(ab) of the Copyright Act, permits the doing of certain acts in order to obtain information essential for operating inter-operability of an independently created computer program provided that such information is not otherwise readily available. Under this section, a user is permitted to do any act (including by necessary assumption, reverse engineering, testing and copying of the computer program) if this is required in order to obtain necessary information essential for achieving inter-operability.

This right cannot be availed if the information in question is otherwise readily available. The purpose of this section is to deal with situations where the licensee wants to make the software work with some other piece of software for which it has not necessarily been designed to work (in order to achieve inter-operability). In such cases it is likely that the manuals and other secondary sources of information will not carry the required information.

A. Independently created computer program

The section does not clarify what an “independently created computer program” is. Does this imply that the programs in question must have been independently created? Will, for instance, this section be interpreted to mean that software such as MS Project cannot be decompiled to understand how it works with MS Word (which may not be independent of MS Office) but it can be decompiled to understand how it works with Writer software in the Open Office Suite.

It might be better to assume that independently created computer programs are those that have been created without any interface with each other and that can function without reliance on the other. For instance, if a media player software is not inter-operable with a file indexing software, this section allows the user to do certain acts to ascertain the information required to make the media player program inter-operable with the file indexer. The user can do any act that is necessary to ensure the inter-operability of either the media player software or file indexer software.

B. Lawful possessor

It is pertinent to note that this section uses the term “lawful possessor”. This means that the right to make a particular computer program inter-operable with another will only be available to the lawful possessor of the program. A person using an illegally obtained (pirated) copy of a computer program cannot exercise this right. If a user is seeking to ensure inter-operability of a program, the user is doing a legal act of ensuring that this program is functioning with some other program. The user will only be allowed to do so if he/she comes with clean hands and has legitimately procured the copy of the program. This ensures that distribution of a computer program and rendering it inter-operable

with another is governed by an intellectual property regime strong enough to recognize the rights of both the user and developer.

C. License terms

Unlike section 52(aa) that mandates that an adaptation can only be done to utilize the program for the purposes for which it was supplied, there is no mention about purpose in section 52(ab). The right under this section has been granted in order to achieve inter-operability and is not restricted by purpose. Under 52(aa), the right to adapt is to an extent restricted by the license terms and can only be done to utilize the program for the purposes for which it was supplied. The right under this section is granted to ensure that inter-operability is achieved and license terms will not in any way hamper this right.

D. Achieving inter-operability

There are two ways of achieving inter-operability of a computer program. A user can make a program work with another program by porting it with another program. For example, if software A is not inter-operable with software C, a user can use the right under section 52(ab) to obtain information about both programs and can write appropriate code, which will allow software A to work with software C.

Another method of achieving inter-operability is by using the rights under both section 52(ab) and section 52(aa). If software A is not interoperable with software C, the user can use the right under section 52(ab) to understand how both software programs function. The user can then adapt either program to make them inter-operable. However, while utilizing the right under section 52(aa), one needs to keep in mind the license terms of the software also.

E. Doing of any act necessary to obtain information

This section permits the user to do any act necessary to obtain information. It is not intended to allow a lawful owner to decompile another person's code and then incorporate that into their independently created code. Such an act

would amount to infringement and will not be entitled to the fair dealing exception. Instead, it allows a user to understand how the software works and then to use the information in order to make the software interact with the other software. The intention of this provision is not to permit someone to incorporate the code into their program. There is, therefore, no need to specifically stipulate that further permission is required to incorporate the information into the independent software.

The act of obtaining the information could amount to an infringement since it could involve the creation of an intermediate copy. This would ordinarily violate the adaptation right under section 14. It is for that purpose that section 52(ab) needs to be included as a fair dealing exception to copyright if the policy of ensuring inter-operability in proprietary software is to be upheld.

While the section talks about obtaining information required to achieve inter-operability, there is no obligation to only obtain that much information as is necessary for the stated purpose. The process of obtaining information could result in greater portions of the code being exposed than is specifically necessary for inter-operability. However, the section specifically permits the doing of *any act necessary* to obtain *essential* information and therefore could, by implication, be deemed to permit all acts without limitation.

VI. LIMITED RESEARCH EXCEPTION (52(AC))

Section 52(ac) of the Copyright Act, reads as follows:

“the observation, study or test of functioning of the computer program in order to determine the ideas and principles which underline any elements of the program while performing such acts necessary for the functions for which the computer program was supplied”.

The limited right of research made available under this section does not permit decompiling. The right under this section is limited to observing, studying and testing of functioning of a computer program to understand the principles and ideas underlining the program, while performing such acts for which the program was supplied.

VII. MAKING OF COPIES/ ADAPTATION OF THE COMPUTER PROGRAM FROM A PERSONALLY LEGALLY OBTAINED COPY (SECTION 55(AD))

Section 52(ad) of the Copyright Act, reads as follows:

The making of copies or adaptation of the computer program from a personally legally obtained copy for non-commercial personal use.

Under this section, one can only use *personally* legally obtained copies as opposed to just *legally obtained copies*. This means that only if the legal copy has been specifically licensed to a user, can that user avail the provisions of this section. For example, if a program licensed for office use is copied and used for home purposes, exception under this section cannot be availed.

However, if the terms of the license agreement prohibit a licensee from making copies or adapting the program, this will not operate so as to nullify the fair dealing right available to licensee under section 52(ad). For example, if A obtains a copy of an operating system for home user, that user can make copies of the program and adapt it for home use without any restrictions, regardless of the terms of a license agreement to the contrary. This seems to suggest that practices of many software companies in enforcing their license conditions may be contrary to law.

Software is often distributed under license conditions which restrict the number of systems on which the software can be installed. Much of the software that comes bundled with laptops or computers have single user licenses. This means that the software can only be used on one computer. The commercial practice indicates that a person having more than one laptop or desktop computer at home for non-commercial personal use cannot install this software on more than one computer at a time without procuring an additional copy of the license. Though this practice is widely followed in the industry, section 52(ad) allows a user to copy or adapt a computer program for non-commercial personal use.

It may be argued that this practice is in violation of the fair dealing right granted under the Copyright Act. Hence, it could also be argued that any software company violating the right of the user to copy a program is violating a right granted under the Copyright Act. It could be argued that such companies be prosecuted under section 63.

Section 63 of the Copyright Act states as follows:

Any person who knowingly infringes or abets the infringement of -
(a) the copyright in a work, or (b) any other right conferred by this Act, except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees: Provided that where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand.

Since section 63 contemplates not just the infringement of copyright, but also any other right of a person conferred under the Copyright Act, it can be argued that a software company which restricts the right of a user under section 52(dd) is violating the right of a user. As discussed earlier, this is under the assumption that fair dealing is a user right granted under the Copyright Act.