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## The Defence of Fair use against Photographer's Copyright

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*The birth of an original idea is a rare incident. One idea can be expressed in many different ways. The notion of building upon other people's artwork drives the community towards more creative and innovative ideas or expressions. In that crowd, it is often difficult for the courts to determine the presence of originality in artworks. A photographer's copyright is in the most vulnerable position in the digital age where sharing and posting images online is a service, just a click away. Therefore, it is extremely necessary that professional photographers whose lives depend upon their talent of photography must know the recent advances in the law of copyright in India and the world. The defence of fair use acts as a strong tool in the hands of an infringer to take the advantage of the copyrighted work and the recent debates on the use of this defence has led to many judgments which try to balance the right to free expression and the right to copyright protection in one way or another. Though the standards for judging fair use keep changing, the duty falls upon the highest courts in each jurisdiction to clear the situation for once and forever.*

**Keywords:** *fair use, defence, copyright, photograoher.*

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### INTRODUCTION

Photography is the one kind of artistic work under section 2(c) of the Indian Copyright Act, 1957 which has more frequent circulation in public space than any other kind of artistic work. More so in this digital era. Digital service providers like Instagram and Facebook have

accelerated the process of dissemination of pictures to the larger public with just a single click.<sup>1</sup> Today, there are as many photographers as there are smartphones. In that case, one should know which photographs are protected by copyright law and what the threshold for their infringement is. The defence of fair use has been defined under section 52 of the Copyright Act, 1957 for excluding certain kinds of copies of the copyrighted work from hitting the threshold of copyright infringement. There has already been a long dispute over the limits for using this defence and it has escalated entering into the digital era where people are constantly sharing and appropriating the copyrighted photographs without even knowing that they are infringing someone's copyright. Although the concept of fair use/fair dealing in India has been defined under the statute to include certain exceptions to copyright infringement, the courts have interpreted this statutory provision in a liberal manner giving it a wider interpretation and increasing the scope of fair dealing in India.

## COPYRIGHT IN PHOTOGRAPHS

Intellectual property laws protect the creations of the mind but the photographs, unlike paintings and literature, are not an outright display of the artist's imagination. Photographs are generated through a mechanical process and are the mechanical representation of facts. It captures an already existing fact as it is. While someone might click a photo with their smartphone camera without putting much effort into it, it is an undeniable fact that skilled photographers put a lot of effort into building a setup or clicking the photo at the right moment at the right location with a certain angle. Therefore, the degree of involvement of the photographer in making a photograph is an essential element for discerning their copyright over it.

There are two chief requirements for artwork like a photograph to gain copyright protection in India<sup>2</sup>:

1. It must be expressed through a tangible medium; and

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<sup>1</sup> Brent Barnhart, 'The Most Important Instagram Statistics you need to know for 2021' (*Sprout social*, 25 February 2021) <<https://sproutsocial.com/insights/instagram-stats/>> accessed 10 August 2021

<sup>2</sup> Copyright Act 1957, s 13

## 2. It must be original

Since the photograph is expressed on the tangible medium of photographic paper or through digital means, the first condition is satisfied. But the originality of a photograph is difficult to discern in the sense that it is an exact copy of the scene before the lens.<sup>3</sup> The basic concept of copyright law everywhere is simple – whoever clicked the photograph owns copyright over it. Therefore, can a person gain copyright protection for his work and dodge the bar of infringement by clicking a photo of a famous photograph? Would it be called an original work or a copy of the former? The courts have always suffered in drawing a fine line between photographs that can and those which cannot gain protection under copyright law. However, the courts in different jurisdictions have come up with different tests for judging the originality of photographs.

### ORIGINALITY OF PHOTOGRAPHS

The two prominent jurisdictions of copyright law viz. US and UK have different concepts for originality in an artwork. While US courts consider “creativity” as the yardstick for originality, UK courts believe that an artwork created by sufficient “sweat of the brow” or labour is original.

**Concept of Creativity** – The courts in the United States believe that the photographs are compilations of facts as existing before the camera lens. The US Supreme Court in *Feist Publications v Rural Telephone Service Co. Inc.* (“Feist”)<sup>4</sup> held that copyright protects only “the selection and arrangement” of facts or data, provided that such selection and arrangement was “made independently by the compiler and entail[ed] a minimal degree of creativity”.<sup>5</sup> The copyright protects the effect created by the photographer's creative choices – lighting and shading, posing of the subject matter, camera angle, background, etc. The copyright lies not in

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<sup>3</sup> Nicholas Caddick, *Copinger & Skone James on Copyright* (17th edn, Sweet & Maxwell 2016)

<sup>4</sup> *Feist Publications v Rural Telephone Service Co Inc* 499 US 340 (1991)

<sup>5</sup> *Ibid*

the subject matter of the photograph but in the effect created by these creative choices of the artist.<sup>6</sup>

**Concept of "Sweat of the Brow"**- On the other hand, UK courts judge originality based on the efforts put in by the photographer, regardless of whether such efforts result in some creative effects in the photograph. There should be a "more than trivial" amount of skill, judgment, and labour for the work to get copyright protection. Therefore, the threshold of originality is pretty low in the UK than in the US. However, in *Temple Island, Collection Ltd v New English Teas Ltd* ("Temple Island")<sup>7</sup> the Patents County Court gave due importance to the creative choices made by the plaintiff in clicking his photograph and held the defendant's photograph to be a reproduction of these creative choices in a similar setup.

**The Middle Ground** - In 2007, the Indian Supreme Court in its judgment of *Eastern Book Company and Ors. vs D.B. Modak and Ors.* ("D.B. Modak")<sup>8</sup> adopted the middle ground from these two extreme concepts. According to the Court, the artist must have expended a good amount of skill, judgment, and labour but the work must also bear a certain level of creativity which would depend on the facts of the case. Therefore, the Indian threshold for originality is a balanced mixture of the two concepts explained above, keeping the bar neither too high nor too low.

## **COPYRIGHT INFRINGEMENT IN THE DIGITAL ERA**

In simple words, copyright infringement occurs when the copyrighted work is reproduced by another person without the consent of the copyright holder. In the case of photographs, there can be two kinds of cases:

- a. Where the photographer himself owns the copyright as he pressed the shutter himself
- b. Where the photographer is hired by a client and the client owns the copyright over the photographs clicked under the scope of such hire work.

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<sup>6</sup> Ysolde Gendreau et al, *Copyright and Photographs: An International Survey* (Kluwer Law International 1999)

<sup>7</sup> *Temple Island Collections Ltd v New English Teas and Another* [2012] EWPCC 1

<sup>8</sup> *Eastern Book Company & Ors v DB Modak & Another* (2008) 1 SCC 1

In the second case, if the photographer shares or in any other way use these photographs without the consent of the client, he would be infringing the copyright of clients.

Copyright infringement in this digital era has accelerated with the widespread dissemination of digitalized content online. Let's take the example of Instagram, where if the content shared or uploaded by the user is not created by the user himself, he would be infringing upon the copyright of someone else unless he has taken prior permission from the copyright holder or the use falls under the category of fair use.<sup>9</sup> This happens on a wide range because users are not aware that they are infringing someone's copyright or even if they are aware, most of them don't care. However, where private users post content just to document their life events, businesses post content to uplift their business activities. Therefore, if the user uses the copyrighted work for commercial activities like advertising or endorsing, he cannot possibly take the defence of fair use.<sup>10</sup>

## FAIR USE IN INDIA

Section 52(1)(a) of the Indian Copyright Act, 1957 stipulates the exception of fair use in the Indian context. The acts it considers as fair use are-

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

In 1998, the Bombay High Court gave a groundbreaking ruling in *Kesari Maratha Trust v Devidas Tularam Bagul* ("Devidas Tularam")<sup>11</sup> in which the Court upheld the copyright of the plaintiff over the photograph and condemned the use of the photograph by the defendant without the plaintiff's permission. Though the photograph was used for a newspaper report, it could not be protected under the fair use provision [section 52(1)(a)(iii)] because this specific

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<sup>9</sup> Instagram Help Centre, 'Copyright' (*Instagram*, 2021) <<https://help.instagram.com/126382350847838>> accessed 12 aUGUST 2021

<sup>10</sup> Leow Wei Xiang, 'Fair Use on Instagram: Transformative Self-Expressions or Copyright Infringing Reproductions' [2017] ScholarBank@NUS Repository

<sup>11</sup> *Kesari Maratha Trust v Devidas Tularam Bagul* 1998 SCC OnLine Bom 761

provision does not apply to photographs. Only sub-clauses (i) and (ii) apply to the photographs. Therefore, a news reporter would require the copyright holder's permission before publishing their copyrighted photographs.

Among all the different categories, it is the 'criticism or review' which gains vast attention and remains a subject of debate as a defence against copyright infringement. In the landmark case of *Civic Chandran v Ammini Amma* ("*Civic Chandran*")<sup>12</sup> the defendant had written a counter-drama on the drama of the plaintiff. To do this, the defendant had copied substantial portions of the drama and altered them. Nevertheless, the Kerala High Court held it to be protected under the fair use provision of 'criticism'. It reasoned that though the counter-drama had copied a substantial portion of the original drama, it had a different purpose from the original drama. It "was for the purpose of criticism of the theme, events and the ideology of the book and its author. At any rate, it was not for the purpose of imitating or reproducing the drama like the copyrighted drama or to produce the same drama with some insignificant changes here and there..."<sup>13</sup> However, the court also noted that the counter-drama also intended to criticize the political and social system of that time and in a way, expounded that the derivative work may not only criticize the original work but also the political and social ideology.

## YARDSTICKS FOR FAIR USE

This exception of criticism or review is applicable to the photographs as well by the styles of commentary, parody, or satire. One significant decision of the US Supreme Court in this regard is that of *Campbell v. Acuff-Rose Music* ("*Campbell*")<sup>14</sup>. It is pertinent to note that the United States considers four factors to determine fair use under section 107 of the US Copyright Act, 1976:

- (i) Purpose and character of use including whether such use is for commercial purposes;
- (ii) Nature of the copyrighted work;

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<sup>12</sup> *Civic Chandran v Ammini Amma* 1996 PTR 142 (Ker)

<sup>13</sup> *Ibid*, para 20

<sup>14</sup> *Campbell v Acuff-Rose Music* 510 US 569 (1994)

- (iii) Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (iv) Effect of the use upon the market for or value of the copyrighted work.

In the *Campbell case*, the Supreme Court added the sub-factor of “transformation” to the first factor and held that the commercial use of the second work doesn’t suffice for the work to be outside the scope of fair use. Even if it has been made for commercial purposes, if the new work “adds something new, with a further purpose or different character, altering the first with a new expression, meaning, or message”, it must be considered a transformative work and should be protected as fair use since it would further the cause of art and creativity in the society.<sup>15</sup>

This test of transformation was applied in *Blanch v Koons* ("Blanch")<sup>16</sup> where the Koons' reuse of Blanch's photograph was considered to be fair use because the purpose and setting in which the photograph was utilized stood as a commentary on the mass media and advertising culture. Again, it was not a direct commentary on Blanch's photograph but on the ideology that it represented. This complete change of the set-up made the Koons' work transformative. Moreover, Blanch admitted that she had never published or licensed this photograph therefore the court saw no harm to her market by the Koons' work.

Therefore, the test of transformation and market harm turned out to be two decisive and most important factors upon which a work can be held as fair use of another.

## TRANSFORMATION CONTROVERSY

The test of transformative use hits the iceberg in the decision of *Cariou v Prince* ("Cariou")<sup>17</sup> where the Second Circuit expanded the scope of the test. The court held Richard Prince's insignificant changes into Carious' photograph as transformative use and held that the second work does not need to comment upon the original work or popular culture to fall under the exception of fair use. In its opinion, if the work has a "new expression, meaning or message" to

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<sup>15</sup> *Ibid*, page 579

<sup>16</sup> *Blanch v Koons* 467 F 3d 244, 248 (2nd Cir 2006)

<sup>17</sup> *Cariou v Prince* 714 F 3d 694, (2nd Cir 2013)

the original, it is sufficient to consider it as fair use. It further expanded the exception of transformative use by undermining the substantiality of the portion used in the second work and said that it "must be [permitted] to 'conjure up' at least enough of the original" to fulfill its "transformative" purpose.<sup>18</sup> The Second Circuit Court, thereby, not only made the transformative use the ultimate test for fair use but also made the test subjective depending upon the reasonable observer's viewpoint (judge). This case made it possible for others to make some insignificant changes to the copyrighted work and claim it to have fallen under the fair use exception.

The factor of the target market was also narrowly applied in this case and the court held in favour of Richard Prince just because his target audience was rich and famous and his works were sold at significant sums and were actively marketed, unlike Cariou's photographs. Therefore, the decision also opened the doors for elite class artists like Richard Prince to appropriate the works of young artists and held not accountable for it.

## END OF CONTROVERSY

The controversy was recently put to halt by a much-anticipated decision of the Second Circuit itself in *Andy Warhol Foundation for the Visual Arts, Inc. v Goldsmith, USA* ('Andy Warhol')<sup>19</sup>. Andy Warhol, an appropriation artist like Richard Prince, had used a photograph of the famous American pop singer, Prince, clicked by Lynn Goldsmith. He created a 'Prince Series' out of it. While the district court had ruled in favour of the Andy Warhol Foundation on the reasoning that Warhol's illustration had completely transformed the Goldsmith's photograph, the Second Circuit's decision went in the opposite direction.

On the scale of the four factors test, the court found Warhol's pictures substantially similar to that of Goldsmith's, stating that one could easily make out that it was Goldsmith's photograph that was used to make these prints. Andy Warhol's prints do not comment upon the original work through these prints but only convey a "higher or different artistic purpose". This was

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<sup>18</sup> Kim J Landsman, 'Does Cariou v Prince Represent the Apogee or Burn-Out of Transformativeness in Fair use Jurisprudence? A Plea for a Neo-Traditional Approach' (2014) 24 *Fordham Intell Prop Media & Ent LJ*

<sup>19</sup> *The Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* No 19-2420 (2d Cir 2021)



not sufficient to hold the work as transformative of the original. The court found that Warhol retained various intricacies of the Goldsmith's techniques in his prints, therefore, amounting to copying substantial portions of the Goldsmith's photograph.<sup>20</sup>

As to the last factor of market harm, the Court laid down a strong ruling that a more famous artist cannot take advantage of his fame for appropriating the artwork of a less famous artist and not held accountable for copyright infringement, stating that the second work has a larger or wealthier market target. It shattered the belief induced by the *Cariou* judgment. Though Warhol and Goldsmith had different primary markets (direct sale) but their derivative markets (the market for licensing your work) were the same and Andy Warhol Foundation's licensing the Prince Series prints to magazines had harmed the derivative market of Goldsmith's photograph of Prince.

## CONCLUSION

The Andy Warhol Foundation has now filed a plea for reconsideration in the Second Circuit after the U.S. Supreme Court gave a landmark judgment in *Google v Oracle* ("Oracle")<sup>21</sup> to the effect that the fair use doctrine may apply in the case of software programs as well. The Court upheld the general public interest in innovation and creativity against copyright protection. The Constitutional right to free speech and expression and the right to copyright protection has always conflicted with each other. It depends on the facts and circumstances of a particular case to determine which right must win in that case.

There is another right called the moral rights of authors/artists which must be protected. Fair use might not infringe the economic rights of the artist but it may harm his/her reputation in the market. One example could be, when the clients put their photographs clicked by a professional photographer on social media, using a filter or making some other small changes to it. The clients, being copyright-holders but not professional artists, might harm the

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<sup>20</sup> Finnegan and others, 'Second Circuit: Warhol's Prince Series Derivative, Not Transformative' (*Lexology*, 12 August, 2021) <<https://www.lexology.com/library/detail.aspx?g=b2217d6e-689a-4769-a85c-c7f1bea24175>> accessed 15 August 2021

<sup>21</sup> *Google LLC v Oracle America, Inc* (2021) 886 F 3d 1179

reputation of the photographer by posting modified photos. The courts and the legislature must look into this gap in the law and should try to remedy it.

Although section 52 of the Indian Copyright Act, 1957 has defined the categories of fair use, the courts in India have also implemented the wider principles of fair use propounded by the Courts and academicians worldwide. The courts are left with wide discretion in the matter of fair use because it always depends on the facts and circumstances of a specific case to determine whether fair use should be granted or not. The Andy Warhol decision presents a more objective understanding of fair use and the same shall be adopted worldwide.